

# “Flexible” cooperation between the European Union and third countries to contain migration flows and the uncertainties of “compensation measures”: the case of the resettlement of refugees in EU Member States

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**Abstract:** This piece focuses on the sets of measures designed by the EU to counterbalance the containment strategy resulting from informal cooperation with third countries of origin or transit of migrants/asylum seekers. In particular, attention is drawn to the resettlement programmes and the EU-Turkey statement and to the various initiatives taken by the EU to support the return of people held in detention centres in Libya. The aim of the study is to examine if these measures provide legal certainty to asylum applicants and migrants who are the target of the EU efforts. The answer is negative as far as the resettlement programmes are concerned. This undermines the qualification of the EU as a trusted partner for international organisations active in the area of migration/refugee protection. It is claimed that the EU, which favoured an increase of resettlement targets by Member States between 2015 and 2018, should do more to address the implementation deficits of the resettlement programmes. Making the disbursement of EU funds conditional upon cooperation in the area of the resettlement of asylum seekers is one of the measures that could be adopted to increase legal certainty for the beneficiaries of the resettlement schemes. Yet, the Commission has confined itself to proposing the setting up of a stable Union resettlement scheme which continues to be voluntary in its recent proposals of reform known as the “Pact on Migration and Asylum”. As a result, some Member States will continue to modestly contribute to resettlement efforts.

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## 1. Introduction.

In the last five years, the EU has sought to prevent “illegal immigration”, comprising potential beneficiaries of international protection<sup>1</sup> and economic

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migrants, coming from land and sea routes; at the same time, in an effort to counterbalance this “containment strategy”, the EU has also organised various resettlement programmes<sup>2</sup> – which can be considered “compensatory measures<sup>3</sup>” – in close cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM)<sup>4</sup>.

There were two driving forces of the various initiatives, announced in the European Agenda on Migration of May 2015<sup>5</sup>: on the one hand, there was a need to stem the migration pressure on the EU Member States, while saving the lives

<sup>1</sup> In the EU legal context, this notion includes persons who have been granted the status of refugees or subsidiary protection status. See Article 2(b) of Directive 2011/95/EU, of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ [2011] L 337/9.

<sup>2</sup> “Resettlement” is defined as the “process whereby, on a request from the United Nations High Commissioner for Refugees (‘UNHCR’) based on a person’s need for international protection, third-country nationals are transferred from a third country and established in a Member State where they are permitted to reside with one of the following statuses: (i) ‘refugee status’ within the meaning of point (e) of Article 2 of Directive 2011/95/EU; (ii) ‘subsidiary protection status’ within the meaning of point (g) of Article 2 of Directive 2011/95/EU; or (iii) any other status which offers similar rights and benefits under national and Union law as those referred to in points (i) and (ii)”. See Art. 2 a) of Regulation 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ [2014] L150/168. For the UNHCR’s definition see *Resettlement Handbook*, 2011, 416. The beneficiaries of the UNHCR resettlement programmes are usually persons who enjoy the status of refugee but other categories of beneficiaries may be included. See S. Marinai, *L’Unione europea e i canali di accesso legale per i soggetti bisognosi di protezione internazionale*, in *Dir. pubb.*, 2020, 57-77. The various Commission’s recommendations, adopting resettlement plans, did not specifically identified the beneficiaries but referred for this task to the UNHCR. See section III. 1.

<sup>3</sup> On the logic of compensation for the containment strategy see C. Favilli, *Nel mondo dei “non-accordi”. Protetti sì, purché altrove*, in *Questione Giustizia*, 2020, 143 and 151.

<sup>4</sup> This is a subsidiary organ of the UN general Assembly and has the primary responsibility in managing refugees and persons in need of international protection. The IOM, which is an intergovernmental organisation created in 1951 as the UNHCR, is concerned with the “organised transfer of migrants” in specific circumstances (Art. 1a of the IOM Constitution available at [www.iom.int/constitution](http://www.iom.int/constitution)) but also with “organized transfer of refugees, displaced persons and other individuals in need of international migration services for whom arrangements may be made between the Organization and the States concerned, including those States undertaking to receive them” (Art. 1b). There is a certain overlap between the activities of the two organizations. On the difficulties of identifying the respective fields of competence and the efforts made in a joint letter signed by the two organizations in January 2019, see S. Moretti *Between refugee protection and migration management: the quest for coordination between UNHCR and IOM in the Asia-Pacific region*, in *Third World Quarterly*, 11 July 2020.

<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions - A European agenda on migration, COM (2015) 240.

of people attempting to cross the Mediterranean Sea<sup>6</sup> to reach the EU<sup>7</sup> with the aid of smugglers. On the other hand, the EU wished to support refugees in the context of its Common European Asylum System (CEAS) on the basis of humanitarian concerns.

The outcome of the mentioned two-pronged strategy is that the EU has managed to reduce migration flows and has thus indirectly contributed to saving the lives of people attempting to reach Italy, Greece and Malta<sup>8</sup>. However, having acted with determination to contain the flows, and, given the territorial nature of the right to asylum<sup>9</sup>, the effective implementation of the commitments to resettle refugees is necessary to provide a certain degree of certainty to the potential beneficiaries about their fate and also to achieve the objectives of the CEAS<sup>10</sup>. The aim of this essay is to check whether the persons in need of international protection can rely on the pledges made by the EU Member States in the context of the various voluntary resettlement programmes coordinated by the Commission after 2015 and, in general, on the EU's support, as a regional organisation which, in principle, is well placed to address problems related to movements of people coming from Africa.

This piece is divided into five sections: section 2 describes and comments on the overall objective of “containing the flows” through the development of informal cooperation with third countries of origin or transit of migrants/refugees. Next, the impact of the containment strategy on the position

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<sup>6</sup> The Central Mediterranean route is the deadliest: 9,492 people have died or are thought to be missing since 2015, according to IOM. See [https://publications.iom.int/system/files/pdf/gmdac\\_data\\_briefing\\_series\\_issue3.pdf](https://publications.iom.int/system/files/pdf/gmdac_data_briefing_series_issue3.pdf).

<sup>7</sup> Rescued people come under the human right obligations of the rescuing State even if the vessels on which they boarded is located on the high sea. See for a well-known case concerning Italy, ECHR, G.Ch., *Hirsi Jamaa and Others v. Italy*, 27765/09, 23-2-2012. For comments see I. Mann, *Maritime legal black holes: migration and rightlessness of international law*, in 29 *European Journal of International Law* 2, 347 and 356 (2018).

<sup>8</sup> The death rate has fallen to 1283 in 2019 in the main Mediterranean route. See <https://www.iom.int/news/iom-mediterranean-arrivals-reach-110699-2019-deaths-reach-1283-world-deaths-fall>.

<sup>9</sup> Asylum applicants cannot apply for asylum in one of the EU Member States when the applicant is outside their territories or when they are not under the control of the national authorities. It should be added that in the current stage of development of EU law, there are no uniform rules on the release of visa for these reasons. The current rules are laid down by the visa code (Regulation (EU) n. 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ [2013] L 182/1). Under its Art. 25, it is possible to apply for a visa with limited territorial validity on humanitarian grounds; however, in 2017 the Court of Justice, who had the chance to examine whether that provision of the visa code imposed legally binding obligations on Member States as far as the release of visa of short-term visa for humanitarian purposes is concerned, gave a negative answer. The Court excluded that this piece of legislation contains similar obligations and added that EU law does not regulate the issuance of long-term visas for humanitarian concerns. See CJEU, 7-32017, c-638/16 PPU, X and X, ECLI:EU:C:2017:173, para. 43-49. For critical comments, see A. Del Guercio, *La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa*, in *European Papers*, 271 (2017).

<sup>10</sup> On the EU asylum system see for all V. Moreno-Lax, *Accessing Asylum in Europe*, Oxford, 2017.

of asylum seekers and on the protection of human rights of migrants is assessed in section 3. Here it is highlighted how participation in resettlement programmes is a necessary component of the European Asylum System. In section 3.1, the successes of the containment strategy are contrasted with the uncertainties due to the implementation deficits of the resettlement and relocation commitments. It is argued that refugees living in countries which were prioritised by the EU or were the beneficiaries of the relocation commitments are left in a situation of uncertainty that puts into question the qualification of the EU as a reliable partner for UNHCR or IOM. Section 3.2 focuses on cooperation with Libya and shows how people on board vessels on the high seas between Libya and Italy are uncertain about their fate and how limited the resettlement efforts have been with respect to migrants placed in the Libyan reception centres. Section 4 briefly examines how resettlement programmes were affected by the outbreak of the pandemic. The analysis carried out in the mentioned sections is complemented by the concluding remarks of section 5. Suggestions are made as to how the effectiveness of the resettlement programmes could be strengthened at the EU level in order to make the CEAS more credible; finally, short comments will be devoted to the set of measures proposed by the Commission in its Communication on a New Pact on Migration and Asylum<sup>11</sup> and the extent to which it is receptive of these suggestions.

## **2. The integration of migration concerns in EU external action through informal cooperation with third countries as a means to contain the flows.**

Since 2015, the EU has extensively used its external powers to contain movements of migrants and asylum seekers as well as to prevent the smuggling of these persons and the loss of their lives at sea<sup>12</sup>.

<sup>11</sup> For an overview of the proposed measures, see

[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_1707#contains](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707#contains). Due to space constraints, it will not be possible to carry out an in-depth analysis of the Pact on Migration and Asylum.

<sup>12</sup> However, the use of external powers to address migration concerns is not new. In 1994 the Commission published a Communication in which it emphasised the need for a comprehensive approach to migration pressure that required a coordination of action in the field of foreign policy, trade policy, development cooperation and immigration and asylum policy by the Union and its Member States. See COM (94) 23 final, par. 50. Two years earlier, the European Council had adopted a declaration on principles governing external aspects of migration policy. For a more comprehensive overview of the external instruments used by the EU see P. Garcia Andrade, I. Martin, *EU cooperation with third countries in the field of migration*, in *Study for the LIBE Committee* (2015); P.J. Cardwell, *Tackling Europe's Migration 'Crisis' through Law and 'New Governance'*, in 9 *Global Policy* 1, 67-75 (2018); S. Carrera, J. Santos Vara, T. Strik, *The external dimension of the EU migration and asylum policies in times of crisis*, in S. Carrera, J. Santos Vara, T. Strik (Eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis - Legality, Rule of Law and Fundamental Rights Reconsidered*, Cheltenham, 2019, 1; D. Vitiello, *L'azione esterna dell'Unione europea in materia di immigrazione e asilo: linee di tendenza e proposte per il futuro*, in *Diritto, immigrazione e cittadinanza*, 3-4, 2016, 9-38.

Both unilateral and bilateral instruments were resorted to in order to achieve the mentioned objectives<sup>13</sup>. As to the former, a new military mission was deployed in the Mediterranean Sea to fight the smuggling of migrants and asylum seekers<sup>14</sup>. In addition, the mandate of existing missions, such as the EU CAP Sahel Niger, was widened to include the improvement of Niger's capacity to control and fight irregular migration and reduce the level of associated crime<sup>15</sup>. Nationals of both countries and also other third-country nationals cross Niger (or also Mali) in order to reach Libya and, from there, Italy. Trade incentives were further external instruments, deployed to support countries hosting large communities of refugees: the EU has agreed to relax the rules of origin for goods imported from Jordan in exchange for integrating Syrians in the job market<sup>16</sup>.

As to the bilateral instruments, forms of practical cooperation with third countries of origin or transit were actively sought by the EU and/or its Member States in order to stem the pressure from the different migration routes. These arrangements were second best with respect to readmission agreements which third countries are notoriously reluctant to sign<sup>17</sup>, and are not always effective in ensuring the swift implementation of returning decisions<sup>18</sup>. In its Communication

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<sup>13</sup> È opinione dell'autrice che le clausole migratorie inserite all'interno di varie categorie di accordi internazionali di cooperazione non possano essere annoverate tra gli strumenti della cooperazione esterna poiché, di solito, si limitano a dare vita ad obblighi generici di cooperazione nella gestione dell'immigrazione senza tuttavia far insorgere obblighi specifici, ad esempio in materia di riammissione.

<sup>14</sup> See Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern

Central Mediterranean (EUNAVFOR MED), OJ [2015] L 122/31. S. Marinai, *Interception and Rescue at Sea of Asylum Seekers in the Light of the New EU Legal Framework*, in 55 *Revista de Derecho Comunitario Europeo*, 901 (2016).

<sup>15</sup> Art. 1 of Council Decision 2018/1247 of 18 September 2018 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger), OJ [2018], L 235/7.

<sup>16</sup> EU-Jordan Association Council, Decision n. 1/2016 of the EU-Jordan Association Committee of 19 July 2016 (2016), OJ [2016] L 233/6. For detailed analysis of the Jordan Compact see A. Al-Mahaidi *Securing economic livelihoods for Syrian refugees: the case for a human rights-based approach to the Jordan Compact*, in *The International Journal of Human Rights*, 15 May 2020, M. Panizzon, *Trade-for-Refugee Employment: Nexing for Deterrence or Development in the EU-Jordan Compact?*, in S. Carrera, L. den Hertog, M. Panizzon, D. Kostakopoulou (Eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Leiden, 2018, 244 f. See also S. Poli, *The Principle of Conditionality in the EU's Relations with Neighbours: its Evolution and Reconciliation with the Principle of Consistency*, in *Il diritto dell'Unione europea*, 3, 2018, 525, esp. 543-550.

<sup>17</sup> J.P. Cassarino, *Informalising readmission agreements in the European Neighbourhood*, in *The International Spectator*, 179 (2007) and more recently, the same author published: *Informalizing EU Readmission Policy*, in A. Ripoll Servent, F. Trauner (Eds), *The Routledge Handbook of Justice and Home Affairs Research*, London, 2018, 83.

<sup>18</sup> According to the most recent data, the third countries with the highest number of nationals (over 10,000 per year) who were issued a return decision are Morocco, Ukraine, Albania, Afghanistan, Algeria, Iraq, Pakistan, Guinea, Mali, Tunisia, India and Nigeria. Commission, Progress report on the Implementation of the European Agenda on Migration, COM (2019) 481, 16 October 2019, 15.



of June 2016 on the new partnership framework<sup>19</sup>, it is clear that the legal form of cooperation with countries of origin or transit of migrants and asylum seekers in preventing migration flows is almost irrelevant. The Commission states that the EU and its Member States, acting in a coordinated manner, should agree with third countries on “comprehensive partnerships” named “Compacts”<sup>20</sup>, designed to better manage migration in full respect of humanitarian and human rights obligations<sup>21</sup>. The short-term objectives of these instruments are to save lives – avoiding migrants and refugees taking dangerous journeys – and to increase the rate of return of migrants to countries of origin and transit. The European Council has backed the Commission’s strategy described in the new partnership framework<sup>22</sup>. Although the EU has traditionally not only relied on legally binding readmission agreements<sup>23</sup> to cooperate with third countries of origin or transit of third-country nationals but also on informal instruments such as policy dialogues, CAMMs<sup>24</sup> and mobility partnerships<sup>25</sup>, in recent years, the informal cooperation has become an established and probably irreversible phenomenon. In substance, flexible cooperation with third countries, which excludes any form of democratic oversight, was intended to lead “to equivalent results in terms of cooperation on actual returns<sup>26</sup>.” The opening of legal channels of migration was one of the quid

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<sup>19</sup> Communication of 7 June 2016 from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM (2016) 385.

<sup>20</sup> See Italian Non-Paper – Migration Compact. Contribution to an EU Strategy for External Action on Migration, 15.4.2016. D. Vitiello, *Il contributo dell’Unione europea alla governance internazionale dei flussi di massa dei rifugiati e migranti: spunti per una rilettura critica dei Global Compacts*, in *Diritto, immigrazione e cittadinanza*, 3, 2018, 21. In the first report on the implementation of the partnership framework, Compacts were better defined. In essence, they are instruments of political nature used by the Member States and the EU to “deliver targets and joint commitments” on the basis of an operational cooperation with a third country. Commission, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM (2016) 700, 18 October 2016, 3. These instruments avoid the need of agreeing on readmission agreements. According to the Commission, the Compact approach “avoids the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal agreement”. *Ibidem*, 3. Compacts operate by financially supporting the readmitting countries and the communities that would have reintegrated those who are returned. *Ibidem*, 7.

<sup>21</sup> COM (2016) 385, cit., 6.

<sup>22</sup> See the conclusions of the European Council of 28<sup>th</sup> June 2016, EUCO 26/16, 1-2.

<sup>23</sup> Until 2016 there were only 17 EU-wide agreements. For a full list of agreements see E. Carli, *EU readmission agreements as tools for fighting irregular migration: an appraisal twenty years on from the Tampere European Council*, in *Freedom, security and Justice*, 13-14 (2019).

<sup>24</sup> For a full list of high-level dialogues existing at the time the Communication on the new partnership framework was adopted, see annex II of COM (2016) 385, cit.

<sup>25</sup> S. Poli, C. Cinelli, *Mobility and Legal Migration in the Context of the European Neighbourhood Policy: What Role for the European Union?*, in 55 *Revista Española de Derecho Comunitario*, 977, 984-987 (2017).

<sup>26</sup> Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM (2017) 471, 6 September 2017, 3.

pro quos for this cooperation, as suggested by the Commission<sup>27</sup>. However, it has not materialised so far.

The first example of informal cooperation was the so-called EU-Turkey statement of March 2016<sup>28</sup>, concluded by Member States' governments<sup>29</sup> with the mentioned third country, in the margins of a meeting of the European Council. This instrument was conceived in a situation of emergency; yet, its effects were prolonged after the end of the crisis given its success in reducing the flows<sup>30</sup>. The mentioned Declaration spearheaded further forms of "practical arrangements" to manage the EU migration challenges and, as of 2016, the use of flexible instruments, aimed at preventing uncontrolled movements of peoples and/or ensuring the readmission of irregular migrants, was generalised. As a result, legal disputes on who is competent between the EU and its Member States to engage in legally binding commitments with third countries in the field of readmission<sup>31</sup> have lost most of their importance.

In October 2016<sup>32</sup> the Commission listed five priority countries for cooperation<sup>33</sup>, some of which had already agreed Common Agendas on Migration

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<sup>27</sup> COM (2016) 700, cit., 3.

<sup>28</sup> See for the text [www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/](http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/). For a recent comment, see H. Kaya, *The EU-Turkey Statement on Refugees Assessing Its Impact on Fundamental Rights*, London, 2020. V. Zambrano, *Accordi informali con Stati terzi in materia di gestione dei flussi migratori: considerazioni critiche con riferimento alla prassi dell'Unione europea e dell'Italia*, in *Freedom, Security & Justice* 1, 2019, 127-129.

<sup>29</sup> CJEU, 28-2-2017, T-192/16, *NF v. European Council*, EU:T:2017:128; 28-2-2017, T-193/16, *NG v European Council*, EU:T:2017:129 and 28-2-2017, T-257/16, *NM v European Council*, EU:T:2017:130.

<sup>30</sup> This statement, which is associated to the Facility for refugees, is overall considered an effective instrument since it had led to a substantial decrease of the number of illegal crossings from Turkey. See Commission, Fourth Annual Report on the Facility for Refugees in Turkey, COM (2020) 162, 30 April 2020, 4.

<sup>31</sup> The EU has an explicit competence in this area under Art. 79(3) TFEU; however, the competence in the area of freedom, security and justice is shared with the Member States, under Art. 4(2)j of the TFEU. This implies that Member States may continue to conclude readmission agreements until the negotiation for an EU-wide agreement has not started. For a discussion on this topic, see F. Casolari, *L'interazione degli accordi internazionali dell'Unione europea e accordi conclusi dagli Stati membri con Stati terzi per il contrasto all'immigrazione*, in *Diritto, immigrazione e cittadinanza*, 1 2018.

<sup>32</sup> COM (2016) 700, cit., 3.

<sup>33</sup> Niger is a key transit country, Nigeria and Senegal are countries of origin of migration, Mali and Ethiopia are both countries of origin and transit of migrants (and of refugees in the case of Ethiopia).

and Mobility (CAMMs)<sup>34</sup>. These are Niger, Nigeria, Senegal, Mali and Ethiopia<sup>35</sup>. Cooperation with Asian countries, such as Afghanistan, was also considered of “high importance<sup>36</sup>.”

While no readmission agreements were concluded with the priority countries<sup>37</sup>, six “readmission arrangements” have been made with some of them (Afghanistan, Guinea, Bangladesh, Ethiopia, Gambia, Côte d’Ivoire)<sup>38</sup> since 2016. A number of non-legally binding initiatives were also taken with respect to non-priority countries, such as Afghanistan<sup>39</sup> and Bangladesh<sup>40</sup>. Considering that the

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<sup>34</sup> The Agendas are the most recent political instruments intended to help third countries, including by providing financial support, to better manage their borders and prevent migrations flows. They also have a humanitarian objective which is to prevent the human trafficking and people smuggling. At the time the Communication on the new partnership framework was adopted, Nigeria (see COM (2016) 700, cit., 7) but also Ethiopia and Niger agreed CAMMs, aside the Valletta Summit. See European Commission press release, IP/15/6050, 23 September 2015. For the texts of the CAMMs with Nigeria and Ethiopia see [https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en). See also Mali-EU Joint Communiqué on the High Level Dialogue on Migration of April 2016 and Joint Communiqué on the High-Level Dialogue on Migration of 16 April 2016 in Côte d’Ivoire, available at: [https://eeas.europa.eu/headquarters/headquarters-homepage/5178/joint-communicu-on-the-high-leveldialogue-on-migration-of-16-april-2016-in-cte-divoire\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/5178/joint-communicu-on-the-high-leveldialogue-on-migration-of-16-april-2016-in-cte-divoire_en).

<sup>35</sup> COM (2016) 385, cit., 16.

<sup>36</sup> COM (2016) 700, cit., 11.

<sup>37</sup> COM (2016) 700, cit., 7. However, the negotiation of such an EU-wide readmission agreement is ongoing with Nigeria since October 2016.

<sup>38</sup> Communication from the Commission to the European Parliament, the European Council and the Council managing migration in all its aspects: progress under the European agenda on migration, COM (2018) 798, 4 December 2018, p. 9. For further details, see E. Temprano Arroyo, *Using EU aid to address the root causes of migration and refugees flows*, European University Institute, 77 (2019).

<sup>39</sup> See the EU-Afghanistan “*Joint Way Forward on migration issues*” of 2 October 2016, available at [https://eeas.europa.eu/headquarters/headquarters-homepage/11107/joint-way-forward-on-migration-issues-between-afghanistan-and-the-eu\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/11107/joint-way-forward-on-migration-issues-between-afghanistan-and-the-eu_en). For comments on this instrument see C. Warin and Z. Zhekova, *The Joint Way Forward on migration issues between Afghanistan and the EU: EU external policy and the recourse to non-binding law*, in *Cambridge International Law Journal*, 143 (2017). In the partnership and cooperation agreement concluded by the EU with this country in 2017 there is a migration clause that sets the framework to conclude a readmission agreement. See Art. 28 (4) Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, GU [2017] L 67/3. However, so far, no readmission agreements were concluded.

<sup>40</sup> See EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay”, included in Annex 1 to Commission Decision of 8 September 2017 on the signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay”, on file with the author and not accessible to the public. The SOP is inspired by similar principles than the Joint way forward with Afghanistan. They were laid down to support the EU Member States bilateral relations with Bangladesh: these procedures, which do not create rights or obligations for the Parties, are intended to ensure the smooth and dignified and orderly return of Bangladeshi nationals who have no legal basis to stay in the territory of the requesting country and do not hold a valid travel document. The SOP with Bangladesh is based on a cooperation between the administrative authorities of the EU Member States and the



cooperation is informal, it is difficult to map out the practical arrangements and to know their content. It is also unclear why Mali and Niger are not mentioned on the list; it may be inferred that no practical arrangements were agreed. Yet, as we shall see in section 3.2, Niger is cooperating with UNHCR to address the problems of persons held in detention centres in Libya, which is the crossroads for asylum seekers and migrants to Italy.

Five years after the Agenda on Migration<sup>41</sup>, the EU's action has proved to be quite effective in terms of detection of illegal border-crossings. Indeed, in 2019 the number of detected persons fell to its lowest level since 2013. In particular, the Central Mediterranean recorded its lowest yearly number of irregular migrants since before the Arab Spring<sup>42</sup>. In contrast with the previous trend, in the reference year there was continuously mounting migratory pressure in the Western Balkans. Indeed, the Eastern Mediterranean route saw the highest total of detected illegal border-crossings since 2016. Compared with 2018, almost 27,000 more migrants on this route were reported by Greece, Cyprus and Bulgaria. Geographically, migratory pressure in 2019 was felt on the Eastern Aegean Sea and on Cyprus<sup>43</sup> due to the deficient implementation of the EU-Turkey statement, to which in March 2020 the EU reacted by rejecting the use of migration pressure for political purposes by the country led by Erdogan<sup>44</sup>.

According to Frontex, the decrease in the total number of illegal entries in 2019, primarily due to fewer detections on the Western and Central Mediterranean routes, was essentially the result of “determined prevention efforts by Northern African countries”<sup>45</sup>. This statement implies that the mentioned countries succeeded in securing border controls to such an extent that they favoured the pullback of migrants and asylum seekers. No mention is made of the costs of the containment efforts in terms of protection of human rights.

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concerned third country and is facilitated by the EU. Although the intention of the parties is to exclude that the SOP create rights and obligations under international or EU law, the document lays down a number of specific commitments undertaken by the Parties to exchange information and documents within precise time limits. It is at least arguable that this document (and other of this kind) have legally binding effects. For more details see the points made by C. Molinari, *The EU and its perilous journey through the migration crisis: informalisation of the EU return policy and rule of law concerns*, in *European Law Review*, 824, spec. 835-836 (2019).

<sup>41</sup> COM (2015) 240, cit.

<sup>42</sup> Frontex, *Risk analysis for 2020*, p. 25, available at [https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2020.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Annual_Risk_Analysis_2020.pdf).

<sup>43</sup> According to Frontex data, in 2019 on the Eastern Mediterranean route the increase in Afghans stood out, with their numbers increasing by 167% (in absolute numbers an increase of roughly 18 000 migrants). See *Ibidem*, 23.

<sup>44</sup> Statement of the EU foreign affair Council, <https://www.consilium.europa.eu/en/press/press-releases/2020/03/06/statement-of-the-foreign-affairs-council-on-syria-and-turkey/>, 6<sup>th</sup> March 2020.

<sup>45</sup> Frontex, *Risk analysis for 2020*, cit. 22.

### 3. Resettlement programmes as a counterbalance to the “containment strategy”.

The satisfactory results in terms of containment of migration flows were achieved thanks to the so-called “externalisation of migration controls”<sup>46</sup> which, in turn, as we have seen, has made increasing use of flexible legal instruments.

Although the right of an individual to leave her/his country co-exists with the sovereign right to admit third country nationals, the mentioned set of informal instruments agreed by the EU with third countries can be questioned. Indeed, they facilitate the circumvention of the obligation of *non-re-foulement*<sup>47</sup>: since they are set to keep migrants/refugees outside the EU external borders, they prevent an individual assessment of the circumstances of the concerned individuals who may qualify as refugees. In addition, informal cooperation enables EU Member States to return migrants to their country of origin or transit, and migrants’ right of access to justice to challenge the returning decisions may not be guaranteed<sup>48</sup>. While the main driver of the EU in seeking cooperation with third countries of origin or transit is to contain migration flows, at the same time, since the EU promotes respect of human rights in its external relations and abides by the principle of *non-refoulement*<sup>49</sup>, the EU institutions are compelled to act in order to help vulnerable migrants and/or potential asylum seekers who, as a result of “practical arrangements” with third countries such as Turkey, which is questionably defined as a “safe third country” for refugees, are prevented from reaching the EU borders. The same obligation applies in the context of EU-Libya relations. The EU’s support for this country in order to strengthen its statehood<sup>50</sup> should be coupled with the greatest possible support to potential asylum seekers and migrants stuck in the country.

<sup>46</sup> See for comments, D. Davitti, *Biopolitical borders and the state of exception in the European migration “crisis”*, in 29 *European Journal of International Law* 4, 1178 (2018); B. Frelick, I. M. Kysel, J. Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, in 4 *Journal of Migration and Human Security* 4, 190 (2016); M. Di Filippo, *Fighting against irregular forms of migration: the poisonous fruits of the securitarian approach to cooperation with Mediterranean countries*, due to publication in F. Ippolito, F. Casolari, G. Borzoni (Eds), *Bilateral relations in the Mediterranean: prospects for migration issues*, Cheltenham; G. Papagianni, *Forging an External EU Migration Policy* in 15 *European Journal of Migration and Law* 3, 283 (2013).

<sup>47</sup> According to some scholars, “action that fosters the curtailment of the right to leave [...] such as EU-Turkey deal/EU-Libya MoU is incompatible with Article 2 Protocol 4 ECHR and may lead to responsibility on the part of the EU Member States for unjustifiable/disproportionate interference with the freedom to exit Turkey and/or Libya of (forced/voluntary) migrants”. V. Moreno-Lax, M.G. Giuffré, *The Raise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows*, in S. Juss (ed), *Research Handbook on International Refugee Law*, Cheltenham, forthcoming.

<sup>48</sup> A. Spagnolo, *“We are tidying up”: The Global Compact on Migration and its Interaction with International Human Rights Law*, in [www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/](http://www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/).

<sup>49</sup> Art. 18 of the EU Charter of fundamental human rights.

<sup>50</sup> The Government of Serraj does not have effective control on all parts of its territory.

Both the Union and its Member States attach high importance to saving lives and to the principle of *non-refoulement* as well as to respect of human rights. This is indicated in a recent statement by the Commission in a strategy document on Africa in March 2020: “The protection of those in need, such as refugees, internally displaced persons and other vulnerable displaced persons should remain a common priority. The EU remains committed to helping African partners address refugee crises and find durable solutions for refugees in hosting countries. The EU should equally continue efforts to resettle persons in need of international protection to Europe”<sup>51</sup>.

Given that asylum seekers or persons entitled to international protection do not enjoy the right to choose the country of destination under international or EU law, for a credible and fair asylum system it is essential that the Union and its Member States fulfil their commitments to actually support these people, considering that their freedom of movement is restricted by third countries that cooperate with the EU in ensuring extraterritorial migration control. Given that Member States are reluctant to open legal channels of migration and considering that the resettlement needs for 2020 amounted to 1.4 million places and that Syrians, Sudanese and nationals of the Democratic Republic of Congo were the populations with the highest resettlement needs<sup>52</sup>, participation in resettlement programmes, in cooperation with UNHCR and IOM, offer the EU the opportunity to rebalance its containment strategy with pursuing the most important asylum objective, which is to protect refugees. A special international organisation such as the EU is expected to reach consensus amongst its constituent members as to the implementation of commitments undertaken in the context of multilateral resettlement efforts. This expectation may seem unfair given that EU Member States have actually exclusive competence to accept asylum seekers and persons entitled to international protection. Yet, the EU is competent in the area of border controls<sup>53</sup>, and its added value for third countries, or international organisations working in the areas of migration/refugee management, lies in its potential role as a trusted partner to achieve common resettlement objectives. We know from UNHCR that there are fluctuations in resettlement places and that the EU could make a valuable contribution in reducing uncertainty. Providing a legal pathway to special categories of persons, protected under international law, as to their resettlement in EU Member States, offers certainty about their destiny to persons whose lives have been disrupted by conflicts or by widespread violence in their countries. Furthermore, it is a way to share with third countries the responsibility to host refugees and/or persons in need of international protection, which is also included in the 1951 Geneva Convention.

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<sup>51</sup> Commission/AR, Joint Communication to the Parliament and to the Council, Towards a comprehensive Strategy with Africa, JOIN(2020) 4 final, 9 March 2020.

<sup>52</sup> UNHCR, Projected resettlement needs 2020, 10 available at: <https://www.unhcr.org/protection/resettlement/5d1384047/projected-global-resettlement-needs-2020.html>.

<sup>53</sup> Art. 67 (2) and 77(2)c TFEU.

In the next two sections, we shall see whether the EU Member States have lived up to their resettlement pledges and the extent to which the Union has managed to be a reliable subject of international law for UNHCR/IOM in participating in resettlement programmes.

### **3.1. Uncertainties concerning the EU resettlement and relocation schemes of 2015–2016.**

The EU Member States failed to fulfil a number of commitments assumed in the context of the common efforts to tackle the migration crisis of 2015 and consisting of agreeing to receive refugees and/or persons in need of international protection. We shall see that as a result of these implementation deficits, the beneficiaries of the envisaged measures were left in a situation of legal uncertainty as to their fate.

It is useful to sketch the different initiatives taken by the EU between 2015 and 2016 to respond to the situations of emergency, due to inflows of migrants/asylum seekers on Central and Eastern Mediterranean routes and at the borders with the Western Balkan States. In June 2015, the Commission recommended<sup>54</sup> the Member States to resettle 20,000 people in “clear need of international protection”<sup>55</sup> from priority countries (the Middle East, the Horn of Africa and Northern Africa), where the Regional Development and Protection Programmes were being implemented, within a period of two years. The number of places, which is determined on the basis of the UNHCR resettlement needs<sup>56</sup>, is the first attempt to set up a common voluntary approach to resettlement on the basis of relocation quotas. The beneficiaries were refugees and other persons falling within the UNHCR submission categories<sup>57</sup>. Criteria that distribute these persons amongst all Member States, depending mainly on their GDP and the size of the population, were identified in the Commission recommendation, on top of the financial support provided by the EU to resettling countries. The idea behind this scheme was that all Member States make a concrete contribution to the CEAS by accepting a limited pre-defined quota of refugees. The establishment of the temporary resettlement programme was proposed to enable asylum candidates from outside the EU asylum to have legal and orderly admission to the EU Member States; however, such a scheme also functioned to avoid secondary movements of refugees. The beneficiaries would have to be accepted by the receiving Member States which would have granted these persons the status of refugee or equivalent protection. At the time the recommendation was adopted,

<sup>54</sup> Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme, OJ [2015] L 148/32.

<sup>55</sup> See the definition of “resettlement” in para. 2 of Recommendation 2015/914, cit. It is not clear why the definition of the beneficiaries in the preamble is different from that in the text of the Decision.

<sup>56</sup> COM (2015) 240, cit., p. 4.

<sup>57</sup> For these specific categories see D. Perrine, F. McMamara, Know Reset Rr 2013/03, *Refugees Resettlement in the EU: between shared standards and diversity in legal and policy frames*, in *EUI RSCAS papers*, 18 (2013).

only 15 Member States had permanent resettlement programmes. The role of the Commission was therefore to stimulate all EU constituent members to share responsibility to resettle and adopt a common approach towards this important humanitarian instrument. On 20 July 2015, the decision was made by all Member States within the Council, except Hungary, to resettle about 22,504 people<sup>58</sup>. The four Dublin associated States also took part in the scheme. The opposition of the mentioned EU country was a signal that a quota system, instead of a voluntary approach, as defined in the first ever proposal made by the Commission on a Union resettlement programme<sup>59</sup>, was opposed by that country.

In roughly the same period, the so-called temporary relocation scheme was set up to the benefit of Greece and Italy through legally binding decisions<sup>60</sup> under Art. 78 (3) TFEU, in order to tackle a situation of emergency<sup>61</sup>. While the EU resettlement scheme was based on humanitarian considerations and complied with the principle of burden sharing, the relocation initiative was taken as an intra-EU solidarity measure with respect to the countries most exposed to the migration flows. Italy and Greece had received a high number of third-country nationals escaping wars or simply seeking a better life and were facing difficulties in managing the flows. As a result, the other EU Member States undertook to receive persons in “clear need of international protection” in order to alleviate the countries of first entry. A difference with the above-mentioned scheme was that the status of refugee was not predetermined. The beneficiaries were persons whose nationality fulfilled an average recognition rate for international protection of 75% or more. The idea was to relocate applicants for international protection who had good chances of qualifying as refugees<sup>62</sup>. These people would be transferred to the receiving EU countries, in derogation from the principles of the Dublin III

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<sup>58</sup> See Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20,000 persons in clear need of international protection, Council document 11130/15. For critical comments on the temporary resettlement scheme, see D. Vitiello, *La dimensione esterna della politica europea*, in Savino (cur.) *La crisi migratoria tra Italia e Unione europea*, 2017, Napoli, 303, spec. 310, 320-323 and in the same volume C. Favilli, *La crisi del sistema Dublino: quali prospettive?*, 279 f.2, spec. 287.

<sup>59</sup> Communication from the Commission to the European Parliament and the council on the establishment of a joint resettlement programme, COM (2009) 447 final, 2 September 2009.

<sup>60</sup> Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ [2015] L 239/146) and Council and Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (as amended by Council Decision (EU) 2016/1754 of 29 September 2016), OJ [2015] L 239/146.

<sup>61</sup> For comments see L. Marin, *Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation*, in *Freedom, Security and Justice: European Legal Studies*, 1, 2019, 55; M. Di Filippo, *Le misure sulla ricollocazione dei richiedenti asilo adottate dall'Unione europea nel 2015: considerazioni critiche e prospettive*, in *Diritto, immigrazione e cittadinanza*, 2, 2015, 33.

<sup>62</sup> Art. 3 of Decision 2015/1601, cit.



Regulation<sup>63</sup>, favouring the allocation of competence to examine applications for international protection from a third-country national or a stateless person to the countries of first entry<sup>64</sup>. The Council had agreed to relocate an initial target of 160,000 persons, reduced in September 2015 to 120,000 (of whom 15,600 from Italy and 50,400 from Greece<sup>65</sup>; the remaining 54,500 had to be transferred from the two Member States by 26 September 2016)<sup>66</sup>. The legally binding Decision defining the mentioned commitments was adopted by a qualified majority, with Hungary, the Czech Republic, Slovakia and Romania voting against. An annulment action before the Court of Justice was unsuccessfully brought against the founding decisions of the relocation scheme<sup>67</sup>.

A special resettlement scheme was also included in the EU-Turkey<sup>68</sup> statement of 18 March 2016 to respond to the influx of persons crossing the Aegean Sea from Turkey or seeking to cross the Western Balkan countries in order to head to Austria, Germany, Sweden and Norway.

On the basis of the agreed commitments in the mentioned Statement, one Syrian was to be resettled to EU Member States based on a voluntary humanitarian admission scheme<sup>69</sup>, in exchange for Turkey's commitment to take back one Syrian who, after 20 March 2016, had crossed the Mediterranean to reach Greece. In principle, this "one-to-one scheme" enabled Syrians living in Turkey to be legally resettled in the EU, according to the vulnerability criteria defined by UNHCR, in an effort to support people whose lives have been disrupted by the conflict. The practical arrangement with Turkey was motivated by humanitarian and pragmatic considerations. The scheme included in this contested instrument was based on two principles which are not usually associated: conditionality and burden sharing (or solidarity) with Turkey considering its contribution to hosting high numbers of Syrians. The mechanism of 1:1 worked as long as the flows from

<sup>63</sup> Regulation (EU) n. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ [2013] L 180/31.

<sup>64</sup> Under Art. 3(2) of Regulation n. 604/2013, cit., the first Member State in which the application for international protection is lodged is responsible for its examination. This Member State is usually the country of first entry, unless other criteria to determine the competence as specified in chapter III of the mentioned Regulation, apply depending on the situation of the applicant.

<sup>65</sup> Art. 4.1a and b of Decision 2015/1601, cit.

<sup>66</sup> Art. 4.2 of Decision 2015/601, cit.

<sup>67</sup> EJEU, 6-9-2017, C-643/15 and C-647/15, *Slovakia and Hungary v Council*, ECLI:EU:C:2017:631.

<sup>68</sup> The concerned third country hosts about 3.5 millions who are registered as "Syrians under temporary protection".

<sup>69</sup> The Commission had recommended the setting up of a voluntary humanitarian admission scheme with Turkey in December 2015 for persons displaced by the conflict in Syria who are in need of international protection and were admitted to Turkey before 29th November 2015. The proposal to resettle had to come from the UNHCR. See Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey, COM C(2015) 9490.

Turkey diminished under the logic of conditionality, otherwise the admission of Syrians could be suspended<sup>70</sup>.

The EU-Turkey statement had a double effect on the resettlement and relocation schemes. As to the former, it was decided that the number of resettled Syrians from Turkey did not count against the target of 22,504 places, but Turkey was added to the list of priority countries<sup>71</sup>. As to the latter, in September 2016<sup>72</sup>, Member States were authorised to subtract from the number of applicants to be relocated the number of Syrians legally admitted to their territories from Turkey under national or multilateral resettlement schemes. The quota of re-allocated persons was 54,000, which is referred to in Decision 2015/601<sup>73</sup>. These two changes deserve comment. It is understandable that, as a result of the pressure coming from the Eastern Mediterranean route, Turkey was added to the priority countries identified in July 2015; it is positive that the number of places of resettlement for Syrians from Turkey was additional to the 22,000 places decided by the Council<sup>74</sup> on 15 July 2015<sup>75</sup>. As to the reduction of the relocation quotas, the Commission maintains that this is in part due to the success of the EU-Turkey statement in reducing the pressure on Greece<sup>76</sup>. Indeed, in light of the decreased migration pressure, there was less need to relocate from this country. However, as we shall see later, notwithstanding the decrease in the number of persons to relocate, the actual amount of relocations by Member States was limited.

Coming to the target of 22,000 persons to resettle for the period 2015–2017, this was achieved in September 2017<sup>77</sup>. Yet, this success is symbolic, considering the resettlement needs for the relevant period was estimated at 1.2 million places. In addition, not all EU Member States had fulfilled their resettlement pledges<sup>78</sup>.

In October 2017, a new recommendation was adopted by the Commission to identify new resettlement commitments for 2017–2019. In July 2017, the Commission had invited Member States “to focus on at least limited resettlement

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<sup>70</sup> See Art. 1(6) of Recommendation C(2015) 9490, cit.

<sup>71</sup> As the Commission states: “While under the Conclusions of 20 July 2015 Member States have agreed on a rather broad spectrum of priority regions for resettlement, it is expected that following the EU-Turkey statement of 18 March 2016, most of the approximately 16,800 remaining places for resettlement in the framework of this scheme should take place from Turkey”. Second report on relocation and resettlement, COM (2016) 222, 12 April 2016, 7.

<sup>72</sup> Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2016] L 268/82.

<sup>73</sup> The 54,000 places made available for legal admission constitute the currently non-allocated reserve for relocation under the existing Council Decision. COM (2016) 222, cit., 7.

<sup>74</sup> Conclusions of the representatives of the governments of Member States of 20 July 2015, supra n. 57.

<sup>75</sup> COM (2016) 222, cit., 7.

<sup>76</sup> Replies of the Commission to the special report of the European Court of Auditors asylum, relocation and returns of migrants: time to step up action to address disparities between objectives and results, COM (2019) 592, 4–5.

<sup>77</sup> Commission Recommendation (EU) 2017/1803 of 3 October 2017 on enhancing legal pathways for persons in need of international protection, OJ 2017, L 259/21, recital n. 7.

<sup>78</sup> Fifteenth Report on relocation and resettlement, COM (2017) 465, 6 September 2017, 7. In particular, Poland and Hungary had not made pledges to resettle.

of the most vulnerable people from Libya, Egypt, Niger, Ethiopia and Sudan” and the total number to be supported was at least 37,750<sup>79</sup>. The EU Member States had pledged to resettle only about 14,000 persons. Considering the global resettlement needs mentioned above, the Commission recommended them to resettle 50,000 by 31 October 2019<sup>80</sup> in exchange for financial support (EUR 500 million). The beneficiaries of this resettlement programme continued to be refugees from Turkey, Lebanon and Jordan. However, in order to contribute to the stabilisation of the situation in the Central Mediterranean, persons in need of protection had to be resettled also “from Libya, Niger, Chad, Egypt, Ethiopia and Sudan, including by supporting the UNHCR's temporary mechanism for emergency evacuation of the most vulnerable groups of migrants from Libya<sup>81</sup>”. It is noteworthy that, in the meantime, France, Germany, Spain and Italy decided to compensate Chad and Niger for reducing the smuggling of migrants by undertaking to resettle special categories of persons: “people in need of international protection who are particularly vulnerable<sup>82</sup>.”

Despite the political pressure made by the Commission on national governments and the latter's endorsement of the targets, the pledges were only partially fulfilled. There were cases in which no resettlement was carried out, as in the case of Hungary and Poland which continued their policy of disengagement. This situation is unsatisfactory from the point of view of the beneficiaries of the resettlement policies and undermines the credibility and the fairness<sup>83</sup> of the European asylum system. One of the reasons advanced to explain the Member States' reluctance to contribute to the EU-coordinated resettlement efforts is that priority countries could not be chosen. For example, it is claimed that for Lithuania priority countries were those of the Eastern Partnership rather than the countries selected by the Commission<sup>84</sup>. It is true that the Baltic countries, as well as Poland, Slovakia, Hungary and Romania, are exposed to flows coming from Ukraine or Belarus, which, for different reasons and at different times, have become unstable. Yet, this logic, which is State-centred, fails to appreciate what the needs of the EU as a whole are and shows little awareness and sensitivity with respect to the degree of instability and concerns coming from the Southern neighbours. Furthermore, this approach is not in line with the principle of loyal cooperation that Member States have with the EU institutions in the context of EU external relations. Further relevant factors that might have affected the fulfilment of the resettlement process are related to the preference towards resettling Christians rather than persons of other religious beliefs<sup>85</sup>.

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<sup>79</sup> *Ivi*, 8.

<sup>80</sup> Commission Recommendation 2017/1803, cit., point 1.

<sup>81</sup> *Ivi*, point 3c).

<sup>82</sup> *Ivi*, recital n. 19.

<sup>83</sup> Art. 67 (2) TFEU provides that a common policy on asylum, immigration and external border control is fair towards third-country nationals.

<sup>84</sup> L. Jakulevičienė, M. Bileišis, *EU refugee resettlement: key challenges of expanding the practice into new member states*, in *Baltic Journal of Law & Politics*, 93 and 109 (2016).

<sup>85</sup> *Ivi*, 108.

Related to the temporary relocation scheme, only 34,705 people<sup>86</sup> were actually relocated from the two Mediterranean countries in 22 Member States, including the EU-Schengen associated countries. The Commission argues that 96% of the persons eligible for relocation were actually relocated and therefore it considers that the implementation of the relocation decisions was successful<sup>87</sup>. Yet, the fact remains that some Member States failed to deliver on their commitments in a blatant breach of the principles of loyal cooperation and solidarity. It is submitted that if the latter principle is applicable to ensure energy security<sup>88</sup>, it should also fully apply to migration challenges, given that its legal basis is Art. 80 TFEU, which is included under chapter 2 of title V of the TFEU. In addition, Member States receive financial support from the Asylum, Migration and Integration Fund for resettling refugees<sup>89</sup>. Yet, Poland (together with Hungary) did not relocate a single person<sup>90</sup>. This has not only weakened mutual trust amongst Member States but has also shown the little interest, to use a euphemism, of these countries for a common approach to migration and refugee management. Solidarity with countries most exposed to flows cannot consist only of consenting to the EU's financial support to these countries<sup>91</sup>. Poland, Hungary and the Czech Republic were finally condemned by the Court of Justice for their failure to comply with the obligations under the temporary relocation scheme<sup>92</sup>. It is regrettable that the judgment was released only in April 2020, almost three years after the relocation decisions expired.

It is possible that the uncertainty for the receiving Member States as to the status of persons to be relocated (it was not sure that these persons qualified as refugees) may have led them not to make any effort to comply with the 2015 decisions. Be this as it may, in September 2017 the temporary relocation scheme expired and ever since only a small number of relocations, carried out on a voluntary and *ad hoc* basis<sup>93</sup>, have actually been carried out. This is justified by the current level of inflows of migrants/asylum seekers in the EU, which, overall, is

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<sup>86</sup> The precise re-location figures are the following: 21,999 from Greece and 12,706 from Italy.

<sup>87</sup> COM (2019) 592, cit., 13.

<sup>88</sup> Poland successfully invoked this principle before the General Court to challenge a Commission decision concerning the transmission of natural gas. See CJEU, 10-9-2019, T-883/16 *Poland v. Commission*, ECLI:EU:T:2019:567.

<sup>89</sup> See art. 17 of the Regulation 516/2014, cit.

<sup>90</sup> COM (2017) 465, cit., 3.

<sup>91</sup> C. Favilli, *La politica dell'Unione in materia d'immigrazione e asilo. Carenze strutturali e antagonismo tra gli Stati membri*, in *Quaderni costituzionali*, 2018, 361 and 374.

<sup>92</sup> The Court of Justice condemned Hungary, Poland and the Czech Republic for having failed to comply with their re-location obligations, under obligations under Article 5(2) of Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, and Article 5(2) of Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, and has consequently failed to fulfil its subsequent relocation obligations under Article 5(4) to (11) of each of those two decisions. Hungary was only bound by Council Decision 2015/1601. EJEU, 2-4-2020, C-715/17, C-718/17 and C-719/17, *Commission v. Poland and others*.

<sup>93</sup> European Court of Auditor, Special report 24/2019 Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results, 66.

under control. However, as is evident from the surge of flows from Turkey in March 2020, the situation of normalcy depends on Erdogan's will, while the relative calm on the Central Mediterranean route is only transitory given that in Libya the civil war is far from over.

Having to assess the degree of certainty provided by the relocation scheme to asylum applicants, it is clear that this is quite low and the perspective to enable beneficiaries to find durable solutions is modest. Overall, the impact of the relocation scheme on the position of the asylum seeker is limited due to the way it was conceived: the relocation decisions were not only temporary but were applied to a narrow category of persons, that is migrants who had arrived in either Greece or Italy between 24 March 2015 and 26 September 2017. Syrians and Eritreans were the two main nationalities that remained eligible throughout the whole period<sup>94</sup>.

As to the EU-Turkey statement, the number of Syrian refugees who were able to be resettled between 2016 and 2020 is not negligible (about 25,560<sup>95</sup>). However, the 1:1 scheme, in addition to being contested for its selectivity<sup>96</sup>, does not provide certainty to the beneficiaries<sup>97</sup> regarding their actual resettlement. It should be acknowledged that the 1:1 scheme is not the only mechanism to support Syrians in Turkey: the deal struck by the Parties in the Statement of March 2016 also includes funds disbursed through the Facility for Refugees in order for this country to better address the basic needs of protection of its large community of refugees and also to strengthen its capacity to manage migration flows. Even if the mentioned financial resources have contributed to improving the situation of Syrians in Turkey, thus certainly proving the EU's added value in coordinating the Member States' response to migration challenges, the fact remains that the actual contribution made by the EU constituent members to resettle Syrians is modest if compared with that of Turkey, which offers temporary protection to more than 3 million Syrians.

<sup>94</sup> European Court of Auditor, cit., 23.

<sup>95</sup> Fourth Annual Report on the Facility for Refugees in Turkey, COM (2020) 162, cit., 4. By contrast, a positive factor for asylum seekers is that only 2735 Syrians were returned from the Greek Islands to Turkey. At the same time, 4,030 migrants have returned voluntarily from the islands since June 2016, supported by the Assisted Voluntary Return and Reintegration Programme (AVRR). EU-Turkey Statement. Four years on [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318\\_managing-migration-eu-turkey-statement-4-years-on\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf), 8 March 2020.

<sup>96</sup> Only Syrians (and not refugees of other nationalities) could be resettled and on the condition that they had not made an irregular entry in the country of refuge. See the critical comments on the selectivity of protection of D. Vitiello, *Legal narratives of the EU external action in the field of migration and asylum: from the EU-Turkey Statement to the Partnership framework for migration and beyond*, in V.V. Mitsilegas, Moreno-Lax, V. Vavoula (Eds), *Securitisating asylum flows*, Leiden/Boston, 2020, 148.

<sup>97</sup> Sometimes, the lack of sufficient information seems to have induced Syrians to turn down resettlement offers. Eleventh report on relocation and resettlement COM (2017) 212, 12 April 2017, 11.



In sum, as of 2019, the results of the Commission's role as coordinator of the resettlement/relocation schemes were the following: only about 34,000 persons were relocated from Italy and Greece and 50,000 persons were resettled in one of the EU Member States<sup>98</sup> on the basis of the 2015 relocation scheme or the EU-Turkey settlement mechanism or other resettlement programmes adopted at national level. Most of the resettled persons (Syrians) came from Turkey<sup>99</sup>, Lebanon and Jordan. The second figure mentioned above is more interesting than the first for the purpose of this piece and deserves comment: the number of resettlements is quite low compared to the global resettlement needs which amount to 1.4 million places for 2019 (only)<sup>100</sup>. Although the EU Member States tripled their annual resettlements between 2015 and 2018 under the two resettlement schemes coordinated by the Commission<sup>101</sup>, they could have done more to support and provide certainty to refugees and other persons in need of international protection in order to make the European Asylum policy more predictable. It is subject to debate whether the EU's substantial humanitarian support to refugees in third countries makes up for the modest contribution to the resettlement of refugees. It is doubtful whether through its humanitarian support to third countries of origin or transit of migration flows the EU has provided a durable solution for refugees located in these countries. It should be added that preventing potential asylum seekers, or persons in need of international protection, from accessing the EU does not ensure the stability and predictability of these flows: on the contrary, as it has been argued: "Due to containment practices, refugee arrivals are unpredictable and invariably look like a crisis<sup>102</sup>".

Greater legal certainty for beneficiaries of resettlement programmes would result from the creation of a mandatory Union framework for the resettlement of a certain number of third-country nationals or stateless persons in need of international protection<sup>103</sup>. A target of resettlements of these persons could be fixed each year. Although third-country nationals would not be able to choose their State of reception, at least they would be able to rely on the Member States' commitment to resettlement and this obligation would be enforceable by the Commission in the context of an infringement action. In 2016 the Commission put

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<sup>98</sup> Progress Report on the Implementation on the Agenda on migration, COM (2019) 126, 6 March 2019, 1.

<sup>99</sup> About 25.560 persons were resettled between 2016 and the end 2019. COM (2020) 162, cit., 4.

<sup>100</sup> UNHCR, Projected Global Resettlement Needs, 2018, 10 available at: <https://www.unhcr.org/protection/resettlement/5b28a7df4/projected-global-resettlement-needs-2019.html>.

<sup>101</sup> C(2020) 6467 final, cit.

<sup>102</sup> C. Costello, *Overcoming containment practices and crisis in 21 German Law Journal* 4, 20 and 21 (2020).

<sup>103</sup> This is in contrast to the initial proposal of resettlement schemes made by the Commission which considered that these programmes had to be voluntary. Communication from the Commission to the European Parliament and the Council on the establishment of a joint EU resettlement programme, COM (2009) 447, point 3.1.

forward a proposal for a regulation to create an EU-wide resettlement scheme<sup>104</sup>, which was part of a reform package of the Dublin Regulation<sup>105</sup>. This proposal could not find enough support within the Parliament to be approved. In addition, the idea of a Union resettlement framework was opposed by the Visegrad countries<sup>106</sup>. Given that the ultimate responsibility in this area lies with the Member States, the only available means for the EU institutions to make resettlement schemes more effective is to subject the disbursement of EU funds to compliance with commitments to resettle refugees. It is argued that the EU resettlement scheme should not only be mandatory but, in the case of prolonged and structural failures by national authorities to comply with their commitments (or if Member States do not make any commitment), a new mechanism should be set up whereby the Commission could suspend the disbursement of EU funds to non-compliant recipient countries. The chances for such a proposal actually to be taken into consideration by the Commission are very slim. The recent Communication on a New Pact on Immigration and Asylum announces modest changes in the area under consideration: the EU will move from an *ad hoc* resettlement scheme to a stable one, which makes it more predictable. Yet, the new scheme will continue to be voluntary. Therefore, it is expected that the Visegrad countries will regrettably continue with their policy of no meaningful contribution to the EU's resettlement efforts.

### 3.2 Uncertainties for migrants/asylum applicants held in reception centres in Libya or on board of vessels on the high sea between Libya and Italy.

Italy has actively contributed to pullback practices by Libya, which has been an unstable country since 2011 and continues to struggle for statehood, on the basis of the cooperation established with the Libyan Government of National Accord in the framework of a memorandum signed in 2017<sup>107</sup>. This informal instrument was

<sup>104</sup> Proposal for a Regulation establishing a Union resettlement framework, COM (2016) 468 final.

<sup>105</sup> S. Nicolosi, *Unfinished Business: The European Parliament in the negotiations for reform of the Common European Asylum System*, in <http://eulawanalysis.blogspot.com/2019/06/unfinished-business-european-parliament.html>, 23 June 2019. The legislative package was criticised for its content and for replicating the defeats of the EU rules on the allocation of competence to examine asylum requests. See the comments made by A. Farahat and N. Markard, *Forced Migration Governance: In Search of Sovereignty*, 17 *German Law Journal* 6, 923 and 936 (2020).

<sup>106</sup> B. Nagy, *Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees*, Working Paper 17, 2017, 10, [http://www.iai.it/sites/default/files/gte\\_wp\\_17.pdf](http://www.iai.it/sites/default/files/gte_wp_17.pdf).

<sup>107</sup> Considering the special bonds between Italy and Libya, a memorandum of understanding was signed on 2 February 2017 between the two countries. This is an example of “soft law” instrument concluded by a Member State *qua* Member State without the formal involvement of the Union. The text of the memorandum can be found on this website: [http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf). For comments see: A.V. Palm, *The EU external policy on migration and asylum: What role for Italy in shaping its future?*, Policy Brief, May 2017, *Observatory on European Migration Law*. See A. Liguori, *Migration law and the externalization of border controls*, New York, 2019.

also welcomed by the European Council<sup>108</sup>; the EU has financially supported the strengthening of border surveillance<sup>109</sup> and has provided the military mission, EU NAVFOR MED Operation Sophia<sup>110</sup>, with the task to train the coastguard authorities, an activity which is now continued by the new naval mission, NAVFOR MED Irini<sup>111</sup>. The UNFIL mission is also deployed to counter the smuggling of migrants on the high seas off the coast of Libya<sup>112</sup>.

It is widely recognised that due to the level of instability of the country, Libya is not a safe third country for asylum seekers. Rescued persons held in detention centres in Libya are also the object of human rights' breaches<sup>113</sup>. In this context, the EU should ensure that migrants/asylum seekers held in detention centres can return home or be resettled in other countries given that it has the competence and the legal obligation to do so<sup>114</sup>. Since the EU has contributed through its various actions<sup>115</sup>, designed to enhance the effectiveness of Libyan border controls, the expectation is that it adequately supports persons who are forced to stay in reception centres. This move would also be in line with one of the objectives of the EU external action, which is to promote respect of human rights<sup>116</sup>.

The Commission, in cooperation with UNHCR and IOM, has sought, on the one hand, to help persons held in these camps in Libya, especially vulnerable

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<sup>108</sup> See Malta Declaration by the Members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 23 September 2017, point 6j. For critical comments see F. Frasca and L. Gatta, *The Malta Declaration on search & rescue, disembarkation and relocation: Much Ado about Nothing*, 3 March 2020, <http://eumigrationlawblog.eu/the-malta-declaration-on-search-rescue-disembarkation-and-relocation-much-ado-about-nothing/>.

<sup>109</sup> About 46.3 million was allocated to support border surveillance in Libya in July 2017. COM (2017), 471, cit., 2.

<sup>110</sup> JOIN (2017) 4, cit., 5.

<sup>111</sup> Council decision (CFSP) 2020/472 of 31 March 2020 on a European union military operation in the Mediterranean (EUNAVFOR MED IRINI), OJ [2020] L 101/4.

<sup>112</sup> UNSC Resolution 2491 of 3 October 2019, S/RES/2491 (2019). The operation was authorised with resolution 2240 of 9 October 2015, S/RES/2240 (2015).

<sup>113</sup> This is recognised by the Commission. See JOIN (2017) 4, cit., 10 and in a Report to the UN Security Council in which Member States are urged to revisit policies that support the return of refugees and migrants to that Libya, considering the situation of migrants and refugees in detention centres. See Report of Acting Special Representative and head of the UN Support Mission in Libya (UNSMIL) to the UN Secretary General, S/2020/360, 5 May 2020, point 88.

<sup>114</sup> The estimated number of migrants detained in Libya at the end of December 2019 is 4596, while the number of migrants is around 636.426 which is additional to that of internally displaced people. Annual Report- IOM Libya, 2019, p. 6, available at: [https://libya.iom.int/sites/default/files/news/Libya%20Annual%20Report%202019\\_final.pdf](https://libya.iom.int/sites/default/files/news/Libya%20Annual%20Report%202019_final.pdf).

<sup>115</sup> On the initiatives taken by the EU in Libya see M. G. Giuffrè, *From Turkey to Libya: The EU Migration Partnership from Bad to Worse*, in *Eurojus*, 20 March 2017.

<sup>116</sup> Art. 21 (2) b) TEU.

people<sup>117</sup>, to return to their home countries<sup>118</sup>, and, on the other hand, to coordinate the resettlement of these people in EU Member States. However, the resettlement component of the EU's action is minoritarian<sup>119</sup>. In order to provide assistance to persons in detention centres in Libya wishing to return to their country of origin, an Emergency Transit Mechanism (ETM) was set up in Niger<sup>120</sup> in 2017 by the Government of this country, under the auspices of UNHCR (and with the financial support of the EU). As a result, persons detained in Libya can be transferred to Niger. The ETM is described by UNHCR as “a unique programme [that] aims to provide life-saving protection, assistance and long-term solutions to extremely vulnerable refugees trapped in detention in Libya, through temporary evacuation to Niger. The aim is to deliver protection and identify durable solutions, including resettlement for these refugees, who are predominantly Eritrean and Somali<sup>121</sup>”. A taskforce was also created in November 2017<sup>122</sup> in order to implement voluntary return and evacuation policies from Libya.

<sup>117</sup> These persons include: “women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants”. See New York Declaration for refugees and migrants, A/RES/71/1, 3 October 2016, point 23, available at <http://www.unhcr.org/uk/57e39d987>.

<sup>118</sup> The assisted voluntary programme is managed by IOM since 2015. About 49.000 were assisted to return from Libya to their home country between 2015 and 2019. COM (2019) 481, cit. According to reports released by the Trust fund, in 2019 there was an increase of 41% with respect to the previous year of migrants or refugees benefited from the programmes of voluntary returns or humanitarian repatriation. About 23.500 persons benefited from this assisted voluntary returns. Trust Fund report, 2019, p. 44, available at: [https://ec.europa.eu/trustfundforafrica/sites/eutf/files/eutf\\_slc\\_2019-q4\\_annual\\_report\\_.pdf](https://ec.europa.eu/trustfundforafrica/sites/eutf/files/eutf_slc_2019-q4_annual_report_.pdf).

<sup>119</sup> The Commission emphasises that: “Opportunities for reintegration in local communities and for assisted voluntary returns *could* (emphasis added) be complemented by resettlement, particularly for the most vulnerable persons”. The use of very careful language (“could” instead of “should”) is noteworthy. See also the Malta Declaration of European Council of 2 February 2017, cit., in which priority actions are listed to address migration flows coming from the Central Mediterranean route but no mention is made of resettling persons in detention centres.

<sup>120</sup> This is a major transit country for people wishing to take the Western and Central Mediterranean migration routes. It is also the least developed country in the world. The EU has used most of the funds of the EU Emergency Trust Fund for Africa to the benefit of this country. EPRS, *La mise en oeuvre du nouveau cadre de partenariat avec les pays tiers Le cas du Niger*, September 2019, p. 6. The mentioned fund was set up in November 2015 to cover projects in North Africa, Sahel and Lake Chad and the Horn of Africa. It should be noted that most of the funded projects in Niger are related to migration management and assisted voluntary returns to countries of origin. COM (2016) 700, cit., 11.

<sup>121</sup> UNHCR, Niger, May 2019, <https://reliefweb.int/sites/reliefweb.int/files/resources/69929.pdf>, 2.

<sup>122</sup> The taskforce is formed by the African Union, the European Union and the United Nations and was created to save and protect the lives of migrants and refugees along the migratory routes, and in particular inside Libya.

We have already seen in the previous section that the support offered by the Member States to Turkey, Jordan, and Lebanon has enabled a limited number of persons, mostly Syrians, to be resettled in the EU. Let us now consider what the impact of the EU's action has been on the position of migrants and asylum seekers in Libya as a result of unilateral, regional or multilateral cooperation. While the assisted voluntary return programme was quite successful<sup>123</sup>, the number of resettlements to the EU Member States is modest. According to the Commission, of the 3,000 people evacuated from Libya to Niger only 1,856 persons have been resettled as of 2017<sup>124</sup>. UNHCR provides slightly different numbers: "about 2,782 people have been evacuated from Libya to Niger and a total of 1,378 individuals have departed for resettlement to Belgium, Canada, Finland, France, Germany, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the United States<sup>125</sup>."

In 2019 a new transit mechanism in Rwanda was funded through the Emergency Trust Fund for Africa and it is able to host up to 1,500 persons<sup>126</sup>. The latest news in February 2020 is that the mentioned centre has hosted 306 people<sup>127</sup>. Most of the refugees transferred in 2019 to EU Member States come from Eritrea, Somalia, and Sudan<sup>128</sup>.

Leaving aside the differences in the figures provided by the EU and UNHCR, the most salient data are represented by the limited overall number of actual resettlements. If, on the one hand, it is possible that this is due to the failure of the transferred persons to fulfil the requirement for international protection, on the other hand, it is hard to believe that fewer than 2,000 persons in two years actually fulfilled the requirements for international protection. As may be inferred from the Commission's words, the key for the success of these measures was "the readiness of Member States to participate in resettlement from Libya"<sup>129</sup>. Once again, there was no will to resettle at the domestic level. According to the Commission, the slow pace of transfer from the ETM to countries other than Niger also induced the government of the latter to set a ceiling for persons who

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<sup>123</sup> It is reported that "Between the beginning of 2017 and the end of 2019, through joint efforts with the IOM and UNHCR, and with the support of the AU and the African consulates concerned, over 50 000 people were able to return home with reintegration support". See EU Annual Report on Human Rights and Democracy in the World 2019, Council document n. 8580/20, 15 June 2020, 116. Since 16 January 2020, the International Organization for Migration has facilitated the voluntary humanitarian return of 1,466 vulnerable migrants from 19 countries of origin. S/2020/360, cit., point 72.

<sup>124</sup> The Commission reports that in 2 years over 4,000 people have been evacuated from Libya, of which around 3,000 to Niger. These evacuations to the ETM have also been complemented by direct evacuations to Italy (808) and to the Emergency Transit Centre in Romania (303). COM (2019) 481 final, cit., 10-11.

<sup>125</sup> *Ivi*, 5.

<sup>126</sup> Commission press release, IP/19/6301, 19 November 2019.

<sup>127</sup> *Ibidem*.

<sup>128</sup> UNHCR, *Europe resettlement*, 1 January-December 2019, 2.

<sup>129</sup> JOIN (2017) 4, cit., 11.



can be hosted in its centre<sup>130</sup>. UNHCR notes: “[...]based on confirmed resettlement places from some countries, UNHCR is undertaking the necessary procedures though the process is inherently slow due to its complexity”<sup>131</sup>. In the light of this situation, the Commission’s statement whereby the Union is set to support African countries to tackle refugee crises seems more a petition of principle than a genuine contribution to make the management of refugees located in Africa more effective.

In addition to preventing the flows from Libya, since 2018 there has been a clear attempt by Italy to avoid “any contacts” with potential asylum seekers coming from Libya and who were attempting to cross the Mediterranean Sea. This was done through the policy of “closed ports” when migrants and asylum seekers were on board vessels on the high seas between Libya and Italy<sup>132</sup>. The EU has facilitated “*ad hoc*” agreements between Member States to disembark persons who were refused entry in the Italian ports but its powers to prevent the policy of “closed ports” are very limited<sup>133</sup>. The only consolation is that, overall, the number of refusals to disembark from Italy and Malta is contained<sup>134</sup>. In order to provide support to persons rescued at sea, the European Asylum Support Office (EASO) provided urgent assistance during 2019 in 24 cases of disembarkation from Italy and Malta involving 2,716 applicants<sup>135</sup>.

Certainly, rescuing persons on board vessels involves a number of difficulties for the rescuing coastal authorities. In order to address the problems posed by persons on board vessels rescued by a Mediterranean member of the EU (in particular, Italy and Malta), a new initiative, a pilot project, dating from September 2019, was taken by Germany, France, Italy and Malta<sup>136</sup>, with the coordination of the Council Presidency held by Finland and the Commission, to set up a new intra-

<sup>130</sup> See press release “*The AU-EU-UN taskforce renews its commitment to rescue stranded migrants and refugees in Libya*”, <https://au.int/en/pressreleases/20200224/au-eu-un-taskforce-renews-its-commitment-rescue-stranded-migrants-and>, 24 February 2020.

<sup>131</sup> *Ibidem*.

<sup>132</sup> The legality of the policy of “close ports”, under international law, is contentious. It seems that only if the vessel carrying persons is in distress, Italy has obligations to disembark, while in such circumstances, there are no obligations under EU law. For a full discussion concerning the “Aquarius incident”, occurring in 2018, see. E. Papastavridis, *The Aquarius Incident and the Law of the Sea: Is Italy, in Violation of the Relevant Rules?*, 27 June 2018, [ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/](http://ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/).

<sup>133</sup> M. Flinck, K. Gombler, J. Rijpma, *In search of a safe harbour for the Aquarius: the troubled waters of international and EU law*, <https://eumigrationlawblog.eu/in-search-of-a-safe-harbour-for-the-aquarius-the-troubled-waters-of-international-and-eu-law/>, 9 July 2018.

<sup>134</sup> For comments on the actual number re-located rescued migrants see <https://www.ispionline.it/it/pubblicazione/migrazioni-nel-mediterraneo-tutti-i-numeri-24892>.

<sup>135</sup> EASO, Annual Report on the situation of asylum in Europe, 2020, 47.

<sup>136</sup> The initiative was taken to alleviate the position of frontline States. Under this political initiative, these mentioned big Member States committed to voluntary disembark and re-locate the rescued persons. The mechanism was similar to that of 2015 but without any relocation quotas. The persons who were not eligible for international protection had to be returned to their home country. See Joint declaration of intent on a controlled emergency procedure -voluntary commitment by Member States for a predictable temporary relocation scheme, 23 September 2019, point 7.

EU mechanism of relocation of asylum seekers rescued at sea to other EU members, in the case of disproportionate migratory pressure in a participating State or a high number of applications for international protection. Although the new relocation scheme, which concerns persons who have applied for international protection, was intended to provide a predictable temporary solidarity mechanism for situations of emergency, in reality it does not see the participation of all Member States, even if their number has grown<sup>137</sup>. The new initiative is another example of a “piecemeal approach” to irregular entries in the EU. A fair and functional relocation system should be based on the contribution of all EU Members and should be based on a decoupling of the obligation of the rescuing State to examine applications for international protection. Indeed, such a rule places an unfair burden on frontline Member States that are better placed to carry out rescuing operations<sup>138</sup>.

It would be preferable if, after the disembarkation of rescued people, those who apply for international protection could be distributed amongst all the Member States, in cooperation with the UNHCR and/or the EU competent agencies. This system would be inspired by genuine solidarity with respect to the rescuing State, which is usually one of the coastal States. The recent Pact on Migration and Asylum, which is based on a number of legislative proposals by the Commission, has institutionalised the temporary solidarity mechanism, set up with the Malta declaration, and has incorporated the voluntary mechanism in relation to relocation. Under one of the proposals for a regulation included in the mentioned Pact<sup>139</sup>, the State that disembarks people in the context of a search and rescue operation is competent to screen the applications for international protection within five days. Although the Regulation provides that persons disembarked should be distributed in a proportionate manner among the Member States, there is no obligation for national authorities to support the rescuing State by accepting relocations of asylum applicants. Member States may choose from different forms of solidarity to support other rescuing States or countries of first entry or third countries. More precisely, they can provide support through return sponsorship or a combination of both, or with other measures (capacity building, operational support, engagement with relevant non-EU countries). Therefore, the idea of solidarity *à la carte* can be found in the proposed system by the Commission. The latter has the task of facilitating coordination between the coastal State and the other Member States in responding to a situation of migratory pressure. But accepting relocations ultimately remains voluntary. Therefore, it is expected that

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<sup>137</sup> These are Luxembourg, Portugal and Ireland. See A Catani, *The so-called Malta agreement: four months later*, 20 February 2020, <https://www.respondmigration.com/blog-1/the-so-called-malta-agreement>.

<sup>138</sup> The idea of regional disembarkation platform where requests for asylum would be screened in cooperation with UNHCR and IOM, was put forward by the European Council. See document n. 8147/2018 of 19 June 2018. Yet, so far no much progress has been made.

<sup>139</sup> In particular, see Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) n. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM (2020) 612.

if the new rules are to be adopted, they will replicate the current ineffective system of solidarity *vis-a-vis* the coastal States.

#### **4. The disruption of resettlement activities caused by the outbreak of the pandemic.**

The outbreak of the Covid-19 pandemic has disrupted resettlement operations. Even though the temporary ban on non-essential travel to the EU includes an exemption for persons in need of international protection and for persons travelling for other humanitarian reasons, the paralysis caused by the restrictive measures taken to contain the pandemic has certainly slowed resettlement procedures. At the start of the emergency, the Commission issued guidelines providing practical advice to Member States in the area of asylum and return procedures and on resettlement. Indeed, there are no common rules on the management of these procedures in the situation of a pandemic. The Commission is fully aware of the difficulties arising from the practical implementation of the pledges made by the Member States of 29,500 resettlement places for 2020<sup>140</sup>. Yet, Member States are urged to continue preparations for the resettlement of asylum seekers, essentially for humanitarian reasons. On the one hand, the Commission stresses that access to the asylum procedure should also be possible to the greatest extent during the pandemic<sup>141</sup>. On the other hand, the beneficiaries of the resettlement programmes are likely to be more uncertain about how the commitments are implemented: indeed, it seems that the Commission is inclined to demand less from the Member States in terms of the implementation of their pledges to resettle after 2020<sup>142</sup>. This impression is confirmed by the Commission's decision to extend by one year the period to implement the target of 29,500 places which was originally intended to cover only the year 2020<sup>143</sup>. Future resettlement commitments for the years 2022-2024 should be made in the context of new legislation which will hopefully be adopted on the basis of the Commission's proposals which are part of the New Pact on Migration and Asylum. There is limited hope that resettlements of asylum seekers by the EU Member States will be significant with respect to global resettlement needs.

#### **5. Conclusions.**

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<sup>140</sup> European Commission, Resettlement: EU Member States' pledges exceed 30,000 for 2020, Press release, 18 December 2019, available at [ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6794](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6794).

<sup>141</sup> Communication from the Commission COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, C(2020) 2516 final, 16 April 2020.

<sup>142</sup> *Ivi* 16-17.

<sup>143</sup> Commission Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C(2020) 6467 final, 23 September, 8.

It is time to make a final assessment of the resettlement efforts deployed by the EU *vis-a-vis* third countries. The conclusion that can be drawn is that resettlement submissions made by UNHCR, and accepted by many, but not all, EU Member States, according to the temporary programmes coordinated by the Commission, have become a means to support both third countries hosting large communities of refugees (such as Turkey, Jordan, and Lebanon) – as this should be under the principle of “shared responsibility” – and transit countries (such as Niger and Libya) as a *quid pro quo* for their willingness to cooperate and ensure effective border control and/or in exchange for financial assistance. Support to people held in detention centres in Libya, which does not have the capacity to deal with migration flows, was also grounded on humanitarian concerns.

Five years after the adoption of the European agenda on migration, the EU has benefited from the externalisation of migration control since, overall, the flows are modest<sup>144</sup>. The positive effect of the containment strategy is that the rate of deaths due to dangerous journeys across the Mediterranean Sea has diminished. However, the cost of these achievements is that access to asylum is difficult for potential applicants. In addition, leaving aside the 2015 relocation scheme, which was very much limited in time to make a real impact on the position of asylum applicants, the EU’s response to global resettlement needs, be they asylum applicants located in Turkey, Jordan, Lebanon or Libya, is currently not satisfactory. The contribution made by the Member States to resettle persons in need of international protection, which should have somehow compensated for the containment strategy, is limited. This is disappointing from a human rights perspective in a context where legal channels of migration are also reduced. The deficient implementation of the resettlement schemes coordinated by the Commission in 2015 and the small number of resettlements from the ETM in Niger undermine the EU’s credibility in the multilateral context and leave refugees in a situation of uncertainty, which is likely to increase with the pandemic. It is hard to define the EU as a “global leader in the resettlement of refugees”, which is a definition that can be found in the latest recommendation on resettlements and humanitarian admission and other complementary pathways<sup>145</sup>. In light of the modest resettlement commitments made to support asylum seekers in priority third countries and the limited number of persons detained in Libya, Member States could have done more to resettle asylum seekers.

The Commission has sought to coordinate Member States’ action to support refugees or other persons in need of international protection in an effort to partially compensate for its containment policy, and it should continue to do so; there is no doubt that the EU should act as a bloc when it comes to resettlement efforts, and it is promising that proposals to have a stable Union resettlement scheme were put forward in September 2020 by the Commission. Certainly, the

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<sup>144</sup> However, in August 2020, a delegation of Italian members of government and two EU commissioners met the members of the Tunisian Government Ministry to discuss about the surge of migrants/asylum seekers who reached the Italian shore.

<sup>145</sup> COM C(2020) 6467, cit., 3.

Commission's recent proposals of reform of immigration and asylum rules could have been more ambitious instead of being inspired by solidarity *à la carte vis-à-vis* the coastal States. Yet, the failures of the Union resettlement policy are directly linked to the reluctance of EU Member States to resettle, since they are ultimately competent to make and implement those decisions. As long as there are no meaningful financial disincentives not to participate in joint resettlement efforts, displaced persons, protected under international law, will be left in a situation of unacceptable uncertainty. It is submitted that, in an effort to provide more legal certainty in respect of the resettlement programmes, and in the absence of common rules on humanitarian visas<sup>146</sup>, the permanent resettlement mechanism, which could be based on modest resettlement commitments in terms of numbers, should be assisted by negative conditionality. Only if Member States comply with their (limited) resettlement pledges should they receive the EU's financial support. This form of negative conditionality would be additional to the existing positive conditionality, consisting of disbursing funds from the Asylum and Migration Integration Fund for each resettled refugee<sup>147</sup>, which so far has not been a sufficient incentive for the resettlement pledges to be delivered.

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<sup>146</sup> For comments on the advantages of establishing common rules on humanitarian visas, see S. Marinai, *L'Unione europea e i canali di accesso legale*, cit., spec. 65.

<sup>147</sup> A total of 1 billion euros were dedicated to directly supporting the resettlement efforts of the Member States for 2015-2020. COM C(2020) 6467, cit., 2.