RED CROSS
EU OFFICE

# Key Messages – EUROPE IN CRISIS: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward[1]

## BACKGROUND: The ACCESS CRISIS

Despite the harmonisation of asylum rules at the EU level in two phases, access to the Common European Asylum System (CEAS) has never been clearly regulated. While Member States have moved immigration and border controls abroad, they have failed to recognise the extraterritorial reach of their human rights and international protection obligations. The end result has been an 'access crisis' that has rendered the CEAS inaccessible to its addressees. Neither the instruments encompassed in the 'internal', nor the 'external' dimensions of EU asylum, immigration and border policy have established means for safe and legal access to the territory of EU Member States for the purpose of seeking asylum. In this context, proposals for offshore processing models of different kinds have been put forward since the early 1980s in an attempt to manage arrivals to the EU in an orderly way, while maintaining a high degree of control.

## KEY PROBLEMS REGARDING OFFSHORE PROCESSING

None of the offshore processing proposals made so far have properly articulated the legal and practical details that would guarantee their feasibility. The key obstacles facing these initiatives are identified below and further detailed in the study with reference to the EU-Turkey Humanitarian Admission Programme, as the most recent proposal in this regard. On this basis, it is posited that the impossibility of overcoming the multiple practical and legal challenges posed by offshore processing schemes should lead to their rejection in favour of options that comply with human rights and refugee law standards.

### Practical Issues:

- Objectives

Prior to the launch of any offshore processing scheme, concretely defining the overall objective pursued is essential to determining the final scope and scale of the initiative, as well as the related costs, and its legal and practical constraints. Considering the problems currently faced with the 'access crisis', including deaths at borders and other human rights violations perpetrated against asylum seekers transiting towards the EU, the focus of inflow management

[1] By Dr Violeta Moreno-Lax, December 2015. Lecturer in Law, Director of the Immigration Law Programme, Queen Mary University of London; EU Asylum Law Coordinator, Refugee Law Initiative. The views expressed in this paper are the author's only and do not necessarily represent the position of the Red Cross EU Office.



**Address**
Rue de Trèves 59-61,
B-1040 Brussels
Belgium
Tel.: +32 2 235 06 80
Fax: +32 2 230 54 64
infoboard@redcross.eu

should be the implementation of safe and legal channels to access the CEAS in ways that offer genuine substitutes to smuggling and trafficking routes. At the same time, any such initiatives would not replace or neutralise the international protection obligations owed to 'spontaneous arrivals'. Therefore, the safe and legal channels created must be conceived of as additional to other exciting means of accessing the CEAS.

- Numbers, scope and scale

In order to constitute a real alternative to smuggling and trafficking channels, the system should be 'criteria based' and designed on account of 'open quotas' that benefit all those who find themselves in the same situation, without discrimination. This would best reflect human rights and refugee law obligations, according to which refugee status is declarative and thus acquired from the moment the person concerned meets the qualification criteria contained in the Refugee Convention definition. On the other hand, a prior analysis of needs and flows is necessary to determining the correct dimension of the programme.

Considering the binding force of underlying legal obligations (especially *non-refoulement* and access to asylum as per the applicable EU and international legal standards), participation in such a scheme should be compulsory and underpinned by a legally enforceable instrument, instead of voluntary and drawn on the basis of soft law arrangements. In this regard, crucial decisions would then have to be taken as to how successful claimants shall be distributed among EU Member States and whether/how this may relate to the Dublin System. A solidarity mechanism to ensure fair distribution would best comply with Article 80 of the Treaty on the Functioning of the European Union (TFEU) – but to be effective, decisions to this end would need to be quick and consider asylum seekers' rights and preferences (*cf.* internal relocation scheme).

- Allocation of responsibilities and accountability arrangements

Once the key objectives and intended outcomes have been defined, apportioning responsibilities for the day-to-day administration of the plan by identifying the competent actors and distributing the related tasks and duties amongst them is essential. The needs, concerns, and capacities of the host country must also be taken into account in a spirit of solidarity and shared responsibility. Furthermore, whether overall coordination will be assumed by the host country itself, UNHCR, or EASO needs to be decided beforehand, in consideration of the resulting implications. Schemes that defer the allocation of responsibilities to an undefined stage after the start of operations, enhance the potential for arbitrariness and risk becoming unmanageable. Considering that compliance with human rights and refugee law obligations is compulsory, effective monitoring arrangements by independent bodies to guarantee transparency and accountability should be contemplated as part of the scheme.

- Costs and resources

Depending on the scale and typology of the offshore processing arrangement selected, the material and legal implications will vary. These arrangements can range from fully centralised multi-actor screening and determination proceedings covering the whole first instance and appeal cycle – requiring the mobilisation of resources on a grand scale, to minimalist conceptions using pre-existing procedures with the assistance of experts from EU Member States, either independently or as part of EASO operations.

Besides processing costs, a series of additional expenses should equally be taken into account, including: the provision of human rights in any offshore centres supporting the scheme, in line with EU/international standards; the funding of UNHCR, IOM and any other organisations contributing to the scheme; the salaries of the experts and staff involved; the costs of the physical transfer of successful cases to countries of destination; the expense associated to the removal of rejected cases; and the costs of border controls and readmission procedures, etc. In this regard, the more intrusive the plan is, the higher the resources necessary to run it will be – which should plead for (cheaper) 'freedom-friendly' options that (best) reflect the agency, rights and preferences of asylum seekers.

## Legal Concerns:

- Applicable law

Before the introduction of any offshore processing scheme, the applicable legal framework should be defined; be it the CEAS instruments, or a dedicated legal instrument yet to be adopted. Considering that the Dublin III Regulation and all recast asylum Directives apply within the entire territorial confines of the Member States, including border zones and territorial waters, any actions planed in these areas will have to respect, and be adjusted to the current asylum *acquis*.

In turn, offshore activities will have to take account of the obligations ensuing from the EU Charter of Fundamental Rights (CFR), the European Convention on Human Rights (ECHR), and other instruments that trigger obligations extraterritorially. In this context, the principles of *non-refoulement*, non-discrimination, fair trial and effective remedy, alongside the prohibition of ill treatment, have to be given special attention. Pre-existing legal obligations cannot be overwritten or displaced by an *ad hoc* system tailored to the purposes of the offshore processing scheme. These obligations have been entrenched at 'constitutional' level in the EU Treaties and other multilateral instruments, as well as in customary international law. They apply *erga omnes,* with most allowing for no limitations or derogations of any kind.

- Legal responsibility

When defining the details of the scheme, it should not be too hastily assumed that legal responsibility will entirely lie with the country hosting joint processing initiatives within its territory. According to well-established legal principles, participating Member States retain responsibility for any actions or omissions that can be attributed to them, whether they act autonomously, through a joint body, via delegation to an international organisation, or through the intermediation of an independent private actor. Unless an alternative regime is put in place, whereby the determination of international responsibility for wrongful acts is effective and in line with international standards, the prescriptions of the International Law Commission (ILC) Articles on State Responsibility, as well as the Articles on the Responsibility of International Organisations remain applicable by default under international customary law. This means that responsibility for violations of human rights and refugee law cannot be eluded through delegation, and even instances of indirect perpetration of wrongful acts will trigger a duty to repair. Activities such as aiding and abetting, financing, sponsoring, or directing wrongful conduct will also entail legal responsibility.

- Beneficiaries and outcomes

The qualification criteria according to which applicants will be selected as programme beneficiaries needs to be made clear before operations start. The best strategy to comply with current obligations under EU and international law, would be to take account of the current qualification conditions for recognition as a refugee, as a beneficiary of subsidiary protection status, and as a non-returnable person protected by the prohibition of *refoulement*, to allow all asylum applicants with a 'well-founded fear' of persecution or a 'real risk' of 'serious harm' the opportunity of accessing the CEAS safely and legally.

The introduction of additional selection criteria on security or other grounds should be discarded, as it could amount to 'hidden' exclusion clauses which lead to an infringement of the principle of non-discrimination or clash with the non-penalisation rule for illegal entry set out in Article 31 of the Refugee Convention. On the other hand, urgent humanitarian needs and/or family links may be considered to prioritise access in line with rights recognised in EU and international law.

Finally, the fate of rejected cases and failed but-non-returnable applicants must also be factored in. Such cases must not remain in indefinite detention or in conditions that do not meet the basic requirements of dignified treatment, and some kind of 'durable solution' will have to be provided – if only to avoid onward movements through irregular means. In this regard, a decision will have to be taken on the impact of such rejections on subsequent in-country applications by the same claimants. If negative offshore decisions prejudice/prevent in-country applications, the end result may well be that applicants prefer to attempt to reach the EU irregularly.

- Reception conditions

While applicants await admission decisions, several options may be considered regarding reception conditions: (a) the adoption of no particular provisions; (b) the establishment of open reception centres; or (c) accommodation in closed reception centres.

(a) Unless procedures are virtually instantaneous and fair, they will fail to provide a viable alternative to irregular migration if no special arrangements are foreseen. Beneficiaries will probably prefer to assume the additional risk of onward irregular movement, instead of waiting unprotected in unsafe countries for the outcome of their applications.
(b) If provisions are made for accommodation in open centres, the applicable standards of human dignity will have to be catered for. Although the Reception Conditions Directive may not directly apply, decent living conditions will have to be provided in order to adhere to Articles 3 of the ECHR and 4 of the CFR, taking account of the 'best interest' of the child and family unity requirements.
(c) If closed reception centres are envisaged, Articles 5 of the ECHR and 6 of the CFR (including concomitant guarantees and access to effective judicial protection) must be taken into consideration to avoid the risk of arbitrary detention.

- Procedural aspects

All asylum decisions, whether preliminary or final (including those taken within hypothetical offshore schemes) are subject to the requirements of **fairness, good administration, and effective remedies**, recognised in Articles 41 and 47 of the CFR. Access to determination procedures must be unobstructed in law and in practice, and should be proactively facilitated by properly trained and competent personnel and suitable facilities, including through translation and legal assistance.

Any conceivable limitations (e.g. in the form of offshore arrangements to administer safe and legal access to the CEAS) must meet the requirements of proportionality and be assessed against asylum seekers' right 'to gain effective access to the procedure for determining refugee status' (ECtHR, *Amuur v France*, para. 43). Examinations at first instance (including in offshore facilities) must be rigorous and independent. The competent body ought be able to examine the substance of the complaint and afford adequate relief. Decisions must be served in writing, following a legal procedure previously established by law, and specify the underlying reasons, alongside the means and conditions that mount an appeal.

Any requirements regarding time limits, accelerated procedures, safety, or other presumptions and evidentiary rules, must preserve the effectiveness of procedural guarantees and not render their exercise pointless or exceedingly difficult. Effective remedies have to be open to those whose application is rejected. And in view of the risk of irreversible damage, remedies must have an automatic suspensive effect.

## ALTERNATIVES

The **impossibility for offshore processing initiatives to meet the above requirements**, especially those regarding reception conditions and effective remedy standards, plead for the adoption of alternative measures to facilitate access to protection to those in need, in full respect of refugee law and human rights norms. These include the flexible use of current immigration policy tools, as well as the full employment of existing asylum mechanisms.

- Wider use of **family reunification** by beneficiaries of international protection that are already in the EU, including for extended family members, as well as the waiver of support, accommodation and health insurance requirements to assist their safe entry should be promoted. A generous approach to the application of visa rules in other existing categories, including students, researchers, and workers should also be encouraged. In particular, the opportunities afforded by negotiations of revised instruments in this area, including the students/researchers and Blue Card Directives, should be utilised for the insertion of flexibility clauses to cater for the specific needs of persons requiring international protection.

- The implementation of the EU-wide **resettlement** programme of 20,000 places approved in June 2015 should be monitored to ensure timely execution and conformity with fundamental rights. In order for the mechanism to be effective and the Union to meaningfully contribute to global efforts to host Syrians and other refugees in need of relocation, EU institutions and the governments of Member States should be requested to expand resettlement in the short to medium term. Adding a scheme for **private sponsorship** by NGOs, families and other civil society actors and organisations in line with FRA recommendations, should be strongly promoted. These elements could be presented in discussions around the proposal indicated in the *Agenda on Migration* for a binding

instrument on resettlement to be submitted by the European Commission in the course of 2016.

Other **innovative solutions** should be envisaged, including both collective and individual approaches to facilitate access to asylum in the EU and put an end to the smuggling and trafficking business. This should entail the activation of a protected-entry mechanism for those in need of protection to reach the Union safely and regularly.

- Among the collective measures possible, the **lifting (or temporary suspension) of visa requirements** for major refugee-producing countries would be coherent with the declared goals of visa and asylum policy at the EU level. Short of this, carrier sanctions on transport companies that transport unduly documented migrants should be abolished so that persons seeking asylum in the EU can arrive safely through ordinary, commercial means.

- In parallel to collective measures, individual mechanisms to facilitate access to the CEAS should be explored. The opportunity offered by negotiations on the recast Visa Code should be seized to clarify obligations on the issuing of **Limited Territorial Validity (LTV) visas** for the purposes of seeking asylum, in line with extraterritorial *non-refoulement* and access to protection duties. In this regard, every effort should be made to prevent protected-entry access via LTVs from becoming a form of offshore processing – as this would entail the practical and legal issues identified above. The best option would thus be to make LTVs available to all those submitting an 'arguable claim' (in ECHR terms) of exposure to persecution or ill treatment, granting access to the CEAS for substantive (onshore) asylum processing. To avoid any detrimental effect that this generous standard may entail, the roll-out of LTV asylum visas could be progressive; first introduced in countries where the presence of applicants from top refugee-producing States is most pressing, and the presumption of unsafety/need for protection most easily recognised (e.g. Turkey/Libya).

The primary objective of these measures should be the facilitation of access to asylum in the EU, not the curtailment or containment of flows of persons in need of international protection in regions of origin and transit. In particular, these measures should not be employed for migration control purposes. They must be considered a **complement**, rather than a replacement of the protection obligations owed **to spontaneous arrivals**.