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Refugees, Europe, Camps/State of Exception: "Into The Zone", the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-seekers (Theories and Practice)

REFUGEES, EUROPE, CAMPS/STATE OF EXCEPTION: "INTO THE ZONE", THE EUROPEAN UNION AND EXTRATERRITORIAL PROCESSING OF MIGRANTS, REFUGEES, AND ASYLUM-SEEKERS (THEORIES AND PRACTICE)

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This article outlines the debate over extraterritorial processing in the European Union (EU) from the Treaty of Amsterdam (1997) to the Treaty of Lisbon (2009). It will briefly outline the historical precedents, the evolution of policy within the EU, and the role of other models (Australian, American, etc.). This article emphasizes the contested understandings of how these zones might be manifested in practice. It uses evidence from the political history and policy-making of the EU to question Giorgio Agamben's concept of the state of exception. In fact, the promotion of extraterritorial zones was not merely sold as necessary, if unfortunate, choices. Likewise, the more sinister interpretation of these zones as a regression from the Liberal State to the universe of camps failed accurately to capture what was happening in reality. Firstly, supranational extraterritorial processing was beyond the constitutional or political capacity of the EU. Secondly, at times, the unintended consequences might have led to a liberalization of so-called "Fortress Europe" and caused certain politicians to become disenchanted precisely because the proposed form of extraterritorial processing threatened to institute a rigorous form of burden sharing.

1. Introduction

In previous papers and publications, I have examined the extent to which a liberal democratic asylum and refugee regime, based on adherence to the 1951 Convention Relating to the Status of Refugees (Refugee Convention), has been undermined in the European Union (EU).[1] In an article published in 2005,

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[1] C. Levy, "European refugee and asylum policy after the Treaty of Amsterdam: The birth of a new regime?", in A. Bloch and C. Levy (eds.), *Refugees, Citizenship and Social Policy in Europe*, Basingstoke, Macmillan, 1999, 12–50; C. Levy, "The Geneva Convention and the European Union: A fraught relationship", in J. van Selm, K. Kamamga, J. Morrison, A. Nadig, S. Spoljar Virinza, and L. van Willigen (eds.), *The Refugee Convention at 50: A View from Migration Studies*, Lanham, MD, Lexington Books, 2003, 129–44; C. Levy, "The European Union after 9/11: The demise of a liberal democratic asylum regime?", *Government and Opposition*, 40(1), 2005, 26–59.

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I argued that the after-shocks of 9/11 and the effects of the rise of Far Right parties were still uncertain.[2] In 2010, European politicians at the senior level were still defending the 1951 Refugee Convention in the EU. It served and still serves as a benchmark of their democratic liberalism.[3]

This article covers the period from the Tampere Inter-Governmental Conference (IGC) of 1999 to the Stockholm IGC of 2009 and examines the discussions and debates on creating extraterritorial processing camps for migrants, refugees, and asylum-seekers. The debate over extraterritorial processing has witnessed the same struggle between restrictive policy or avoidance strategies, and the legal and moral imperatives to carry out the obligations of the 1951 Refugee Convention that I observed in my earlier work. In the past decade, however, this has been filtered through three policy paradigms: the security–migration nexus, the migration–development nexus, and the asylum–migration nexus.

The security–migration nexus is associated with the debates over the extent to which 9/11 had a direct effect on the EU asylum and refugee regime. A direct effect is now largely discounted by much scholarship, although the debate is still raging about what type of security discourse and policy affects migration policy in the EU.[4] On the other hand, by 2010, the migration–development[5] and asylum–migration nexuses have become predominant in the rhetoric and policy of the EU and its Member States.

The issue of extraterritorial processing/zones raises four themes. Space constraint precludes full discussion in this article. However, I signal them and

[2] One of the best recent treatments of the Far Right in Europe is C. Mudde's *Populist Radical Right Parties in Europe*, Cambridge, Cambridge University Press, 2007.

[3] N. Steiner, *Arguing about Asylum. The Complexity of Refugee Debates in Europe,* Basingstoke, Palgrave Macmillan, 2002; L. Schuster, *The Use and Abuse of Political Asylum in Britain and Germany,* London, Frank Cass, 2003; M. Gibney, *The Ethics and Politics of Asylum: Liberal Responses to Refugees,* Cambridge, Cambridge University Press, 2005; C. Boswell, *The Ethics of Refugee Policy,* Aldershot, Ashgate, 2005; C. Boswell, "Theorizing migration policy: Is there a third way?", *International Migration Review,* 41(1), 2007, 75–100.

[4] F. Bicchi and M. Martin, "Talking tough or talking together? European security discourses towards the Mediterranean", *Mediterranean Politics*, 11(2), 2006, 189–207; M. Collyer, "Migrants, migration and the security paradigm: Constraints and opportunities", *Mediterranean Politics*, 11(2), 2006, 255–70; C. Boswell, "Migration control in Europe after 9/11: Explaining the absence of securitization", *Journal of Common Market Studies*, 45(3), 2007, 589–610; R. Dower, "Towards a common EU immigration policy: A securitarization too far?", *European Integration*, 30(1), 2008, 113–30; R. Bermejo, "Migration and security in the EU: Back to Fortress Europe?", *Journal of Contemporary European* Research, 5(2), 2009, 207–24; C. Kaunert, "Liberty versus security? EU asylum policy and the European Commission", *Journal of Contemporary European Research*, 5(2), 2009, 148–70.

[5] The migration–development nexus emphasizes the economically beneficial relationship between the EU and the Global South of circular migration, diaspora networks, remittances, and skill development of returnees to the Global South ("brain gain"). Refugees and asylum-seekers can be placed within this rubric sociologically through the concept of mixed flows, but the legal autonomy of the 1951 Refugee Convention can be compromised as a result. See, D. Styan, "Security of Africans beyond borders: Migration, remittances and London's transnational entrepreneurs", *International Affairs,* 83(6), 2007, 1171–91; S. Lavenex and R. Kunz, "The migration-development nexus in EU external relations", *European Integration*, 30(3), 2008, 439–57; M.-H. Chou, "The Migration-Development Nexus, the European Union and circular migration", Paper presented at the ISA-ABRI Joint International Meeting Diversity and Inequality in World Politics, Rio de Janeiro, 22–24 Jul. 2009.

subsequently address some related aspects. Firstly, there is the historical record: the mapping of longer trends stretching back to the 1980s or, as Virginie Guiraudon argues, to the late nineteenth century.[6] Thus, one could track a tradition from Ellis Island to anomalous airport zones or even designated hotel rooms in the 1990s and 2000s. Or, from the 1990s to the present, this thread could be traced from the so-called safe areas in the Yugoslav Wars of Succession in the 1990s[7] and the farming out of security to the private sector and away from borders (airline check of visas, etc.). In short, such a process would reveal the evolution of a new regime of neo-*refoulement*.[8] Here, the interest of geographers has been aroused and, thus, the roles of offshore sites of detention, deportation, screening, and admission have become an object of comparative study.[9]

Secondly, there is the evolution of a specific policy on extraterritorialization, which can be traced from the Austrian Presidency paper of 1998, the camps outside Kosovo during 1999, and the Tampere IGC later that year to the Thessaloniki IGC (2003), onwards to the effects of the Lisbon Treaty (2009) and the Stockholm IGC (2009). Although there was a sharpening of tone from the liberal spirit of Tampere to the more security-conscious Hague programme,[10] EU supranational stewardship appeared to be stymied or at least sidelined after 2004–05.[11] From 2005 to 2010, the advancement of extraterritorial zones became bi- or multilateral projects of various constellations of Member States and partners in the European Neighbourhood or amongst South Saharan African countries.[12] The EU held the ring through a process of supranational

[6] V. Guiraudon, "Before the EU border: Remote control of the 'Huddled Masses'", in K. Groendijk, E. Guild, and P. Minderhoud (eds.), *In Search of Europe's Borders*, London, Kluwer Law International, 2002, 191–214.

[7] J. Hyndman, "Preventive, palliative or punitive? Safe spaces in Bosnia-Herzegovina, Somalia and Sri Lanka", *Journal of Refugee Studies*, 16(2), 2003, 167–85.

[8] Neo-*refoulement* means the package of *non-entrée* policies (safe third countries, pre-screening, the farming out of border controls to the private sector, extra-territorialization, etc.) that prevents spontaneous and mass flows from reaching borders of countries to claim asylum. See J. Hyndman and A. Mountz, "Another brick in the wall? Neo-*Refoulement* and the externalization of asylum by Australia and Europe", *Government and Opposition*, 43(2), 2008, 249–69. For the privatization of migration control, see G. Menz, "Outsourcing migration control: The rise of private actors in the enforcement and design of migration policy", paper presented at the European Consortium for Political Research, 5th General Conference, Potsdam, 10–12 Sept. 2009.

[9] A. Mountz, "Islands as an enforcement archipelago: Off-Shore migration processing, graduated sovereignty and borders", paper presented at the meeting of the International Studies Association, 50th Annual Convention, New York, 15 Feb. 2009.

[10] T. Balzacq and S. Carrera, "The Hague Programme: The long road to freedom, security and justice", in T. Balzacq and S. Carrera (eds.), *Security versus Freedom? A Challenge for Europe's Future*, Aldershot, Ashgate, 2006, 3–32.

[11] M. Garlick, "The EU discussion on extraterritorial processing: Solution or conundrum?", *International Journal of Refugee Law*, 18(3), 2006, 629.

[12] M.-T. Gil-Bazo, "The practice of Mediterranean states in the context of the European Union's Justice and Home Affairs external dimension. The Safe Third Country concept revisited", *International Journal of Refugee Law,* 18(3–4), 2006, 571–604; A. Betts, "Towards a Mediterranean Solution? Implications for the region of origin", *International Journal of Refugee Law*, 18(3–4), 2006, 652–76; S. Wolff, "Border management in the Mediterranean: Internal, external and ethical challenges", *Cambridge Review of International Affairs*, 21(2), 2008, 253–71; S. Buckel and J. Wissel, "State Project Europe: The transformation of the European border regime and the production of bare life", *International Political Sociology*, 4(1), 2010, 22–49.

intergovernmentalism,[13] namely the use of agencies such as Frontex[14] and the more recent European Asylum Support Organization (EASO),[15] the open method of coordination, and other variations on soft law.[16] This approach was used rather than a formalized communitarian method, which was politically and legally more difficult to accomplish, especially since there was and still is no compulsory system of burden sharing amongst Member States. Further, it was not clear to what extent Member States were responsible under various European and international legal instruments for the well-being of deterred asylum-seekers or detained migrants outside the formal borders of the EU.

Thirdly, there is the complex story of policy transfer, policy imitation, and policy construction to Europe, of the United States' Caribbean policy of interdiction on the high seas and Australia's Pacific Plan to Europe, the subject of several in-depth comparative analyses in the past decade.[17] Of especial interest is

[13] Supranational intergovernmentalism is the structured communitarian behaviour, which Member States have assimilated in their policy-making as in the case of Frontex that relies entirely on the sovereign assets (border guards, coast guards or navies) of Member States to carry out the policy. See, S. Puntscher Riekmann, "Security, freedom and accountability: Europol and Frontex", in E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot, Ashgate, 2008, 19–34.

[14] S. Leonard, "The creation of FRONTEX and the politics of institutionalization in the EU external borders policy", *Journal of Contemporary European Research*, 5(3), 2009, 371–88; A. Neal, "Securitization and risk as the EU border: The origins of FRONTEX", *Journal of Common Market Studies*, 47(2), 2009, 333–56; J. Pollak and P. Slominski, "Experimentalist but not accountable governance? The role of Frontex in managing the EU's external borders", *West European Politics*, 32(5), 2009, 904–24.

[15] I. Boccardi, "EU practical co-operation on asylum and the European Asylum Support Agency", IASFM, 12, University of Nicosia, Cyprus, 29 Jun. 2009.

[16] For an overview of the concept of the soft law concept of the open method of coordination, see A. Caviedes, *Prying Open Fortress Europe: The Turn to Sectoral Labor Migration*, Lanham, MD., Lexington Books, 2010. For an overview of soft law see, A. Betts, "Towards a soft law framework for the protection of vulnerable irregular migrants", IASFM, University of Nicosia, 28 Jun. to 2 Jul. 2009.

[17] For an overview of the literature, addressed in this paragraph, see G. Noll, J. Fagerlund and F. Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure,* The Danish Centre for Human Rights, Copenhagen, 2002; G. Noll, "Visions of the exceptional: legal and theoretical issues raised by Transit Processing Centres and Protection Zones", *European Journal of Migration and Law,* 5(3), 2003, 301–41; A. Betts, "The international relations of the 'new' extraterritorial approaches to refugee protection: Explaining the policy initiatives of the UK government and the UNHCR", *Refuge*, 12(1), 2004, 58–70; S. Lavenex, "EU governance in 'wider Europe', *Journal of European Public Policy,* 11(4), 2004, 668–700; Levy, "The European Union after 9/11", *op. cit.* 46–50; K. F. Afeef, "The politics of extraterritorial processing: Offshore asylum policies in Europe and the Pacific", RSC Working Paper, No. 36, Oxford, Refugee Studies Centre, Oct. 2006; S. Debenedetti, "Externalization of European asylum and migration polices", 2nd Session of the Florence School on Euro-Meditarranean Migration and Development, 15–30 Jun. 2006, European University Institute, Robert Schuman Centre of Advanced Studies; 2006; P. Green, "State crime beyond borders: Europe and the outsourcing of irregular migration control", in S. Pickering and L. Weber (eds.), *Borders, Mobility and Technologies of Control,* Dordrecht, Springer, 2006, 149–66; S. Kneebone, C. McDowel, and G. Morrell, "Mediterranean Solution? Chances of success", *International Review of Refugee Law,* 18(3–4), 2006, 492–508; S. Kneebone, "The Pacific Plan: The provision of 'effective protection'?", *International Journal of Refugee Law,* 18(3–4), 2006, 696–721; S. Lavenex, "Shifting up and out: The foreign policy of the European immigration control", *West European Politics,* 29(2), 2006, 329–50; S. Kneebone and S. Pickering, "Australia, Indonesia and the Pacific Plan", in S. Kneebone and F. Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers,* New York, Berghahn, 2007, 167–88; T. Gammeltoft-Hansen, "The extraterritorialization of asylum and the advent of 'protection lite'", Dansk Institut for Internationale Studiier Working Paper no. 2007/2, Copenhagen, 2007; A. Francis, "Bringing protection home: Healing the schism between international obligations and national safeguards created by extraterritorial processing", *International Review of Refugee Law,* 20(2), 2008, 273–313; A. Geddes, "Migration as foreign policy? The external dimension of EU action on migration and asylum", Stockholm, Swedish Institute for European Policy Studies, 2009, 2.

the identification of individuals and bureaucracies, which transferred models of extraterritorialization and interdiction into the EU at the very point when the public liberal face of Europe deplored them. At various times, different Member States (Austria, Denmark, the United Kingdom (UK), the Netherlands, Germany, and Italy) acted as policy entrepreneurs in formal and informal discussions surrounding the European Council meetings from 1998 to 2005.

In order to understand this, studies of policy transfer or mimesis are linked to the growing literature on the formation of migration regimes and the epistemic and normative communities which manage them.[18] The use of the methods advanced in this literature demonstrates that attempts to sell a full-fledged policy of extraterritorialization were not unilateral and certainly not very successful. Indeed, its partisans amongst the Member States, the European Commission and even the United Nations High Commission for Refugees (UNHCR) were schizophrenic, with different players and indeed key individuals (Otto Schily, for example) revealing a good deal of mental and moral confusion. On the other hand, from the late 1990s to at least 2003, the UK and Denmark were consistent supporters of extraterritorial processing. From Jack Straw to David Blunkett, the UK brought the argument back to the table even when other players would have preferred to sideline it.[19]

Meanwhile, the very idea of disavowing the 1951 Refugee Convention was advanced by the Austrians in 1998 and later by the British. Both attempts were unsuccessful. When we look back from the vantage point of 2010, the 1951 Convention is now enshrined in EU law and in EU legal space through the Lisbon Treaty.[20] This raises issues about the limits of neo-*refoulement* in the face of the realities of global migration on the one hand (the asylum–migration nexus or mixed flows[21]), and the self-constructed normative image of the EU, the embedded liberalism of European political culture, on the other.[22] Thus, a fourth part of this article links up to a much broader discussion of the concepts

[18] C. Thorez and F. Channac, "Shaping international migration policy: The role of regional consultative processes", *West European Politics*, 29(2), 2006, 370–87; A. Niemann, "Dynamic and countervailing pressures of visa, asylum and immigration policy treaty revision: Explaining change and stagnation from the Amsterdam IGC to the IGC if 2003-04", *Journal of Common Market Studies*, 46(3), 2008, 559–91; A. Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime,* Ithaca, Cornell University Press, 2009; A. Balch, *Managing Labour Migration in Europe: Ideas, Knowledge and Policy*, Manchester, Manchester University Press, 2010.

[19] Levy, "The European Union after 9/11", *op. cit.* 46–50.

[20] By the time negotiations were underway for the failed Constitutional Treaty and the successful Treaty of Lisbon, the British had already given up pressing this point and no other Member State objected to enshrining the 1951 Geneva Convention within Community Law. See S. Lavenex, "Towards the constitutionalization of aliens' rights in the European Union?", *Journal of European Public Policy*, 13(8), 2006, 1292–3.

[21] For mixed flows in the context of three overlapping travel, economic and refugee regimes, see A. Betts, "The refugee regime complex", in this issue.

[22] There is a vast literature on the normative "soft power" of the EU. See J. Checkel, "Norms, institutions and national identity in contemporary Europe", *International Studies Quarterly*, 43, 83–114; I. Manners, "Normative power Europe: A contradiction in terms?", *Journal of Common Market Studies*, 40(2), 2002, 235–58: I. Manners, "The normative ethics of the European Union", *International Affairs*, 84(1), 2008, 46–60.

of the state of exception and the camp, and the state of the refugee being physical embodiment of them.[23]

In this article, I argue that extraterritorial zones were not merely promoted as necessary states of exception. Moreover, the more sinister interpretation of these putative EU zones as the regression of the Liberal State to a universe of camps, which scared mid-twentieth-century Europe, failed to capture what was happening in reality. Extraterritorial zones within the proximity of the EU were linked to equitable burden sharing under the supervision of the UNHCR and, thus, were rejected by some politicians; as they feared it could lead to a liberalization of "Fortress Europe" policies that had essentially outlawed spontaneous arrival of refugees at the boundaries of Member States by the early twenty-first century.

In the remainder of this article, I focus on three aspects of the themes just enumerated. Firstly, a review of the state of play is necessary. It is generally assumed that extraterritorialization has the potential to be illiberal, indeed to be the fulfilment of a policy of neo-*refoulement*. To what extent, after the Hague Programme, the dawn of the Stockholm Programme,[24] and the ratification of the Treaty of Lisbon, is the EU's refugee and asylum policy more or less liberal, or more or less driven by the needs of security? More practically, a supranational form of extraterritorialization would require greater communitarization of policy: what precisely is the nature of the EU refugee and asylum regime in 2010, 13 years after the Treaty of Amsterdam, which launched the drive for a Common European Asylum System (CEAS)? Does the EU have the wherewithal to pursue a policy of supranational extraterritorialization, even if it wanted to do so? Secondly, the fate of extraterritorialization must be linked to the other methods of dealing with a flow of migrants into the EU, demonstrating that pragmatic, legal, and ethical pressures have shaped the present regime in a complex fashion. Although it has worrying legal and ethical implications, the present regime nevertheless is not as straightforward or as stark as the followers of Giorgio Agamben interpret them. Finally, in my conclusion, I will return to the Stockholm IGC and the Lisbon Treaty. A major, still largely symbolic effort by the EU, to promote resettlement programmes outside and inside Europe is

[23] The concept of the state of exception and the work of Giorgio Agambem has been questioned since Gregor Noll's pioneering article was published in 2003 (Noll, "Visions of the exceptional", *op. cit.*). See Agamben's *State of Exception*, Chicago, University of Chicago, 2004. This approach was reinforced by the simultaneous rediscovery of the work of Hannah Arendt on the fate of the refugee in the mid-twentieth century and the use of the theoretical legacy of Michel Foucault to explain the increasing restrictive management of migratory flows. There are significant differences between Agamben, Arendt, and Foucault. The Refugee Studies Centre in Oxford also devoted an entire seminar series, entitled, "Camp Life: Exception, Emergence and Spaces of Forced Migration" (2007), to these new approaches. The seminar included the following papers: B. Nielsen, "Policing the borders of politics: Camps in the global context", N. Sigona, "The comfort of exceptionality: Roma coping strategies in nomad camps in Italy", J. Edkins, "Missing, displaced, disappeared: Persons in a state of emergency", M. Duffield, "Development and emergency: Containing the migratory effects of underdevelopment", B. Diken, "From refugee camps to gated communities: A culture of exception", and R. Andrijasevic, "From exception to excess: Re-reading detention and deportation in today's Europe".

[24] The Stockholm Programme replaced the Hague Programme, which aimed to create a fully functioning CEAS, in 2010 and will continue through 2014.

now likely and is joined by a new form of camp, the Emergency Transit Centre (the first of which opened in Romania in 2008), which highlights a new way forward. Conceivably, the road to more equitable burden sharing and the rise of an offshore-quota refugee regime within Europe may be on the horizon. In my conclusion, I return to the conundrum of embedded liberalism, which characterizes European policy and has been the main theme and driver of all my work in this area.

2. Situating the historical context and a counterfactual history

The possibility of a policy of refugee resettlement through and within the EU poses a useful counterfactual historical question. Are the recent developments in Romania and in the Stockholm Programme anticipated by the Kosovo crisis of 1999? By the late 1990s and the early 2000s, extraterritorial zones and regional protection plans were being framed as pragmatic and liberal developments even in an era when immigration, the War on Terror, and citizenship and assimilation were the "hot button" issues of European politics.[25] This may be a naïve and an untenable interpretation of what policy-makers and politicians were doing in actuality. Even if one were to be sceptical about motives, however, it would still be important from a constructivist[26] viewpoint in order to explain how they sold these policies to escape the twinges of their own consciences, thereby preserving an image of a Europe which was differentiated from Bush's America and represented a Europe of liberal norms, of soft power, and of embedded liberalism. Yet, I believe such a conclusion may be overly cynical. Although geo-political realism and rational choice theory have been invoked by several academics to explain the weakness of intra- and inter-European burden sharing, ideas and norms indeed matter.[27] A major violation of legal obligation remains unthinkable, or violations are carried out in the shadows because the collective self-construction of liberalism relies heavily on the public endorsement of the 1951 Refugee Convention by politicians and parliaments.

[25] For overviews of migration and European societies since 1945, see C.-U. Schierup, P. Hansen, and S. Castles, *Migration, Citizenship and the European Welfare State. A European Dilemma,* Oxford, Oxford University Press, 2006; C. A. Parsons and T. M. Smeeding, *Immigration and the Transformation of Europe*, Cambridge, Cambridge University Press, 2006; A. Messina, *The Logics and Politics of Post-War Migration to Western Europe*, Cambridge, Cambridge University Press, 2007.

[26] Constructivism is a social scientific methodology inspired by the post-modern turn in the humanities and the social sciences, which emphasizes the need to take seriously the worldviews and narratives constructed by policy-makers. Constructivism is suspicious of the objectivity of technocratic policy-making or what is found in the official archive, and imports the tools of post-modern literary criticism, psychoanalysis, and cultural history to understand how one policy wins acceptance in a given epistemic policy-making community. See A. Betts, *Protection by Persuasion*, *op. cit*. See also A. Betts, *Forced Migration and Global Politics*, Chichester, Wiley-Blackwell, 2009, 18–43.

[27] E. R. Thielemann and T. Dewan, "The myth of free-riding: Refugee protection and implicit burden-sharing", *West European Politics*, 29(2), 2006, 351–69; A. Betts, "What does 'efficiency' mean in the context of the global refugee regime?", *British Journal of Politics and International Relations*, 8(2), 2006, 148–73. See the critiques of R. C. Smith, "Outsourcing refugee protection responsibilities: The second life of an inconscionable idea", *Journal of Transnational Law & Policy*, 14(1), 2004, 137–53.

Thus, the Kosovo experience of 1999, in the context of proposals for extra-territorial zones and European camps within the borders of the EU itself, could be a model of equitable burden sharing between the Member States of the EU, with the potential to strengthen the 1951 Refugee Convention. It is my contention that the shocks of the mass movements of Kosovar refugees in the spring of 1999, in the context of the previous shameful events at Srebrenica four years earlier, posed a potential turning point in the history of asylum and refugee policy in Europe, when history did not turn.[28] In the history of regime creation, the 1951 Refugee Convention itself was a product of liberal revulsion and guilt in the aftermath of the Second World War. It also arose in order to reinforce stability in the post-war settlement, which was threatened by the unresolved issue of refugees and displaced persons. Afterwards, the arrival of Cold War Europe froze a certain way of interpreting the 1951 Refugee Convention until the 1980s and 1990s when refugee streams shifted to the Global South and the former Yugoslavia.[29] Similarly, a new regime in Europe might have been established after 1999 if the Serbians had not withdrawn immediately. Admittedly, at the height of the crisis, much to the anger of the German government, the French and British were at first reluctant to accept their share of refugees. In the end, however, they prepared themselves to take tens of thousands of Kosovars, whose presence in Macedonia and elsewhere threatened the overall stability of the Balkans, in the eventuality of a long-term crisis.[30] Indeed, public opinion flip-flopped: in the UK, for example, after mounting a hostile campaign against the Kosovars in the spring of 1999, the press and their readers seemed to champion their protection.[31]

The aim of this counterfactual history is to show that, far from supporting Giorgio Agamben's nightmarish vision, camps founded on a policy of resettlement may have initiated a system of effective burden sharing in certain contexts. It is not unreasonable to argue that a new European refugee agency, charged with supervising burden sharing on a regular basis rather than merely during times of mass flight, might have been the result. The Kosovo crisis, in the broader context of the Wars of the Yugoslav Succession in the 1990s, would have been the shock to transform the regime in Europe rapidly to full-fledged supranationalism, in

[28] For a general discussion of the Kosovo crisis, see J. Van Selm-Thornburn (ed.), *Kosovo's Refugees in the European Union*, London, Continuum, 2000.

[29] C. M. Skran, *The International Refugee Regime and the Refugee Problem in Interwar Europe,* Oxford, Oxford University Press, 1995; G. Loescher, *The UNHCR and World Politics. A Perilous Path,* Oxford, Oxford University Press, 2001; B. Cronin, *Institutions of the Common Good: International Protection Regimes in International Society,* Cambridge, Cambridge University Press, 2003; M. Mazower, "The strange triumph of human rights 1933-1950", *Historical Journal,* 47(2), 2004, 379–98; E. Haddad, *The Refugee in International Society,* Cambridge, Cambridge University Press, 2008; G. Loescher, A. Betts, and J. Milner, *UNHCR: The Politics and Practice of Refugee Protection into the 21st Century,* London, Routledge, 2008; M. Mazower, *No Enchanted Palace. The End of Empire and the Ideological Origins of the United Nations,* Princeton, Princeton University Press, 2009.

[30] A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford, Oxford University Press, 2009, 155–6.

[31] P. Marfleet, *Refugees in a Global Era*, Basingstoke, Palgrave Macmillan, 2006, 161.

the same way that the post-war era gave birth to the 1951 Refugee Convention. The Kosovar refugee crisis passed too quickly and did not create the grounds for rapid liberalization. On the other hand, neither the War on Terror nor the uncertainties of globalization undermined the Geneva regime. Instead of an age of exception, as Didier Bigo argues, the current era is one of unease and insecurity in which targeted technocratic surveillance allows much of Europe's population to be exempted from exceptional measures, the rule of law to not be suspended but finessed, and migratory flows to be managed, albeit at times illegally, but not to be staunched.[32]

Furthermore, in light of the events in the former Yugoslavia, one should not be so quick to stereotype camps as sites of what Agamben terms "bare life" and of unaccountability, whose denizens are invisible and barely human: a *Gulag* of refugee warehouses, as one critic in a review of UNHCR camps puts it.[33] The thick social good of protection and security[34] cannot readily be dismissed; Agamben's "aesthetics of pure disaster"[35] provided refugees with a path to authenticity, not safety.[36] But Srebrenica was a failure because it did not live up to its name as a "safe haven", because the refugees' Dutch protectors abdicated their mission and left 8,000 Bosnian men and boys to their fate.[37] Thus, the Yugoslav Wars of Succession can be read through a consequentialist ethics, an ethics which is pragmatic,[38] rather than Agamben's unworkable absolutist ethics and therefore camps can save lives and are not the epitome of "bare life", as the Italian philosopher argues.

Agamben and his more enthusiastic followers lack any proportionality, when they distastefully lump together varieties of refugee camps, Auschwitz,

[32] D. Bigo, "Security and immigration: Toward a critique of the governmentality of unease", *Alternatives*, 27, 2002, 63–92; D. Bigo, "Security, exception, and surveillance", in D. Lyon (ed.), *Theorizing Surveillance: The Panopticon and Beyond*, London, Willan Publishing, 2006, 46–68; D. Bigo, "Detention of foreigners, states of exception, and the social practices of control of the banopoticon", in P. K. Rajaram and C. Grundy-Warr (eds.), *Borderscapes. Hidden Geographies and Politics at Territory's Edge*, Minneapolis, University of Minnesota Press, 2007, 3–33; D. Bigo, "Globalized (in) Security. The field and the ban-opticon", in D. Bigo and A. Tsoukala (eds.), *Terror, Insecurity and Liberty. Iliberal Practices of Liberal Regimes after 9/11*, London, Routledge, 2008, 10–45. See also related approaches by J. Huysmans, *The Politics of Insecurity. Fear, Migration and Asylum in the EU*, London, Routledge, 2006; V. Squire, *The Exclusionary Politics of Asylum*, Basingstoke, Palgrave Macmillan, 2009; R. Vans Munster, *Securitizing Immigration. The Politics of Risk in the EU*, Basingstoke, Palgrave Macmillan, 2009.

[33] J. Stevens, "Prisons of the stateless. The derelictions of UNHCR", *New Left Review*, 42, 2006, 53–67.

[34] I. Loader and N. Walker, *Civilizing Security*, Cambridge, Cambridge University Press, 2007, 31, 91–3, 140, 258–64.

[35] See the piercing critique of Agamben by P. Mesnard, "The political philosophy of Giorgio Agamben: A critical evaluation", *Totalitarian Movements and Political Religions*, 5(1), 2004, 139 (139–57).

[36] J. Huysmans, "The jargon of exception-on Schmitt, Agamben and the absence of political society", *International Political Sociology*, 2(2), 2008, 177–8.

[37] C. Dubernet, *The International Containment of Displaced Persons: Humanitarian Spaces without Exit*, Aldershot, Ashgate, 2001.

[38] J. Snyder, "Realism, refugees, and strategies of humanitarianism", in A. Betts and G. Loescher (eds.), *Refugees in International Politics*, Oxford, Oxford University Press, forthcoming, 2011.

and even gated communities.[39] Refugees are not cannon fodder for radical metaphysical arguments,[40] and should not be equated to (a historically inaccurate) mass of passive, half-dead inmates of Auschwitz's work camps. Far more inmates there and in the pure death camps of Operation Reinhard died within hours of arrival; hale and healthy individuals were reduced to ash within hours, as the camps were established to exterminate, not to house, populations of displaced people.[41] Thus, as Elspeth Guild argues, "refugees are neither victims nor *Homo Sacer*; they are struggling for their rights".[42]

By treating refugees or forced migrants as passive, hapless victims, academics and policy-makers would be misled and would misinterpret the active role played by both. In any case, the failure of a Fortress Europe policy and the embracing of managed migration is precise evidence of the realization by the EU of this stubborn reality.[43] But, not only does Agamben orientalize or exoticize the refugee, he also overly dramatizes the camp and, by doing so, is of little use in understanding the varieties of camps present (including the semi-formal camp in Sangatte, long-term regional camps, processing camps for offshore/resettled refugees, extraterritorial camps, etc.), which cannot be understood in the same context.[44] A recent study divided refugees into situational refugees fleeing from violence, persecuted refugees, and State-in-exile refugees. Their camps can be mapped onto a spectrum of forms of governance from those run democratically, through the despotism of warrior refugees, or through the benign imperialism of nongovernmental organizations (NGOs) and international NGOs.[45] As we shall see, these varieties of camps and their governance are relevant to the present discussion, especially when one addresses the question of the legal status and the position of the inmates within the varieties of extraterritorial camps.[46]

In summary, the shock of Kosovo might have shifted Europeans to an EU-wide, burden-sharing regime, as the bedrock for a supranational form of extraterritorial processing. Nevertheless, this external shock may not have been enough. Lessons from the Regional Protection Programmes (RPP) in the

[39] B. Diken and C. Bagge, *The Culture of Exception: Sociology Facing the Camp*, London, Routledge, 2005.

[40] P. Owens, "Beyond 'bare life': Refugees and the 'right to have rights', in Betts and Loescher, *Refugees, op. cit.*

[41] M. Mazower, "Foucault, Agamben: Theory and the Nazis", *Boundary 2*, 35(1), 2008, 23–34.

[42] E. Guild, *Security and Migration in the 21st Century*, Cambridge, Polity Press, 2010, 25.

[43] P. Nyers, "Taking rights, Mediating wrongs: Disagreement over the political agency of non-status refugees", in J. Huysmans, A. Dobson, and R. Prokhonik (eds.), *The Politics of Protection. Sites of Insecurity and Political Agency*, London, Routledge, 2006, 48–67; R. Puggioni, "Resisting sovereign power: camps in-between exception and dissent", in *ibid.*, 71, 76–77; P. Nyers, *Rethinking Refugees beyond States of Emergency*, London, Routledge, 2006; V. Pupavic, "Refugee advocacy, traumatic representations and political disenchantment", *Government and Opposition*, 43(2), 2008, 270–92. R. Andrijasevic, "From exception to excess: Detention and deportations across the Mediterranean space", in N. de Genova and N. Peutz (eds.), *The Deportation Regime: Sovereignty, Space and the Freedom of Movement*, Chapel Hill, Duke University Press, 2010.

[44] Debenedetti, "Externalization", *op. cit.* 5–6.

[45] S. K. Lischer, *Dangerous Sanctuaries: Refugee Camps. Civil War, amd the Dilemma of Humanitarian Aid,* Ithaca, Cornell University Press, 2005; Nyer, *Rethinking, op. cit.*

[46] R. Wilde, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away,* Oxford, Oxford University Press, 2008, 61–2, 378–459.

Global South are not very reassuring, as they failed in the 2000s when African partners came to the conclusion that they were mere burden-shifting exercises. The ill-fated UNHCR Convention Plus exercise of 2003–05 lacked the winning combination of elements, which had seen the success of previous efforts in Central America and Indochina.[47] The RPPs lacked solid issue cross-linkages between Africans and Europeans, an effective UNHCR facilitator, and the presence of a powerful sovereign hegemonic power or even a condominium of nations with shared interests (as the CEAS was still a work in progress).[48] As Alexander Betts puts it, the conditions for a suasion game were not present.[49] With the decline of solidarist African socialism and political liberalization, local populations were paradoxically "free to hate". Under pressure from increasingly xenophobic citizens, the governments of Tanzania and Kenya refused to play their parts in this European game of remote-control migration. Africans had learned the fine arts of restrictionism by observing the behaviour of their European partners.[50] Thus, the concept of burden sharing within the EU was honoured sporadically, under the pressure of extreme events such as Kosovo, but burden shifting (from Germany to her partners in the 1990s) was the driver for the growing restrictive policies within Europe itself which, in turn, was manifested as another bout of burden-shifting when it was applied to the policies of RPPs in the Global South.[51]

However, extraterritorialization was also checkmated because it threatened the existential basis of politics in Europe. A comparison further afield is useful. Leaving aside the legality of the Pacific or Caribbean Solutions, the Australians and the Americans always argued that extraterritorial processing camps were acceptable precisely because, as self-described countries of immigration, such policies could be linked to their regimes of accepting offshore refugees, which fitted naturally into their migration policy and their national narratives, while Europe wanted an immigrant labour force without an immigrant society. Thus, in 2004, for example, the United States (US), Canada, Australia, and New Zealand accepted 100,000 offshore/resettled/sponsored refugees, Europe accepted a mere 4,000 and, 5 years later, Europe accepted just under

[47] A. Betts and J.-F. Durieux, "Convention Plus as a norm-setting exercise", *Journal of Refugee Studies*, 20(3), 2007, 509–35; M. Zieck, "Doomed to fail from the outset? UNHCR's Convention Plus initiative revisited", *International Review of Refugee Law*, 21(3), 2009, 367–420.

[48] See also G. Loescher and J. Milner, "The missing link: The need for a comprehensive engagement in regions of refugee origin", *International Affairs*, 79(3), 2003, 583–617; E. Haddad, "The external dimension of EU refugee policy: A new approach to asylum?", *Government and Opposition*, 43(2), 2008, 190–205.

[49] The most comprehensive account is Betts's *Protection by Persuasion op. cit*, "suasion game", 32.

[50] For an overview see, J. Milner, *Refugees, the State and the Politics of Asylum in Africa*, Basingstoke, Palgrave Macmillan, 2009, especially, 45, 52–3, 163, 171–77. In certain cases, African States (Guinea) employed a cooperative policy to secure more aid from European partners, so long as the aid extended to the population beyond the encampments, 165. But the Kenyans were less cooperative: "We do not consider that Kenya should be the automatic or natural home for asylum-seekers and refugees from Somalia", quoted in Betts, *Protection by Persuasion*, *op. cit.* 170. See also A. Betts and J. Milner, "The externalization of EU asylum policy: The position of the African states", Working Paper No. 36, Oxford, COMPAS, 2006.

[51] Levy, "The European Union after 9/11", *op. cit.*

7 per cent of the total global offshore refugees for 2009.[52] Therefore, the issues surrounding burden sharing in Europe were not merely affected by the unique constitutional machinery of the confederal EU, which prevented the creation of a European Refugee Agency with State-like powers to impel Member States to accept a quota of refugees, unlike the merely technical, "hand-holding" remits of the European Refugee Fund (ERF) or EASO. Rather, the issue goes to the core of the national legitimacy of the Member States. Whether or not the 1973 migration stop was more illusion than reality, it was only in the late 1990s or early 2000s that Member States openly, and in public documents, welcomed and acknowledged a system of managed migration, bowing to the compelling logics of globalization and an ageing population. The elastic, "Competition State" heralded a new era of labour migration to and within Europe, where imported unskilled and highly skilled labour were seen as central to economic security and to the well-being of the nation.[53] On the other hand, as I have mentioned, offering hospitality to refugees was an ethical–legal duty, the bedrock to the concept of liberalism. Nowhere in the EU, however, was migration essential to the national story, as is the case in the Immigration States. Indeed, the basis for citizenship in most countries was converging on some form of modified *jus sanguinis*.[54] Andrew Geddes has detected a detachment of a strictly one-dimensional relationship between territorial borders and status. Thus, he envisages three types of borders: organizational (encompassing the graduated membership requirements to access labour markets, the Welfare State, and eventually citizenship), conceptual (pertaining to the degree of assimilation with specific regard to language, politics, and rituals), and territorial (notably the borders of the Member States, the borders of Schengen, and the borders of the EU).[55]

However, even if one can detect a multi-level series of statuses from irregular migrant to full citizen, the EU and its Member States are not geared to accept immigration as the life's blood for the future of their national societies. This issue has never properly been addressed and, when raised outside academic circles, the discussion is prompted and framed by the xenophobic Far Right.[56]

[52] R. Luubers, "Put an end to their wandering", *The Guardian*, 20 Jun. 2003, 5; European Commission, "Communication from the Commission to the European Parliament and the Council on the establishment of a joint EU resettlement programme", Com (2009) 447 Final, 2 Sept. 2009, 6.

[53] G. Menz, *The Political Economy of Managed Migration: Non-State Actors, Europeanization and the Politics of Managing Migration,* Oxford, Oxford University Press, 2009.

[54] J. van Selm, "Refugee Protection Policies and Security Issues", in E. Newman and J. van Selm (eds.), *Refugees and Forced Displacement: International Security,* Tokyo, United Nations University Press, 2003, 66–92; Schierup, Hansen and Castles, *Migration, Citizenship and the European Welfare State*, *op. cit.*

[55] A. Geddes, "Europe's borders relationship and international migration relations", *Journal of Common Market Studies*, 43(4), 2005, 787–806.

[56] The Centre Right has sometimes prepared the ground for more radical proposals of the Far Right or has been influenced by the Far Right by competing for the same voters. See T. Bale, "Turning around the telescope, centre-right parties and immigration and integration policy in Europe", *Journal of European Public Policy,* 15(3), 2006, 315–30. There is vast literature on the roles of EU citizenship and/or EU legal space in constructing a new settlement based on shared human rights values. There is also radical academic literature which embraces open borders in Europe for regular and irregular migrants but would merely exacerbate the xenophobia already present. See D. Spence, "The cosmopolitanization of the EU's borders", *Portal. Journal of Multidisciplinary International Studies*, 4(2), 2007, 1–17. See Elspeth Guild's criticisms of the no-borders position, *Security and Migration*, *op. cit.* 27.

Equally, the first premises of the real implementation of immigration practice within each of the Member States are not discussed with great candour between the Member States themselves, because they are kept as confidential matters within the national discussion of each. This leads to misunderstandings of what a mixed flow of migrants in the early twentieth century really means and, in turn, results in a misleading picture of what the common external policy of the CEAS should be.

Thus, it is argued that Italy is the soft underbelly of the Schengen system when, in fact, it has been shown recently that Italy receives more irregular migrants from Germany, where citizens of the western Confederation of Independent States (CIS) who are on expired work visas make their way south to Italy. It has also been noted that Italy, which acceded to the 1967 Protocol Relating to the Status of Refugees just over twenty years ago, has a particularly low rate of asylum-seeker recognition but that this is because many would-be asylum-seekers are swept into legality via regularization and/or the acquisition of work visas. Whereas massive regularizations are not carried out in Germany because they would undermine the hegemonic ideology of State effectiveness, the granting of asylum remains a long-established practice, enshrined in its Basic Law and part of the post-war process of political rehabilitation. In this respect, Germany appears to be a more diligent member of the 1951 Refugee Convention than Italy when, in practice, an arguably similar number of refugees find an *ad hoc* regime of protection in Italy's porous labour markets. Most irregular immigration in Italy entails persons from the CIS who overstay their visas in Germany and, subsequently, arrive in Italy via secondary migration contrary to the more newsworthy, alarming, and heart-rending images of boat people landing on Lampedusa. The latter, however, feed the populist grandstanding policies of maritime push-backs in the Mediterranean or extraterritorial camps in Libya.[57]

3. The common european asylum system: liberal or illiberal?

The first premises of the migration regime in Europe should be recalled before we enter into a review of the state of play of the CEAS in 2010. First, as I have mentioned previously, the EU acknowledged that a form of managed migration or mixed flows was the starting point of policy-making and, as a consequence, the rhetoric of a Fortress Europe was no longer taken seriously in the policy community. Member State governments, such as Italy's Berlusconi administration dependent on the support of radical right populists, have balanced fire-breathing restrictionist rhetoric with one of the most generous regularizations of irregular migrants in the past 30 years: Italy's middle-class families depend on carers to look after children and elderly parents; crops require harvesting, and the mini-steel mills of "Deep North" Brescia would grow silent

[57] C. Finotelli, "The importance of being southern: The making of policies of immigration control in Italy", *European Journal of Migration and Law*, 11(2), 2009, 119–38; C. Finotelli, "The North-South myth revised: A comparison of the Italian and German migration regimes", *West European Politics*, 32(5), 2009, 886–903.

without workers from outside the EU. Like the Italians, most Member States have resorted to grandstanding although, in reality, they implement more pragmatic policies towards these mixed flows of migrants.[58] It has been estimated that:

> [A]lmost every Western European state except Finland has carried out some sort of amnesty in the past few years. Indeed perhaps 40 regularizations have taken place in Europe over the past decade, giving legal status to over 3 million people.[59]

At Stockholm, the European Council sternly denounced further national regularizations for undermining the credibility of EU polices, but a recent academic report concludes that, "regardless of political declarations, amnesties will be undertaken furtively by all but a few European countries".[60]

Similarly, all Member States have tightened their domestic laws to make it generally impossible for asylum-seekers, waiting to be assessed, from entering their labour markets and therefore they become reliant on aid from host governments. They also insist that they welcome non-EU workers with high skills and indeed through the Blue Card system seek to attract the skilled from around the globe. In segregating asylum-seekers from domestic labour markets, Member States feed the misconceptions about asylum-seekers and welfare and fuel the rise of the xenophobic Far Right. This, in turn, has accelerated the very policies of *non-entrée* that are being undermined by "furtive amnesties". These policies of the Member States, likewise, have not helped clarify the importance of different statuses in the minds of the European public, as studies have demonstrated that citizens do not easily differentiate between asylum-seekers, non-European economic migrants, and economic migrants from the new accession States.[61]

Equally, the longstanding myth of the universality of the Refugee Convention remains in place in 2010: the overwhelming majority of asylum-seekers do not receive full Convention status recognition but the constraints of *non-refoulement*, the Convention Against Torture, and indeed the new safeguards of the Treaty of Lisbon will not change this *status quo*.[62]

This reciprocal circle of hypocritical policy-making, this form of political grandstanding as a political art form, has made it very difficult for academic analysts to give a balanced account of the effects of the CEAS programme in 2010 because they mistake restrictive rhetoric for realities on the ground. These realities can be more flexible through implementation gaps, the pragmatic

[58] A. Geddes, "Il rombo dei cannoni? Immigration and the centre-right in Italy", *West European Politics,* 15(3), 2006, 349–66.

[59] E. Collett, "Beyond Stockholm: Overcoming the inconsistencies of immigration policy", EPC Working Paper No. 32, Brussels, European Policy Centre, Dec. 2009, 48.

[60] *Ibid.*, 49.

[61] A. Geddes, "Chronicle of a crisis foretold: The politics of smuggling in the UK", *British Journal of Politics and International Relations*, 7(3), 2005, 324–39.

[62] Levy, "The European Union since 9/11", *op. cit.* 33.

hypocrisy of amnesties, and the persistence of a frayed form of embedded liberalism.[63]

Nevertheless, several things are clear. After more than a decade of EU legislation, the process has still not left the phase of oxymoronic intergovernmental supranationalism: the CEAS is still a work-in-progress, with the final document at Stockholm proclaiming 2012 as a new target date for its fulfilment. Indeed, one informed observer has even queried "whether a fully functioning Common European Asylum System is still the core goal of the EU member states".[64] Even if domestic grandstanding might still be prevalent at the EU level, "there is a conscious and definite shift towards more practical forms of European cooperation",[65] noted in the rise of the role of agencies and variations on the theme of the open method of coordination.

The major aims of EU asylum policy have been the control of spontaneous movement into the Union and the prevention of secondary movement once asylum-seekers have entered its border. Since the Treaty of Amsterdam, this consequently has meant the creation of a working system for the assignment of exclusive responsibility for the examination of asylum claims, the establishment of a minimum standard of reception conditions, and the definition of refugee and asylum conditions. Its history, however, has been one of delays and inconsistencies.[66] Indeed, the Dublin II system is currently under re-examination, with observers claiming that it is costly and inhumane and that it fails to prevent secondary movement. If Dublin II cannot function, it remains to be seen how a more stringent form of burden sharing can function in present conditions.[67] In any case, Eikko Thielemann, the leading scholar on European burden sharing, concludes that the historical path of cultural and historical ties dependent on chain migration, language, and post-colonial ties overrides the might of Dublin II.[68]

Essentially, the Member States have agreed to disagree about fundamental issues that determine the prevention of secondary movement. Thus, wildly varying recognitions rates for asylum-seekers remain in force: in 2007, Italy recognized 98 per cent of all Afghan asylum-seekers, the UK recognized 42

[63] G. Lahav and V. Guiraudon, "Actors and venues in immigration control: Closing the gap between political demands and policy outcomes, *West European Politics*, 29(2), 2006, 201–33; A. Ellermann, "Street-level democracy: How immigration bureaucrats manage public opposition", *West European Politics*, 29(2), 2006, 293–309; H. G. Sicakkan, "Political asylum and sovereignty-sharing in Europe", *Government and Opposition*, 43(2), 2008, 206–22.

[64] Collett, "Beyond Stockholm", *op. cit.* 29.

[65] *Ibid.*

[66] For an overview of the CEAS in 2010, see A. Geddes, *Beyond Fortress Europe*, 2nd edn., Manchester, Manchester University Press, 2008, 131–8; O. Ferguson Sidorenko, *The Common European Asylum System. Background to the Current States of Affairs and Future Directions*, The Hague, T.M.C. Asser, 2007; S. Lavenex, "Justice and Home Affairs. Communitarization with Hesitation", in H. Wallace, M. A. Pollack and A. R. Young (eds.), *Policy-making in the European Union*, Oxford, Oxford University Press, 2010, 457–77.

[67] Collett, "Beyond Stockholm", *op. cit.* 28.

[68] E. R. Thielemann, "The Effectiveness of Governments' Attempts to Control Unwanted Migration", in Parsons and Smeeding, *Immigration*, *op. cit.* 468–9.

per cent of all Afghans, and Greece denied all Afghan cases.[69] In the same year, Sweden accepted 18,000 Iraqi asylum-seekers, equivalent to more than half of those who entered the EU.[70] Furthermore, such domestically based recognition procedures are reinforced by the fact that Member States do not recognize the status granted to individuals by their fellow Member States.[71] As the European Commission and the European Parliament admitted in 2008, "a common European asylum system does not imply as yet a transfer of responsibility for receiving asylum seekers and processing claims to the European Union",[72] nor does it seem likely that "EU Member States by adopting the Lisbon Treaty were prepared to completely give up their specific concepts of accommodating protection needs".[73]

From 2003 to 2008, most of the other objectives listed above passed into European law. Critics have argued that this process has been a race to the bottom and an attempt to finalize the restrictionist policies of major Member States, such as Germany or the UK, to repel asylum-seekers from the core of the EU and, thus, also to further a policy of extraterritorial processing.[74] The restrictive effects of the recent legislation are probably exaggerated: several recent surveys have shown how the Directives have not lowered conditions for asylum-seekers in the EU 15, and the 2004 and 2007 accession Member States have incorporated a raft of newly minted domestic legislation under the guidance of the European Commission, which has seen a marked improvement in asylum and refugee law and policy in the East.[75] Furthermore, the definition of an asylum-seeker has been expanded to include victims of non-State actors. Thus, for example, we see a noticeable increase of the recognition rate for Somalis in Germany, where courts were chary to recognize refugees from Failed States.

[69] E. Guild and S. Carrera, "Towards the next phrase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposal for the Stockholm Programme", the Centre for European Policy Studies Policy Brief No. 196, 20 Aug. 2009, 5.

[70] "EU ready to accept 10,000 Iraqis", *BBC News*, 28 Nov. 2008.

[71] S. Lavenex, "Mutual recognition and the monopoly of force: limits of the single market analogy", *Journal of European Public Policy*, 14(5), 2007, 765; S. Peers, "Legislative update: EU immigration and asylum competence and decision-making in the Treaty of Lisbon", *European Journal of Migration and Law*, 10(2), 2008, 234–6.

[72] European Union and European Parliament, "Towards a Common European Asylum System: Assessment and Proposals-Elements to be Implemented for the Establishment of an Efficient and Coherent System", Brussels, Sept. 2008, 1.

[73] *Ibid.*, 2.

[74] This was already noted as a universal trend in the West in the early 2000s. See M. J. Gibney and R. Hanson, "Asylum policy in the West: Past trends, future possibilities", in G. J. Borjas and J. Crisp (eds.), *Poverty, International Migrations and Asylum*, Basingstoke, Macmillan Palgrave, 2005, 84.

[75] C. Kaunert, "Liberty versus security", *op. cit.* 151; E. Thielemann and N. El-Enamy, "Beyond Fortress Europe? How European cooperation strengthens refugee protection", Fifth General Conference of the ECPR, Potsdam, 10–12 Sept. 2009. The improvement of asylum and refugee policy in part of the European Neighbourhood should also be noted: L. Feijin, "Facing the asylum-enlargement nexus: The establishment of asylum systems in the Western Balkans", *International Journal of Refugee Law*, 20(3), 2008, 413–31. A more jaundiced view of the effects of the European legislation was advanced by Elspeth Guild: See "The Europeanization of Europe's asylum policy", *International Journal of Refugee Law*, 18(3–4), 2006, 630–51.

However, while it is true that common mutually recognized standards may halt a downward spiral of conditions, the advocates of this argument fail to see that, before this European legislation, the policies of rigorous restrictionism were already firmly in place in the West. Furthermore, Member States have twisted human rights laws, as Matthew Gibney shows in his study of the British deportation regime, to be in favour of 1951 Refugee Convention but simultaneously undermine its basic intent.[76]

Thus, the internal asylum and refugee regime of the EU is still a process marked by conflicting restrictionist and liberal tendencies and is left in a limbo of intentional ambiguity. Increasingly:

> constellations of states are emerging, whether along geographical lines or based on common interest (see, for example, the Prüm group, C.L.). The majority of new ideas of the last few years have been instigated and put into practice by governments, with secondary support from the Commission.[77]

Thus, the Stockholm document notes that there is neither a legal impediment for some Member States "to establish common institutions for processing asylum seekers and/or specialized boards deciding on appeals against negative asylum decisions"[78] nor is there a means to prevent certain Member States from banding together to experiment cooperatively with Europeanized asylum procedures. From the point of view of the European Commission, a fully functioning CEAS would be achieved when there was a shift from the voluntary to the mandatory and the abolition of opt-out clauses, joined to full harmonization of mutually recognized standards down to individual determination. This has not been achieved so far. Whether or not the Lisbon Treaty will allow the European Court of Justice supremacy over domestic courts to create a legal asylum space in the EU remains to be seen. However, the Stockholm IGC probably marked a watershed and the current programme:

> reflects the fact that the EU has now reached the outer edges of political cooperation on immigration and asylum, and has put in place most of the major legislative initiatives which are currently feasible. The focus is on strengthening cooperation within the EU and with third countries, and the need to consolidate the work done over the past decade.[79]

4. Is there life after extraterritorial processing?

An EU programme of supranational extraterritorial processing is impossible without a fully functioning CEAS, but the fate of extraterritorial processing in the EU remains in an analogous condition of intentional ambiguity to the CEAS

[76] M. Gibney, "Asylum and the expansion of deportation in the United Kingdom", *Government and Opposition*, 43(2), 2008, 146–67.

[77] Collett, "Beyond Stockholm", *op. cit.* 21.

[78] European Union and European Parliament, "Towards", *op. cit.* 1.

[79] Collett, "Beyond Stockholm", *op. cit.* 24.

and the EU itself. EU supranational extraterritorial processing may prove unsuccessful lacking greater integration within the EU itself, but naked sovereign interests were not the only blockage as embedded liberalism also acted as another formidable veto player at key turning points in the debate. I conclude by highlighting the use of intentional ambiguity in this field and demonstrate how more pragmatic policies on the ground echo the logic that motivates furtive amnesties within the EU itself.

As mentioned previously, the antecedents to the push for extraterritorial processing can be found in the Yugoslav "safe areas" of the early 1990s as well as earlier in the Danish global proposal to the United Nation General Assembly in 1986, although the latter was closer to the establishment of RPPs in that they were envisaged near-conflict zones in the Global South and not on the borders of the EU itself. The Dutch inspired suggestions at the High Level Working Group on Asylum and Migration Policies in 1999. However, these systems of externalization and temporary protection were seen as ways to preserve the sanctity of the 1951 Refugee Convention. Meanwhile, the various British, Danish, German, and Italian plans from 2001 to 2005 were largely envisaged as systems to replace the 1951 Refugee Convention.[80] The two events that weigh heavily on the burst of activity from 2001 to 2005 were the previously discussed Kosovo crisis of the spring of 1999 and the leaked Austrian Presidency paper of 1998 discussed at length at Tampere in 1999.[81] The Austrian paper resembles the process of the externalization of refugee and asylum policy, as carried out repeatedly from 1999 through today by the EU, but differs in key aspects, which I examine.

The Austrian paper more or less matches the geo-political map of migration in 2010 (an inner circle of the EU Member States now expanded eastwards; a second circle of the Western Balkans candidate or near-candidate countries for EU membership; a third circle of the European Neighbourhood countries in the CIS and North Africa; a fourth circle of countries, the Sub Saharan African countries, China, etc.). The Austrian Presidency draft paper was sharply criticized by the French and Germans because it directly threatened the principle of *non-refoulement* and confused the issues of asylum and economic migration. In the spring of 2000, at the European Conference on Asylum, sponsored by the then current Portuguese Presidency of the European Council, the British Home Secretary, Jack Straw, called for a redrafting of the Geneva Convention. Like the Austrian plan, he suggested an international quota system under which European countries would share asylum-seekers from countries recognized as violators of human rights. Straw's suggestions were criticized for confusing temporary protection with the Geneva system of individual determination of cases and for undermining the concept of *non-refoulement* by creating an *ad hoc* system of safe countries. In the spring of 2003, the British government released its "Vision

[80] See Afeef, "The politics", *op. cit.*; Betts, "The international relations", *op. cit.*; Garlick, "The EU discussion", *op. cit.*; Levy, "The European Union after 9/11", *op. cit.*; Noll, "Visions of the exceptional", *op. cit.*

[81] For a discussion of Tampere, see I. Boccardi, *Europe and Refugees: Towards an EU Asylum Policy*, The Hague, Kluwer Law International, 2002, 175–80.

Paper" that rapidly became the basis for a discussion between the EU and UNHCR. This is where the Danish and Austrian plans of the 1980s and 1990s were melded together and the twin proposals for "transit processing camps" outside but near the EU and "regional processing centres" closer to the countries of origin in the South also were examined. The Danes dusted off the 1986 proposal during their Presidency in the second half of 2002. Yet, at the same time, they let the British "take the heat" for this series of controversial proposals, which were considered "superb" by the Far Right Danish People's Party, a party that held the balance of power in the Danish parliament and kept the then centre-right government in power.[82]

The fate of the RPPs has already been discussed and they were even less controversial within the EU. The suggestion of establishing "transit processing centres" sparked a fierce argument, as suggested by Gregor Noll's path-breaking academic article in 2003, which Amnesty International disseminated to the general public. Opponents of extraterritorial processing noted the policy transfer from the Australian Pacific, American Caribbean, and European Kosovo plans, but it was argued that the British proposal was more radical because it suggested enshrining serial *refoulement*: asylum-seekers already within the territory of the EU would be deported to these transit processing centres. The Australians had invented the "Pacific Solution" precisely to prevent asylum-seekers from touching Australian soil and thereby forcing their claims to be heard. The "Vision Paper" took such a policy to its logical if extreme conclusion. Thus, the meeting of the European Council of 28 March 2003, saw David Blunkett suggest that Albania and Croatia become venues for screening of all refugees in Europe. This would make it impossible for spontaneous asylum-seekers to seek refuge in a Member State and effectively render all attempts illegal. An international quota system would replace the right of asylum for individual fleeing persecution. Temporary refugees, caused by mass flight, would, it seemed, be treated under the same regime, in some ways, making plain what had happened on the ground since the Yugoslav Wars of Succession.

Blunkett's plan, at first, received general support from fellow Member States but they awaited approval from UNHCR. High Commissioner, Ruud Lubbers, would only approve the plan if it were to be located within the EU and only entailed processing claimants from "safe countries". In other words, the very purpose of the "Vision Paper" was undermined, and the embedded liberalism, which had shot down the full-fledged endorsement of the Austrian Presidency paper, had been a motivating factor.[83] This time, the Germans and Swedes declared their principles. Thus, the Swedish Minister of Immigration, Jan Karlsson, declared: "We are against any sort of system that would deny people the right to apply for asylum in the country they have sought refuge in".[84] The German response was more muddled; Otto Schily seemed to object in a

[82] Levy, "The European Union after 9/11", *op. cit.* 44–8.

[83] *Ibid.*, 48–9.

[84] Migration News Sheet, Jul. 2003, 13.

similar fashion but he was also reported to have said that it was an ineffective form of *non-entrée* policy because it would reduce the distance asylum-seekers would have to travel in order to have their claim heard by the EU and its Member States.[85] In the meantime, the European Commission distanced itself from the British proposal and emphasized the need for burden sharing within the EU. And, finally, the EU Presidency Conclusions of Tessaloniki on 19–20 June 2003 reiterated the sanctity of the Refugee Convention and the British withdrew their proposal, seeming intent on pursuing it with the "Coalition of the Willing" (the Danes and the Dutch).

One further burst of activity occurred between 2004 and 2005, when Schily (now fully converted to the British approach) and the Italians (Giuseppe Pisanu) revived the drive and suggested that the Baltic States, Slovakia and Ukraine, establish such camps. Nevertheless, the situation quickly turned when the Ukrainians learned of this plan after reading about it in a British newspaper and angrily denounced the project. In November of 2004, the Hague Programme pledged to look into the feasibility of joint processing inside and outside the territory of the EU, but camps were not openly discussed. A final last gasp was found in Schily's single paper of 9 September 2005, which was issued as a press statement at an informal meeting of the Justice and Home Affairs Ministers in Florence ("Effective Protection for Refugees, Effective Measures Against Illegal Migrants"). Here, an argument was made for reception centres in North Africa linked to voluntary burden sharing, but this paper also claimed that Member States would not have legal liability for the governance of these camps. Screening was discussed, but protection needs were not raised and, in any case, all the North African States rejected it.[86]

At Tampere, Lisbon, Thessaloniki, and Florence, from 1998 to 2005, a shifting coalition of Member States vetoed or expressed significant concerns about extraterritorial processing camps if they fatally undermined the 1951 Refugee Convention. By relying on the endorsement of UNHCR at the EU level, they placed themselves in a precarious position by facing the possibility of a full-fledged supranational system of burden sharing for offshore and spontaneous refugees, in which the whole point of playing the *non-entrée* policy was in danger of being undermined, thus the alarm of Schily. The Hague Programme's vague promise to investigate extraterritorial processing was weakened by a clause insisting on "the need for careful assessment of the legality of any potential processing scheme".[87] Which law would apply in such camps? And where, as we have seen, was the mandatory European joint burden-sharing system to facilitate such a system? Thus, just as we have seen that the irreconcilable contradictions of a full-fledged CEAS and especially burden sharing could only be finessed by intentional ambiguity, the history of supranational extraterritorialization followed a similar path.

[85] D. Dombey, "UK asylum proposals draw mixed response", *Financial Times*, 29 Mar. 2003, 12.

[86] Garlick, "The EU discussion", *op. cit.* 619–20.

[87] *Ibid.*, 625.

Supranational extraterritorialization was also unsuccessful, however, because putative host countries were not willing to host such camps. As has been noted in a comparative study, while the Australian and American plans were neo-colonial in all but name, with one regional hegemonic power using domineering tactics to accommodate such programmes, the relationship between such hosts as Morocco or Ukraine and the EU were more balanced than Haiti or Jamaica to the US or Nauru and Papua New Guinea to Australia, respectively. Host countries, such as Croatia and Morocco, were worried their international reputations would suffer. They too did not want to become magnets for greater flows of migrants seeking to be closer to the EU.[88]

A new phase of policy-making ensued in 2004–05, when European interior ministers agreed on five pilot schemes in Tunisia, Morocco, Algeria, Mauritania, and Libya, with funding of one million Euros financed by the European Commission.[89] The era of supranational extraterritorial projects had ceased and bilateral and multilateral efforts were in the vanguard for the remainder of the decade. Following 2005, the centre of attention shifted from the establishment of extraterritorial processing zones and a fixed obsession with security, to the repackaging of policy employing the concept of the migration–development nexus. In the documents and rhetoric of the European Commission and the European Presidency, the migration–development nexus envisaged migration as a tool of development rather than merely a problem endangering Europe's sovereignty. Especially after the tragic shootings of migrants at Melilla and Ceuta in the autumn of 2005, a series of meetings between North African countries, South Saharan African countries, and the EU (Rabat, Tripoli, Madrid, and Lisbon) signalled this new tact.[90] Pilot mobility schemes were signed with Moldova and Cape Verde. Concepts, which, until the middle of the 2000s, had been considered outside the EU policy kit and more likely associated with its academic critics, became standard issue by the time of Stockholm. Thus, circular migration, "brain gain", and the linking of diaspora networks with home countries were conveyed confidently in Commission and Presidency documents at the end of the decade.[91]

However, there was still a gap between policies that seemed more measured and those that received the greatest funding. Thus, the method of supranational intergovernmentalism produced a neat division of labour: whilst supranational institutions advanced a human rights approach, Member State governments pushed for greater migration control through the dissemination of Integrated Border Management, Frontex, Rapid Border Intervention Teams (RABITS), and

[88] Afeef, "The politics of extraterritorial processing", *op. cit.* 28–9; A. Ellermann, "The limits of migration control: Deportation and inter-state cooperation", *Government and Opposition*, 43(2), 2008, 168–89.

[89] Betts, "Towards a Mediterranean solution?", *op. cit.* 660–4.

[90] Lavenex and Kunz, "The migration-development nexus", *op. cit.* 449–50.

[91] Debenedetti, "Externalization of European Asylum", *op. cit.* 10. For a critique of the mobility agreements, see R. Parkes, "EU mobility partnerships: A model of policy coordination?", *European Journal of Migration and Law*, 11(3), 2009, 327–45.

the dissemination of readmission agreements to North and sub-Saharan Africa. In addition, the promotion of multilateral and bilateral policies, which drew on the agencies of the Union in a questionably legal manner, was also evident. The readmission of Libya into the system of migration control was the most troubling and unresolved example of this ambiguous policy. Beginning in 2003, Italian governments increasingly worked with Libya. This culminated in a treaty in 2009 in which the Italians paid compensation for past colonial war crimes in exchange for joint efforts at pushing back boat people in the Mediterranean.[92] Over the years, the Italians have funded several detention camps in Libya and, by 2010, of twenty secret detention camps identified in Libya, three had been established by the Italians. Further complicating this situation is the fact that Libya is not a signatory of the 1951 Refugee Convention and, although International Organization for Migration (IOM) has a presence in the country, it does not have a protection role, albeit UNHCR has had an increasing presence through the good offices of Libyan NGOs, even if that presence has not resolved serious faults in Libya's treatment of migrants, refugees, and asylum-seekers.[93] The European Commission has complained about the illegality of the push-back policy but, to date, there has been no change. Meanwhile, Libya has exaggerated the flow of migrants across the Mediterranean in order to increase its bargaining power.[94] In fact, Libya is part of a Sahel–Saharan circular migration system formally enshrined in the Community of Sahel–Sahara States (CEN-SAD), in which migrants have been drawn to oil-rich Libya but also to Algeria and Morocco to work and have no intention to travel onward to Europe.[95] Meanwhile, bilateral deals have been struck by France, Spain, and Germany with Tunisia, Morocco, and Algeria: Integrated System of External Vigilance (SIVE), European external border surveillance system (EUROSUR) (Integrated Border Management technology), and Frontex have made it increasingly difficult for boat people in the Atlantic or the Mediterranean to make the passage to Europe. Algeria and Morocco have changed their migration laws and passed anti-trafficking regulations.[96] The new

[92] On the re-entry of Libya and their collaboration with the Italians in their push-back policy, see L. Martinez. "Libya: The conversion of a 'Terrorist State'", *Mediterranean Politics*, 11(2), 2006, 151–65; R. Andrijasevic, "Lampedusa in focus: migrants caught between the Libyan desert and the deep blue sea", *Feminist Review*, 82(1), 2006, 120–5; R. Andrijasevic, "How to balance rights and responsibilities on asylum at the EU's southern border of Italy and Libya", Working Paper No. 27, Oxford, COMPAS, 2006; S. Hamood, "EU-Libya cooperation on migration: A raw deal for refugees and migrants?", *Journal of Refugee Studies*, 21(1), 2008, 19–42.

[93] Buckel and Wissel, "State project Europe", *op. cit.* 41; UNHCR, *UNHCR Global Appeal*, Geneva, UNHCR, 2010, 4–5; C. Peregin, "Grounds for concern in Libya-UNHCR", *Times of Malta.com*, 24 Jan. 2010, available at: http://www.timesofmalta.com/articles/view/20100124/local/grounds-for-concern-in-libya-unhcr (last accessed 20 May 2010). UNHCR was expelled from Libya in June 2010 (see: "Libya 'expels' UN refugee agency UNHCR", BBC News Africa 8 June 2010, available at: http://www.bbc.co.uk/news/10264625 (last accessed 26 July 2010).

[94] E. Paoletti, "Migration, Security and Interdependence: The Case of the Italian-Libyan Agreement on Migration", International Studies Association, 50th Annual Convention, New York, 15–18 Feb. 2009.

[95] Andrijasevic, "How to balance", *op. cit.* 17.

[96] Wolff, "Border management in the Mediterranean", *op. cit.*

frontier is now the Sahara itself, although this is an age-old liminal area of trade and migration, wherein the cities and towns have increasingly become cosmopolitan centres for circular and European-bound migrants undergoing journeys that could take years to complete and of which the status of a refugee who has left for fear of persecution becomes an economic migrant with time.[97]

In Africa, we are witnessing a constant shifting of statuses, a battle between the technical and geographical reconfigurations of migration control, and the social reorganization of transit migration. As a result, the North African States effectively have become *ad hoc* Schengen members although lacking the possibility to become Member States of the EU. A Euro-Mediterranean system of managed migration, thus, has come into effect without a full acknowledgement of it.[98] Of course, the human cost is well known; thousands have perished in the Atlantic, Mediterranean, and the Sahara.[99] A European chain of extraterritorial camps never materialized; instead, a string of detention camps administered by North African and Sahel States, in part aided by the EU and the IOM, populate the landscape. On the one hand, Morocco has sought to heighten its credibility as an efficient migration manager, in order to win concessions for the legal movement of Moroccans to Spain and elsewhere.[100] On the other hand, in Morocco, one finds a straggling series of illicit camps, such as in Oudja, in which well-educated and highly motivated Africans play a cat-and-mouse game with the police in their attempt to make their way to the Spanish enclaves or to the European mainland itself.[101] These informal and formal camps act as sieves through which migratory populations flow clandestinely, fearing the State and traffickers alike. These are not the camps of Agamben's imagination, the inmates possess an ingenious agency, and the States, which channel and manage them, are rather porous, if capriciously violent, entities (especially the Libyan State).[102]

Thus, extraterritorial processing camps under the aegis of the supranational EU were not viable. Certainly, before the Lisbon Treaty increased the potential oversight capacities of the European Court of Justice and the European Parliament, the EU did not have the same constitutional legitimacy or political authority that national States, such as the US and Australia, had. In any case, the embedded liberalism of the EU, central to its normative framework of soft

97 H. de Haas, "Trans-Saharan Migration to North Africa and the EU: Historical Roots and Current Trends", Washington DC, Migration Policy Institute, 2006; M. Collyer, "In-Between Places: Trans-Saharan transit migrants in Morocco and the fragmented journey to Europe", *Antipode*, 39(4), 2007, 668–90.

98 *Ibid*., 687; S. Mazzella, "Putting asylum to the test: Between immigration policy and co-development", in T. Fabre and P. Sant-Cassia (eds.), *Between Europe and the Mediterranean. The Challenges and the Fears*, Basingstoke, Palgrave Macmillan, 2005, 41–9.

99 H. M. Cross, "The EU migration regime and West African clandestine migrants", *Journal of Contemporary European Research*, 5(2), 2009, 171–87.

100 Wolff, "Border management in the Mediterranean", *op. cit.*

101 M. Carr, "The invisible people of Oujda", *The New York Times* as reproduced in *The Observer*, 2 May 2010, 3.

102 Andrijasevic, "Lampedusa in focus", *op. cit.* 124.

power, undermined the cagey authoritarianism sanctioned by populism, which drove the American and Australian models. Furthermore, the same practical problems, which confronted the Pacific or Caribbean solutions, would have affected the EU, only with greater salience, because legal accountability would have been even murkier. When migrant flows built up in the camps, what rights would have failed applicants had at the removal stage? International law might have prevented *refoulement* of many failed asylum-seekers. Who would have taken the legal responsibility for their long-term detention? Extraterritorial processing zones would confront the same legal problems that all international territorial authorities face.[103] Asylum-seekers could challenge this in constituent Member State courts, the host nation's courts, or possibly the European Court of Justice. In any case, would closed camps be legal? Why would any Member State want to venture into such a legal minefield? Indeed, it has been argued that, precisely for these reasons, the British abandoned their "Vision Paper" after 2003.[104] Thus, embedded liberalism led to obvious as well as unintended consequences, as outlined by Noll in 2006, which made such a policy too costly to pursue.

> What is the problem with 'regional protection areas' or 'transit processing areas'? Essentially, it is the necessity for barbed wire. An RPA or processing centre must offer human rights protection on a level roughly equivalent to that within the European Union. This would be necessary to satisfy European courts that removal to such centres is in accordance with human rights and refugee law. Then, the barbed wire is needed to keep out the local population where the country is located. On the other hand, if RPAs or processing centres offer human rights protection below the European Union level, migrant inhabitants will continue their efforts to reach the Union. Barbed wire would need to keep them in. So is extraterritorial processing a better alternative than smugglers? The same amount will try to get into informal labour markets as today but without filing for asylum if this means they go to a camp.[105]

5. Conclusion: resettlement camps, quotas, and resettlement programmes – a long march to effective burden sharing in the EU?

As we have seen, the draconian and unilateral predictions of European extraterritorial processing did not materialize. In 2010, we are presented with a more

[103] Garlick, "The EU discussion", *op. cit.* 622; K. de Vries, "An assessment of 'Protection in Regions of Origin' in relation to European asylum law", *European Journal of Migration and Law*, 9(1), 2007, 83–103.

[104] C. Boswell, *European Migration Policies in Flux: Changing Patterns of Inclusion and Exclusion,* Oxford, Blackwell, 2003, 37–41.

[105] G. Noll, "Safeguard asylum", in UNHCR, *The State of the World's Refugee 2006: Human Displacement in the New Millennium*, Oxford, Oxford University Press, 2006, 38–9.

mixed and nuanced result: circular migration and mixed flows are formally accommodated as part of EU policy. Pilot regional camps have been attempted in the Western CIS, North Africa, and East Africa. Mobility partnerships and joint naval patrols under the aegis of Frontex or bilateral operations are commonplace in 2010. Integrated Border Technology stretches from the Western Atlantic coast to Libya. A series of informal camps populate the landscape of the Maghreb. Although the EU has increased its budget substantially for the European Refugee Fund III, EASO, and the Fundamental Rights Agency, which present a softer side to managed migration, far more funds are still allocated for security and the general tone remains focused on the prevention, detection, and discontinuation of as many migratory flows as possible.

Nevertheless, the European Commission's Communication on the Establishment of a Joint EU Resettlement Programme of 2 September 2009 may signal a new approach to the use of camps more in the spirit of the counterfactual possibilities of the Kosovo crisis of 1999 discussed earlier in this article. This Communication reminds the reader that the Green Paper on the Future of the Common Asylum System (June 2007) already noted the difference between resettlement of refugees from outside the EU and burden sharing from within the EU. Present resettlement policies refer to the apportionment of UNHCR offshore refugees, but the suggestion that EASO in Malta will facilitate this transfer to those Member States who have volunteered to take part in this programme (of which there are ten to date) might lead to more extensive burden sharing within the EU.[106] To be clear, EASO is not in place of a European Refugee Agency that the EU requires for a proper system of burden sharing. Rather, EASO is in the tradition of supranational intergovernmentalism and will facilitate shared knowledge of countries of origin "to harmonize practices, procedures and decisions". In other words, in the tradition of the open method of coordination, the aim is to redefine "problems hitherto perceived (as) national instead of common European problems".[107] The Justice and Home Affairs Council on 18–19 June 2009 adopted in its conclusions the aim to resettle 10,000 Iraqi refugees in the EU; the Germans have recently accepted 2,500 additional Iraqi refugees. This is a sign of a nascent burden-sharing mechanism coming into view because, as mentioned previously, the largest number of Iraqi refugees in Europe and North America had previously ended up in Sweden due to a generous unilateral national programme.[108]

Parallel to these developments was the creation of the Emergency Transit Centre in Romania based in Timosoara. This was established through a tripartite agreement in 2008 among the UNHCR-IOM, the Government of Romania,

[106] European Commission, "Communication from the Commission to the European Parliament and the Council on the establishment of a joint EU resettlement programme", COM (2009) 447 Final, 2 Sept. 2009.

[107] Pollak and Slominski, "Experimentalist", *op. cit.* 913.

[108] European Commission, "Joint resettlement programme", *op. cit.*

and a local NGO, which helped in its administration. Opened in early 2009, this was a modest effort in which several hundred offshore/resettled refugees were housed for up to 6 months for further resettlement within the EU or elsewhere.[109] However, the EU saw this as a pilot programme and thought it fit well with the Communication of September 2009, and a new push on advancing the harmonization of resettlement efforts through the offices of EASO. Under ERF III (2008–13), Member States would receive 4,000 Euros for each refugee resettled and the Commission instructed Member States to supply annual figures for numbers resettled.

It is also instructive to see how the Romanian Government handled the publicity surrounding the camp in Timosoara. Unlike the secret camps in Libya or the pilot camps elsewhere in Africa and the Western CIS, or the sharp dismissive reactions of Croatia and Ukraine in 2003, Romania was proud of its achievement, broadcasting it to demonstrate Romania's embrace of global and EU solidarity, to demonstrate that this recently admitted Member State was adopting the embedded liberal political culture of Europe, that it was a responsible and willing partner not only in migration management, as the Moroccans had trumpeted, but in the ethical values of liberal hospitality.[110] In this case the camp was a liberal beacon not hidden from public view as a place of lawless irresponsibility. And the Romanians explained how the occupants of the camp had regular contact with the local inhabitants of Timosoara in which the local participating NGO helped to foster the sympathies of the Romanian population. The EU hoped that EASO and Romanian efforts would incite the spread of pilot camps elsewhere in the EU and called on a marriage between these internal camps and new generation of putative regional protection camps in North Africa and the Middle East.[111]

Just as the Romanian pilot camp points to a far more humane form of camp than those in Libya or the miserable informal camps in North Africa, so too the concept of extraterritoriality can be used in an entirely different way in light of the passage of the Treaty of Lisbon. The end of the pillar structure within the EU means that the European Court of Justice and the European Parliament will have far more power to enhance the Area of Freedom, Security, and Justice. With the formal recognition of the European Convention of Human Rights and the Refugee Convention, a new form of liberal extraterritoriality will come into play, the long-term effects of which remain difficult to discern.[112] Earlier, I

[109] UHHCR-Government of Romania-IOM-OIM-EU, "The Emergency Transit Centre in Romania," 9 Jul. 2009.

[110] *Ibid*.

[111] European Commission, "Joint resettlement programme", *op. cit*.

[112] For discussions of the Treaty of Lisbon and its possible effects, see R. Crowe, "The Treaty of Lisbon: A revised legal framework for the organization and function of the European Union", ERA Forum, 9, 2008, 163–208; S. Peers, "Legislative update: EU immigration and asylum competence and decision-making in the Treaty of Lisbon", *European Journal of Migration and Law*, 10(2), 2008, 219–47; S. Kessler, "The Lisbon Treaty and the European asylum and migration policies", Information Note 4, Brussels, Jesuit Refugee Service-Europe, Nov. 2009; C. Reh, "The Lisbon Treaty: De-constitutionalizing the European Union?, *Journal of Common Market Studies*, 47(1), 2009, 625–50.

suggested that Member States seem to be merging towards a common understanding of citizenship based on a modified form of *jus sanguinis*. But the supranational EU is a community of law, not one based on common ancestry, ethnicity, or fate, and it is a community of law in which law has an extraterritorial effect.[113] European primary and secondary law oblige European border-control bodies to uphold *non-refoulement*. Agencies such as Frontex will be under the review of the European Court of Justice and naval push-backs by Member States may also be judged illegal by the Court. There seems to be growing consensus amongst European jurists that the US Supreme Court's ruling on Caribbean interdictions was given on very shaky legal grounds; the message heard is that EU Member States cannot escape their legal obligations in extraterritorial space.[114] And the European Court of Justice has begun to rule on asylum and refugee law in the Member States with Greece and Denmark losing cases for failing to enforce asylum directives. The Court also reversed a Dutch decision to refuse protection of an Iraqi asylum-seeker in February 2009.[115]

Thus, we can see the development of countervailing powers within the legal space of the EU, with legal and supranational mechanisms countering avoidance strategies, which rely on extraterritorialization. Indeed, the European Commission has anticipated this legal clash, by stating that the Joint Curriculum of the Schengen Border Code for border guards and Frontex personnel include a section on the obligations to enforce the EU's obligations under international refugee and asylum law. Meanwhile, various agencies which have prioritized security policy are being potentially countered by others, such as the Fundamental Rights Agency. Embedded liberalism is flexible and contingent, realism does enter, and it is certainly true that pragmatic arguments are necessary to ensure that international obligations are enforced.

Nevertheless, the rule of law is no mere ruse. Prophecies of the rule of an exceptional regime or critics of human rights rhetoric (be they conservative or post-modernist) may be too hasty; even if Marie-Bénédicte Dembour's Nietzschean take on human rights, or "human rights nihilism", argues that human rights are an artificial creation, an ideal type, and open to abuse by interested powers; nevertheless, she also concludes they must be cherished, they are strategically necessary even if one should be sceptical of special pleading and the inverted usages by Member States who use human rights to achieve the reverse.[116] Thus, while the "obscurity of legal reasoning or institutionalized

[113] This does not mean that the political and sociological factors comprising the EU's migration regime will mitigate this outcome. As Parsons and Smeeding remind us, the EU's "combination of 'nativist' national identities, established minorities, and quasi-federal government make political solutions particularly difficult to elaborate". See C. A. Parsons and T. M. Smeeding, "What's unique about immigration in Europe?", in Parsons and Smeeding, "Immigration", *op. cit.* 26–7.

[114] A. Fischer-Lescano, T. Löhr and T. Tohidpur, "Border controls at sea: Requirements under international humans rights and refugee law", *International Journal of Refugee Law*, 21(2), 2009, 256–96.

[115] Collett, "Beyond Stockholm", *op. cit.* 45–6.

[116] M.-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, Cambridge, Cambridge University Press, 2006, 26, 142, 180, 274–5.

rights language",[117] as has been recently argued, may mask the power struggles, national priorities, and ideological influences behind the formation of the CEAS, human rights, even human rights without illusions, are important to understand the motivations behind EU policy-making and the unintended outcomes of the politics of the exceptional. It is impossible to understand the dynamics behind the Geneva regime in the EU without accepting that, even if it honoured in the breach, burden sharing, *non-refoulement*, and sanctity of international law remain shared aspirations.

If we return to Giorgio Agamben, behind him we find Carl Schmitt and his fashionable ideas that identifying an enemy and fear are the motivating forces of politics, but, with these first premises, a despotic mentality is the natural outcome. However, as Jef Huysmans has shown, a social democratic concept of the exceptional was posited against Schmitt's bargain in Weimar Germany by other democratic jurists.[118] Thus a form of social solidarity, a legal space founded on fundamental freedoms and welfare rights, a pragmatic humanitarianism, is the best way to promote human rather than "homeland security".[119]

[117] J. Pirjola, "European asylum policy-inclusions and exclusions under the surface of universal human rights languages", *European Journal of Migration and Law*, 11(4), 2009, 347.

[118] J. Huysmans, "Minding exceptions: The politics of insecurity and liberal democracy", *Contemporary Political Theory*, 3(3), 2004, 321–41.

[119] Although the concept of human security may be a useful rhetorical flourish it may be problematic for asylum and refugee policy. See A. Hammerstad, "The Securitzation of Forced Migration and its Impact on the International Refugee Regime", ISA, 50th Annual Convention, New York, 16 Feb. 2009.