

# **ASYLUM AT THE EUROPEAN COUNCIL 2018: OUTSOURCING OR REFORM?**

**ECRE'S ANALYSIS OF THE PROPOSALS LAUNCHED  
AT THE JUNE 2018 EUROPEAN COUNCIL AND ITS  
UPDATED ASSESSMENT THE CEAS LEGISLATIVE  
REFORMS, WITH RECOMMENDATIONS ON THE  
COMPROMISE TEXTS.**

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## INTRODUCTION

The expectations for the June 2018 European Council meeting were high in the area of migration and asylum. After two years of discussing the asylum package this meeting was announced as the decisive moment for the reform of the Common European Asylum System (CEAS). The EU leaders meeting was considered the last chance to resolve the deadlock on the solidarity chapter of the Commission's proposal for a Dublin IV Regulation, and for there to be a chance to have the package adopted before the European elections in May 2019.

With five of the seven Commission proposals on asylum at trilogue stage and compromises concluded between the Presidency and the EP rapporteurs, remarkable progress had been made. In fact, compared to the first and second phase of harmonization in the area of asylum law, which in both cases took five years to conclude, the EU is still moving faster this time. Yet, without agreement on the reform of the Dublin system, no agreement on the other proposals seems possible as the Council maintains a package approach. As the various asylum instruments are strongly interconnected - both legally and politically - the Council is not thus far prepared to formally adopt the Commission proposals separately.

Initially envisaged by the Commission as the meeting which would give the final push for the completion of the CEAS reform, it was eventually hi-jacked by political turmoil within the German government and the debate on disembarkation of migrants and refugees rescued at sea triggered by the blunt refusal of the Italian government to let the NGO Search And Rescue (SAR) ship the Aquarius dock in its harbours.

The final text of the Conclusions offers mainly vague ideas and admittedly creative new European jargon such as "controlled centres" and "regional disembarkation platforms".<sup>1</sup> However, the life-span of these concepts remains to be seen. Only hours after the European Council conclusions were adopted, France and Italy in particular were already bickering about the meaning and location of the "controlled centres", with other Member States rejecting any possibility of creating such centres, or of receiving migrants and asylum seekers processed in such centres, on their territory.<sup>2</sup> Also regional disembarkation platforms were received with scepticism due to the lack of a clear definition in the Conclusions.

Both concepts have since been further elaborated by the Commission in two non-papers published on 24 July 2018 which are discussed below as well as in the IOM-UNHCR proposal for a regional cooperative arrangement for migrants rescued in the Mediterranean,<sup>3</sup> which served as a basis for the Commission's non-paper on "regional disembarkation arrangements".

Notwithstanding the emphasis on the externalization of EU protection obligations, some direction is provided on the reform of the CEAS and the next steps in negotiating the asylum package. Beyond an invitation to the Council to continue work with a view to concluding negotiations as soon as possible and a progress report at the October European Council, a "speedy solution to the whole package" and a "consensus" on the reform of the Dublin Regulation is called for. As imposing mandatory relocation proved a calamitous strategy, EU leaders seem to have decided against it in order to avoid the risk of another major political crisis. Whether this approach will lead to the speedy solutions the EU is looking for is uncertain, given the current political context and the conflicting interests of various groups of Member States in the reform of the Dublin system.

This policy paper first comments on the legal and practical implications and feasibility of proposals to outsource protection obligations of EU Member States to third countries that have once more gained momentum at the EU level. Secondly, taking stock of the progress made on the negotiations of the CEAS reform, the paper also presents ECRE's main concerns regarding the compromises provisionally agreed between the Bulgarian Presidency and the European Parliament rapporteurs in June on the Qualifications Regulation, Reception Conditions Directive and the Union Resettlement Framework Regulation. COREPER's refusal to endorse the provisional compromise texts has provoked severe criticism from the European Parliament but at the same time presents an opportunity to address remaining protection gaps. Finally, ECRE's key concerns and recommendations on the reform of the Dublin system will be reiterated.

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1. European Council Conclusions, 28 June 2018, Press Release 421/18, para.5.

2. BBC New, [Migrant crisis: EU leaders split over new migrant deal](#), 29 June 2018.

3. IOM/UNHCR, [IOM-UNHCR Proposal to the European Union for a Regional Cooperative Arrangement Ensuring Predictable Disembarkation and Subsequent Processing of Persons Rescued at Sea](#), 29 June 2018.

# CHAPTER 1 - PREVENTING ACCESS THROUGH OFF-SHORE ASYLUM: OLD WINE IN NEW BOTTLES?

Europe's response to the increase in arrivals of refugees in 2015/2016 has been to step up efforts to externalise asylum, that is, to prevent access to European territory and asylum procedures, and to persuade, pay or force third countries to assume additional responsibilities. This is in addition to policies of non-entrée and push-backs in violation of the principle of *non-refoulement* which are pursued in practice, including at the EU internal borders, and mainstreamed in the political discourse.

The June European Council added to these efforts with the introduction of the idea of regional disembarkation platforms, further elaborated in the European Commission non-paper of 24 July. This section assesses this addition to the externalization “toolkit”.

## 1.1. THE POLITICAL CONTEXT: THE “DISEMBARKATION CRISIS”

The issue of access was prominent by the time of the European Council due to emergency provoked by the new Italian government's refusal to accept the disembarkation of migrants rescued at sea by NGO vessels and legal action taken by Malta to prevent NGOs from operating at sea. These actions set dangerous precedents which severely undermine the effectiveness of SAR operations and SAR capacity in the Mediterranean as well as violating international human rights and maritime law.<sup>4</sup> However, they also constitute a continuation of efforts to limit access to Europe by reducing European SAR capacity.

Such actions have grave humanitarian consequences and will increase political tension: revisiting the situation before Mare Nostrum, Europe is now facing more stand-offs between Member States over where to disembark migrants and State actions undermining NGO SAR activities, endangering the lives of migrants in distress at sea, as illustrated by the various incidents in the Mediterranean which were reported in July.<sup>5</sup>

## 1.2. EU PROPOSALS ON REGIONAL DISEMBARKATION

### *European Council Conclusions: regional disembarkation platforms*

Regional disembarkation platforms were proposed in response to the crisis described above but they are not well defined in the European Council Conclusions. Although external processing of asylum applications is not explicitly embraced, it may be implied as the concept of regional disembarkation platforms is to be explored “in cooperation with third countries” and should allow for “distinguishing individual situations”.<sup>6</sup> Since the adoption of the Conclusions, multiple versions of the concept have been presented, and in the Commission's recent non-paper it has transmuted into regional disembarkation “arrangements” rather than “platforms”.

Regardless of which version is being promoted, key questions include the following.

- First, does the region covered by the arrangement include all Mediterranean States, i.e. EU and North African coastal states, and is disembarkation envisaged for both sides of the Mediterranean or just one or the other?
- Second, what additional reception facilities are foreseen for the persons disembarked, do they conform with international human rights law and international maritime law, and what guarantees are in place that they will not constitute (de facto) detention?
- Third, what mechanisms for processing asylum applications are envisaged? Do they include external processing by EU Member States or Agencies? In case of disembarkation on EU territory, does it involve new even more expedited procedures or an active role of Member State experts deployed by

4. See, for instance, IMO Guidelines on the treatment of persons rescued at sea stating the duty of the shipmaster to “seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized”, Guidelines on the treatment of persons rescued at sea, Doc. MSC 78/26/Add.2, Article 5.1.6. They further define a place of safety as “a location where rescue operations are considered to terminate”; where the survivors' safety is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Furthermore, it must be a place from which “transportation arrangements can be made for the survivors' next or final destination” (Article 6.12).

5. See for instance the Sarost 5 incident, involving a ship carrying 40 migrants, including two pregnant women, CNN, [Migrant ship stranded for two weeks after four countries refuse entry](#), July 2018.

6. European Council Conclusions, para. 5.

the European Asylum Support Office (EASO)?

- Fourth, what mechanisms for sharing responsibility for persons post disembarkation are envisaged and in case of disembarkation in Europe, is there a role for relocation?

### *The Commission's interpretation of regional disembarkation arrangements*

The legal and practical feasibility of different disembarkation options was assessed by the Commission following the informal working meeting (the "Mini-Summit") of 16 Member States on 24 June 2018. In addition, a Commission "non-paper" (informal document) was published on 24 July 2018 presenting its preliminary "assessment for establishing regional disembarkation arrangements".

### *The Commission's scenarios presented in June 2018*

In June, the Commission distinguished three scenarios:

- (1) a regional arrangement for disembarkation in EU Member States for migrants rescued in the territorial sea of a Member State;
- (2) a regional arrangement for disembarkation in third countries for migrants rescued in the territorial sea of a third country or by vessels in international waters; and
- (3) external processing of asylum applications and/or return procedure in a third country.

The third scenario, which would exclude any processing of asylum applications made on EU territory, is not explicitly dismissed by the Commission but presents "significant legal and practical challenges" and it is "questionable" whether this scenario is in line with EU values.<sup>7</sup> However, as the Commission further considers that sending an asylum seeker to a third country without processing the application constitutes refoulement and is therefore not permissible under EU and international law, it is clear that it excludes such scenario as unfeasible and unlawful. In contrast, the first and second scenarios are considered legally feasible, although the practical challenges that arise are not dismissed.

The first scenario involves an arrangement for disembarkation in Europe. It implies greater cooperation or even an agreement among coastal states on disembarkation responsibilities, presumably to avoid the kind of stand-off that arose over the Aquarius. Although it is not explicitly mentioned in the Commission's June document, the arrangement is likely to require a mechanism for sharing of responsibility for those disembarked, for example, in the form of relocation. Indeed, in the UNHCR-IOM proposals discussed below a relocation mechanism is envisaged. The idea is that countries will be persuaded to keep their ports open because they will not be responsible for all persons disembarked.

The Commission's first scenario likely entails an extension of the hotspot approach in EU Member States of disembarkation, with faster asylum and return procedures supported by Frontex and EASO. This would mean increased reception and detention capacity and mandatory border procedures under the proposed Asylum Procedures Regulation may be needed. Although no indication is provided as to the possible scale of detention, the Commission's approach ignores the numerous human rights violations in the existing hotspots, resulting from migrants and asylum seekers being held in squalid conditions, unlawful restrictions on their freedom of movement, and deficient and lengthy procedures to identify vulnerable groups.<sup>8</sup>

The Commission's second scenario is obviously the most controversial and closest to some governments' fantasies about external processing. It departs from the situation which pertained until recently in the Mediterranean whereby all disembarkations by EU-flagged vessels occur in EU Member States' ports, including in Frontex-coordinated sea operations. The scenario proposes that those rescued in the territorial waters of third countries by third country vessels and by vessels under an EU Member State flag, could be disembarked in a third country participating in the regional disembarkation arrangement, provided that the principle of *non-refoulement* is respected. It would require cooperation with UNHCR and IOM on resettlement and return, but it would exclude the option of accessing the asylum procedure in an EU Member State.

First, this scenario overlaps to a great extent with the external processing scenario, which is dismissed by the Commission as unlawful. As the migrants concerned would not be able to access the asylum procedure in an EU Member State before being resettled through a resettlement programme, their asylum application would be entirely processed outside EU territory. Processing of asylum claims on the territory of third countries without

7. European Commission, *The legal and practical feasibility of disembarkation options. Follow-up to the informal working meeting of 24 June 2018*, p. 4-5.

8. AIDA, *Country Report Greece*, 2017 Update, p. 130-135.

the option of applying for international protection on EU territory is also promoted by the Austrian Presidency as the ultimate solution.<sup>9</sup> The idea is certainly not new. Proposed numerous time in the past at EU level, the idea has been shelved time and again due to unsurmountable legal, political and practical obstacles, as well as the enormous financial cost of processing applications in a third country.<sup>10</sup>

Nothing suggests it will work this time. Denying the right to apply for asylum on EU territory is simply impossible as it violates EU asylum law and Article 18 EU Charter of Fundamental Rights which enshrines the right to asylum. Direct or indirect involvement of EU authorities in processing applications outside the EU, would trigger their responsibility under the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (the Charter) extra-territorially, something President Macron understood immediately (perhaps due to criticism of similar proposals he launched early in his presidency).<sup>11</sup> The burning practical question, which remains unanswered to date, is where to implement external processing? So far no third country has come forward to host such an operation and it is hard to imagine that any country would want to risk becoming a magnet for smugglers offering their services to those who are rejected. What compensation would be necessary to convince the countries concerned?

Second, it is unclear why not enabling applicants to apply for asylum in an EU Member State is considered contrary to EU law under scenario three, but not under scenario two in the case that migrants are rescued by an EU State flag vessel. In both scenarios, Article 3 ECHR and the Refugee Convention would be violated, as well as Article 18 of the Charter and Article 4 of the Maritime Border Surveillance Regulation<sup>12</sup> (in cases where migrants are rescued by an EU state vessel operating in the context of a Frontex-coordinated sea operation).

### *The Commission's July non-paper*

The Commission non-paper on regional disembarkation arrangements published on 24 July 2018 does not provide any substantial additional clarifications. On the contrary, it remains vague and ambiguous on where persons rescued at sea would be disembarked under the proposed arrangement. Although the non-paper considers it essential "to ensure a genuine regional dimension to disembarkation, covering both the EU and third countries",<sup>13</sup> it has no further explicit reference to disembarkation in EU countries. Instead, it outlines the following:

- the obligations of third countries;
- the role of UNHCR and IOM in case of disembarkation in third countries;
- a strategy to convince third countries to engage in such arrangement; and
- the type of support the EU can offer to partners at bilateral or regional level.

However, unlike the second and third scenario envisaged in its June document, the non-paper no longer refers to excluding the option of applying for international protection on EU territory, although this option is not explicitly included either. Deliberately leaving out details on the disembarkation responsibilities of EU Member States under such arrangements is self-defeating as it will simply reinforce third countries' opposition and may fatally undermine efforts to encourage them to further develop their search and rescue capacity.

### *Re-defining the safe third country concept under the APR Proposal: the missing link?*

The debate on regional disembarkation mechanisms is closely related to the definition of the safe third country concept and the Commission proposal for an Asylum Procedures Regulation, which will continue under the Austrian Presidency.<sup>14</sup> Controversial proposals under consecutive EU Presidencies aim to broaden support or oblige EU Member States to shift protection responsibilities outside EU territory by:

- lowering the level of protection required under EU law for a country to be considered a safe third country; and

9. Austrian Presidency, Informal Meeting of COSI - Strengthening EU External Border Protection and a Crisis-Resistant EU Asylum System, Vienna Process, 2-3 July 2018.

10. For an overview, see ECRE, [Protection in Europe: Safe and Legal Access Channels. ECRE's Vision of Europe's Role in the Global Refugee Protection Regime: Policy Paper 1](#), February 2017.

11. BBC News, [Macron warning over EU's Africa Migrant centre plans](#), 4 July 2018.

12. See Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2014 L 198/93.

13. European Commission, [Non-paper on regional disembarkation arrangements](#), 24 July 2018, p. 1.

14. European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final, Brussels, 13 July 2016. See also Council of the European Union, Doc Nr. 10973/18, Brussels, 11 July 2018.

- loosening or even entirely removing the “sufficient connection” (meaningful link) requirement from the concept’s definition.<sup>15</sup>

A weakened safe third country definition fits with attempts to eliminate existing legal barriers to disembarkation in third countries of persons rescued in Libyan territorial waters or on the high seas by enabling the classification of more countries as safe. It would thus complement plans to establish disembarkation centres in selected North African countries supported or run by EU Member States.

While the Council is yet to adopt its position,<sup>16</sup> the EP did so in May 2018. The EP’s position keeps both the safe third country concept and the admissibility concept optional, contrary to the Commission proposal.<sup>17</sup> At the same time, the notion of effective protection – accepted as a guiding principle along with the Geneva Refugee Convention – is defined in line with UNHCR standards. This entails *inter alia* a right to legal residence, appropriate access to the labour market, reception facilities and health care, the right to family reunification, and protection from *non-refoulement*. Moreover, the EP position requires the existence of a sufficient connection between the applicant and the third country for it to be reasonable to expect the applicant to apply for international protection there. Rather than mere transit, a sufficient connection is to be assessed in light of the duration and nature of previous residence or a stay in the potentially safe third country.

The systematic shifting of protection responsibilities to third countries goes against States’ commitments in the New York Declaration for refugees and migrants to “more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees”.<sup>18</sup> This type of outsourcing of responsibilities by Europe would be self-defeating and undermine the global protection regime. The third countries concerned might soon enough apply safe third country concepts themselves enabling them to quickly dismiss asylum applications in truncated admissibility procedures. It risks further shrinking the international protection space at a time where forced displacement is at an unprecedented level, which may in turn further increase refugee movements, including towards Europe.

ECRE maintains that the safe third country concept should only be applied with respect to countries which have ratified and apply the Geneva Convention without geographical limitation. However, if the notion of effective protection is to be included as a protection standard, it should be fully aligned with UNHCR’s definition in order to minimise risks of mainstreaming lower protection standards. Finally, the meaningful connection requirement should be maintained, excluding the possibility of mere short transit constituting such connection.

### 1.3. IOM AND UNHCR PROPOSAL: A REGIONAL COOPERATIVE ARRANGEMENT ON DISEMBARKATION AND SUBSEQUENT PROCESSING

#### *The details of the IOM and UNHCRs’ proposal*

The IOM and UNHCR published a joint proposal on the day of the European Council, after having provided input into the discussions prior to the meeting of the Heads of State and Government. The timing of the publication is notable, probably motivated by the organisations’ concern not to be associated with the regional disembarkation platform concept, or at least not with the version presented in the press as part of a pure and simple externalization agenda. Pointing at the paradox of an artificial sense of emergency created by political leaders at a time when sea arrivals in the first six months of 2018 dropped by more than 50% compared to the same period in 2017,<sup>19</sup> the proposal notes divergent EU Member State views have resulted in “new challenges” and necessitate revisiting regional disembarkation arrangements.

The IOM and UNHCR suggest a common approach involving both sides of the Mediterranean Basin, i.e. EU Member States and North African countries, in order to address the current SAR challenges more effectively. The chain of refusals to allow NGO ships to dock by Member States, as well as the criminal charges pressed against those NGOs on the basis of unsubstantiated accusations of collusion with smugglers, has created not only a toxic political environment but also put the lives of hundreds of persons rescued at risk. Recently, the

15. For an analysis, see ECRE, [Debunking the “Safe third Country” Myth](#), Policy Note 8, October 2017.

16. See the latest Austrian Presidency Proposal, Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (First Reading), LIMITE 10973/18, Brussels, 11 July 2018.

17. European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016)0467 – C8-0321/2016 – 2016/0224(COD)), A8-0171/2018, Amendment 264 and following.

18. See UN, General Assembly, New York Declaration for Refugees and Migrants, A/RES/71/1, 3 October 2016, par. 68.

19. IOM, [Mediterranean Migrant Arrivals reach 47,637 in 2018, deaths reach 1,422](#), 10 July 2018.

Italian Interior Minister took it one step further and threatened to also close Italian ports to ships taking part in international sea operations, such as Frontex-led Operation Themis and the EUNAVFOR Med operation Sophia.<sup>20</sup>

The IOM/UNHCR proposal does not pretend to provide a ready-made solution to the current challenges but rather presents a general framework covering all steps in the process from disembarkation to the return of those without legitimate claim to reside on the territory of the host State.

As far as the thorniest issue of disembarkation is concerned, the proposal recalls the legal obligation of all States with legal responsibility for designated SAR zones to “coordinate responses to SAR events” and to avoid delayed disembarkation. No specific criteria are mentioned for determining the place of disembarkation other than “geographic distribution with due consideration for available capacities in pre-identified disembarkation centres in EU territory and potentially elsewhere”, and respect for human rights of all people on the move and the principle of *non-refoulement*. Furthermore, reception centres for those disembarked should be state-operated and ensure access to food, sanitation, psychological support and immediate health care needs, while biometric registration and security screening would be carried out immediately. Whether such centres would be closed or open is not specified, but the immediate registration and security screening suggests that at least some restriction of freedom of movement is envisaged.

As the disembarkation arrangement aims to swiftly distinguish between various categories of persons and in particular those who are in need of international protection as well as persons with specific needs who may require some form of temporary protection, accelerated procedures for both manifestly well-founded and unfounded cases are mentioned. Examination of protection needs would be in line with international and – where applicable national and regional – standards, either by the concerned State alone or supported by UNHCR Rapid Response Teams.

Finally, solutions for those disembarked in EU ports include “eligibility assessment for possible transfer to another EU Member State” and “a flexible and swift collaborative arrangement for solutions”, a euphemism for relocation. Those disembarked outside the EU must hope for resettlement or humanitarian admission, family reunification, local integration, or voluntary repatriation and reintegration in their home country.

The proposal resembles a concept note, leaving the details to be fleshed out at a later stage and in cooperation with States on both sides of the Mediterranean Basin. This too has been tried before, for instance with the UNHCR Central Mediterranean Sea Initiative<sup>21</sup> launched in 2013 following a tragic shipwreck off the coast of Lampedusa. The IOM/UNHCR proposal thus leaves many questions unanswered from a legal and practical perspective, but it does refer to an already existing operational model framework for cooperation after rescue at sea – that included in UNHCR’s 2011 Djibouti Conclusions. These conclusions are the result of expert meetings exploring improved and more predictable responses to rescue at sea operations involving asylum seekers and refugees based on responsibility sharing.

#### 1.4. THE UNHCR DJIBOUTI CONCLUSIONS: A WORKABLE FRAMEWORK FOR EUROPE?

The framework elaborated in an annex to the Djibouti Conclusions is specifically designed to deal with situations where disembarkation at a place of safety and/or processing of rescued persons is being considered in a State other than the flag State of the rescuing vessel.<sup>22</sup> The framework remains flexible as to the place of disembarkation but it should of course be determined within the boundaries set by the applicable SAR and SOLAS provisions, the principle of *non-refoulement*, and purely practical considerations such as geographical proximity.

As far as the actual processing of international protection needs is concerned, the framework allows for processing in (1) the country of disembarkation, (2) the flag State of the rescuing vessel or (3) a third State which has agreed to assume responsibility in line with applicable international standards. Interestingly, in any of these three options the processing may be undertaken by the “authorities of the State where processing occurs and/or by authorities of another relevant State, subject to applicable international standards”, while the

20. Even though the demarche was quickly denounced by Italy’s Foreign Minister, who reaffirmed Italy’s commitment to compliance with European law but also referred to the imminent revision of the strategic mandate of EUNAVFOR Med. See Ansa, [Italy won’t duck int’nal commitments – FM](#), Ansa General News, 9 July 2018.

21. UNHCR, [Central Mediterranean Sea Initiative](#), Updated December 2014.

22. UNHCR, [Refugees and Asylum-Seekers in Distress at Sea – how best to respond?](#) Expert Meeting in Djibouti, 8 to 10 November 2011, Summary Conclusions, p. 9.

existing capacity of a State to undertake fair and efficient asylum procedures is a relevant fact in determining the location of processing.

The relevant policy and legal considerations for these forms of extra-territorial processing following maritime operations are set out in a 2010 UNHCR protection policy paper, and are the backbone of the June 2018 proposal.<sup>23</sup> As it constitutes the most detailed and concrete description of what regional cooperation in search and rescue and subsequent processing of protection needs could look like, the legal and practical feasibility of the various options for processing post-disembarkation outlined in the UNHCR paper are assessed below.

### *UNHCR Models for processing applications*

Whereas the policy paper primarily deals with consequences of maritime interception operations, legally distinct from search and rescue operations, most of its recommendations are also applicable to arrangements to deal with situations post search and rescue operations carried out on the high seas or in the territorial waters of a third state.<sup>24</sup> This is particularly the case with respect to the modalities for processing applications because the legal qualification of an operation as interception or search and rescue has no bearing on procedural safeguards and eligibility criteria under international refugee and human rights law.

In UNHCR's vision, processing in an extra-territorial setting can take the form of (1) pre-screening of protection needs, (2) full blown refugee status determination or (3) grants of temporary forms of protection to particular groups instead of full refugee status determination procedures.

It distinguishes "third state" processing, "out of country" processing, regional processing and processing on board maritime vessels.

#### *Third state processing model*

Under the "third state processing model", international protection claims are assessed in and by a State other than the rescuing State. This is appropriate when the rescue operation took place in the search and rescue area of that third state or where that third state has concurrent jurisdiction in addition to the intercepting state (for instance because interception took place in its territorial waters). Strict preconditions apply. The third State must be a party to the 1951 Refugee Convention, it must have a fair and effective asylum system in place and the third State must have been identified as the most suitable place for disembarkation or where maritime safety has required it. Processing is also envisaged in and by a third state which has no jurisdiction over the person as a result of a SAR or interception operation but where the asylum-seeker has valid links with that third country and there is an agreement with that third State for transfer of responsibility.

This seems to suggest the establishment of a Dublin-type of arrangement between coastal States on both sides of the Mediterranean that may appear particularly appealing to EU Member States and could circumvent the political and legal problems of disembarking in Libya. However, according to the framework the intercepting or rescuing State remains responsible for the individuals concerned as long as they are within that State's jurisdiction, which implies assurances – before transfer of the individuals concerned – from the third State that it is able and willing to provide access to fair and efficient asylum procedures and protection.

#### *Could it be workable?*

Given the lack of functioning asylum systems in any of the North African countries,<sup>25</sup> the "third country" processing option is not feasible from a legal and practical perspective. As a result, unless asylum seekers and refugees are rescued by vessels of one of the North African States in their territorial waters, disembarkation and processing has to take place in an EU Member State. If safety reasons make disembarkation on the territory of one of the North African countries inevitable, this should be temporary pending referral to the asylum authorities of an EU Member State, identified on the basis of a fair responsibility sharing arrangement as part of the reformed Dublin Regulation.<sup>26</sup>

#### *Out of country processing*

23. UNHCR, Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing, Protection Policy Paper, November 2010.

24. Ibid., par. 5.

25. See also overview of North African States' accession to human rights instruments in Annex.

26. See ECRE, [Principles for fair and sustainable refugee protection in Europe](#), February 2017.

The “out of country” processing option in UNHCR’s paper involves the asylum application of a person rescued or intercepted at sea being examined by the rescuing or intercepting State but on the territory of another State or on part of its own territory that is qualified as extra-territorial. The main difference compared to “third country” processing is that this option does not involve the transfer of responsibility for the application to another State.

The option is considered appropriate where those rescued would otherwise be disembarked in a country without a functioning asylum system or one which is not a party to the Refugee Convention. For example, where a group of asylum seekers has been intercepted or rescued in the territorial waters of a State without an asylum system and where relocation to the territory of the rescuing or intercepting State is not possible. As the rescuing or intercepting State maintains full responsibility over the persons concerned, the same procedural guarantees and reception standards applicable on its own territory would apply, including safeguards to prevent arbitrary detention. The policy paper does not provide further details however, on how such an arrangement would relate to the national legislation of the State hosting the “out of country” processing on its territory. A key question is how access to an effective remedy and legal assistance would be ensured, including with respect to deprivation of liberty or restrictions of freedom of movement that would necessarily occur.

The UNHCR paper seems to consider such option theoretical and as part of a longer term strategy to enhance the protection capacity of the country where the processing takes place or as a responsibility-sharing instrument, rather than a workable short-term mechanism. In fact, the paper acknowledges and warns against the risk of responsibility-shifting generated by this option and rules it out if there are no durable solutions for the individuals concerned within a reasonable time after claims have been processed.

#### *Could it be workable?*

Translating to the context of rescue operations in the Mediterranean, this option is also neither realistic nor lawful. The rescuing or intercepting EU Member State would have no tools to enforce compliance with its domestic standards on the territory of a third State. At the same time, it would remain bound by its obligations under the ECHR as it would retain full jurisdiction over the persons concerned through the exercise of effective control.<sup>27</sup> Whether the EU Charter of Fundamental Rights would apply in such circumstances extra-territorially is uncertain and would essentially depend on whether an EU Member State in such a scenario can be said to be implementing EU law or not.<sup>28</sup> Extra-territorial application is excluded under the recast Asylum Procedures Directive and the recast Reception Conditions Directive, but not under the Qualification Directive.

In the case of *Akerberg Fransson*, the CJEU equated “when implementing EU law” with “falling within the scope of EU law” as “situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable”.<sup>29</sup> However, in the case of *X and X*, the CJEU ruled that an application for a visa with limited territorial validity under Article 25 EU Visa Code was a matter of national law because the actual objective of the applicant was to apply for international protection once arrived on the territory of the issuing State, which is beyond the remit of the EU Visa Code.<sup>30</sup> In any case, theoretically at least, an application for international protection lodged with an EU Member State on the territory of a third State but processed under domestic asylum legislation would leave no doubt as to the applicability of EU law, through the Qualification Directive, and therefore the EU Charter applies.

#### *Regional processing*

“Regional processing”, the third option envisaged by UNHCR, involves joint processing carried out by several transit or destination States in regional processing centres located on the territory of one of the participating States. Except for the possible involvement of third country officials, this option is already implemented in the hotspots in Greece today through EASO deployed national experts (i.e. processing carried out by a consortium of national asylum officers and second instance decision makers or a multi-agency task force).

#### *Could it be workable?*

Leaving aside the human rights violations and dire conditions for asylum seekers in the hotspots,<sup>31</sup> experience has shown that such an approach is only workable where asylum seekers’ stay in such centres is limited and complemented with functioning referral mechanisms within the host country and sustainable intra-EU solidarity

27. See ECtHR, *Hirsi Jammaa and Others v. Italy*, Application no. 27765/09, Judgment of 23 February 2012.

28. Article 51(1) EU Charter of Fundamental Rights. Contrary to the ECHR the applicability of the EU Charter is contingent on individuals being within an EU Member State’s jurisdiction or territory.

29. CJEU, Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Judgment of 26 February 2013, para. 21.

30. CJEU Case C-638/17 PPU, *X and X v Etat belge*, Judgment of 7 March 2017.

31. For a critical analysis, see AIDA, Country Report Greece, 2017 Update.

mechanisms, including relocation in meaningful numbers.<sup>32</sup>

Furthermore, these forms of joint processing pose multiple challenges related first, to the fact that deployed experts from other Member States are not familiar with the domestic legislation and procedure under which they have to operate. Second, the language barrier would probably be exacerbated if non-EU countries were also involved. Third, problems of the accountability for decisions taken in individual cases remain unresolved. In any case, due to the human rights situation in North African countries, this option is currently only feasible on EU territory and therefore presents no alternative to the status quo.

### *Processing on board vessels*

Finally, “processing on board maritime vessels” is virtually excluded by UNHCR as an option if only for logistical and safety reasons. Even within the EU context, on board processing has never been considered a realistic option by any State or EU institution.

### *Conclusion*

The current political environment increases the risk of the proposal being instrumentalized to promote or even legitimize an EU externalization agenda. The explicit reference to UNHCR and IOM’s cooperation in exploring the EU Conclusions’ regional disembarkation platform concept further exacerbates this risk, despite both organisations dissociating publicly from this version of the concept. On the other hand, the same EU Member State discourse promoting a purely external approach is very likely to undermine efforts to involve North African countries in establishing a more predictable arrangement for search and rescue and disembarkation in the Mediterranean. The UNHCR and IOM proposal’s cautious formulation as to the place of disembarkation suggests that the centre of gravity of the regional arrangement would remain on EU soil and that disembarkation in substantial numbers in North African countries is a long-term objective, also contingent on successful capacity-building of national asylum systems at the other side of the Mediterranean.

UNHCR and IOM’s efforts to revive regional arrangements on SAR and to re-build trust across the region are important and help facilitate the “coordination” among coastal states required under international maritime law. The previous expert-level discussions on the topic and the options set out in the Djibouti Conclusions provide models to inform discussions on arrangements for the Mediterranean. A preliminary assessment of the options shows that the only workable approach is to adapt the models such that disembarkation and processing take place in Europe. Maintaining cooperation with North African countries is clearly important, but with a focus on long-term capacity-building. In the short-term the priority is agreement among the Europeans to keep ports open; such an agreement could be brokered within the context of discussions of these proposals and models or separately. Either way, it is likely to be a pre-condition for meaningful cooperation with the countries of the southern Mediterranean.

## **1.5. EU-BASED “CONTROLLED CENTRES”**

Parallel to its non-paper on regional disembarkation arrangements, the Commission published a non-paper outlining the concept of “controlled centres” in the EU,<sup>33</sup> referred to in the European Council Conclusions as facilities for rapid and secure processing and to distinguish between irregular migrants and those in need of international protection.<sup>34</sup> Here, too, there is nothing new as the non-paper essentially describes the use of hotspots as trialled in Italy and Greece on the territory of any willing Member States. It would involve full support from the EU and EU Agencies, including Frontex for identification and return and EASO for asylum processing. A test phase is proposed, with targeted assistance and processing of 500 disembarked persons, with all procedures to be completed within eight weeks.

The envisaged time-frame is unrealistic for processing asylum applications, and certainly if all procedural guarantees, including the right to an effective remedy and reception standards, required under EU law are to be respected. Research on the hotspots has revealed a persistent pattern of substandard reception conditions, violation of procedural guarantees in truncated border procedures, and lack of timely identification of vulnerabilities.<sup>35</sup>

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32. See AIDA, *Relocation: A view from receiving countries*, May 2018.

33. European Commission, *Non-paper on “controlled centres” in the EU – interim framework*, 24 July 2018.

34. European Council Conclusions, para. 6.

35. See Dutch Council for Refugees, Greek Refugee Council, CIR, ECRE and Pro Asyl, *The implementation of the hotspots in Italy and Greece. A study* and Danish Refugee Council, *Fundamental Rights and the Hotspot Approach*, October 2017.

In line with the European Council conclusions, the non-paper refers to voluntary relocation as one of the actions that could be supported by the EU without providing further details on possible financial or other incentives for Member States to engage in relocation. The non-paper also leaves the key question on the nature of the controlled centres as open reception or (de facto) detention facilities unanswered.

The link between controlled centres and the regional disembarkation arrangements discussed in section 2.2 remains unclear, although the non-paper states that the “two concepts are fully interlinked and together they aim to ensure a truly shared regional responsibility”. It can be assumed that the intention is for these centres to receive people disembarked in Europe, thereby facilitating the operation of a regional disembarkation arrangement, but this is not made explicit. In any case, relocation in meaningful numbers of persons disembarked in an EU coastal Member State will be an essential component to ensure the sustainability of any type of regional disembarkation arrangement. The recent ad hoc relocation of persons disembarked in Italy and Malta following SAR operations has shown that this can function effectively when other Member States are willing to show solidarity.<sup>36</sup>

## 1.6. ECRE’S ASSESSMENT OF REGIONAL COOPERATION ON DISEMBARKATION AND PROCESSING

In ECRE’s view, strengthening search and rescue capacity of all coastal States on both sides of the Mediterranean is a legitimate aim of EU policy. Increased search and rescue capacity in the Mediterranean is urgently needed given the increasing number of deaths at sea along the Central Mediterranean route, and search and rescue is a responsibility of all coastal states, regardless of any migration-related considerations. Regional cooperation between EU and North African countries could contribute to a more predictable and better functioning system of disembarkation – but only if international maritime and human rights law is fully respected in practice.

In the absence of functioning asylum systems in any of the North African countries and for as long as they are not in place, disembarkation of those rescued on the high seas or in the SAR zone of Libya by vessels under an EU Member State’s flag, by commercial or by NGO vessels should take place in an EU Member State, unless the immediate safety of the persons on board the ship demands another destination.<sup>37</sup> While all North African countries, with the exception of Libya, are a party to the Refugee Convention and the 1967 New York Protocol, none of them have adopted national legislation establishing a proper asylum system and securing refugee rights in accordance with international human rights law.<sup>38</sup>

In line with ECtHR jurisprudence, mere ratification of international human rights treaties including the Refugee Convention is not a sufficient guarantee that individuals will not be subjected to treatment prohibited under the ECHR nor does it imply that States’ obligations under the ECHR will not be engaged in case of return to such a country. What matters is compliance in practice with international human rights standards, including effective protection from direct and indirect refoulement and effective access to socio-economic rights, including sufficient means of subsistence.

Any regional disembarkation arrangement must also necessarily involve a predictable mechanism for sharing responsibility among EU Member States for the reception and processing of those disembarked in an EU Coastal Member State, including through relocation. This would contribute to preserving the right to asylum in the EU and prevent stand-offs between Member States which endanger the lives of those rescued and crews on the ships concerned, in violation of obligations under international maritime law.

Under the SOLAS and SAR Conventions States have an obligation of cooperation and coordination to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their

36. See for instance Times of Malta, [Fourth group of Lifeline-rescued people leave Malta](#), 29 July 2018 and UNHCR, [UNHCR welcomes end to latest Mediterranean standoff, but says predictable approach to rescue still urgently needed](#), 19 July 2018.

37. IMO Guidelines accompanying the May 2004 amendments to the SOLAS and SAR Conventions state that the government responsible for the SAR region in which people were rescued is responsible for providing a place of safety or ensuring that such a place of safety is provided (par. 6.7). A place of safety is described as a location where their safety or life is no longer threatened, their basic human needs can be met and their lives and freedom will not be at risk. It is also a place from which transportation arrangements can be made for the survivors’ next or final destination (par. 6.12). It should be noted that Malta has not ratified the 2004 amendments, whereas Italy has. See Resolution MSC.167(78) (adopted on 20 May 2004), Guidelines on the treatment of persons rescued at sea.

38. It should be noted that, according to Amnesty International, Morocco maintains a policy allowing refugees to access basic rights and services, including education and that refugees recognised as such by UNHCR, receive documents protecting them from refoulement, without, however, taking a decision on their final status. However, no national asylum procedure has been established so far. See Amnesty International, Amnesty International Report 2017/18 - Morocco/Western Sahara, 22 February 2018, available at: <http://www.refworld.org/docid/5a9938ac4.html> [accessed 5 July 2018].

obligations with minimum further deviation from the ship's intended voyage.<sup>39</sup> ECRE notes that International Maritime Law does not distinguish between State-led and NGO search and rescue operations with respect to the duty of States to facilitate disembarkation in a place of safety as soon as possible. Therefore, and in light of the increasing death toll of Mediterranean Sea crossings, State measures obstructing the launch of NGO-led search and rescue operations or successful termination of such operations through disembarkation on their territory must be immediately stopped.

Responsibility for processing applications for international protection and return for those without a right of residence in an EU Member State must then be shared between all EU Member States as part of fundamentally reformed Dublin system based on the principle of fair sharing of responsibility and solidarity in accordance with Article 80 TFEU.

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39. Resolution MSC.155(78)(adopted on 20 May 2004), Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended, 3.1 and Resolution MSC.(78) (adopted on 20 May 2004), Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended, regulation 33,4.

# CHAPTER 2 - REFORMING THE CEAS: INTO THE HOME STRAIGHT OR PALLIATIVE CARE?

## 2.1. THE STATE OF PLAY: CEAS REFORM AT THE EUROPEAN COUNCIL

Prioritising the strengthening of the EU's external border and external processing through its "Future of the European Protection System (FEPS)" proposal,<sup>40</sup> the Austrian government had long before the start of its Presidency indicated that the legislative reform of the CEAS is not high on its political agenda.

The European Council Conclusions invite the Council to continue work on the whole asylum package, including the Dublin reform, with a view to its speedy conclusion. However, no deadline is set, nor is the Austrian Presidency specifically encouraged to act. While discussions on the Commission proposals will formally continue both within the Council and, for those files which are at the trilogue stage, with the European Parliament, it is clear that they will not be treated as high priority by the Presidency, which may slow down the pace of negotiations considerably.

The reform of the Dublin Regulation remains the political hot potato as no Council negotiating mandate could be adopted under the Bulgarian Presidency. Key points of disagreement among the Member States are

- the role and scope of (mandatory) relocation of asylum seekers as part of the responsibility allocation mechanism;
- the duration of responsibility;
- the scope and nature of pre-Dublin checks; and
- the inclusion of beneficiaries of international protection in the scope of the Regulation.

ECRE maintains its position that a deep overhaul of the Dublin system is needed with permanent responsibility sharing and procedural safeguards to protect asylum seekers from fundamental rights violations at its core. This implies the deletion of any pre-Dublin checks which add to administrative burdens and procedural complexity and run contrary to solidarity. Likewise, the first irregular entry criterion and permanent or prolonged responsibility for applicants should be deleted as they add to disproportionate pressure on Member States located at the EU's external borders. Finally, procedural sanctions and exclusion from reception conditions to address secondary movements must be rejected as they are counterproductive and unlawful under CJEU jurisprudence. Rather, positive incentives for compliance with Dublin rules should be provided by taking into account meaningful links of applicants with specific Member States when allocating responsibility and facilitating freedom of movement of beneficiaries of international protection.<sup>41</sup>

Contrary to popular perceptions, considerable progress had been made in the negotiation of all other Commission proposals (except for the Asylum Procedures Regulation proposal) by the end of the Bulgarian Presidency. The results so far constitute a mixture of improvements to the Commission proposals and aspects that remain of great concern from a human rights perspective. Positive outcomes of the negotiations, compared to the Commission proposals include:

- a dilution of the punitive approach to secondary movement;
- the deletion of systematic and mandatory review of the continued need for protection of beneficiaries of international protection;
- the codification of the benefit of the doubt principle;
- access to the labour market to be granted after six months for certain categories of asylum seekers; and
- strengthened guarantees with regard to the representation of unaccompanied children in the asylum process.

On the hand, concerning changes so far include:

- the broader scope withdrawal or reduction of material reception conditions;
- provisions on the detention of children;

40. See Austrian Presidency of the European Union, Strengthening EU External Border Protection and a Crisis-Resistant EU Asylum System, Vienna, Austria 2-3 July 2018, p. 3.

41. For detailed analysis of the Commission proposal, see ECRE, [Comments on the Commission proposal for a Dublin IV Regulation \(COM\(2016\) 270](#), October 2016. See also ECRE, [Beyond Solidarity: Rights and Reform of Dublin, Legal Note 3](#), February 2018.

- provision on the internal protection alternative and actors of protection; and
- the conditionality requirement in the area of resettlement.

ECRE's concerns with regard to these provisions are discussed below.

### *The provisional compromises*

The lack of final agreement on any of the proposals at trilogue stage and the package approach pursued by the Council leaves room for further changes (positive or negative) to the provisional compromises reached between the European Parliament and the Council. The Institutions may link adoption of the asylum package to other contentious legislative proposals such as the interoperability of IT systems<sup>42</sup> and the Multi-annual Financial Framework.<sup>43</sup> In addition, because of the package approach, it is not excluded that certain agreements reached between the institutions are reopened.

One such example is the compromise on the draft EU Asylum Agency (EU AA) Regulation which was provisionally concluded back in June 2017. A broad political agreement and referendum was reached on all 12 chapters of the EU AA proposal but this agreement is subject to endorsement by COREPER following further work on the recitals.<sup>44</sup> Some parts of the text have not been finally agreed upon as they relate to other legislative proposals in the asylum package. In particular, the provisions relating to the role of the EU AA in the operation of Dublin, and the Union Resettlement Framework, as well as regards its role in assisting the Commission in the assessment and designation of third countries as safe countries of origin and safe third countries, are still open; the Council had no mandate to negotiate on these elements. It remains unclear when formal adoption will take place and there is still a possibility that parts of the compromise reached may be reopened if necessary to reach an agreement on the reform of Dublin. Should the solidarity component of the Dublin IV Regulation become an empty box, it is not excluded that certain Member States insist on further changes, for instance taking out or reducing the EU AA's powers to monitor and evaluate Member States' performance in key areas of the EU asylum acquis. The resources to be dedicated to the EU AA may be reviewed in light of its tasks and responsibilities as part of the Multi-annual Financial Framework discussions.

As a result, there are still opportunities for further improving the compromise texts and enhancing the level of protection enshrined in the EU asylum acquis. ECRE recommends improvements to ensure better compliance with human rights law and a better functioning asylum system.

## **2.2. THE INTERNAL PROTECTION ALTERNATIVE– ARTICLE 8 QUALIFICATION REGULATION PROPOSAL**

The proposed compromise text provides for (1) a presumption against the existence of an Internal Protection Alternative (IPA) where persecution emanates from the State, excepting where this is limited to a specific geographical area and (2) a mandatory assessment of the IPA, where persecution emanates from a non-State actor. The compromise text under consideration further refers to the obligation to “examine” whether an IPA exists, rather than an obligation to “determine” that an IPA exists when certain conditions are met.

ECRE has consistently questioned the use of the concept as it constitutes an additional criterion to eligibility for refugee status beyond the criteria in Article 1A of the Refugee Convention.<sup>45</sup> At the same time, the reference to “shall examine” introduces legal uncertainty insofar as it does not squarely state whether a Member State is

42. See European Commission, Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/226, COM(2017) 793 final, Strasbourg, 12 December 2017 and Amended Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration) and amending [Regulation (EU) 2018/XX [the Eurodac Regulation],] Regulation (EU) 2018/XX [the Regulation on SIS in the field of law enforcement], Regulation (EU) 2018/XX [the ECRIS-TCN Regulation] and Regulation (EU) 2018/XX [the eu-LISA Regulation], COM(2018) 480 final, Brussels, 13 June 2018.

43. See in particular European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund, COM(2018) 471 final, Strasbourg, 12 June 2018 and Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM(2018) 375 final, Strasbourg, 29 May 2018.

44. Council of the European Union, [EU Agency for Asylum: Presidency and European Parliament reach a broad political agreement](#), Press Release 431/17, 29 June 2017.

45. And therefore also its compatibility with Article 78(1) TFEU, requiring the EU's common policy to be in accordance with the Refugee Convention, can be questioned.

required to examine and apply the internal protection alternative in every case or whether, following examination, it may opt not to use it. In the former case, the provision would reduce the flexibility for determining authorities not to apply the concept where they consider that to be the appropriate option in the individual circumstances of the case, even if the criteria for applying the concept are fulfilled. In the latter, it would entail an unnecessary administrative burden as Member States would have to examine the concept in every single case, even where they choose not to apply it as a matter of policy.

Second, the presumption against the existence of an internal protection alternative where the persecution or serious harm emanates from State agents is undermined considerably through the possible inclusion of a paragraph allowing the determining authority to exceptionally consider that effective protection is in fact available if it is “clearly established that the risk of persecution stems from an actor whose power is clearly limited to a specific geographical area or where the State itself only has control over certain parts of the country”.

In particular, the reference to the State only having control over certain parts of the country risks rendering the abovementioned presumption meaningless in practice. The rationale of the presumption is that State power extends to the entire territory and that persecution therefore cannot be ruled out, even in parts of the territory that are under the de facto control of non-State actors, as this may only be temporary or may not constitute effective protection of the individual concerned. Furthermore, an actor’s power being “clearly limited to a specific geographical area” constitutes a dubious criterion to assess the existence of an internal protection alternative in the absence of concrete factors to assess the scope of such actor’s ability to persecute the applicant. It is often wrong to assume that a person is out of reach of a non-state agent solely on the basis of his or her presence in a part of the territory which is under the control of State authorities.

Finally, given the rapidly changing nature and scope of conflicts and actions of state and non-state actors in such situations, the compromise provision seems very difficult to apply in practice for asylum administrations. Whereas Article 8(3) requires them to act on the basis of up-to-date information, this would be difficult to ensure with respect to such ill-defined “areas of control”, where tracking changes in the situation on the ground is particularly challenging.

- » **ECRE therefore recommends keeping the internal protection alternative as an optional provision. Article 8(1) of the compromise text should be amended accordingly and provide that the determining authority “may examine if an applicant is in need of international protection where he or she can safely and legally travel to and gain admittance...”**
- » **The second sentence of Article 8 (1a) in the compromise text should be deleted in order to exclude the existence of an internal protection alternative when persecution emanates from a State actor.**

## 2.3. ACTORS OF PROTECTION – ARTICLE 7 QUALIFICATION REGULATION PROPOSAL

The provisional compromise text alters the definition of non-state actors as actors of protection in Article 7 of the recast Qualification Directive to “stable established non-State authorities, including international organisations, who control the State or substantial part of the territory of the State, provided they are able and willing to provide effective and non-temporary protection in accordance with paragraph 2”.

Maintaining non-State actors as actors of protection in the Qualification Regulation is problematic in principle and practice. The Refugee Convention does not include the concept of protection being provided by non-State entities. Non-State actors, including international organisations,<sup>46</sup> cannot be held accountable under international law in the same way as States, they have limited power to enforce the rule of law, and they are often only able to provide protection which is limited in duration and scope.<sup>47</sup>

It is extremely unlikely that non-State actors, including as defined in the compromise text, will be able to provide effective and non-temporary protection as required under Article 7(2)<sup>48</sup> and as interpreted by the CJEU. The deletion of “parties” as potential actors of protection is an improvement of the current recast Qualification

46. See on this issue, UN High Commissioner for Refugees, UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466, February 2018, p. 14.

47. On the issue of non-State actors of protection, see M. O’Sullivan, Acting the Part: Can Non-State Entities Provide Protection under Refugee Law? *IJRL* (2012) 24(1), 85-110.

48. State practice shows that non-State entities are rarely considered as stand-alone actors of protection. See ECRE, Asylum Aid, Hungarian Helsinki Committee, Vluchtelingenwerk Nederland, Actors of Protection and the application of the Internal Protection Alternative, *European Comparative Report*, 2014, p. 49-50.

Directive but is replaced with an equally unclear notion of “stable established non-State authority”, which is not further defined.

- » **Therefore, ECRE urges the co-legislators to seize the opportunity to delete altogether the possibility to consider non-State actors as actors of protection.**

## 2.4. DETENTION OF CHILDREN – ARTICLE 11 RECEPTION CONDITIONS DIRECTIVE PROPOSAL

The compromise text on the recast Reception Conditions Directive further amends current Article 11 recast Reception Conditions Directive with respect to the detention of children on two accounts. 1) The presumption against the detention of minors is more firmly enshrined in the Directive by stating that “minors shall, as a rule, not be detained” as opposed to the current formulation according to which “minors shall be detained only as a measure of last resort”. As a consequence, placement of children in suitable reception facilities adapted to their needs is imposed on States as the norm.

However, whereas the EP’s position was to ban the detention of children as a matter of EU law, the provisional compromise still allows for such detention in exceptional circumstances and as a measure of last resort. On the one hand, the wording is better as this is only possible after it has been established that other less coercive alternative measures cannot be applied effectively and after detention is assessed to be in their best interest.

The latter requirement does not claim that detention for immigration purposes is in the best interests of the child. To the contrary, it presents an important guarantee to further reduce child detention as it is virtually impossible to conceive of a situation in which the detention of children, even when detained with adult family members, would be in their best interest. In fact, recently, UN Treaty bodies UNCRC and UNCRW have taken the position that “children should never be detained for reasons related to their parents’ migration status” and that “any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice”.<sup>49</sup>

In this regard it is important to note that the jurisprudence of the European Court of Human Rights now consistently acknowledges the devastating effects of detention on the mental and physical health of children and on their relationship with their parents in case of family detention. The ECtHR’s ruling in *A.B. v France, A.M. and Others v France and R.C. and V.C. v. France*, for instance, have confirmed that the conditions inherent in detention facilities are a source of anxiety and exacerbate vulnerability of children, leading to a violation of Article 3 ECHR.<sup>50</sup> In addition, the Parliamentary Assembly of the Council of Europe in its resolution 2020 called on States to introduce and enforce laws prohibiting the detention of children for immigration purposes.<sup>51</sup>

At the same time, the abovementioned guarantees against detention of children, seem significantly undermined by the inclusion of two child-specific grounds of detention in Article 11(1) in addition to the general detention grounds laid down in Article 8(3) which remain applicable to children falling within the scope of the Directive. Where it is considered to be in their best interests, the compromise text provides that (1) accompanied minors may be detained where the minor’s parent or primary care-giver is detained and (2) unaccompanied minors may be detained where it safeguards the minor.

By explicitly including both grounds as reasons for detaining children under EU law, the Directive risks undermining positive developments in certain EU Member States already applying general prohibitions on the detention of accompanied or unaccompanied children.<sup>52</sup> It would also risk regression on some of the above-mentioned positive developments in the ECtHR jurisprudence regarding the detention of migrant and asylum-seeking children. With regard to EU Member States, the ECtHR’s assessment as to whether the State’s interference with asylum seekers’ right to liberty is “in accordance with the law” takes into account the level of protection guaranteed under EU law. A broadening of detention grounds with respect to children could trigger

49. United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (UNCMW) and United Nations Committee on the Rights of the Child (UNCRC), [Joint general comment No. 4 \(2107\) on the Rights of All Migrant Workers and Members of Their Families and No. 23 \(2017\) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return](#), 16 November 2017.

50. ECtHR, *A.B. and Others v. France*, Application No 11593/12, *A.M. and Others v. France*, Application No 24587/12, *R.C. and V.C. v. France*, Application No 76491/14, judgments of 12 July 2016.

51. Parliamentary Assembly of the Council of Europe (PACE), Resolution 2020 (2014) Final Version, The alternatives to immigration detention of children.

52. By the end of 2017, detention of both unaccompanied children and children in families was very exceptional in countries such as Sweden and the Netherlands, while it is prohibited in Cyprus and Italy. See the respective AIDA country reports, Update 2017.

a more permissive approach in future jurisprudence. Moreover, the premise that deprivation of a child's liberty can ever be a "safeguarding" measure should be rejected given the overwhelming evidence of the contrary.

Therefore, ECRE urges the co-legislators to seize the opportunity of the reform to ban the detention of asylum seeking children, whether accompanied or unaccompanied as per the EP negotiating position.

Should the Institutions wish to maintain child detention as an exceptional measures, the provisional compromise text on Article 11(2) should be further amended by deleting letters a) and b), maintaining only the possibility of detention of children "in exceptional circumstances, as a matter of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively and after detention is assessed to be in their best interest in accordance with Article 22".

Finally, the compromise text further weakens the Commission proposal with regard to access to education of detained children. Whereas the Commission proposal includes an obligation to "secure their right to education" when minors are detained, this is diluted in the compromise text to a right to education in accordance with Article 14, unless the provision of education is of limited value to them due to the very short period of their detention.

In the absence of any indication of what constitutes a "short" period of detention, this leaves an unduly wide margin of discretion to Member States and may lead to arbitrary denial of access to education for children in violation of the EU Charter of Fundamental Rights, further undermining their intellectual and emotional development.<sup>53</sup> Since it concerns the detention of children pending the examination of their asylum application and not in the context of return, there is no reason why their access to education should be subject to rules other than those laid down in Article 14 of the Reception Conditions Directive.

» **Therefore, ECRE calls on co-legislators to firmly consolidate the right to education, including of detained children and further amend the provisional compromise text as follows: "Where minors are detained, they shall have the right to education in accordance with Article 14".**

## 2.5. WITHDRAWAL OR REDUCTION OF MATERIAL RECEPTION CONDITIONS – ARTICLE 19 RECEPTION CONDITIONS DIRECTIVE PROPOSAL

Article 19 of the compromise text allows Member States, when it is duly justified and proportionate, and in addition to withdrawing the daily expenses allowance to:

- reduce other material reception conditions; or
- withdraw other material reception conditions where an applicant has seriously and repeatedly breached the house rules of the reception centre or has behaved violently.

Both options also seem available in a range of other situations, including where the applicant

- (1) abandons a geographical area within which the applicant may move freely in accordance with Article 6b or the designated place of residence under Article 7;
- (2) does not cooperate with the competent authorities, or does not comply with the procedural requirements set by them;
- (3) has lodged a subsequent application;
- (4) has concealed financial resources;
- (5) fails to participate in compulsory integration measures; or
- (6) has been transferred to the Member State where he or she is required to be present after having absconded to another Member State.

The extended possibilities to reduce or withdraw material reception conditions could potentially affect considerable numbers of asylum seekers.<sup>54</sup> The degree of the reduction is not further expanded on. However,

53. Detention periods vary considerably among EU Member States. For instance, asylum seekers are detained during the entire asylum procedure in the transit zones in Hungary, while unaccompanied children were detained there on average for 47 days in 2017. See AIDA, [Country Report Hungary](#), Update 2017. In Portugal unaccompanied children have been detained in 2017 for periods ranging from 4 to 50 days and families for periods ranging from 3 to 60 days. See AIDA, [Country Report Portugal](#), Update 2017, p. 91.

54. Research in Italy, for instance, revealed that in 2016-2017 on the basis of 35 out of 100 Prefectures, reception conditions were withdrawn with respect to at least 22,000 asylum seekers. See AIDA, [Country Report Italy](#), Update 2017, p. 77-78.

Article 19(3) includes an obligation to ensure under all circumstances access to at least emergency health care, essential treatment of illnesses and necessary sexual and reproductive health care which is essential to address a serious physical condition, and a standard of living in accordance with Union law and international obligations of applicants.

The lack of a precise definition of this standard of living, which is de facto defined differently in national legislation, renders it difficult to use as a threshold, whereas the applicability of Article 1 of the EU Charter of Fundamental Rights on human dignity obliges States to provide some form of reception in all circumstances. The possibility to reduce “other material reception conditions” without any restriction as to the type of material reception conditions asylum seekers are entitled to under the Directive, leaves considerable discretion to Member States to impose sanctions which could put significant numbers of asylum seekers in situations of destitution.

The possibility for Member States to completely withdraw material reception conditions in case of subsequent applications is particularly worrying in this regard and has already been abandoned by several countries under the current directive.<sup>55</sup> According to data from the European Asylum Support Office (EASO), about 55,000 applications, or 8 % of the total number of applications in the EU Member States and Schengen Associated States in 2017, were repeated applications by persons who had already lodged an application previously in the same EU or Schengen Associated country.<sup>56</sup>

Depriving applicants of access to or seriously reducing their reception conditions may also have an adverse effect on the quality of the asylum process as it can undermine applicants’ ability to comply with deadlines and other procedural obligations and to substantiate new elements, in particular if they become homeless. Such a policy therefore indirectly entails the risk of increased cases of refoulement where persons with international protection needs have not had an effective opportunity to comply with procedural requirements.

Finally, as argued elsewhere, withdrawing or significantly reducing material reception conditions of applicants who engaged in secondary movement or were transferred back to the responsible Member State, is counterproductive as it is likely to create situations of irregularity. The perspective of only being entitled to reduced material reception conditions or an insecure standard of living is not an incentive to comply with the Dublin rules.<sup>57</sup>

- » **ECRE calls on the co-legislators to revisit the compromise on Article 19 and delete the possibility in paragraph 1 to completely withdraw material reception conditions or reduce other material reception conditions.**

## 2.6. CONDITIONALITY – ARTICLE 4 UNION RESETTLEMENT FRAMEWORK PROPOSAL

The role of conditionality in the Union Resettlement Framework (URF) has been a contentious issue throughout the discussion on the Commission proposal. The Commission’s proposal to make the choice of third countries from which refugees can be resettled under the URF conditional on countries’ relevance for EU foreign policy and migration management objectives was embraced by the Council and opposed by the European Parliament. ECRE has consistently held that any references in the Regulation to migration management objectives or the Partnership Framework should be removed as they run counter to the long-standing function of resettlement as a lifesaving and humanitarian protection and global solidarity instrument.<sup>58</sup>

It is important for EU law to support the strategic use of resettlement in the sense of using it to meet broader protection-related objectives, including generating positive benefits beyond those experienced by the resettled persons. This could include using it as an incentive to encourage objectives such as durable solutions for other persons and strengthening asylum systems in the refugee hosting country. Using it to support narrowly conceived EU migration control objectives should be avoided.

Therefore, ECRE welcomes the deletion of conditionality language in Article 4 of the compromise text as an essential improvement of the Commission’s proposal, which should be maintained.

55. For an overview of current practice in selected EU Member States, see AIDA, [Withdrawal of reception conditions of asylum seekers. An appropriate, effective or legal sanction?](#) July 2018.

56. EASO, Annual report on the situation of asylum in the EU 2017, June 2018, 33.

57. ECRE, [Comments on the Commission proposal recasting the Reception Conditions Directive](#), October 2016, p. 7.

58. ECRE, [EU Resettlement for Protection](#), Policy Note 6, 2017.

## CONCLUSION

The events at and around the European Council of July 2018 demonstrate a growing gap between EU policy-makers fixated on finding purely external solutions, unfortunately including Austria, holders of the current EU Presidency, and those who understand that it is neither desirable nor feasible to outsource all of Europe's responsibilities. Unfortunately, the Commission's position remains ambivalent with contradictory statements being produced, some supporting efforts to block access to Europe and others seemingly focused on trying to facilitate agreements within Europe.

The current iteration of the European political crisis on migration and refugee issues is the Mediterranean disembarkation crisis. But underlying it are the same long-term causes: the lack of fair responsibility sharing systems; the return again and again to fantasies of Fortress Europe; and the revival of simplistic unworkable options such as mass deportation or external processing of asylum applications. The absence of a fair allocation system both creates the disincentive for allowing disembarkation because the country will be responsible for all those disembarked and fosters support for the extremist forces that have provoked the crisis by implementing commitments on closure of ports.

The answers offered by the European Council conclusions are unsatisfactory, as analysed here. The "controlled centres", even after the publication of the Commission non-paper further elaborating the concept, remains a rebranding of the existing hotspot approach. Rather than new terminology, an expansion of the concept should focus on addressing the problems identified with the hotspots. Regional cooperation on disembarkation has transmuted from a potentially useful idea of agreements on disembarkation to that of the "regional disembarkation platform" based only on outsourcing responsibility for disembarkation to non-European countries. ECRE believes this approach is illegal under international refugee and human rights law, and International Maritime Law. It is also not politically feasible.

The meeting convened on 30 July by UNHCR and IOM bringing together states from around the Mediterranean was a useful initiative, and efforts to develop arrangements involving all Mediterranean coastal states should continue. But trust needs to be re-established with the countries of the southern Mediterranean. In the long-term, functioning SAR in the Mediterranean involves all coastal states but some European leaders' efforts to outsource all responsibility to the non-European countries is undermining efforts to work with these countries and gives them no incentive to develop SAR capacity or functioning asylum systems. It thus directly undermines Europe's long-term interests as well the future of the global protection system. Bi-lateral forays in to the region to buy these countries' support are ineffective and embarrassing, undermining wider European foreign policy, including its security efforts.

A regional disembarkation arrangement could be a useful tool but it needs to be built on the long-term vision of fully functioning asylum systems on both sides of the Mediterranean. The Conclusions, the Commission's non-paper and too many of the speeches from European leaders focus only on the obligations and commitments of third countries. As such, it becomes impossible to persuade Northern African countries that this is not another attempt to shift responsibilities to them rather than to share responsibilities with them.

In the short-term the priority is to keep open ports in Europe in order to avoid the shocking scenes of rescue ships stranded at sea. The differing interpretations of International Maritime Law means that this requires an agreement among European coastal states to share responsibility for disembarkation. This is already the case for Frontex-led operations but should now be developed for all SAR in the region and it could be facilitated by the Commission in the form of disembarkation protocols or a wider agreement. It should be accompanied by responsibility-sharing mechanisms, including relocation, which also bring in non-coastal states. The ad hoc arrangements put in place during the summer show that this can work. In the absence of agreement on either a deeper reform of the Dublin system for allocation of responsibility viewed as essential by many, or on the "corrective allocation mechanism" proposed by the Commission, ad hoc mechanisms are the only option. In order to create certainty, they can be gradually formalised however in the long-term it is not acceptable that certain Member States simply opt out of solidarity, a treaty requirement. Political and financial consequences must follow.

Involvement of countries outside Europe could be useful if focused on long-term assistance to build capacity; disembarkation cannot be considered for countries that are not places of safety. Efforts to build trust and to support cooperation with these countries are important and should continue to be facilitated by UNHCR and IOM. But as soon as this becomes about outsourcing responsibility – for SAR, disembarkation or asylum processing – to the region these efforts will be fatally damaged. The only way to support development in the region is first for Europe to develop its own agreement on disembarkation, combined with reform and

responsibility sharing. It might then have a chance of working with partners to support their SAR and asylum capacity.

Civil society has a key role to play in all of these efforts, including SAR. The attacks on civil society have expanded beyond scapegoating and threats to now encompass criminalization and spurious prosecutions of individuals for simply providing assistance to asylum-seekers, migrants and refugees. These measures are an attack on the rule of law which depends on the free operation of civil society and cuts off sometimes life-saving support to people when states are unwilling to provide it.

Finally, the European Council Conclusions call for a rapid resolution of the remaining disputes concerning the proposed legislative reforms of the CEAS, in order that the entire asylum package can be passed, including the Dublin reform proposals. These efforts cannot be separate from the debate on disembarkation. Having in place a fair sharing of responsibility for asylum seekers and beneficiaries of international protection, including relocation of those disembarked in EU coastal States, would contribute to ensuring that European ports remain open and that obligations under international maritime and human rights law are upheld.

With European Parliament elections fast approaching, negotiations on the package enter a decisive phase. A number of the compromise proposals on the table, inter alia on eligibility for protection, detention of children and withdrawal of reception conditions remain problematic from the perspective of both human rights and efficiency. Rather than pushing for fast adoption at any cost, with an eye on political legacies, co-legislators should further improve provisions with the aim of ensuring full compliance with obligations under international human rights law as well as the EU Charter of Fundamental Rights.



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