DOES OFFSHORING ASYLUM AND MIGRATION ACTUALLY WORK?

WHAT AUSTRALIA, SPAIN, TUNISIA AND THE UNITED STATES CAN TEACH THE EU

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INTRODUCTION: IS OFFSHORING HERE TO STAY AND HOW IS ITS SUCCESS MEASURED?

As the stalemate continues over a common set of rules on asylum within the European Union, 'externalising', 'offshoring', 'outsourcing' and, most recently, 'regionalising' asylum and migration management in non-EU countries appear to be the buzzwords of the moment. But is the idea of involving countries outside the bloc to stem arrivals really new? As early as the mid-1990s, when Denmark and the Netherlands proposed hosting asylum seekers outside Europe, various forms of this concept have surfaced periodically in the European debate – only to be regularly discarded for a host of both legal and practical reasons.

The sustained arrivals in 2015-2016, however, changed this dynamic in a number of ways. First of all, migration became the political topic *par excellence* across Europe, including in countries which were barely affected by what was quickly labelled a 'crisis'. Right-wing and anti-establishment movements seized on the electoral opportunities which anxiety about identity in the context of ongoing economic and social transformations had unleashed, while mainstream parties and the media followed suit, focusing on the issue as the defining one facing the continent. In doing so, migration management – a complex, multi-faceted phenomenon, which continues to involve millions of people moving legally to and within the European Union – was reduced to the 'fight against irregular migration'. Despite attempts to reform the EU's dysfunctional asylum system pushed by the European Commission and European Parliament, policymakers' overriding objective in both Brussels and national capitals became to bring numbers down.

Secondly, the EU managed to actually externalise migration and asylum management to a non-member state via the EU-Turkey statement in 2016, the first time the bloc – and not individual countries like Spain or Italy – had entered into an agreement with a neighbouring country to stop migrant and refugee arrivals. Rights organisations have pointed repeatedly to the human costs of the deal, which has left tens of thousands of men, women and children trapped in abysmal camps on Greece's easternmost islands, as well as to refugees and asylum seekers' conditions in Turkey, which has only partially adopted the 1951 Refugee Convention and its Protocols. Others have highlighted the fact that the route is not actually closed as thousands continue to move through the Western Balkans, where they are met by increasingly harsh border enforcement, in a desperate bid to reach the EU. Despite this, the agreement with Turkey is still touted as a success, as measured by the primary yardstick - arrivals are down dramatically compared to the peak period in 2015-2016.

The third reason why the periodic recurrence of calls to offshore or externalise migration may be entering a new phase is that the crisis mentality has stuck despite a significant fall in the number of irregular migrants reaching the EU over the last couple of years. As increasingly extremist leaders across the continent have shown, a few thousand asylum seekers crossing the Mediterranean can still be considered too many – the aim is now to seal Europe's borders to all irregular arrivals. As this cannot be achieved, including because of EU governments' obligation to allow refugees to seek safety in their countries, the endless cycle of increasingly repressive measures and harsh rhetoric continues – as do efforts to convince states bordering the EU or further afield to step in to help solve the bloc's largely self-inflicted political crisis.

So, is offshoring asylum here to stay? And when can it be considered a success? If bringing irregular arrivals down is the primary or sole objective of these arrangements with other countries, do they actually work? In 2017, a year after the EU-Turkey deal was struck, the Open Society European Policy Institute (OSEPI) commissioned research from the Centre for European Policy Studies (CEPS) to look into previous or ongoing experiences with this concept in very different geographical or historical contexts, with a view to gleaning lessons for the EU. The result is a report, *Offshoring asylum and migration management in Australia, Spain, Tunisia and the United States: lessons learned and feasibility for the EU*, which is being published jointly with this OSEPI brief. This document also draws on research and fieldwork carried out by OSEPI as well as by organisations supported by Open Society Foundations in Spain, Italy, Morocco and Tunisia.

AUSTRALIA'S 'PACIFIC SOLUTION': THE PERFECT EXAMPLE OF OFFSHORING?

Australia is often cited as the primary example of offshoring asylum – as a model for those on the right of the political spectrum, who believe no irregular migrant should be allowed to arrive, and with horror by human rights groups and the media outlets which have been reporting on the country's 'Pacific solution' since it was first implemented in the early 2000s. For the former, the policy works as boat people very rarely manage to make it past what is effectively a navy blockade. For the latter, Australia's extreme approach demonstrates that outsourcing or externalising asylum and migration management comes with a huge human cost and countless rights violations. More subtly – and of relevance for the EU as it grapples with an internal erosion of the rule of law, which can partly be attributed to the ongoing panic over migration – the Australian example shows how laws, both international and domestic, can be violated or circumvented with impunity when dealing with what Zygmunt Bauman defines as 'redundant people'.

The CEPS report provides an exhaustive historical overview of the Pacific solution and pinpoints the main reason why European states cannot stop migrant boats at sea, tow or escort them to a third country, and process asylum seekers there. Unlike Australia, all EU members are bound by the Council of Europe's European Convention on Human Rights, whose Strasbourg-based court ruled in 2012 that Italy's 2008-2009 policy of returning asylum seekers and migrants intercepted in the Mediterranean to Libya was illegal. The Italian naval authorities' ships were considered Italian territory, which made taking potential refugees back to a state where they could suffer abuse and potentially be sent back to their country a case of *refoulement*, or an illegal push-back. Although Australia is bound by United Nations conventions and its refugee policies are regularly condemned by UN bodies (and the EU state representatives who sit in them), no regional court can hold Australia to account for violating international refugee law. Nevertheless, successive governments from both sides of the political spectrum have had to engage in bending or adjusting domestic legislation to carry on enacting the policy – a relevant *modus operandi* for the EU in recent times.

To justify taking people who had disembarked on its soil to other countries, Australia has 'excised' territories from its 'migration zone', effectively declaring them to be extra-territorial for the purposes of migration management. Echoes of this policy can be found in the Greek islands involved in the EU-Turkey deal, which are *de facto* long-term holding camps for asylum seekers crossing the Aegean, who are in most cases not allowed to move to mainland Greece, where conditions are much better, so as not to jeopardise the deal's much-touted deterrent effect. Most notably, Italian and EU efforts to circumvent the European Court of Human Rights' 2012 ruling in an effort to stem arrivals from Libya have led to bolstering the capacity of the local coast guard so that migrants are pulled, rather than pushed back – without them setting foot on an Italian or other European ship, where they would be on Italian/European territory and therefore non-returnable.

For those who still consider Australia to be a relevant model for the EU, CEPS' research offers three more sobering lessons. The first is that the Pacific solution, or trying to put an end to irregular arrivals, does not exist in a vacuum or as the sole policy response to migration and asylum management – Australia has significant legal channels for migrant workers and a robust resettlement programme for refugees from crisis areas, both of which are currently lacking at EU level. The second is that Australia has been able to entice or strong-arm island nations in its vast ocean neighbourhood into hosting the processing facilities, which the EU has thus far failed to do – in fact, the push-back from possible candidates like Tunisia or Morocco is so strong that their failure to set up functioning asylum systems has been blamed on the EU's interest in offshoring asylum management there should they do so. The third lesson is that, under pressure from domestic public opinion and national courts, countries that have agreed to host offshore facilities can revoke those agreements, plunging the system into chaos and leaving the people caught in it in even worse conditions. The current abysmal situation in Papua New Guinea, where the infamous Manus refugee camp is being closed following a ruling by the country's Supreme Court, is a case in point.

'WET FOOT, DRY FOOT', INTERDICTION AND EXTRA-TERRITORIAL PROCESSING IN THE US: DO THESE POLICIES BRING THE NUMBERS DOWN?

The United States have a long history of engagement with neighbouring countries to reduce arrivals of asylum seekers and migrants – although, just like in the case of Australia, significant legal migration and resettlement to the US are enduring features of the migration management model, even under the current administration. Starting in the 1980s and based on a Supreme Court ruling that *non-refoulement* only occurs when asylum seekers reach US territory, and not on the high seas, maritime authorities began engaging in robust interdiction efforts, returning thousands of mostly Haitian and Cuban migrants to their countries.

Significantly, from a current EU perspective, the US have also experimented with a number of models of extra-territorial asylum processing over the years, ranging from much-criticised summary procedures on board coast guard vessels to facilities established in Haiti and Cuba. Most recently, centres to assess claims presented by vulnerable children fleeing gang violence were set up by the Obama administration in El Salvador, Guatemala and Honduras, and have since been shut down under the Trump presidency. Asylum seekers who are interdicted at sea and recognised as refugees are also not transferred to the US and may only be resettled to third countries willing to take them in – a policy which is currently being discussed at EU level based on its presumed deterrent effect, i.e. the argument that the offshore facilities would not constitute a 'pull factor' for potential asylum seekers.

Have US efforts at interdiction, deterrence and extra-territorialisation actually brought the number of irregular migrants down, though? The CEPS research demonstrates that arrivals from Cuba only decreased dramatically in the mid-1990s, when legal channels were opened for Cubans seeking employment or asylum in the US[1]. Since 1995, when 20,000 work visas have been issued to Cubans yearly and an annual average of over 3,000 people have been recognised as refugees at the US asylum processing facility on the island state, irregular Cuban migrants to the States have dropped from a high of over 38,000 to a few hundred per year.

And would the US model be applicable in an EU context? The main obstacle to setting up extra-territorial asylum facilities outside the EU, alongside Europe's more stringent interpretation of *refoulement* and the difficulties of finding countries willing to host the centres, is precisely the reason why the Union's leaders are so beholden to the idea of offshoring in the first place – the lack of agreement over common asylum rules for all EU countries and some member states' refusal to take in any asylum seekers or refugees via EU-wide redistribution mechanisms. Without a truly common European asylum system, there can be no clarity over how to and who would carry out the processing, and, ultimately, where the refugees would then be transferred.

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1   CEPS, *Offshoring asylum and migration management in Australia, Spain, Tunisia and the United States: lessons learned and feasibility for the EU, September 2018* (https://www.ceps.eu/publications/offshoring-asylum-and-migration-australia-spain-tunisia-and-us)

SPAIN'S HANDLING OF THE 'CAYUCO CRISIS': A BEST PRACTICE?

Back in 2005-2006, when migrant arrivals by sea were far from being EU countries' preferred summit topic – an EU official has estimated that between January 2016 and June 2017, almost half (40%) of prime ministers and ministers' time at European summits in Brussels was dedicated to 'fighting irregular migration', despite other pressing issues like Brexit, climate change or sluggish economic growth[2] – the Spanish government moved swiftly and resolutely to close down the route from West Africa to the Canary Islands. Using a mix of bilateral diplomacy, development aid, interdiction at sea and externalised migration management, the number of mainly African migrants reaching Spain's Atlantic islands fell from highs of 30,000 to a few thousand per year.

Spain's multi-pronged approach, which it still implements in its relations with what is currently the main transit country for asylum seekers and migrants seeking to reach Europe, Morocco, is not focused exclusively on curbing irregular migration. Instead, it does contain elements of genuine partnership with non-European countries which go beyond the merely transactional approach currently favoured by many in Brussels and in national capitals, whereby the goals of less migrants arriving and/or more returned migrants taken back by source countries are pursued by offering more funds or other types of support, or by threatening to cut visa numbers to Europe. In the early 2000s, when Spain was rapidly becoming a destination country for migrants, an ugly case of anti-migrant violence in the southern town of El Ejido contributed to laying the foundations for this approach. A tacit bipartisan pact followed the incident, with the main political parties agreeing to refrain from exploiting migration for political gain and to manage what was rightly perceived as a structural and long-term phenomenon.

However, was the way the 'cayuco' (from the name of the boats being used by African migrants) crisis was addressed the full-blown success it is often credited with being? One of the main lessons from Spain's crackdown on the West African route was that, as it became much harder for asylum seekers

and migrants to reach Spanish soil via the Atlantic, migrant routes shifted. Starting in the mid-2000s, the Western Mediterranean route via Morocco (either across the Straits of Gibraltar or through Spain's exclaves on Moroccan territory, Ceuta and Melilla) became the main entry point to the country. At the same time, new routes further east opened up, with Libya becoming a key transit country for sub-Saharan and North African migrants and refugees seeking to reach Europe. Although there is no simple knock-on effect and the nationalities of those arriving are somewhat different, a similar dynamic may currently be at play as Italian and EU efforts have led to less chances for migrants of leaving Libya – by the end of the summer of 2018, arrivals in Spain were almost double the number of those reaching Italy.

Under Spain's response in the mid-2000s, migrants intercepted in the Atlantic were also not simply returned to the coasts of West Africa. Instead, they were taken to Mauritania, where they were held in a facility in the capital Nouadhibou which locals and human rights groups promptly nicknamed 'Guantanamito', in a reference to the infamous US detention camp for Al Qaeda suspects in Cuba. The centre's legal status as a reception facility or a detention camp was never clarified, leading to a legal limbo for those held there, who could not challenge their detention or the decisions to return them to their home countries from Mauritania – a problem which could easily resurface in the event of new efforts by the EU or European countries to establish extraterritorial processing of any kind. More broadly, as part of its cooperation with Spain, the Mauritanian government engaged in the systematic criminalisation of irregular migration, including of those who were living in the country and had no intention of moving to Europe. Similar patterns, on a much greater scale, are evident in Niger today, where experts are concerned that the EU-sponsored crackdown on irregular migration is disrupting livelihoods in the north of the country as well as previously relatively unfettered free movement in the region based on the ECOWAS agreement.

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2   Personal communication, July 2017.

TUNISIA'S CHOUCHA REFUGEE CAMP: A PRECURSOR TO CURRENT PROPOSALS FOR REGIONAL DISEMBARKATION PLATFORMS?

As Libya collapsed into civil war in early 2011, hundreds of thousands of people began to flee across the land border into Tunisia, which was also grappling with the aftermath of its own revolution. An estimated one million people – a similar number to those whose arrival sparked the beginning of the 'refugee crisis' in Europe, a continent of 500 million - entered the small North African country in the space of a few months, including at least 200,000 non-Libyan migrants and refugees, who had been living in Libya or trying to reach Europe from there. With no stable government in place, tens of thousands of Tunisians also embarking on the sea crossing to Italy and in a country without a viable asylum system, UN and intergovernmental agencies were immediately mobilised to manage arrivals. The International Organization for Migration handled the repatriation of foreign workers who had fled violence in Libya, while UNHCR, the UN refugee agency, took over direct responsibility for Choucha refugee camp, a few kilometres from the Libyan border, where it assessed refugee claims and eventually resettled several thousand to host countries such as the US, Germany and the Scandinavian states.

As EU governments engage in discussions about 'regional disembarkation platforms' or mechanisms for those rescued at sea and taken to non-EU countries, the example of Choucha may yield important lessons. First, the camp was hosted by a non-European country, but this only occurred because of geographical proximity and because of mass arrivals, not due to Tunisia agreeing to act as a processing hub for those fleeing Libya. In no instance were people fleeing Libya rescued at sea by EU or other ships and taken to Tunisia for processing, as many EU member states are currently proposing despite recent warnings from the European Commission which underscored the high risk of violating the principle of *non-refoulement*[3].

Secondly, Choucha and the return and resettlement programmes were entirely managed by the United Nations, a model which the EU is keen to replicate as it would remove the intractable problem of agreeing on a common EU asylum procedure and on who – EU asylum agency staff or national officials – would be tasked with carrying it out. However, conditions in the camp and the way it was managed were far from ideal – it was criticised for being too near Libyan territory, for effectively detaining asylum seekers due to its remote location, for segregating the inhabitants by nationality and ethnicity (with some groups being granted refugee status at higher rates, leading to tensions), and for the arbitrary cut-off date for applying for resettlement elsewhere.

And finally, the experience of Choucha, which largely bypassed the Tunisian authorities, did not strengthen the local asylum system – one of the arguments made by the EU and the UN refugee agency to support the idea that some forms of EU and non-EU burden-sharing on asylum management may serve to strengthen the international protection regime. When the camp was closed in 2013, several rejected asylum seekers who could not return home stayed on in the facility until they were evicted by the Tunisian authorities in 2017. Refugees currently in the country – those now fleeing Libya, for instance – are also still not entitled to protection, despite a draft asylum bill which has been languishing in parliament for years. The years since Choucha ceased to function as a refugee camp have coincided with increasing pressure on the part of the EU for Tunisia to develop its own asylum system, but, as highlighted above, the pushback has been consistent. Throughout the neighbourhood, EU efforts to offshore may therefore be undermining efforts to build up protection space in third countries, with even Morocco, which has regularised tens of thousands of migrants over the last few years, stalling on rolling out a comprehensive asylum law.

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3   European Commission, *The legal and practical feasibility of disembarkation options, June 2018* (https://ec.europa.eu/commission/sites/beta-political/files/migration-disembarkation-june2018_en.pdf)

LESSONS LEARNED FROM ALL FOUR CONTEXTS: OFFSHORING MAY BE HERE TO STAY, BUT IT IS NO SILVER BULLET

The CEPS report provides exhaustive evidence of the most chilling aspect of the four examples which the comparative study looked at, i.e. the human rights violations which occurred under all of these models. In all four cases, *refoulement* was reported – or would now be recognised as such, in the case of the Canary route interdictions, following the 2012 European Court of Human Rights ruling. Any form of extra-territorial processing in the four contexts also led to *de facto* detention of asylum seekers and migrants, in sub-standard conditions and often for prolonged and, in some cases, indefinite periods of time. It was also very difficult, if not impossible, to access judicial review of or to appeal against the detention itself as well as of asylum or return decisions. Both these characteristics would make it extremely problematic for the EU to engage in offshoring asylum and migration, be it via cursory screenings on EU vessels (an option from the US toolbox which thankfully appears not to be on the table in discussions in Europe), EU-managed processing centres outside the bloc or in facilities outsourced to UN agencies or third countries. The CEPS researchers therefore analyse the legal arguments against offshoring and lay out new prospects for litigation against attempts to externalise asylum and migration management which go beyond the European Convention on Human Rights and are based on EU law – including the Charter of Fundamental Rights and EU agency Regulations – as well as on scrutiny of the use of EU funds for these purposes.

But do the case studies demonstrate that the various efforts to crack down on irregular migration and to involve third countries in doing so actually brought the numbers down? As the US example shows, the only discernible drop in irregular arrivals appeared to coincide with a new policy allowing migrant workers and refugees to reach the States legally. And where legal channels have existed for decades, like in Australia, the number of irregular migrants seeking to enter the country is not linked to heavier-handed interception or the purported deterrent effect of

the abysmal conditions in the island camps, but to fluctuations in global refugee trends and their impact on the Asia-Pacific region.

Spain's handling of the 'cayuco' crisis may be a clear example of migration routes diverting as others are closed off, but there are other ways in which irregular movements take place as a consequence of attempts to contain asylum seekers and migrants far away from their intended destination. One is the uncertainty about the length of time they will be expected to spend in offshore facilities and about the procedures they will have to undergo, which pushes some to carry on their journey. And another – a crucial one in an EU context – is the lack of resettlement opportunities once refugees have been processed. Despite pledges of several thousand places from EU states through a dedicated mechanism established by the European Commission, very few refugees have actually been transferred to Europe via UNHCR's recently established ad hoc Emergency Transit Mechanism, which evacuates people from Libya to Niger, leading to the repeated suspension of the scheme due to Nigerien concerns over refugees remaining in the country[4].

Both these points illustrate a broader one, that government attempts to curb irregular migration may make it harder and more dangerous for those involved, but ultimately have little impact if the drivers and the demand for irregular migrants (in certain sectors of European countries' economies, for instance) remain unaltered. Discussions about offshoring may be here to stay in the European context for quite a while, but it will not prove to be the magic bullet which will solve EU's migration conundrum. Instead, the notion of outsourcing asylum and migration to non-European countries, while politically expedient, will only continue to divert resources and time away from a sustainable, workable model of migration management, to undermine efforts to build genuine partnerships with non-EU states – and to compromise European values in the process.

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4   UNHCR, *Niger country operation update, July 2018* (https://data2.unhcr.org/en/documents/download/65147)

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