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EU Asylum Offshoring: An Analysis of the Limits Imposed by European Human Rights Standards

Can the European Union copy Australia in the offshoring of the asylum function?

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Abstract

In this paper I analyse the externalization of asylum by means of the establishment of processing centres outside the EU from a comparative legal approach. In light of the EU's recent steps towards offshoring, I study the limits of this practice within the European asylum acquis. Looking at Australia as a reference, given its existing offshoring program, I analyse the European asylum law, more precisely the rulings of the ECtHR, which have shaped the protection of refugees and asylum seekers in Europe. This comparison lays down the limits the EU will find in their aim to replicate the Australian offshoring, which are mainly the notion of jurisdiction, the principle of non-*refoulement*, and law surrounding detention.

Keywords

Externalization, offshoring, asylum, refugees, EU

Author's biographical note

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ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
MoU	Memorandum of Understanding
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
OPFRA	Office Français de Protection des Réfugiés et Apatrides
PNG	Papua New Guinea
UK	United Kingdom
UNHCR	United Nations High Commissioner for the Refugees

Introduction

Over 180,000 migrants and refugees arrived in the EU by sea in 2016, marking the third consecutive year in which arrivals exceeded the 100,000, according to the Frontex Risk Analysis Report. The so-called refugee crisis sprung mainly from the Syrian war, which pushed larger numbers of people into engaging in migratory routes (Arenas-Hidalgo, 2016). Unarguably, these routes have proven to be deadly in what is today known as the Mediterranean tragedy: over 15.000 migrants have lost their lives in the Mediterranean Sea on their way to Europe since 2014 (2015 resulting as the deadliest year with 5,143 loses).

Those fleeing from persecution, war or hunger have historically envisioned Europe as the panacea; the search for the possibility to obtain international protection, asylum, or simply the chance for a new life. However, upon the increase of irregular arrivals to its shores, the EU has looked at ways to deter the influx of migrants and asylum seekers, often invoking national security. The externalization of borders, implemented by the EU for decades, aims at hampering and discouraging the migration plans of those coming mainly from Africa and the Middle East. It has encompassed multiple national and community-driven policies intended to move legal obligations regarding third country nationals far from EU's perimeter. Notwithstanding, among all policies, there is one which could potentially become the master-key or 'culminating idea' (Den Heijer, 2011) in 2018: the offshoring of asylum by the establishment of processing centres in third countries outside the EU.

In the past, several EU Member States have attempted to push this idea forward and generate debate before the European Council. In recent times, these initiatives have seemed to receive greater support, particularly under the rhetoric of the need to prevent deaths at sea. In parallel, EU Members have been looking at Australia through an analytical lens since the application of its "Pacific Solution": an immigration policy in force since 2001 by which all asylum seekers arriving by boat to the Australian coasts are automatically transferred to the Pacific islands of Papua New Guinea (PNG) and Nauru where their asylum applications are allegedly processed. Despite the on-going flagrant violations of human rights denounced by the UNHCR and other relevant NGO's in the field, EU Members have not only failed to condemn this policy, but some have even referred to Australia as a model to follow regarding its externalization of the asylum function. As The Guardian recently reported 'from France to Holland and Denmark, politicians point to the Australian model as the solution for Europe's

refugee crisis (…) the real attraction, especially since the massive refugee influx of 2015, is offshoring' (Polakow-Suransky, 2018).

Australia and the EU share relevant features: they are historical recipients of migration, with deep-rooted protection of refugees; they are signatories of the 1951 Refugee Convention (Geneva Convention) and its 1967 Protocol; they have maritime borders which implies that most irregular arrivals are made by the sea; and both have been very focused on border control in their last decades. However, an important difference is that EU policies are constrained by the jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) – in so far as these policies must be applied by Member States, and acknowledging the fact that the EU has not acquired all competencies in the asylum area. The ECtHR has extended the personal and material scope of the Geneva Convention and has granted the principle of *non-refoulement* an absolute character, in as much as it meets the standards protected by the European Convention on the Protection of Human Rights and Fundamental Freedoms – hereinafter, the ECHR. Unarguably, the developed case-law shows that the ECtHR is nowadays one of the most important juridical institutions for the protection of asylum seekers throughout Europe (Bacaian, 2011). Thus, its rulings on the legality and legitimacy of the asylum processing centres offshore could ultimately shape the future of the asylum in Europe.

The existence of the Australian case, leader in the matter, along with the intensity of the political discourse towards the implementation of offshore asylum centres are sufficient reasons to consider that this reality could be closer than ever. Consequently, it is our aim to present the legal constraints the EU would encounter in trying to do this.

Research question

Hence, this paper is structured around the following **research question:** what are the limits imposed by the European standards of human rights EU Member States will find in their attempt to replicate Australia in the offshoring of the asylum function?

By answering this question, we aim at providing an overview of the key norms and rulings the EU has developed regarding the protection of refugees and asylum seekers. The asylum acquis is not harmonized in the EU. Member States hold most competencies regarding their

border control and migration laws. Despite aims to develop a more comprehensive European Asylum System, Member State decisions finally prevail. Regardless, their policies are bound to the rulings of the European juridical bodies, as it has been briefly introduced, and it is the focus of this study to highlight which European standards of human rights can limit the asylum function of States.

Choice of subject

The EU has historically lead the defence of human rights and fundamental freedoms on the foundations of the rule of law, democracy and solidarity. Regarding refugees and people seeking international protection, it has not been any different. However, the safeguard of national security and the management of migration have been priorities in the European Agenda in the last years. The popular uprising in some countries –mainly during the Arab Spring– resulted in unprecedented migration movements which had the EU as a destination. This reverted in unwavering policies, from an increase in border control to the strengthening of bilateral agreements in pursuit of deterring influxes of people. We are unarguably in the era of externalization. The humanitarian values upon which the EU was founded seem not that prevalent when the protection of the *national security* is at stake. The externalization of the asylum function is back in the European forum and it is our aim to assess the possibilities and implications of policies that put the protection of human rights at the service of national sovereignty.

This paper aims at contributing to literature by means of a ground-breaking analysis of the limitations EU migration policies will find in their mission to conclude with the ultimate form of externalization of borders. Although the literature has largely analysed *how the EU is to replicate Australia's case*, *whether that is possible* remains a rather unexplored area.

Methodology

The offshoring of asylum in the EU is approached mainly from a legal perspective. The main argument goes around a comparison with the Australian case so as to answer the research question, pointing at the differences between both cases. Acknowledging that the European offshore centres do not exist (yet), the objective of this paper is to draw the red lines imposed mainly by the European legal standards on human rights before there is a serious

attempt to replicate the Australian case. For the legal analysis, the choice of literature is based on academic works, legal norms and jurisprudence.

Although the legal approach will prevail, an analysis of the politics in the Australian case and the EU, thorough attempts and discourses, has been considered relevant. For the political analysis, we have used a mix of doctrine, reports and press articles.

The ultimate goal is to present how the European asylum acquis has been shaped and defined by the rulings of the European Courts in their interpretation of the EU norms, and, more particular, the ECHR, in order to draw a map of the protection of asylum seekers and refuges which shall ultimately convince the reader of the limits it presents towards the offshoring of asylum outside the EU.

1. The offshoring of the asylum function

1.1 Definition and insights

The externalization phenomena encompass all actions undertaken by Governments to exercise their migration control outside its borders (Abrisketa Uriarte, 2017). Among the externalization of borders we can find policies as diverse as: visa requirements and controls at embassies, the militarization of border control, bilateral agreements with third countries and detention centres in transit areas or third countries. All these policies have been eventually implemented by the EU. Current examples are as tangible as the EU-Turkey deal, ultimate representative of the third country-agreements; or the Spanish southern border at the African enclaves of Ceuta and Melilla, which exemplify the militarization of border control and the insurmountable character of *EU fortress.*

Amidst the externalization of borders policies, there is one strategy which is particularly interesting for the impact it has on the study of State responsibility within international law: a modality known as *neo-refoulement*, defined as a:

> 'geographically based strategy of preventing the possibility of asylum through a new form of forced return different from non-*refoulement*, the strictly legal term that prohibits a signatory state from forcibly repatriating a refugee against its commitment codified in Article 33 of the 1951 Refugee Convention.' (Hyndmann and Mountz, 2008)

In particular, this paper focuses in the offshoring of the asylum function, also known as the externalization of protection (Betts, 2004), through the establishment of asylum processing centres abroad or in transit areas. This measurement falls into the category of *neo-refoulement*, although it is narrowed to the practices by which 'OECD countries aim at de-territorializing the provision of protection to refugees in such a way that temporary protection and the processing of asylum claims take place outside of the given nation-state' (Betts, 2004). Under the umbrella of international law – precisely the Geneva Convention– these centres subject their legality to art. 33.1, which narrowly analysed enshrines the concept of the "safe third country": the fact that only returning refugees to a country where there is risk of suffering threats against their lives and freedom is considered unlawful, implicitly allows States to send refugees back to transit countries or to "safe third countries". By the same token, establishing processing centres offshore could be subjected to the legality of the Geneva Convention in so far as it does not put refugees and asylum-seekers at risk. However, the functioning and the legal implications derived from these centres trigger other juridical questions and they will be explored in the following sections.

1.2. Offshore asylum processing centres

As explained above, under this policy, refugees and asylum-seekers are transferred to centres located outside the territorial jurisdiction of States upon which the decision of granting asylum is pending.

These facilities are designed and built by the State interested in deriving the processing of asylum, in agreement with the country where they are set up and run. As it will be later analysed, in the Australian case this agreement is materialized in several Memorandums of Understanding (MoU) which deal with the transfer, assessment and settlement in Papua New Guinea and Nauru of refugees and asylum-seekers. For the purpose of this study, this paper uses the case of PNG, more particularly after the MoU of 2013, for being the one which offers a more exhaustive analysis. This agreement, six pages long, establishes the objectives, guiding principles and operations involved in the *transfer of competences*. As it happens with other third-country agreements of this sort –the EU-Turkey deal serving as an example– this text elicits only the minimum standards before its conclusion, while more technical questions are established *off the record.*

The lack of transparency surrounding these centres obstructs the study of their functioning. From what we can extract from existing examples, these centres are detention facilities where asylum-seekers remain until they can go through an interview which will determine their status and their eligibility for resettlement. Those who are recognised as genuine refugees or otherwise eligible for international protection would theoretically be resettled in their first country of destination. Those who are not found eligible would have to return to their countries.

Finally, the implication of private companies in the construction and running of the centres exemplifies the *denacionalization (*Spijkerboer, 2017) feature, described as one of the three developments of the Europeanization era. Offshore processing centres are technically run by private companies which provide the necessary services for its functioning. Notwithstanding, the legally attributable actions of private companies running the centres can determine the responsibility States incur when breaches of human rights take place.

2. The Australian case

As mentioned above, Australia approved the Pacific Solution in the year 2001. It was a government policy intended to dodge responsibilities under international law regarding asylum-seekers. It came to light after the Tampa Affair and it followed the rhetoric "out of sight, out of mind". The Tampa Affair arose in August 2001, when the Australian authorities denied the entry to Australian waters of the Norwegian ship MV Tampa, which was carrying 433 refugees, mainly from Afghanistan. Legally speaking, it triggered the so-known Tampa Case (Ruddock v Vadarlis). Politically, it set the grounds for the creation of unwavering migration control policies, since it was believed that 'the arrival of the Tampa coupled with the terrorist attack on the US just weeks later resulted in a conflation of the threat of terrorism with the arrival and presence of asylum seekers' (McKay, 2013).

According to the Pacific Solution, all asylum-seekers arrived to the Australian coasts irregularly would automatically be sent to the offshore asylum processing centres on the islands of Nauru and Papua New Guinea. There, they would be granted a sort of visa called

"Special Purpose Visa" which would guarantee a legal stay in the country while their applications were in progress. The Pacific Solution was in force during the years 2001 to 2007, until the arrival to power of the Labour party, which closed the offshore centres in 2008 following a campaign promise. However, in the year 2012, upon the increase of irregular arrivals to the Australian coasts, the PNG centre in Manus Island was reopened in the after the conclusion of the MoUs mentioned above. A few months later, Kevin Rudd, the Minister of Immigration, declared that no refugee would ever be resettled in Australia, arguing that those recognised as genuine refugees would be able to stay in PNG.

Until the year 2016, the centre hosted hundreds of asylum-seekers. Despite eventual tension between internees and locals, the agreement seemed to work well, thanks to the support of the Australian masses and the passivity of the international community. However, on the 16th April 2016, clashes between PNG authorities and internees concluded with several injured. Just 12 days later, the Supreme Court of PNG ruled that the centre in Manus Island was illegal and anti-constitutional and ordered Australia to close it and resettle the 854 interns up to that date – half of which were genuine refugees. In response, the Australian Government declared the closing of the centre on the 17th of August. From that day onwards, the *genuine refugees* remaining were offered three possibilities: moving to a new centre set up ad hoc in the island of Lorengau –reported by several NGO's as not being ready for their reception–; returning to their countries of origin –ignoring the risks it entails– or searching for resettlement wherever they may have a residence permit. Those who were not considered genuine refugees would have to return to their countries of origin or resettle in PNG at their own risk.

At that time, the conditions for the refugees and asylum-seekers in PNG were reported as unsustainable. The violent climate and the flagrant breaches of human rights which were taken place in the community were largely denounced by human rights organizations. Meanwhile the Australian Government stayed oblivious to the situation, ignoring the vulnerability of asylum-seekers who had been exposed to detention for over 4 years and the claims made by NGOs to access the centres in order to provide medical care.

3. European discourses towards offshoring: 15 years of discourses [1]

3.1. The first voices on offshoring

Within policy debased in the European Union, offshoring can be traced back to the year 2003. The UK took the lead with what was widely known as "UK Proposals" for "transit processing centres" and "regional processing zones" (Betts, 2004). It followed the Australian model and it proposed offshore centres which would be managed by the IOM. These facilities would serve the *filtering* purpose of 'screen applicants from the controversial "white list" of States suspected of having "unfounded claims" already detained and fast-tracked' (Betts, 2004) in reception centres. This proposal found the opposition of the European Commission, most Member States –especially France and Sweden– and many human rights organizations (Morgades, 2010). However, it rose up the debate and even the implication of the UNHCR, which rushed to decouple the "Convention Plus" from the UK's plans. The year after, the German Interior Minister Otto Schily suggested "creating EU-funded 'safe zones' in North Africa", whose proposal was developed in the paper 'Effective protection for refugees: fighting effectively against illegal migration' (Léonard and Kaunert, 2016).

In 2014, the European Commission in a communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the regions wrote 'An open and secure Europe: making it happen. A feasibility study on possible joint processing of protection claims outside the EU, without prejudice to the existing right of access to asylum procedures in the EU, could be initiated'. As reported by The Guardian, Dimitris Avramopoulos, the commissioner of home affairs, said Brussels 'wanted to use EU offices and embassies in third "countries of origin" to process applications for asylum and refugee status before the migrants reach Europe'. The aim, similar to the previous initiatives, would allegedly be to stop the entry of irregular migrants and filter those eligible for international protection.

Unarguably, since 2015 discourses towards offshoring asylum are gaining power: European Member States are taking profit of the climate surged during the refugee crisis as an opportunity to follow Australia's steps. Only a few weeks after the world was moved by the images of the corpse of Alan Kurdi, Ukip's leader Nigel Farange stated 'if the European

[1] This section is based on a former paper titled "Keeping asylum-derived responsibilities outside Europe Fortress" written for the subject Geopolitics of the mobility in the Mediterranean, with Professor L. Gabrielli.

Union had the right policy, people would know they would not be accepted by coming across the water, just as the Australians dealt with this problem.' (Polakow-Suransky, 2018). In the same line, Geert Wilders, the far-right Dutch Congressman declared 'if you don't want them to come, you should not treat them all that well, which is what the Australians do' (Polakow-Suransky, 2018). And finally, Hungarian Foreign Minister Peter Szijjarto declared 'we want to process migrants at offshore centres like Australia does' (Grady, Walt, Cook and Lewis, 2016) in an exclusive interview at U.N. headquarters in New York. As the other politicians, the latter referred to the Australian example as something which seemed 'to be working well'.

Through this brief overview along the different initiatives held by Member States in the last decades, we can see how the offshoring of asylum is not a new rhetoric for the EU. The UK proposal did not find support back in 2003, but the political climate at this moment could be more favourable.

3.2. The latest voices on offshoring

In May 2015, the European Agenda on Migration was redefined by a 'Communication from the Commission to the European Parliament, the Council, The European and Economic and Social Committee and the Committee of the Regions' with the main objective of giving an immediate response to the Mediterranean tragedy. Cooperation with third countries was enshrined in the Agenda in the section 'Working in partnership with third countries to tackle migration upstream'. Among the presented actions, there was one which touched upon the idea of offshoring: the reference to asylum processing found in the wording "resettlement opportunities for those in need".

In August the same year, French President Emmanuel Macron invited mandatories from Libya, Niger, Chad, Italy, Germany and Spain to Paris to discuss how to deter the flow of irregular migrants and refugees. According to the journal The Conversation 'the leaders explored the possibility of establishing processing facilities in North Africa to identify refugees and turn back anyone who does not qualify for resettlement'. Two months later, Macron declared that his plan of setting up asylum processing centres in Niger and Chad was culminating. According to BMigration the measure would be 'a joint effort between the French Office for the Protection of Refugees and Stateless People (OFPRA), the UNHCR, and the Nigerien and Chadian governments' (Bosphorus Migration Studies, 2018). The

French NGO Gisti made echo of these plans in an article titled *Mais qu'est allé faire l'Ofpra au Tchad?/ But what is the OFPRA doing in Chad?*. It described the French Government implications derived from the plans stated in the European Agenda on Migration in the above-mentioned countries, criticising that 'delocalising OFPRA, France is exporting the appearances of asylum procedure, legal remedies and means of defence with lower standards.'[2] Finally, in February 2018, The New York Times set the alarm bells ringing with its article 'At French outpost in African migrant hub, asylum for a select few' where it reported the conclusion of the French asylum processing centre in Niger as the most recent resurface of the externalization of asylum.

Finally, in June 2018, mass media reported the news about an EU summit taking place where EU leaders discussed the "development of the concept of regional disembarkation platforms" in Africa (Rankin and Henley, 2018). Although not much seems to have been done in that line since, it is to be believed that what was once conceived as hot air, could one day become a reality.

4. Can the Australian centres be replicated by the EU?

The Australian case shows how the formula can succeed, at least politically. It requires a mix of a harsh security discourse, claiming the preservation of national borders before an *overwhelming influx of illegal migrants*, and the appearance of compliance with the law. There is no doubt that EU Members can follow Australia's political steps; hence, it is now our aim to analyse the legal obstacles they will find along the way.

4.1.Australian practices: a review of the international law on asylum

The Australian offshore processing centres have become the object of study for many relevant scholars and human rights NGOs as they pose legal questions hard to be resolved with a clear answer. In this study, we will be looking at the three main legal aspects concerning offshoring in order to set the grounds for a final comparative analysis between the

[2] "En délocalisant l'Ofpra, la France exporte les apparences d'une procédure de demande d'asile, voies de recours et moyens de défense en moins". GISTI (2017) 'Mais qu'est allé faire l'Ofpra au Tchad ?'

Australian and the EU potential cases. These are the principle of non-*refoulement*, the notion of State jurisdiction and law surrounding detention.

Firstly, for these centres to comply with the international law, one of the two following hypotheses must be at stake: that they are under Australian jurisdiction (effective control[3]) or that Australia returns migrants to safe third countries complying with the international law.

On the one hand, Australia claims the centres are in no way whatsoever under its jurisdiction. As it has been said before, the MoU with PNG only covers the most superficial parts of the agreement, while the technical aspects are established in private contracts. However, it is publicly stated that Australia bears all the costs derived from the creation and functioning of the centres, in addition to the provision of basic services which is carried out by Australian subcontractors. On these grounds, the Kaldor Centre of Human Rights cited as concrete examples of the attributable conduct 'the policy decision to remove asylum seekers to Nauru or PNG for detention and processing', 'the design, construction and maintenance of each centre', 'responses to requests for equipment, services and supplies' or the 'age determinations of asylum seekers claiming to be minors'. In addition, the latest decision to create new centres in Lorengau and to order the transfer of the asylum-seekers remaining in Manus was solely and entirely Australian, fact that evidences the continuous implication of Australia in the future of the asylum-seekers held in PNG. For all the reasons stated above, Australia has been pointed out for creating a "legal fiction" (Doherty, 2018).

On the other hand, Australia could claim its transfers of asylum-seekers to PNG and Nauru follow the legitimate *refouling* foreseen under the umbrella of the Geneva Convention. According to UNHCR's Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers:

> 'the arrangements involving the transfer of asylum-seekers from one country to another for the purpose of processing their asylum claims must be done (a) to the State where they first sought (or could have sought) asylum; or (b) to other countries with which the asylum-seeker has no previous links.'

Given the geographical position of PNG and Nauru, the former is rather unlikely; so it is then left to believe PNG and Nauru are considered safe third countries. As it has been object

[3] Object of study in section 5.2. 1.

of previous study, at least PNG, does not seem to be a safe country for the existing refugees and asylum-seekers. The climate of hostility due to the coexistence of different ethnicities and nationalities, the presence of vulnerable persons or the violence escalated after the closing of the centre are sufficient reasons to believe so. Only two months after the publication of the abovementioned Guidance Note, the UNHCR reported the situation in the PNG centres and considered that 'the existing arrangements still do not meet the required international protection standards'.

Finally, detention of asylum seekers is generally acceptable under international law when it 'pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case', according to the Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention. In the case of the Australian offshore centres, the issue of detention presents the greatest difficulties. Is Australia detaining asylum-seekers in PNG or is PNG providing a centre for the assessment of asylum applications within its jurisdiction? Are the asylum-seekers actually detained or they are free to leave and resettle in PNG once they are recognised as genuine refugees? What purpose 'detention' serves if the asylum-seekers are deprived of resettlement in Australia and free to move in PNG?

The wording 'detention' in relation to the Australian case has been intentionally avoided through the paper. In fact, recent circumstances in the centre of Manus raised questions of whether these centres are indeed detention facilities or safe havens –upon the belief that they were under Australia's effective control and therefore protected the confined asylum-seekers from external risks–. One way or another, what seems to be a matter of consensus is that these centres breach several universal human rights standards: the right to seek asylum, as we have seen, according to the UNHCR the slow proceeding does not meet the requirements on international protection; the right of security of the person, since the asylum-seekers have been exposed to severe and continuous harm; the protection against detention arbitrariness, since authorities do not proceed to 'an assessment of the individual's particular circumstances'; 'the need for conditions at detention to be humane and dignified', proof of the opposite has been reported above; and the attention to 'special circumstances and needs of particular asylum-seekers' since there is presence of children, women, victims of trauma or torture and homosexuals.

Conclusion

The Australian Government seems to be indifferent to whether refugees and asylum-seekers are exposed to persecution. It does not identify and assess every individual case before the transfer to the centres. It does not analyse if the conditions of the refugees and asylum-seekers in PNG –in detention or at liberty– amount 'to significant harm, including cruel, inhuman or degrading treatment' protected in the Geneva Convention. It does not assume any control over the offshore facilities. And it has no intention to neither grant these people protection nor intervene in their resettlement in a safe place. All of the former provided, it is presumable Australia breaches its *non-refoulement* obligations under the Geneva Convention along with other human right standards. At the light of the facts, Australia does not seem to be in compliance with the human right standards of international law, although two decades after the creation of the offshore centres, there is not much left to say. The analysis of the Australian case was considered necessary, even though it is not by any means exhaustive: it is conceived solely to set the grounds for the legal analysis of the potential asylum processing centres offshore the EU.

4.2. Overview on European Asylum Law: European human right standards

While the Geneva Convention grounded the protection for refugees worldwide –after the changes introduced by its Protocol – the ECHR did not explicitly contain the right to asylum. However, far from staying oblivious to the rights and needs of refugees and asylum seekers, as Mole and Meredith point out, 'the substantial body of jurisprudence that has emerged from the Convention organs between 1989 and 2009 now sets the standards for the rights of asylum seekers all across Europe' (Mole and Meredith, 2010).

The CJEU, as the judicial body of the EU, is the institution in charge of ensuring EU countries and EU institutions 'abide by EU law'. EU Member States send their preliminary rulings to the European Court of Justice (one of the two organs who compose the CJEU) and they remain bound by the interpretations of the Court. Provided that the harmonization of the refugee and asylum law is rather a recent and on-going process in the EU, the majority of cases do not tackle core issues concerning the application of asylum law.

On the contrary, the ECtHR, the Convention organ, has become the main figure in the guarantee of the asylum law in Europe and the protection of the rights of refugees and asylum-seekers. Its rulings on particular articles –mainly art 3, 5, 8 and 13– have unarguably redefined the standards of the European asylum law; hence, it is on these rulings that we will ground the arguments to explore in the following sections.

a) *State Jurisdiction*

To draw the lines regarding the jurisdiction over the centres and the refugees and asylum seekers confined in them is paramount to derive the legal implications States can incur in the offshoring of the asylum function. In other words, the existence of jurisdiction over the offshore centres will trigger State responsibilities under international law. According to the UN High Commissioner for Refugees 'it is generally recognized that a State has jurisdiction, and consequently is bound by international human rights and refugee law, if it has effective de jure and/or de facto control over a territory or over persons'. In European law, State jurisdiction has been developed by the extensive jurisprudence of the ECtHR. The interpretation of art 1 of the ECHR states the notion of jurisdiction 'has developed searching for the balance between the relevance of the territorial dimension of the notion and the need to cover situations of extraterritorial authority enforcement' (Morgades, 2017).

Case Law

The Court examined the question of State jurisdiction in the Case Medvedyev and others v. France in the year 2010. A French naval ship was given instructions to intercept a Cambodian Vessel (the Winner) in international waters, which was presumed to carry drugs, and to detain the crew and take them to France to put them through a criminal proceeding. The applicants 'alleged that they had been arbitrarily deprived of their liberty' claiming that they were not under the jurisdiction of the French Courts, despite the fact that Cambodia had authorised the arrest. The Court found that France assumed jurisdiction 'having exercised full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France', in accordance to art 1 of the ECHR.

The notion of effective control was again explored by the ECtHR in the Case Hirsi Jamaa shortly after. In 2009 over 200 people from Somalia and Eritrea were intercepted at the sea by the Italian authorities and pushed to return to Libya. The ECtHR found that 'the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities' therefore 'the events giving rise to the alleged violations fall within Italy's "jurisdiction" within the meaning of Article 1 of the Convention.' It was a historical case in which the ECtHR confirmed that even outside a State's territorial jurisdiction, the actions undertaken with de iure and/or de facto control by a State can imply a breach of the European Asylum law.

These cases consolidated the ECtHR previous rulings on the matter, establishing for the first time the term 'effective control' linked to the idea of jurisdiction. Although the idea of extraterritorial jurisdiction remained exclusive for specific cases, later on, in the case Loizidou v. Turkey, the Grand Chamber confirmed that 'under Article 1 of the Convention the concept of 'jurisdiction' was not restricted to the national territory of the Contracting States' opening the floor for further State responsibility for extraterritorial actions.

Conclusion

As we have analysed above with the Australian case, the potential EU asylum processing centres *offshore* in third countries would require the explicit statement of their jurisdiction, that is, discerning if a) the centres are under EU's total jurisdiction, adjusted to the domestic laws and in compliance with the EU law and rulings of the ECtHR, or b) they are not under EU control, but are rather based on the "safe third country" notion.

Australia has always manifested its lack of jurisdiction over the offshore centres. It has done so by decoupling all actions regarding the creation and running of the centres and the transfer of refugees and asylum-seekers from its own control. If EU Member States decided to go for option a), they would be creating a sort of 'buffer zone' (Vives, 2016) in which the EU Member's national law would apply offshore. Therefore, any action found to breach human rights could be attributed to the State under whose jurisdiction the centre is.

If, on the contrary, these centres followed the provision of "safe third country" –as Australia seems to be doing–, the EU Member State involved would be constrained by a set of

requirements, provided in the Minimums Directive, for it not to breach the principle of non-*refoulement*.

b) The principle of non-refoulement

The principle of non-*refoulement* is known as the cornerstone of the refugee protection, and, as we know, it has its legal basis in art 33.1 of the Geneva Convention. Under international law, this principle binds States from returning a refugee to a territory where they might be at risk of suffering threats to their life or liberty on accounts of the reasons enshrined in art 1A2 of the Geneva Convention.

On the European asylum acquis, the principle is identified through a comprehensive reading of art 3 of the ECHR which states 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.' That is, it broadens the scope foreseen in the Geneva Convention since it bans States from expelling a person to a territory where it might be subjected to not only to the circumstances protected in the Geneva Convention, but also to torture or degrading or inhuman treatment of art 3 ECHR (expansion of the material scope).

In addition, this principle is understood as having a 'preventive dimension' (Morgades, 2010), in so far as it binds Member States to grant provisional protection to those aliens who may put their lives at risk if returned to their country of origin. That is, the principle of non-*refoulement* covers asylum-seekers whilst a decision is pending upon them (expansion of the personal scope).

Finally, as it highlights the EU Agency for Fundamental Rights (FRA), the principle of non-*refoulement* not only prohibits the direct return to a country of risk 'but also to countries where individuals would be exposed to a serious risk of onward removal to such a country' (indirect *refoulement*). This provision, as it will object of final conclusion, poses one of the major limits for EU's offshoring.

Case-law

Soering v The United Kingdom is considered as the ECtHR's landmark case on the principle of non-*refoulement* since it foresees for the first time the provision of art 3 of the ECHR, in relation with art. 33 of the Geneva Convention, for cases in which a State may send

a person to a State or territory where he can be exposed to torture or inhumane or degrading treatment, expanding this way State responsibility upon the persons inside or outside the territory. The ECtHR found the UK had breached art 3 of the ECHR when it aimed at extraditing a German national, Mr. Soering, to the United States where he would face death penalty on accounts of a sentence of murder. Despite the fact that he did not qualify as refugee or asylum seeker, the ECtHR found that if Mr. Soering was extradited, he would be exposed 'to torture or to inhuman or degrading treatment or punishment.'

Two years after, the Court ruled on Cruz Varas vs. Sweden. Cruz Varas was a Chilean national who had applied for political asylum in Sweden claiming he had been detained and ill-treated for engaging in political actions against the Government of Pinochet. The Board considered 'that the applicants had not invoked sufficiently strong political reasons to be considered as refugees' and were thus expelled from Sweden. Cruz Varas took his case before the ECtHR, claiming that if Sweden were to expel him to Chile it would breach art 3 of the ECHR. The Court referred to Soering and ruled that 'although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion'.

Finally, in Jabari v. Turkey, the ECtHR found that if Ms. Jabari, an Iranian woman who had fled her country following fear of suffering inhumane treatment for having committed adultery in her country, were returned to Iran it would arise a violation of art 3 of the ECHR, using reference to the above-mentioned cases to ground the absolute character of the provision.

Conclusion

As we know by now, States have found by means of the "safe third country" notion a way to legally reject asylum applications in the EU territory and, in other words, potentially avoid the breaching of the principle of non-*refoulement*. In the EU, the safe third country notion is harmonised (Morgades, 2010) in the Council Directive 2013/32/EC of 26 June 2013 on Minimum Standards in Procedures in Member States for Granting and Withdrawing International Protection; and, despite these principles being seemingly attainable, the Directive adds in the second paragraph a number of requirements national laws must be subjected to. These requirements depart from analysing all asylum applications thoroughly in

order to ascertain the link between the asylum seeker and the country where it will be sent, the guarantee that this country will not put the asylum-seeker at risk in the country itself or out of their return to another country (indirect *refoulement)* and the certainty that the asylum-seeker will not be exposed to 'torture and cruel, inhuman or degrading treatment as laid down in international law'. In addition, national legislation may ask for the explicit provision on the resettlement opportunities for those who are found eligible of international protection. The EU Member States, contrary to Australia, would need to materialize how the resettlement is to be done.

c) Detention

The UNHCR Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, briefly analysed before, establish the criteria for the detention of asylum-seekers under international law. In the European scope, the ECHR states in art 5 the rights to liberty and security, reading 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. More precisely, paragraph f) deals with the detention of third country nationals: 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.

Although detention is arguable in the case of asylum proceeding, the jurisprudence of the ECtHR has ruled upon some cases regarding detention of asylum-seekers which has set the grounds for a consideration of the limits that shall be at stake in case of establishing offshore processing centres.

Case law

The case Amuur v France constitutes a landmark case regarding art. 5.1. of the ECHR. In the year 1992, four Somalis fled to France fearing for their lives in their country of origin. The OFPRA –French Migration Office– held them at the airport's transit zone and automatically sent them to Syria without granting them the right to make an effective asylum application. The ECtHR found that 'holding aliens in the international zone does indeed involve a restriction upon liberty (…) acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations.' The Court, after

establishing the French jurisdiction de jure over the airport's international zone, found a violation of article 5.1.

Later, in Riad et Idiab v. Belgium, the ECtHR found Belgium was accountable for detaining Mr Riad and Mr Idiab in the Brussels National Airport transit area for over 10 days without providing them food, water and other basic needs. The ECtHR ruled that it is 'unacceptable that anyone might be detained in conditions in which there is a complete failure to take care of his or her essential needs'. On these grounds, it found violation of articles 3 and 5 ECHR.

And finally, in 2013, in the case MSS v. Belgium and Greece, the ECtHR ruled on the detention conditions of asylum-seekers in Greece who had been sent to this country from Belgium following the established Dublin Regulation regarding first country to claim asylum. The Court found that the detention conditions in Greece amounted to the threshold of harm protected by art 3 and asked Belgium to make use of the sovereignty clause enshrined in art 17 in the same Regulation. This case was historical since not only it linked deprivation of liberty with the notion of harm, but also considered that conditions at liberty for asylum-seekers in the country where their application is processed can also amount to the level of significant harm enshrined in art 3 (Morgades, 2012).

Conclusion

The cases referenced are paramount to discern the differences between the International asylum acquis and the European acquis regarding detention of third-country nationals. When analysing the Australian case, questions regarding the notion of detention were raised with the aim of triggering this difference. The ECtHR has been crucial at defining the implications of detention, confinement in *international zones* and liberty of asylum-seekers in conditions that could amount to violation of the ECHR referred articles.

If the EU Members were to copy Australia in the processing of asylum in offshore centres under their effective control – option a) studied in section 5.1.1– art 5 of the ECtHR would unarguably be challenged. Confinement of asylum-seekers for their asylum processing would have to be done following the standards stated by the ECHR and the ECtHR rulings, which imply that: cases would have to be assessed individually, to see if the third country meets the

criteria for a safe processing of the particular asylum application; conditions at detention and at liberty meet the standards protected by art 3 and 5 of the ECtHR, including the access to an effective remedy –enshrined in art 13–; time of asylum processing is adequate to the principles of proportionality and necessity; and the needs of vulnerable asylum-seekers are taken into account and protected consequently.

5. Final remarks

This paper argues that the establishment of EU asylum processing centres in third countries is inevitable. The existing political climate and the steps towards achieving further harmonization on the Common European Asylum System prepare the grounds for the ultimate trend in the externalization of asylum. This provided, it is only left for us to claim that it will have to at least be done the best way possible, and that implies *not copying Australia in its handling of the offshoring of asylum.*

5.1 . Ethical concerns

The offshoring of asylum function is a trigger of major ethical concerns regarding the human rights of refugees and asylum-seekers. Externalization is, at the end of the day, a set of policies conceived to set some distance from the unprivileged ones. Migrants in general and forced migrants in particular, leave their homes on legitimate grounds and that is universally recognised in the right to migrate enshrined in the Universal Declaration of Human Rights, among others. The conundrum this freedom of movement arises is however, the fact that they go somewhere else, where they are not always wanted. The international legal protection of refugees and asylum seekers guarantee the assessment of their claims wherever they go; but what happens when that assessment occurs in a place they did not choose? Externalising means silencing claims, blind-folding our eyes from reality and risking losing empathy; acknowledging that we cannot keep them out of sight, without keeping them out of mind.

5.2. The EU cannot replicate Australia in the offshoring of the asylum function because of the human rights standards developed by the ECtHR

Out of the two options introduced for EU Member States on attempting to offshore asylum, we can now conclude they cannot establish centres in safe third countries disregarding their implications on them, as Australia does in PNG. Returning third country nationals to transit countries or safe third countries will most likely breach the principle of non-*refoulement* as it has been largely ruled by the ECtHR. Attending to the specific cases to determine the link between the asylum-seekers and the third country where their application would be processed, analysing if third countries are safe, attending to personal circumstances and detention conditions, assuring there is no possibility of asylum-seekers to be indirectly *refouled*, guaranteeing they have access to effective remedies and further resettlement possibilities look an impossible commitment at this day and time. The Australian case has extensively shown this formula violates the international law of human rights; however, as it was briefly introduced at the beginning, Australian policies are not subjected to a supranational juridical organ –due to the lack of a UN juridical body– and this means in the practice that asylum matters remain a domestic issue in which individuals cannot further their claims anywhere outside the country. Australia is only exposed to the reproof of the international community, and history shows that is not a sufficient deterrent. If EU Member States attempted to follow this formula, they would encounter the limits imposed by articles 1, 3 and 5 –among others– of the ECHR, regarding jurisdiction, the principle of non-*refoulement* and detention. Hence, the extensive development of ECtHR case law in the matter is today the best guarantee against asylum processing in third countries *the Australian way.*

5.3. Offshoring could be done lawfully, but is it legitimate?

Finally, it is just left to consider the possibility of EU Members creating offshore asylum processing centres under their effective control, and therefore, jurisdiction. Looking back at the former study, it is unarguable that this option, although not desirable, would be the lesser evil. By establishing this sort of centres, as it has been briefly mentioned above, the EU would be creating a sort of *buffer zone.* That is, extraterritorial areas under the control of the EU Member State, and consequently under its domestic –and European– law. If these centres functioned lawfully, they would not necessarily undermine the protection of refugees and asylum-seekers. This formula has been raised by scholars and politicians as a way to claim it avoids migrants from engaging in deathly migratory routes. However, it poses crucial technical questions this paper cannot answer due to length: how will the EU Member State meet the requirements regarding detention time limits and conditions? Could they guarantee

attention to specific cases like vulnerable people? How will resettlement be provided? Will the Dublin Regulation be adapted regarding first country of asylum? A further study on the matter shall regard these questions, since a lack of guarantees could hamper future plans. Notwithstanding, EU's recent history on externalization is the best evidence to argue the lack of protection we can achieve regarding migrants and asylum-seekers: the recent EU-Turkey deal –with record low settlement rates– and the questionable practices on bilateral cooperation, to cite some. There is nothing at this stage that can guarantee that the establishment of offshore processing centres turn out the most beneficial solution of asylum seekers. And ultimately, it raises the ethical and humanitarian concerns analysed above, since it takes advantage of a legal loophole to dodge international obligations which were conceived to address human rights and humanitarian issues. This allows us to conclude that even if under certain conditions it could be legal, offshoring asylum does not seem a legitimate tool for the protection of refugees and asylum-seekers within the most democratic and economically privileged region in the world.

The EU is bound to provide long-lasting solutions for refugees and asylum seekers upon the protection of their lives and human dignity. The world's leading advocate for the defence of universal human rights cannot turn its back now. It is within the behaviour towards the forced migrant population that the core values of the EU rely today; let's not keep them out of sight.

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