

THE LEGAL AND PRACTICAL FEASIBILITY OF DISEMBARKATION OPTIONS

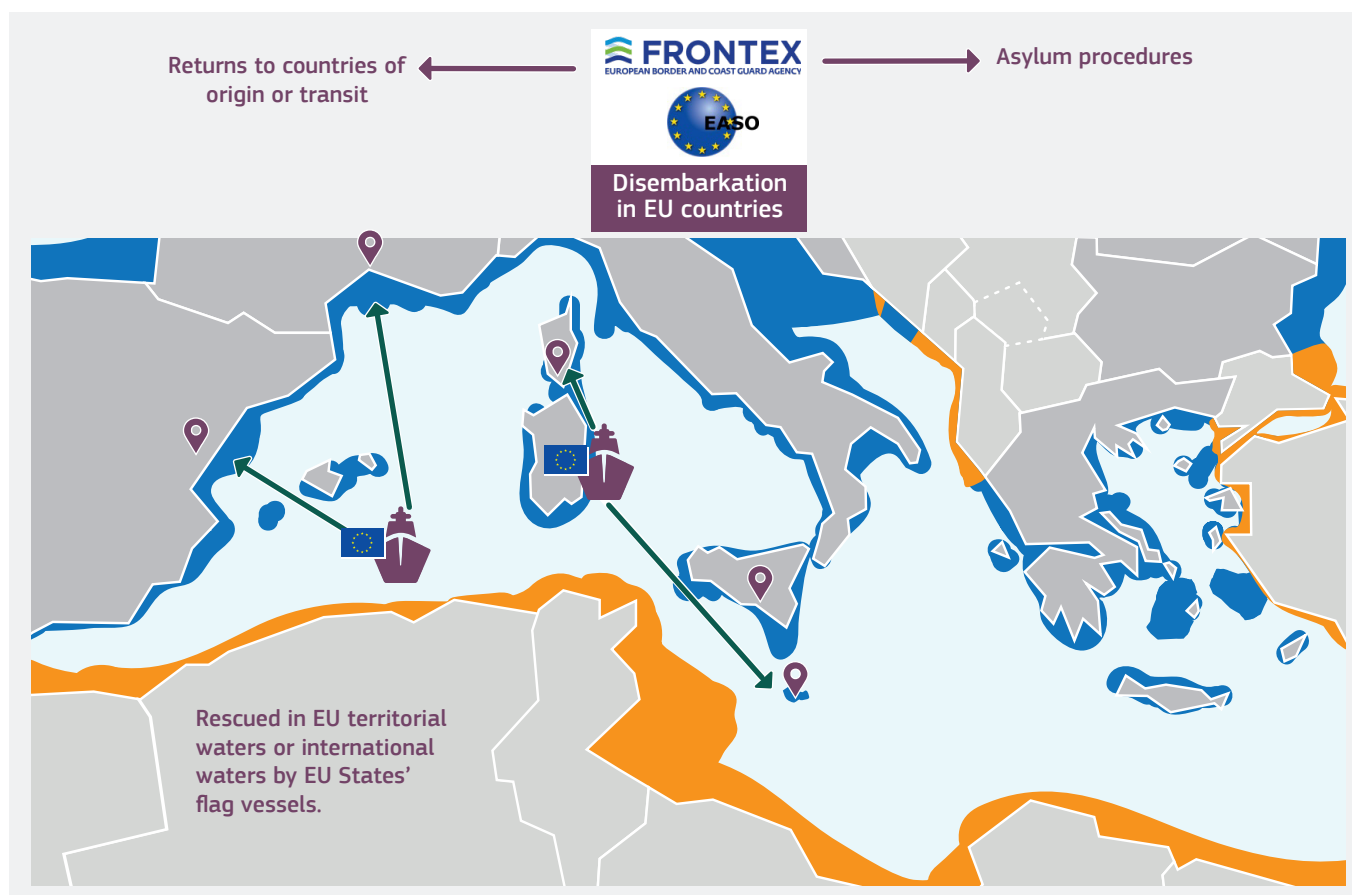
FOLLOW-UP TO THE INFORMAL WORKING
MEETING OF 24 JUNE 2018



This note presents a first assessment of the legal and practical feasibility of the three different scenarios on disembarkation presented at the Informal Working Meeting of 24 June 2018. Under international maritime law, people rescued at sea must be disembarked at a place of safety. International law sets out elements of what a place of safety can be and how it can be designated, without excluding the possibility of having regional arrangements for disembarkation.

SCENARIO 1:

A regional arrangement for disembarkation (and setting up of disembarkation centres) in EU Member States for migrants rescued in the territorial sea of a Member State or by an EU State's flag vessels in international waters



DISCLAIMER: This map is for illustrative purposes only and is NOT indicative of either precise territorial water delimitations or potential disembarkation points or countries.

■ territorial waters in the EU □ international waters ■ territorial waters in third countries

LEGAL FEASIBILITY:

Search and rescue operations carried out in the territorial sea of a Member State engage the responsibility of EU Member States. In particular, rescued migrants would acquire a right to access the asylum procedure. This applies as well in the case that an EU State's flag vessel is involved in search and rescue in international waters and disembarks rescued migrants in EU territory.

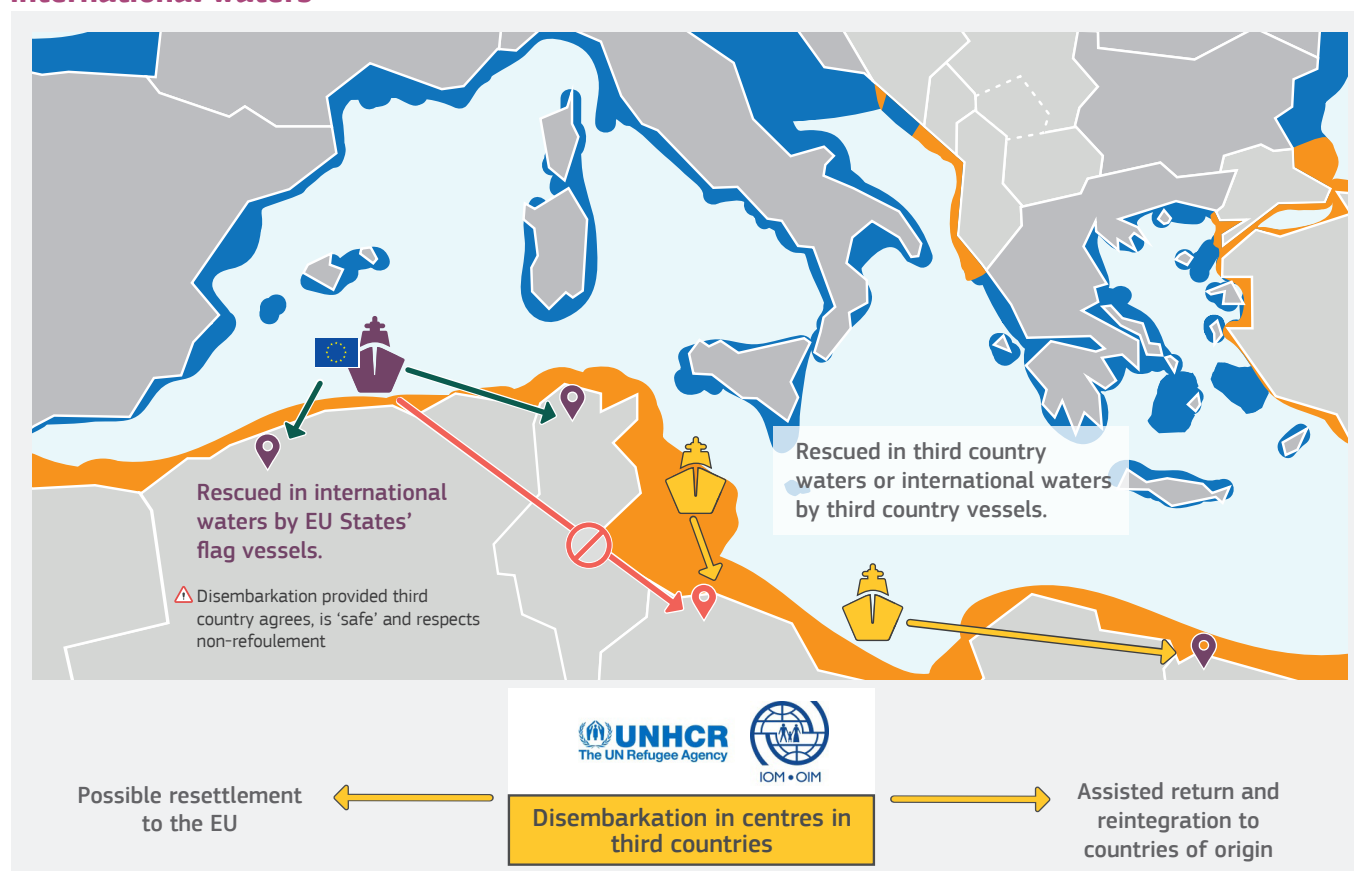
A regional arrangement could function by reinforcing the existing hotspot approach with further coordinated action by the European Border and Coast Guard Agency and the EU Asylum Agency (particularly if the mandates of both bodies are further strengthened). They would work in cooperation with local authorities to facilitate and accelerate the processing of asylum claims and the carrying out of returns. The border procedure could be used to facilitate processing at the disembarkation points: Union law on asylum provides for simplified procedures enabling a swift handling of asylum applications at the external borders under certain conditions in order to decide on the inadmissibility of an application or the substance in cases likely to be manifestly unfounded, with possibilities of detention where justified.

PRACTICAL FEASIBILITY:

- to further streamline procedures at the border, the border procedure (under the Asylum Procedures Regulation) may need to be made mandatory in certain cases;
- this would require reinforcing the «hotspot» approach, notably by:
 - increasing reception/detention capacity at the external borders;
 - coordinated action by the European Border and Coast Guard Agency and the EU Asylum Agency in cooperation with local authorities to ensure identification, registration, screening, fingerprinting, to facilitate processing of asylum claims and returns;
- as part of the regional arrangement among Member States, a solution will need to be found for those with well-founded claims/beneficiaries of international protection that will remain in the Union. At the same time, those not in need of protection will have to be swiftly returned to the relevant third countries on the basis of streamlined return procedures.

SCENARIO 2:

A regional arrangement for disembarkation (and setting up of disembarkation centres) in third countries for migrants rescued in the territorial sea of a third country or by vessels in international waters



DISCLAIMER: This map is for illustrative purposes only and is NOT indicative of either precise territorial water delimitations or potential disembarkation points or countries.

■ territorial waters in the EU □ international waters ■ territorial waters in third countries

LEGAL FEASIBILITY:

Cooperation on disembarkation in a third country is possible if the search and rescue is carried out in the territorial sea of that country by its coast guard or by other third country vessels. If the search and rescue occurs in international waters and involves an EU State's flag vessel (including in the context of European Border and Coast Guard sea operations) disembarkation can still take place in a third country, provided that the principle of *non-refoulement* is respected.

A regional arrangement could function by identifying partner countries and working with the UNHCR and IOM to ensure those disembarked can be channelled to existing EU resettlement schemes if they are in need of protection or into the return and reintegration programmes run by the IOM if they are not.

Under this scenario, individuals rescued would not acquire the right to access the asylum procedure in an EU Member State.

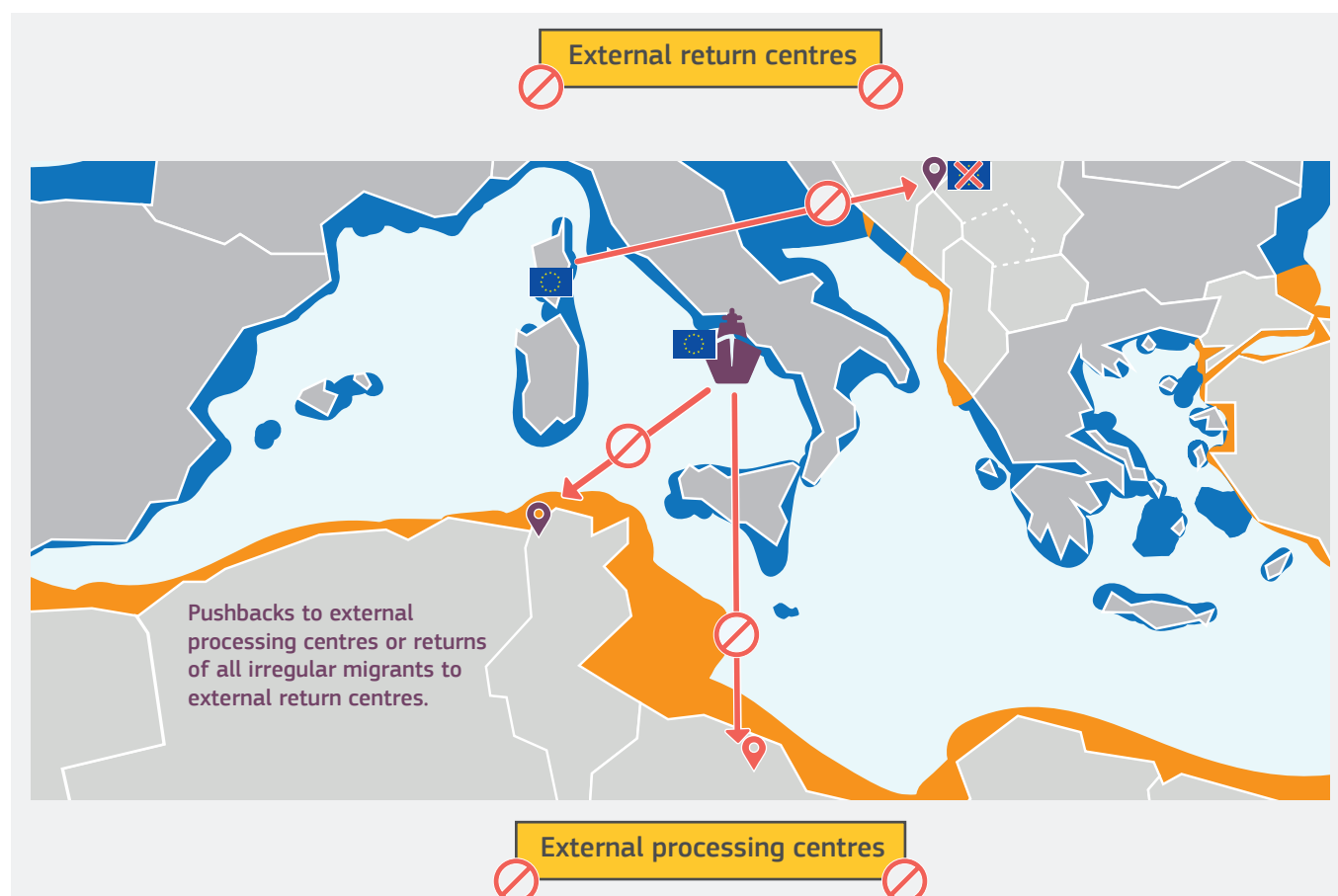
PRACTICAL FEASIBILITY:

- no need for changes in EU legislation; however swift adoption of the EU Resettlement Framework proposed by the Commission in March 2016 (as one of the 7 asylum reform proposals which will establish the first-ever permanent EU-wide resettlement framework and set 2 year plans targeting commonly agreed priority regions) would be useful as flanking measure. Increased resettlement efforts (building on the current >50,000 pledged places) and targeting them to respond to the needs of the disembarkation centres would in any event be required;
- need to identify partner third countries; secure the agreement of the third country by offering financial and other possible incentives;
- need to make sure that disembarkation centres are set up under the auspices of the UNHCR;
- need to facilitate voluntary return to countries of origin in close cooperation with the IOM;
- need to invest in further developing the capacity of third-countries' coast guards.

To be underlined that scenarios 1 and 2 are not mutually exclusive. On the contrary, they could be mutually supportive.

SCENARIO 3:

External processing of asylum applications and/or the return procedure in a third country



DISCLAIMER: This map is for illustrative purposes only and is NOT indicative of either precise territorial water delimitations or potential disembarkation points or countries.

■ territorial waters in the EU □ international waters ■ territorial waters in third countries

EXTERNAL PROCESSING OF EU ASYLUM APPLICATIONS

Under this scenario, all irregular arrivals (whether they make an application for international protection in EU territory or not) would be sent directly to the territory of a third country without any form of processing in the territory of the EU Member States and instead offered the possibility to apply for asylum from there.

LEGAL AND PRACTICAL FEASIBILITY:

- Sending back an asylum seeker to a third country without processing their asylum claim constitutes refoulement and is not permitted under EU and international law.
- When in EU territory (or at the EU's external borders) a person fleeing war or persecution has the right to claim asylum. When outside the EU, there is no such right. The only means of getting refugee status from outside the EU is therefore resettlement. To allow individuals to «apply» for asylum outside the EU would require the extra-territorial application of EU law which is currently neither possible nor desirable.
- The only way this could function would be by establishing an EU asylum system and EU courts to process claims accompanied by an EU-level appeal structure. There would then still have to be a system for distributing asylum seekers among Member States. In addition to requiring a major institutional transformation, substantial resources would need to be allocated to these new EU-asylum courts and bodies.

EXTERNALLY-LOCATED RETURN CENTRES

Under this scenario, irregular migrants – not necessarily rescued at sea – who could not be returned to their country of origin after their asylum claim was rejected in an EU Member State (because of lack of cooperation of the country of origin concerned), would, instead, be sent to a centre in a third country.

LEGAL AND PRACTICAL FEASIBILITY:

- It is not possible under EU law on returns to send someone, against their will, to a country they do not originate from or have not transited through.
- An agreement with a third country would be a necessary pre-condition for implementing this scenario, as is a revision of EU rules. The risk of infringing the principle of non-refoulement is high.

Scenario three presents significant legal and practical challenges. The risk of infringing the principle of non-refoulement is high. It is questionable whether this scenario is in line with EU values.