
13. The informalisation of the external dimension of EU asylum policy: the hard implications of soft law

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1. INTRODUCTION: THE PROBLEM OF ACCESS TO INTERNATIONAL PROTECTION IN EUROPE

There is a tension at the heart of the Common European Asylum System (CEAS). While a right to asylum has been recognised in legally binding form,¹ the regulation of admission to the territory of the Member States and the relevant procedures by those in need of international protection remains equivocal.² There are no channels to reach the EU regularly and safely as a refugee on a routine basis. Article 18 of the Charter of Fundamental Rights has yet to become fully accessible, exercisable, and effective in the protection it provides. The instruments adopted hitherto in this regard are small in scale, good-will based and non-compulsory. This leads to a fundamental mismatch between the hard law nature of the obligations recognised in the Charter of Fundamental rights, the 1951 Refugee Convention,³ and 'other relevant treaties',⁴ on the one hand, and the soft law character of the mechanisms supposed to ensure their effective implementation, on the other hand, as the following sections will demonstrate.

Ever since the 1999 Tampere Conclusions,⁵ the Area of Freedom, Security and Justice (AFSJ) – that the Union is to 'constitute'⁶ 'with full respect for fundamental rights'⁷ – is intended to remain accessible to 'those whose circumstances lead them justifiably to seek access to our territory'.⁸ The 'aim is an open and secure' EU, 'fully committed' to international human rights and refugee law.⁹ The Stockholm Programme, ten years later, corroborated this approach, establishing that '[p]eople in need of protection *must* be ensured access to legally safe and efficient asylum procedures'.¹⁰ At the same time, 'the need for a consistent control of external borders to stop illegal immigration' has remained a top priority.¹¹ A balance is

¹ EU Charter of Fundamental Rights, [2000] OJ C 364/1 ('CFR'), art 18.

² See, extensively, Violeta Moreno-Lax, *Accessing Asylum in Europe* (OUP 2017) 47–80.

³ Convention relating to the Status of Refugees, 189 UNTS 150 ('CSR51').

⁴ TFEU, art 78(1).

⁵ Presidency Conclusions, 'Tampere European Council 15–16 October 1999, Presidency Conclusions' ('Tampere Conclusions') <www.europarl.europa.eu/summits/tam_en.htm> accessed 7 January 2022.

⁶ TFEU, art 67(1) and TEU, art 3(2).

⁷ Presidency Conclusions, European Council 26–27 June 2014, EUCO 79/14, para 1.

⁸ Tampere Conclusions (n 5), para 3.

⁹ *Ibid*, para 4 and TFEU, Art 78(1), referring to the Convention relating to the Status of Refugees, 189 UNTS 150 ('CSR51').

¹⁰ The Stockholm Programme, Council doc. 17024/09, 2 December 2009, 5 (emphasis added).

¹¹ Tampere Conclusions (n 5), para 3.

supposed to be struck, so that ‘the necessary strengthening of European border controls [does] not prevent access to protection systems by those people entitled to benefit under them’.¹² The final goal, as reiterated in the New Pact on Migration and Asylum, is to ‘reduce unsafe and irregular’ migration, while ‘promot[ing] sustainable and safe legal pathways for those in need of protection’.¹³

However, efforts so far have concentrated on ‘stepping up the effectiveness of EU external borders’,¹⁴ ‘reinforcing the fight against migrant smuggling’¹⁵ and ‘maximising the impact of our international partnerships’, supporting partner countries ‘in developing effective migration governance and management capacity’ so they can ‘manage irregular migration, forced displacement and combat migrant smuggling networks’.¹⁶ There are, in fact, very few safe access channels to protection in the EU. Most asylum seekers, before and after the 2015 ‘refugee crisis’, were and continue to be compelled to reach the territory of the Member States irregularly. Up to 90 per cent of those eventually recognised as beneficiaries of international protection enter the EU either on forged or no documents, assisted by smugglers or falling prey to human traffickers.¹⁷ EU policies contain persons in need of refuge in areas ever closer to the countries they escape, to the detriment of strategies that expand international protection space and advance access to ‘durable solutions’. The underlying assumption – which I have contested elsewhere¹⁸ – appears to be that, while the Union and its Member States may reach beyond territorial borders to control migration and deter irregular arrivals, their human rights and refugee protection obligations are limited, so that no extra-territorial duties are owed to those trying to seek asylum in the EU.

In this environment of prevailing extra-territorial border and migration controls but contested extra-territorial international protection obligations, the Hague Programme launched ‘the external dimension of asylum’,¹⁹ developed in successive policy documents, whose evolution is tracked in Section 2. Several (soft-law) solutions, discussed in Section 3, have been posited to facilitate protection, including Regional Protection Programmes (RPPs);²⁰ resettlement;²¹ and other ‘complementary pathways’.²² However, an overall emphasis on migration control prevails,²³ entrenching a ‘consensual containment’ model that relies on third

¹² European Pact on Immigration and Asylum, Council doc. 13440/08, 24 September 2008, 11.

¹³ New Pact on Migration and Asylum, COM(2020) 609 final, 23 September 2020, 2.

¹⁴ *Ibid*, heading of section 4.1, 11.

¹⁵ *Ibid*, heading of section 5, 15.

¹⁶ *Ibid*, heading of section 5, 15.

¹⁷ ‘Resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL))’ (*European Parliament*, 11 December 2018), para E <www.europarl.europa.eu/doceo/document/TA-8-2018-0494_EN.html> accessed 7 January 2022.

¹⁸ Moreno-Lax, *Accessing Asylum in Europe* (n 2) 290–98 and 380–84. See also Violeta Moreno-Lax and Cathryn Costello, ‘The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model’, in Steve Peers et al. (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart 2014) 1657.

¹⁹ The Hague Programme, Council doc. 16054/04, 13 December 2004, para 1.6. For commentary, see Violeta Moreno-Lax, ‘External Dimension’, in Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild (eds), *EU Immigration and Asylum Law*, Vol III (2nd edn, Brill 2015) 647.

²⁰ Regional Protection Programmes, COM(2005) 388 final, 1 September 2005 (‘RPPs’).

²¹ The establishment of a Joint EU Resettlement Programme, COM(2009) 447 final, 2 September 2009.

²² Resolution on Humanitarian Visas (n 17).

²³ New Pact on Migration and Asylum (n 13), section 6, 17–21.

countries to preclude unauthorised arrivals.²⁴ Admission for asylum seeking purposes and access to protection in the EU has thus become tokenistic and unenforceable, as problematised in Section 4. The final result, as the remainder of this chapter will show, is a degradation of the legal protections of asylum, *non-refoulement*, good administration and effective remedies, among the key rights third-country nationals (TCNs) derive from EU law, that contradicts and critically undermines their hard-law quality.²⁵

2. EVOLUTION OF THE POLICY FRAMEWORK

Since the adoption of The Hague programme in 2004, three main instruments have shaped the EU's approach to external migration management and the CEAS, seeking above all to pre-empt unauthorised flows (including of asylum seekers) in cooperation with third countries: The Global Approach to Migration and Mobility (GAMM),²⁶ the Agenda on Migration,²⁷ and the Migration Policy Framework.²⁸

Since the 'Arab Spring', the GAMM – the recast version of the Global Approach to Migration²⁹ – purports to develop a 'coherent and comprehensive migration policy' by fostering: (1) legal migration and mobility; (2) the fight against irregular migration; (3) asylum; and (4) the migration-development nexus, but with an overall focus on the fight against irregular migration.³⁰ The premise is that 'without well-functioning border controls, lower levels of irregular migration and an effective return policy, it will not be possible for the EU to offer more opportunities for legal migration'.³¹ Asylum is to be delivered predominantly by non-EU countries in the regions of origin and transit, with whom the EU should cooperate 'in order to strengthen their asylum systems and national asylum legislation ... to ensure compliance with international standards'.³² The Agenda on Migration and the Migration Policy Framework pursue similar objectives.³³

The Agenda on Migration addresses the short- and medium-term measures required to handle the 2015 'refugee crisis' and its aftermath. It thus focuses on 'immediate action', targeting deaths at sea; smuggling networks; the relocation and resettlement of refugees; assistance to Member States at the external frontiers of the EU; and cooperation with third countries 'to

²⁴ Violeta Moreno-Lax and Mariagiulia Giuffr , 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows', in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 81.

²⁵ CFR, arts 4, 18, 19, 41 and 47.

²⁶ European Commission, *The Global Approach to Migration and Mobility*, COM (2011) 743 final, 18 November 2011 ('GAMM').

²⁷ A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.

²⁸ Migration Policy Framework, COM(2016) 385 final, 7 June 2016 ('MPF').

²⁹ Global Approach to Migration, Council Conclusions, 17 December 2005, Council doc. 15914/05. For analysis, see the chapter of Paula Garc a Andrade in this volume.

³⁰ GAMM (n 26), 2.

³¹ *Ibid.*, 5–6.

³² *Ibid.*, 17.

³³ On the externalisation of asylum and its incompatibility with refugee law standards, see UNHCR, *Note on the "Externalization" of International Protection* (May 2021) <www.refworld.org/pdfid/60b115604.pdf> accessed 7 January 2022.

tackle migration *upstream*'.³⁴ Like the GAMM, the Agenda identifies 'four pillars to manage migration better', concentrating on containing unauthorised movement, reinforcing return and readmission, enhancing border controls and 'support[ing] third countries developing their own solutions to better manage their borders'.³⁵ Some attention is paid to resettlement and RPPs as well as action on the root causes of displacement, particularly through development assistance, with a view to 'reducing the incentives for irregular migration',³⁶ but the main focus stays on containment and control.

The Migration Policy Framework serves as the implementation mechanism of the Agenda's external dimension, placing migration 'at the top of the EU's external relations priorities'.³⁷ It is based on intensified cooperation with third countries, in the form of rapid result-oriented 'partnerships', pursuing migration management through 'all means available'.³⁸ This entails a multi-dimensional engagement, going beyond the 'migration toolkit alone', through the coordination of EU action and Member States' bilateral efforts; the mainstreaming of the Framework's goals in all EU policies; and increased financial assistance and targeted support to priority countries, comprising top refugee-producing and transit States.³⁹ The Framework also introduces migration management conditionality entailing the mobilisation of 'all ... tools' available and the use of a 'mix of positive and negative incentives', 'bringing maximum leverage', with the aim of 'effectively preventing irregular migration'.⁴⁰

The Migration Policy Framework pursues three short-term priorities: The first is to 'increase the rate of return', presumably within a human rights-compliant context.⁴¹ However, this is to be achieved 'not necessarily' through 'formal readmission agreements',⁴² but also with informal arrangements – which, by definition, heighten the risk of *refoulement*,⁴³ since soft-law tools cannot produce legally enforceable guarantees. The second priority is to 'enable migrants and refugees to stay close to home', cooperating with partner countries 'to improve the[ir] legislative and institutional framework for migration', and delivering capacity building assistance – without paying sufficient attention to the need to guarantee the effectiveness of the right to leave any country, including one's own, and the right to seek asylum. The third priority is to 'save lives in the Mediterranean', which has yet to materialise in the launch of an EU-wide mission with a specific rescue mandate, and is, instead, planned to be achieved through border control deployments and operations fighting smuggling by sea.⁴⁴

In the long term, actions should tackle the root causes of migration. Enhanced conditionality is to be employed, 'to ensure that development assistance helps partner countries manage migration more effectively, and also incentivises them to effectively cooperate on readmission

³⁴ Agenda on Migration (n 27), 3 and 5 (emphasis added).

³⁵ Ibid, 6 and 11.

³⁶ Ibid, 4–5, 7–8 and 16.

³⁷ MPF (n 28), 3, 5–6 and 11.

³⁸ Ibid, 2.

³⁹ Ibid, 2–3. The priority countries are Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan (p 8) as well as Jordan, Lebanon, Libya, Iran and Egypt (p 13ff).

⁴⁰ Ibid, 6 and 9. See also EC Conclusions, 28 June 2016, Council doc. EUCO 26/16, paras 1–8.

⁴¹ MPF (n 28), 6 and 2.

⁴² Ibid, 7.

⁴³ Mariagiulia Giuffr , *The Readmission of Asylum Seekers under International Law* (Hart 2020).

⁴⁴ MPF (n 28), 6.

of irregular migrants'.⁴⁵ Yet, this fails to consider that the use of development aid as an incentive for migration control may seriously impair meaningful action on root causes in practice.⁴⁶ Democratisation and development efforts may not necessarily be assisted by enhancing the control capacities of regimes with dubious human rights records. This also contravenes Article 208 TFEU, which explicitly stipulates that development assistance 'shall have as its primary objective the reduction and, in the long term, the eradication of poverty', rather than '[r]estoring order', bringing 'robustness' to external border systems and '[s]temming...irregular flows',⁴⁷ which can have deleterious effects on human rights.

Against this background, the New Pact on Migration and Asylum is not a 'fresh start', but rather inherits the orientation and core content of preceding instruments.⁴⁸ Despite its stated aim of building a system for long-term migration management 'grounded in European values and international law', including legal pathways through 'Talent Partnerships' and enhancing resettlement,⁴⁹ the accent remains on containment and deterrence. The text re-emphasises readmission and the 'fight against migrant smuggling', through a common system based on 'tailor-made Counter Migrant Smuggling Partnerships' with third countries to 'prevent dangerous journeys and irregular crossings'.⁵⁰ This approach is further developed in a dedicated EU Action Plan,⁵¹ which may use tools, such as information exchange, joint operations with partner countries, and targeted funding,⁵² to 'boost cooperation and [encourage] effective action by police and judicial authorities' in countries of origin and transit.⁵³

Corruption, instability, human rights and rule of law concerns are rarely mentioned and have yet to be effectively addressed. Instead, the focus is on 'support' and 'capacity building' to 'help partner countries manage irregular migration' through existing 'agreements and arrangements',⁵⁴ thus embracing the informalisation of EU instruments in this field, taking the 2016 EU-Turkey Statement as a blueprint.⁵⁵ As the next sections illustrate, actions based on the GAMM, the Agenda on Migration, and the Migration Policy Framework reflect the overwhelming preoccupation with halting irregular migration, administering access to protection in tokenistic, unpredictable fashion, and thus raising compatibility issues with core EU principles.⁵⁶

⁴⁵ Ibid, 9.

⁴⁶ Loren B. Landau, 'A Chronotope of Containment Development: Europe's Migrant Crisis and Africa's Reterritorialisation' (2019) 51 *Antipode* 169.

⁴⁷ MPF (n 28), 5–6 and 13.

⁴⁸ New Pact on Migration and Asylum (n 13), p. 1. See also García Andrade, 'EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?', (*EU Migration Law Blog*, 8 December 2020) <<https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/>> accessed 7 January 2022.

⁴⁹ New Pact on Migration and Asylum (n 13), 1 and section 6.6.

⁵⁰ Ibid, 7 (heading), 8 and 14–15.

⁵¹ A renewed EU action plan against migrant smuggling (2021–2025), COM(2021) 591 final, 29 September 2021.

⁵² Ibid, 20 and 22. See generally ss 6.1–6.5.

⁵³ New Pact on Migration and Asylum (n 13), 15–16.

⁵⁴ Ibid, 21.

⁵⁵ 'EU-Turkey Statement' (*European Council*, 18 March 2016) <www.consilium.europa.eu/en/press/pressreleases/2016/03/18/eu-turkey-statement> accessed 7 January 2022.

⁵⁶ See further Mark Akkerman, *Outsourcing Oppression: How Europe Externalises Migrant Detention Beyond its Shores*, Transnational Institute Policy Brief, 14 April 2021 <www.tni.org/en/outourcingoppression> accessed 7 January 2022.

3. INSTRUMENTS OF THE EXTERNAL DIMENSION

The pool of soft-law instruments that translate the external dimension of the CEAS into practical detail is varied and complex. Amongst the refugee-specific mechanisms that aim to facilitate access to protection, whether in the EU or (preferably) elsewhere, three stand out as the most accomplished. Even though their outcomes do not match their original ambition, RPPs, resettlement and other ‘complementary pathways’ recur in policy documents and are the ones that have actually been operationalised since The Hague Programme.

3.1 Regional Protection Programmes

Regional Protection Programmes (RPPs) – renamed Regional *Development* and Protection Programmes (RDPPs) in the EU Agenda on Migration⁵⁷ – constitute the response of the European Commission to the extraterritorial processing debate sparked in the Union in 2003. The UK’s government aspiration to cut by half the number of asylum applications lodged in Britain had led the Blair government to propose offshoring asylum procedures outside the EU.⁵⁸ The ensuing ‘New Vision for Refugees’⁵⁹ triggered an intense discussion and the consternation of the United Nations High Commissioner for Refugees (UNHCR) and civil society organisations.⁶⁰ The European Council invited the Commission ‘to explore all parameters’ of this new approach.⁶¹ As a result, together with other ‘protected-entry procedures’, the Commission proposed RPPs as a means to enhance the protection capacity of regions of origin – but it avoided moves towards the extraterritorialisation of asylum procedures and the forcible transportation of asylum seekers to supposedly safe zones abroad.⁶² It conceived of RPPs as a ‘tool box’ of measures, ‘*mainly* protection oriented’,⁶³ and including a resettlement component that would ‘address[] protracted refugee situations globally in a comprehensive and concerted approach’.⁶⁴ The Hague Programme endorsed the proposal and requested the Commission to develop it in practice.⁶⁵

⁵⁷ Agenda on Migration (n 27), 5, establishing a strategic link with development policy.

⁵⁸ Seumas Milne and Alan Travis, ‘Safe havens plan to slash asylum numbers’ (*The Guardian*, 5 February 2003) <www.theguardian.com/society/2003/feb/05/asylum.immigrationasylumandrefugees> accessed 7 January 2022.

⁵⁹ *New Vision for Refugees*, 7 March 2003 www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf accessed 7 January 2022 and *New International Approaches to Asylum and Protection*, 10 March 2003 <www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf> accessed 7 January 2022.

⁶⁰ UNHCR, Three-Pronged Proposal, June 2003 <www.unhcr.org/refworld/pdfid/3efc4b834.pdf> accessed 7 January 2022; UK Refugee Council, Unsafe havens, unworkable solutions, June 2003 <www.refugeecouncil.org.uk/policy/responses/2003/unsafe_havens.htm> accessed 7 January 2022; Human Rights Watch, An Unjust “Vision” for Europe’s Refugees, June 2003 <www.hrw.org/legacy/backgrounder/eca/refugees0603/refugees061803.pdf> accessed 7 January 2022.

⁶¹ Presidency Conclusions, European Council 19–20 June 2003, Council doc. 11638/03, para 26.

⁶² Improving access to durable solutions, COM(2004) 410, 4 June 2004. Cf. Rwanda Plan in the UK, see ‘Rwanda asylum plan: UN warned UK plan was unlawful, court told’, BBC News, 10 June 2022 <www.bbc.com/news/uk-61758828> accessed 10 July 2022.

⁶³ Improving access to durable solutions (n 62), para 51 (emphasis added).

⁶⁴ *Ibid.*, para 57.

⁶⁵ The Hague Programme (n 19), para 1.6.2.

A fully-fledged RPP proposal was tabled in September 2005.⁶⁶ As framed by the Commission, RPPs should respond to the specific needs of target countries, to increase their capacity to protect refugees in protracted situations,⁶⁷ and generally ‘better to manage migration’.⁶⁸ Since 2015, RDPPs include an explicit development component as well.⁶⁹ Among the conceivable activities, to be implemented ‘via international organisations’,⁷⁰ supporting local authorities and civil society as ‘implementing partners’,⁷¹ RDPPs may include projects introducing Refugee Status Determination (RSD) procedures, ‘which can help host countries better manage the migration implications of refugee situations’; programmes delivering ‘direct benefits’ to refugees; projects benefitting the local hosting community; and a ‘resettlement commitment’ by EU Member States, that remains ‘voluntary’.⁷² These activities should ‘add value’ to existing humanitarian and development programmes of the EU.⁷³

In 2007, two pilot RPPs were launched in Tanzania, a region of origin hosting ‘the largest refugee populations in Africa’,⁷⁴ and in Moldova, Belarus and Ukraine, which together comprise a major region of transit towards the EU.⁷⁵ A number of factors determined the selection of these locations,⁷⁶ including not only humanitarian but also migration policy factors,⁷⁷ despite the fact that some recipients are not States party to the 1951 Refugee Convention, and therefore would neither extend refugee protection to those who qualify, nor be possibly considered ‘safe third countries’ (STC).⁷⁸ This reinforces the impression that the main consideration is the management of flows, regardless of the risk of containment and its human rights implications.⁷⁹

⁶⁶ RPPs (n 20).

⁶⁷ Protracted situations entail 25,000 or more refugees living in exile for at least five years. See UNHCR Standing Committee, Protracted Refugee Situations, EC/54/SC/CRP.14, June 2004.

⁶⁸ RPPs (n 20), para 2.

⁶⁹ Agenda on Migration (n 27), 5.

⁷⁰ ‘Regional Development and Protection Programmes in North Africa projects’ implementation’ (European Commission, 27 April 2020) <https://ec.europa.eu/home-affairs/news/regional-development-and-protection-programmes-north-africa-projects-implementation-2020-04-27_en> accessed 7 January 2022.

⁷¹ Commission Recommendation on legal pathways to protection in the EU, C(2020) 6467, 23 September 2020, para 3.

⁷² RPPs (n 20), para 6.

⁷³ Ibid, para 5.

⁷⁴ Ibid, para 16.

⁷⁵ Joint EU Resettlement Programme (n 21), para 3.2.3. There has not been a formal amendment to or suspension of the Moldova-Belarus-Ukraine RPP since the outbreak of the Russian invasion, see European Commission, ‘regional development and protection programme (RDPP)’, undated <https://home-affairs.ec.europa.eu/pages/glossary/regional-development-and-protection-programme-rdpp_en> accessed 10 July 2022.

⁷⁶ RPPs (n 20), para 9.

⁷⁷ Ibid, para 10.

⁷⁸ For the STC criteria under EU law, see Arts 38 and 39, Asylum Procedures Directive 2013/32/ EU (recast), [2013] OJ L 180/60 (‘APD’).

⁷⁹ Cf. on the situation e.g. at the EU-Belarus border, see Amnesty International, ‘Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU’ (Amnesty International, 20 December 2021) <www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/> accessed 7 January 2022.

An external evaluation of pilot RPPs was carried out in 2010, revealing that ‘their impact was limited due to limited flexibility, funding, visibility and coordination with other EU humanitarian and development policies, and insufficient engagement of third countries’.⁸⁰ Nonetheless, the Commission proposed to continue the programmes and even to extend them to North Africa (Egypt, Libya, Tunisia) and the Horn of Africa (countries neighbouring Somalia).⁸¹ The North Africa RPP became one of the key responses to displacement during the Arab Spring.⁸² The Agenda on Migration called for an RDPP in the Middle East to be ‘set up’ and for those in North Africa and the Horn of Africa to be ‘deepened’.⁸³ The overarching objective is supposedly to improve living conditions in the target countries, ‘offering [migrant and refugee populations] alternatives to irregular migration’,⁸⁴ ignoring realities on the ground.

Overall, there is a mismatch between the rhetorical ambition of RDPPs and the means deployed, including in budgetary terms, leading UNHCR to warn against excessive expectations.⁸⁵ Since 2015, only 40 projects have been funded through a €41 million allocation for the North Africa RDPP.⁸⁶ The need, however, is for a properly coordinated, protection-oriented approach of sufficient scale that takes into account the actual needs of refugees and their host countries. Assisting third countries in dealing with refugee populations should not result into the further protraction of their situations.⁸⁷ It has to be accepted that ‘durable solutions will not always be available in regions of origin or transit’.⁸⁸ This is why out-of-the-region resettlement is essential to the success of RDPPs. Resettlement, to which the next section turns, taken as part of a genuine responsibility-sharing endeavour, ‘could reinforce efforts to establish viable asylum systems and to create opportunities for local integration’.⁸⁹ Yet experience shows that ‘resettlement has remained a relatively underdeveloped component’ of EU asylum policy.⁹⁰

3.2 Resettlement

Resettlement is one of the ‘durable solutions’ supported by UNHCR. It consists of the selection and transfer of already-recognised refugees from a ‘country of first asylum’ to a third

⁸⁰ Although the evaluation has not been made public, the Commission mentioned it in its First Annual Report on Immigration and Asylum (2009), COM(2010) 214, 6 May 2010, 6.

⁸¹ First Annual Report on Immigration and Asylum (2009), SEC (2010) 535, 6 May 2010, 38.

⁸² A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011) 292, 24 May 2011, 7.

⁸³ Agenda on Migration (n 27), 5.

⁸⁴ Regional Development and Protection Programme for North Africa (RDPP NA), Factsheet, 27 April 2020 <https://ec.europa.eu/home-affairs/pages/publication/regional-development-and-protection-programme-north-africa-rdpp-na_en> accessed 7 January 2022.

⁸⁵ UNHCR, Observations on the Communication on Regional Protection Programmes (*Refugee Law Reader*, add day October 2005) <www.refugeelawreader.org/inventory.d2?start=600&target=search&i_doctype%5B%5D=0> accessed 7 January 2022.

⁸⁶ RDPP NA (n 84).

⁸⁷ UNHCR EXCOM Conclusion, Economic and social impact of refugee populations on host developing countries as well as other countries, EC/53/SC/CRP.4, 10 February 2003.

⁸⁸ UNHCR, Observations (n 85) 1.

⁸⁹ *Ibid.*, 5.

⁹⁰ Joint EU Resettlement Programme (n 21), para 3.2.3. See also Recommendation on legal pathways (n 71), Recital 3, calling on Member States to actively engage in resettlement to support RDPPs.

State that agrees to admit them as refugees and grants them residence.⁹¹ The main reason for resettlement is the need for *better* protection of particularly vulnerable refugees who have reached a country of first asylum where their situation is precarious, undignified or unsafe due to health, security or other reasons. Despite the benefits of resettlement as ‘a life-changing experience’,⁹² less than 1 per cent of the 27 million refugees worldwide are resettled.⁹³ And only a small fraction of States participate in UNHCR’s resettlement programme.⁹⁴

The EU Member States’ contribution has been slow and scarce. Only 13 have established annual schemes, most with very limited capacity.⁹⁵ At EU level, only *ad hoc* resettlement initiatives have been executed, which are understood to be paving the way for a more permanent scheme that, if adopted, will systematise national efforts within an EU-wide framework.⁹⁶ The first harmonising attempt was the Joint Resettlement Programme in 2009,⁹⁷ which intended to foster the development of a common approach, involving as many Member States as possible, raising the global humanitarian profile of the EU, while improving access to asylum ‘in an orderly way’. The idea was to match the programme with the GAMM through the identification of common priorities not only on protection grounds, but also on the basis of broader migration policy concerns, using resettlement ‘strategically’ to curtail unauthorised entry into the EU, ‘reducing irregular migration’, ‘disrupt[ing] migrant smuggling networks’ and ‘bet-ter[ing] [the] overall management of the migratory situation’.⁹⁸

The European Refugee Fund (ERF) was amended in 2012 to support resettlement.⁹⁹ However, the results were minimal. During the Arab Spring, only 700 resettlement places were offered EU-wide, while UNHCR estimated at least 11,000 were needed.¹⁰⁰ The replacement of the ERF with the Asylum, Migration and Integration Fund (AMIF) 2014–2020,¹⁰¹ with increased monetary provisions per resettled refugee, was expected to significantly attract additional pledges. But this did not fully materialise. In June 2015, the Commission proposed an *ad hoc* plan for a 20,000-place scheme to respond to the Syrian crisis, submitted as part

⁹¹ UNHCR Resettlement Handbook (Geneva, 2011), p 3 <www.unhcr.org/46f7c0ee2.pdf>. For a definition of ‘country of first asylum’, see UNHCR, Master Glossary of Terms (June 2006), p 7 <www.refworld.org/es/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5d82b8fa4#:~:text=Country%20of%20First%20Asylum%3A%20The%20his%20Fher%20application%20for%20asylum>.

⁹² UNHCR, Resettlement Information (undated) <www.unhcr.org/uk/resettlement.html> accessed 7 January 2022.

⁹³ UNHCR, Refugee Data Finder (as of ‘mid-2021’) <www.unhcr.org/refugee-statistics/> accessed 7 January 2022.

⁹⁴ UNHCR, Resettlement Fact Sheets 2017–2021 <www.unhcr.org/search?page=search&skip=0&docid=&cid=49aea9390&scid=49aea939c&comid=5cf8e2ce4&tags=factsheet> accessed 7 January 2022.

⁹⁵ Recommendation on legal pathways (n 71), Annex, Resettlement: 2020 Pledges, ranging from 18 places pledged by Lithuania up to 5,500 by Germany.

⁹⁶ Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework, COM(2016) 468, 13 July 2016 (‘URF Proposal’).

⁹⁷ Joint EU Resettlement Programme (n 21).

⁹⁸ Commission Recommendation on enhancing legal pathways for persons in need of international protection, C(2017) 6504, 27 September 2017, Recitals 1, 4 and 13.

⁹⁹ ERF Decision 281/2012/ [2012] OJ L 92/1.

¹⁰⁰ ‘Statement by Cecilia Malmström on the results of the Ministerial Pledging Conference 12 May’ (Brussels, 13 May 2011) <http://europa.eu/rapid/press-release_MEMO-11-295_en.htm?locale=fr> accessed 7 January 2022.

¹⁰¹ AMIF Regulation 516/2014, [2014] OJ L 150/175.

of the Agenda on Migration.¹⁰² The European Council endorsed it and raised the target to 22,504.¹⁰³ Within the two years envisaged for completion, 19,432 people were brought to safety in the EU (86 per cent of the initial pledges).¹⁰⁴ In parallel, in September 2016, a reform of the Relocation Decisions, adopted to alleviate pressure from Italy and Greece by transferring asylum applicants to other Member States, was introduced.¹⁰⁵ This made it possible for Member States to fulfil their relocation obligations by resettling Syrians from Turkey rather than by relocating asylum applicants already present in Europe. 54,000 places of those initially foreseen for intra-EU relocation were repurposed for resettlement. Since the conclusion of the EU-Turkey Statement, over 27,000 Syrian refugees have been resettled from Turkey through this means.¹⁰⁶

In September 2017, a further commitment to resettle 50,000 refugees over two years was tabled ‘as part of the European Commission’s efforts to provide viable safe and legal alternatives for those who risk their lives at the hands of criminal smuggling networks’ across the Mediterranean.¹⁰⁷ To facilitate the transition into a more permanent framework, the Commission simultaneously adopted a non-binding Recommendation, inviting Member States to take a ‘stronger engagement’, focusing primarily on the Middle East and North Africa (MENA) region, especially on ‘key African countries along and leading to the Central Mediterranean migration route’.¹⁰⁸ Therein, it also called for a commitment under UNHCR’s new ‘temporary mechanism for emergency evacuation of the most vulnerable migrants from Libya’.¹⁰⁹ Nearly 44,000 persons were eventually resettled through the scheme (88 per cent of projected pledges), which has been hailed as ‘a success’.¹¹⁰

The global resettlement landscape, however, profoundly changed in 2015–20, bringing it nearly to a halt. Although needs remain high, with UNHCR demanding 1.47 million places, the Trump administration drastically reduced the biggest scheme worldwide, from nearly 150,000 to 22,000, and the COVID-19 pandemic has delayed operations everywhere.¹¹¹ The EU’s response has also been affected. The 2020 plan, counting 29,500 pledges, was turned into a two-year programme to be implemented until the end of 2021, with new programmes to ‘be

¹⁰² Commission Recommendation on a European resettlement scheme, C(15) 3560, 8 June 2015.

¹⁰³ EC Conclusions, Council doc. 11097/15, 20 July 2015.

¹⁰⁴ European Commission, ‘European Agenda on Migration: Continuous efforts needed to sustain progress’, Press Release, 14 March 2018 <http://europa.eu/rapid/press-release_IP-18-1763_en.htm> accessed 7 January 2022.

¹⁰⁵ Council Decision 2016/1754 of 29 September 2016 amending [Relocation] Decision (EU) 2015/1601, [2016] OJ L 268/82. See further, Elspeth Guild, Cathryn Costello and Violeta Moreno-Lax, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, PE 583.132 (European Parliament 2017) <[www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU\(2017\)583132_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf)> accessed 7 January 2022.

¹⁰⁶ Recommendation on legal pathways (n 71), Recital 11.

¹⁰⁷ ‘State of the Union 2017 – Commission presents next steps towards a stronger, more effective and fairer EU migration and asylum policy’, Press Release, 27 September 2017 <http://europa.eu/rapid/press-release_IP-17-3406_en.htm?locale=FR> accessed 07 January 2022.

¹⁰⁸ Recommendation on enhancing legal pathways (n 98), Recitals 10, 14–15 and paras 3(a)–(c).

¹⁰⁹ *Ibid.*, Recital 18 and para 3(c).

¹¹⁰ Recommendation on legal pathways (n 71), Recital 9.

¹¹¹ *Ibid.*, Recital 17. See also Welfens, Lehmann, and Wagner, ‘Towards a Global Resettlement Alliance’, Friedrich Ebert Stiftung (December 2021), p 2 <<http://library.fes.de/pdf-files/iez/18647.pdf>> accessed 7 January 2022.

considered from 2022 onwards'.¹¹² The objective, in the meantime, is for the European legislator to approve the 2016 proposal for a permanent Union Resettlement Framework (URF).¹¹³

The Framework will introduce a unified procedure and common selection criteria, replacing *ad hoc* initiatives with a harmonised approach and facilitating the attainment of Commission targets.¹¹⁴ This is expected to reduce divergence among the Member States and put the EU in a stronger position, speaking with one voice internationally. Making a single pledge on behalf of all the Member States together, it is believed, will give more visibility and increase the EU's credibility as a contributor to world resettlement efforts. It is also hoped that this will enhance the EU's leverage vis-à-vis third countries, helping it to achieve foreign policy objectives and better manage migration, making it easier to convince international partners to assume *their* share of responsibility.¹¹⁵ As things stand, this is an odd proposition, considering that, of the total 84 million persons of concern to UNHCR, only about three million are hosted in the EU (1.2 million in Germany alone), representing roughly 3.5 per cent of the globally displaced (or 2 per cent, excluding Germany).¹¹⁶ Additional expected benefits are the reduction of irregular, unsafe journeys and the risk of large-scale arrivals to the EU,¹¹⁷ as well as 'a direct demonstration of [solidarity]'.¹¹⁸

The programme, although taking the form of an EU Regulation, does not create a legal duty to resettle. It is based on *voluntary* commitments by the Member States and does not produce an individual right to resettlement, despite the recognition of (or 'without prejudice to', in the Commission's words) the right to asylum and the protection from *refoulement* as binding obligations 'in accordance with Articles 18 and 19 of the Charter of Fundamental Rights'.¹¹⁹ The programme only requires that, *if* Member States *choose* to resettle, they do so in line with the common rules introduced in the proposed Regulation. Thus, the problem of inadequate soft-law implementation of hard-law obligations (to honour and preserve the effectiveness of the right to asylum and the principle of *non-refoulement*) remains. Therein, resettlement is defined as 'the admission of third-country nationals ... in need of international protection from a third country to which or within which they have been displaced to the Member States with a view to granting them international protection',¹²⁰ which becomes effective only if and 'when resettled persons arrive on the territory of the Member States'.¹²¹ But there is no express obligation to facilitate their arrival in the first place.

'Strategic' priorities are to be discussed regularly at a High-Level Resettlement Committee of representatives from the EU institutions and the Member States, with the European Asylum

¹¹² Recommendation on legal pathways (n 71), Recitals 13, 20 and 21 (emphasis added).

¹¹³ Ibid, Recital 12. See also URF Proposal (n 96).

¹¹⁴ URF Proposal, Explanatory Memorandum, 1–2 and Draft Regulation, Recital 11.

¹¹⁵ Ibid and Draft Regulation, Recitals 9 and 10.

¹¹⁶ UNHCR, Refugee Data Finder <www.unhcr.org/refugee-statistics/>; and UNHCR, Figures at a Glance (2020) <www.unhcr.org/figures-at-a-glance.html> accessed 07 January 2022.

¹¹⁷ URF Proposal (n 96), Explanatory Memorandum, p 6 and art 3 of the Draft Regulation.

¹¹⁸ Ibid, 4 and 5.

¹¹⁹ Ibid, 7 and Recitals 19 and 33 of the Draft Regulation. It is also not intended to affect the capacity of the Member States to adopt or continue to pursue their own national resettlement schemes, provided they 'do not jeopardize the attainment of the Union's objectives under this Regulation'. Therefore, '[r]esettlements under national resettlement schemes outside of this framework will not be supported financially by the Union's budget', as per the Explanatory Memorandum, 15.

¹²⁰ Ibid, Draft Regulation, art 2.

¹²¹ Ibid, Draft Regulation, Recital 25 and art 10(7)(a).

Support Office (EASO) – now the European Asylum Agency, UNHCR and the International Organisation for Migration (IOM) possibly invited as observers.¹²² Those priorities are to infuse the design of the yearly operational Annual Union Resettlement Plan, which should indicate the maximum number of resettlement places, the overall geographical priorities, and the *voluntary* contributions of each Member State.¹²³ The criteria for the definition of the geographical priorities, however, are deterrence oriented and have been criticised as a vehicle for migration control.¹²⁴ Draft Article 4 establishes that in the selection of beneficiary countries, the risk of onward movement of displaced persons to the Member States must also be taken into account, alongside the EU's overall relations with the country concerned, the complementarity of resettlement with other financial and technical assistance provided to that country, and, most importantly, the country's cooperation record in reducing the number of persons irregularly coming to the EU.

Eligibility criteria, by contrast, are more generous than those typically applying under the UNHCR Resettlement Handbook.¹²⁵ Not only persons qualifying as refugees, but also persons at risk of serious harm are eligible for resettlement. Yet, apart from meeting the criteria for protection under the Qualification Directive,¹²⁶ candidates must fall within at least one of the vulnerability categories in Article 5(b) of the Draft Regulation. This includes all UNHCR resettlement categories plus 'persons with socio-economic vulnerability'. The Draft Regulation also defines family members of EU citizens or foreign nationals legally residing in a Member State as potential beneficiaries. Nonetheless, within these groups, Member States retain discretion and 'may give preference' to candidates with family links in the resettlement country, or social or cultural ties that 'can facilitate integration' (without further specification).¹²⁷

However, the Draft Regulation introduces a very restrictive exclusion regime. It contemplates an obligatory exclusion clause, according to which persons falling, in substance, within the exclusion categories of the Refugee Convention or having committed a serious crime or otherwise posing a danger to the community, security, 'public policy', public health or international relations of any Member States *must* be banned from resettlement. Persons for whom an alert has been issued in the Schengen Information System or equivalent domestic database for the purpose of refusing entry; and persons who have irregularly entered or stayed, or merely 'attempted to irregularly enter' a Member State 'during the five years prior to resettlement' *must* also be excluded. Finally, persons who have already been resettled by another Member State; and persons whom Member States have refused to resettle in the last five years or in relation to whom a Member State 'has objected to their resettlement' *must* be disqualified as well.¹²⁸ In addition, Member States *may* refuse resettlement to candidates to whom the obligatory exclusion clause applies *prima facie* – however that may be interpreted. The Draft Regulation does not specify how the *prima facie* analysis is to be carried out, according to

¹²² Ibid, Draft Regulation, art 13.

¹²³ Ibid, Draft Regulation, art 7 and Recital 21.

¹²⁴ European Policy Centre, 'The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?', (Discussion Paper 2018) <www.epc.eu/documents/uploads/pub_8632_euresettlement.pdf?doc_id=2012> accessed 7 January 2022.

¹²⁵ UNHCR, Resettlement Handbook (n 91).

¹²⁶ Qualification Directive 2011/95/EU (recast), [2011] OJ L 337/9, Arts 13 and 18.

¹²⁷ URF Proposal (n 96), Draft Regulation, art 10(1).

¹²⁸ Ibid, Draft Regulation, art 6(1).

which proof or what standards, and whether there is an option to object or appeal decisions taken on this basis. It is also not clear whether UNHCR could resubmit the case for reconsideration during the five-year resettlement ban. Resulting decisions risk being arbitrary and fail to comply with good administration and effective remedy requirements.

The entire resettlement procedure,¹²⁹ as designed, falls foul of Articles 41 and 47 of the Charter. The four stages contemplated: identification, registration, assessment, and decision,¹³⁰ involve multiple steps, actors, and proceedings, in both the ‘ordinary’ and ‘expedited’ variants.¹³¹ All envisage very little agency by the candidate, who cannot self-refer for resettlement, contribute actively to the process or contest intermediary findings. If the final decision is negative, no resettlement shall take place. There are no details in the Draft Regulation as to whether candidates are to be informed in writing of negative outcomes, given reasons for them, or whether any legal avenues for appeal or judicial review should be made available by the Member States.¹³²

To ‘bridge the transition’ towards the Union Resettlement Framework, the Commission has submitted a *Recommendation on legal pathways to protection in the EU*, promoting resettlement and inviting Member States to ‘scale up’ their current schemes.¹³³ Following the strategic approach, Member States should focus their pledges on resettlement from Lebanon, Jordan, and Turkey, of persons displaced by the Syrian conflict, and from Libya, Niger, Chad, Egypt, Ethiopia, and Sudan, as well as from the temporary emergency evacuation mechanisms in Niger and Rwanda, ‘to support the implementation of the EU-Turkey Statement’ and ‘the continued stabilisation of the situation in the Central Mediterranean’.¹³⁴ This is not only to ‘contribute to international resettlement ... initiatives’, but foremost also to ‘better [the] overall management of migration’, on the understanding that resettlement on top of ‘help[ing to] save lives’ also ‘reduce[s] irregular migration’.¹³⁵

The adequacy of putting resettlement at the service of a broader migration management objective is questionable, as it risks distracting the Programme from its primary international protection goal.¹³⁶ There is also no change to the perception that ‘offering legal pathways to the Union’ is a ‘moral’ responsibility in which all Member States ‘should’ participate,¹³⁷ rather than a compulsory legal obligation stemming from the Charter, necessitated by the need to render its asylum-relevant clauses effective in practice. Since the Treaty of Lisbon, the right to asylum, especially at its intersection with the principle of *non-refoulement*, should be understood to generate a positive duty to ensure that international protection is accessible and exercisable (within the scope of EU law) by those escaping persecution or serious harm.

¹²⁹ Ibid, Draft Regulation, Recital 14 and art 10.

¹³⁰ Ibid, Draft Regulation, Recital 13.

¹³¹ Ibid, Draft Regulation, Recitals 14–15.

¹³² The principle of effective judicial protection is a general principle of EU law of general application across the EU legal system. See, e.g., Case C-64/16 *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, referring to CFR, art 47 and TEU, 19.

¹³³ Recommendation on legal pathways (n 71), paras 2 and 7. See also the Commission Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, C(2020) 2516 final.

¹³⁴ Recommendation on legal pathways (n 71), para 5 and Recital 15.

¹³⁵ Ibid, Recitals 4 and 2.

¹³⁶ ECRE, ‘Untying the EU Resettlement Framework’, Policy Note 1 (ECRE 2016).

¹³⁷ Recommendation on legal pathways (n 71), Recital 1.

Like any other EU fundamental right, the provision entails an obligation to respect, protect and fulfil its substance (meaningfully and in good faith) including in the context of the CEAS' external dimension. The opposite makes it redundant. In particular, there is a 'right to flee' dimension,¹³⁸ of key significance for current purposes, which is to be recognised as binding on 'the institutions and bodies of the Union ... and [on] the Member States ... when they are implementing Union law',¹³⁹ that neither the Union Resettlement Framework nor the additional 'complementary pathways' explored next adequately integrate.

3.3 Other Complementary Pathways

Together with resettlement, the Commission has proposed a series of goodwill-based 'complementary pathways' to protection, including sponsorship mechanisms and humanitarian admission schemes, as a means to 'remove the incentive to embark on dangerous journeys to reach Europe'.¹⁴⁰ Discussion on such measures dates back to the beginning of EU asylum cooperation. Facilitation of access to protection became urgent during the Yugoslavia and Kosovo crises,¹⁴¹ prompting the Tampere Conclusions to consider ways to 'offer guarantees to those who seek protection in or access to the European Union'.¹⁴² The Commission launched a study to investigate 'common approaches' in this regard.¹⁴³ Relevant mechanisms have thence been considered several times, most recently in the 2020 *Recommendation on legal pathways to protection in the EU*. The idea is for these mechanisms to provide 'additional means of admission to expand the number of places offered through safe and legal pathways, in addition to resettlement'.¹⁴⁴ Although no dedicated legislation is proposed to buttress an EU-wide scheme, 'a wide array of promising experiences already exist ... which can be scaled up or replicated' and 'help Member States increase the number of resettlement places and successfully integrate refugees'.¹⁴⁵ Below I analyse two of these experiences: Sponsorship mechanisms and humanitarian admission programmes.

3.3.1 Sponsorship mechanisms

Community or private sponsorship schemes already exist in some Member States. The *Recommendation on legal pathways* attempts to encourage EU-wide uptake. This may facilitate the emergence of an EU approach, although potentially quite fragmented, since programmes are intended to be designed 'in line with the[] respective national priorities [of the

¹³⁸ Moreno-Lax, *Accessing Asylum in Europe* (n 2) 337–94; and Moreno-Lax, 'Intersectionality, Forced Migration and the Jus-generation of the Right to Flee', in Basak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (OUP 2021) 43.

¹³⁹ Art 51(1) CFR. See further Violeta Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights*, PE 603.512 (European Parliament 2020) 20–21 <www.europarl.europa.eu/cmsdata/226387/EU_External_Migration_Policy_and_the_Protection_of_Human_Rights.pdf> accessed 7 January 2022.

¹⁴⁰ New Pact on Migration and Asylum (n 13), 22.

¹⁴¹ Sandra Lavenex, 'Passing the Buck: European Union Refugee Policies towards Central and Eastern Europe' (1998) 11 *Journal of Refugee Studies* 126.

¹⁴² Tampere Conclusions (n 5), para 3.

¹⁴³ Towards a common asylum procedure and uniform status valid throughout the Union, for persons granted asylum, COM(2000) 755 final, 22 November 2000, para 2.3.1.

¹⁴⁴ Recommendation on legal pathways (n 71), Recital 23 (emphasis added).

¹⁴⁵ *Ibid.*, Recitals 25 and 27.

Member States] and tak[ing] into account EU external relation priorities and interests', which reinforces the 'strategic' use of resettlement and humanitarian admission channels as a tool of migration control.¹⁴⁶

Typically, sponsorship initiatives make available resettlement places to a wider spectrum of potential beneficiaries. These initiatives are characterised by a transfer of responsibility from State authorities to non-State actors for all or part of the resettlement action, including the identification, referral, pre-departure guidance, post-arrival reception or integration process. However, State authorities retain final responsibility for the scheme. They determine the qualification criteria for sponsors and beneficiaries, may co-finance programmes through provision of funding and services, and should intervene if sponsorship relations break down.¹⁴⁷ Normally, the objectives pursued are several: sponsorship programmes tend to expand protection capacity of the receiving State; enable legal admission to groups that would normally not qualify for resettlement; facilitate integration and acceptance in host communities; and foster cost effective public-private resettlement partnerships.¹⁴⁸

Canada has pioneered such efforts,¹⁴⁹ with the model replicated elsewhere. The European Migration Network (EMN) has identified several Member States that follow similar approaches.¹⁵⁰ When these schemes build on the principle of additionality they 'add to' the government resettlement quota, enabling a durable solution at the sponsoring community's or private initiative. Moreover, some of these schemes, unlike 'classic' resettlement programmes, allow resettlement directly from the country of origin, thereby opening a route of 'primary' access to asylum that spares the dangers of unsafe journeys to a country of first asylum.¹⁵¹

Community sponsorship initiatives, as emerged in Canada, allow organisations, including NGOs, faith-based communities and similar actors registered with, and authorised by, the government as resettlement partners to submit referrals of persons in need of international protection for consideration. If approved, the sponsor becomes responsible for providing material and financial assistance to the beneficiary while they integrate in the host community. Accommodation, clothing, food and general settlement orientation and services are to be provided during this time, which can last several years. Normally, the sponsor must also

¹⁴⁶ Ibid, Recitals 26 and 29 and para 13. See also paras 11–18.

¹⁴⁷ Ibid, paras 14–15.

¹⁴⁸ Ibid, para 16. See also European Commission, Study on the feasibility and added value of sponsorship schemes as a possible pathway to safe channels for admission to the EU, including resettlement (October 2018), 4–5 <<https://publications.europa.eu/en/publication-detail/-/publication/1dbb0873-d349-11e8-9424-01aa75ed71a1>>.

¹⁴⁹ Government of Canada, 'Sponsor a Refugee', (9 August 2018) <www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-outside-canada/private-sponsorship-program.html> accessed 7 January 2022.

¹⁵⁰ European Migration Network (EMN), Resettlement and Humanitarian Admission Programmes in Europe what works? (November 2016) <http://emn.ie/files/p_201611221258152016_emn_informs_resettlement.pdf> accessed 7 January 2022, mapping out programmes developed by EU countries in response to the Syrian refugee crisis. See also, European

Resettlement Network (ERN), Expanding complementary pathways of admission for persons in need of international protection: Scoping paper (March 2018) <www.resettlement.eu/page/ern-publications>.

¹⁵¹ Violeta Moreno-Lax, 'From Complementary to "Primary" Pathways to Asylum: A Word on the "Right to Flee"' (2021) FMR 21 <<https://www.fmreview.org/externalisation/morenolax>>.

help the resettled person find employment and become self-sufficient within the period of the agreement.¹⁵²

In terms of eligibility criteria, most countries select on vulnerability grounds. Germany, for instance, launched the *Neustart im Team* (NesT) initiative in May 2019, targeting vulnerable persons.¹⁵³ Poland and Slovakia target victims of religious persecution, especially with a Christian background. The content of protection statuses also varies. While in Canada persons obtain permanent settlement, in Germany sponsored individuals receive a two-year extendable permit with an immediate right to work. By contrast, Ireland accords them a specific humanitarian status, allowing beneficiaries to work, invest or establish a business. In Poland they are granted refugee status, while in Slovakia they receive asylum on national terms. In all cases, most costs are borne by the sponsor, including pre-departure travel and other arrangements, and post-arrival medical and maintenance needs for several months or years.¹⁵⁴

This constitutes a form of ‘privatisation of protection’, shifting key responsibilities from public authorities, which may also lead to excessive selectivity of candidates for reasons ultimately unrelated to international protection needs. Other obstacles concern the complexity and length of procedures, logistical and coordination difficulties between multiple actors, including regarding pre-departure arrangements, such as obstacles in obtaining travel documents or in completing security checks prior to arrival.¹⁵⁵

Private sponsorship, including ‘family-based sponsorship’,¹⁵⁶ differs slightly from community sponsorship. It enables private citizens to support individual arrivals by family members and extended kin, normally already recognised as refugees by UNHCR or the authorities of a country of first asylum.¹⁵⁷ The first programme emerged in Canada in 1979 and has resettled nearly 300,000 refugees.¹⁵⁸ Thereafter, private sponsorship has risen to account for 65 per cent of the total resettlement quota, sparking criticism for the programme’s privatisation and commodification effects.¹⁵⁹ Nonetheless, the Canadian model has inspired the 2016 UNHCR-led Global Refugee Sponsorship Initiative, which is designed to support other countries to adopt similar schemes.¹⁶⁰

¹⁵² UNHCR, Resettlement Country Chapter: Canada, 2017 (revised February 2018) <www.unhcr.org/3c5e55594.html> accessed 07 January 2022.

¹⁵³ EASO Annual Report 2018, 36 <www.easo.europa.eu/sites/default/files/easo-annual-report-2018-web.pdf> accessed 07 January 2022. See also Benjamin Etzold and Simone Christ, ‘Humanitarian Admission Programmes: How Networks Enable Mobility in Contexts of Protracted Displacement’ (2021) FMR 63.

¹⁵⁴ EMN (n 150), 7–8.

¹⁵⁵ Ibid, 8.

¹⁵⁶ Recommendation on legal pathways (n 71), Recital 31 and para 12.

¹⁵⁷ Government of Canada, ‘Groups of Five – Sponsor a Refugee’ (4 October 2018) <www.canada.ca/en/immigrationrefugees-citizenship/services/refugees/help-outside-canada/private-sponsorship-program/groups-five.html> accessed 7 January 2022.

¹⁵⁸ Asylum Insight, ‘Private Sponsorship’ (14 September 2017) <www.asyluminsight.com/private-sponsorship/#.Wqc9q10f3A> accessed 7 January 2022.

¹⁵⁹ See e.g. Canadian Council for Refugees, 2017 Immigration Levels – Comments (undated) <<http://ccrweb.ca/en/2017-immigration-levels-comments>> accessed 7 January 2022.

¹⁶⁰ UNHCR, ‘The Global Refugee Sponsorship Initiative’ <<http://refugeesponsorship.org>> accessed 7 January 2022.

The German Family Assistance Programme, for instance, facilitates family reunion with Syrian relatives affected by the conflict. Since 2013, more than 20,000 have benefitted from the scheme.¹⁶¹ The criteria require relatives (German citizens or legal residents) to sign a binding declaration assuming personal liability for all travel and accommodation expenses up to five years after arrival – excluding medical care, integration programmes and education and vocational training costs. The referral is done directly by the sponsoring kin and the beneficiary is then issued a two-year renewable permit on humanitarian grounds. However, a subsequent successful asylum application will not relieve the sponsor of their obligations. Applications are processed by German representations abroad, which has proved challenging given the high number received, translating into strained capacity and exceedingly long waiting periods.¹⁶² This is why, since June 2016, IOM ‘service centres’, opened in close proximity to German consular offices, have provided assistance to alleviate the pressure. Several centres have opened in Turkey, Iraq and Lebanon.¹⁶³ But the numbers catered for remain small and the programme geographically limited to Syria.

3.3.2 Humanitarian admission programmes

Other means of humanitarian admission have been proposed alongside resettlement and sponsorship programmes,¹⁶⁴ including humanitarian visas, which have yet to be adopted at EU level.¹⁶⁵ The latter are visas requested by an individual, without referral by another person or organisation, directly from the country of origin, and issued for travel to a country of destination for the purpose of lodging an asylum application within the general asylum system.¹⁶⁶ A variation on the theme are so-called humanitarian corridors, which exist in Italy, France and Belgium, relying on resettlement-type referrals and visa provisions in EU or domestic law to provide access to asylum procedures on arrival.¹⁶⁷ Other complementary pathways, on the basis of education or work, have also been explored.¹⁶⁸ In relation to these, the 2020 *Recommendation on legal pathways* encourages Member States to ‘facilitate ... access to the labour market [and] ... access to universities’ through ‘more flexible ... selection process[es], financial support and adapted language classes’, ‘working in partnership with [universities]

¹⁶¹ ICMC, *Private Sponsorship in Europe – Expanding Complementary Pathways for Refugee Resettlement* (Scoping Paper 2017) 27.

¹⁶² *Ibid.*, 28–9.

¹⁶³ German Federal Foreign Office, IOM’s Family Assistance Programme, 4 April 2017 <http://germany.iom.int/sites/default/files/FAP/FAP_Infosheet_ENGLISH_2017-04-04.pdf> accessed 7 January 2022. See also, IOM, ‘Family Assistance Programme Centre Opens in Erbil to Facilitate Family Reunification in Germany’ (*IOM*, 3 March 2017).

¹⁶⁴ For a recent overview, see Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe* (Hart/Nomos 2020); and Francesco Luigi Gatta, ‘Legal Avenues to Access International Protection in the European Union: Past Actions and Future Perspectives’ (2018) 3 *Journal Européen des Droits de l’Homme* 163.

¹⁶⁵ Resolution on Humanitarian Visas (n 17).

¹⁶⁶ *European Added Value Assessment accompanying the European Parliament’s legislative own-initiative report (Rapp. Lopez Aguilar) on Humanitarian Visas* (European Parliament, 2018), especially Violeta Moreno-Lax ‘Annex I: Legal Aspects’, 23–124 <[www.europarl.europa.eu/RegData/etudes/STUD/2018/621823/EPRS_STU\(2018\)621823_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621823/EPRS_STU(2018)621823_EN.pdf)> accessed 7 January 2022.

¹⁶⁷ Recommendation on legal pathways (n 71), Recital 28. See also Moreno-Lax, *A Model Instrument for an Emergency Evacuation Visa* (International Bar Association 2019), 57–60 <www.ibanet.org/MediaHandler?id=bd13bef4-6a29-414f-8d65-e2ddb7c695df> accessed 7 January 2022.

¹⁶⁸ Recommendation on legal pathways (n 71), Recital 32.

and employers' to develop additional admission routes 'for those in need of international protection'.¹⁶⁹ But no further details have been provided.

The most developed scheme, part of the EU-Turkey Statement implementation, is a dedicated Voluntary Humanitarian Admission Scheme (VHAS),¹⁷⁰ which should be activated once 'irregular crossings between Turkey and the EU end or ... substantially and sustainably reduce[]'.¹⁷¹ The scheme combines 'classic' resettlement with a humanitarian visa scheme, targeting persons hosted in a first country of asylum, rather than still in the country of origin, providing a temporary permit that allows the individual to *subsequently* lodge an asylum application on arrival. It developed under the one-for-one 'exchange' component of the EU-Turkey Statement, according to which for every Syrian national irregularly crossing into Greece and readmitted to Turkey from the EU, one Syrian refugee is to be resettled in the EU from Turkey.¹⁷²

The scheme intends to provide Syrian refugees in Turkey with 'orderly, managed, safe and dignified' access to international protection in an EU Member State and to demonstrate international solidarity.¹⁷³ But it aims to reduce irregular arrivals above all. In fact, 'the number of persons to be admitted ... is to be determined regularly taking into account ... the sustainable reduction of numbers of persons irregularly crossing ... into the European Union'.¹⁷⁴ The triggering of the scheme is, thus, strictly subordinated to Turkey's success in halting unwanted migration rather than premised on protection needs. The rationale is not to expand asylum space per se, but to stem the flow of asylum seekers coming via Turkey into the EU, which detracts from the EU's commitment 'to create a system of solidarity and burden sharing with Turkey for the protection of persons forcefully displaced by the conflict in Syria', as per the instrument's preamble.¹⁷⁵

Once activated,¹⁷⁶ the system will be deployed through a double-referral process, whereby UNHCR makes 'a recommendation ... following [a] referral by Turkey'. But it will only cover displaced persons 'registered by the Turkish authorities prior to 29 November 2015', thereby substantially reducing the pool of potential beneficiaries.¹⁷⁷ Moreover, participation in the scheme will be voluntary, with decisions taken according to a 'standardised' admission procedure with several elements, modelled on 'classic' resettlement programmes. The process will be run through a 'collaborative effort of the participating Member States, Turkey, UNHCR and EASO [now the European Asylum Agency (EAA)]', according to standardised operating procedures (SOPs),¹⁷⁸ prepared by the EAA and designed in consultation with 'the

¹⁶⁹ Ibid, paras 19–21.

¹⁷⁰ Commission Recommendation for a VHAS with Turkey, C(2015) 9490, 15 December 2015.

¹⁷¹ Recommendation on legal pathways (n 71), Recital 15.

¹⁷² EU-Turkey Statement (n 55), para 2.

¹⁷³ VHAS Recommendation (n 170), Recitals 4 and 6.

¹⁷⁴ Ibid, Recital 10 and para 3.

¹⁷⁵ Ibid, Recital 3.

¹⁷⁶ Ibid, para 6.

¹⁷⁷ Ibid, para 2.

¹⁷⁸ SOPs were agreed in May 2016. See EC Presidency, VHAS with Turkey – Endorsement, Council doc 14571/1/17 REV1, 5 December 2017, ANNEX <<https://data.consilium.europa.eu/doc/document/ST-14571-2017-REV-1/en/pdf>> accessed 7 January 2022.

Commission, participating States, the Turkish authorities, UNHCR and IOM'.¹⁷⁹ Nevertheless, all final decisions will rest solely (and without appeal) with the Member State concerned.¹⁸⁰

Candidates will be selected on a *prima facie* basis, 'as [being] in need of international protection, [and] without having a profile that could bring them under the scope of the exclusion clauses'.¹⁸¹ They must fall within at least one UNHCR resettlement submission category. The assessment will be undertaken on the basis of documentary evidence or an interview with the candidate,¹⁸² who can be excluded due to 'reasons for exclusion from international protection' under the Qualification Directive or because of indeterminate security concerns.¹⁸³ Rather than refugee status, once admitted to the country of resettlement, successful candidates will be granted subsidiary protection or an 'equivalent temporary status under national law', with a minimum duration of one year.¹⁸⁴ But, according to the SOPs, this will be 'without prejudice to the right of the admitted candidate to [subsequently] apply for and be granted international protection in the framework of an asylum procedure',¹⁸⁵ implying that beneficiaries may submit fresh asylum applications upon arrival – in seeming contradiction of the terms of the Dublin regime.

To foster operational cooperation between the authorities of participating EU countries, the Commission Recommendation suggests that 'common processing centres and/or mobile teams' be developed, 'where staff of one participating State is authorised to represent another participating State for the purpose of conducting whole or part of the selection process on behalf of that other State', including for 'the assessment of documentation and the conducting of interviews'. The idea is that this takes place 'either at the representation or in the province where the admission candidate is registered'. But the procedures to follow, the regulatory framework applicable, and any due process guarantees and effective remedies have not been specified.¹⁸⁶

While the scheme has yet to be activated,¹⁸⁷ Turkey continues to top the list of asylum countries, hosting 3.7 million (mostly Syrian) refugees.¹⁸⁸ Syrians remain the top refugee nationality, with 6.6 million internationally displaced since 2011.¹⁸⁹ This is not to diminish the importance of the 27,000 resettled in the EU,¹⁹⁰ but to put it in perspective. The number

¹⁷⁹ VHAS Recommendation (n 170), para 8.

¹⁸⁰ *Ibid*, paras 9–10.

¹⁸¹ SOPs (n 178), 4.

¹⁸² *Ibid*, 10.

¹⁸³ VHAS Recommendation (n 170), para 7.

¹⁸⁴ *Ibid*, para 11.

¹⁸⁵ SOPs (n 178), 12.

¹⁸⁶ For a thorough critique of the EU-Turkey VHAS, see Moreno-Lax, *Europe in Crisis: Facilitating Access to International Protection, (Discarding) Offshore Processing and Alternatives for the Way Forward*, (Red Cross EU Office 2016), 20ff <<https://redcross.eu/positions-publications/europe-in-crisis-facilitating-access-to-protection-discarding-offshore-processing-and-mapping-alternatives-for-the-way-forward>> accessed 7 January 2022.

¹⁸⁷ Turkish officials have repeatedly called for activation, see e.g. 'Turkey Expects EU to Increase Resettlement Quotas for Migrants' (*Daily Sabah*, 6 July 2021) <www.dailysabah.com/politics/eu-affairs/turkey-expects-eu-to-increase-resettlement-quotas-for-migrants> accessed 7 January 2022.

¹⁸⁸ UNHCR, 'Refugee Data Finder' (2021) <www.unhcr.org/refugee-statistics/> accessed 7 January 2022.

¹⁸⁹ UNHCR, *Syria Refugee Crisis Explained* (UNHCR, 2021).

¹⁹⁰ Recommendation on legal pathways (n 71), Recital 11.

represents 0.5 per cent of the total refugees hosted by Turkey. Insisting on further reduction of irregular crossings and cooperation on returns¹⁹¹ appears unjustified from both a responsibility sharing and international protection standpoint.¹⁹²

4. THE INFORMALISATION OF MEANS AND COMMITMENTS

CEAS external dimension mechanisms, specially RPPs and the collaboration ensuing from the EU-Turkey Statement, focus on containing refugee flows in regions of origin and transit, aiming to provide access to durable solutions ‘at the *earliest* possible stage’,¹⁹³ while impeding irregular migration to the EU. The objective is to enhance the protection capacity of partner countries, ‘so that everyone assumes *their* responsibilities’.¹⁹⁴ This equates geographical proximity to refugee crises with responsibility to provide international protection,¹⁹⁵ enforcing the rationale through the STC rule.¹⁹⁶ The approach reflects Member States’ reluctance to accept any binding commitments to admit refugees, whether through resettlement, relocation¹⁹⁷ or humanitarian admission.¹⁹⁸ A zealous approach to their sovereign discretion prevents legal harmonisation of meaningful implementation initiatives of the right to asylum.

This understanding disregards the positive duties attached to it, especially in its physical and procedural facets, which – as I have defended elsewhere – should be taken to entail a right to gain access to the territory of the Member States and to lodge an asylum application, for otherwise the right the EU Charter recognises is rendered pointless in law and ineffective in practice.¹⁹⁹ The Member States’ general position, however, (and that of the European Commission) has been to negate the extra-territorial reach of Article 18 CFR. They fail to acknowledge that Charter obligations track all EU activities and Member State initiatives falling within the scope of EU law, ignoring the implications of Article 51 CFR.²⁰⁰ This contradicts existing CJEU caselaw, according to which, even where EU rules defer to Member State preferences and allow them a choice of implementation avenues, such references ‘do not mean that the Member States may undermine the effectiveness of [EU law protections]’.²⁰¹ All implementing decisions, including discretionary ones, irrespective of territorial parameters,

¹⁹¹ Ibid, Recital 15.

¹⁹² Turkey cannot be considered a STC. For an elaboration, see Moreno-Lax and others, *The EU Approach on Migration in the Mediterranean*, PE 694.413 (European Parliament 2021) 126–9 <[www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU\(2021\)694413_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf)> accessed 7 January 2022.

¹⁹³ The Hague Programme (n 19), para 1.6.1 (emphasis added).

¹⁹⁴ New Pact on Migration and Asylum (n 13), 18 (emphasis added).

¹⁹⁵ Declaration on Principles Governing External Aspects of Migration Policy, Annex 5 Part A to EC Edinburgh, Presidency Conclusions, 12 December 1992, Council doc. SN 456/92.

¹⁹⁶ Arts 38 and 39 APD. Cf. Violeta Moreno-Lax, ‘The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties’, in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration and Refugee Protection in the 21st Century* (Martinus Nijhoff 2015) 665.

¹⁹⁷ Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council*, ECLI:EU:C:2017:631.

¹⁹⁸ Case C-638/16 *PPU X and X*, ECLI:EU:C:2017:173; and ECtHR, *M.N. v. Belgium*, App. 3599/18, 5 March 2020.

¹⁹⁹ Moreno-Lax, *Accessing Asylum in Europe* (n 2) 337–94.

²⁰⁰ Case C-617/10 *Fransson*, ECLI:EU:C:2013:105, para 21.

²⁰¹ Case C-571/10 *Kamberaj*, ECLI:EU:C:2012:233, para 78.

‘must comply with the rights and observe the principles provided for under the Charter’.²⁰² Member States are not permitted to jeopardise or nullify their substance through inadequate implementation,²⁰³ including via optional, unenforceable, soft-law means.

The soft-law character of measures supposedly intended to provide access to refuge degrades the protection derived not only from the right to asylum, but also from related provisions, including the prohibition of *refoulement* and the right to an effective remedy. Insofar as informal arrangements exclude the European Parliament’s input and the CJEU’s jurisdiction, they become structurally incapable of ensuring compliance with EU fundamental rights, if only because, pursuant to the principle of legality, all measures that may interfere with individual rights need to be provided for ‘by law’,²⁰⁴ which renders soft-law instruments unsuitable by definition. Soft law has additional drawbacks in terms of democratic accountability and judicial oversight, which may impinge on EU competences and the principle of institutional balance.²⁰⁵ For current purposes, the non-enforceability of commitments and individual guarantees that non-binding measures entail make them incompatible with the rights to good administration and judicial protection enshrined in the Charter, which ultimately require *legal* remedies to be made available in case of a violation of EU rights.²⁰⁶

Although non-binding measures may lead to the ‘soft harmonisation’ of institutional, procedural, and operational arrangements among Member States,²⁰⁷ their voluntary and non-compulsory nature contradicts the basic mandate of the EU legislator. One may argue that the regulation of access to international protection falls outside the scope of EU law, noting that border crossing by asylum seekers has not been (fully) regulated by the borders or the asylum *acquis*.²⁰⁸ However, the Treaty establishes that the Union ‘shall’ adopt measures, ‘in accordance with the ordinary legislative procedure’,²⁰⁹ regarding ‘the checks to which persons crossing external borders are subject’.²¹⁰ Accordingly, the means and criteria for admission of *all* and *any* persons crossing external borders, presumably including those potentially in need of international protection, have to be specified in EU law – the contrary making the Schengen project unworkable. This requirement is reinforced by the complementary call on the EU legislator to adopt measures ‘[in] partnership and cooperation with third countries for the

²⁰² Ibid, para 80.

²⁰³ E.g. Case C-502/10 *Singh*, ECLI:EU:C:2012:636, para 51; Case C-508/10 *Commission v. The Netherlands*, ECLI:EU:C:2012:243, paras 69ff. However, see *X and X* (n 198). Cf. Violeta Moreno-Lax, ‘(LTV) Asylum Visas as an Obligation Under EU Law: Case C-638/16 PPU *X, X v État belge*’, (*EU Migration Law Blog*, 16 February 2017 and 21 February 2017) Part I <<https://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/>> and Part II <<https://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/>> accessed 7 January 2022.

²⁰⁴ CFR, art 52(1).

²⁰⁵ Andrea Ott, ‘Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges’ (2020) *Yearbook of European Law* 569.

²⁰⁶ CFR, arts 41 and 47.

²⁰⁷ Luc Leboeuf, ‘Legal Pathways to Protection: Towards a Common and Comprehensive Approach?’, (*EU Migration Law Blog*, 3 December 2020) <<https://eumigrationlawblog.eu/legal-pathways-to-protection-towards-a-common-and-comprehensive-approach/>> accessed 7 January 2022.

²⁰⁸ For the full discussion see, Moreno-Lax, ‘Humanitarian Visas: Legal Aspects’ (n 166) 39–48.

²⁰⁹ TFEU, art 77(2).

²¹⁰ TFEU, art 77(2)(b).

purpose of managing the *inflows* of people applying for asylum',²¹¹ which 'shall be governed by the principle of solidarity and fair sharing of responsibility'.²¹² While the EU legislator may choose the means to comply, it is legally-bound to fulfil these obligations. It cannot select them out or undo them at will. Against this background, it is difficult to reconcile the duty to adopt binding *legal* measures ('in accordance with the ordinary legislative procedure'²¹³) for the management of refugee *inflows* (in partnership with third countries and governed by the principle of solidarity), so as to fulfil the overarching obligation to regulate the entry of (all and any) 'persons crossing external borders' (for the purposes of the Schengen cooperation), with the *voluntary* character of the relevant initiatives adopted so far on the admission of asylum seekers to the territory of the EU Member States.

Finally, although it may be inferred from the general tenor of the measures proposed or already in place, nowhere is it clearly stated that such measures 'must be a complement to – and not a substitute for – the provision of protection where needed to persons who apply for asylum in the EU or at its borders'.²¹⁴ The Commission has failed to recall its past observation that complementary pathways remain 'without prejudice to Member States' obligations to determine asylum claims in fair procedures and to provide protection in their territory in accordance with international law'.²¹⁵ The existence of resettlement or similar schemes cannot be relied upon to deny admission to spontaneous arrivals;²¹⁶ nor can it legalise a reduction of procedural guarantees for those who did not 'wait their turn' in regions of origin or transit to be orderly resettled in the EU. These mechanisms should not be used as containment tools to justify border protection and prevent access to asylum.

4. CONCLUSIONS: IN NEED OF 'PRIMARY' PATHWAYS TO ASYLUM

The instruments of the CEAS' external dimension, aligned with the objective of combatting irregular migration, have rendered the right to asylum non-exercisable through legal means. Travel to the EU as a refugee is generally impossible through safe and regular channels, leaving protection seekers virtually no option but to attempt 'spontaneous arrivals' risking their lives.²¹⁷ There are no dedicated avenues to escape persecution and request admission as a (yet-to-be-recognised) refugee specifically for the purpose of seeking asylum that individuals can initiate (themselves) to exercise their right to international protection as recognised in Article 18 CFR.

The 'complementary pathways' that exist, whether resettlement, sponsorship, or other humanitarian admission schemes, are typically small-scale and *ad hoc*. They target individuals

²¹¹ TFEU, art 78(2)(g) (emphasis added).

²¹² TFEU, Art 80 (emphasis added). See also, Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2017) 24 *Maastricht Journal of European and Comparative Law* 740.

²¹³ TFEU, arts 77(2) and 78(2).

²¹⁴ UNHCR, *Response to the Green Paper on the Common European Asylum System* (2007) 44.

²¹⁵ Improving access to durable solutions (n 62), para 25.

²¹⁶ Cf. Naoko Hashimoto, 'Refugee Resettlement as an Alternative to Asylum' (2018) 37 *Refugee Survey Quarterly* 162.

²¹⁷ IOM, *Missing Migrants Project* <<https://missingmigrants.iom.int/>>.

who have already undergone some form of selection, if not full status determination, and who find themselves in a particularly vulnerable situation or have special family or other ties to the resettling Member State. Additional conditions, beyond those for qualification for international protection, have been imposed to ensure that only those who are perceived as more valuable, deserving or better able to make a contribution to the receiving country benefit from these initiatives, generating hyper-selectivity, and even discrimination, among refugees.²¹⁸

Most significantly, ‘complementary pathways’, including those proposed by the Commission and still to be implemented, remain voluntary and good-will based.²¹⁹ There are no ‘primary’ pathways to international protection in the EU,²²⁰ which denies the right to asylum its effectiveness in law and in practice. Contrariwise, Article 18 CFR should be deemed equal in nature to the other provisions in the Charter and equal in standing to other fundamental rights recognised by EU law, which requires the right to asylum to become accessible, exercisable, and effective in the protection it provides.

Although soft-law mechanisms may have certain ‘strategic’ advantages, boosting practical harmonisation, respecting State sovereign discretion, and aligning with external policy priorities,²²¹ they involve important drawbacks. They erode the enforceability of the binding obligations to which they relate, downgrade democratic accountability and generally undermine the rule of law²²² – which are constitutional values of the Union, required to guide all internal and external action by its institutions, bodies and agencies and by its Member States when implementing EU law.²²³ These instruments should be repealed and replaced with hard-law equivalents that comply with the principle of legality. Any measure interfering (or with the potential to interfere) with fundamental rights must be provided for by laws that are published and accessible, offering safeguards against arbitrariness, and subject to the principle of proportionality.²²⁴

The essence, purpose and core content of the right to asylum must be preserved in good faith. Further research is necessary to establish the best way in which ‘primary’ pathways to protection should be regulated, how access to them is to be guaranteed, and how refugees’ agency, entitlements and aspirations, as well as inter-state solidarity and responsibility sharing are incorporated. The external dimension of the CEAS is facing a key challenge that Member States cannot escape.²²⁵

²¹⁸ This is forbidden by CSR51, art 3.

²¹⁹ This is true also at the global level, see Global Compact on Refugees, UNGA Seventy-third Session Supplement No. 12 (A/73/12 (Part II)), paras 94-96.

²²⁰ Statement of Dr. Moreno-Lax, Queen Mary University of London, to Thematic Discussion IV, 14 November 2017, Panel III, Consultations on Global Compact on Refugees, Submission on ‘primary’ pathways to admission <www.unhcr.org/5a13eaaf0.pdf> accessed 7 January 2022.

²²¹ Cf. Joanna van Selm, ‘Strategic Use of Resettlement: Enhancing Solutions for Greater Protection?’, in Adela Garnier, Liliana Lyra Jubilut and Kristin Bergota Sandvik (eds), *Refugee Resettlement* (Berghahn 2018) 31.

²²² Caterina Molinari, ‘The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns’ (2019) 44 *European Law Review* 824.

²²³ TEU, arts 2 and 21.

²²⁴ CFR, art 52(1).

²²⁵ Concurring, see Natalie Welfens and others, ‘Active Refugee Admission Policies in Europe: Exploring an Emerging Research Field’ (*Fluchtforschungs Blog*, 13 May 2019) <<https://blog.fluchtforschung.net/active-refugee-admission-policies-in-europe-exploring-an-emerging-research-field/>> accessed 7 January 2022.