

THE EXTRATERRITORIAL PROCESSING OF ASYLUM CLAIMS

Anna Liguori

Introduction

The idea of establishing centres for the “external processing” of asylum claims – already supported by some EU Member States in the past, and actually realized in the Caribbean by the USA¹ and in the Pacific area by Australia² – has recently come to the fore again in European debate.

Those who support such a proposal think that it could, first of all, reduce the dramatic death toll in the Mediterranean (a death toll which has become even worse since the transition from *Mare nostrum* to *Triton*); moreover, it would contribute to lasting solutions for those refugees who are not able to leave their own region and help to put an end to trafficking at its very source.

On the other hand, several concerns have been raised about this idea, since some States tend to consider offshore centres as «rights-free zones»³ where it is not clear whether domestic or international legal obligations apply and human rights violations are extremely likely (arbitrary or inhuman detention, risk of *refoulement* to unsafe countries, lack of access to effective remedies etc.)⁴, as the U.S.A. and Australian experiences demonstrate. Finally, and in my opinion this is a crucial issue, it is not clear who would be responsible in case of the violation of human rights and what remedies would be available for individuals.

Since the European Union has not so far approved any concrete proposal, it is not yet clear exactly what kind of agreement/s will eventually be set up; whether these centres will be managed directly by the EU; whether decisions on asylum should be taken by EU bodies, or Member States’ bodies, or “joint bodies” (composed of representatives of the EU, Member States and hosting Third States, together with local staff and employees of international organizations such as the UNHCR or of NGOs); how refugees should be resettled in EU countries; what would be the fate of those persons who are not entitled to international protection, but at the same time cannot be sent back to their country of origin because they face a real risk of being tortured or subjected to inhuman or degrading treatment etc.

¹ The U.S.A. practice in the Caribbean sea in managing migration flows, greatly criticized by academics, has been swinging between *refoulement* (endorsed by the Supreme Court in the *Sale* judgment) and pre-screening in the Naval Base of Guantanamo and in Jamaica and Turks and Caicos: see Stephen Legomsky, “The USA and the Caribbean Interdiction Program”, in *International Journal of Refugee Law*, 2006, p. 680 ff.; Harold Hongju Koh, “The ‘Haiti Paradigm’ in United States Human Rights Policy”, in *Yale Law Journal*, 1994, p. 2391 ff.; on the *Sale* judgment see in particular Guy Goodwin-Gill, “YLS Sale Symposium: The Globalization of High Seas Interdiction–Sale’s Legacy and Beyond”, of 16 March 2014, available at <http://opiniojuris.org/2014/03/16/yale-sale-symposium-globalization-high-seas-interdiction-sales-legacy-beyond/> (06/15).

² Australia has actually experimented with extraterritorial processing in two periods, from 2001 to 2008 and again from 2012 onward, outsourcing to Nauru and Papua New Guinea the examination of the asylum claims of individuals, intercepting them before they reach Australia or sending them to offshore centres after initial identity and health screening in Australia. See Susan Kneebone, “The Pacific Plan: The Provision of ‘Effective Protection’”, *International Journal of Refugee Law*, 2006, p. 696 ff. On the influence of the Australian practice on Europe see in particular Jane McAdam, “Migrating laws? The ‘plagiaristic dialogue’ between Europe and Australia” in H  l  ne Lambert, Jane McAdam and M. Fullerton (eds.) *The Global Reach of European Refugee Law*, Cambridge University Press, Cambridge, 2013, p. 25 ff.

³ See Maarten den Heijer, *Europe and Extraterritorial Asylum*, Hart Publishing, Oxford and Portland, Oregon, 2012, p. 274; Gregor Noll, “Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones”, in *European Journal of Migration and Law*, 2003, pp. 338 ff.

⁴ On the possible violations of human rights see Gregor Noll, “Visions of the Exceptional”, cit.; Angus Francis, “Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing”, in *International Journal of Refugee Law*, 2008, p. 273 ff.

After a brief history of the proposals launched at European level⁵, the present paper intends to analyze in particular - among the multiple legal issues involved in the establishment of such centres - which of the various actors implicated would be responsible, and to what extent, in cases of violations of asylum seekers' human rights, if such centres were to become reality. In fact, the scenario that could be envisaged at the moment – without a concrete proposal to analyze – is extremely complex. Disentangling the web of action/attribution/responsibility could be very difficult and the risk of “blame shifting” or “passing the buck” among the various actors very high. Finally, the possibility of the extraterritorial application of the European Convention of Human Rights will also be explored, in order to verify individuals' access to remedies before the European Court of Human Rights.

The European debate about extraterritorial processing

One of the first countries to suggest establishing offshore processing centres was Denmark, which in 1986 prepared a draft Resolution⁶ for the UN General Assembly, recommending the institution of centres administered by the UN (but the draft Resolution did not receive the necessary support). Later on it was the turn of The Netherlands, which proposed the setting up of processing centres managed by a coalition of different actors.

In 2003 Blair's government launched its “New Vision for Refugees”, proposing “Regional Protection Zones” (RPZs) and “Transit Processing Centres” (TPCs) (where asylum seekers arriving in participating Member States would be transferred) and pursuing an explicit aim of deterrence⁷. The proposal of establishing centres outside EU territory, which would be managed by the IOM and financed by participating Member States, received the support of the Netherlands and Denmark (already favorable in the past to this kind of proposal, as I said before, and of Spain and Italy, but was strongly opposed by Sweden, Germany⁸ and France, partly because it was not clear who would be responsible for protection in such centres).

⁵ With respect to non European cases of offshore processing see, with reference to the Comprehensive Plan of Action for Indochinese Refugees (1988/1996), the observations of Guy Goodwin-Gill, “Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action”, available at <http://www.jmcmigrants.eu/category/working-papers/>. (06/15).

⁶ UNGA, International procedures for the protection of refugees: draft resolution, UN Doc A/C.3/41/L.51, 12 Nov. 1986.

⁷ See p. 5 of “New International Approaches to Asylum and Protection”, 10 Mar. 2003, available at <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf> (06/15).

⁸ Later on Germany, after the Cap Anamur episode (see on this point Madeline Garlick “The EU Discussions on Extraterritorial Processing: Solution or Conundrum?”, in *International Journal of Refugee Law*, 2006, p. 615-616), changed its position: see the document “Effective Protection for Refugees, Effective Measures against Illegal Migration”, available at http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Archiv/presseerl/Schily_ueberlegungen.pdf (06/15), where the German Interior Minister Otto Schily suggested joint interception at sea and pushbacks to extraterritorial processing centres in North Africa: a behavior that would be condemned by the European Court of Human Rights some years later: see *Hirsi v. Italy*, of 23rd February 2012 (on this judgment see Mariagiulia Giuffrè, “Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v Italy”, in *International and Comparative Law Quarterly*, 2012, pp 728 ff.; Anna Liguori, “La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso *Hirsi*”, in *Rivista di diritto internazionale*, 2012, p. 415 ff.; Francesco Messineo, “Yet another mala figura: Italy breached non-refoulement obligations by intercepting migrants' boats at sea, says ECtHR”, available at www.ejiltalk.org; Violeta Moreno-Lax, “*Hirsi v Italy* or the Strasbourg Court v Extraterritorial Migration Control?”, in *Human Rights Law Review*, 2012, p. 574 ff.; Nicola Napoletano, “La condanna dei ‘respingimenti’ operati dall'Italia verso la Libia da parte della Corte europea dei diritti umani: molte luci e qualche ombra”, in *Diritti umani e diritto internazionale*, 2012, p. 436 ff.; Bernard Ryan “*Hirsi*: Upholding the Human Rights of Migrants at Sea”, available at www.kent.ac.uk; Matteo Tondini, “The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the Ecthr Decision in the *Hirsi* Case”, in *Journal of International Maritime Law* 2012, p. 59 ff.

The UNHCR, on the other hand, while opposing the idea of setting up TPCs outside the EU, launched a counter-initiative⁹, proposing, *inter alia*, the establishment of processing centres in the EU, where “[u]pon arrival anywhere within the territory of EU Member States or at their borders, all asylum seekers from designated countries of origin would be transferred immediately”, with the exception of persons unable to travel or stay in closed reception centres for medical reasons, as well as unaccompanied and separated children; the people to be transferred to such centres were therefore to be “populations who consist primarily of economic migrants, that is, persons from specific countries of origin whose asylum applications are likely to be manifestly unfounded” (but in December 2003 this proposal was modified, the UNHCR suggesting the setting up of “a comprehensive EU system”, including EU Reception Centres, an EU Asylum Agency and an EU Asylum Review Board for Appeals - and, which is remarkable, Reception Centres would no longer be closed).

What was the response of the European Union? In 2003 the European Commission issued a Communication “Towards more accessible, equitable and managed asylum systems”¹⁰ without supporting either the UK or the UNHCR proposals, but instead inviting Member States to consider the introduction of Protected Entry Procedures¹¹. The Commission was then urged, in the Hague Programme, to prepare two studies, one to “look into the merits, appropriateness and feasibility of joint processing of asylum applications outside the EU territory, in complementarity with the [CEAS] and in compliance with the relevant international standards” and another one “on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications within the Union”. So far, only this second study has been commissioned (and was completed in February 2013)¹².

In 2009, the Stockholm Programme, “in rather cryptic terms”¹³, urged “the Commission to explore ... new approaches concerning access to asylum procedures targeting main transit countries, such as protection programmes for particular groups or certain procedures for examination of applications for asylum, in which Member States could participate on a voluntary basis”¹⁴. In the same period, while Italy was at the height of its shameful push-back policy, the former JHA Commissioner, Jacques Barrot, launched in an interview the very inappropriate proposal that Libya should open “reception points” for asylum seekers in its territory; in this same year the French delegates proposed a “partnership with migrants’ countries of origin and of transit” with the aim of “finding innovative solutions for access to asylum procedures”¹⁵. The plan suggested joint maritime operations at the EU’s external borders¹⁶ and that people intercepted would be taken to Libya for

⁹ UNHCR, Three-Pronged Proposal, Jun. 2003, available at <http://www.refworld.org/docid/3efc4b834.html> (06/15). On the Convention Plus initiative see <http://www.unhcr.org/pages/4a2792106.html> (06/15). For a critical assessment of the UNHCR position see Alexander Betts “The International Relations of the “New” Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR”, in *Refuge*, 2004, p. 58 ff., available at <http://refuge.journals.yorku.ca/index.php/refuge/article/view/21318> (06/15).

¹⁰ COM(2003) 315 final

¹¹ Gregor Noll, “Visions”, cit., p. 308.

¹² See Helene Urth et al, *Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*, HOME/2011/ERFX/FW/04, Feb. 2013, available at http://www.ec.europa.eu/home-affairs/doc_centre/docs/hague_programme_en.pdf (06/15).

¹³ See Violeta Moreno Lax, “External Dimension”, in Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild (eds) *EU Immigration and Asylum Law (Text and Commentary)*, 2nd Revised Edition, Martinus Nijhoff/Brill, Leiden/Boston, 2015, p. 653.

¹⁴ The Stockholm Programme, p. 73.

¹⁵ The migration situation in the Mediterranean: establishing a partnership with migrants’ countries of origin and of transit, enhancing Member States’ joint maritime operations and finding innovative solutions for access to asylum procedures, Council doc. 13205/09, 11 Sept. 2009

¹⁶ *Ibidem*, p. 4.

processing¹⁷, with the cooperation of the UNHCR and IOM (and the financial aid of the European Union).

The plan received not only the support of the Italian Government, as one could expect in the light of the Italian push-back campaign, but also of the Brussels European Council of October 2009¹⁸ and of the JHA Council of February 2010¹⁹, and this notwithstanding several international reports²⁰, from international organizations and NGOs, which showed the risk of violations of human rights in Libya. Only the outbreak of the civil war in Libya put a stop to this initiative.

In 2014 the idea of establishing offshore centres resurfaces: in the Commission's Communication of 2014 "An open and secure Europe: making it happen"²¹ a feasibility study on possible joint processing of protection claims outside the EU is again envisaged, and some EU Member States, in particular Italy, re-propose the idea of establishing refugee centres in Libya²².

An explicit reference to the setting up of offshore centres appears also in the Khartoum process, launched on 28 November 2014. The Ministers of the 28 EU countries, plus Eritrea, Ethiopia, Somalia, South Sudan, Sudan, Djibouti, Kenya, Egypt and Tunisia, as well as the European and African Union Commissioners in charge of migration and development and the EU High Representative actually agree, among other things, on "Where appropriate, on a voluntary basis and upon individual request of a country in the region, assisting the participating countries in establishing and managing reception centres, providing access to asylum processes in line with the international law, if needed, improving camp services and security, screening mixed migratory flows and counseling migrants".

After the death toll of 18 April 2015, the idea gains a new momentum²³. In the documents adopted as a consequence of the new crisis²⁴, there is however only a reference to the necessity of enhancing cooperation with the countries of origin and transit of migration flows. In particular in the European

¹⁷ The plan suggested also, as an alternative, the possibility of presenting applications at the Member States' embassies.

¹⁸ See Presidency Conclusions, European Council 29–30 October 2009, Council Doc. 15265/09, 30 October 2009, par. 40.

¹⁹ See "29 measures for reinforcing the protection of the external borders and combating illegal Immigration", Council conclusions, JHA Council, Brussels 25–26 Feb. 2010.

²⁰ See, *inter alia*, Human Rights Watch, *Stemming the Flow: abuses against migrants, asylum seekers and refugees*, September 2006; Comité des droits de l'homme des Nations Unies, *Observations finales Jamahiriya arabe libyenne*, 15 November 2007; Amnesty International, *Libye — Rapport 2008 d'Amnesty International*, 28 mai 2008; Human Rights Watch, *Libya Rights at Risk*, 2 September 2008; United States Department of State, *2010 Human Rights Report: Libya*, 4 April 2010. All these reports are also quoted in the Hirsi judgement of the European Court of Human Rights (par. 40).

²¹ COM(2014) 154 final.

²² "Italian Premier Renzi calls for UN refugee camps in Libya", ANSAMed News, 20 May 2014, available at: http://www.ansamed.info/ansamed/en/news/nations/italy/2014/05/20/italian-premier-renzi-calls-for-un-refugee-camps-in-libya_49bd97fb-61c7-4e9a-8d03-beb9124b02b3.html (06/15).

²³ See Jane McAdam, "Policy Brief 1 - Extraterritorial processing in Europe: Is 'regional protection' the answer, and if not, what is?", <http://www.kaldorcentre.unsw.edu.au/publication/policy-brief-1-extraterritorial-processing-europe-%E2%80%98regional-protection%E2%80%99-answer-and-if> (06/15), who reports the Australian media questioning if "the pacific solution" would be the solution for the Mediterranean as well: David Wroe, 'Refugee Crisis: Europe Looks to Australia for Answers', *Sydney Morning Herald*, 24 April 2015 <http://www.smh.com.au/national/refugee-crisis-europe-looks-to-australia-for-answers-20150424-1ms804.html> ; 'Australia's Refugee Policy: Should Europe Emulate It?', *DW*, 22 April 2015 <http://www.dw.de/australias-refugee-policy-should-europe-emulate-it/a-18399274> ; Jonathan Pearlman, 'How Australia's Migrant Policy Works – And Is It Transferable to the Mediterranean?', *The Telegraph*, 22 April 2015 <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11554161/How-Australias-migrant-policy-works-and-is-it-transferable-to-the-Mediterranean.html> .

²⁴ See "Joint Foreign and Home Affairs Council: Ten point action plan on migration" of 20 April 2015, available at http://europa.eu/rapid/press-release_IP-15-4813_en.htm (06/15); "Special meeting of the European Council" of 23rd April 2015 – statement, available at <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> (06/15); "European Parliament resolution of xx April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP))", available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0176+0+DOC+XML+V0/EN> (06/15).

Commission Agenda for Migration²⁵, launched by the European Commission on 13 May 2015, the suggestion of putting “in place concrete measures to process migrants before they reach the EU's borders”, provided for in a leaked draft of the Commission communication²⁶, was changed to the vaguer proposal of putting “in place concrete measures to prevent hazardous journeys”. The Agenda also proposes setting up, by the end of the year, a pilot multi-purpose centre in Niger, which, “working with the International Organization for Migration (IOM), the UNHCR and the Niger authorities ..., will combine the provision of information, local protection and resettlement opportunities for those in need”. Even if “it is unclear precisely what its function would be”²⁷, it “could imply the extraterritorial assessment of asylum and other protection claims”, as the European Parliament Research Centre suggests²⁸; we certainly cannot exclude that – in a more or less transparent way - it might turn into an intermediate step towards the establishment of veritable transit processing centres.

In any case, some EU Member States continue to think of establishing offshore centres as a desirable option to manage the increased migration flows in the Mediterranean²⁹ and the UNHCR, too, has recently supported this idea³⁰, cautiously affirming that “Under certain circumstances, such processing could be envisaged through a multilateral cooperative arrangement”³¹.

²⁵ COM(2015) 240 final

²⁶ Available at <http://eulawanalysis.blogspot.it/2015/05/commission-strategy-on-eu-immigration.html> (06/15)

²⁷ See Jane Mc Adam “Policy Brief 1. Extraterritorial processing in Europe: Is ‘regional protection’ the answer, and if not, what is?”, available at <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Extraterritorial%20processing%20brief%20FINAL.pdf> (06/15), note n° 8, p. 16. According to this author, it is “something very different from an extraterritorial processing centre for the EU”.

²⁸ <http://eptionktank.eu/2015/06/10/extraterritorial-processing-of-asylum-claims/> (06/15).

²⁹ See in particular the position of the United Kingdom and specifically the article by UK Minister Theresa May which appeared in The Times on 13 May 2015: <http://www.thetimes.co.uk/tto/opinion/thunderer/article4438589.ece> (06/15).

³⁰ See the 2015 “UNHCR proposals to address current and future arrivals of asylum-seekers, refugees and migrants by sea to Europe”, available at <http://www.refworld.org/pdfid/55016ba14.pdf> (06/15), in which the UNHCR reports having “been informally approached by a number of EU Member States inquiring as to whether it would be ready to participate in arrangements that may be set up in some transit and first asylum countries in Africa and the Middle East to assess the claims of third country nationals for international protection *in situ*” (p. 5). The UNHCR has also stated that, when asylum claims are examined in extraterritorial processing centres: “Responsibility for the identification and implementation of solutions for those in need of international protection and resolution for others would remain with all States involved in the regional processing arrangement”: see “Protection Policy Paper Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing”, 2010, available at <http://www.refworld.org/docid/4cd12d3a2.html> (06/15).

³¹ See also Madeline Garlick, who, in her paper published in March 2015, “The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims”, available at <http://www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims> (06/15), while analyzing the renewed interest of Europe for offshore processing, at the question “Has Anything Changed to Make These Ideas Worth Revisiting?”, answers “Arguably yes”, in the light of the extensive developments in the EU asylum law framework in recent years, of the entry into force of the EU Charter of Fundamental Rights, of the recent case law of the Strasbourg and Luxembourg courts (which “have clarified states’ obligations”) and of the evolution of the institutional landscape (“the European Asylum Support Office (EASO) has explicit authority to cooperate with third countries, whilst the European External Action Service (EEAS) is seeking more intensive working relationships with non-EU countries, including on migration and asylum”). In her conclusions, however, she asks “whether other channels could result in safer and better managed routes to protection”, stressing that “discussions should include rigorous cost-benefit analysis, considering states’ interests but *based also on protection principles and fundamental rights*” (the Italics are added). See also Jane McAdam, “Policy Brief 1. Extraterritorial processing in Europe”, cit. p. 8, who affirms that “To better respond to the needs of those on the move, a number of complementary strategies are needed”, indicating a ... tool which includes, inter alia, the issue of humanitarian visas. A recent study (Iben Jensen, *Humanitarian Visas: Option or Obligation?*, PE 509.986, Brussels, 2014), commissioned by the European Parliament, examines whether the issue of these visas is a legal obligation in certain circumstances (see on this point also Violeta Moreno-Lax, “Must EU Borders Have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States’ Obligations to Provide International Protection to Refugees”, 2008, in *European Journal of Migration and Law*, p. 315 ff.).

Who would be responsible for conducts affecting asylum seekers and refugees in offshore centres?

The present study intends to analyze what international law entails whenever a State and/or an IO (in this case the European Union) uses the territory of a third State to process asylum claims (previously filed on its territory or which might have been filed there if the asylum seekers had not been intercepted before reaching Europe). It is uncontroversial that States have often made recourse to extraterritorial practice in the attempt to deal with asylum claims “outside the law”. But, as Prof. Goodwin-Gill has observed, “like many measures which a State may take in the gray, apparently unregulated areas of international law, offshore processing is in fact subject to law, and subject to the rule of law”³².

“European proposals to date have left many unanswered questions”³³. One of them is who would be responsible for the centres in cases of violations of asylum seekers’ human rights, which, as borne out by Australian practice³⁴, are highly probable. “Would responsibility be in the hands of the State transferring the persons concerned or the State upon whose territory the centre is located, or would there be shared responsibility between the transferring State and the State host to the centre?”³⁵

The scenario that could be envisaged at the moment might in effect involve multiple actors: the EU and /or EU agencies directly involved (such as Frontex and/or EASO), EU Member States, the third State hosting the centre, international organizations (such as the UNHCR and IOM), NGOs and /or private actors possibly involved in the processing (to whom the EU/Member States or the territorial State might outsource the processing). In our opinion there might be a shared responsibility³⁶ - shared among the hosting state, the outsourcing State/IO involved and the International Organizations which may be cooperating in the processing.

The present paper intends in particular to identify the possible legal basis, according to the rules on the International Responsibility of States (as codified in the 2001 ILC Project: ARIO) and on the International Responsibility of International Organizations (as codified in the 2011 ILC Project: DARIO), for considering the outsourcing State/IO responsible in case of human rights breaches, taking into consideration that offshore processing is particularly at risk of *refoulement*, arbitrary and

³² Guy Goodwin-Gill, “The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations”, in *UTS Law Review*, 2007, p. 27. See also Jorrit Rijpma and Marise Cremona, “The Extra-Territorialisation of EU Migration Policies and the Rule of Law”, EUI Working Papers LAW, 2007, available at http://cadmus.eui.eu/bitstream/handle/1814/6690/LAW_2007_01.pdf?sequence=1 (06/15).

³³ Jane McAdam, “Policy Brief 1. Extraterritorial processing in Europe”, cit. p. 8.

³⁴ Juan E Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 28th sess, Agenda item 3, UN Doc A/HRC/28/68/Add.1 (6 March 2015) 7–9; Amnesty International, *Report 2014/15: The State of the World’s Human Rights* (2015) 63–64, available at http://www.amnesty.org.au/images/uploads/about/Annual_Report_2015_The_State_of_the_Worlds_Human_Rights.pdf; Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February 2014 to 18 February 2014* (2014), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report; Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), available at http://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf; Philip Moss, *Review into Recent Allegation relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (Department of Immigration and Border Protection, 6 February 2015), available at <https://www.immi.gov.au/about/dept-info/files/review-conditions-circumstances-nauru.pdf> (06/15).

³⁵ Jane McAdam, “Policy Brief 1. Extraterritorial processing in Europe”, cit., p. 8.

³⁶ By the expression *shared responsibility* we mean « responsibility of multiple actors for their contribution to a single harmful outcome »: cfr. André Nollkaemper and Dov Jacobs, “Shared Responsibility in International Law: A Conceptual Framework”, in *Michigan Journal of Int. Law*, 2013, p. 367, available also at <http://www.sharesproject.nl/wp-content/uploads/2011/08/Nollkaemper-Jacobs-Shared-Responsibility-in-International-Law-A-Concept-Paper.pdf>. (06/15).

inhuman detention, lack of effective remedies and violations of children's rights, and that both the EU and Member States are obliged not to commit these violations (EU Charter of Fundamental Rights, ECHR, Geneva Convention, Convention on the Rights of the Child ...)³⁷.

The legal responsibility of States

Regarding the responsibility of the transferring State, there are in my opinion multiple legal bases for affirming either a direct responsibility or at least an indirect one.

According to general international law, a State is directly responsible for the conduct of its organs and agents (the organ or agent exercising elements of government authority acts for the State, even when it exceeds its authority or acts contrary to instructions)³⁸: this might entail a direct responsibility on the part of the State either if it adopts a decision of transfer for those who have already arrived on its territory, or if it intercepts a vessel carrying asylum seekers and diverts it to the host State. In the latter case, as the famous *Hirsi*³⁹ judgment has demonstrated, there might be a responsibility not only as a consequence of the violation of the principle of non *refoulement* (a direct violation, if the conditions in the centres in the host State prove to be inhuman or arbitrary, or indirect, if from that centre there is the risk for the asylum seeker of being sent back to the country of origin) but also of the prohibition of collective expulsion and of the right to an effective remedy (if there is no individual examination of each specific situation, nor the possibility of appealing before an independent body)⁴⁰.

The responsibility for the conduct of its organs and agents might entail the responsibility of the outsourcing State also if its agents are directly involved in the processing in the hosting country; in addition the outsourcing State could be held responsible also for the conduct of persons or entities exercising elements of government authority⁴¹ (in the case for instance of outsourcing to private actors) and for the conduct of an organ placed at its disposal by another State⁴² (if it is proved that the organ of the territorial State is at the disposal of the outsourcing State). Where the organ of one State acts on the joint instructions of its own and another State (for instance the State hosting the centre), or where a single entity is a joint organ of several States, the conduct in question is attributable to each State (art. 47 ARIO).

The outsourcing State can be responsible also indirectly if it aids or assists (art. 16 ARIO) or directs and controls (art. 17 ARIO) another State in the commission of an internationally wrongful act by the latter if it does so with knowledge of the circumstances of the internationally wrongful act and the act would be internationally wrongful if committed by that State). While the latter hypothesis is probably unlikely in practice⁴³, the former could be very useful as a legal basis for establishing the responsibility of the outsourcing State in those cases where the State does not participate in the processing, but only finances the centres.

The legal responsibility of IOs

³⁷ For a detailed analysis of relevant obligations under International and European law for EU and/or EU Member States in the various hypotheses of processing schemes envisageable see "External Processing conditions applying to the processing of asylum applications outside the European Union", report of the Advisory Committee on Migration Affairs (ACVZ), The Hague, 2010, available at <http://www.acvz.org/publicaties/Advies-ACVZ-NR32-ENG-2010.pdf> (06/15), p. 26 ff.

³⁸ See articles 4-11 of ARIO.

³⁹ *Hirsi Jamaa v Italy*, Appl. No. 27765/09, 23 February 2012. On this judgment see the literature quoted in note n° 8.

⁴⁰ Violeta Moreno Lax, "External Dimension", cit., p. 661 ff.

⁴¹ Ar. 5 ARIO.

⁴² Art. 6 ARIO.

⁴³ As the Commentary of art. 17 (par. 7) says: "In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern".

When we discuss the legal responsibility of IOs, we think both of the EU (imagining that there might be EU-sponsored processing centres), and also of the IOs which may be directly involved in the processing (for instance the UNHCR and/or IOM). What might the legal basis for such responsibility be? The 2011 ILC Project (DARIO), in addressing the issue of the responsibility of international organizations, follows the same approach adopted with regard to State responsibility and so provides a direct responsibility of an IO for conduct of an organ or agent of an international organization and for the conduct of organs of a State placed at its disposal.

The DARIO Commentary also envisages the possibility of *dual attribution* of the same conduct to both a State and an IO (see par 4 of introduction to commentary of II Chapter DARIO: “although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization”)⁴⁴.

Finally, the ILC Project also envisages the hypothesis of responsibility (without attribution) of an international organization in connection with the acts of a State or of another organization (which would cover, among other things, those cases in which an IO aids or assists and directs and controls a State or another organization), and of responsibility of a State in connection with the conduct of an international organization, which covers, among other things, the cases in which a State aids or assists and directs and controls an IO.

In my opinion this last rule could be useful particularly in the case of the involvement of Frontex in intercepting and diverting boats. The question of the allocation of responsibility among Member States and Frontex, in cases of violations of human rights during joint operations at sea, is a particularly complex one⁴⁵. In my opinion, and despite the recital (4) of Frontex regulation which says that “The responsibility for the control and surveillance of external borders lies with the Member States”, there is also a responsibility of Frontex – and therefore of the European Union⁴⁶ – at least for aiding and abetting⁴⁷.

Most interestingly, DARIO also provides for the possibility of responsibility if the IO circumvents an international obligation through decisions and authorizations addressed to members (art. 17): as

⁴⁴ Also the European Court has implicitly acknowledged the possibility of dual attribution: see par 80 of *Al-Jedda v. United Kingdom*, Judgment of 7 July 2011 (on this point see Marko Milanovic, “Al-Skeini and Al-Jedda in Strasbourg”, in *European Journal of International Law*, 2012, p. 134 ff.; Irene Papa, “Le autorizzazioni del Consiglio di sicurezza davanti alla Corte europea dei diritti umani: dalla decisione sui casi Behrami e Saramati alla sentenza Al-Jedda”, in *Diritti umani e diritto internazionale*, 2012, p. 229 ff.; Anna Liguori, “Shared responsibility nel corso di peacekeeping operations delle Nazioni Unite: quale ruolo per la Corte europea dei diritti umani?”, in *Rivista di diritto internazionale*, 2015, p. 517 ff. The admissibility of *dual attribution* has been affirmed also in some domestic judgments delivered by Dutch courts with respect to the massacre in Srebrenica (see *Supreme Court (Hoge Raad), State of the Netherlands v. Mustafić et al.*, *State of the Netherlands v. Nuhanović*, Judgments of 6 September 2013 and *District Court, Mothers of Srebrenica v. State of the Netherlands*, Judgment of 16 July 2014, available at <http://www.haguejusticeportal.net/> (06/15)).

⁴⁵ As has been observed (see André Nollkaemper and Dov Jacobs, “Shared Responsibility in International Law”, cit.), “If two states contribute to joint Frontex missions to control the external borders of the EU, and the rights of persons seeking asylum are violated, the question will arise whether the EU, and/or one or both of the states involved are responsible and, if so, how responsibility is distributed among them”.

⁴⁶ Accepting as a premise that Frontex involves the responsibility of the European Union (we base this on the thesis which does not recognize a separate and independent international personality of EU agencies: see on this point Melanie Fink, “Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding ‘Technical Relationships’”, in *Merkourios, Utrecht Journal of International and European Law*, 2012, p. 26; for the opposite thesis see G. Schusterschitz, “European Agencies as Subjects of International Law”, in *International Organizations Law Review*, 2004, p. 169).

⁴⁷ See on this point Cfr. Anna Liguori, Novella Ricciuti, “Frontex ed il rispetto dei diritti umani nelle operazioni congiunte alle frontiere esterne dell’Unione Europea”, in *Diritti umani e diritto internazionale*, 2012, p. 554 ff. and in particular p. 556.

was noted by the Austrian delegate during the preparatory works of DARIO⁴⁸, “an international organization should not be allowed to escape responsibility by ‘outsourcing’ its actors”. One may wonder if this rule could be a valid basis for preventing the EU from escaping its obligations, for instance, by authorizing an international organization (such as the UNHCR) to process the asylum claims in a third country. In parallel, art. 61 DARIO provides for the possibility of a responsibility of the State that, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s international obligations, circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation. As for art. 17, this might imply that no State may circumvent its own obligations, for instance, by contracting out to an international organization (the UNHCR or IOM) the screening, the determination of status and/or the reception of asylum seekers. Of course, in this case, the responsibility of the member States of the organization would add to the responsibility attaching directly to the organization as a subject of international law⁴⁹.

This brief outline shows that a shared responsibility - shared between the territorial State and the EU and/or the Member States and the IOs, UNHCR and/ or IOM which may be involved in the processing-, is highly probable (direct responsibility for some of the authors, indirect for the others, according to the circumstances), whatever form the hypothetical cooperation agreement/s between the EU and the African partner may take.

The advantages of envisaging a shared responsibility are that this limits the risk of “blame shifting” or “passing the buck” among the various actors and that it might multiply the possibilities of recourse available to victims and therefore better facilitate the realization of the right to a remedy⁵⁰.

Remedies-the Achilles heel

The last part of our paper intends therefore to analyze whether claims could be brought against the outsourcing States before international human rights bodies, and in particular before the European Court of Human Rights, in the light of the effectiveness of this kind of recourse (thanks, among other things, to the jurisprudence of the Strasbourg Court, which has been able in various cases to adopt a creative approach in responding to the new challenges in asylum and migration issues⁵¹) and to the binding nature of the decisions delivered by this court.

A State that is party to the human rights treaty is bound to respect and uphold the rights contained in that treaty only for persons within its ‘jurisdiction’.

Traditionally a State’s jurisdiction, for the purposes of its human rights obligations, was assumed to be limited mainly, if not exclusively, to its territory. As international human rights law has evolved, it is now accepted that a State’s jurisdiction for human rights purposes can extend to persons outside its territorial limits, whenever the State has a certain degree of “power, authority or ‘effective control’” over them, or over the territory in which they are located.

In order to give a concrete example of the questions at issue, we shall quickly analyze the case of Australia (although the scenario in the case of EU offshore processing centres would probably be more complex).

⁴⁸ DARIO Commentary art. 17, para (1).

⁴⁹ With reference to offshore centres managed directly by the European Union or an EU Agency, in order to establish the responsibility not only of the EU, but also of the EU Member States, see “External Processing conditions applying to the processing of asylum applications outside the European Union”, cit., p. 24-26.

⁵⁰ See, *mutatis mutandis*, Tom Dannenbaum, “Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers”, in *Harvard International Law Journal* 2010, p. 170 (with reference to another hypothesis considered in literature as “shared responsibility”).

⁵¹ See in particular *M.S.S. v. Belgium and Greece* and *N.S. v. Secretary of State for the Home Department* (regarding Dublin transfers) and *Hirsi v. Italy* (on interception in high seas) and Cathryn Costello, “Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored”, in *Human Rights Law Review*, 2012, p. 287 ff.

Australia has actually experimented extraterritorial processing in two periods, from 2001 to 2008 and again from 2012 onward, outsourcing to Nauru and Papua New Guinea the examination of asylum claims of individuals, intercepting them before they reach Australia or sending them to offshore centres after initial identity and health screening in Australia. Did Australia acknowledge its jurisdiction? In most public interviews, representatives of Australian governments denied any responsibility, affirming that ‘[the] regional processing centres are a matter for the Nauru and Papua New Guinea governments as these centres are located in their sovereign territory’⁵², and arguing that Australia “does not have the ‘very high level’ of effective control necessary to establish its jurisdiction over asylum seekers and refugees offshore”⁵³.

A very interesting reply on this point was given by the Committee against Torture in its Concluding observations on the fourth and fifth periodic reports of Australia, adopted on 26 November 2014, which stated that:

“The Committee is concerned at the State party’s policy of transferring asylum seekers to the regional processing centres located in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports on the harsh conditions prevailing in these centres, including mandatory detention, also for children; overcrowding, inadequate health care; and even allegations of sexual abuse and ill-treatment. The combination of these harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering. All persons who are under the *effective control*⁵⁴ of the State party, because inter alia they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the Convention (arts. 2, 3, 16)”.

In other words, according to the CAT, Australian jurisdiction was triggered in those centres (however, it is not clear, whether, according to the CAT, this may happen only in the presence of the three criteria enumerated - having transferred the asylum seekers there, chosen the private contractor and financed the centres - or whether jurisdiction may be established also in the presence of just one of them).

The Committee concluded by urging Australia “to adopt the necessary measures to guarantee that all asylum seekers or persons in need of international protection who are under its effective control are afforded the same standards of protection against violations of the Convention regardless of their mode and/or date of arrival. The transfers to the regional processing centres in Papua New Guinea (Manus Island) and Nauru, ... does not release the State party from its obligations under the Convention”.

A confirmation of Australia’s jurisdiction in offshore centres came also in December 2014, when an Australian Senate Committee inquiry⁵⁵, concerning a riot in the Manus Island detention centre in February 2014, expressly acknowledged that Australia was at that time, and still is, exercising *effective control* over the Manus Island centre and over the individuals held there and that “the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the centre clearly satisfies the test of effective control in international law”.

The Australian Committee founded its conclusions on evidence provided by experts in international human rights law, in particular on the following elements: “the only reason asylum seekers are in detention and at risk of human rights violations in Nauru or PNG is because Australia forcibly sent them there; certain decisions made by Australian authorities have created or exacerbated the risks of harm in offshore detention centres, for example the decision to start sending asylum seekers to

⁵² See “Offshore processing and Australia’s responsibility for asylum seekers and refugees in Nauru and Papua New Guinea”, available at <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-australia-responsibility> (06/15), p. 8, reporting various interviews and statements delivered by Australian Government representatives.

⁵³ *Ibidem*.

⁵⁴ The italics are added.

⁵⁵ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island (06/15).

Nauru and PNG before construction of the centres was complete, or in such numbers as to cause overcrowding; Australian authorities exercise a considerable degree of control and enjoy substantial decision-making powers in relation to asylum seekers detained offshore, and therefore have a significant and direct impact on their enjoyment of rights ...; and Australian DIBP officers have either conducted or closely supervised the refugee status determination processes in both offshore processing countries”⁵⁶.

Offshore Centres and the ECHR

Could Member States be brought before the European Court of Human Rights ? (At the moment, and before the accession of the European Union to the ECHR the EU cannot be brought before the Strasbourg Court⁵⁷)

The case law on jurisdiction before the Strasbourg Court is very complex⁵⁸. The leading case is *Al Skeini v. United Kingdom*⁵⁹, where the Court, after reiterating that “A State’s jurisdictional competence under Article 1 is primarily territorial”, then affirmed the existence of jurisdiction “whenever the State, through its agents, exercises control and authority over an individual” (personal model) and “when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory” (spatial model). According to this case-law, extraterritorial jurisdiction will most probably be established where offshore migration controls entail the detention of those intercepted in the high seas or removed from Europe, while it is uncertain whether simply carrying out immigration interviews or just financing the creation of a centre (without intercepting or taking an expulsion decision) might trigger the jurisdiction of a State⁶⁰, unless a more functional approach to extraterritorial jurisdiction is affirmed.

ECHR jurisprudence on jurisdiction is in effect quite puzzling. One might ask if *Bankovic* - where the Court held that the text of “Article 1 does not accommodate” an approach to a “cause-and-effect” notion of jurisdiction⁶¹ (vigorously denying a functional approach) - , has been overruled by *Al-Skeini*. Moreover, in a few cases, the Court actually seems to have indeed applied a more “functional test”: in the decision of 3 June 2008, *Andreou v. Turkey* (concerning Turkish authorities positioned behind the border killing a demonstrator inside the UN-controlled area) the Court for instance stated that “even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and

⁵⁶ See “Offshore processing and Australia’s responsibility”, cit, p. 8.

⁵⁷ On 18 December 2014, the Court of Justice ruled that the Draft Agreement of 5 April 2013 (doc. 47+1(2013)008rev2, available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf) , was not compatible with EU law: see Opinion 2/13 available at <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN> (06/15).

⁵⁸ See, *ex multis* Giorgio Gaja, “Art. 1”, in Sergio Bartole, Benedetto Conforti, Guido Raimondi (eds.) *Commentario alla Convenzione europea per la salvaguardia dei diritti dell’uomo*, Cedam, Padova, 2001, p. 28; Pasquale De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell’uomo*, Giappichelli, Torino, 2002; Michael O’Boyle, “The European Convention on Human Rights and Extraterritorial Jurisdiction: a Comment on ‘life after Bankovic’”, in F. Coomans, M. Kamminga (eds.) *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerpen, 2004; Evelyne Lagrange, “L’application de la Convention de Rome à des actes accomplis par les Etats parties en dehors du territoire national”, in *Revue générale de droit international public*, 2008, p. 521 ff.; Raffaella Nigro, “The Notion of ‘Contracting Parties’ Jurisdiction in Art. 1 of the ECHR”, in *Italian Yearbook of International Law*, 2010, p. 11 ff.; Pasquale De Sena, “The Notion of ‘Contracting Parties’ Jurisdiction in Art. 1 of the ECHR: Some Marginal Remarks on Nigro’s Paper”, *ivi*, p. 75 ff.; Rosario Sapienza, “Art. 1”, in Sergio Bartole, Pasquale de Sena, Vladimiro Zagrebelsky (eds.) *Commentario breve alla Convenzione europea*, Cedam, Padova, 2012, p. 13 ff.; Marco Milanovic, “Al-Skeini and Al-Jedda in Strasbourg”, cit.

⁵⁹ *Al-Skeini v UK*, Appl. No. 55721/07, 7 Jul. 2011.

⁶⁰ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control*, Cambridge University Press, Cambridge, 2011, p. 133.

⁶¹ ECtHR, *Bankovic v Belgium*, Appl. No. 52207/99, 12 December 2001, Para. 75.

immediate cause of those injuries, was such that the applicant must be regarded as within the jurisdiction of Turkey”. To quote the most recent developments, the *Jaloud v. The Netherlands* judgment (20.11.2014) is remarkable; here the Court stated that M. Jaloud fell within the jurisdiction of the Netherlands because he passed through a checkpoint “manned by personnel under the command and direct supervision of a Netherlands Royal Army officer”. However, this case, too, shows that the Court is probably not yet ready for a notion of “cause and effect” jurisdiction; otherwise, as observed⁶², “All the talk [in Jaloud] about occupation, exercise of public authority and manning checkpoints would have been quite unnecessary”. In any case, given the significant progress made in this field so far, further developments in Strasbourg case-law are not to be excluded.

Conclusions

To sum up, as Prof. Goodwin-Gill wrote⁶³, “no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, or to an international organization”.

Therefore the outsourcing of migration control, and in particular of the processing of asylum claims, cannot imply a mere shift of responsibility. As we have seen, according to the rules of general international law, an outsourcing State and/or an IO might be responsible in most circumstances, at least for complicity.

The heel of Achilles is, however, whether it is/will be possible to bring the responsible states and IOs before an international human rights body⁶⁴ given, on the one hand, that it might be difficult in some cases to demonstrate the existence of a jurisdictional link between the individuals concerned and the outsourcing State and, on the other, that it is absolutely impossible to sue IOs in international or domestic courtrooms at the moment⁶⁵.

⁶² See Aurel Sari, in response to Julian Lehmann, “The Use of Force Against People Smugglers: Conflicts with Refugee Law and Human Rights Law”, available at <http://www.ejiltalk.org/the-use-of-force-against-people-smugglers-conflicts-with-refugee-law-and-human-rights-law/> (06/15). See also the judgment of the High Court of Justice (Queen Bench Division Administrative Court) *Al-Saadoon & Others v. Secretary of State for Defence*, of 15 March 2015, available at <http://www.11kbw.com/uploads/Judgments/Al-Saadoon%20Final%20Judgment%20KS.SA.pdf> (06/15).

⁶³ Guy Goodwin-Gill, “The Extraterritorial Processing”, cit. p. 34.

⁶⁴ The lack of effective remedies for establishing IOs’ responsibility is even worse at the moment, given that it is impossible to bring a claim against IOs before human rights bodies.

⁶⁵ After the accession of the EU to the ECHR, it will be possible to bring a claim against the European Union before the Strasbourg Court (this possibility is however at the moment quite remote, given ECJ opinion 2/13, quoted above).