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Gradations of externalisation: Is the EU sailing towards offshoring asylum protection?

By Daria Davitti, Marlene Fries & Marie Walter-Franke

© Za'atari Syrian Refugee Camp, 2014

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Gradations of externalisation: is the EU sailing towards offshoring asylum protection?

Daria Davitti, Marlene Fries & Marie Walter-Franke

In looking for solutions to the failings of the current European asylum system and its inability to operate in times of 'crisis', many European politicians have reconsidered an old fantasy: offshore asylum processing. While Australia and the United States have adopted offshoring policies on and off for decades, the idea has been discussed at the European level since the 1980s but has never materialised, for many good reasons. This brief examines how offshore processing has found new life in the context of renewed 'externalisation engineering' in the aftermath of the 'migration summer' of 2015.

1. From managed migration to the temptation of offshore processing: externalisation as a continuum

The European Union (EU) and its member states appear to have drawn one main conclusion from the rise in arrivals of refugees and migrants in 2015-2016: they need to appear in control if they do not want to face a backlash from their voters. To that end, a wide range of measures and instruments have been mobilised at the national and the EU level.

Two essential, cross-cutting dimensions common to the measures implemented since 2015 are, first, the attempt to control and manage whether, and how, people arrive on European territory in order to limit numbers and filter refugees out of so-called 'mixed migration flows'. Secondly, the policies in place post-arrival aim at controlling where requests for international protection are filed and where applicants reside during the processing of their claim. These two dimensions are presented as the fundamental elements of an 'orderly' process of arrivals that is supposed to be an antidote to the events of 2015-2016, a policy objective at the core of the 2016 proposals published by the Commission to reform the Common European Asylum System (CEAS).

This double **imperative to manage refugee flows** links measures taken inside and outside of the EU in an overall 'managed migration' agenda that constitutes a form of externalisation policy in concentric circles (see figure 1).

- The first circle is the EU itself. Asylum-seekers and migrants are contained at the EU borders based on the Dublin principle of the first countries of arrival. This containment became a physical reality in 2016 with the establishment of 'hotspots' in Greece and Italy where a preliminary screening is conducted. Applicants are then directed into the national asylum system of the states in which the hotspots are located, or redistributed among EU member states through a relocation mechanism (though the beta programme that ran from 2015 to 2017 had very moderate success). Meanwhile, the spontaneous 'secondary movement' of asylum-seekers across EU borders is impeded though temporary border controls, an opportunistic use of the Dublin system, and a crackdown on irregularly-staying migrants. Finally, EU member states have worked to increase both voluntary and coerced 'returns' of irregular migrants and failed asylum seekers.
- In the second circle, that of the EU's immediate neighbourhood, the EU has intensified its migration diplomacy (Davitti and Fries 2017) with key countries of transit such as Turkey (Walter-Franke 2018). Custom-made deals are negotiated to push partners to keep refugees on their territory through positive incentives (integration opportunities) and negative incentives (strengthened border enforcement, clamp down on migration networks, both increasing the cost and risk of irregular movement).
- Beyond its immediate neighbourhood, the EU is scaling up its action in and collaboration with countries further up the migration route (Walter-Franke 2017). A variety of measures (Davitti and Ursu 2018) are rolled out to 'fight the root causes' of migration, including the linking of aid to migration control and readmissions, but also direct civil and military interventions, or new resettlement arrangements.

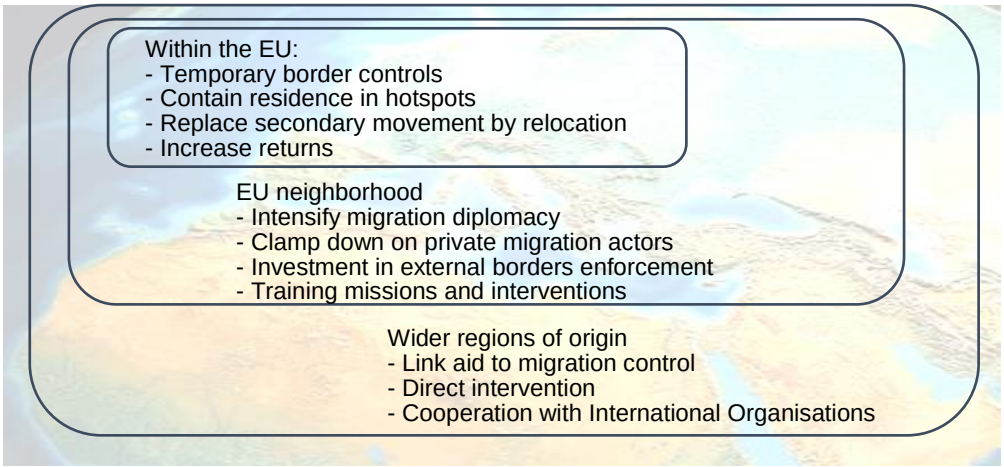

Figure 1: The concentric circles of the EU's 'managed migration'

The EU and its member states have long negotiated migration control measures in the second (neighbourhood) and third (wider circle of countries of origin and transit) circles. These efforts have intensified since 2016 with the EU-Turkey 'deal' and enhanced cooperation with Libya, among others, and constitute one of the prevalent forms of externalisation at the core of EU migration policy since the 1980s.

Meanwhile, the new EU experiments conducted in Europe during the 'crisis', in particular the 'hotspot+relocation' approach, have given new life to the idea of externalising asylum processing itself, aiming at limiting access to Europe to persons recognised as refugees overseas. This idea may be presented as innovative but it is as old as 'fortress Europe' itself.

2. Offshore processing: blowing the dust off an old idea

Proposals to process asylum claims outside of the EU have been put forward repeatedly since the 1980s. Denmark first came up with the idea of 'refugee-processing centres to deal with the existing flows of refugees' in 1986 (UN Doc A/C.3/41/L.51 of 12 November 1986). Since then, offshore processing has been proposed in over 25 official documents, on different European platforms. For instance, Austria proposed the processing of Iraqi refugees in Turkey following the migration flows related to the Iraq 'crisis' in 1998 (EU Doc 7839/98), whilst France suggested the implementation of 'protection programmes' in Libya as an 'innovative solution' for the 'Mediterranean migration crisis' in 2009.

Unsurprisingly, in the aftermath of 2015, some politicians such as Austria's chancellor Sebastian Kurz have explicitly argued in favour of implementing offshore processing following the Australian model, i.e. *refoulement* even within territorial waters to offshore processing centres in third countries, despite its infamous reputation and the profound human rights violations that have taken place in detention centres on Nauru and Papua New Guinea. In July 2017, French President Emmanuel Macron also came out in favour of EU processing centres based on the hotspots model in Libya. Most recently, the Danish social democrats put forward a surprisingly similar proposal to abolish asylum processing in Denmark and outsource it to UNHCR camps in regions of origins.

Three main arguments are commonly put forward in favour of external processing:

1. **Reducing the 'pressure' at home:** The overuse of the term 'crisis' to describe any fluctuation in the numbers of arrivals to the EU reflects a substantive fear that higher numbers of refugees and asylum seekers may threaten 'the welfare state, national identity, and social cohesion' (Betts 2004) of EU member states. Such fears were articulated as key elements of recent electoral campaigns in various member states. Once refugee flows, or rather 'irregular migration' flows, are interpreted as 'security threats' (Andersson 2016), offshore processing and complementary externalisation policies are easily presented as the most appropriate solution 'to reallocate this threat or "burden"' (Betts 2004) to other countries, ideally outside Europe.

2. **Offshore processing as a more humane solution**: Externalisation measures are often presented as humanitarian endeavours to end the perilous crossings of the Mediterranean and 'save lives at sea' (Léonard and Kaunert 2016). This humanitarian veneer enables the deployment of repressive measures to stop refugees from reaching Europe while at the same time presenting these interventions as aimed at saving lives and enhancing international protection (Walter-Franke and Bar-Tuvia 2017). As a corollary, the EU appears, at least on paper, to be taking a tough stance against human smugglers.

3. **Towards a more proactive EU migration policy**: A third argument evoked by proponents of offshore processing is that by reducing spontaneous arrivals, the EU could set up an orderly system of legal migration both for refugees and other migrants, through resettlement, family reunification and various visa regimes (Walter-Franke 2017). Instead of continuously dealing with recurring 'crises', this system of orderly, managed migration would pre-empt arrivals, and thus reconcile European electorates with migration altogether.

3. The case for EU offshore processing does not hold up

Can offshore processing be a better deal for refugees and migrants? The head of the Bundesamt für Migration und Flüchtlinge (German Federal Office for Migration and Refugees), for instance, claimed that 'we have to give refugees the possibility to gain protection before they die of thirst in the desert or drown in the Mediterranean'. However, if anything can be learnt from the Australian offshoring policies, it is that the system does not offer any real chance of a credible and fair assessment of asylum claims or of resettlement, even for recognised refugees. The implementation of the Greek and Italian encampment policies, just like in the case of the Australian policies, have been incapable of guaranteeing basic human dignity and safety. Notorious are the well documented reports of torture and other inhuman and degrading

treatment in Australian detention centres. Considering that the EU is not geographically as remote as Australia, persons seeking protection will therefore continue to risk their lives to reach the EU, no matter how dangerous the routes are, unless they are offered a credible and better alternative. This would defeat the first argument on reducing pressure at home and the third on a more proactive EU policy.

Another humanitarian justification often put forward is that the current system, where refugees apply for asylum in the host country, tends to benefit only the refugees who have the financial and physical means to leave, and not necessarily the most vulnerable ones. However, the recent proposals suggest offshore processing would take place in third countries in the region of origin or transit countries en route to Europe. Reaching these countries already requires significant physical and financial efforts, and leaving one's country is often the most dangerous part of a refugee's journey. As such the vulnerability argument is unpersuasive.

For offshore processing to be a humane solution, cooperation with International Organisations (IOs) is key. However, the idea of offshore processing is closely interlinked with the notion of 'mixed migration flows' in the discourse of key relevant IOs, which sheds an ominous lights on the prospects of asylum-seekers. Indeed, the International Organisation for Migration (IOM) defines mixed flows as 'complex population movements including refugees, asylum seekers, economic migrants and other migrants'. Even the UNHCR has put forward proposals for processing centres to 'address the phenomenon of mixed movements of asylum-seekers and economic migrants by processing jointly presumed manifestly-unfounded asylum claims from selected non-refugee producing countries of origin'. Such a belief that the need of protection of a person can be inferred from her country of origin is highly problematic. It constitutes a fundamental misinterpretation of the concept of international protection, as it neglects the individual nature of persecution and the obligation of host states to guarantee an individual examination of each asylum claim.

Finally, from a utilitarian perspective, offshore processing is represented as a potential cornerstone for the Common European Asylum System, implying a 'more efficient use of resources such as expertise, staff and infrastructure' (Léonard and Kaunert 2016). However, existing offshore processing schemes have proven very costly, both financially and in terms of human lives. Evidence from the Australian offshore facilities shows that the system costs 240.000€ per person per year, which would allow for each refugee to be accommodated in the London's Ritz Hotel for a year. Thus, since arguments in favour of offshore processing remain unsubstantiated, the reasons for their reoccurrence can only be political.

4. Insurmountable legal concerns

Besides the moral, political and financial concerns raised by offshore processing, there are many crucial legal concerns. First and foremost, the project raises significant conflicts with primary and secondary EU law, as well as with the 1951 Refugee Convention. In particular, Article 31 of the Convention prohibits states to impose penalties for 'illegal entry or presence'. Transferring to or holding asylum seekers in offshore processing centres can be interpreted as a form of penalisation on their attempted entry into the EU (Human Rights Watch 2003) in violation of Article 31.

Human rights provisions enshrined in the European Convention on Human Rights (ECHR) would also most likely be breached under existing offshore processing proposals. The confinement of asylum seekers in the processing centres, for instance, may amount to arbitrary or indefinite detention, violating Article 5 ECHR as well as flying in the face of 'UNHCR's general principle that asylum seekers should not be detained' (Noll 2003). Further concerns have been raised regarding the compatibility with Article 3 ECHR and possible violations of the provision of *non refoulement* as it seems impossible to guarantee that each and every decision made in the processing centres will be done in a way that does not violate this principle – including *direct* and *chain refoulement*. This concern is even more pronounced when the host states are more limited in their resources and have signed rather dubious readmission agreements. Such policies also raise concerns regarding the connected right to an 'effective remedy' for a refused asylum seeker (because of the *de facto* impossibility of appealing a negative refugee status determination) and a violation of the prohibition of rejection at the border.

Despite these fundamental issues, some well-known scholars (e.g. Goodwin-Gill 2007) have suggested that offshore processing might be compatible with human rights if certain safeguards are introduced to guarantee specific 'legal standards', for instance by ensuring effective protection in processing centres (Garlick 2015). This line of argument gives reason for member states to assume that they can avoid a violation of Article 3 ECHR by preventing people from reaching the EU altogether, instead of failing to transfer or rejecting them. Yet, as seen above, the specific safeguards envisaged by Article 3 ECHR are generally unenforceable in offshore processing centres.

Since arguments in favour of offshore processing remain largely unsubstantiated, the cynical motive behind externalisation policies remains avoiding responsibility for potential human rights violations, or rather escaping the

jurisdictional reach of the ECHR. And indeed, classical international legal views would not easily recognise responsibility of EU member states and state parties to the ECHR in cases where offshore processing centres are run by third countries, private actors or IOs outside of the European territory and their effective control. Yet, these states would play such a crucial role in pursuing and enabling offshore processing measures that their complicity could not be legally ignored. As we argued here, offshore processing proposals imply a clear contribution of ECHR member states in at least initiating, setting up and financing these centres. This contribution can be seen as an act of complicity (Davitti and Fries, 2017) capable of triggering state responsibility and jurisdiction (Jackson, 2016) of ECHR member states for the human rights violations occurring in these centres.

Most importantly, offshore processing in any form can only work if it is combined with a substantive resettlement effort. EU member states, however, notoriously continue to drag their feet when it comes to effectively resettling refugees while millions of UNHCR-registered refugees worldwide are waiting for resettlement (McAdam 2015). As the failure of the EU relocation mechanism shows, their reluctance even denies solidarity towards overburdened Greece and Italy. Accordingly, there is no reason to expect EU member states to be more willing to accept refugees from offshore processing centres.

5. Is Europe so far from pursuing offshore processing? A close reading of existing arrangements and ongoing reforms reveals a striking resemblance

a) Nauru and Moria: not so different after all

Considering the serious concerns arising from both the notion and practical reality of offshore processing, it would appear reassuring that the EU has so far not implemented the Australian model. Most European policy makers appear to be aware that shipping asylum-seekers from EU territory to offshore camps would be incompatible with applicable human rights standards.

That said, **the existing hotspots approach already** replicates some of the most concerning elements **of the Australian precedent** (Alpes, Tunaboylu and van Liempt 2017), including pushbacks legalised by the Dublin system; forced encampment in remote, insular locations; detention and neglect-based human rights violations; chronic lack of appropriate access to information linked to the limited provision of legal counsel, interpreters and supporting NGOs; and deprivation of freedom of movement. Similarly to detainees in Nauru and Papua New Guinea (PNG) centres, who were not offered sustainable solutions even after being recognised as refugees, persons processed in Greece and identified as in need of protection are not granted adequate opportunities to relocate due to unacceptable delays by EU member states in implementing the 2015 relocation mechanism. And even if relocations had taken place promptly, numbers committed to remained far lower than actual relocation needs on the ground.

Although there are significant differences from the Australian model, (Mussi and Feith Tan 2017) it is important to note that the nature of the violations and their structural character are very similar. Despite the fundamental shortcomings identified in the Greek and Italian hotspots, these have now become an integral part of EU migration management measures, with some member states, such as Hungary and Germany, also adopting similar encampment strategies at national level.

b) Cooperation with third countries: are the foundations of offshore processing already in place?

Efforts to replicate the EU hotspots model outside of the EU have so far not materialised, as Tunisia and Egypt, for instance, have refused to host such hotspots. However, several arrangements with third countries include elements that could form the foundation of a new offshore processing mechanism, or at least set a dangerous precedent towards making offshoring more acceptable in the near future.

The 2016 EU-Turkey deal, for instance, included a swapping mechanism according to which persons reaching EU shores irregularly would be returned to Turkey in exchange for the resettlement of the same number of Syrian refugees from Turkey. Since Greece is obliged under refugee law to grant access to asylum procedures, this deal could not be implemented. 2,130 persons were however sent back, including alarming cases of so-called 'returns', where people were misinformed or unable to access an asylum procedure (Alpes, Tunaboylu and van Liempt 2017). Since Turkey was recognised as a safe third country by the Greek Supreme Administrative Court in September 2017, there is a risk that similar expulsions will increase in the near future. If such an increase is indeed recorded, the EU-Turkey deal would increasingly resemble an offshoring deal à la Canberra – assuming refugee status determination (RSD) procedures take place east of the Aegean Sea.

The growing acceptability of offshore processing is also supported by the creation of a UNHCR-based emergency mechanism, introduced through the idea of 'Protection Missions for the Resettling of Refugees in Europe', based on a multilateral agreement between EU states and Niger and Chad. Since November 2017, selected migrants and refugees are being transferred by UNHCR and IOM from detention camps in Libya to Niger with EU support. There, they are

screened with the perspective of resettlement to Europe. France and Italy both started receiving small numbers of refugees through this emergency system. This seems a complicated process to rescue the thousands of persons trapped in the horrific Libyan detention centres. Resettling directly from Libya was however impossible for practical and political reasons. Although they cooperate with this scheme in the framework of wider migration deals, Niger and Chad have been vocal in refusing to become 'catch basins' for sub-Saharan asylum seekers on their way to Europe (Walter-Franke 2017). They are however some of the poorest states in the world and are susceptible to increasing EU pressure.

In that light, an ominous signal was sent in February 2017 by France and Germany, when they proposed to go a step further and to create a 'crisis mechanism', allowing for people to be transferred from the European 'arrival zones' (most likely the 'hotspots') to safe third countries for processing without specifying the location of these host states. This proposal bears resemblance to the short-lived, controversial deal between Israel and Rwanda from which grave human rights violations arose (Bar-Tuvia 2017). A European Parliament's (EP) Resolution from April 2017: 'Addressing refugee and migrant movements: the role of EU external action', arguing for safe and legal pathways to Europe, also called for allowing 'requests for asylum, as well as the processing of asylum claims, to take place outside the EU or at the EU's external borders'. Even assuming good intentions from the EP, such proposals pave the way for a legitimisation of offshore processing.

c) The shadow of offshore processing in the ongoing CEAS reform

Finally, we must stress that externalisation with offshoring tendencies is not only anchored in deals with third states. It is also a dimension of the ongoing reform of the CEAS. In its recommendations to Bulgaria for its Presidency of the CEU, UNHCR warned that 'aspects of the EC proposals to reform the CEAS [focus] on procedures entail the possibility of shifting protection responsibilities outside of the EU'. This includes the possible introduction of mandatory admissibility procedures, which would take precedence over family reunion possibilities and would make greater use of safe country concepts. Indeed, the 2016 proposals intended to harmonise policies put in place by several member states that already fast-tracked asylum procedures for certain nationalities based on low recognition rates or the categorisation of these third countries as 'safe'. The thinking behind this legal construct shifts the responsibility to grant protection from the country processing the application to countries of transit or, in the case of readmissions, creates a presumption that there is no risk of persecution in the country of origin. Where these European procedures connect with lucrative readmission and/or cooperation agreements for the third countries concerned, the resemblance to an Australian-style offshoring model, potentially leading to legalised *refoulement*, becomes apparent.

6. A word of conclusion

In sum, current policies in place within Europe, as well as cooperation with third countries, already bear a strong resemblance to the Australian offshore processing model. Ongoing reforms also include elements which appear to strengthen current externalisation trends. As such, the risk of a European version of offshore processing is less remote than might be expected. As the reform of the EU asylum system is supposed to be completed by the European Council during their session in June, a close monitoring of these developments is urgently warranted.