THE EXTRATERRITORIALISATION OF ASYLUM AND THE ADVENT OF "PROTECTION LITE"

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Abstract

When does the refugee encounter the State? The straightforward and traditional answer to this question would be, when arriving at the border and surrendering herself to the authorities uttering the magical word, "asylum". Reality, however, only seldom conforms to this picture. Today, the person seeking asylum in the EU is much more likely to encounter the State before reaching the EU border – at the visa consulate, through the EU Immigration Liaison Officers posted at the airports of key migration transit and origin countries, during passage over the Mediterranean where navy vessels are patrolling. Alternatively, the refugee may not meet EU *in persona*, but through delegation, either in the form of an airline company bound by EU regulations to carry out migration control or as a third State having in EU cooperation to perform exit border control or provide alternative protection in the region.

This paper explores the growing nexus of these "external" or "extraterritorial" policies in the developing EU asylum and immigration policy. From a legal perspective, these developments create a number of challenges for ensuring the rights of asylum seekers and refugees. Looking into three contentious areas (extraterritorial jurisdiction, extraterritorial protection and extraterritorial policy implementation) it is argued that the present drive to move migration control and refugee protection outside the EU is becoming a strategic feature of the common EU asylum and immigration policy, in which States are instrumentalising the territorial principles of the present refugee regime to relieve themselves of international legal obligations and institutionalise a new ethos of "protection lite".

1. Encountering the State

When does a refugee encounter the State? The straightforward answer to this question would be when arriving at the border and surrendering herself to the authorities uttering the magical word, "asylum". Reality, however, only seldom conforms to this picture. First of all, a substantial number of asylum seekers only make their claim some time after actually entering the country of asylum. Secondly, and more importantly, the last decades have seen a number of policy developments to extend migration control and asylum regulation well beyond the borders of the State.

A refugee seeking asylum in Europe may thus encounter European authorities before even departing. It could be at the consulate attempting to obtain a visa, at the airport of key departure or transit countries where EU Immigration Liaison Officers are deployed to oversee the migration control carried out by third country authorities, or during the attempt to cross the Mediterranean, where NATO warships and radar systems operate to intercept even the smallest vessel before reaching the territorial waters of European States (Lutterbeck 2006).

Alternatively, the refugee may not encounter the State *in persona*, but rather through delegation. Under the European Neighbourhood Policy, States like Morocco are thus expected to carry out exit border control in cooperation with EU Member States.[1] Or it may take the form of private companies. Under the Schengen Acquis heavy fines are imposed on airline carriers for boarding passengers without proper documentation and visas, effectively making these companies responsible for carrying out rigorous migration control functions.

The above initiatives are the concrete expressions of more structural efforts carried out by European States to extend their policy reach on migration and asylum issues outside their territory. Since the first comprehensive framework for a common European asylum and immigration policy was laid down at the EU summit in Tampere 1999, cooperation with third countries in this area has been given top priority, and in 2005 a full strategy for the 'external

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[1] European Commission (2003). Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours. COM(2003) 104 final. Brussels. 11.3.2003.

dimension' of EU's asylum and migration policy was presented.[2] Several scholars have observed how this "external dimension" is increasingly "colonising" the EU foreign policy agenda (Boswell 2003; Lavenex 2004; Gammeltoft-Hansen 2006; Rodier 2006). Thus, a precondition for receiving development aid from the EU is cooperation on readmissions and illegal migration.[3] Similarly, EU's financial instrument to provide assistance to third countries in the area of migration and asylum (AENEAS) was expanded from 20 million Euros in 2001-2003[4] to 250 million Euros for the following four years.[5] Under this programme, the EU is providing technical equipment for improving control of transit migration and piloting 'regional protection programmes' to improve third country capacity for hosting asylum seekers.

This new-found interest in the global management of asylum and migration flows is one of the most striking developments of the on-going development of a common EU asylum and migration policy. Though refugees, by their very nature, are an international issue and thus have always affected inter-state relations (Loescher 1992), the institutions of asylum as developed after the Second World War has been firmly grounded in a reactive and exilic logic (Chimni 1999; Okoth-Obbo 1996). Similarly, migration control has traditionally focused strictly on the border as the natural locus of sovereign delineation (Gammeltoft-Hansen 2006b). While so far these initiatives have far from replaced national asylum systems and migration control, one thing seem safe to conclude; today, the classical dictum that territorial borders confine the scope of a State's executive power can no longer be asserted with the same rigour.

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[2] European Commission (1999). Presidency Conclusions of the Tampere European Council. SI (1999) 800. 16.10.1999.
Council of the European Union (2005). A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice. 14366/1/05 JAI 417 RELEX 628. 24.11.2005

[3] This is specified in Article 13 of the Cotonou agreement governing EU's relations with the ACP countries.
Council of the European Union (2000). Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States on the One Part, and the European Community and Its Member States, of the Other Part, Signed in Cotonou, Benin on 23 June 2000. AF/ACP/CE/en. 23.06.2000.

[4] At that time the budget-line was known as B7-667.

[5] Reflecting the importance of linking these funds to the developing EU asylum and immigration policy, these funds are managed directly by the Justice and Home Affairs Council rather than the related Foreign Affairs and Development DGs (Samers 2004: 15).

In this process, asylum occupies a special position. As one scholar has noted, the refugee is poised squarely between State sovereignty, understood in terms of territorial supremacy and the power to control access to that territory on the one hand, and humanitarian considerations and international legal obligations requiring States to moderate this sovereignty on the other (Goodwin-Gill 1996: v). While political concerns over numbers of asylum-seekers have risen across Europe, States have been keen to come up with policy innovations to somehow relieve them of these obligations or distribute them differently. For a long time this game has been played out among European States themselves, in which a race for the most restrictive or un-welcoming asylum system was seen as a prerequisite for not succumbing to the beggar-thy-neighbour polices of other European countries. It could be argued that the growing EU *acquis* and minimum standards on asylum have helped overturn this logic, but perhaps more import-antly the venue seems to have changed. Today, the EU is becoming the primary platform for attempts by European States to recruit neighbouring and developing countries into schemes to move the regulation of asylum and provision of protection away from Europe.

This *externalisation* or *extra-territorialisation* of asylum raises important questions of international law and future responses to the plight of refugees. Whereas refugee advocates normally refer to international law to harness restrictive developments in European asylum policy, one should realise that this framework continues to be understood and effected in territorial terms. Both the assignment of State responsibility and the provision of protection ultimately follow territorial principles. As this article will try to show, European States have been keen to exploit this very structure in order to deflect the burden of asylum or to change the obligations asso-ciated with it altogether. Paradoxically, the current interest in developing asylum policies with a global reach seems to be accompanied by an increasingly restrictive interpretation by Euro-pean States of their protection obligations as something tied exclusively to the territory of the acting State.

The following section starts by clarifying the territorial principles of the current refugee regime. The article then goes on to show how they impel some of the different mechanisms of the current EU framework to externalise asylum. As will be shown, externalisation largely serves to produce a logic of 'rights management' by European States in deciding whom to offer asylum to and the quality of protection provided. To the extent that these initiatives become a substitute for asylum in the EU, the fear is that this will institutionalise a new paradigm of 'protection lite', in which more developed countries with a global reach are able to exploit the territorial principles of the present refugee regime to shuttle protection-seekers towards less costly solutions.

2. The Westphalian heritage of the refugee protection regime

Across Europe, policy-makers have claimed that the present refugee regime is becoming increasingly inadequate in structuring State responses to the plight of refugees (Hathaway 1997: xviii). At the same time, refugee advocates and scholars have proclaimed a 'crisis of asylum', since they cannot see how the present legal framework will be able to survive the surge in restrictive policies (Zolberg 2001). On the other hand, on several occasions European States have reaffirmed their commitment to the rules and principles set out in the Refugee Convention. Most notably, the UNHCR's process of Global Consultations witnessed wide support for the core legal framework, while at the same time opening up a discussion of the operational flexibility that refugee law affords.

Thus, rather than a crisis of asylum threatening to overthrow the refugee protection regime as such, this article suggests that European developments, in particular externally oriented policies, represent a move to redefine the existing *modus operandi* for how the protection of refugees is realised. The present article also argues, however, that this process of testing new policies against the boundaries of refugee law has little to do with the somewhat optimistic hopes of some scholars that the protection afforded to those in need of it can somehow be maximized and distributed better (Hathaway 1997). Rather, recent attempts to externalise protection feed into existing policies deflecting the responsibility of protection on to non-EU countries (Vedsted-Hansen 1999b). In a perverse turn of events, the international refugee protection regime itself becomes a vehicle for achieving an effective redistribution of burdens away from Europe.

2.1 THE TERRITORIAL PRINCIPLES OF THE INTERNATIONAL REFUGEE PROTECTION REGIME

To understand this, one needs first of all to consider how the refugee protection regime operates and is bound within a territorial logic. Despite the appearance of universality, this regime is in the true sense of the word *inter-national*. Protection is not guaranteed in a global homogenous juridical space but materialises as a patchwork of commitments undertaken by individual States, tied together by multilateral treaty agreements (Palan 2003: 87). This should be easily realised not only when looking at the global provision of protection but also when examining the fundamental principles upon which the international legal norms are premised.

At the core of this regime is the obligation on States not to send back, or *refouler*, a refugee to a place in which he or she risks persecution.[6] This basic obligation kicks in when an asylum-seeker or a refugee is present within the territory or jurisdiction of the State in question. In addition, in principle it obliges States to undertake a refugee status determination process of such asylum seekers to determine whether this person can be expelled without breaking the principle of non-refoulement.

Consequently, States that fear the burden of asylum processing have been keen to develop mechanisms preventing asylum seekers from even arriving, such as the growing nexus of off-shore migration control mechanisms,[7] or being obliged to admit them into their asylum systems, such as the safe third country policies dealt with below. These so-called *non-entrée* policies (Hathaway 1992) have entailed a drive among European States to shift the respons-ibility for taking care of asylum-seekers on to others, first among each other and subsequently to third States. In this game, the defining mechanism for allocating responsibility to States remains firmly grounded in the principle of territorial division; whatever State territory or jurisdiction a refugee is within, that State is responsible for not returning that person to a place in which he or she may be persecuted.

Beyond this fundamental obligation, however, rights under the refugee protection regime are granted according to a *principle of territorial approximation*. The rights stemming from the 1951 Refugee Convention are not granted en bloc, but rather progressively according to the 'level of attachment' a refugee obtains to a given country. Thus, the most sophisticated rights, such as access to welfare, employment and legal aid, are only granted when the refugee is 'lawfully staying' or 'durably resident' in the territory of the host State. Conversely, refugees or asylum-seekers that are not present in a State's territory but de facto under its jurisdiction, such as on

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[6] In effect this also applies to asylum-seekers, as refugee status is declaratory, not constitutive. This necessarily requires the application of principles such as non-refoulement presumptively.

[7] The developing body of what could be called 'remote migration control' instruments operated by the EU and its Member States includes, for example, visa policies, carriers sanctions, the posting of immigration liaison officers in transit and origin countries, and inter-State arrangements to control migration in, e.g., the Mediterranean. See, for example, Gammeltoft-Hansen 2005: 72ff; Guild 2002; Guiraudon 2002; Lahav 2003.

the high seas or in the territory of a third State, are only entitled to a very basic set of rights centred around the non-refoulement obligation.[8]

This incremental approach reflects a seemingly sensible concern of the drafters not immediately to extend the full scope of rights in situations where refugees may arrive spontaneously in large numbers (Hathaway 2005: 157). However, at a time when States are moving both migration control and the management of asylum outside their own territorial confines, this notion of progressiveness risks being compromised, as refugees and asylum-seekers may never reach the territory of the acting State.

Lastly, protection is not just protection. Despite the nearly global applicability of human rights instruments such as the 1951 Refugee Convention, the protection of refugees – understood as the rights afforded to them under the Refugee Convention and related instruments – is ultimoately dependent on individual sovereign States, which are obliged to guarantee them. As such, the protection afforded to refugees has been seen to vary considerably depending on the country bestowing it.

This variation can be seen to have at least three dimensions. First of all, one could ask whether it can be assumed that the rights owed to refugees under the Refugee Convention are actually afforded? This is most evident in the case of States that are not party to the Refugee Convention or other relevant human rights instruments, and therefore under no obligation to guarantee the rights embedded in them.[9] Furthermore, as proved repeatedly by the agency responsible for supervising the application of the Refugee Convention, the degree of certainty with which rights are effected and adherence to the obligations owed should not be taken for granted even for States that are a party to the Convention. As the surge in restrictive asylum and immigration policies has taken hold among countries in the Global North, it becomes increasingly difficult to find 'model States'.

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[8] The most pertinent rights under the Refugee Convention that are specifically granted without reference to being present or staying at the territory include Article 33 (non-refoulement), Article 16 (access to courts) and Article 3 (non-discrimination). Of somewhat lesser importance, Articles 13 (property), 22 (education) and 20 (rationing) also apply extraterritorially (Hathaway 2005: 160ff.).

[9] Except for obligations that may take the form of *jus cogens*, as some scholars argue is the case for the non-refoulement principle. See, for example, Allain 2001.

Secondly, even though a certain adherence to the formal protection requirements is taken for granted, specific rights may not be implemented or implemented rather differently in different countries. Thus, the scope of rights afforded can be said to vary. Only four (Arts. 3, 4, 16(1) and 33) of the 33 articles specifying the right of refugees (Arts. 2-34) are exempt from the possibility of reservations. In some cases, reservations have been employed to derogate from the way in which a specific right is granted. Denmark has a reservation towards Article 17 (the right to labour), as it has been reluctant to extend to refugees similar access to the labour market as enjoyed by 'most favourable foreigners', which are that is, the Nordic countries, with whom Denmark has entered into special agreements.

This leads to the last, but perhaps most important aspect. A great number of rights pertaining to refugees are specifically granted at a level *relative* to how each country treats different categories of people. The freedom of religion guaranteed under Article 4 of the Refugee Convention is thus not absolute, but only enjoyed in relation to the freedom of religion afforded to nationals of a particular country. This is particularly pertinent to the social rights and services that can be claimed by refugees, where the great differences between living standards in more and less developed countries are likely to make the refugee experience dramatically different between, for example, Uganda and the UK.

Together these three dimensions can be termed the 'quality of protection', understood as the *certainty*, *scope* and *level* of rights afforded to refugees. They paint a rather chequered picture of the entitlements that are actually provided to refugees under the international refugee regime. Thus, when States attempt to prevent the triggering of the territorial mechanism that make them responsible for granting certain rights to asylum-seekers (as in the case of visa policies or carrier sanctions) or subsequently to shift the burden for bestowing these rights on to third countries (as in the case of 'safe third countries' rules), it may be relevant to consider not only whether protection will be afforded elsewhere, but also the quality of this protection.

2.2 THE ADVENT OF 'PROTECTION LITE'

There has been a tendency to overlook this point when considering the transfer of responsibility for protection as, for example, under the 'safe third country' rule. As the House of Lords of the United Kingdom declared:

> the Convention is directed to a very important but very simple and very practical
> end, preventing the return of applicants to places where they will or may suffer
> persecution. Legal niceties and refinements should not be allowed to obstruct that

purpose. It can never, save in extreme circumstances, be appropriate to compare an applicant's living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it. (R. v. Secretary of State for the Home Department, ex parte Yogathas, [2002] UKHL 26, 29 October)

However, such a limited interpretation of the Refugee Convention fails to acknowledge the array of rights bestowed even before the status of a refugee is recognised (Hathaway 2005: 332). In the process of externalisation, States not only shift the formal responsibility for non-refoulement to third States but may also fundamentally change the quality of the protection provided. To the extent that protection responsibility is deflected or transferred to less developed States, or even to States with poor human rights records or undeveloped asylum systems – as has indeed been the case – this may effectively erode the quality of protection afforded under the present refugee regime.

The result is what could be termed 'protection lite', understood as the presence of formal protection, though with a lower certainty, scope and/or level of rights afforded. It is important to note that, within a strict or *restrictive* reading, this may well fall within the operational flexibility made possible by the international legal framework. Indeed, the territorial principle of dividing responsibility and bestowing rights relative to the practices and situation of each particular country enshrined in the 1951 Refugee Convention is the very premise for this development.

Whether it is within the spirit of the present regime, however, is another question. The last three decades of European asylum policy have seen a general backtracking of the liberal standards and practices developed during the first decades of the post-WWII refugee regime. Policy developments increasing the possibilities for migration control and the deflection of asylum-seekers are challenging established norms and generally accepted principles of refugee protection. Yet European States have consistently presented these policies as falling within the scope of the legal framework, attempting to carve out new operational space. As these practices are becoming more established and firmly entrenched within the developing common EU asylum system, it may indeed be relevant to ask whether the EU is in the process of transforming our understanding of the nature of the obligations owed to refugees and the likely effect this may have on their future protection.

3. The mechanism of the EU rights management regime

Field research is doubtless needed into the implementation of protection in those countries to which the EU is pushing the responsibility for refugees in order to grasp the full consequences of this externalisation process.[10] To appreciate *how* this avoidance or shifting of asylum burdens is being made possible, however, this article will focus on the mechanisms through which deflection strategies are institutionalised. More specifically, the so-called 'safe third country' rules, as they have developed in the EU context, are examined first as the core instrument for shifting the responsibility for asylum processing and providing protection to third States by unilaterally introducing a concept of responsibility distribution on top of the territorial principle. Lastly, the recent European attempts to set up protection and asylum-processing mechanisms outside EU territory are shown to illustrate the continued political salience of creating extra-territorial solutions to replace the need for processing asylum claims in Europe, as well as to demonstrate the worrying strategy in pursuit of a rights management logic.

While the limits of this article will not permit a substantial analysis of all the legal issues surrounding these mechanisms, it will aim to show how they are linked to the above-mentioned principles of territoriality. In short, the new policy is acting, directly or indirectly, to shove the responsibility for refugees away from European States by emphasizing or circumventing the principle of territorial responsibility distribution that is inherent in the formal framework of the present refugee regime.

3.1 SAFE THIRD COUNTRIES

The idea of 'safe third countries' is among the most hotly debated and contested issues within international refugee law. While the UNHCR has stressed that the 'safe third country' remains a notion, as opposed to an established legal principle or concept, European States have been keen to integrate it into national legislation. Indeed, the incorporation of this principle as part of the evolving EU asylum *acquis* can be seen as a move by European States to provide a regional legal base for this concept, in spite of this criticism. As this section will argue, this should be viewed primarily in light of the flexibility it provides to States in transferring

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[10] For an example of such research in the context of the recent EU enlargement process, see Byrne et al. 2002.

responsibility for protection to third States, which may subsequently alter the content of the obligations owed to refugees.

The central aspect of the safe third country notion is the principle that a State may deny access to substantial refugee status determination on the grounds that he or she had already found protection, or could reasonable have been expected to find protection, in another country (Lassen and Hughes 1997: 1). Thus, as opposed to visas and other non-arrival policies, the safe third country notion implies at least some guarantee that the need for protection will actually be satisfied elsewhere, although the premise for ensuring this and the quality of protection required is still disputed.

In their inception, safe third country rules have often been justified with reference to the practical and administrative demand for the more efficient management of asylum-seekers among host States. The arguments put forward by EU officials and Member States in support of these initiatives generally emphasized the need to establish practical rules determining the responsibility for increasingly mobile asylum-seekers. In this perspective, instruments such as the 'safe third country' are tools of burden-sharing, ensuring that asylum-seekers are processed efficiently by preventing asylum-shopping (Selm 2001: 3, 25).

In practice, however, the safe third country notion has become a cornerstone of European *non-entrée* regimes (Byrne et al. 2002: 16; Hathaway 1992). Whereas off-shore migration-control policies represent policies proactively preventing the geographical precondition for a State's obligations towards asylum-seekers, namely access to the territory or sovereign jurisdiction of the receiving State, the underlying logic of the 'safe third country' instrument is to limit entry reactively to the procedural door of the European asylum system for those who do arrive.

As such, this forms part of an increasingly popular nexus of measures, such as 'safe country of origin' policies, 'time limits' for lodging an asylum application and the notion of 'manifestly unfounded claims', which all aim to restrict access to or cut short ordinary asylum procedures (Selm 2001; Gibney and Randall 2003; Vedsted-Hansen 1999b). Yet, while these instruments generally target specific categories of asylum-seekers on the basis of their nationality, claim or manner of entry, the particular importance of safe third country policies in this context is their broad scope and territorial assumptions. The safe third country concept potentially affects all protection seekers who have transited a country designated 'safe' before reaching the country in which they are actually seeking protection. Secondly, safe third country policies build on the assumption that protection can be found 'elsewhere' and that the responsibility for processing the asylum-seeker thus rests with the third State in question.

3.1.1 The EU 'safe third country' rule

In the EU context, the safe third country notion had its first manifestation in the 1992 London Resolutions.[11] Following the collapse of communism in eastern Europe, west European States quickly pushed efforts to shift the responsibility for providing protection to asylum-seekers and refugees on to the new central and east European States (Byrne et al. 2002: 16). This was also enshrined in paragraph 3(5) of the 1990 Dublin Convention, which gives the State liable under the Dublin Convention the possibility to shift responsibility for processing asylum claims on to countries of origin or transit (Byrne et al. 2002: 19). Yet, unlike the Dublin redistribution system, 'safe third country' policies involving central and east European States have generally been implemented unilaterally, with no corresponding duty for the third State in question to admit third country nationals and afford them protection (Lavenex 1999: 52)

Due to the intergovernmental nature of the London Resolutions, 'safe third country' rules have been realised rather differently in each Member State. The countries that are designated 'safe' vary substantially among European States: where some countries apply the safe third country rule to deny access entirely to substantial determination, others merely apply accelerated procedures (Vedsted-Hansen 1999b; Lavenex 1999: 77f). The Commission eventually realised that the 'first country of asylum' principle applied under the Dublin Convention may require a more substantial degree of harmonisation:

> Problems can arise in cases where the Member State to which a transfer request is
> made would apply the 'safe third country' concept in a case where the requesting

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[11] The two London Resolutions and one Conclusion were adopted at the Edinburgh Council in 1992. Although not legally binding, they came to institutionalise the 'safe third country', 'safe country of origin' and 'manifestly unfounded' concepts in European asylum systems (Boccardi 2002: 74). The 'Resolution on a harmonised approach to questions concerning host third countries and the problem of readmission agreements' do not use the term 'safe third country', but instead 'host third country'. In the original definition, this had the important implication that asylum-seekers were assumed actually to have applied for asylum in these countries (equivalent to the dominant understanding of the 'first country of asylum' notion), yet over time this condition was generally disregarded and the phrase 'safe third country' more commonly adopted. The controversy has nonetheless persisted in national interpretations and implementations of the concept (Selm 2001: 8, 16; Legomsky 2003: 570).

On the national level, a 'safe third country' rule was first implemented by Denmark in 1986 by virtue of the so-called 'Danish Clause'.

State would not do so because it does not consider that the third country can be regarded as safe for the applicant.[12]

The recently adopted EU Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Procedures Directive)[13] thus includes provisions for the further harmonisation of the 'safe third country' concept (Article 27), as well as introduce binding obligations as to a special category of 'European safe third countries' (Article 36, also known as 'super safe third countries').[14]

According to Article 27.1 of the Procedures Directive, the 'safe third country' rule may be applied if, and only if:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;
(c) the prohibition on removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected: and
(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

Compared to the various applications of the safe third country rule in European countries, the Directive does aim to raise the standard with regard to two of the most contentious issues. The first three clauses above clearly set out to avoid direct or indirect non-refoulement as defined in the Refugee Convention and the related obligation in Article 3 of the European Convention on Human Rights. This represents a specific requirement to conform to the core principle of the refugee regime, which should be seen as a clear improvement compared to

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[12] European Commission (2000): Commission Staff Working Paper: revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one the Member States, Brussels. Par. 33.

[13] Council Directive 2005/85/EC.

[14] It also inserts a distinction between 'safe third countries' and 'first country of asylum' (Article 26). For the latter, the asylum-seeker must have obtained protection already, either in the form of refugee status or 'otherwise…sufficient protection', which is left somewhat undefined beyond protection from non-refoulement (Article 26.2(b)).

many national practices hitherto (Lassen and Hughes 1997) and an important step avoiding chain-refoulement.

Secondly, the blanket application of safety is moderated by Article 27.2, which requires national legislation, including

> (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

It seems strange, however, that only the right to challenge in respect to the absence of torture or other inhumane treatment as defined in Article 3 of the European Convention on Human Rights is specifically guaranteed. Although this is clearly essential in order to ensure compliance with the extra-territorial responsibilities under this Convention as outlined above, one might think that a right to challenge a potential situation of refoulement as defined by the first two clauses of Article 27.1 would be even more crucial.

Secondly, no requirements are specified that national legislation should allow asylum-seekers to challenge the application of the safe third country principle because of a lack of 'protection in accordance with the Geneva Convention'. Thus, the asylum-seeker may be left with no opportunity to challenge the quality of protection provided. Most relevant here, no safeguards are provided against cases in which the application of the 'safe third country' rule will result in the effective withdrawal of certain rights acquired when responsibility for protection is transferred from one State to another.

The explanation for these crucial omissions in the right to challenge the conformity of a 'safe third country' to the Refugee Convention may be seen in conjunction with the fact that only the European Convention on Human Rights allows a State's conduct to be tested subsequently under judicial review, with all that follows from this, both legally and politically. This is equally evident when examining the 'super safe third countries' dealt with under Article 36. As these countries are assumed to have ratified both the Refugee Convention and the European Convention on Human Rights, the right to challenge is completely curtailed. Needless to say, this exemption has attracted criticism from several sides (ECRE 2005; Hathaway 2005: 328).

Beyond these issues, however, one might ask whether assurance against persecution or torture, whether in the destination country or as a result of refoulement, is enough to validate the implementation of the safe third country rule? Only the last clause of the EU Directive's Article 27.1 deals with the protection afforded to refugees beyond the non-refoulement requirement.

As Hathaway points out,

> Despite the fact that refugees under the Convention are entitled immediately to receive a small number of core rights and to benefit over time from the full range of rights set out by Arts. 2-34 of the Refugee Convention, judicial commentary on qualification as a 'safe third country' has thus far been strictly limited to determining whether the 'safe third country' will respect the duty of non-refoulement. (Hathaway 2005: 329)

The lack of consideration given to rights beyond non-refoulement creates a pretext for the deflection of asylum-seekers to third States in which they may receive a markedly lower standard of protection. Although little research has been done into the protection conditions for those returned to 'safe third countries' outside the EU, studies conducted in the context of the enlargement process point to the conclusion that candidate countries designated as 'safe' as regards formal and procedural requirements provided little and clearly insufficient protection in respect of other rights (Byrne et al. 2002; Lavenex 1999).

Secondly, although the reference to protection in accordance with the Geneva Convention marks an improvement in comparison to the London Resolution, which merely required 'effective protection in the host third country against refoulement' (Article 2(d)), it remains to be seen how this will be transposed into national law. Although the general reference to protection in accordance with the Geneva Convention marks an improvement over the bulk of safe third country rules implemented in Europe (Hathaway 2005: 328), no consideration is given to the specific quality of protection and its implementation. So far, European applications of the safe third country rule have generally been limited to considering the negative obligations of third country responsibilities, such as the non-refoulement principle (Noll 2000: 201). As the limited guarantees provided for in Article 27.2(c) illustrate, obvious problems persist in adjudging and ensuring that the protection provided in third countries is in accordance with the Refugee Convention, especially with regard to the positive obligations owed by States.

3.1.2 The political management of 'safety'

In essence, the safe third country notion has become a management tool for EU Member States. At the immediate level, it does away with the possibility for refugees to determine their preferred country of asylum, leaving it to States to distribute the 'burden' of asylum-seekers among themselves.[15] As some scholars have argued, this could be seen as achieving a 'procedural economy', as safe third country rules allow European States to minimise substantive processing among themselves (as under the Dublin system) or to deflect it to third countries (Noll 2000: 200; Selm 2001: 14).

On the one hand, this deflection is made possible because the safe third country principle establishes an exception to the responsibility otherwise owed by States to process protection seekers present in their territory or on their borders. In this sense, it works to absolve the territorial principle of responsibility inherent in the refugee protection regime and to replace it with a norm of redistribution (Lavenex 1999: 165). On the other hand, it does this by invoking this very principle with respect to a third country. By declaring a third country equally fit and first in line to process a given claim, a norm is inserted that prevents the successive movement of refugees by requiring them to seek asylum in the first country they can.

On a second level, the safe third country notion may also serve to achieve what could be called a 'rights economy'. The push to redistribute responsibility for protection on to third States could be seen as an attempt by European States to achieve a market mechanism of rights, in which protection is routinely realised at the lowest possible cost. This will obviously affect the quality of the protection provided and possibly the protection regime overall. First of all, the unchecked shifting of burdens on to States situated closer to the country of origin is likely to become an incentive for these States to introduced more restrictive recognition procedures, thus limiting the number of asylum-seekers who gain access to these rights in the first place. Secondly, the shifting of responsibility on to third States with less developed human rights and asylum systems may entail a reduction in the quality of protection owed to refugees. *In extremis*, the risk is that an interpretation of the safe third country concept is applied that 'effectively nullifies the ability of refugees to claim all but one of their Convention rights' (Hathaway 2005: 332).

In both cases, the designation of which countries can be considered 'safe' is crucial. The usefulness of the safe third country notion as a redistribution system is dependent on the

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[15] For a comprehensive discussion of the refugee's right to choose, see Vedsted-Hansen 1999b.

possibility for States to positively identify a third country to which responsibility may be assigned instead.[16] Although present EU rules set out some minimum requirements for declaring a country 'safe', this clearly leaves considerable scope to the various interpretations of different Member States, which may continue to apply different lists and criteria.

Indeed, national practices hitherto suggest that the designation of 'safe third countries' has more to do with foreign-policy priorities and interests in achieving a redistribution of asylum-seekers away from Europe than merely achieving effective burden-sharing (Lavenex 1999: 167; Selm 2001: 13ff). Consequently, even within the current EU *acquis,* formal requirements, such as being a party to the relevant instruments and having an asylum procedure, are likely to outweigh more substantial examination of the implementation of these instruments and of the actual protection afforded. In this eagerness to expand the circle of 'safe third countries', a strange and self-sustaining dynamic may develop, as the designation itself becomes an endorsement that the procedures and protection afforded in these countries is 'sufficient' to comply with international standards.

3.2 THE END OF ASYLUM? DE-LINKING TERRITORY AND PRO-TECTION

In February 2003, a UK proposal for a 'new vision' for refugee protection was leaked to the press. The proposal contained two main elements. The first was to improve the management of asylum-seekers in the region. Under this heading, it was suggested that 'regional protection areas' in asylum-producing regions be set up as a means to reduce secondary movement and return failed asylum-seekers who for other reasons cannot be returned to their countries of origin (UK Home Office 2003: 11f).[17] It was the second half of the proposal, however, that

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[16] And under the EU Directive ultimately also the acceptance of these countries to receive those asylum seekers returned. This has been achieved largely through readmission agreements. In recent decades more than a hundred such agreements have been signed between third countries and individual EU Member States. However, the competence to sign such agreements was formally transferred to the EU by the Treaty of Amsterdam. So far, common EU readmission agreements have been concluded with Albania, Hong Kong, Macao, Russia and Sri Lanka, and negotiations initiated with Algeria, China, Morocco, Pakistan, Turkey and Ukraine.

[17] As the February edition is not publicly available, this reference is to a slightly revised March edition.

sparked the most furious debates.[18] This part envisaged the establishment of 'transit processing centres' in third countries on the major transit routes to the EU. Asylum-seekers arriving spontaneously in the EU would thus as a rule be sent back for status determination to centres managed by IOM and operating a screening procedure approved by UNHCR (ibid.: 13f.). Those who were approved would be resettled within the EU on a burden-sharing principle, while those who failed to be approved would be returned to their country of origin under new and strengthened readmission agreements (ibid.: 20).

Though the scheme was eventually vetoed by Germany and Sweden at the June 2003 Thessaloniki European Council, the UK proposal has nonetheless served to frame subsequent and ongoing initiatives to dissolve the traditional link between the provision of protection and asylum processing and the territory of the State undertaking these functions. In this sense, these initiatives seem to adhere to a somewhat different logic than the safe third country policies discussed above. Rather than merely deflecting the responsibility on to third States or neglecting it altogether, the current surge in initiatives to extra-territorialise asylum processing and protection all presuppose some sort of responsibility on the part of the externalising State, ranging from the formal assertion of authority to merely providing financial assistance or compensation.

Nevertheless, European States have been keen to emphasise that this responsibility is not to be equated with that owed to asylum-seekers who are present on their territory. Rather, extra-territorial initiatives are seen to provide a context for achieving operational freedom unconstrained by national law and, to some extent, international law too. Thus, even though some of these proposals have been framed in a spirit of solidarity and been seen by some academics as having the potential to revitalise the delivery of protection beyond territorial limits (Peral 2005: 19), one should be aware that they may also become instruments of 'rights management' in the sense that European States may paradoxically assert increased sovereignty, in the sense of executive power, when acting outside their territory.

[18] The two parts were conflated in a later version presented to the EU Commission in March 2003 under the common heading of 'regional protection areas', although subsequent discussion papers and a Danish Memorandum retained the distinction. For an overview of the different language and content of these documents, see Noll 2003: 10ff.

3.2.1 The quest for extra-territorial protection

Though the UK proposal was never realised in an EU context, the proposal has continued to draw support from a number of Member States, in particular the Netherlands and Denmark, which are keen to see parts of the plan implemented among themselves (Danish Ministry of Refugees, Innovation and Integration 2003). Other proposals drawing their inspiration from the UK plan have similarly continued to surface. Thus more recently, the German Minister of the Interior, Otto Schily, launched a similar proposal to send back asylum-seekers interdicted in the Mediterranean to UNHCR operated 'screening camps' in North Africa (Schily 2005).

While the UK proposal was new in the EU context, it is worth remembering that the idea of extra-territorial processing, or even transit processing centres, is not new as such. The proposal clearly drew inspiration from Australia's 'Pacific Solution' and US policies dating back from the mid-1990s, both of which involved the interdiction of spontaneous arrivals and subsequent processing in third countries in closed facilities. Similarly, the idea of a regional UN processing centre replacing spontaneous asylum-seeking with orderly resettlement had been tabled by Denmark as early as 1986, though it was rejected (Noll 2003: 8).

In addition, extra-territorial processing as a *complementary* rather than *exclusive* solution is already being practised by a majority of EU States in the form of 'protected entry procedures'. Yet, where the UK and the other models listed above all entail the forced return of those arriving in the host country and their subsequent detention in closed processing camps, the 'protected entry procedures' concept merely serves as a complementary opportunity to apply for asylum directly at the consular offices of EU States in countries of origin or transit. A 2003 study commissioned by the EU suggested that well-crafted consular procedures could be a valuable supplement to territorial asylum systems, thus alleviating the need for human smugglers and traffickers and delivering 'more protection for the euro' (Noll et al. 2003: 5).

Although the idea of 'transit processing centres' as a closed environment has so far not materialised, the other element of the UK proposal, the provision of protection closer to refugees' countries of origin, has generally fared better. Most notably, the Council adopted a plan for 'regional protection programmes',[19] with pilot projects in the western Newly Independent States, East Africa and Great Lakes Region starting implementation in autumn 2006. In contrast to the 'protection zones' under international authority envisaged by the UK plans, this programme works within the territorial structure seeking to assist third countries in regions of

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[19] COM(2005) 388 final, 1.9.2005.

origin or transit to improve the national delivery of protection.[20] Secondly, rather than acting directly, EU States are relying primarily on non-governmental organisations and the UNHCR to implement the programmes with EU funding.[21]

Although the UNHCR, a key implementing partner, has generally endorsed the plans,[22] others have remained more sceptical. Several scholars have noted that the underlying principle still seems to involve the assumption that 'protection in the region' is seen as a substitute for spontaneous arrivals in the EU (Pastore in Bertozzi and Pastore 2006: 17; Peral 2005: 7; Betts 2005b: 30). Although this is not evident from the text itself, it is notable that the initial proposal of the Commission envisaged a strong resettlement component, which seems to have been somewhat downplayed in the final version, which emphasises rather the primacy of durable solutions in the region and defers a formal resettlement structure to a later phase.[23] Similarly, while most of the programme's content is still unclear, the strong emphasis on a registration component, including biometric identification, stands out.[24] While this is traditionally a core part of the status determination procedure, establishing the identity, nationality and travel route of the asylum-seeker is also crucial in ensuring returns to 'safe third countries' (Vedsted-Hansen 1999: 4).

[20] Ibid., para. 6.

[21] Funding is assured primarily under the AENEAS budget line, which, unlike most other development and foreign-policy funding instruments, is managed directly by the JHA Council. In the 2005 call for proposals 6 m. Euros out of a total 40.5 m. Euros were earmarked for improving asylum and international protection in the designated RPP countries; in 2006 this amount was increased slightly to 6.5 m. Euros out of a total budget of 40.7 m. Euros.
European Commission. (2006). "EuropeAid - Call for proposals - Financial and technical assistance to third countries in the field of migration and asylum." EuropeAid/124151/C/ACT/Multi Retrieved 26 October 2006 at http://ec.europa.eu/comm/europeaid.

[22] The UNHCR is a member of the European Commission Regional Protection Programmes Expert Group and thus actively involved in the programme planning. Further, the Regional Protection Programmes draw some of their inspiration from the UNHCR's development of 'Comprehensive Plans of Action' and the 'Strengthening Protection Capacity Project' in Tanzania, Kenya, Thailand, Benin and Burkina Faso, funded by the European Commission and the governments of Denmark, the Netherlands and the United Kingdom.

[23] Ibid., para. 8.

[24] ibid.

3.2.2 TRANSFORMING THE MEANING OF PROTECTION

It should be remembered that so far EU initiatives to realise extra-territorial processing and protection have been presented as complementary to, rather than substitutive of traditional European asylum systems. Does it matter, then, if such benevolent efforts are not carried out to the same legal and material standards as those within Europe? While it is hard to deny what many refugee advocates have been calling for, namely a more comprehensive and global approach that takes into account the protection of the vast majority of asylum-seekers and refugees who never reach the industrialised world,[25] the context in which these initiatives have been poised suggests otherwise. The proposed regional protection programmes bear a close resemblance to earlier bilateral programmes carried out to prepare central and east European States to take back asylum-seekers, as these States were subsequently designated 'safe third countries' (Byrne et al. 2002: 17). The continued political rhetoric to the effect that solutions in the region are more cost-effective is likewise indicative of an underlying *substitutive*, or at least *preventive*, premise (Betts 2005: 13ff).[26]

In this context, the rights management benefits achieved by destination States under these schemes as compared to territorial asylum processing and protection should not be overlooked. While the UK proposal was widely seen as stretching the present legal framework too far,[27] current initiatives, such as 'protected entry procedures' and 'regional protection programmes', present few challenges to the formal refugee protection regime, while still allowing States to exploit an increased manoeuvrability with respect to actual obligations. The aim in pushing asylum processing and/or the delivery of protection beyond the territory of the Union is the eclipse of a range of legal constraints, giving EU States considerably more freedom in defining procedural rights, to whom to afford protection and the exact nature of these benefits.

Perhaps most fundamentally, it has proved difficult to construct a right of subsequent entry following a successful asylum application made abroad. Even though the non-refoulement principle has been argued to be applicable extra-territorially by some scholars (Goodwin-Gill

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[25] See, for example, the contributions to Hathaway 1997.

[26] Others, however, have pointed out that the total costs of returning asylum-seekers, running transit-processing centres and ensuring cooperation with third countries is likely substantially to outweigh the savings from deterring *mala fide* asylum applicants and providing social services in cheaper geographical areas. In the Australian case, the budget indicated a net loss of AUD 900 million over the three years the 'Pacific Solution' had been operating (Noll 2003: 21).

[27] For a comprehensive analysis of the legal issues surrounding this proposal, see Noll 2003.

1996: 43), this does not amount to a positive obligation to allow onward passage to a host country by, for example, granting a visa (Noll 2005). Only in the more limited cases where denying such passage would amount to a violation of the European Convention on Human Rights or the Convention on the Rights of the Child – both of which have explicit extra-territorial applicability – could such an obligation be imposed. Consequently, extra-territorial processing largely leaves States free to decide to whom they should offer protection subsequently.

Secondly, the procedural rights are more limited. As demonstrated by the Commission study on protected entry procedures, asylum-seekers processed outside the destination State can generally not invoke a right to a fair trial or effective remedy as otherwise guaranteed in international law (Noll et al. 2003: 56).[28] Similarly, extra-territorial processing can be used to circumvent specific national legislation in the destination States that provide for additional safeguards for the asylum-seeker. In more practical terms, invoking a State's responsibility remains difficult in cases of extra-territorial processing for the same reasons that apply to visas and carrier sanctions discussed above. As the asylum-seeker is removed and confined to a third country, the ability to launch a claim with the destination State is drastically reduced. The Australian and US cases further suggest that access to authentic information for refugee advocates or courts is similarly impaired (Noll 2003: 20).

Lastly, with regard to the protection that is provided, one could make a similar argument to that concerning safe third countries above. By severing the link between territoriality and the provision of protection, European States may be able to achieve a 'rights economy' as compared to protection in the EU. Whereas standards of protection remained somewhat open under the UK proposal due to the conflicting authorities, the Regional Protection Programmes are clearly tied to the protection framework of the State in which the programme is being implemented.[29] Consequently, the quality of protection need only be relative to overall rights and living standards in that State, which, for developing countries with frail asylum systems and poor human rights records, is most likely to work to the detriment of the protection-seeker.

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[28] The main exception seems to be the right to remedy enshrined in Article 13 of the European Convention on Human Rights, which can be made applicable to the extent that ECHR rights are effected by the omissions or actions of State representatives (Noll et al. 2003: 56).

[29] The UK proposal did, however, state that the protection offered should not be to a higher standard than that offered in the surrounding area, so as to not create a 'magnet effect' (UK Home Office 2003: 13).

To some extent the quest for extra-territorial protection has even been accompanied by arguments to institutionalise the territorial limits of international law further. This is particularly clear in the UK proposal. A subsequent memorandum drafted together with Denmark and the Netherlands clearly envisaged the processing in the transit processing centres as being outside the jurisdiction of the destination States and thus unconstrained by their particular norms and legal safeguards (Danish Ministry of Refugees, Innovation and Integration 2003: 5).

It should be pointed out that, since the processing is effectively carried out by the destination State, that State will remain responsible under international law,[30] and in particular under the European Convention on Human Rights. This was noted by the UK proposal itself when it argued that, '[w]e would need to change the extra territorial nature of Article 3 [of the European Convention on Human Rights] if we wanted to reduce our asylum obligations' (UK Home Office 2003: 9). The instrument is identified as the only obstacle binding the UK to actions occurring outside its territory. The UK proposal thus envisages either renegotiating the article itself or persuading the ECtHR to change its previous opinion on the matter (ibid.). While most lawyers would agree that the above interpretation is unsustainable, it is nonetheless illustrative of the ambition of at least some States to apply a rather restrictive reading of the geographical scope of their international obligations.

4. Conclusions

In developing an external dimension to the EU asylum acquis, European States seem to be combining current policy innovations with older initiatives in forging a rights management regime in order to relieve themselves of the obligations otherwise owed under international law and increasingly to redistribute the protection burden to third States. While the desire to reassert sovereign power in this field is a common thread running through these and other

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[30] For example, Articles 4 and 5 of the Draft Articles on State Responsibility of the International Law Commission could be made applicable to the extent that destination States intend to conduct extra-territorial processing using their own organs (as in the case of protected entry procedures) or through lawfully empowered entities. See 'state responsibility. Draft Articles provisionally adopted by the Drafting Committee on Second Reading', 11 August 2000, UN Doc. No. A/CN.4/L.600. This observation was made by Gregor Noll (Noll 2003: 25).

initiatives to externalise migration control, it is perhaps more noteworthy that the above policies seem to work by means of a basic premise of the present refugee protection regime. Although they challenge certain norms and most likely the spirit of Refugee Convention, these policies are ultimately premised on the territorial principles of this very regime. Only by upholding the territorially bounded spheres of State responsibility do these policies become effective in achieving the above ambition.

In this sense, the development of mechanisms to move asylum and protection outside the geographical confines of European States has been coupled with a somewhat incongruous discourse reinterpreting international refugee law as applying merely within the territorial space of the particular State. This could be seen as part of a larger process of applying a more restrictive reading of international instruments pertaining to refugees. In their quest to deflect or absolving the responsibilities they owe to refugees, a number of developed States are trying to do away with the bulk of soft law and benevolent administrative practice developed throughout the last half century. Instead, a black letter reading of the core obligations is put forward that consistently seeks to carve out a new operational space for States' sovereign power in granting entry and protection to those claiming it.

There are two consequences of this. First, the simultaneous extension of policy reach and retraction of international obligations may fundamentally change the *modus operandi* of the present refugee regime. While this could be seen as an opportunity to achieve a better distribution of the global protection opportunities, the analysis above paints a different picture. Not only do these externalisation policies serve to provide host States with ever more discretion regarding whom to offer protection, but the territorial principles of the current regime seem to become a context for strategically shifting protection to less developed States in order to achieve more cost-effective solutions. In doing so, the progressive premise underlying traditional efforts to enhance the protection capacity of less developed countries is cut short, as the desire of more developed States to shift the burden is leading to the designation of inferior standards of protection as 'sufficient' and a continuous race to the bottom for what counts as 'effective protection' (Legomsky 2003). The result is what this article has termed 'protection lite', understood as protection that may fall within the formal requirements of the 1951 Refugee Convention, yet with substantially fewer calories than the protection owed by European States directly.

Secondly, it should be fully realised how these policies are affecting neighbouring and developing countries. Already left to bear the brunt of the world's refugees, it seems unlikely that these developments will prove sustainable, regardless of the present efforts to provide

financial and political compensation (Gammeltoft-Hansen 2006). In this regard, one should not underestimate the norm-setting power that European States have enjoyed in this field (Selm 2001: 9). As third countries are becoming increasingly concerned at the administrative and political costs of hosting more and more refugees, they are themselves adopting externalisation mechanisms to push the burden of asylum even further away. *Non-entrée* policies, readmission agreements and safe third country rules are already flourishing among central and east European, North African and some Asian countries (Byrne et al. 2002; Rutinwa 1999). In this sense, current efforts to externalise asylum in Europe may start a global trend that threatens to undermine the refugee protection regime itself.

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