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Offshore processing of asylum applications

Out of sight, out of mind?

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The sharing of responsibility for processing asylum applications among EU member states has been a key source of controversy in the 2015-16 European refugee humanitarian crisis. Despite the main EU responses to tackle the crisis, this controversy remains by and large unresolved.

Implementation of the Council Decisions¹ on relocation of 160,000 asylum seekers from Italy and Greece to other EU member states adopted in summer 2015 is still woefully behind schedule. As of [6 December 2016](#), only 1,950 asylum seekers have been relocated from Italy and 6,212 from Greece. If this track record is anything to go by, enthusiasm on the part of the member states to take responsibility for arriving asylum seekers appears to be rather low.

The Council also adopted Conclusions in July 2015, calling on member states to resettle 20,000 Syrians stranded in Turkey (that is, to accept and facilitate their admission as refugees). This resettlement plan was broadened in September 2016 to include resettlement of Syrian refugees from Turkey as part of the relocation (intra-EU movement) quota assigned to each member state (except Greece and Italy). According to the Commission, as of 6 December 2016, 13,887 refugees had been resettled.

According to EUROSTAT,² in the third quarter of 2016, the member states took 177,735 positive decisions to grant international protection to asylum seekers who had arrived in their states. It should come as no surprise to experts that the best outcome for a refugee seeking international protection is to arrive in an EU member state (even if irregularly) and seek asylum. Anyone who waits in a refugee camp in Turkey for resettlement will be there for the long term.

This disparity between relocation within the EU, resettlement from outside the EU and outcomes of spontaneous applications has attracted the interest of the Austrian authorities. Austria's Defence Minister Hans Peter Doskozil has recently joined the discussion on asylum seekers and [recommended](#) the 'off-shoring of responsibility' over refugees by setting up EU centres in third countries for processing

¹ Available at <http://data.consilium.europa.eu/doc/document/ST-12098-2015-INIT/en/pdf> and <http://data.consilium.europa.eu/doc/document/ST-11131-2015-INIT/en/pdf>

² See http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_by_outcome_and_recognition_rates_3rd_quarter_2016.png.

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asylum applications, with entry only taking place after the positive asylum decision, and [‘entry caps’](#) for each member state.

The proposal seems to be a mixture of resettlement – where asylum seekers are chosen by member states to be brought from a third country to their state and granted international protection – and a bar on granting spontaneous applications by asylum seekers who have managed (successfully) to get to EU territory.

The idea of establishing reception centres in third countries, however, is not new. It was first suggested, unsuccessfully, by Tony Blair in 2003.³ It was then taken over by the former German Interior Minister Otto Schily in 2005,⁴ who proposed to establish asylum centres in North Africa, and more recently [Italy](#). The original 2003 Blair proposal was that any third-country national who sought asylum in the EU would be returned immediately to a centre in a third country where his or her application would be considered.

This is not far from the [Australian](#) model under which any asylum seeker arriving by boat in that country is automatically sent to a third country (either Nauru or Papua New Guinea) with which Australia has agreements for this purpose. However, asylum seekers are held, both in Nauru and Papua New Guinea, in detention centres paid for by the Australian authorities and run for them by private companies. The conditions in these centres are so abysmal that there has been international outcry (including by the United Nations High Commissioner for Refugees) over the conditions.⁵

The EU has not moved forward on any of these proposals, as of now. A fundamental reason why these past proposals have not been successful relate to the following questions: can the offshoring of responsibility over asylum seekers be consistent with the member states’ human rights obligations? What challenges will these proposals face and can they be seen as an alternative to irregular entry of asylum seekers into the Union?

Since its inception the idea of establishing ‘offshore applications centres’ has received mixed reactions and a large degree of scepticism when it comes to legality and legitimacy.⁶ There is substantial legal opinion that offshoring asylum procedures is not compatible with the member states’ obligations under the UN convention relating to the status of refugees 1951 and its 1967 Protocol and that the inevitable deterioration of conditions in centres where such offshoring may take place is contrary to the member states’ human rights obligations.

As previous critiques have emphasised, this proposal would face “insurmountable legal and practical problems”.⁷ The first question would be who or which authority would be responsible to carry out the

³ UK Home Office, A New Vision for Refugees, referred to in “Safe havens plan to slash asylum numbers”, *The Guardian*, 5 February 2003.

⁴ German Interior Ministry, Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration – Überlegungen des Bundesministers des Innern zur Einrichtung einer EU-Aufnahmeeinrichtung in Nordafrika 9 September 2005.

⁵ <http://www.refworld.org/country,,UNHCR,,NRU,,563860c54,0.html>; <http://www.bbc.co.uk/news/world-asia-28189608>.

⁶ 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, pp. 303-341.

⁷ S. Peers, E. Guild, D. Acosta, K. Groenendijk and V. Moreno Lax (eds), *EU Immigration and Asylum Law*, 2nd Ed, Vol. 2, Brill, 2012, and P. Bruycker (2010), “Setting Up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system”, Study for the European Parliament,

assessment or processing in these third countries? EU member state? EU Delegations? EU Agencies like the [European Asylum Support Office \(EASO\)](#)? In the current stage of European integration in the domain of asylum the answer is not straightforward. At present it is for EU member states' authorities, and not the EU, to assess asylum applications.

True, EU member states may be supported by EASO in the operation of their asylum systems. This Agency has already played a very active role in the running of the EU Hotspot and temporary relocation model in Greece. This has even included conducting admissibility and eligibility procedures together with the Greek authorities. A key issue for consideration would be if the [new regulation amending EASO](#) (called 'EU asylum agency') which is currently in inter-institutional negotiations could envisage a new power for the re-vamped EU asylum Agency to process asylum applications.

A closely related issue is the one of 'jurisdiction' and legal responsibility for actions and decision taken abroad. A specificity of the EU in comparison to other world regions, is that in the European legal system 'territory' is not the only connecting factor in determining responsibility and jurisdiction at times of assessing member states and EU institution and agencies actions affecting people seeking international protection. As the European Court of Human Rights in Strasbourg has clearly concluded,⁸ the notion of jurisdiction and liability in cases of violations of the rights of asylum seekers (in particular the principle of *non-refoulement*) does not end at EU's borders.⁹

Wherever that 'processing' goes, including in third countries territory, so it does the obligation to comply with the rule of law and fundamental human rights of people seeking international protection. Key questions which remain unresolved regarding offshoring proposals would be: How would the legal responsibility of whoever would carry it out be dealt with in light of ECtHR ruling determining 'jurisdiction' and in compliance with the EU Charter and EU asylum standards? What about 'effective remedies' abroad of applicants whose applications are rejected in the first instance? Would the Common European Asylum System rules on qualification and procedures also apply to these offshore centre? If not, would the whole project would be unlawful as an attempt to get around EU rules on the consideration of asylum applications?

If the purpose of extraterritorial processing is to shift responsibility for asylum seekers elsewhere, then this would be directly inconsistent with the member states' duties to provide asylum to refugees and to act in good faith in doing so. Indeed, and perhaps differently from countries like Australia, the EU and its member states are subject to the European Convention of Human Rights (ECHR). Jurisdiction extends beyond territory. It applies wherever any EU and

Directorate-General Internal Policies, Policy Department for Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 425.622 (Brussels), Part 3, Section 6.

⁸ ECtHR 23 February 2012, Judgment, *Hirsi Jamaa and others v. Italy*, Application no. 27765/09.

⁹ Similar legal questions are currently being considered by the ECtHR in another case against Italy called *Khlaifia and Others v. Italy* (<http://www.statewatch.org/news/2016/jun/echr-Grand-Chamber-hearing-Khlaifia-and-Others-v-%20Italy.pdf>).

member state actors exercise control over actions or inactions, including the processing of asylum applications, wherever this may be.¹⁰

Another challenge would be how to duly ensure that human rights would be respected in third countries, which brings us back to the jurisdiction challenge. This has been a key issue during the discussions leading to the adoption of the [European Border and Coast Guard \(EBCG Regulation\)](#), which envisages a stronger mandate to Frontex (EU External Borders Agency) in cooperating with non-EU countries as regards expulsions of irregular immigrants.

The EBCG Regulation expressly says that whatever the EU EBCG and member states do abroad, they will be expected to comply with European law at all times, including fundamental rights and the *non-refoulement* principle. A similar expectation would apply in any EU model on extraterritorial processing of asylum applications. Yet, it constitutes one of the biggest challenges.¹¹ What would happen with those asylum seekers whose applications would be rejected? Under whose reception conditions would they be treated? Are there any other legal paths/channels to stay and/or enter the EU for economic purposes? Would there be any monitoring system checking compliance with EU standards?

Other related issues of relevance in relation to third-countries' cooperation on asylum would include: Where would the asylum application be actually processed? They could not be processed in countries of origin, as a refugee only becomes a refugee in accordance with international law when he or she is outside his or her country of origin. Also, for practical reasons, refugees cannot apply for asylum abroad while they are in their state as they are at risk of persecution and normally are in flight from the authorities of their country. As soon as an asylum seeker is in a country of transit, the EU has a knee-jerk reaction to first consider whether this is a 'safe third country' so there is no obligation on EU member states to consider asylum applications from anyone in that country. This is the basis of the EU-Turkey deal where notwithstanding the [evidence](#) to the contrary, the EU determinedly holds that Turkey is a safe third country for Syrian refugees.¹²

What would be the interest/incentives for third countries to set up these centres in their territories? As the Australia example has neatly shown, third countries that have accepted this role have sought to wash their hands of the whole business. Yet, this is not possible even in the Pacific – international organisations are holding Nauru and Papua New Guinea to account for the gross violations of human rights that are being committed in the Australian-run asylum centres hosted on their territory. Asylum centres are expensive and if they are open (i.e. not housed in detention centres), there is little incentive for asylum seekers to stay if it looks like their applications will be rejected. What happens to asylum seekers whose applications are rejected – are they the responsibility of the state where the centre is housed or of the EU? Would it be for the EU to expel them to their countries of origin? If not, how successful are any negotiations likely to be with countries around the EU? It would require a very high and stable degree of cooperation and reliability/sustainability in external relations. If relations do not work this way, this model could backfire politically on the EU and potentially unleash another 'humanitarian crisis' in the EU.

¹⁰ E. Guild, C. Costello, M. Garlick and V. Moreno-Lax, "Enhancing the Common European Asylum System and Alternatives to Dublin", CEPS Paper in Liberty and Security in Europe, CEPS, Brussels, 2015.

¹¹ M. Garlick, "The EU discussions on extraterritorial processing: solution or conundrum?", *International Journal of Refugee Law* 18.3-4, 2006, pp. 601-629.

¹² See <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>.

There are additional practical challenges that would need to be covered. For instance, after being recognised as a refugee, where the person would go or be sent to? To which EU member state? Here also the dilemma of quotas would enter the discussion. The lack of success of the EU's temporary relocation programme from Greece and Italy indicates that out of sight and out of mind is the order of the day where asylum seekers are not actually housed on the territory of the host member state.

The remaining question therefore is what should the EU do? The challenges above call for the EU to remain cautious and wary before thinking of advancing or 'revisiting' offshore processing of asylum applications. At the UN Declaration of New York this past September 2016, it was agreed that states should expand the number and range of legal pathways for refugees to be admitted and resettled. Any discussion related to third-country cooperation in the asylum domain should therefore go hand-in-hand with feasible and effective resettlement¹³ schemes that are in line with this goal.

¹³ According to the [European Migration Network](#) (EMN), resettlement in the EU context means "the transfer, on a request from the UNHCR and based on their need for international protection, of a third-country national or stateless person, from a third country to a member state, where they are permitted to reside with one of the following statuses: (i) refugee status within the meaning of Art. 2(d) of Directive 2011/95/EU; or (ii) a status which offers the same rights and benefits under national and EU law as refugee status".