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The EU's Role in Implementing
the UN Global Compact on Refugees
Contained Mobility vs. International Protection

Sergio Carrera and Roberto Cortinovis

Abstract

The Global Compact on Refugees (GCR), adopted in December 2018 by the United Nations (UN) General Assembly, expresses the political will of UN member states and relevant stakeholders to foster responsibility sharing for refugees and their host countries. Among GCR key objectives is that of expanding mobility and admission channels for people in search of international protection through resettlement and 'complementary' pathways of admission. The GCR provides a reference framework to critically assess European Union (EU) policies in relation to two main issues: first, the role and contribution of the EU and its Member States towards the implementation of the GCR in ways that are loyal to the Compact and EU Treaties guiding principles; second, and more specifically, the main gaps and contested issues of existing resettlement and complementary admission instruments for refugees and would-be refugees implemented at the EU and Member State levels.

This paper argues that EU policies in the field of asylum and migration have been driven by a 'contained mobility' approach, which has been recently operationalised in the scope of EU third country arrangements like the 2016 EU-Turkey Statement. Under this approach, restrictive and selective mobility/admission arrangements for refugees have been progressively consolidated and used in exchange of, or as incentives for, third country commitments to EU readmission and expulsions policy. The paper concludes by recommending that the EU moves from an approach focused on 'contained mobility' towards one that places refugee's rights and agency at the centre through facilitated resettlement and other complementary pathways driven by a fundamental rights and international protection rationale.

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1.   Introduction

The Global Compact on Refugees (GCR),[1] endorsed by the United Nations (UN) General Assembly in December 2018, represents the international reference framework for planning and monitoring policy responses to address refugee situations in the future. The main goal of the GCR is to provide a basis for predictable, fair and equitable responsibility-sharing for hosting and supporting the world's refugees among all UN Member States and other relevant stakeholders. Though non-legally binding, the Compact expresses the political ambition and will of UN members to stick to its guiding principles and implement its Programme of Action, advancing a set of arrangements for burden sharing and initiatives in key areas in need of support.

The GCR is international refugee protection and international human rights-driven. It confirms as its point of departure the existing international protection framework, centred on the cardinal principle of *non-refoulement*, which lies at the core of the 1951 Geneva Convention and its 1967 Protocol, as well as other international human rights instruments. While recognising the key role played by states in advancing durable solutions for refugees, the GCR also calls for the establishment of a multi-stakeholder and partnership approach, which foresees the involvement of a broad set of actors – including independent civil society organisations, local communities and refugees themselves – in the design, monitoring and implementation of its actions. [2]

The GCR underlines the need to develop and facilitate mobility and admission channels for people in search of international protection. It seeks to enlarge the scope, size and quality of resettlement[3] and to make available additional 'complementary' pathways to protection in a

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[1] See "The Global Compact on Refugees. Final Draft" (as of 26 June 2018). https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/Global-Compact-on-Refugees.pdf

[2] As stated in paragraph 3 of the UN GCR, its implementation engages the following 'relevant stakeholders': "international organizations within and outside the United Nations system, including those forming part of the International Red Cross and Red Crescent Movement; other humanitarian and development actors; international and regional financial institutions; regional organizations; local authorities; civil society, including faith-based organizations; academics and other experts; the private sector; media; host community members and refugees themselves".

[3] Resettlement is defined by UNHCR as "the transfer of refugees from an asylum country to another State that has agreed to admit them – as refugees – with permanent settlement status. The status provided ensures protection against *refoulement* and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized

more systematic, organised and sustainable way. In support of efforts undertaken by states, the UN High Commissioner for Refugees (UNHCR) has committed to devising a three-year strategy (2019-2021) to increase the number of resettlement places in the scope of the already-existing multilateral resettlement architecture,[4] involving additional countries in global resettlement efforts and improving the quality of resettlement programmes by fostering 'good practices' and new national and regional arrangements.

Besides the expansion of resettlement programmes, the GCR calls for complementary pathways of admission for persons in need of international protection to be offered on a more systematic, organised, sustainable and gender-responsive basis and to ensure they contain appropriate international protection safeguards. These are aimed at creating safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met. Specifically, the UNHCR distinguishes between refugee specific complementary pathways – which include humanitarian admission programmes, private or community sponsorship programmes and humanitarian visas – and non-refugee specific complementary pathways based on existing migration avenues, which may include family reunification, education and labour opportunities (UNHCR, 2019).

The GCR provides a unique mirror to critically assess European Union (EU) policies on matters related to asylum and refugees, in particular in the framework of third country cooperation and arrangements. Existing literature on this Compact has placed increasing focus on its implementation challenges, particularly in light of its lack of legal 'bindingness' and its open-textured nature (Goodwin-Gill, 2019; Türk, 2019). The GCR relationship with the UN Global Compact for Safe, Orderly and Regular Migration (GCM) and its expected impacts on refugee mobility has also been addressed (Costello, 2019; Carrera, Lannoo, Stefan and Vosyliūtė, 2018).

Less attention has been paid to the opportunities that the GCR offers as a monitoring and assessment framework in two main areas: first, the role of the EU and its Member States, their compliance and contribution towards the implementation of the GCR Programme of Action in ways that are loyal to the Compact and EU Treaties guiding principles; second, the operational implementation, as well as the main gaps and contested issues, of existing resettlement and complementary admission instruments for refugees and would-be refugees implemented at the EU and Member State levels.

In light of the previous, this paper examines the EU's role in the implementation of the UN GCR. Section 2 starts by critically examining what we call the EU's approach of 'contained mobility'

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citizen of the resettlement country." Refer to UNHCR Resettlement Handbook, retrievable from https://www.unhcr.org/46f7c0ee2.html The Handbook also states that "Resettlement is not a right, and there is no obligation on States to accept refugees through resettlement. Even if their case is submitted to a resettlement State by UNHCR, whether individual refugees will ultimately be resettled depends on the admission criteria of the resettlement State."

[4] The international architecture on resettlement includes Annual Tripartite Consultations and the Working Group on Resettlement. See: https://www.unhcr.org/partnership-resettlement.html

which has been operationalised in the scope of EU third country arrangements like the 2016 EU-Turkey Statement. Section 3 covers the field of resettlement and highlights recent EU contributions and initiatives. Instruments falling under the notion of 'complementary pathways' are then examined in Section 4 (humanitarian visas), and Section 5 (other complementary pathways based on legal immigration channels). The paper concludes by recommending that the EU moves from an approach focused on 'contained mobility' towards one which is 'facilitative' (Aleinikoff, 1992), i.e. placing refugee's rights and agency at the centre through facilitated resettlement and other complementary pathways driven by a fundamental rights, protection and humanitarianism rationale, and which is loyal to principles laid down in the EU founding Treaties and Member State constitutional traditions.

2.   The European Union and the GCR: Third Country Arrangements

The academic literature has brought to light the role that EU cooperation on migration and asylum matters has played in the development of policy and legal instruments focused on 'containment' of asylum seekers and refugees in countries of origin or transit. Since the 1990s, several European countries have actively engaged in the adoption of restrictive domestic policies driven by migration management priorities and focused on the prevention of entry and expulsion of asylum seekers. These have included, among others, restrictive visa policies, carrier sanctions, readmission agreements and arrangements, and the use of safe third country notions (for an analysis refer to Aleinikoff, 1992; Shacknove, 1993; Chimni, 1998).

Already in the early 90s, Aleinikoff (1992) identified a restrictive move in European asylum policy prioritising state controls over admissions and resettlement and underlined the existence of a *containment* or *source-control* bias aimed at removing the so-called 'root causes' of refugee mobility in countries of origin of refugee flows. In his view, "refugee law has become immigration law emphasising protection of borders rather than protection of persons". Along the same line, Shacknove (1993) underlined states' "immigration control mentality" translating into policies aimed at forcing asylum seekers into patterns of immigration, pre-empting their entry or containing them in countries of transit or origin.

Some of these same policies guided by non-arrival and non-admission logics[5] have, since 1999, found their way into EU legal instruments, taking the shape of a common EU visa and border (Schengen) policy, EU readmission agreements and arrangements, carrier sanctions and the inclusion of provisions of 'safe country concepts' in EU asylum legislation (Byrne, Noll and Vedsted-Hansen, 2002; Costello, 2005; Scholten, 2015; Carrera, 2016; Costello, 2016; Costello, 2017; Carrera, 2018). As a consequence of this consolidated EU and national legal and policy framework centred on containment, refugees face overwhelming legal and practical barriers in accessing protection in the EU. Savino has rightly pointed out that the resulting paradox is one

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[5] Byrne, Noll and Vedsted-Hansen (2002: p. 13) have differentiated between 'non-admission policies', understood as instruments applying restrictive criteria for asylum seekers to be admitted and have access to assessment procedure and to territory and 'non-arrival policies' aimed at keeping asylum seekers at a distance from any asylum procedure or any possible territory of protection.

where EU policies "feed the very same phenomenon of unauthorised arrivals – that the broader EU migration policy intends to curb" (Savino, 2018).

When assessing the GCR, and its nexus with the GCM, through the lens of refugee containment literature, Costello (2019) reminds us how migration control practices suppress refugee mobility and bear down particularly heavily on refugees and would-be refugees. In her view, the bifurcation of the UN GCR and the GCM into two separate processes risks solidifying a distinction between the categories of 'refugee' and 'migrant' that has important consequences for refugee mobility and rights. This approach artificially reframes many people in search of international protection as 'migrants' and may lead to an unlawful side-lining of states' international and regional human rights and refugee law commitments. While acknowledging the positive potential, inherent in the GCR design, to develop better resettlement opportunities, Costello (2019) points out the risk that the UN GCR "may serve to legitimate refugee containment, rather than open up greater mobility opportunities for refugees".

During recent decades, the EU has developed a complex and diversified matrix of policy, legal and financial instruments to involve third countries in the management of migration, borders and asylum. More recently, scholars have identified how 'in the name of the 2015 European Refugee Humanitarian Crisis', EU cooperation with third countries on asylum and migration has been re-prioritised, leading to the adoption of a number of non-legally binding political 'arrangements'. The literature has identified a shift in EU policy: from an approach emphasising formal cooperation through legal acts and international agreements, towards another calling for informal channels and political tools or non-legally binding/technical arrangements of cooperation often linked to emergency-driven EU financial tools (Carrera, den Hertog, Panizzon and Kostakopoulou, 2018; and Carrera, Santos and Strik, 2019).

A case in point has been the conclusion of the 2016 EU-Turkey Statement (Carrera, Santos and Strik, 2019),[6] which is controversially portrayed by some EU actors as a 'model' to be replicated in other EU third country arrangements. The 'deal' set up an operative framework under which asylum seekers having irregularly entered Greece via Turkey, or been intercepted in Turkish waters, would be returned to the latter. At the same time, it included the so-called 'one-for-one' (1:1) resettlement arrangement, according to which, for every Syrian returned from Greece to Turkey, another Syrian would be resettled from Turkey to the EU. The Statement was based on the political framing of Turkey as a 'safe third country', despite the fact that the country is not bound by the 1967 Protocol to the United Nations Geneva Convention on Refugees (thus it refuses to recognise full refugee status for non-European asylum seekers), and the wealth of evidence about the human rights violations and rule of law challenges in the country (Amnesty International, 2017; Council of Europe, 2017).

The EU-Turkey statement is an exemplary case illustrating how the containment bias often comes with specific forms of mobility and admission for refugees. The Statement in fact

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[6] Council of European Union (2016), EU-Turkey statement, 18 March 2016, Press Release 144/16, 18 March (https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf).

provides both containment and mobility elements in its priorities and design, and may be seen as a living instance of an EU 'contained mobility' approach. Such an approach combines aspects on containment – e.g. safe third country rules, border surveillance and interception at sea – with others on mobility, yet a kind of mobility that presents highly selective and restrictive features, e.g. 1:1 only covering Syrian nationals.

The Statement is a political declaration coming in the guise of a press release. The academic literature has expressed concerns about the strategic political 'non-use' of EU Treaty instruments that escape democratic scrutiny by the European Parliament and judicial control by the Court of Justice of the EU in Luxembourg, and the non-compatibility of this approach with the EU Treaty principles of inter-institutional balance and sincere and loyal cooperation (Carrera, den Hertog and Stefan, 2019; Carrera, den Hertog and Stefan, 2017).

There has also been substantial disagreement as regards the actual authorship of the EU-Turkey Statement, and the extent to which any EU institution was involved in its adoption. Surprisingly for many, the Luxembourg Court confirmed that it was a product of the Heads of Government and State of EU Member States, and not of any EU actor (including the European Commission). Irrespective of who the actual author was, EU institutions and agencies such as Frontex and EASO have been central in its operational implementation and financial support through the so-called 'EU Facility for Refugees in Turkey' (Carrera, 2019).

This has been acknowledged by the European Ombudsman, which in a Joint Inquiry issued on January 2017, reminded the Commission about its obligation to ensure robust human rights impact assessments of the Statement (European Ombudsman, 2017). The implementation of the EU-Turkey Statement has raised fundamental questions regarding the independence of civil society actors and non-governmental organisations in the Greek islands and the Hotspots. Many civil society actors decided to stop providing services and assistance to asylum seekers and leave the country due to the human rights challenges that the operationalisation of the Statement posed to their ethos, independence and humanitarian assistance principles (Carrera, Mitsilegas, Allsopp and Vosyliute, 2018). On the occasion of the third anniversary of the Statement in March 2019, a group of twenty-five civil society organisations sent an open letter to European leaders, reiterating their concerns about the 'unfair and unnecessary containment policy' implemented via the deal, which is still forcing around 12,000 refugees and asylum seekers to live in degrading conditions in hotspots on the Greek Islands.[7]

The human rights violations inherent in its practical implementation in Turkey and Greece have been well documented (Carrera, den Hertog and Stefan, 2019; Médecins Sans Frontières, 2019). The selective mobility logic included in the one-for-one resettlement scheme – which only covers certain Syrians – is contrary to established principles of international refugee law, which lie at the basis of the UN GCR. In particular, the scheme violates the prohibition of non-

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[7] See NGOs calling on European leaders to urgently take action to end the humanitarian and human rights crisis at Europe's borders. https://oxfam.app.box.com/v/3yearsEUTurkeyDeal

discrimination based on country of origin as laid down in Art. 3 of the 1951 Geneva Convention (Carrera and Guild, 2016).

Finally, the effectiveness of the 'deal' has been largely questioned. The limited number of Syrian refugees that have been returned to Turkey in the framework of the Statement (337 from April 2016 to December 2018), as well as the total number of returns (only reaching about 2,000 over the same period) is a clear demonstration of the legal obstacles that arise when wrongly applying the safe third country concept (UNHCR, 2018a). Moreover, the EU-Turkey Statement has not prevented mobility from happening. According to statistics provided by 2019 Frontex Risk Analysis, in 2018 there were about 56,000 irregular border crossing from Turkey to Greece, in comparison to 42,000 entries in 2017 (Frontex, 2019). In light of the above, the EU-Turkey Statement provides a 'non-model' of third country cooperation and sharing of responsibility as it stands at odds with the human rights and refugee protection principles at the basis of the UN GCR and the EU Treaties.

3. Resettlement

Resettlement has represented the main channel for providing recognised refugees in first countries of asylum access to EU Member State territory. It involves the selection and transfer of refugees from a state in which they have sought protection to a third state which has agreed to admit them – as refugees – with permanent residence status. Identified as a 'durable solution' by the UNHCR, resettlement targets specifically vulnerable refugees that cannot enjoy an adequate level of protection in their country of first asylum (e.g. victims of torture, women and girls at risk, people in need of medical treatment not available in the country of residence) (European Resettlement Network, 2019).

The number of resettlement beneficiaries remains by and large in hands of relevant country governments. According to UNHCR data, after a growth in global resettlement quotas over the period 2012-2016, resettlement opportunities saw a steep reversal in 2017; in fact, the 20-year record high of 163,200 submissions in 2016 was more than halved in 2017, when only 75,200 refugees were submitted for resettlement. This negative trend should be read against the background of a global context characterised by unprecedented displacement and approximately 1.4 million refugees estimated to be in need of resettlement in 2019 (UNHCR, 2018b).

Traditionally, resettlement activities have been carried by a group of Member States outside the EU framework through the implementation of national resettlement programmes or ad hoc initiatives targeted to specific populations of refugees. Since 2000, the European Commission considered the potential establishment of a common EU approach on access to the territory for people in need of protection, including the option of "processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme" (European Commission, 2000). This was followed up with a Study exploring the feasibility of implementing so-called 'Protected Entry Procedures' (PEPs) in EU Member State diplomatic representations, which would allow asylum seekers to submit an

asylum claim and be granted with an entry permit by a potential destination country outside its territory (Noll, Fagerlund and Liebaut, 2002).[8] While the Commission followed up the reflection on some of these initiatives (European Commission, 2003), the discussion on the development of a common EU approach on legal and safe avenues was stalled when it reached EU Member States in the Council, which opposed 'more EU' in these areas.

Instead, the focus was then shifted to coordinating Member State resettlement efforts. The first EU joint action on resettlement date back to November 2008, when the EU Justice and Home Affairs (JHA) Council agreed to resettle 10,000 refugees from Iraq (ERN 2019). Following that experience, cooperation at the EU level was formalised in 2012 with the launch of the Joint EU resettlement Programme, which established a framework of voluntary participation of Member States in resettlement activities. Specifically, the Joint EU Resettlement Programme introduced a mechanism for setting common annual priorities on resettlement linked with the provision of financial incentives to those Member States accepting to take part in the programme. The Commission motivated the establishment of the programme by the need to strengthen the EU global role in the field of resettlement, underlying that EU Member States accounted at the time less than 7% of refugees resettled worldwide (European Commission, 2009).

In spite of EU attempts to coordinate its resettlement efforts, expectations for a substantial increase in resettlement pledges by Member States in the following years were largely unmet (van Ballegooij and Navarra, 2018). However, since 2016, with the unfolding of the so-called European humanitarian refugee crisis and in line with global efforts promoted by the UNHCR, EU Member States initiated a number of ad hoc initiatives in this field.

In June 2015, the Commission adopted a proposal on a European Resettlement Scheme, which was followed by an agreement among the Member States in July the same year to resettle 22,504 persons in clear need of international protection over the following two years. As mentioned in the previous section, a resettlement component (the 'one-to-one' mechanism) was also included in the framework of the 2016 EU-Turkey Statement. The Statement specified that resettlement under this mechanism should take place, first, by filling the places still unallocated under the July 2015 Resettlement scheme and, afterwards, through a similar voluntary arrangement up to a limit of an additional 54,000 persons.[9] In its Progress report on

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[8] The Study presented five main proposals for future EU policies, in particular: a flexible use of the visa regime that includes a protection dimension; the introduction of a sponsorship model which involve civil society actors in the area of selection funding and integration of beneficiaries of PEPs: the establishment of EU Regional Task Force supporting third countries' authorities in processing of asylum claims and identifying people to be granted access in the EU; gradual legislative harmonisation through an EU Directive laying down best practices; and, finally, full harmonisation through and EU regulation on a so-called 'Schengen Asylum Visa". Refer to Section 7.2.2 of the Study.

[9] To meet resettlement needs under the EU-Turkey deal, in September 2016 it was decided to amend the Decision on intra-EU Relocation to the benefit of Italy and Greece adopted in September 2015 to make it possible for Member States to fulfil their obligations in relation to 54,000 places under that Decision by resettling Syrians from Turkey instead than relocating asylum applicants from Italy and Greece. See Council Decision 2016/1754 of 29

resettlement of 6 September 2017, the Commission stated that the total number of people resettled under both the 20 July 2015 scheme and the EU-Turkey deal since their launch was 22,518.[10]

However, the Report also pointed to obstacles in implementation, underlining that nine Member States had not yet resettled under the 20 July 2015 scheme and thirteen Member States had not resettled under the EU-Turkey Statement (European Commission, 2017). In September 2017, recognising growing resettlement needs at the global level and the need for additional efforts by the EU, the Commission adopted a recommendation on enhancing legal pathways for persons in need of international protection, including the target to resettle 50,000 persons in the following two years. According to the Commission, at the end of 2018, 15,900 out of the 50,000 places agreed had been filled (European Commission, 2018a).

Civil society and international organisations such as the UNHCR have consistently advocated for expanding resettlement places in Europe. Stakeholders active in the field of refugee protection have underlined the importance that the EU start coordinating its pledges in the area of resettlement in view of the first Global Refugee Forum to be held in December 2019, going beyond the 50,000 places already pledged in September 2017 (ECRE 2019). Civil society has also stressed the importance of going beyond traditional state-led resettlement programmes and exploring alternative instruments, such as community and private sponsorship programmes. In the context of resettlement, private and community sponsorship programmes involve a transfer of responsibility from government agencies to private actors for some elements of the identification, pre-departure, reception, or integration process of resettled refugees.

While recognising the value-added that a strengthened public-private partnership approach may bring to the implementation of resettlement programmes, sponsorship schemes should be based on the principle of additionality, meaning the beneficiaries must be admitted in addition to those who enter through government-supported programmes. From the point of view of procedures, there is a need to better ensure the integrity, certainty and non-discriminatory nature of selection procedures and vulnerability determination of applicants (ERN, 2017; ECRE & PICUM, 2019).

September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2016] OJ L268/82.

[10] Refer to https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_eu-turkey_en.pdf. As result of the controversy on exact numbers with temporary relocation emergency decisions, 20,000 out of the 160,000 original target for relocation were later on moved to resettlement (See Carrera, 2019). See Council of the European (2015), 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, 11130/15, ASIM 62, RELEX 633, Brussels, 22 July (https://data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf).

In order to move towards a more structured and harmonised approach to resettlement, in July 2016 the Commission tabled a proposal for a Regulation on an EU Resettlement Framework,[11] which aims at reducing current divergences among national resettlement practices by fostering a "collective EU approach to resettlement". The EU Resettlement Framework is considered by the Commission as an important step in increasing the level of coordination of resettlement efforts and, potentially, of increasing the numbers resettled in Europe (Commission 2016). The Commission's proposal provides a common definition of the notion of resettlement,[12] the factors to be considered for including non-EU countries from where resettlement would occur and a set of common eligibility criteria and grounds for exclusion of applicants. It would establish common procedures and annual Union resettlement plans with targeted resettlement schemes through Commission 'implementing acts'.[13]

The proposal on a Union Resettlement Framework has raised several points of controversy of direct relevance when assessing it in light of the UN GCR. This includes a close linkage and inter-dependency between restrictive mobility and admission possibilities through resettlement and border and migration management. Article 4 of the proposal on "Regions or third countries from which resettlement is to occur" includes as a relevant factor for determining third countries to be prioritized for resettlement their 'effective cooperation with the Union in the area of migration and asylum'. Such cooperation would be determined by the EU in light of the efforts undertaken by third countries in reducing the number of irregular migrants to the EU and increasing readmission rates of third country nationals found in an irregular situation in EU Member States, including their willingness to conclude readmission agreements. Third countries to be prioritised for resettlement purposes are also requested to create the conditions for the use of the first country of asylum and safe third country concepts as grounds for accepting expedited and accelerated expulsions of asylum seekers from the EU, an approach that follows the one laid down by the Commission in its accompanying proposal to recast the EU Asylum procedures Directive (Cortinovis, 2018).

The introduction of a logic of 'contained mobility' in the EU Resettlement Framework has been one of the key stumbling blocks during trilogue talks between the EU co-legislators during the last two years. Specifically, recalling the position of several stakeholders, the European Parliament stressed in its Report that "Determining geographical priorities based on third countries cooperation in the area of migration and leveraging resettlement to reach foreign policy objectives would therefore de facto jeopardise a humanitarian, needs-based and international protection approach". Member States, on the other hand, have been consistent in underlining the importance of resettlement as a "strategic instrument to manage migration

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[11] European Commission (2016), Proposal for a regulation establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, Brussels, 13.7.2016 COM(2016) 468 final 2016/0225 (COD).

[12] Art. 2 of the Proposal defines resettlement as "the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection".

[13] See Arts. 7 and 8, as well as 10 and 11 on procedures.

by helping to reduce the incentives for irregular migration" (Council of the European Union, 2018).

Several civil society actors having played an active role in the implementation of current resettlement programmes issued a Joint Comments Paper on 14 November 2016 that raises important concerns about the proposed Union Resettlement Framework.[14] They underlined that "the proposed Framework is overly reactive and focuses unduly on migration control objectives, to the potential detriment of resettlement's function as a lifesaving tool and a durable solution", which lay at the heart of the UN GCR guiding principles. The kind of cooperation envisaged in the Commission proposal has been seen as posing major risks that refugees will be expelled to their country of origin in direct contravention of the *non-refoulement* principle (Savino, 2018).

UNHCR comments on the Framework raised additional concerns about the provision in the proposal to include family members as a separate category of eligible persons under the Framework (UNHCR, 2016). According to the UNHCR, the Framework would in this way contribute to blurring the distinction between resettlement as a tool for protection (focusing on vulnerability criteria) and family reunification, which should be kept independent of resettlement targets and quotas. The UNHCR also recommended that the Union framework should avoid duplications with already existing structures and take place under "the existing international resettlement architecture". Importantly, it also pointed out that it "understands States' concerns and desire to deploy various tools to effectively manage migration. Yet, resettlement is, by design, *a tool to provide protection and a durable solution* to refugees rather than a migration management tool" (emphasis added).

4. Humanitarian visas

The UN GCR calls for increasing the availability and predictability of complementary pathways which could include "humanitarian visas, humanitarian corridors and other humanitarian admission programmes". There is not a commonly held and agreed international and EU definition for each of these three categories. The notion of 'humanitarian admission' is usually understood an 'umbrella concept' encompassing several sub-programmes, amongst which are referral mechanisms designed to provide expedited and time-efficient asylum processing and providing temporary protection to refugees (ICMC Europe, 2015). It can capture several protection tools such as Humanitarian Admission Programmes (HAPs), amongst which there are humanitarian visas and corridors, and others such as family reunification programmes (See Section 5 of this paper below). Existing research on HAPs shows high disparities and a wide-

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[14] See the Joint Comments Paper by: Caritas Europa, Churches' Commission for Migrants in Europe (CCME), European Council for Refugees and Exiles (ECRE), International Catholic Migration Commission (ICMC Europe), International Rescue Committee (IRC), Red Cross EU office (2016), on European Commission proposal for a Regulation establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council COM(2016) 468, 13 July 2016, Brussels, 14 November 2016 (https://www.ecre.org/wp-content/uploads/2016/11/NGO-joint-comments-resettlement-141116.pdf).

range of fragmented national-specific instruments and programmes across the EU (ERN+, 2018).

In the aftermath of the European humanitarian refugee crisis, the issuing of humanitarian visas to people in need of protection has been proposed by a wealth of civil society actors and scholars, fostering a debate about the added value for the adoption of a common set of EU rules in this area. A key difference between humanitarian visas and resettlement is that while the latter is addressed to those that have been already been accorded refugee status by the UNHCR, humanitarian visas would provide a means of access to asylum seekers in urgent need of protection whose actual Refugee Status Determination (RSD) is yet to be established. A study conducted in 2014 to take stock of Member State experiences in issuing humanitarian visas came to the conclusion that a total of 16 Member States were at the time running (or had run in the past) some form of scheme for issuing humanitarian visas, while recognising the lack of comprehensive and comparative qualitative and statistical knowledge on existing practices (Iben Jensen, 2014).

Besides programmes carried out by Member States based on national law, there is at present no EU legal framework for humanitarian visas. While the EU Visa Code allows derogations from the procedural and substantive criteria required for obtaining a visa based on "humanitarian grounds", it does not expressly include a clear and consistent procedure for issuing Schengen visas for the purpose of reaching the territory of a Member State in order to seek international protection. This was confirmed by the Court of Justice of the EU (CJEU) in the case between Syrian asylum-seekers v. the Belgian state (*X and X v. Belgium*),[15] where it concluded that humanitarian visas were a matter of national law and policy. Scholars have however argued that the Luxembourg Court ruling completely disregards the extraterritorial application of the EU Charter of Fundamental Rights and its Articles 4 (Prohibition of torture and inhuman or degrading treatment or punishment) and 18 (right to asylum), and provides a too narrow and restrictive interpretation of Article 25.1 of the EU Visa Code, in particular the obligation to issue a short-term visa with limited territorial validity (Brouwer, 2017a; Brouwer, 2017b).

Currently, the main 'refugee producing countries' at the global level are included in the so-called EU visa "black list", which implies that citizens of those countries must be in possession of a visa to cross the border and enter the Schengen area legally.[16] This in turn implies that applicants from those countries should fulfil relevant criteria for obtaining a visa specified by the EU Visa Code, including evidence of an intention to return to their country of origin, which is obviously an unreasonable and disproportionate condition to apply in the case of refugees

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[15] CJEU, 7 March 2017, C-638/16 *PPU, X. and X. v. Belgium*.

[16] See Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification), OJ L 303/39, 28.11.2018. For statistical data on main countries of origin of refugees see UNHCR Statistical yearbooks, available at: https://www.unhcr.org/statistical-yearbooks.html

and other beneficiaries of subsidiary or complementary forms of international protection (Moreno-Lax, 2018; Brouwer, 2017a).

The reform of the EU Visa Code, initiated in 2014 by the European Commission, represented an opportunity for introducing a common EU approach on humanitarian visas. However, during trilogue negotiations that started in May 2016, the Council opposed the inclusion of provisions related to humanitarian visas put forward by the European Parliament. In light of diverging views in the Council, the Commission and the European Parliament, which mainly related to the Council and Commission's opposition to include humanitarian visas in the EU Visa Code, the Commission withdrew its former proposal[17] and published a new one in March 2018.[18]

Following the refusal by Member States to consider provisions on humanitarian visas in the context of the reform of the EU Visa Code, the LIBE Committee decided to draft a Legislative Own-Initiative Report on Humanitarian Visas, requesting that the Commission submit a legislative proposal for a separate legal instrument in the form of a Regulation by 31 March 2019. The Report, formally adopted by the EP plenary in November 2018, recommends the introduction of a new legislative instrument, a visa with limited territorial validity, which could be requested at any consulate or embassy of an EU Member State and that would allow asylum seekers to enter the territory of the Member State issuing the visa for the sole purpose of making an application for international protection.

The Commission, however, dismissed the EP request to present a legislative proposal on an EU humanitarian visa, arguing that it would not be 'politically feasible' to create a subjective right for a person in need of international protection to enter the EU to seek asylum, and the corresponding obligation for the Member States to admit such a person (European Commission, 2019). According to the Commission, this stems from the fact that the CEAS is 'territorially bound', which means it only covers applications for international protection made in the territory of the Member States and not requests for diplomatic asylum lodged at Member State representations in third countries. This conclusion, however, is problematic in line of extraterritorial protection-related obligations under the Charter of Fundamental Rights of the European Union (CFR). As argued by legal scholars, the CFR (including obligations of non-refoulement) applies whenever member states act within the scope of EU law (Art. 51 CFR), with territoriality non being a decisive criterion (Moreno Lax, 2018).

Furthermore, the Commission recalls the process of negotiation of the Union Resettlement Framework, on which co-legislators reached a political compromise in June 2018 and which now requires "full attention" from EU institutions. In a way that blurs the distinction between

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[17] European Commission (2018c), Commission Work Programme 2018 An agenda for a more united, stronger and more democratic Europe, Strasbourg, 24.10.2017 COM(2017) 650 final (https://ec.europa.eu/info/sites/info/files/cwp_2018_en.pdf).

[18] European Commission (2018d), Proposal for a Regulation amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), Brussels, 14.3.2018 COM(2018) 252 final 2018/0061 (COD) (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/201780314_proposal-regulation-establishing-community-code-visas_en.pdf).

the specific rationales and different categories of targeted beneficiaries of these two instruments, the Commission concludes that, once adopted, the Union Resettlement Framework would have the potential to achieve the same objective pursued by the EP initiative on humanitarian visas, namely increasing the number of persons in need of international protection admitted into the EU.

The stance taken by the Commission in reply to the EP request runs counter to the position expressed on this subject by a wide number of stakeholders, including civil society and academia, that took part in the consultation process accompanying the EP initiative on humanitarian visas. As stated in an open letter addressed to the EP by 160 academics ahead of the Plenary vote on the Resolution on Humanitarian visas, which took place on 11 December 2018, the adoption of a clear set of rules in this area would be instrumental in introducing a mechanism of safe and legal access to international protection in Member States, in line with *a fundamental rights-based and protection-driven understanding* of the CEAS (Moreno-Lax et al., 2018). Related to the previous, a clear and effective procedure for granting access to the territory of EU Member States for people in clear need of protection would also represent a concrete and relevant delivery on the commitment to expand legal pathways to protection included in the Global Compact on Refugees (ECRE, 2019).

The European Parliament proposal was also informed by a Study (European Added Value Assessment accompanying the European Parliament's legislative own initiative report) on Humanitarian Visas (van Ballegooij & Navarra, 2018). The Study emphasised that "EU legislation does not provide clear and complete standards on admission to the EU for asylum seeking purposes and that there is no common understanding of the applicable practical arrangements". The Study called for the need to ensure safe and legal pathways for people searching international protection in the EU and concluded that "one may reasonably expect a significant portion of migrants travelling to the EU to seek asylum through irregular means to apply for an EU humanitarian visa, thus reducing irregular migration flows to the EU". It also provided evidence on the negative fundamental rights effects as well as the impacts of the current lack of a formalised humanitarian visa system at EU level on individuals, Member States and the Union as a whole.

The same EP study underlined that existing 'Protected Entry Procedures' (PEPs) adopted by EU Member States tend not to be open-ended, but quota-based, geographically bounded and limited in time, with highly complex selection criteria and not always protection-driven (Moreno-Lax, 2018). Existing admission schemes are also criticised for their lack of publicity, transparency and predictability and for non-alignment with legal certainty and rule of law standards. A key challenge relates to exact ways in which the integrity of the selection procedures of potential beneficiaries takes place in practice. The risks of corruption, extortion and clientelism when managing humanitarian visas schemes has been recently illustrated in the case of Belgium, with a local representative of the Flemish nationalist party N-VA suspended from his functions on account of allegations of selling humanitarian visas to refugees. According to revelations by investigative journalists, the local mayor allegedly charged the refugees a fee

in order to be placed on a list of names eligible for the visa that he later sent to the then-immigration minister Theo Francken (Euronews, 2019).

5.   Complementary pathways based on legal immigration channels

Besides resettlement and other humanitarian entry channels, the UN GCR calls for additional complementary pathways to protection, by making flexible use of existing immigration policy tools, such as family reunification, study and mobility channels. Facilitating visas for the family members of beneficiaries of international protection that are already present in a Member State would be a straightforward way to use current immigration tools to assist safe access to the EU. To achieve that objective, the term 'family member' could be interpreted more widely (Collett et al., 2016).

The literature has understood that facilitating family reunification instruments and arrangement for refugees has been considered an essential pre-requisite for ensuring an effective delivery of the human right to family life stipulated in Article 8 of the European Convention of Human Rights, and Article 7 of the EU Charter of Fundamental Rights (Costello, Groenendijk and Halleskov, 2017). The European Court of Human Rights (ECtHR) in Strasbourg has held[19] that in the case of refugees and others who are non-removable or expellable, there are *ipso facto* insurmountable obstacles for establishing family life in their country of origin. Establishing new entry channels for extended family members, however, may prove difficult considering the range of obstacles and restrictions that beneficiaries of international protection are currently facing to reunite even with core family members in several EU Member States (Conte, 2018).

Additional pathways to protection could also be created through enhanced opportunities for refugees to arrive safely in the framework of study or education programmes. This objective could be pursued first by ensuring that existing academic scholarship and apprenticeship programmes take into consideration the specific challenges faced by refugees in accessing those programmes, including lack of documentation and academic certificates. Partnership between public institutions, industry and educational institutions at the EU, national and local levels could also be established to design study programmes specifically targeted to refugees (UNHCR, 2015). In the aftermath of the Syrian crisis, promising practices have been introduced by some EU Member States, as well as the European Commission, such as the creation of partnerships with higher education institutions to offer ad hoc opportunities for refugees to come to Europe for their studies. While the numbers of refugees that have benefitted from these opportunities have generally been low, there is a need to carry out an independent evaluation of these programmes and potentially expand them in a way that is both sustainable and protection-sensitive (European resettlement network, 2017).

The same flexible and protection-based approach could also be explored to allow refugees access to existing labour mobility opportunities. This would require removing the legal,

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[19] *Mengeshar Kimfe v. Switzerland*, Judgement 9 July 2010, Application No. 24404/05.

administrative, and informational barriers that often prevent refugees from accessing existing labour opportunities. As a further step, entry programmes specifically targeted at refugees could also be introduced, in consultation and partnership with the social partners, including interested employers and recruitment agencies of destination countries and in full compatibility with international labour standards laid down in International Labour Organisation (ILO) instruments (UNHCR/ILO, 2012; Norwegian refugee Council et al., 2018: UNHCR, 2019).

Stakeholders have underlined a set of considerations and protection safeguards to be considered when designing pathways for refugees based on migration avenues. First, in order to provide added value compared to current responses, pathways in the above-mentioned areas should always be *additional* – not a substitute – to established humanitarian entry channels and procedures. They should in no way be used as a way of curtailing already established rights and protection. In the case of family reunification, the creation of ad hoc programmes to facilitate reunion with extended family members should by no means be considered as an option for restricting the right to reunite with family members and facilitate family unity. A *protection-sensitive approach* should be adopted when exploring possible access by refugees to existing legal entry channels for study and work. As those often provide for the right to stay in the destination country only for a limited period of time, special arrangements may be required to ensure that the rights of refugees and their protection needs are safeguarded. Beneficiaries must in all cases be protected against *non-refoulement* and be able to apply, without prejudice, for asylum at any time (Norwegian Refugee Council et al., 2018).

Furthermore, the admission of people in need of international protection, including those entering through migration-related channels, should be accompanied by comprehensive post-arrival integration policies. An individualised and tailored (follow-up) approach has proved particularly crucial for ensuring effective and durable labour market insertion by immigrants and refugees (Carrera and Vankova, 2019). Restrictive mandatory civic and language integration programmes, and restrictive family reunion policies, have undermined human rights and inclusion of asylum seekers, refugees and beneficiaries of subsidiary protection (Carrera and Vankova, 2019). Instead, voluntary introduction and labour insertion measures focused on skills provision and practical information on rights and entitlements at work can play a key role in successful socio-economic inclusion. Well-designed integration policies offering language courses, skills/qualifications-recognition and personalised professional training may facilitate refugee inclusion into their labour market and reduce the risks of exploitation, irregular work, and low wages and unfair working conditions. Adequate and long-term financial state support is central here (Carrera and Vankova, 2019).

6. Conclusions

The UN GCR provides a basis for predictable and equitable responsibility-sharing among all UN members and other international actors on refugee protection, thus addressing a major gap in the international protection regime since its creation in the 1950s. Its adoption raises the crucial question as regards the exact role and contributions by the EU, and its Member States,

in its faithful implementation in line with its guiding principles and in full compliance with human rights and refugee law standards and EU Treaty principles. The GCR arrives in an EU policy context where the focus is mainly on shifting responsibilities on refugees towards third countries of transit and/or origin, which sometimes include admission or mobility opportunities and instruments that are highly selective, discriminatory and migration-management driven. Current EU legal instruments, policy/political (non-legally binding) arrangements and emergency-driven funds give an overwhelming priority to *non-admission* of refugees and would-be refugees.

EU instruments and arrangements with third countries rely on expulsions (including so-called 'voluntary repatriation'), *non-arrival* measures and addressing 'the root causes of migration and refugee' movements in countries and regions of origin. These policies exemplify a *contained mobility logic*. Restrictive and selective mobility/admission arrangements for refugees have been progressively consolidated and used in exchange of, or as incentives for, third country commitments to EU readmission and expulsions policy, with little consideration of their concrete negative impacts on human rights and international and regional refugee commitments, or their role in increasing 'incapacity' in third countries to uphold the rule of law, human rights and refugee protection standards.

This has come along with a reframing of individuals in search of protection from 'refugees' (thus legitimate beneficiaries of international protection) to 'migrants', which rests on the wrong assumption that they cannot rely on legal entitlements to seek asylum in the EU, and that Member States have no obligation to deliver refugee and human rights to them. It is in this respect that the relationship between the UN GCR and the GCM calls for close and detailed scrutiny during their implementation phases, including the effects of involving international organisations with no human rights and refugee protection firmly anchored in their mandates and statuses (Guild, Grant and Groenendijk, 2017). This is even more necessary in light of the existence of 'complementary' and/or 'legal' pathways for admission to refugees such as humanitarian admission programmes across EU countries – relying by and large on scattered, fragmented and obscure selection procedures, which do not clearly meet solid integrity, non-discriminatory selection and transparency standards, and involving a diversity of implementing actors.

The EU and its Member States could play a key role in ensuring that the UN GCR will make a difference in contrast to the current state of play in responsibility-sharing arrangements. A *coordinated EU position* in GCR implementation would be a most welcome way forward. EU Member States should refrain from undermining the effective implementation of the UN GCR, otherwise they would be infringing their obligation of sincere and loyal cooperation as established in Article 4.3 TEU. Such a coordinated EU position should give firm priority to human rights and refugee protection over an approach focused on containment bias (Guild and Grant, 2017).

In line with the guiding principles included in the GCR, calls have been made to EU and national policymakers to increase the scope of legal avenues for protection in Europe, through

resettlement and other complementary pathways that are driven by a *fundamental rights, protection and humanitarianism approach*, and as an expression of solidarity towards those countries mostly affected by the refugee situation as well as towards asylum seekers and refugees themselves. As called for by the European Parliament, a set of common EU rules laying down a formal procedure for lodging and processing of applications for humanitarian visas would be instrumental in ensuring that Member States comply with their protection obligations by issuing a visa on humanitarian grounds when this is necessary to prevent violations of the fundamental rights of the individuals concerned.

Attention is increasingly paid by a number of stakeholders to how to create additional non-humanitarian pathways to protection in the EU. Enabling entry for family members is a straightforward way of offering greater protection and guaranteeing the integration of refugees and beneficiaries of subsidiary forms of protection by upholding the right to family life. Current family reunification criteria could be made less burdensome and expanded. The possibility should be considered to facilitate entry of refugees through already existing or specifically designed education and labour migration channels. While the potential of complementary pathways to expand protection in the EU should be fully explored, those channels should be seen as additional to those already established by Member States, and ensure that beneficiaries are protected against *refoulement* and can access the asylum process in their country of residence.

The impact of contained mobility policies discussed in this paper should be considered in a context where EU external funding (in particular development funds) is increasingly mobilised in pursuit of similar non-admission and non-arrival objectives. Channelling EU development funds into the framework of 'extra treaty' arrangements with third countries that are driven by such an approach is not in line with UN Sustainable Development Goals (SDGs) or UN GCR principles and is not conducive to durable protection-driven solutions for refugees and other forced migrants. Development cooperation should not be 'Euro-centric' and instead aim mainly to meet the needs of developing countries. The ongoing negotiations on the next MFF 2021-2027 should centre on increasing the transparency and accountability of EU funding instruments, limiting emergency-driven funding tools and ensuring full consistency between EU external migration and refugee policy and the humanitarian and development principles enshrined in EU Treaties and UN human rights and refugee law commitments.

The following years will show whether the implementation of the UN GCR will be able to facilitate the establishment of a global responsibility sharing framework driven by international refugee protection and human rights considerations, where not only state actors, but also a wider set of stakeholders, including civil society and refugee organisations as well as refugees themselves are mobilised in assessing and delivering 'solutions' to the emerging refugee protection challenges at the global level. A substantial improvement is needed in the current policy responses adopted by the EU and its Member States to provide an effective contribution to the achievement of the common goals laid down in the GCR.

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