Chapter 10

External Dimension*

1. Introduction

Ever since the Tampere Conclusions were adopted by the European Council in 1999, the Area of Freedom, Security and Justice that the Union is mandated to “maintain and develop”, “with full respect for fundamental rights”, is supposed to remain accessible to “those whose circumstances lead them justifiably to seek access to our territory”. The Heads of State and Government agreed on that occasion that “[t]he aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments …”. The Stockholm Programme, ten years later, has corroborated this approach, setting out that “[p]eople in need of protection must be ensured access to legally safe and efficient asylum procedures”. At the same time, “the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes” remains a top priority. A balance is, hence, supposed to be struck, so that “the necessary strengthening of European border controls [does] not prevent access to protection systems by those people entitled to benefit under them”.

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2 Art. 3(2) TEU.
4 Tampere Conclusions, para. 3.
5 Tampere Conclusions, para. 4.
7 Tampere Conclusions, para. 3.
The reality remains, however, that, while the “integrated border management” system of the EU has been adopted and is being thoroughly developed through the Schengen acquis, no channels have been opened, as part of the Common European Asylum System (CEAS), to guarantee legal access for asylum seekers to the EU for the purpose of claiming international protection. This means that asylum seekers enter the territory of the Member States irregularly. Although no official statistics exist, it has, indeed, been estimated that up to 90% of those eventually recognised as beneficiaries of international protection gained access to the EU either with forged or no documents, usually with the help of smugglers and/or falling prey to human trafficking networks. The recast instruments adopted in 2013 during the CEAS second phase, analysed in this volume, have left this situation unchanged. The assumption appears to be that, while Member States may reach beyond their borders to control migration flows and eventually contain and deter irregular entrants, their human rights and refugee protection obligations are limited to the confines of their own territories, so that no extra-territorial duties are owed to those trying the enter the EU to seek asylum.

In this environment of prevailing extra-territorial border controls and contested extra-territorial international protection obligations, the Hague