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**Feasibility of the extra-territorial processing  
of asylum applications by the member states  
of the European Union**

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## **Abstract**

The thesis elaborates upon the political and legal feasibility of processing asylum applications in offshore centres operated by EU member states; this shall promote legal and safe migration of asylum seekers into the European Union. The legal feasibility is determined by member states' ability to safeguard provisions under the 1951 Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The key condition for the legal feasibility of offshore asylum processing is the ability to safeguard the principle of non-refoulement. Features of member states' initiatives for offshore processing as well as those of the operational Australian asylum system are analyzed, and their incompatibility with this principle is confirmed. Ability to fully safeguard against refoulement extra-territorially is further discussed. By analyzing the situation within the territorial Common European Asylum System, the political feasibility for creating an effective and legally feasible extra-territorial asylum procedure is assessed; this involves resettlement of confirmed refugees into the EU and readmission of failed asylum seekers. It is concluded that offshore processing of asylum applications is politically and legally unfeasible at this stage; it would require pooling of national sovereignty much beyond the extent that it now politically feasible – also, member states firstly have to address current deficiencies of the territorial asylum system.

Keywords:

asylum – extra-territorial – legal migration – non-refoulement – offshore – refugee

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# Chapter 1

## 1.1 Introduction

Under international law, there exists no right to enter a country except for its own nationals. Every country has a sovereign right to decide which non-nationals to admit to its territory and under what conditions. Within the European Union, the common visa policy harmonizes these rules for all its member states with exception of the United Kingdom and Ireland. The third-country nationals who do not benefit from exemption have to obtain a visa before accessing the EU territory – otherwise, they are considered as illegal (or irregular) migrants. At the same time, however, all EU member states have commitment under both international and European law to process applications from asylum seekers and to grant asylum to persons who qualify as persons in need of international protection. Nonetheless, these persons have very limited opportunities to enter the EU legally; “their diplomatic representations in war-torn countries are often closed down or located in areas of capitals that are under surveillance of national security forces. For nationals of these countries, obtaining a visa to enter the EU is difficult since there is a risk of overstay”.<sup>1</sup> This puts asylum seekers into a peculiar situation as there is no mechanism that would allow asylum seekers to file their applications while not physically present on the EU territory; thus, they resort to irregular journeys, often organized by human smugglers, in order to be recognized by EU member states’ authorities as refugees. The term *refugee* is defined under Article 1(A)2 of the 1951 UN Convention relating to the Status of Refugees (otherwise known as Geneva Convention or Refugee Convention) as:

person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

The most frequent route of asylum seekers into the EU is by crossing the Mediterranean Sea; these journeys are very dangerous<sup>2</sup>, but detections of illegal border-crossing reached a new record in 2014 and the overall number for 2015 is expected to further increase.<sup>3</sup> Around 800 people who were being smuggled to Europe died in April 2015 about 200 km off Lampedusa coast; this was the greatest

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<sup>1</sup> The Fundamental Rights Agency, *Legal entry channels to the EU for persons in need of international protection: a toolbox*, 2015, p.2. Accessible online at: [http://fra.europa.eu/sites/default/files/fra-focus\\_02-2015\\_legal-entry-to-the-eu.pdf](http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf)

<sup>2</sup> For details, see: International Organization for Migration, *Fatal Journeys –tracking lives lost during migration*, 2014. Accessible online at: [http://publications.iom.int/bookstore/free/FatalJourneys\\_CountingtheUncounted.pdf](http://publications.iom.int/bookstore/free/FatalJourneys_CountingtheUncounted.pdf)

<sup>3</sup> Frontex, *Annual Risk Analysis*, 2015. Accessible online at: [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2015.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf)

disaster so far and took place only days after around 400 people drowned in another disaster off the Libyan coast. These events have intensified the pressure on the EU and its member states to search for more opportunities for legal and safe migration for persons requiring international protection.

In my thesis, I elaborate upon the feasibility of EU offshore processing as a proposed policy to tackle this issue. This constitutes “the assessment of claims for asylum in non-EU countries under arrangements operated or supported by the European Union collectively” (Garlick, 2015). European proposals in this regard never materialized as they were declared as legally or politically unfeasible. “Australia has pioneered a systematic use of offshore processing [but] serious human rights violations have been extensively documented. If Australia’s approach were adopted in Europe, it would also breach European regional human rights laws and EU norms” (McAdam, 2015, p.9). Nonetheless, discussions on extra-territorialisation of asylum continue; in March 2015, Italy proposed to offshore asylum claims to centres in northern Africa but no concrete plan stemmed from discussions of foreign affairs ministers.<sup>4</sup> Therefore, I attempt to contribute to the academic debate by elaborating upon the legal and political feasibility of offshore processing, referring in particular to the legal responsibility that EU member states would have to assume, and their capability and political will to do so.

## **1.2 Aim of the thesis and determination of legal framework**

The aim of this thesis is to conduct a thorough research into the legal and political feasibility of the extra-territorial processing of asylum applications in EU offshore centres as a strategy to provide for legal and safe migration of asylum seekers into the European Union.

In order to elaborate upon the legal feasibility, I make extensive reference to both international treaties and EU law. The treaties - namely the 1951 Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – are treated in my analysis as a legal basis that cannot be compromised and therefore I research if member states can safeguard its provisions in full. I also refer to the relevant case law of the European Court of Human Rights (the ECtHR). Sources of EU law are the 4 pieces of legislation governing the Common European Asylum System (CEAS) and Directive 2008/115/EC (‘the Returns Directive’). These form a starting point for further analysis; member states are not legally obliged to provide for same standards for extra-territorial asylum processing as is the case under the CEAS as long as the legislation is in conformity with the abovementioned treaties.

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<sup>4</sup> EUobserver, *EU set for further talks on overseas asylum centres*, 2015, March 16. Accessible online at: <https://euobserver.com/foreign/128011>

### 1.3 Research questions and thesis structure

In chapter 2, I firstly discuss the 'Blair Letter' and the Schilly proposal – the two initiatives proposed by EU member states themselves for the extra-territorialisation of asylum. I then scrutinize the European Commission's document Agenda on Migration to assess the current development in this regard. Lastly, I briefly explain why some EU member states' attitude towards asylum seekers has been rather reserved than opened. The aim of the chapter is to introduce some historical and current initiatives related to extra-territorialisation which also form the basis for my further analysis in subsequent chapters.

Chapter 3 analyses the principle of non-refoulement enshrined in the 1951 Geneva Convention and its relation to the ECHR in the context of the extra-territorial asylum processing. It reflects back on the proposals introduced in the previous chapter and also discusses the Australian extra-territorial asylum system:

- What guarantees must be in place in order for EU offshore asylum processing to be in compliance with the principle of non-refoulement?

Furthermore, I elaborate upon specific challenges to safeguard the non-refoulement on a territory of a third country and, on the other hand, the extent to which member states can free themselves of their legal obligation to process an asylum application:

- Are member states able to safeguard the principle of non-refoulement extra-territorially?
- What are the exceptions allowing for renunciation of the legal responsibility to process an asylum application and can they be applied extra-territorially?

In chapter 4, I elaborate in detail upon the very asylum procedure. Research questions that I wish to answer here are:

- Is it necessary in legal terms to provide for similar standards extra-territorially regarding asylum procedure guarantees and receptions conditions as is the case under the CEAS?
- Who shall be legally responsible for conducting the asylum procedure and making binding decisions on asylum applications in an offshore processing centre? Is it politically feasible to harmonize the extra-territorial asylum procedure?

- What shall be the 'exit strategy' for those who are granted asylum as well as for those who are denied the refugee status once the asylum procedure in an offshore processing centre is completed and can these strategies be effectively implemented?

Chapter 5 is the final chapter of my thesis. Here, I make an overall assessment of the political feasibility and an overall assessment of the legal feasibility; main arguments are based on the analysis conducted in previous chapters of the thesis. Lastly, I present the final conclusion concerning the political and legal feasibility of EU offshore centres as a strategy to provide for legal and safe migration of asylum seekers into the European Union.

## **1.4 Methodology and its limitations**

I scrutinize asylum law (see section 1.2) and define key characteristics of legally feasible EU extra-territorial asylum system. Reference to the CEAS is vital since it enables me to assess in greater detail how the territorial system works; by considering the way in which asylum applications are processed territorially as well as some problems that the CEAS is facing, I am able to identify potential pitfalls that are likely to emerge if asylum seekers are to be processed in offshore centres. The offshore system can only be legally feasible once member states are capable of and willing to safeguard standards stipulated under the Geneva Convention and the ECHR. The comparison is also made with the Australian asylum system which does not need to be in conformity with the ECHR.

The assessment of political feasibility is derived from EU member states' perception of and behaviour towards asylum seekers and attitude towards measures related to the extra-territorialisation of asylum. My sources of information are the academic literature, official documents published by EU member states, EU institutions, the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organizations (NGOs) as well as online newspaper articles. A thorough analysis of these documents will allow me to elaborate upon political feasibility of measures that are necessary in order for offshore asylum processing to be legally feasible.

Given the limited scope of my thesis, I do not attempt to elaborate upon other relevant issues related to EU offshore processing. How shall it work in combination with other proposed measures related to the legal migration of asylum seekers? Is it more suitable solution for a particular geographical region? Where exactly shall the centres be located and how many shall be built? Is offshore processing likely to change the behaviour of asylum seekers? These important practical questions go one step further from my current research. In other words, the question I ask myself is *if* offshore processing is feasible, not *how* it shall be implemented to become an effective and sustainable tool of EU migration policy.

Importantly, I do not provide detailed elaboration upon the legal and political feasibility of the extra-territorialisation of asylum from the perspective of third countries that were to host EU offshore processing centres. This is also given by the limited scope of the thesis and also by the fact that sources at my disposal are European or from other economically developed countries. My thesis could therefore invite for further and more complex research in this field.

Lastly, it must be stated that my thesis is being written at time when the so-called refugee question is very much at the centre of political and public debate in the European Union; in this sense, it might prove difficult to make political predictions as the direction of this debate is difficult to anticipate. Arguments related to political feasibility are based on my elaboration upon member states' positions and behaviour between 2003 and summer 2015. I do not conduct any primary research such as interviews or fieldwork that would contribute towards the assessment of political feasibility.



## **Chapter 2**

### **Chapter overview:**

**In this chapter, I assess early member states' initiatives for offshore processing (the 'Blair Letter', the Schilly proposal) as well as policies introduced in March 2015 in the European Commission's official communication Agenda on Migration. Lastly, I briefly discuss reasons why asylum seekers are often portrayed negatively which leads to the securitization of migration and less opportunities for their legal migration into the EU.**

### **2.1 Member states' initiatives for extra-territorialisation of asylum**

The cornerstone for discussions on the EU offshore processing is the so-called 2003 Blair Letter<sup>5</sup> in which the then-prime minister of the United Kingdom Tony Blair introduced the plan for "better management of the asylum process globally" (p.2) in front of the European Council. The proposal called for the establishment of processing centres on transit routes into the European Union. The resettlement would have been only applicable for "an appropriate proportion of genuine refugees" (p.4) on a burden-sharing basis that is not specified in the proposal. Also, member states would have been able to return irregular asylum seekers already present on the EU territory back to these centres. According to McAdam, (2012, p.5) "this was very clearly intended as a containment strategy – to restrict access to EU territory and shift to a discretionary resettlement process." The legality of this proposal was build on the argument that "there is no obligation under the 1951 Refugee Convention to process asylum claims in the country of application" (p.7).

In 2004, the then-German Interior Minister Otto Schilly proposed to build offshore centres in North Africa to intercept and return people while on their journey to the European Union; this proposal was linked to the voluntary burden-sharing mechanism and refused legal liability of the EU member states for the governance of these camps. Both proposals were declared as technically and legally unfeasible (McAdam, 2015, p.5, Levy, 2010, p.111). Noll (2003, p.308) argued that proposals disrespected the basic premises of international regime, "most prominently the complementarity of new approaches to the existing territorial reception and processing of protection seekers". I return to these two proposals in section 3.1 when assessing the legal feasibility of the EU offshore processing in relation to the principle of non-refoulement. What shall be clear from this section

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<sup>5</sup> The 'Blair Letter', 2003. Accessible online at: <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf> (all unannotated quotes in this paragraph refer to the 'Blair Letter')

is that both of them aimed to give member states greater control over migration flows rather than to create more opportunities for asylum seekers to reach the European Union legally and safely.

## 2.2 Agenda on Migration

### 2.2.1 Agenda on Migration 2015 as a response to shipwreck disasters in the Mediterranean

Following the shipwreck disasters off Lampedusa coast in April 2015, the European Council at its special meeting declared that “immediate priority is to prevent more people from dying at sea”.<sup>6</sup> The European Parliament passed a resolution on the report of the extraordinary European Council urging member states to act in accordance with this declaration and find a solution “based on a holistic approach that takes into account all dimensions of the issue, including introducing new safe and legal migration channels, humanitarian visas, mandatory resettlement programmes for member states, and cooperation with third countries, which would also have positive effects on internal security.”<sup>7</sup> The European Commission (further referred to as ‘the Commission’) reacted to the tragedy the very same day by producing a statement in which it promised to adopt a new European Migration Strategy by mid-May because “we need immediate actions to prevent further loss of life as well as a comprehensive approach to managing migration better in all its aspects.”<sup>8</sup> The resulting document with concrete policy proposals to tackle the current crisis is the Commission’s Communication Agenda on Migration published on 13.5.2015. The conclusions of the European Council meeting held on 25.-26.6.2015 are the official response of the member states towards these policies. However, in spite of renewed self-declared urgency of the issue by all the main EU institutions, I argue below that policies that are now to be implemented do not provide for systematic solutions that would allow for legal migration of persons seeking international protection.

### 2.2.2 Resettlement and relocation schemes

The Commission proposed two schemes based on a quota system – resettlement and relocation. To alleviate pressure on Italy and Greece, the Commission invoked Article 78(3) TFEU and called for the compulsory relocation of 40.000 asylum seekers to other EU member states; according to

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<sup>6</sup> The European Council, *Statement from the Special Meeting*, 2015. Accessible online at: [http://ec.europa.eu/malta/news/2015/24.04.2015\\_stetement\\_euco\\_en.htm](http://ec.europa.eu/malta/news/2015/24.04.2015_stetement_euco_en.htm)

<sup>7</sup> The European Parliament, *Resolution on the report of the extraordinary European Council*, 2015. Accessible online at: <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2015-0377&language=GA>

<sup>8</sup> The European Commission, *European Commission Statement on developments in the Mediterranean*, 2015. Accessible online at: [http://europa.eu/rapid/press-release\\_STATEMENT-15-4800\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-4800_en.htm)

the proposal, EU member states shall redistribute asylum seekers from Syria and Eritrea (i.e. countries with the highest refugee recognition rate) to undertake asylum procedure and grant asylum within their territory to those who are confirmed as refugees. Nonetheless, this proposal was met with criticism from some EU countries; for instance by the Czech Republic and Slovakia who currently host negligible number of refugees or by Hungary that only acts as a transit country for asylum seekers travelling to Germany. These countries disapprove of the compulsory nature of the relocation scheme which would legally oblige member states to share refugees within the EU more fairly pursuant to exact figures calculated for each member state; such proposal is said to limit their national sovereignty.<sup>9</sup> Furthermore, Denmark, Ireland and the United Kingdom would not be legally-bounded to implement the scheme given their opt-out clause in specific provisions related to the AFSJ as stipulated in Protocols 21 and 22 TFEU. In the end, the compulsory relocation scheme failed the approval of the European Council. Instead, the Council Conclusions confirmed that 40.000 people concerned will be relocated from Greece and Italy based on consensus among member states over distribution, but the nature of relocation will be temporary and exceptional (p.2).

The resettlement of 20.000 refugees pre-selected by the UNHCR not yet present on the territory of the European Union shall be voluntary even though the Agenda on Migration suggests that “if necessary this will be followed up with a proposal for a binding and mandatory legislative approach beyond 2016” (p.5). The European Council eventually agreed to the voluntary resettlement of refugees from the UNHCR camps in Africa into the EU. However, given the divisions among member states over the relocation scheme, the well-functioning resettlement scheme might prove very challenging to implement in near future; while this plan provides for legal migration and subsequent protection for 20.000 refugees, it fails to offer any kind of mechanism that could be used by other asylum seekers forced to flee their country of origin.

### 2.2.3 Other proposals related to extra-territorialisation

The Agenda stipulates that migration liaison officers shall be seconded as members of EU Delegations to number of African countries “with the purpose of gathering, exchanging and analysing information” (p.8). According to den Heijer (2011, p.188), the role of officers in the past only contributed to the strengthening of external border management; mostly present at international airports, they either directly prohibited potential asylum seekers from boarding the plane or gave negative recommendations to transport carriers which led to the same result. The Agenda gives no

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<sup>9</sup> EUobserver, *Refugee quotas ‘unacceptable’ for Visegrad states*, 2015, September 4. Accessible online at: <https://euobserver.com/migration/130122>

details about the sort of information that these officers shall gather; however, they shall clearly not be involved in asylum processing.

Furthermore, the Commission seeks to address fatalities in the Mediterranean Sea by “restor[ing] the level of intervention provided under the former Italian 'Mare Nostrum' operation” (p.3). Through adopting the new Triton Operational Plan and tripling its budget, the border agency Frontex shall extend its mandate from the management of borders to greater involvement in search and rescue operations. Mare Nostrum was an Italian-led operation that started in October 2013 following another Lampedusa shipwreck tragedy when more than 360 people drowned in the Mediterranean Sea and terminated in October 2014. The new Triton Operational Plan was agreed by the European Council and shall therefore contribute towards safer migration to Europe. However, asylum seekers still need to undertake illegal journey to be able to file asylum application. It shall be also noted that the former Mare Nostrum operation was criticised by some member states for legitimizing irregular journeys to Europe.<sup>10</sup>

Apart from the one-off resettlement discussed in section 2.2.2, other policies that would allow for the extra-territorialisation of asylum are not addressed in much detail. For instance, the Agenda on Migration states that “member states should use to the full the other legal avenues available to persons in need of protection, including private/non-governmental sponsorships and humanitarian permits, and family reunification clauses” (p.5); these mechanisms do already exist and the Agenda does not come up with further specifications supporting their enforcement.

Lastly, the Commission proposes to set up by the end 2015 a pilot multi-purpose centre in Niger:

“Working with the International Organisation for Migration (IOM), the UNHCR and the Niger authorities, the centre will combine the provision of information, local protection and resettlement opportunities for those in need. Such centres in countries of origin or transit will help to provide a realistic picture of the likely success of migrants' journeys, and offer assisted voluntary return options for irregular migrants” (p.5).

Nonetheless, since no official details are provided and the proposal is neither mentioned in the Council Conclusions, there are different interpretations of possible functions and objectives of this centre in Niger, which is a transit country for many asylum seekers. Resettlement opportunities are

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<sup>10</sup> The Washington Post, *Italy ran an operation that saved thousands of migrants from drowning in the Mediterranean. Why did it stop?*, 2015, April 20. Accessible online at: <https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/italy-ran-an-operation-that-save-thousands-of-migrants-from-drowning-in-the-mediterranean-why-did-it-stop/>

explicitly mentioned which led to a reaction from the European Parliamentary Research Service that its establishment “ could imply the extraterritorial assessment of asylum and other protection claims.”<sup>11</sup> The IOM issued a press release envisaging that the centre would “ provide information on the perils ahead, protection from exploitation and identify those in need of resettlement, temporary protection, family reunification and other options.”<sup>12</sup> On the other hand, the Migration Policy Institute Director Elisabeth Collett drew a parallel to a similar information centre called CIGEM set-up in Mali in 2008 which closed its doors 4 years later – “ it didn’t last very long, it wasn’t a success [and] there are some question marks about what would be different about this one”.<sup>13</sup> According to limited sources available about the centre, the mission of the CIGEM centre was to reduce migration flows into Europe and to assist with return procedures; Germany’s broadcaster Deutsche Welle reported that “ most of the time, [the centre] showed videos designed to deter people from leaving the country.”<sup>14</sup> Given these contrasting opinions and limited information about the multi-purpose centre in Niger, it is very difficult to assess if it can contribute in any way towards legal migration of asylum seekers. The centre shall be established by the end of 2015, yet no further sources of information about this project are accessible.

## 2.3 Explaining antagonism towards asylum seekers

As Levy (2010, p.114) puts it, “ a European chain of extraterritorial camps never materialized; instead, a string of detention camps administered by North African and Sahel States, in part aided by the EU and the IOM, populate the landscape”. The early member states’ initiatives as well as the content of the Agenda on Migration and member states’ attitude towards this document clearly suggest that the priority lies with greater migration control rather than with measures contributing towards legal migration into the European Union. The term *Fortress Europe* has been adopted for policies aimed to prevent irregular migrants from reaching the European territory. The explanation for this behaviour is most commonly referred to as the *securitization of migration*; irregular migrants are viewed as a security issue or even a threat for Europeans.

The inherent problem of irregular flows of migrants into Europe is the inability to differentiate in advance between those in need of international protection and other types of irregular migrants.

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<sup>11</sup> The European Parliamentary Research Service, *Extraterritorial processing of asylum claims*, 2015. Accessible online at: <http://epthinktank.eu/2015/06/10/extraterritorial-processing-of-asylum-claims/>

<sup>12</sup> The International Organization for Migration, *IOM welcomes European Commission proposals on migration*, 2015. Accessible online at: <http://www.iom.int/news/iom-welcomes-european-commission-proposals-migration>

<sup>13</sup> Siegfried, K., *Five false assumptions driving EU migration policy*, 2015. Accessible online at: <http://www.irinnews.org/report/101573/assumptions-driving-eu-migration-policy>

<sup>14</sup> *Deutsche Welle. Global 3000: Voluntarily or Involuntarily? Returnees in Mali* [video], 2015, April 27. Accessible online at: [https://www.youtube.com/watch?v=\\_CX4YBpB3k0](https://www.youtube.com/watch?v=_CX4YBpB3k0)

While it has been argued that “even ostensibly legitimate asylum seekers might have some economically motivated reasons for migrating, just as political circumstances might motivate what would otherwise be considered economic migration” (Adelson, 2004, p.2), the term *economic migrant* has a pejorative connotation in the current European debate since it is often associated with people misusing the anarchy in conflict regions and growth in human smuggling to escape poverty in a search of a better life in wealthy European countries; their journey is therefore perceived as a matter of personal preference rather than as an absolute necessity (Adelson, 2004, p. 1-2). The German chancellor Merkel stated in August 2015 that the country has not got a capacity to grant asylum to people only because they believe that German economy is stronger and it might be easier to find a job here.<sup>15</sup>

The main debate concerning the irregular migration is now centred on clandestine migrants reaching the Southern external EU border. According to Babická (2015), the fear within Europe is largely caused by the irregular nature of this migration; journeys are hazardous, asylum seekers often reach Europe under dramatic circumstances, and the whole process seems to be out of control.<sup>16</sup>

Nonetheless, it is often the arriving people themselves who are portrayed as a threat. For instance, it has been argued by many – including the German Minister for the Interior de Maizière – that there is a legitimate fear that terrorists would mix into these irregular streams and reach Europe unnoticed.<sup>17</sup>

However, there are also arguments explaining antagonism towards asylum seekers that do not stem from the impossibility to differentiate genuine refugees from other irregular migrants. For instance, cultural proximity – lot of asylum seekers are Muslim which raises fear that it is impossible to integrate them into the European society. For instance, Slovakia argued that it can accept only Christian refugees since there are no mosques in the country.<sup>18</sup> Very important point is that asylum seekers are traditionally rather perceived as an economic and capacity burden for the host member state than as an economic opportunity; “it is usually contended that the ‘costs’ of refugees on their hosts – rising commodity prices, the depression of local wage rates, fiscal pressures - outweigh other micro- and macro-economic benefits.”<sup>19</sup>

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<sup>15</sup> Die Welt, *Merkel will ‘Normalmodus’ für Flüchtlinge beenden*, 2015, August 18. Accessible online at: <http://www.welt.de/politik/deutschland/article145287284/Merkel-will-Normalmodus-fuer-Fluechtlinge-beenden.html>

<sup>16</sup> Babická, K., *Evropská migrační agenda a tolik kontroverzní kvóty*, 2015. Accessible online at: <http://migraceonline.cz/cz/e-knihovna/evropska-migracni-agenda-a-tolik-kontroverzni-kvoty>

<sup>17</sup> Neue Zürcher Zeitung, *Anschlag auf Bardo-Museum: Trauermarsch durch Tunis*, 2015. Accessible online at: <http://www.nzz.ch/international/naher-osten-und-nordafrika/trauermarsch-durch-tunis-1.18512602>

<sup>18</sup> EUobserver, *EU states favour Christian migrants from Middle East*, 2015, August 21. Accessible online at: <https://euobserver.com/justice/129938>

<sup>19</sup> Zetter, R., *Are refugees an economic burden or benefit?*, 2012. Accessible online at: <http://www.fmreview.org/en/preventing/zetter.pdf>

In the light of the above-mentioned facts, the pre-arrival status determination in offshore centres can be considered as a major advantage; it could lead to reduced stigmatization of asylum seekers and related suspicion over their motives for coming into Europe. Nonetheless, even the genuine refugees are not always welcome by some EU member states as they are viewed as a burden for the host economy and society; this is apparent, for example, from the current attitude of the Czech Republic, Slovakia and Hungary towards the compulsory relocation scheme (section section 2.2.2.) as well as from the early member states' initiatives - the 'Blair Letter' and the Schilly proposal (see section 2.1).

**Interim conclusion:**

**By proposing the 'Blair Letter' and the Schilly proposal, both the UK and Germany attempted to deprive themselves of the responsibility for asylum seekers arriving irregularly; the proposals did neither guarantee resettlement for all confirmed refugees processed extra-territorially.**

**The European Council approved the Commission's voluntary resettlement scheme which, however, does not constitute a durable solution for all asylum seekers. Other initiatives present in the Agenda on Migration are either not new (e.g. humanitarian permits) or it is unclear if they could contribute towards legal migration (e.g. multi-purpose centre in Niger). Compulsory burden-sharing mechanism was not adopted for relocation of asylum seekers already present in the EU.**

**The humanitarian argument alone (i.e. tragedies at sea) therefore did not lead towards opening of more legal channels into Europe. Asylum seekers are often portrayed as a financial and an administrative burden and as a security threat. Offshore processing could partly improve the current situation if it allowed for differentiation of asylum seekers from other types of irregular migrants.**

# **Chapter 3**

## **Chapter overview:**

**In this chapter, I extensively elaborate upon the principle of non-refoulement in relation to the extra-territorial asylum processing. Firstly, I define the principle and prove its extra-territorial application. I then analyse characteristics of the Australian asylum system and its incompatibility with this principle. Later, I elaborate upon limitations of safeguarding this principle outside of the EU territory and upon exceptions defined by law allowing for renunciation of the legal responsibility for an asylum seeker.**

## **3.1 The non-refoulement principle**

As enshrined in Article 33 of the 1951 Geneva Convention:

“no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

This is known as the principle of non-refoulement which is “the cornerstone of asylum and of international refugee law; following from the right to seek and to enjoy in other countries asylum from persecution...,this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.”<sup>20</sup>

The jurisprudence of the European Court of Human Rights (the ECtHR) also confirmed that the non-refoulement principle is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment. The landmark decision was the 1989 *Soering v. United Kingdom* ruling which stated that:

“expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling State under the Convention, where substantive grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.”<sup>21</sup>

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<sup>20</sup> The UNHCR, *The UNHCR Note on the principle of non-refoulement*, 1997. Accessible online at: <http://www.refworld.org/docid/438c6d972.html>

<sup>21</sup> *Soering v. UK*, Judgement of 7 July 1989, ECtHR, Appl. No. 14038/88



The connection between the ECHR and the EU law were significantly strengthened by coming into force of the Lisbon Treaty; Article 6 declares that “fundamental rights as guaranteed by the Convention ... constitute general principles of the Union's law.” Also, the EU Charter of Fundamental Rights is now legally binding on all EU institutions and national governments in the same way as EU Treaties; Article 18 of the Charter stipulates that “the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention.”

In 2012, the ECtHR ruled in *Hirsi Jamaa and Others v. Italy*<sup>22</sup> that as long as a person is under the continuous and exclusive *de jure* and *de facto* control of state authorities, the principle of non-refoulement applies even if the exercise of this control takes place outside of the national territory. In this particular case, the Court referred to pushback by Italian authorities of a ship to Libya without any documentation of people aboard – this was in breach of Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) and also Article 13 (right to an effective remedy) and Article 4 of Protocol 4 (prohibition of collective expulsion).

The implementation of the ‘Blair Letter’ and the Schilly proposal (introduced in section 2.1) would therefore not be legally feasible as returning of irregular migrants without conducting the asylum procedure is in breach of the non-refoulement principle. The UK proposal itself was aware of this problem when it argued that “we would need to change the extra-territorial nature of Article 3 if we wanted to reduce our asylum obligations” (UK Home Office, 2003 IN Gammeltoft-Hansen, 2007, p. 22). The extra-territorial asylum system must supplement and not replace existing national asylum systems and processes. In other words, “creation of more opportunities for international protection for refugees [does] not affect the responsibility of European states to grant protection to those in their territory who need it — and by implication, to afford access for asylum seekers to member state asylum systems and territories for that purpose” (Garlick, 2006, p.618). The EU member states, as an operator of offshore processing centres, must also accept the legal responsibility for implementing the processing arrangements in accordance with their international and national legal obligations (McAdam, 2015, p.7).

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<sup>22</sup> *Hirsi Jamaa and others v. Italy*, Judgement of 23 February 2012, ECtHR, Appl. No. 27765/09

## 3.2 Compatibility of EU offshore processing with the Australian asylum system

Australia's offshore asylum processing regime commonly referred to as the Pacific Solution is an example of an operational extra-territorial asylum system. "Refugees are, in Australian context, absolutely a form of regular migration ... processed offshore and selected for resettlement as part of the offshore migration programme." This is due to separation of programmes that distinguish between "genuine refugees" who fall within the scope of the abovementioned procedure and "unauthorized arrivals" who are not eligible to be granted asylum in Australia (Johnson, 2014 p.74-75). In order to divest itself of the legal responsibility, Australia excised many of its external territories from its migration zone in 2001; as a result, asylum seekers are no longer able to claim the protection visa upon arrival to these territories, but are removed to detention centres in Nauru, Papua New Guinea or Christmas Island for status determination. Those granted refugee status may be granted asylum in Australia but cannot invoke a right of entry, and thus might be transferred to another country that closed such deal with the Australian government (den Heijer, 2011, p.281-4). Meanwhile, unauthorized boat arrivals intercepted at sea are being forcibly turned back, usually to Indonesia. Since 2014, upon the full implementation of the Operation Sovereign Borders, only 1 ship was able to reach Australian mainland with all people aboard eventually transported to Nauru after rejecting a return to India.<sup>23</sup>

As argued by den Heijer (2011, p.285) "[EU member states] cannot simply excise particular territories from their human rights obligations, nor are they absolved from respecting those obligations when undertaking activity in foreign territory". The Court's ruling in *Hirsi* case of 2012 confirms den Heijer's argument. In this sense, if some EU member states decide to process asylum applications on a territory of a third country, asylum seekers would still fall under their *de jure* and *de facto* control; member states would be legally obliged to accept the legal responsibility for them and make sure that safeguards against refoulement are in place. This is different to the Australian model where people considered as genuine refugees are processed in another country and cannot invoke their procedural rights against Australia; in particular right to a fair and effective determination of asylum claims (den Heijer, 2011, p.286). In sum, implementation of the Australian model by EU member states would not be legally feasible due to insufficient protection against refoulement; Australia's policies would be in breach of the ECHR, in particular Articles 3 and 13.

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<sup>23</sup> The Economic Times, *Australia sends asylum-seekers to Nauru, as India offer refused*, 2014, August 2. Accessible online at: [http://articles.economictimes.indiatimes.com/2014-08-02/news/52356542\\_1\\_nauru-australian-mainland-asylum-seekers](http://articles.economictimes.indiatimes.com/2014-08-02/news/52356542_1_nauru-australian-mainland-asylum-seekers)

### **3.3 Safeguarding the principle of non-refoulement on a foreign territory**

The principle of non-refoulement imposes an obligation on a state to shield a person from harm, regardless of territorial considerations, as long as that person is within its jurisdiction (den Heijer 2011, p.149). It is defined by a result, which is that a person would end up in a country where his life is under threat; this is irrespective of the manner in which this result comes about, as long as pertaining to a state action amounting to expulsion, return, or refoulement (Coleman, 2009, p.235).

At the same time, however, every state possesses territorial sovereignty i.e. an exclusive right to exercise its powers within the boundaries of its territory. In this sense, conflict of laws might arise in case the territorial state where the offshore processing centre would be located would, for whatever reason, prohibit the processing of an asylum application and/or request handing over of an asylum seeker to national authorities. In such hypothetical situation, the territorial state could expel the person concerned or even refoul him back to his country of origin; the member state processing the application would still have *de jure* control but lose its *de facto* control of such asylum seeker. Non-compliance with requests of the territorial state is very exceptional and “granting extraterritorial asylum by way of humanitarian exception in opposition to demands of territorial state has a weak legal basis” (den Heijer, 2011, p.123); most of all, it is associated with individual cases of people living in an embassy for long periods of time facing imprisonment upon re-entering the territorial state (den Heijer, 2011, p.122). This is not a feasible solution for the extra-territorial asylum processing; it would inevitably lead to diplomatic tensions and probably also to closure of processing facilities.

Therefore, given that a territorial state is sovereign to decide if an asylum seeker can stay on its territory while his asylum procedure is carried out, EU member states would not be in position to safeguard the principle of non-refoulement to the same extent as on their national territories. Of course, member states are unlikely to choose location for the centre in a country where this risk is very probable. Nonetheless, this possibility can never be completely ruled out.

### **3.4 Exceptions to legal obligation to process an asylum application**

In the above sections, I have established that all states have legal obligation to protect any person from refoulement into a country where his life could be threatened. However, both the international and EU law provide for some exceptions. Letters C-F of Article 1 of the Geneva Convention define categories that are excluded from the scope of application of this Convention; these are for example

war criminals, people who no longer face persecution in their home country or people already receiving protection or assistance from UN bodies other than the UNHCR. Article 33 of the Directive 2013/32/EU (further referred to as 'the Asylum Procedures Directive') defines cases when an asylum seeker can be removed from the country without status determination in compliance with the EU law. The refusal to process all asylum applications individually and reliance on exceptions provided by law might lead to procedural errors. However, I do not discuss the impact of using accelerated return procedures on human rights of asylum seekers any further; this issue would be the same in the context of extra-territorial asylum system as is the case for asylum seekers whose application is immediately refused on a territory of one of EU member states. Instead, I elaborate more closely upon exceptions listed in Article 33(2) b, c, and d of the Asylum Procedures Directive and possibility of their extra-territorial application. The other two exceptions (Article 33(2)a and e) are irrelevant for this analysis.

The first exception is the concept of the first country of asylum further defined under Article 35 of the Asylum Procedures Directive; person who already enjoys international protection from another state or has a pending asylum application shall not also request protection from an EU member state. It is crucial to make sure that this exception is also applied extra-territorially. Otherwise, all refugees who have already been granted protection by a third country could re-apply in the offshore processing centre which would undoubtedly put an excessive burden on member states' capacities. However, given that asylum seekers often arrive without any proper documentation, the ability to distinguish people who have already been granted asylum by another non-EU state would be dependent on information-sharing between all countries in the region. For instance, countries in the Syrian neighbourhood already host around 4 millions of refugees, start introducing more restrictive policies towards asylum seekers and call for greater solidarity from the EU.<sup>24</sup> Given the large number of people coming to countries such as Jordan or Lebanon, their proper documentation is likely to be technically problematic. Moreover, what would motivate such third countries to acknowledge that a person has already been granted protection? An exodus of refugees from countries that can no longer cope with their high numbers is surely a priority for countries in the Middle East as is clear from the calls for greater EU solidarity. Therefore, the use of the first country of asylum concept has many practical constraints and its effective extra-territorial implementation is questionable.

The second exception is the case of subsequent application(s) from a person whose application was already rejected; the Asylum Procedures Directive stipulates under Article 40 that "that member

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<sup>24</sup> EUobserver, *Syria refugees: nowhere to go*, 2015, June 17. Accessible online at: <https://euobserver.com/opinion/129148>

state shall examine ... the elements of the subsequent application in the framework of the examination of the previous application..., insofar as the competent authorities can take into account and consider all the elements underlying ... the subsequent application within this framework.”

According to a study of the Commission, there are known cases of persons who have been rejected in protected entry procedures but were granted protection upon irregular entry into a destination country, however, “a properly designed protected entry procedure could, at least to an extent, address this risk by replicating or even exceeding territorially available benefits, by handling the second application as a repeat application, and by coherent return practices with regard to the rejected caseload.”<sup>25</sup> Pursuant to the Regulation 603/2013 (the Eurodac Regulation), all member states shall collect fingerprints of asylum seekers for identification purposes and record this data to the central database. The use of the same method for identification in the extra-territorial asylum system would allow for swift identification of persons filing their subsequent application. Moreover, the interconnection between the data collected territorially and extra-territorially could contribute towards the smooth-running of both the territorial and extra-territorial asylum system; an asylum seeker who is not granted the refugee status in an offshore centre could be subject to accelerated return procedures if he decides to come to Europe irregularly and failed asylum seekers returned from the EU would be denied the extra-territorial processing.

The third exception that the Asylum Procedures Directive provides for is the concept of safe third country (Article 38). “Member states should not be obliged to assess the substance of an application for international protection where the applicant, due to a sufficient connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, and there are grounds for considering that the applicant will be admitted or readmitted to that country” (Recital 44 of the Asylum Procedures Directive).

However, the use of this provision would be very problematic. Firstly, the country needs to be listed as safe pursuant to criteria under Article 38(1). Given that offshore processing centres shall be located in regions where they can be reached by persons who are likely to be confirmed as refugees, it is unlikely that many countries would fulfil this condition. Secondly, there is no definition of what constitutes a reasonable connection; member states could theoretically interpret a mere transit through a safe third country as sufficient for rejecting the applicant (Coleman, 2009, p.289). Most importantly, however, “where the third country does not permit the applicant to enter its territory,

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<sup>25</sup> The European Commission, *Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure*, 2002, p.82

member states shall ensure that access to a procedure is given [by an EU member state]” (Article 38(4)). The transfer of responsibility for non-nationals has no established legal basis in international law; readmission agreements establish this legal basis and thus help to facilitate the implementation of safe third country policies (Coleman, 2009, p.49, 225). However, what shall motivate third countries to assume the legal responsibility for asylum seekers applying in the EU offshore centre? In this case, the connection to a third country is much weaker than for the first country of asylum concept which was discussed earlier in this section. For these reasons, I assume that the safe third country concept could hardly ever be applied in the context of offshore asylum processing.

**Interim conclusion:**

**In order for offshore processing to be in compliance with the principle of non-refoulement, EU member states must accept the legal responsibility for asylum seekers processed extra-territorially and do this without compromising its obligation to process applications of those arriving irregularly. Hence, implementation of the ‘Blair Letter’ the Schilly proposal or the Australian asylum system would not be legally feasible within the European Union.**

**Member states’ ability to safeguard the principle of non-refoulement extra-territorially is lower than on their territories; it depends on the territorial state that has a sovereign right to expel a person during the processing of an asylum application. Non-compliance with request of national authorities to hand over a person has a weak legal basis and is neither a diplomatically feasible solution.**

**The Geneva Convention allows states not to process asylum applications from certain categories of people. Exceptions are also listed in the Asylum Procedures Directive; inadmissible application is the one where the asylum procedure has been already carried out or in case it shall be carried out by a third country. The co-operation between the offshore processing centre and national asylum systems on member states’ territories could lead to better management of subsequent applications filed in both systems. The implementation of the other two exceptions is more problematic because it is dependent upon the co-operation with third countries; the first country of asylum concept depends on third countries’ acknowledgement of the legal responsibility for confirmed refugees and the safe third country concept requires voluntary takeover of the legal responsibility from an EU member state by another third country given that the country is considered as safe and a sufficient connection of the asylum seeker to that country can be established.**

# **Chapter 4**

## **Chapter overview:**

**In this chapter, I firstly elaborate upon standards of the asylum procedure and reception conditions in the extra-territorial asylum system. Then, I analyze who shall be responsible for conducting the procedure and if it is feasible to create a uniform extra-territorial procedure. Later, I discuss issues related to allocation of the legal responsibility for conducting the procedure and the subsequent resettlement of confirmed refugees. Lastly, I elaborate upon the need to provide for a well-functioning readmission policy.**

## **4.1 Asylum procedure guarantees and reception conditions in the extra-territorial asylum system**

This section elaborates in more detail upon the extra-territorial asylum procedure and reception conditions. The first issue that I discuss is detention. In the Australian asylum system, whose implementation by EU member states would be legally unfeasible (see section 3.1), detention of asylum seekers is the norm. Den Heijer (2011, p.290) declares that “successful and failed claimants alike were compelled to remain within the Nauru facility for considerable periods of time. It has been reported that asylum seekers recognized as refugees remained on Nauru for four years before being brought to Australia.” Furthermore, Australia does not bear the legal responsibility for living conditions in detention centres and for the way asylum seekers are being treated there. It has been argued (Johnson, 2014, p.74-75) that the poor treatment in these offshore centres is a part of the containment strategy that has forced many detainees to withdraw their asylum application and return to their country of origin.

According to Article 5 ECHR, detention is legal only when issued “for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law”. In this sense, the use of detention is another issue that needs to be dealt differently by EU member states than is the case for the Australian offshore system in order for the EU extra-territorial asylum processing to be legally feasible. For the CEAS, the asylum procedure is governed by the previously mentioned Directive 2013/32/EU (the Asylum Procedures Directive). Reception conditions are governed by the Directive 2013/33/EU (further referred to as the ‘the Reception Conditions Directive’). I now wish to scrutinize this EU legislation; as I laid down in determination of legal framework (see section 1.2), EU member states are not legally committed to provide for same standards extra-territorially as under the CEAS as long as they act in compliance with the ECHR.

However, as I argue in the following paragraphs, many safeguards need to be provided for also in the extra-territorial system and their implementation would be more complicated than within the territory of the EU.

Detention of asylum seekers is legal and widely used by many of the EU member states. The Receptions Conditions Directive stipulates that detention shall only be issued “if other less coercive alternative measures cannot be applied effectively” (Article 8(2)). Nonetheless, as long as the asylum procedure is underway, this is in compliance with Article 5 ECHR. “The ECtHR has not, up to now, set very strict limits to the detention of asylum seekers if their detention forms part of a procedure to decide on their right to enter the territory” (Boeles et al., 2014, p.272). The Asylum Procedures Directive specifies the maximum period for the whole examination procedure which is set for 21 months in case there are exceptional circumstances slowing down the process (Article 31(5)). Member states would not be legally obliged to provide for the maximum duration of the examination period in an offshore processing centre. Nonetheless, I argue that it would be increasingly difficult to justify longer containment than stipulated under the directive. Furthermore, significant delays in the procedure would likely make offshore processing unattractive for asylum seekers (McAdam, 2015, p.8).

There are further characteristics that facilities that accommodate asylum seekers on the EU territory shall have. For instance, the Reception Conditions Directive stipulates that minors and vulnerable persons shall be accommodated separately from other asylum seekers (Article 11) and “member states shall take appropriate measures to prevent assault and gender-based violence... within the premises and accommodation centres” (Article 18(4)). Non-provision of these guarantees could challenge Article 3 ECHR (prohibition of torture) and Article 8 ECHR (right to respect for private and family life), for instance, if sufficient protection against sexual violence would not be in place. If challenged in front of the ECtHR, the proportionality test would need to be carried out; the margin of appreciation can be given if conditions in an offshore asylum centre are not compatible with the ECHR but are proportional to the aim of rescuing lives by making it possible to apply for asylum before undertaking a dangerous journey.

Furthermore, in accordance with Article 13 ECHR (right to an effective remedy) and Article 6 ECHR (right to a fair trial), the Asylum Procedures Directive provides for free legal assistance and representation in appeals procedures (Article 20), services of an interpreter (Article 15(c)). Also, the medical staff shall also be available pursuant to Article 19 of the Reception Conditions Directive. By providing all these examples from the CEAS legislation, I aim to clarify that offshore centre shall not



be only associated with the secondment of immigration officers; many other professions (e.g. doctors, lawyers, interpreters) need to be available to ensure the legal feasibility and the swift processing of an asylum application. The offshore processing centre shall therefore be perceived as a complex of many buildings (e.g. for the staff, for vulnerable persons etc.) to make sure that reception conditions and the asylum procedure are legally feasible.

The question that remains open is whether member states could create standards in offshore processing centres that would be in compliance with the ECHR. Safeguarding of provisions under the two directives on member states' territories is very challenging for many of them. I argue that it would be even more difficult to provide for similar standards extra-territorially given the isolation of such centre from the EU territory and the existing infrastructure of the member states (e.g. medical centres, organizations providing the legal assistance, network of asylum centres). As discussed in section 2.2.2, the European Council agreed to relocate asylum seekers from over-burdened national asylum systems in Greece and Italy. What would happen to asylum seekers in offshore processing centres if living conditions and procedural guarantees severely deteriorated? This remains to be unclear. This is especially problematic given that provisions under the ECHR are subject to relatively strong enforcement mechanisms; in addition, "if standards are lower, processing times longer, or durable solutions less forthcoming, then asylum seekers will continue to weigh up the risk of entering and residing in the EU irregularly" (McAdam, 2015, p.8).

#### **4.2 Potential for harmonization of the extra-territorial asylum procedure**

The CEAS legislation to a large extent approximates asylum policies throughout the European Union. Nonetheless, it must not be forgotten that "the Common European Asylum System essentially remains a collection of 28 national asylum systems" (Garlick, 2015). Each member state has to transpose the Asylum Procedures Directive into its national law. Therefore, there is no single asylum procedure and each member state has its own internal mechanisms for processing asylum seekers on its territory. In this section, I elaborate upon the possibility of harmonizing the extra-territorial asylum procedure. Firstly, I discuss who shall be responsible for conducting the procedure. Then, I discuss if it would be feasible to have a single extra-territorial asylum procedure; this is achieved by comparing asylum procedures currently conducted by member states on their territories.

Under the CEAS, an asylum application is processed by state authorities from the member state where the application has been filed. Who shall be responsible for conducting the procedure and granting the refugee status in the extra-territorial asylum system? Garlick (2015) raises the question

if supranational EU corps of asylum officers authorized to make binding decisions is needed. Article 78(2) TFEU gives the European Union legislative competence for the adoption of measures on a uniform status of asylum valid throughout the Union and therefore can be considered as an adequate legal basis for joint processing (Urth et al., 2013, p.81). Nonetheless, such option currently remains politically unfeasible; all national legislations specify that acts related to handling or preparation of the asylum case must be performed exclusively by national authorities (Urth et al., 2013, p.62). Hence, there is currently no joint processing inside of the EU or mutual recognition of positive asylum decisions taken by one of its member states in spite of provisions under Article 78(2) TFEU.<sup>26</sup> In this sense, I must also declare the option of delegating powers from member states to supranational authority in the context of offshore processing as politically unfeasible. After all, member states' expectation from the extra-territorialisation of asylum is to have a greater control over who will eventually gain access to their territories (see section 2.3). This is not provided for when asylum seekers travel throughout Europe irregularly but neither if individual member states were to recognize the legal authority of a supranational body with power to determine the asylum destination of recognized refugees. Therefore, based on the fact that no joint processing of asylum applications on the EU territory has materialized, I conclude that in order to be politically feasible, the offshore asylum procedure must be conducted by national immigration officers from all participating member states; these shall have the authority to decide who is granted asylum on the state's territory.

Would it be politically feasible to have national immigration officers processing asylum application based on a common or at least similar asylum procedure? Practices within national asylum systems do vary; for instance, asylum decision in one EU member state is normally 10-12 pages long, whereas in others it is usually 2-3 pages; this is an illustration of how procedures differ when it comes to what information is required in an asylum decision (Urth et al., 2013, p.53). Urth et al. (2013) elaborate upon feasibility of joint processing of asylum applications inside the EU territory and note that procedural differences are even more pronounced in appeals phase; "in some countries, appeals are handled by an administrative body, in others it is a quasi-judicial body, while in others again it is a court decision. These national procedures and requirements are established by law, which would have to be amended if other Member States were to be involved in the process. [This] was assessed [by member states themselves] as unfeasible in the short to medium term" (Urth et al. 2013, p.50-51).

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<sup>26</sup> Mitsilegas, V. *Professor Mitsilegas on the mutual recognition of asylum decisions in the Common European Asylum System*, 2014. Accessible online at: <http://www.law.qmul.ac.uk/news/2015/155825.html>

In this sense, it could be argued that the potential for harmonization is much greater in the first instance phase such as in case of necessary information required for an asylum decision. By being in daily contact with immigration officers from other countries and witnessing their practises, member states have greater chance than in the territorial processing to learn from each other; this might lead to greater harmonization and eventual adoption of the most efficient procedure provided that member states would agree to this voluntarily. This could potentially lead to a lower administrative burden for the offshore centre and also to a greater conformity of decisions taken. Harmonization of appeals procedure seems to be more problematic – national practices differ considerably and are a matter of national sovereignty. Since Urth et al. (2013) assess the joint appeals processing as politically unfeasible for the territorial processing, there is no reason to believe that member states' attitude would differ in the context of extra-territorial processing. As I already established earlier in this section, it is critical for member states to have control over who is admitted to their territories; this would be severely constrained if there was a supranational appeals court with power to overturn decisions taken by member states. Also, this would require such Court to interpret law of one of the member states and apply it throughout all appeals procedures which adds to its political unfeasibility. Study presented by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) argues that the "authority does not necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective" (LIBE, 2014, p.71). In contrast, Urth et al. (2013, p.80) argue that for joint processing, "to have appeals handled by an administrative, rather than judicial body... would not be in line with EU law, as it would give power to administrative officials to interpret and apply EU law without means to refer questions of interpretation to the Court of Justice".

Both first instance guarantees and an effective remedy must be accessible legally and materially (see section 4.1). Pursuant to the case law of the ECtHR (*M.S.S. v. Belgium and Greece*<sup>27</sup>), the absence of an effective remedy may result in an irreversible damage if the risk of refoulement or persecution materializes (LIBE, 2014, p.71). The percentage of rejected asylum seekers in first instance decisions on the EU territory is by no means marginal; according to Eurostat data from 2014, 45% of those who applied in the EU-28 received a positive first instance decision.<sup>28</sup> Nonetheless, there is no existing academic literature or policy document that would address the issue of safeguarding the right to an effective remedy in the context of extra-territorial asylum. I therefore consider it as a major constraint for the feasibility of offshore processing because member states are legally committed

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<sup>27</sup> *M.S.S. v. Belgium and Greece*, Judgement of 21 January 2011, ECtHR, Appl. No. 30696/09

<sup>28</sup> Eurostat, *Asylum applicants and first instance decisions on asylum applications*, 2014. Accessible online at: <http://ec.europa.eu/eurostat/documents/4168041/6742650/KS-QA-15-003-EN-N.pdf/b7786ec9-1ad6-4720-8a1d-430fcfc55018> [Table 9 (p. 12)]

to allow asylum seekers to appeal against the decision but I have not identified any politically feasible solution that could be applied extra-territorially.

#### **4.3 Allocation of the legal responsibility for asylum seekers in the extra-territorial asylum system**

As I have established in section 4.2 above, the extra-territorial asylum procedure shall be carried out by national immigration officers from EU member states; a positive asylum decision shall lead to resettlement to the state that carried out the procedure – otherwise, as I argue above, the extra-territorial asylum processing would not be legally feasible. With this in mind, I shall elaborate upon the criteria that shall determine allocation of the legal responsibility to a single EU member state in an offshore asylum processing centre. In the CEAS, these criteria are stipulated under the Regulation 604/2013 (further referred to as ‘the Dublin Regulation’). In this section, I try to elaborate upon peculiarities associated with allocation of the legal responsibility in the extra-territorial asylum system.

The Dublin Regulation lists the principle of family unity as the top criterion; an applicant shall undergo the asylum procedure in the same state where his family member was granted international protection (Article 9) or applied for international protection (Article 10). The second criterion assumes that an applicant is in possession of a valid residence permit or visa (Article 12). The third criterion allocates the legal responsibility to the first state where an applicant has irregularly entered the EU (Article 13). Therefore, the Dublin Regulation has a very limited extra-territorial application; only the principle of family unity is likely to be established for some asylum seekers with other two criteria being highly irrelevant. Furthermore, “where no member state responsible can be designated on the basis of the criteria listed in this Regulation, the first member state in which the application for international protection was lodged shall be responsible for examining it” (Article 3(2)). This would imply in the context-of extra territorial processing that most asylum seekers would be free to choose the member state that shall assume the legal responsibility.

In this sense, the extra-territorial asylum system would require participating EU member states to agree on a new set of criteria governing the rules for allocation of the legal responsibility. Even the family unity principle can be regarded as problematic. On the one hand, Article 8 ECHR stipulates that everyone has a right to respect for private and family life; this principle is firmly enshrined in EU law and therefore shall be also applied in the context of refugee resettlement. On the other hand,

the refugee population within the European Union is already unequally spread among the member states and the extensive use of the family unity principle would logically lead to even greater imbalances. In contrast, the German chancellor Merkel calls other member states to share responsibility for the refugee crisis and come up with the common response.<sup>29</sup> Similarly, the Agenda on Migration states that “the EU needs a permanent system for sharing the responsibility for large numbers of refugees and asylum seekers among member states” (p.4).

When assessing the position of member states, the Czech Republic for example argues that the key criterion for accepting refugees shall be their willingness and ability to integrate into the recipient society.<sup>30</sup> This also has to do with the issue of cultural proximity discussed in section 2.3. However, it has also been argued by Kris Pollet from the European Council on Refugees and Exiles that the equal responsibility-sharing is not compatible with good integration perspectives; in short, asylum seeker from former French colony in Africa who speaks the language can more easily adapt into France, more so because his family, friends, or at least people of the same nationality already live there.<sup>31</sup> However, it could also be argued that presence of large minority populations often leads to segregation from the recipient society rather than to integration.

I argue that the will of a refugee to live in any given member state is the central prerequisite for his successful integration and prevention of the illegal onward movement from the state he has been resettled into. Crucially, since I argued that it is now politically unfeasible to harmonize the extra-territorial asylum procedure (see section 4.2), the average recognition rate by individual member states in the offshore procedure would also likely have an impact on the ‘attractiveness’ of individual member states. Shall asylum seekers have any influence over which state is made responsible for their asylum claims? This is unclear even for the current relocation scheme (described in section 2.2.2); for instance, while the refugee shall be informed about the relocation decision, the Commission’s proposal does not provide for appeals procedure or any other legal instrument in case the refugee does not wish to be granted asylum by a particular country.<sup>32</sup> In this sense, it is vital to ask what would happen if a similar situation happened in an offshore processing centre. There are no legal instruments allowing for forcible transfer of such person into the EU. On the other hand,

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<sup>29</sup> Deutschland.de, *Sharing the responsibility*, 2015, September 1. Accessible online at: <https://www.deutschland.de/en/news/sharing-the-responsibility>

<sup>30</sup> Sczczepanikova, A, *The Transformation of Asylum*, 2011. Accesible online at: <http://migrationeducation.de/21.1.html?&rid=182&cHash=12350630fcbfc44c62fc797052477816>

<sup>31</sup> Pollet, Ch., Speech during the event *Beyond Dublin: Rethinking Europe’s Asylum System* held on 3.6. 2015 in Brussels: <http://greenmediabox.eu/en/ct/90-Beyond-Dublin-Rethinking-Europe-s-Asylum-System>

<sup>32</sup> Scheu, H., *Několik poznámek k návrhu uprchlíckých kvót v rámci Evropské unie*, 2015. Accessible online at: <http://www.cicar.cz/article/show-article/nekolik-poznamek-k-navrhu-uprchlickych-kvot-v-ramci-evropske-unie>

however, it can be argued that a person who refuses the international protection by one of EU member states shall not qualify as a refugee in the first place.

However, if a refugee accepts to be resettled into one of EU member states but in reality does not wish to stay there, it is likely to provoke irregular movements throughout the EU; the first country of asylum is obliged to readmit such person into its territory and therefore a refugee that wishes to 'choose' another member state once resettled into another member state cannot do so legally pursuant to the CEAS legislation. Further irregular movements would undermine the whole concept that the extra-territorialisation of asylum shall provide for well-managed and legal migration into the EU with member states having control over refugees staying on their territories. Therefore, I argue that taking into account asylum seekers' preferences would have a positive impact on the overall feasibility of offshore processing as an effective strategy for the well-managed migration.

In sum, since I have argued that an offshore processing shall be conducted by individual member states, determination of the legal responsibility can be regarded as very problematic. It would require setting-up a completely new hierarchy of criteria separate from the Dublin Regulation. The balance shall be found between the effective responsibility-sharing, priorities of member states and favourably also asylum seekers' preferences which are, however, currently very narrow; according to Eurostat, one out of three asylum seekers in the EU-28 applied in Germany in 2014.<sup>33</sup>

Moreover, setting up a distribution key or other arrangement for extra-territorial processing could mean a potentially unquantifiable open-ended commitment (Garlick, 2015), much greater than for the resettlement scheme presented in the Agenda on Migration. Since offshore detention of confirmed refugees would no longer be justified (Article 5 ECHR) and their return would be in breach of the non-refoulement principle, the only 'exit strategy' for refugees processed extra-territorially would be their subsequent resettlement into the European Union. Without this precondition, no third country is likely to agree to host any processing centre (Garlick, 2015). Therefore, member states could negotiate over percentage share each of them would resettle but would have no control over the overall number of resettled refugees. This goes beyond the political feasibility of many EU member states; the failure to implement on an EU level a compulsory-quota mechanism is a stark evidence of this.

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<sup>33</sup> Eurostat, *Asylum applicants and first instance decisions on asylum applications*, 2014. Accessible online at: <http://ec.europa.eu/eurostat/documents/4168041/6742650/KS-QA-15-003-EN-N.pdf/b7786ec9-1ad6-4720-8a1d-430fcfc55018> [Table 6 (p. 9)]

The reader shall also be aware that the Dublin criteria that allocate the legal responsibility within the CEAS are now under heavy criticism: “utilising criteria for distribution that do not relate to the capacity of member states for receiving asylum seekers, and have limited connection to factors which are of concern for asylum seekers, the system in many cases does not produce outcomes which are fair nor sustainable for states nor asylum applicants” (LIBE, 2014, p.84). This reflects the extensive use of the third Dublin criterion i.e. allocating responsibility to the first member state where an asylum seeker enters the EU territory. The Mediterranean countries call for the replacement of the Dublin Regulation and creation of a system based on solidarity and equal burden-sharing.<sup>34</sup> Italy, that experienced a 240% rise in applications compared to 2010, granted in 2011 permits to around 22 000 migrants, mostly from Tunisia, enabling them to travel within the EU. In reaction, France – the likely destination of these migrants – closed its border in violation of the Schengen agreement (Langford, 2013, p.246). Italy warned yet again before the European Council meeting in June 2015 that it will start issuing temporary visas if no burden-sharing mechanism is established, describing the relocation scheme as insufficient; importantly, police are increasingly patrolling the international traffic within the EU and more countries are threatening to close their borders to migrants.<sup>35</sup>

However, “reaching agreement among governments on the precise criteria ... would be likely to pose a challenge, as each member state is likely to be inclined to favour a formula which would result in a lower number for itself. ‘Free choice’ might result in greater imbalances and less equitable sharing than seen at present, as a small number of member states might prove to be the most frequently-chosen destination” (LIBE, 2014, p.54-55). In this sense, the CEAS is currently facing the same issue of allocation of the legal responsibility as member states would be facing in an offshore processing regime. Therefore, implementation of a functioning and politically feasible system for the responsibility allocation within the EU is a necessary prerequisite before plans for the extra-territorialisation of asylum can materialize. However, there is a crucial difference between the CEAS and the potential extra-territorial asylum system. Since member states are legally obliged to process asylum applications on their territories, there is much greater pressure to find an agreement between member states on a system that would be acceptable and that would not endanger the functioning of the Schengen area. In contrast, member states are not legally obliged to provide for

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<sup>34</sup> EUobserver, *EU leaders skirt asylum rules debate*, 2015, April 23. Accessible online at: <https://euobserver.com/justice/128440>

<sup>35</sup> The Guardian, *Italy threatens to give Schengen visas to migrants as EU ministers meet*, 2015, June 15. Accessible online at: <http://www.theguardian.com/world/2015/jun/15/italy-threatens-to-give-schengen-visas-to-migrants-as-eu-dispute-deepens>

offshore processing and the current experience associated with difficulties over allocation of the legal responsibility can disincentivize their further efforts.

#### **4.4 Readmission of failed asylum seekers from offshore centres into the country of origin**

The Council of the European Union declared in 2009 that “an effective and sustainable return policy is an essential element of a well-managed migration system within the Union. The European Union and the Member States should intensify the efforts to return illegally residing third-country nationals”<sup>36</sup>. In the Agenda on Migration, the Commission acknowledges that “EU’s return system – meant to return irregular migrants or those whose asylum applications are refused – works imperfectly [with] only 39.2% of return decisions issued in 2013 effectively enforced” (p.9) All countries are legally obliged under international law to readmit their own nationals; readmission agreements only confirm and specify general international law (contrary to the safe third country concept discussed in section 3.4)(Coleman, 2009, p.49).

Directive 2008/115/EC (further referred to as ‘the Returns Directive’) governs the rules on return, whether voluntary or enforced, of third-country nationals illegally staying on the EU territory to the country of origin, transit country or any third country the person concerned decides to return and in which he shall be accepted (Boeles et al., 2014, p.391). Asylum seekers are exempt from the scope of the directive but only until a negative decision on their application is issued and appeal procedure is exhausted. While EU member states have a capacity to stop the returning procedure at any moment and instead legalize the stay of a third-country national, the removal out of the territory of the European Union must be in accordance with procedural guarantees and with full respect of the fundamental rights (Boeles et al., 2014, p.392-393). Crucially, “when [for whatever reason] a member state ... comes to the conclusion that neither voluntary return nor forced removal are realistic prospects, it should consider... to legalize stay in order to terminate an unsolvable situation” (Boeles et al., 2014, p.392). Detention of irregular migrants would no longer be legal as discussed in section 4.1.

The problematic feature of the Australian extra-territorial asylum system is the failure to establish an adjoining strategy as to the eventual release, leading to the prolonged detention of asylum seekers (den Heijer, 2011, p.290). The inability to carry out the readmission of failed asylum seekers meant that the majority of people held in the detention centre on Nauru were eventually brought to the Australian mainland; the same applied for all Cuban migrants held in Guantanamo Bay in 1990s that

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<sup>36</sup> The European Commission, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, 2009, p. 66



were resettled to the United States (den Heijer, 2011, p.295). Is the European Union capable of establishing an effective 'exit' strategy for third-country nationals who failed to be granted asylum in an offshore processing centre and who do not wish to return voluntarily and whose country of origin refuses its legal responsibility to readmit them to its territory?

The problematic use of the safe third country concept concerning readmissions was already discussed in section 3.4. Hence, in case that implementation of readmission agreements with the country of origin or a third country fails, there is no legal precedent that would allow for readmission of failed asylum seekers; if the Returns Directive was to be applied extra-territorially, member states would have to consider legalizing their stay and resettle them into the EU; this can be regarded as a scenario that is politically absolutely unfeasible for the European Union and its member states; as discussed in section 2.3, even Germany declared that it shall offer its help only to people in need of international protection. The other option is to expel failed asylum seekers from the centre and leave them on the territory of the territorial state where the centre is located; this would, however, not solve the problem as the whole burden would fall on the territorial state.

Therefore, substantial improvement in effectiveness of EU readmission policy is a fundamental requirement for the feasibility of offshore asylum processing. The European Commission has not yet specified how it aims to increase the percentage of people successfully returned; the Agenda on Migration states that "the implementation of the EU rules on the return of irregular migrants is now being assessed thoroughly ... and a 'Return Handbook' will support Member States with common guidelines, best practice and recommendations" (p.10). In sum, until the statistics of successfully returned third-country nationals from the territorial CEAS dramatically improve, I argue that it is not politically feasible to extra-territorialize asylum. In this regard, it must be stated that the improvement of readmission policy is a long-term priority of the European Union; the CEAS has been established under three multi-annual programmes, namely the Tampere, the Hague and the Stockholm Programme (running between 1999 and 2014) and malfunction of the readmission policy and the need for its improvement has been spelled out in all of them.

**Interim conclusion:**

**In order for offshore processing to be legally feasible, asylum seekers need to be provided with similar asylum procedure guarantees as within the CEAS to ensure that every asylum seeker has a right to a fair trial and to an effective remedy. In regard to reception conditions, it is possible to detain asylum seekers but not longer than absolutely necessary, and with particular attention to vulnerable persons. It could therefore be problematic in terms of administration to make sure that all rights stipulated by the ECHR such as the right to a fair trial or the right to respect for private**

and family life are guaranteed out of the EU territory. The EctHR upon conducting the proportionality test can give some margin of appreciation to member states, however, in case the standards constitute a serious breach to the ECHR, offshore processing would no longer be legally feasible.

Given that there is no joint processing of asylum applications on the EU territory, this option is regarded as politically unfeasible also in the context of extra-territorial asylum system. Therefore, in order for offshore processing to be politically feasible, decision to grant asylum must be made by member states' authorities. Similarly, based on the fact that harmonization of territorial asylum procedures conducted by member states would require significant amendments to their national legislation, it can be concluded that neither the extra-territorial asylum procedure can be fully harmonized. There is, however, some potential for co-ordination of these procedures; member states would have a chance to learn from each other and eventually adopt the most efficient procedure. However, this would be much more politically sensitive for the appeals phase where I have not identified any solution that would be both legally and politically feasible.

The only legally feasible 'exit strategy' for people granted the refugee status is their resettlement into the European Union. The offshore resettlement scheme would represent much more open-ended commitment than is currently politically feasible; since every confirmed refugee would have to be resettled, member states would not have control over the total number of refugees granted asylum on their territory. Furthermore, the resettlement scheme would require setting-up a new system for allocation of the legal responsibility. An agreement on a system that would be based on an effective responsibility-sharing between all EU member states was not yet reached within the CEAS. Also, preferences of asylum seekers are relatively narrow; in 2014, every third asylum seeker in the EU-28 applied for international protection in Germany. It is therefore unclear if a system based on an effective responsibility-sharing would work. The offshore processing of asylum claims cannot become a politically feasible option before these issues within the CEAS are solved.

The 'exit strategy' for unsuccessful asylum claimants shall be their readmission into the country of origin. It would be absolutely politically unfeasible to resettle people who are not in need of international protection. However, the EU readmission policy does not function well; only 39.2% of return decisions issued in 2013 were effectively enforced. People who refuse to return voluntarily once the negative decision on their asylum application is made are likely to become a burden for the offshore centre and/or the territorial state. Therefore, significant improvement of the effectiveness of EU readmission policy is a necessary prerequisite for the feasibility of offshore asylum processing.

# Chapter 5

## Chapter overview:

**This is the final chapter of my thesis. I present an overall assessment of the political feasibility, an over assessment of the legal feasibility and the final conclusion.**

## **5.1 Overall assessment of the political feasibility**

The political feasibility of the extra-territorial processing of asylum applications is determined by the position of individual EU member states towards measures related to extra-territorialisation of asylum. The United Kingdom in 2003 and Germany in 2004 proposed to set up processing centres outside of the territory of the European Union. However, these proposals were largely envisaged as systems to replace the 1951 Refugee Convention ... and directly threatened the principle of non-refoulement (Levy, 2010, p.109). Implementation of these proposals would replace existing national asylum systems and processes; this is currently the case of the Australian asylum system where the Australian government divests itself of its responsibility to process asylum seekers arriving irregularly.

Following 2005, once it became clear that such proposals are legally unfeasible, member state governments shifted the centre of their attention away from the establishment of offshore processing centres (Levy, 2010, p.112). As I mentioned in the introduction, proposals to offshore asylum have not completely disappeared; Italy again opened the issue at the Council of Ministers meeting in March 2015.<sup>37</sup> However, such plans gain little support from the majority of the EU member states. The European Commission is well-aware of this; before coming into office, the Commission's president Juncker presented his Five Point Plan on Immigration where he states that:

Europe needs more political determination when it comes to legal migration. I know well that this is not popular and often controversial. But we will only be able to cope with immigration if Europe adopts a sound policy that allows migrants to come to Europe legally and in a controlled manner, instead of by stealth, or by crossing the Mediterranean in unstable boats organised by shady human traffickers.<sup>38</sup>

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<sup>37</sup> EUobserver, *EU set for further talks on overseas asylum centres*, 2015, March 16. Accessible online at: <https://euobserver.com/foreign/128011>

<sup>38</sup> Juncker, J-C., *Europe needs more solidarity to cope with the challenge of immigration*, 2015, May 2. Accessible online at: <http://juncker.epp.eu/news/europe-needs-more-solidarity-cope-challenge-immigration>

Nonetheless, the final text of the Commission's document Agenda on Migration does not reflect the ambition to comprehensively address the legal migration of asylum seekers into the European Union. The Agenda on Migration does not come up with any clear and long-term solution for asylum seekers who wish to come into the EU legally. The Juncker administration announced in April 2015 that "it will not propose legislation that does not have the necessary support from EU countries to pass".<sup>39</sup> Throughout my master thesis, I have elaborated upon several issues affecting the political feasibility of the extra-territorialisation of asylum:

Provision of offshore asylum processing would constitute a fundamental shift from the measures related to securitization of migration employed by EU member states. Refugees are largely perceived as a burden or even a threat for the host member state. Implementation of an offshore processing mechanism would require member states to grant asylum on their territory to all confirmed refugees. This would further require member states to pool their national sovereignty well beyond the extent that it is politically feasible as of today; this is both the case for the asylum procedure and resettlement of confirmed refugees into the EU. I identified that the potential for joint processing of extra-territorial asylum applications is very low and the procedure shall therefore remain in hands of individual member states. This raises the problem with allocation of the legal responsibility for asylum seekers; given that every member state carries out its asylum procedure individually, member states would have to come up with completely new criteria to determine a state that is legally responsible to conduct the procedure and to resettle confirmed refugees. However, a system of allocation that would contribute towards fairer responsibility-sharing and also respect preferences of both member states and refugees would be very difficult to establish. Currently, member states are searching for a solution to the unequal-responsibility sharing for refugees within the CEAS, however, the European Council failed to agree on any compulsory relocation scheme applicable for all refugees within the EU. The offshore resettlement scheme would therefore represent a commitment that member states are not prepared to make at this stage. For these reasons, it must be stated that a well-functioning territorial asylum system must be in place before EU member states can start seriously discussing the possibility to supplement the CEAS by an offshore system of asylum processing. However, the current unsatisfactory handling of the refugee question within the CEAS might well disincentivize their further efforts.

Equally, the extra-territorial asylum processing can only become politically feasible if member states are able to distinguish between those who are eligible for the international protection from those

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<sup>39</sup> EurActiv, *Juncker suffers double blow on immigration at summit*, 2015, 24 April. Accessible online at: <http://www.euractiv.com/sections/global-europe/juncker-suffers-double-blow-immigration-summit-314053>

who are not; for the latter category, EU member states must have means to return people to their country of origin or a third country that is willing to admit them. However, the low enforcement rate of expulsions decisions from the EU territory signifies that EU readmission policy is not working properly; in the context of the extra-territorial asylum system, this would constitute a serious problem to the offshore centre as well as the territorial state where such centre would be located. Furthermore, there is a risk that the offshore processing centre might attract people who were already granted asylum in another non-EU member state. For this reason, EU member states shall co-operate with non-EU states to identify these people; however, I argued that non-EU states, for example countries in the Syrian neighbourhood that are hosting large refugee populations, call for the greater solidarity from the European Union and therefore have no real incentive to share this information even if they had this data at their disposal. Besides the humanitarian commitment – the European Council, the Parliament and the Commission all aim to prevent further casualties associated with irregular migration into the EU and fight against human smuggling – I have identified only one argument that supports the political feasibility of offshore processing; asylum seekers who failed to be granted asylum in an offshore centre and subsequently irregularly arrive to one of the EU member states could be subject to accelerated asylum procedure as evidence concerning their claim would have already been collected and vice versa.

Based on my analysis of the political feasibility which is summarized in this section, I conclude that the extra-territorial processing of asylum applications in EU offshore centres is not politically feasible.

## **5.2 Overall assessment of the legal feasibility**

The legal feasibility of the extra-territorial processing of asylum applications is determined by the ability of EU member states to safeguard provisions under the 1951 Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms. By enabling the offshore processing, EU member states must accept the legal responsibility for asylum seekers who undertake the asylum procedure in offshore processing centres and make sure that the processing arrangements are in accordance with member states' legal obligations. The key principle related to the refugee protection is the principle of non-refoulement stipulated in the Geneva Convention which prohibits any state to return a person to a country where his life or freedom would be threatened. The jurisprudence of the ECtHR confirmed that the non-refoulement principle is an inherent obligation under Article 3 of the ECHR (*Soering v. United Kingdom*) and that Article 3 of the ECHR has an extra-territorial application (*Hirsi Jamaa and Others v. Italy*).

In my thesis, I argued that member states cannot fully safeguard this principle on a territory of another state. The territorial state where the processing centre would be located might request the suspension of an asylum procedure of a particular person and his handover to national authorities. In such hypothetical situation, this could lead to subsequent indirect refoulement of the person concerned. Granting asylum in opposition to demands of the territorial state has a weak legal basis (den Heijer, 2011, p.123).

The absence of an effective remedy may result in an irreversible damage if the risk of refoulement or persecution materializes (*M.S.S. v. Belgium and Greece*); therefore, both first instance guarantees and an effective remedy must be accessible legally and materially (LIBE, 2014, p.71). In this regard, “ migrants held in an offshore facility may invoke the right of having access to a court or an effective remedy. Article 13 ECHR obliges states to ensure the availability of an effective remedy to vindicate the substantive rights and freedoms guaranteed under the Convention” (den Heijer, 2011, p.285).

However, I argued in my thesis that the EU joint processing of asylum applications and creation of a single extra-territorial asylum procedure would be politically unfeasible; this leads to many issues concerning the legal feasibility. There is a high risk that asylum decisions taken by member states in the offshore centre would be inconsistent depending on the concrete member state and its asylum procedure. Moreover, this has a crucial impact on the appeals procedure that must be provided for in accordance with Article 13 ECHR; which body would be in charge of the appeals procedure and which law would it interpret? Unless the political feasibility improves, the asylum procedure cannot be fully conducted in an offshore asylum centre as applicants would have to travel to the European Union to defend their case in front of national courts in compliance with their right to an effective remedy. I have not found any legally feasible solution for safeguarding Article 13 ECHR extra-territorially that would at the same time have a chance to be supported by EU member states.

Similarly to the asylum procedure, the reception conditions shall also be in compliance with the ECHR. I argued that it might pose a particular challenge to safeguard some of its provisions, in particular the right to respect for private and family life under Article 8 ECHR. The ECtHR could theoretically give some margin of appreciation to member states given that the provision of offshore asylum processing has a potential to rescue lives by making it possible to apply for asylum before undertaking a dangerous journey. However, in case the procedural standards and reception conditions constitute a serious breach to the ECHR, offshore processing would no longer be legally feasible.

Based on my analysis of the legal feasibility which is summarized in this section, I conclude that the extra-territorial processing of asylum applications in EU offshore centres is not legally feasible; in particular, protection against non-refoulement cannot be fully guaranteed. This is due to the fact that a territorial state where such centre would be located has an exclusive right to exercise its powers within the boundaries of its territory but also due to the fact that member states are not able to guarantee the right to an effective remedy extra-territorially.

### **5.3 Final conclusion**

At the very end of my thesis, the reader shall be already well-aware of the fact that politically feasible proposals to extra-territorialize asylum are not legally feasible and that EU member states lack the political will to provide for guarantees contributing towards legal feasibility of the extra-territorial asylum processing. Since member states are legally bound to respect provisions under the Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms, the EU offshore processing regime can only materialize if the member states' attitude changes significantly. The priority for the whole European Union is, however, the well-functioning Common European Asylum System. Only then can member states seriously consider supplementing this system by enabling the processing of asylum applications extra-territorially. However, I have not found many reasons that would contribute towards political feasibility of the offshore asylum processing and there are also concerns over member states' ability to safeguard the principle of non-refoulement extra-territorially. It must be therefore concluded that the extra-territorial processing of asylum applications in EU offshore centres can be regarded as politically and legally unfeasible.

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