

The EU and Offshore Asylum Processing

Why looking to Australia is not a way forward

The European Union appears to often look to Australia as a country that has successfully managed to seal its – maritime – borders and control migration. This has been most concretely demonstrated by Denmark’s newly passed legislation, which allows for the relocation of asylum seekers to third countries while their applications are being processed. This raises concerns and expectations that other countries might follow suit. In this policy brief, we show why seeking to emulate the Australian model is not a good idea, and how it would breach a number of fundamental human rights principles upon which the EU is built.

Brief Points

- Australia has received strong international condemnation due to the severe human rights violations resulting from its off-shore processing.
- Australia has since remained firm in its claim that it is not liable for the human rights violations taking place in the third country processing centres, as it has no control over the centres.
- Despite this, policy makers in the EU often refer to the successes of Australia in managing to control its borders.
- With Denmark exploring options for third country asylum processing, several other EU countries might follow suit.
- The EU is bound by a range of EU and international legal frameworks that make such practices hard to effectuate without breaching fundamental human rights.

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The EU Exploring Offshore Options

Since the ‘migration crisis’ of 2015, the EU has been continuously striving towards implementing non-arrival regimes through various external cooperation schemes. These schemes are emblematic of a rhetoric that aims to push migration management outside the external EU borders, and similarly push ‘out of sight’ the political and humanitarian situations that make people flee. European leaders are currently looking towards even more far-reaching solutions, inspired by the Australian model.

Under the Migration Act, Australia has contracted out the processing of asylum applications to third countries. This model, known as the Pacific Solution, has been deemed a moral, legal and financial failure by the international community at large.

In September 2020, the Danish government appointed Anders Tang Friberg as special envoy on migration, for the primary purpose of opening reception centres outside the EU borders, and to prevent ‘as many spontaneous asylum-seekers as possible’.¹ In June 2021, the Danish Aliens Act was amended to enable the Danish government to transfer asylum seekers to third countries for the processing of asylum applications. In light of the intensifying anti-immigrant rhetoric throughout the EU, it seems very likely that more countries will attempt to follow in Denmark’s footsteps, with the end-goal of deterrence and decreasing the visibility of asylum seekers within European borders.

The Failures of the Australian Model

Despite the severe condemnation directed at the Australian government, numerous European leaders have continued to praise the Pacific Solution and push for the exploration of the concept of ‘regional disembarkation platforms’, where the processing of asylum seekers could take place outside of EU borders. Unsurprisingly, other externalized asylum processing models are forming in the horizon. Before examining why this would breach a range of fundamental EU laws, it is helpful to review how the Australian model was established and how it worked – and failed.

The Pacific Solution

Even before the ‘refugee reception crisis’ of 2015, Australia has been notorious for its strict immigration policies. Successive Australian

governments have continuously demonstrated deterrence to be their primary aim while establishing refugee protection schemes. Although these policies have been failures in the eyes of the international legal community, they have played a significant role in the electoral wins by various politicians, such as the former Prime Minister John Howard.

The Pacific Solution was first implemented by the Australian government under the Migration Amendment Act of 2001. The legislative process was preceded by a rather self-contradictory narrative of humanitarian concern for ‘genuine asylum seekers’ and hostility aimed at ‘people smugglers’, ‘country shoppers’ and ‘economic migrants’.² Migration across the Mediterranean has similarly been framed as both a humanitarian concern, and a security issue for Europe.

The Amendment enabled the Australian government to designate any island or external territory as an ‘excised offshore place’, which would be deemed to be outside of Australia’s migration zone. Any asylum seeker who would enter an ‘excised Australian territory’ would be unable to make valid asylum applications within Australian territory.

Following a period of negotiations, two separate memorandums of understanding (hereafter MOU) were signed with the governments of Nauru and Papua New Guinea (hereafter PNG). Under these MOUs, Nauru and PNG undertook to operate the detention centres and conduct all activities in accordance with their own constitutions and domestic laws.

The offshore processing centres remained operational for seven years until the first Pacific Solution was dismantled in 2008 by the Labor government, who labelled it ‘costly, unsustainable and wrong as a matter of principle’.³ However, the scheme was reintroduced as the second Pacific Solution in 2012, in line with the recommendations of the Expert Panel on Asylum Seekers appointed by the government to advise on ‘how best to prevent asylum seekers risking their lives by travelling to Australia by boat’. Under this second Pacific Solution, any person arriving to Australia by sea without a valid visa is liable to removal to the detention centres in Nauru or PNG and will not be resettled in Australian territory regardless of whether they are found to be ‘genuine refugees’ as defined under the Refugee Convention.

In April 2016, the PNG Supreme Court deemed the detention of asylum seekers in the offshore centres unconstitutional. By 2019, the detention facilities within PNG were completely closed, and according to statistics released by the Australian Border Force, as of 31 January 2020, there are no remaining refugees in the Nauru Regional Processing Centre. The Australian government has indicated that Nauru will keep receiving asylum seekers under the MOU, whereas PNG will no longer be a part of the offshore processing scheme.

Human rights violations

Various UN bodies have taken extraordinary measures to address the human rights violations that plagued the Pacific Solution and requested Australia to review the Migration Act. Among these violations, a few stand out due to their severity and persistence.

The right to access to justice, which can be defined as ‘the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’,⁴ is a fundamental right engraved in key international human rights instruments such as Articles 6 (1) and 13 of the European Convention on Human Rights (ECHR) and Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

Under the Pacific Solution, the mandatory detention policy encompasses all asylum seekers, without a case-by-case evaluation. Furthermore, there is no time limit for how long a person can be detained within the off-shore centres, as is evident from the infamous case of Kurdish-Iranian journalist Behrouz Boochani,⁵ who remained in detention for over six years.

More troublingly, once in off-shore detention, refugee status determination becomes the responsibility of Nauru and PNG. This is a concerning prospect as the legal frameworks and administrative systems in both countries lack a majority of the safeguards and due diligence standards – such as independent merits review – that would be accessible to asylum seekers being processed in mainland Australia.⁶

Another issue on which UN bodies and human rights organizations have raised serious concerns are the abject conditions within the off-shore centres. Following various monitoring visits to Nauru and PNG, the UN High Commissioner for Refugees (UNHCR) observed that:

- The centres did not provide safe and humane conditions of treatment in detention
- The only real opportunity for privacy was ablution blocks, many of which were not cleaned and maintained regularly
- PTSD and depression had reached epidemic proportions and the anticipated mental illness, distress and suicide would continue to escalate in the immediate and foreseeable future.⁷

The prohibition against torture and other cruel, inhuman or degrading treatment, as well as being embedded in a number of international human rights instruments such as Article 3 of the ECHR, is a non-derogable norm of international law. This means that under no circumstances can a state limit or infringe upon this prohibition. Following an analysis of the human rights violations taking place in the detention centres, the International Criminal Court's Prosecutor has stated that the conditions of detention constituted cruel, inhuman or degrading treatment, and the gravity of the alleged conduct has been such that it was in violation of fundamental rules of international law.⁸

Violation of the principle of non-refoulement

The principle of non-refoulement, engraved in Article 33 (1) of the Refugee Convention, is the most fundamental principle of international refugee law. Under this principle, 'No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' The Refugee Convention also stipulates that a person must find him or herself in the country they want to apply for asylum to, and while there is no absolute obligation for a state to grant asylum, any signatory state is obliged to provide access to apply for asylum for anyone who wishes to do so.

Human Rights Settlements

In the 2015 case of *Kamasae v. Commonwealth of Australia & Ors.*, an Iranian detainee, Majid Karami Kamasae, filed a class action lawsuit on the basis of false imprisonment and negligence. The case was settled among the parties for a payment of AUD \$70 million, the largest human rights settlement in Australian legal history.

There are a number of different ways in which the Australian model has given rise to a breach of the obligation of non-refoulement, such as indirect refoulement, which takes place when there is a risk that the destination state – in this case PNG and Nauru – will return the asylum seeker to another state where there is a possibility that the asylum seeker will face persecution. Most significantly, this violation has taken place through the transfer of asylum seekers to third countries where they have been exposed to a plethora of human rights violations.

Aside from the Refugee Convention, there are a number of key human rights instruments in which the principle of non-refoulement is crystallized. Article 3 (1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) encapsulates the prohibition on torture and imposes a direct prohibition on refoulement as it states, 'No State Party shall, expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

Moreover, the UN Committee Against Torture has reaffirmed this prohibition by stating that a State Party is prohibited from transferring a refugee to 'a country where the extradited or expelled person might be exposed to cruel, inhuman or degrading treatment'.⁹

Failure to incorporate non-refoulement obligations into domestic Australian law

Under Australian law, a treaty cannot operate as a direct source of rights and obligations unless it is incorporated into municipal law by statute. The Refugee Convention has been partially incorporated into domestic law through the Migration Act. Consequently, the Australian government is bound by the obligation of non-refoulement, within the scope prescribed by the Convention.

Despite the Refugee Convention being the primary international instrument concerning the protection of refugees, the obligation of non-refoulement is also enshrined in a number of different international human rights instruments. The CAT is among the most notable, referring to non-refoulement explicitly and with no preclusions. In the same vein, Article 7 of the ICCPR further expands on this principle by prohibiting removal to a country where one could be subjected to torture or to cruel, inhuman or degrading treatment. The Australian government has failed

The Financial Cost of the Pacific Solution

A 2019 Asylum Seeker Resource Centre report revealed that between 2016 and 2020, the off-shore scheme had cost around AUD \$9 billion (approx. EUR 5.7 billion), meaning around AUD \$573,000 (EUR 364,241) per asylum seeker each year. This number is astronomical compared to the average annual cost of allowing an asylum seeker to live in a community in Australia with a temporary visa, which according to the 2017–2018 estimates of the Australian Senate would have been around AUD \$10,000 (EUR 6,357).

to incorporate non-refoulement obligations under these legislations to its domestic legislation in a manner that protects asylum seekers against refoulement.

EU Safeguards against Third Country Processing

While implementing refugee protection policies, EU countries are obliged to comply with EU law, as well as international human rights law. The EU has a variety of human rights protections in effect that make a mandatory third country processing regime unlawful.

Access to asylum

One legally binding supranational instrument that serves as a significant benchmark on refugee status determination and non-refoulement is the EU Charter of Fundamental Rights. The right to asylum is expressly established under Article 18 of the Charter. The Article foresees that the right to asylum will be granted in accordance with the rules of the Refugee Convention and the 1967 Protocol Relating to the Status of Refugees. This right also encapsulates the right to have access to effective asylum procedures, including the right to appeal and of access to review mechanisms against expulsion. An all-encompassing mandatory detention scheme which would result in removal to outside EU borders, without any avenue of appeal before EU grievance mechanisms, would be in direct violation of this Article. Article 19 of the Charter further expands upon this protection by prohibiting collective expulsion, which would be an integral part of a third country processing arrangement.

Following the ICC Prosecutor's decision to not open a preliminary examination of the allegations made against the Australian government,

it appears unlikely that Australia will be held accountable before an international judicial mechanism. Unlike Australia, the EU has an oversight mechanism in the form of the European Court of Human Rights (ECHR), delivering binding judgements on violations of the ECHR. All member states of the EU are parties to the ECHR, placing them under the jurisdiction of the Court. Article 6 of the Treaty on EU, which names the ECHR as part of the principles of the Union's law, prescribes that all member states will be bound to comply with the ECHR through accession.

In the case of *Hirsi Jamaa and Others v. Italy*, the applicants, who were a group of asylum seekers and refugees, were intercepted at sea by the Italian coastguard and given no opportunity to apply for asylum and consequently returned to Libya under the Italy-Libya 2009 MOU. The Court decided that this interception by the Italian coastguard was in violation of Article 4 of Protocol No. 4, which prohibits collective expulsion, and in violation of Article 13, which guarantees effective domestic remedy. The Court's case-law has precedential value and has been very consistent on the issues of access to asylum and complementary protections against non-refoulement. As seen in the judgements of *Kebe and Others v. Ukraine* and *M.A. and Others v. Lithuania*, the Court has emphasized the obligation of member states to allow applicants to remain within their territory as their asylum claims are being duly processed by competent domestic authorities.

Refoulement through human rights violations

Article 19 of the Charter proscribes removal to any country where there is a serious risk that the person 'would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. The article encompasses all persons, irrespective of the recognition of their refugee status. Further, Article 78 of the Treaty on the Functioning of the EU reiterates that any

common asylum policy must be in compliance with the principle of non-refoulement, The Refugee Convention and its 1967 Protocol.

The jurisprudence of the Court continues to play a vital role in expanding the protection against refoulement through complementary forms of protection. Numerous decisions of the Court have referred to Article 3 of the ECHR, which stipulates that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment' as an effective instrument against refoulement.

In a June 2018 note on the feasibility of disembarkation options, the European Commission clearly stated that sending an asylum seeker to a third country without processing their asylum claim would constitute refoulement and is not permitted under EU and international law.

EU leaders' inclination towards the Australian model has not come out of the blue. The EU already has a number of non-arrival regimes in place, such as the EU-Turkey Statement and the funding of the Libyan coastguard under the heading of 'capacity building', through the European naval operation Irini. This operation has specifically moved away from conducting Search and Rescue operations – as the predecessor of this operation was accused of serving as a 'pull factor' for migrants to Europe, and is primarily aimed at overseeing the UN arms embargo on Libya. Despite the ruling in the 2012 case of *Hirsi Jamaa et al.*, practices de facto amounting to push-backs have not entirely ceased, although they are carried out in [more covert ways](#)¹⁰ (e.g. by removing rescue vessels in the Mediterranean and delegating this responsibility to Libyan authorities). These controversial schemes create a duality for the EU in its desire to be a global champion of human rights. This duality is one of the primary reasons why these policies emerge enwrapped in a humanitarian narrative, despite their failure to stem migration

flows and save lives at sea. Irrespective of the narrative used to legitimize these models aimed at deterrence, it is clear that any model of third country processing would be in breach of international law and constrained by fundamental EU legislation and oversight mechanisms. ■

Notes

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3. Marks, Kathy (2012) Julia Gillard Revives Plans to Deport Australia's Boat Refugees. *The Independent*, 14 August.
4. UNDP (2005) *Programming for Justice: Access for All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*. United Nations Development Programme.
5. See BBC (2020) Behrouz Boochani: Refugee author granted asylum in New Zealand. *BBC News*, 24 July.
6. Von Doussa, John (2007) Human Rights and Off-shore Processing. *UTS Law Review* 3: 41–56.
7. UNHCR (2013) Monitoring Visit to the Republic of Nauru 7 to 9 October 2013. UN Refugee Agency; UN Refugee Agency (2013) Monitoring Visit to Manus Island 23 to 25 October 2013. UN Refugee Agency.
8. Mochockoko, Phakiso (2020) Response from the ICC Office of the Prosecutor.
9. Committee Against Torture (2017) General Comment No.1 on the Implementation of Article 3 of the Convention in the Context of Article 22.
10. See InfoMigrants (2021) Italy-Libya accord, NGOs call for immediate revocation. 3 February.

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THE PROJECT

HumBORDER (2017–2022) is a multidisciplinary project with the primary goal of understanding how new types of humanitarian spaces are created and carved out outside, on and inside the geographical borders destined to govern mobility. It employs a global scope to understand the role of borders in humanitarianism, and uses the European Union and the 'refugee crisis' as a specific case study.

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