

Externalisation of EU asylum is gaining increased traction, which threatens to weaken and offshore EU protection obligations. This document summarises the current "state of play" in relation to the externalisation of EU asylum and migration responsibilities. It moreover outlines RRE's key positions and recommendations, which aim to ensure Europe's ability to meet its obligations under international law.

THIRD-COUNTRY COOPERATION

BACKGROUND AND CURRENT STATE OF PLAY

Cooperation with third countries on migration and asylum – with the ultimate goal of reducing the number migrants and refugees in Europe – is and will remain a priority of the European Union and its member states in 2020 as expressed in a recent report from the Presidency of the Council of the EU¹.

The **European Border and Coast Guard Agency**, for which a revised regulation was adopted in November 2019², is being strengthened (staff and equipment) and given a broader mandate³ which notably allows to deploy Frontex border management teams to third countries and conduct operations in the territory of third countries (Articles 73 to 75). The deployment of liaison officers to third countries is also foreseen, with priority given to countries of origin and transit (Article 77). Reference to controlled centres has been deleted compared to the draft proposal of 2018.

Cooperation with Libya is particularly high on the EU agenda. Within EU-Libya cooperation activities, the EU Border Assistance Mission in Libya (EUBAM) and EUNAVFOR Med-Operation Sophia have both been prolonged, until 30 June 2020 and 31 March 2020 respectively⁴. EUBAM contributes to the "development of a broader border management framework in Libya, including a maritime security strategy, through capacity delivery and implementing projects", while Operation Sophia notably trains the Libyan coastguard and navy in border management and search and rescue. In December 2019, the litigation battle initiated in April by French and Italian NGOs (MSF, Gisti, LDH, Agsi, Amnesty France, La Cimade, Migreurop) was successful and France abandoned delivery of six ships to Libyan coast guards⁵.

In March 2019, the EU took stock⁶ of its **third year of cooperation with Turkey** under the "EU-Turkey Statement", naming it a "game changer" for having contributed to a 97% drop in daily arrivals from 6,350 in October 2015 to 83 in March 2019. Meanwhile, the situation in Greek hotspots has continued to deteriorate⁷. The Fundamental Rights Agency highlighted that 2016 challenges persist⁸.

During summer 2018, Spain became a key entry point into Europe for displaced people⁹, mainly coming through Morocco. This increased a sense of urgency in the EU to support both Spain and Morocco to "address irregular migration". EU migration-related **assistance to Morocco** was increased through the EU Trust Fund¹⁰ and Spain also received EU emergency assistance (over 52 million EUR) channelled into projects to manage arrivals in southern Spain (humanitarian and emergency measures, registration and reception centres, support to the Guardia Civil)¹¹. In parallel, Spain and Morocco reached a bilateral agreement in February 2019 to "contain" irregular migration, therefore allowing Spain's sea rescue services to take some of the rescued individuals back to Moroccan ports. As a result, the number of arrivals has decreased, but with an increase in deaths¹².

¹ Council of the EU, Presidency report: way forward for EU migration and asylum policy, Nov 2019 (p.2) <http://bit.ly/2t9ZND7>

² Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, 23 October 2019 <http://bit.ly/2U9Yj74>

³ Council of the EU, Press release on EBCG mandate, April 2019 <http://bit.ly/3aT6YR9>

⁴ EEAS EU-Libya relations factsheet, September 2019 <http://bit.ly/37A5usV>

⁵ Migreurop, Press release, 2 December 2019 (FR) <http://bit.ly/36z4nZa>

⁶ EU-Turkey statement, Three years on, March 2019 <http://bit.ly/318uyEN>

⁷ InfoMigrants, Situation in Greece for migrants "insupportable" <http://bit.ly/37Gdokn>

⁸ Update of the 2016 FRA Opinion on fundamental rights in the hotspots in Greece and Italy, March 2019 <http://bit.ly/2SOjjuj>

⁹ IOM data, January 2020 <http://bit.ly/2tj16kA>

¹⁰ EU Commission, Western Mediterranean route: EU reinforces support to Morocco, December 2018 <http://bit.ly/38Puljo>

¹¹ EU Commission, Managing migration: EU financial support to Spain, January 2020 <http://bit.ly/38TFAjX>

¹² Statewatch Analysis, Spain-Morocco "Migration control, not rescue": squeezing search and rescue in the Mediterranean, September 2019 <http://bit.ly/2Uch4ln>

REFUGEE RIGHTS EUROPE'S KEY POSITIONS

Third country cooperation agreements must only be permitted with states operating a functioning asylum system adopted through national legislation, that are Party to the 1951 Geneva Convention and the 1967 New York Protocol, and complying with international human rights law in practice.

Prior to concluding Agreements, Member States must carry out Human Rights Impact Assessments – assessed, in addition to the above, against Art. 44 & 45 of the Proposed Asylum Procedures Regulation - vetted by an independent human rights body such as the Council of Europe. Member States must ensure regular independent monitoring of the Agreements' implementation (specifically for human rights compliance), including the EU-Turkey Agreement and EU cooperation with Libya. Cooperation must be suspended in cases of serious or repeated human rights violations or other gross misconduct.

The newly strengthened European Border and Coast Guard agency must act with full respect for fundamental rights, in particular the right to asylum.

The extended mandate of the European Border and Coast Guard agency¹³ to carry out operations on the territory of third countries contributes to the further externalisation of the EU's migration management policies. Respect for fundamental rights, in particular respect of the Agency's obligations under Article 80§2, must be carefully assessed, including by external monitoring mechanisms, and publicly reported on. Particular attention from external monitoring bodies must be paid to the way personal data are transferred to third countries insofar as it must not prejudice the right of applicants to international protection.

Funding to "external migration" as part of the Multiannual Financial Framework (MFF) must not contribute to the externalisation of responsibility for protection.

The last EU Presidency proposal on the MFF^{14,15} mentions that some funding would be allocated to "address external migration" under Heading 4 "Migration and Border Management" (broad reference) and Heading 5 "Security and Defence" and 6 "Neighbourhood and the World" (under thematic facilities). Clear objectives and indicators must be defined to frame the way funding would be allocated to "address external migration". Such funding must contribute to realising the rights of asylum seekers and refugees in third countries. Support to third countries must not be made conditional to their cooperation with the EU to meet its migration and asylum objectives in terms of decreasing arrivals to the EU. Allocation of funding to these facilities must be monitored and their use must be carefully assessed to ensure that they contribute to the implementation of programmes and activities that are in line with European and international human rights law.

REFORM OF THE COMMON EUROPEAN ASYLUM SYSTEM AND THE RISK OF EXTERNALISATION

BACKGROUND AND CURRENT STATE OF PLAY

The legislative proposals introduced by the Commission in 2016 as part of the proposed reform of the CEAS are **increasing the risk of externalising asylum proceedings to third countries**. Indeed, applying the concepts of safe third country and first country of asylum within the framework of an admissibility procedure would become mandatory and systematic both as part of the proposed Procedure Regulation¹⁶ and of the Dublin Regulation¹⁷ (preceding the assessment of Dublin criteria possibly leading to relocation within the EU).

While there has been no new development in 2019 (at least no publicly advertised ones), work on the reform of the CEAS continues according to the Council¹⁸. The Commission is also expected to shortly present a new **Pact on Asylum and Migration**, "which sets out to reinforce the comprehensive approach to migration by looking at external borders, systems for asylum and return, the Schengen area of free movement and working with [our] partners outside the EU"¹⁹.

REFUGEE RIGHTS EUROPE'S KEY POSITIONS

EU outsourcing responsibility of refugee protection to third countries through the reform of the CEAS must be prevented.

¹³ Regulation (EU) 2019/1896 <http://bit.ly/37POTRS>

¹⁴ Council of the EU, MFF 2021-2027: Negotiating box with figures, December 2019 <http://bit.ly/2u8EfHh>

¹⁵ Negotiations around the definition of the Multiannual Financial Framework are aimed to be wrapped up with an agreement in the first half of 2020.

¹⁶ European Commission, Procedure regulation proposal repealing the directive, July 2016 (p.16) <http://bit.ly/2S1sgmX>

¹⁷ European Commission, recast Dublin regulation proposal, May 2016 (p.15 second §) <http://bit.ly/2uJrdQI>

¹⁸ Ibidem Council of the EU Presidency report, Nov 2019 (p.6)

¹⁹ Ibidem Council of the EU Presidency report, Nov 2019 (p.6)

As part of the ongoing reform of the CEAS and in view of the upcoming presentation by the Commission of a new Pact on Asylum and Migration, the introduction of a systematic and mandatory 'admissibility procedure' based on the concepts of 'safe third country' and 'country of first asylum' must be removed. This admissibility procedure has been introduced in both the revised Dublin IV Regulation and the proposed Procedures Regulation. Such procedure must under no circumstances obstruct effective access to asylum procedures, dignified reception conditions and comprehensive protection measures, in line with the 1951 Geneva Convention and its additional Protocol. The concept of 'safe third country' and 'country of first asylum' must not be used by the EU and its member states as migration management tools at the expense of the fundamental right to asylum.

REGIONAL DISEMBARKATION ARRANGEMENTS AND CONTROLLED CENTRES

BACKGROUND AND CURRENT STATE OF PLAY

In its conclusions of June 2018, the European Council invited the Council and the Commission to explore the concepts of "regional disembarkation arrangements"²⁰ and "controlled centres"²¹. Since the release in 2018 by the Commission of two non-papers and the submission of a joint IOM-UNHCR proposal for a "regional cooperative arrangement ensuring predictable disembarkation and subsequent processing of persons rescued at sea"²², **no further element have been produced**. However, a statement found on the Council website²³ indicates that **EU member states "continue to work in the appropriate fora** on a solution on disembarkation as part of the follow-up to the June 2018 European Council conclusions".

REFUGEE RIGHTS EUROPE'S KEY POSITIONS

Disembarkation platforms or arrangements should be prohibited in, or with, states lacking a functioning asylum system adopted in national legislation, that are not Party to the 1951 Geneva Convention and the 1967 New York Protocol, and/or not complying with international human rights law in practice.

Negotiations on Disembarkation Platforms or Arrangements beyond EU territory should be halted until EU institutions are able to deliver guarantees on the operationalisation of such sites' human rights compliance in practice. Specifically, the provision of humane and dignified reception conditions not amounting to detention; swift access to the asylum procedure including free legal aid and access to effective remedies, as well as prohibition of external asylum processing which would contravene Art. 3 ECHR, Art. 18 EU Charter, and the 1951 Geneva Convention.

Negotiation on the Establishment Of 'Controlled Centres' Should be Halted.

The concept, which merely reinforces the existing, failed Hotspot approach, should be abandoned and replaced by open reception and asylum processing centres. Such centres must under no circumstances hinder access to the EU asylum process (which would contravene Art. 14 UDHR), through the use of arbitrary 'selection' procedures, the application of truncated asylum procedures with diminished due process guarantees, or to facilitate unlawful returns of protection seekers to locations beyond EU territory. Open centres must guarantee access to the full asylum procedure as provided under EU and international law, including free legal aid and the right to an effective remedy, while upholding the principle of non-refoulement without exception. Moreover, such centres must provide humane and dignified conditions, adequate and timely vulnerability assessments, effective security and SGBV safeguarding, as well as access to education for children within 3 months.

The "appropriate fora" to work on a solution on disembarkation cannot be behind closed doors between EU ministries for Home Affairs; a multi-stakeholder approach must be promoted.

Each time a so-called 'innovative' problem-solving concept is put forward by the Commission or the Council in the area of migration and asylum it results from political bargains behind closed doors and paves the way for a lowering of protection standards. The EU and its member states must renounce this lack of transparency to restore trust and instead harness meaningful debates and considerate consultations with third country partners, civil society organisations, academic researchers and experts, UN agencies and private actors. A rights-based and sustainable solution on disembarkation can be found if there is a change of paradigm from the EU and its member states. They must open the doors, encourage equal participation of all concerned actors and promote a jointly designed solution.

²⁰ EU Commission, Non-paper on regional disembarkation arrangements, July 2018 <http://bit.ly/2uNCM9e>

²¹ EU Commission, Non-paper on controlled centres, July 2018 <http://bit.ly/38OB0n3>

²² IOM-UNHCR, Proposal for regional cooperative arrangement ensuring predictable disembarkation, June 2018 <http://bit.ly/38OVzjq>

²³ See 26 September item of "Timeline - response to migratory pressures" <http://bit.ly/31ayjpp>

BACKGROUND AND CURRENT STATE OF PLAY

As of December 2019, there were **four EU Operations in the Mediterranean**²⁴, including one operation by Frontex in support to Spain which does not have a search-and-rescue (SAR) component²⁵ (although it reports on lives saved²⁶). The deployment of naval assets of Operation Sophia remained suspended in 2019.

In parallel, **several facts of criminalisation of NGOs** and individuals conducting SAR operations in the Mediterranean, as well as EU political interferences in humanitarian activities, were widely reported in 2019²⁷. A situation showcased by the numerous incidents which targeted the Sea Watch 3 throughout the year²⁸, including bans to disembark rescued individuals in EU ports, seizure of boats, legal proceedings against NGOs and humanitarians undertaking search-and-rescue, etc.

As a reaction to situations where survivors and crews have been spending up to 19 days at sea waiting for an authorisation to disembark, France, Germany, Italy and Malta have issued a **joint statement proposing a temporary voluntary disembarkation and relocation mechanism**²⁹. While the proposed mechanism seems quite similar to what ECRE had called for in January 2019³⁰, return is stressed as a priority as well as strengthening cooperation with Libyan coast guards and third countries³¹.

REFUGEE RIGHTS EUROPE'S KEY POSITIONS

A well-functioning operational plan for search-and-rescue missions must be put in place, with disembarkation in the EU.

The European Union and Member States develop a well-functioning and sufficiently resourced operational plan for search and rescue missions in the Mediterranean with disembarkation in the EU. The EU must hold to account the coordinating authorities of rescue missions, ensuring that they consistently uphold the human rights of rescued individuals, and that no individuals are under any circumstances put in situations where they would face torture, inhuman or degrading treatment, or arbitrary deprivation of liberty.

The criminalisation of search-and-rescue activities and humanitarian assistance at sea must be halted.

Organisations and individuals carrying out search-and-rescue activities in the Mediterranean, and delivering humanitarian assistance at sea, must not be criminalised by EU member states. The latter must never put displaced people's lives and security at risk by refusing them to disembark or by sending them back to States where they could be subjected to death, torture, arbitrary detention, rape, exploitation or any other form of cruel and inhumane treatment.

²⁴ See Council infographic, data as of 15 December 2019 <http://bit.ly/314ENKB>

²⁵ Frontex, Operation Minerva, Indalo (Spain) <http://bit.ly/3aU4jGR>

²⁶ EU Commission, Western Mediterranean route: EU reinforces support to Morocco, December 2018 <http://bit.ly/38Puljo>

²⁷ Human rights at sea, Briefing note, February 2019 <http://bit.ly/3aYiNWm>

²⁸ See Watch news 2019 <http://bit.ly/2U7tekj>

²⁹ Temporary voluntary disembarkation and relocation mechanism, September 2019 <http://bit.ly/2GDdCgy>

³⁰ ECRE, A contingency plan for disembarkation and relocation, January 2019 <http://bit.ly/2U9vtDO>

³¹ Statewatch Analysis, September 2019 <http://bit.ly/2UjSXWX>