External Processing

CONDITIONS APPLYING TO THE PROCESSING OF ASYLUM APPLICATIONS OUTSIDE THE EUROPEAN UNION

Advisory Committee on
Migration Affairs

ADVISORY REPORT

De ACVZ

The Advisory Committee on Migration Affairs (ACVZ) consists of ten experts on migration affairs. The ACVZ is an independent consultative council that was established by law. The committee offers recommendations to the government and parliament on migration issues. It examines migration policies and legislation and suggests possible improvements. The ACVZ publishes practical advisory reports designed to solve current and future problems.

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Summary

External processing

Conditions applying to the processing of asylum applications outside the European Union

This advisory report describes the background to the concept of external processing and explores the legal and practical aspects of such processing and the conditions subject to which it might be implemented.

What is external processing?
The report first explains what the term 'external processing' is taken to mean in this context. The aims that have led to proposals to adopt an external processing regime are discussed. The report further focuses on elements of those proposals that together give shape to the concept of external processing.

Definition
External processing is used to denote the processing of an application for international protection by or under the authority of the EU or an EU member state at a location *outside* the EU.

Aims
Two aims would be served by external processing. One, transferring asylum seekers to an external processing centre outside the EU could support a restrictive migration policy. Two, it could improve international protection for refugees by offering asylum procedures in or near the region of origin.

Initiatives
Around the turn of the century a start was made on harmonising asylum and migration policy within the EU. At the same time, the focus in a number of member states came to rest on a more restrictive admissions policy. First the United Kingdom, and then Germany and Italy proposed the introduction of external processing. These proposals received no support. In 2003, a study of external processing was commissioned by the European Commission. The researchers came to the conclusion that although this form of processing was dogged by a great many legal and practical problems, offering an asylum procedure outside the EU to asylum seekers who had never entered the EU was a possible option. However, these and other initiatives have never led to practical steps within the EU.

Legal framework

The scope within current international and European law for an external processing system are explored in this section of the report. First, the regulation of the responsibility of the state vis-à-vis the asylum seeker is discussed, after which a number of themes relevant to external processing are considered. These are: non-refoulement, standards applying to the granting of asylum status and the asylum procedure, and the competence under EU law to establish rules concerning external processing. Next, specific legal conditions with which external processing must comply are distilled from these themes. In addition,

problems which could get in the way of external processing are identified and possible solutions explored.

Responsibility
A key aspect of external processing is the question of which country (countries) is (are) responsible for a person seeking international protection. In turn, state responsibility, where several countries are involved, and state responsibility when international organisations are involved are discussed.

Relevant obligations and conditions under international and European law
Depending on the exact form it takes, external processing may be subject to obligations under international and European law. Three such obligations are discussed in detail in this report: non-refoulement, standards applying to the granting of asylum status and the requirements with which the asylum procedure must comply. Within the framework of state responsibility, these obligations constitute the three basic conditions which the report puts forward for external processing.

Legal obstacles
The report identifies two legal obstacles in existing law to external processing. The first problem is that on the one hand article 7 of the Asylum Procedures Directive gives the asylum seeker the right to await the decision at first instance on his/her application in the state which is handling that application (which state that is, is determined by the Dublin Regulation). On the other hand, article 27, paragraph 2 (a) of the same Directive determines that an asylum seeker may only be handed over to a safe third country if he has a meaningful connection with that country. These provisions do not therefore allow an asylum seeker to be transferred to a country with which he/she has no meaningful connection. A second legal obstacle is the question of where the competence lies within the EU to develop external processing: the EU or the member states. There is no straightforward answer to this question.

New legislation
If and to the extent that current legislation is an obstacle to introducing external processing, the question arises of whether it is possible to adopt new legislation or amend existing legislation. Desirable amendments would include a legal basis in EU law for external processing and amendment of national legislation. Agreements will also have to be concluded with third countries where external processing will take place.

The conclusion is that there are numerous legal complications associated with external processing. Account will have to be taken of the legal conditions and obstacles outlined in this report when developing the practical application of external processing.

Practical aspects and conditions

The major practical conditions for external processing are discussed on the basis of six themes. These are: the *location* of an external processing centre, *access* to external processing, the *reception* of asylum seekers in an external processing centre, the *procedural conditions* governing asylum procedures, the *distribution* of asylum seekers entitled to international protection, and the *way* in which failed asylum seekers are dealt with.

It becomes clear in the discussion of these major practical conditions that considerable effort and investment will be required if they are to be met.

Conclusions and recommendations

The ACVZ therefore recommends that if it is decided to proceed with external processing, the concept should be developed at EU level.

Recommendation 1:
If the decision is taken to develop external processing, it should be done at EU level.

Recommendation 2:
Until there is clarity concerning the legal basis for EU action in the area of external processing, focus on achieving the conditions for external processing, including harmonisation of European asylum policy and a quota arrangement for the distribution of persons in need of international protection.

CHAPTER 1

Introduction

1.1 Request for advice

On 29 September 2009, the State Secretary for Justice asked the Advisory Committee on Migration Affairs (ACVZ) to issue an advisory report on external processing and burden-sharing.

The State Secretary's request for advice reads as follows:

I hereby request that you issue an advisory report on external processing and burden-sharing. This topic is part of your 2009 work programme.

In the context of working towards an asylum policy that is uniform in terms of content, thought must be given at EU level to the development of scope for reception, determination of status and protection of asylum seekers in the region (i.e. in countries close to the country of origin and/or transit countries).

In the interests of a balanced asylum and refugee policy focusing on reception in the region, it is important to ascertain the extent to which external processing and the creation of transit centres in third countries would contribute to burden-sharing.

I would ask you in drafting the report to bear in mind the desire for clarity regarding the conditions with which external processing should comply. I would therefore like to receive an overview of:
- the various proposals made over the last ten years;
- the relevant literature;
- the way in which the European Commission has responded or referred to the above;
- the legal aspects of external processing;
- the impact it would have on the Dublin Regulation and/or the criteria for the distribution of refugees among EU member states;
- possible inconsistencies/pitfalls in the above.

I should also like to know what value should be attached to bilateral agreements concerning the processing of asylum applications in neighbouring countries such as Libya.

1.2 Reasons for compiling report; methods

External processing, in other words, processing asylum applications extraterritorially, does not as yet exist in practice.[1] It has, however, regularly been put forward as a possibility by EU member states.

1 In this advisory report the term 'extraterritorial' refers to a location outside the borders of the EU or of an EU member state. The EU has not as yet introduced such a system. There are however precedents outside the EU, such as external processing by the US at Guantanamo Bay and by Australia on Nauru and Christmas Island. The present report does not concern itself further with these examples; the focus lies on external processing by the EU or its member states.

Asylum and migration issues are the focus of great political and public concern. As has been pointed out in the specialist literature, there is ever-growing interest in an extraterritorial approach to these issues.[2] In the Stockholm Programme, the intention to deliver a common European asylum policy and an external dimension to the European Area of Freedom, Security and Justice was reiterated. The recently published Action Plan of the European Commission contains specific points for action that are intended to flesh out these intentions.[3] Within this framework, an exploration of the conditions required to arrive at a form of external processing is appropriate.

Research methods and their limitations

To obtain an insight into the conditions that external processing must comply with, a number of research methods were employed. First, a literature study was carried out, and other written sources were consulted.

The Committee also spoke to a number of experts in the field of refugee law, UNHCR and European law. These were René de Bruin ((UNHCR), Maarten den Heijer (Leiden University), Tineke Strik (Centre for Migration Law, Nijmegen University), Myrthe Wijnkoop (Dutch Refugee Council), and Professor Marjolein Zieck (University of Amsterdam).

Given the wide range of this subject, the committee chose to give a broad outline of the main issues involved. In view of its international scope, the complete text of the report is available in English.

This advisory report was prepared by a sub-committee consisting of Adriana van Dooijeweert, Dr. Hans Sondaal, Professor Hemme Battjes, Dr. Susana Menéndez, Professor Ashley Terlouw and Dr. Loes van Willigen. The project team consisted of Wolf Mannens, Geor Hintzen, Mark Klaassen, and Gerdie van Aalst-van Adrichem.

1.3 Structure of this report

The ACVZ was asked to ascertain the conditions with which external processing, that is, the extraterritorial assessment of applications for international protection, should comply. Since this system has not yet been introduced within the EU, this report proposes a model for such processing. On the basis of the model, the conditions necessary to enable extraterritorial processing of applications for international protection are discussed in turn.[4] Setting out the most important elements of external processing provides insight into the questions of whether and how external processing would be possible from a legal and practical point of view and what obstacles might impede its implementation.

The advisory report consists of three parts. Chapter 2 explains what is meant by external processing and what aim it serves. Chapter 3 sets out the legal framework for external processing. Chapter 4 discusses the practical conditions, in terms of asylum procedure:

2 See among others B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges*, Leiden and Boston, 2010, p. 3.

3 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, *Delivering an area of freedom, security and justice for Europe's citizens,* Action Plan Implementing the Stockholm Programme, COM(2010) 171.

4 The term 'international protection' is employed in this report as a collective term covering refugee and subsidiary protection status as defined in article 2 (a) of Directive 2004/83/EC, OJEU 2004, L304/14.

admission, location, reception, procedure and distribution or repatriation. Finally, Chapter 5 presents the Committee's conclusions and recommendations.

CHAPTER 2

What is external processing?

2.1 Introduction

This Chapter describes what is understood by the term 'external processing' in this report. The aims underlying the proposals to adopt a system of external processing are discussed. From this discussion, a number of elements which together shape the concept of external processing are distilled. These elements then lay the basis for further detailing of the legal framework in Chapter 3.

2.2 Definition of terms and related concepts

There is no single definition of external processing. The term is frequently used to indicate the processing of the merits of an application for international protection by and/or subject to the responsibility of the EU or one of its member states which takes place at a location outside the borders of that state or of the EU. Since no member state is actually handling applications in this way, it is not possible to describe how it works in practice. In the literature, terms such as 'externalised processing', 'extraterritorial processing'[5] or 'transit processing' are also in use.[6] The most common terms in French are 'externalisation d'asiel' or 'l'externalisation des demandes d'asile'. In other languages it remains untranslated. In addition, other terms of comparable meaning are in use.[7]

All these terms essentially refer to the same thing: the possibility of offering an asylum procedure outside the borders of the European Union. For ease of reading, this advisory report uses the term 'external processing' and the definition 'extraterritorial assessment of applications for international protection (or: asylum applications)'.

External processing is based on the assumption that there is a safe area outside the territory of the EU where an EU member state or the EU itself can process applications for international protection (or have them processed) and assess them. [8] For this purpose, centres for external processing or transit centres can be set up where applications can be disposed of and a legal remedy against denial of an application is available. Asylum seekers whose applications are successful can then be transferred to an EU member state or a safe third country for their protection. Unsuccessful asylum seekers can be sent back to the country of origin or taken in elsewhere.

5 K. Afeef, *The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific*, RSC Working Paper no. 36, Oxford, 2006, p.7 ff.

6 European Union Committee of the House of Lords, *Handling EU Asylum Claims: New Approaches Examined*, 2004.

7 Karin de Vries, for example, speaks of 'protection in regions of origin' in her article 'An Assessment of "Protection in Regions of Origin" in relation to European Asylum Law', *European Journal of Migration and Law*, 2007, pp. 83-103. See Annexe 2, 'Related terms', for other terms.

8 See for example M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' and E. Guild, 'The Europeanisation of Europe's Asylum Policy', both in *International Journal of Refugee Law*, 2006, pp. 601-629 and 630-651 respectively.

External processing gives rise to a number of complex issues. For example, it is important to establish which country or countries is/are responsible for the person applying for international protection. Most of the proposals for external processing give no definite answer to this question.[9]

Because external processing can take place either in the direct vicinity of the country of origin or in a transit country,[10] the question of where applicants for international protection can go will always be present. Which in turn leads to the question of how such persons can be distributed among the different countries. Burden-sharing, or responsibility-sharing, as NGOs usually call it, is a possible answer to this question.[11] In general, burden-sharing consists of measures to distribute persons seeking international protection among the various countries. These measures may consist of funding or quotas. In a financial form of burden-sharing (money-sharing), some countries may offer financial support to enable others to offer reception facilities to asylum seekers, while people-sharing provides for a mechanism under which asylum seekers are distributed according to certain criteria among a number of countries where they will settle.

2.3 Background and aims

As a concept, external processing came into being during discussions on a global approach to asylum and migration policy. These took place at the end of the 1990s and in the first few years of the present century and were prompted by a sharp rise in migration to Europe.[12] This consisted largely of mixed migration flows (or simply 'mixed flows'). According to the International Organization for Migration (IOM), these mixed flows are ' complex population movements including refugees, asylum seekers, economic migrants and other migrants'.[13]

One dilemma that these flows give rise to is the question of how to separate people seeking international protection from other migrants. In practice this has led to a need to ascertain how tighter border controls can be combined with an effective and treaty-compliant asylum policy.[14] On the one hand, tighter border controls and better control of migration flows should limit the influx of migrants, but they also make it more difficult for asylum seekers to seek international protection within the EU. On the other hand, where there are large numbers of asylum seekers, a sound protection policy requires careful, individual assessments, whereby large numbers of foreign nationals must be admitted in order to enable assessments of applications for international protection to be made.

9 See section 2.4 below.

10 A country which migrants travel through on their way to their ultimate destination.

11 See the recently published study commissioned by the European Parliament: Thielemann c.s., *What system of burden-sharing between Member States for the reception of asylum seekers?*, Brussels, 2010 at http://www.europarl.europa.eu/activities/committees/studies/. The term 'burden-sharing' will be used in this report, although it mostly has negative connotations in the literature, since it is the term used in the request for advice and is the one used by UNHCR.

12 See J.J.P. de Jong, 'De migratiecrisis: oorzaken, prognose en aanzet tot een beleidsdiscussie' (The migration crisis: causes, prognosis and suggestions for a policy debate) *Internationale Spectator* 2001, pp. 138-143. See too the next section.

13 IOM, *Glossary on Migration*, Geneva, 2004, at http://www.iom.int/.

14 V. Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' *European Journal of Migration and Law*, 2008, pp. 315-363.

The asylum policy of most countries has gradually become more restrictive since the 1980s and 1990s. Many states, particularly Western states, adopted a policy of obstacles to admission with extraterritorial features.[15] In other words, border controls often begin outside the territory of the EU. For example, nationals of certain countries now need an entry visa, making it more difficult for irregular migrants to travel to an EU member state.[16] In addition, carriers have to check passengers' documents before they depart and face sanctions if they transport irregular migrants.[17] Furthermore, by way of prevention, EU member states offer training and other assistance to countries outside the EU to enable them to strengthen their border controls. This has led the EU to expect neighbouring countries to control their borders in order to prevent irregular migrants gaining access to the EU via their territory.[18] And still further, irregular migrants are refused admission to EU member states at sea and land borders, in which cases it is not always clear whether the irregular migrant is an asylum seeker or not.[19] As a consequence of this stricter immigration policy, the concern arose in several quarters that people needing international protection now had no access to it.[20] It was pointed out that since many migrants come from conflict areas, the fact was that they needed better access to protection.

At the same time, UNHCR and NGOs were emphasising the need to improve protection. Creating the possibility of applying for international protection in the region would assist the many asylum seekers who needed protection but who for a variety of reasons were unable to reach the EU. In addition, people who now have to make a long and often dangerous journey would be able to travel safely to the EU once their application had been accepted.

In theory, external processing would offer an opportunity to resolve at least part of the migration dilemma. Making it possible to apply for asylum outside the EU would have two benefits. On the one hand it would make it possible to support a restrictive admissions policy, and on the other, it would offer better access to protection by assessing applications closer to areas of conflict or in transit countries. Most of the initiatives and proposals of the last decade combine these two aims, sometimes with the emphasis on migration control and sometimes on protection. In this context it is worthy of note that proposals from the member states tend to focus on a more restrictive migration policy.

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15 J. Hathaway, 'The Emerging Politics of Non-Entrée', *Refugees* 1992, p. 40 and V. Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges*, Leiden and Boston, 2010, p. 39.

16 See Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (hereafter 'Visa Code'), *OJEU* 2009, L 243/1. and G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 2007, pp. 374–375.

17 E. Feller, 'Carrier Sanctions and International Law', *International Journal of Refugee Law* 1989, p. 48.

18 European Commission, *COM(2003)104: Communication from the Commission to the Council and the European Parliament, Wider Europe — Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours,* Brussels, 2003, p. 7.

19 The mandate of the European agency Frontex is to work towards enhancing the EU's external border security. Its series of HERA operations aimed to tackle directly the flow of boat refugees from countries such as Senegal. See, for example, http://www.frontex.europa.eu/newsroom/news_releases/art13.html.

20 See, for example, M. Martin, '"Fortress Europe" and Third World Immigration in the Post-Cold War Global Context'. *Third World Quarterly* 1999, pp. 821-837 and A. Ceyhan and A. Tsoukaia, 'The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies' *Alternatives* 2002, Special Issue, pp. 23, 31.

2.4 Overview of initiatives and proposals over the last decade

Both the Netherlands and Denmark have made proposals in the past to adopt forms of external processing.[21] As early as 1986, Denmark put forward a plan during a meeting of the UN General Assembly. And in 1993, at a meeting of the Council of the European Communities a representative of the Dutch Ministry of Justice urged that asylum seekers be sent back to reception centres in their region of origin so that their applications could be processed there. Neither of these proposals led to concrete decisions or measures.

Around the turn of the century, the EU member states began increasingly to work together in the field of asylum and migration. This was partly the result of the transfer of these two issues from the intergovernmental third pillar to the supranational first pillar of the EU under article 61 ff of the Treaty establishing the European Community (TEC), which prescribed a period of five years in which the Council would create a basis for common measures.[22] In 1998, a High Level Working Group (HLWG) was set up on the initiative of the Netherlands. The HLWG's mandate was to develop a common and comprehensive approach to migration and asylum policy.[23] One of its objectives was to enter into discussion with countries of origin and transit countries in order to achieve better control of migration flows.[24] In 1999, the European Council meeting in Tampere declared that 'The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit'.

Around the same time, UNHCR made attempts to adapt the refugee law regime to the changing nature of global migration while retaining the rights established under the Convention relating to the Status of Refugees (the 'Convention Plus' initiative). The initial aim of the initiative was to expand the obligations with regard to burden-sharing as laid down in the Refugee Convention.[25] In 2005 it became clear that the aim of establishing international agreements on burden-sharing had not succeeded.[26] However, the lack of a comprehensive solution was the reason given for the failure of Convention Plus.[27] In addition, UNHCR published a study of a triple-pronged approach to refugee protection in the EU, which discussed the possibility of assessing at EU level asylum applications with poor prospects for success.[28] The discussion on the two UNHCR proposals did not ultimately lead to concrete plans.

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21 See for the rest of this section, Afeef, 2006, p. 2 and L. Schuster, *The Realities of a New Asylum Paradigm*, Working Paper no. 20, Centre on Migration, Policy and Society, 2005, p. 6.

22 Craig and de Búrca, *EU Law. Text, Cases and Materials*, Oxford, 2008, p. 240 and pp. 255-259. Before the Treaty of Amsterdam was signed, asylum and migration came under the intergovernmental third pillar of the EU.

23 This proposal followed the rejection of a strongly criticised proposal from the Austrian presidency which contemplated amending or abolishing the Refugee Convention. See S. Sterkx, *The comprehensive approach off balance: externalisation of EU asylum and migration policy*, 2004, p. 12 at http://webhost.ua.ac.be/psw/pswpapers.

24 S. Lavenex and E. M. Uçarer (eds.), *Migration and the Externalities of European Integration*, Oxford, 2003, pp. 151-156 at http://www.migrationpolicy.org/files/vanselm_chap8.pdf. The countries mentioned were Afghanistan/Pakistan, Albania and the region around it, Morocco, Somalia and Sri Lanka; Sterkx, 2004, p. 12.

25 See UNHCR, *Convention Plus at a Glance*, 2005 at http://www.unhcr.org/refworld/docid/471dcaedd.html. At a later stage the focus turned to three 'strands', as a result of which the initiative became bogged down in detail.

26 A. Betts and J.F.Durieux, 'Convention Plus as a Norm-Setting Exercise', *Journal of Refugee Studies* 2007, pp. 509-535.

27 M. Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' *International Journal of Refugee Law* 2009. pp. 390 and 419.

28 UNHCR, *UNHCR's Three-Pronged Proposal*, 2003, available at http://www.unhcr.org/refworld/docid/3efc4b834.html.

In the meantime, a number of EU member states began to focus on a more restrictive admissions policy. In 2002, the UK government introduced an Act giving its officials extraterritorial powers to subject foreign nationals to a 'pre-clearance test' at foreign airports and seaports on the basis of UK law.

Moreover, in 2003, the UK government submitted a proposal to amend EU asylum policy.[29] This proposed that persons seeking asylum in EU member states could be automatically sent on to a transit and processing centre outside the EU, where their applications would then be assessed.[30] According to the UK government, such a transit and processing centre could be set up in a state like Croatia, which borders on the EU.[31] In addition, regional protection areas would be set up in areas plagued by conflict. This plan was never transformed into concrete policy, though it initially seemed to be able to count on the support of a number of member states.[32] During the 2003 European Council meeting in Thessaloniki the proposal received insufficient support. The precise reason for this is unclear, but a lack of political will among a majority of EU member states would seem to be the cause. A year after the European Council meeting in Thessaloniki, the House of Lords published a critical report questioning the feasibility and desirability of the proposal.[33] In this report, the House of Lords pointed in particular to the serious legal problems that implementing this form of external processing would give rise.[34]

In its conclusions, the Thessaloniki European Council asked the European Commission to explore how access to asylum procedures could be improved and how reception capacity in regions of origin could be expanded.[35] The term 'external processing' did not appear in the Conclusions.[36] The European Commission responded to this invitation with a Communication discussing entry to the EU for asylum seekers and a review of resettlement policy in the EU.[37] Among other things, the Communication stated that new entry procedures for asylum seekers from outside Europe would have to be set up alongside existing national asylum systems, and should not replace them.[38] After all, the introduction of such protected entry procedures (PEPs) under the common asylum policy would not affect existing international obligations taken on by the member states.[39] The

29 Home Office, *New International Approaches to Asylum Processing and Protection*, London, 2003.

30 According to Schuster there was nothing new in the proposal. All of its elements had already been raised in other contexts and the proposal clearly followed up on proposals made by UNHCR and other international organisations. Furthermore, much of the document was intended for domestic political debate. See Schuster, *The Realities of a New Asylum Paradigm*, Centre on Migration, Policy and Society, 2005, p. 1.

31 UK government, 2003, page 5 of the Annexe, point 2. Croatia is not named in the document, but turns up in another source as a possible location; see M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', *International Journal of Refugee Law* 2006, p. 616.

32 A. Durand, *Comment les projets dits 'd'externalisation de l'asile' ont-ils été inscrits à l'agenda européen?* Paris, 2005, available at http://www.univ-paris1.fr/IMG/pdf/DURAND.pdf .

33 House of Lords European Union Committee, 'Handling EU Asylum Claims: New Approaches Examined: Report with Evidence'. *11th Report of Session 2003-04*, London, 2004, Chapter 5.

34 House of Lords European Union Committee, 2004.

35 Council of the European Union, Presidency Conclusions of the Thessaloniki European Council on 19 and 20 June 2003, para. 26.

36 Presidency Conclusions of the *Thessaloniki European Council on 19 and 20 June 2003.*

37 European Commission, *COM(2004)410: Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: improving access to durable solutions.*

38 COM(2004)410.

39 See Annexe 2 (Related terms) for a discussion of the term 'protected entry procedures'.

European Commission had already emphasised existing international obligations and the need for a better system of burden-sharing within and outside the EU in an earlier Communication.[40]

In response to the request from the European Council, the European Commission commissioned a study of external processing in the form of regulated entry from a group of academics, including the Swiss professor Gregor Noll. The study resulted in a report describing various aspects of regulated entry. Noll and his colleagues came to the conclusion that access to asylum in the EU member states should be facilitated by some form of European asylum visa.[41] This arrangement should be put in place alongside the existing national asylum systems, so that a person who sought asylum in an EU member state would retain the right to a full asylum procedure. The ideas outlined in the report were never elaborated further by the Commission or the Council. A year after Noll's recommendations were published, the Netherlands abolished its authorisation for temporary stay (*machtiging tot voorlopig verblijf*, MVV) for asylum seekers.[42] The asylum MVV was in effect a form of regulated entry such as Noll and his colleagues had envisaged, though only limited use of it was made in practice. Since that date, it has not been possible under Dutch asylum policy to apply for asylum outside the country.[43] In general, access to asylum procedures for refugees outside the EU remained problematic because active measures were taken to restrict access to the EU.[44]

The UK proposal was followed up in 2004 by a similar proposal from Otto Schily, the German Minister of the Interior, and his Italian counterpart Giuseppe Pisanu. They proposed opening a number of external processing centres in North Africa. These centres would provisionally assess the asylum applications for international protection made by asylum seekers who had been intercepted while crossing the Mediterranean Sea on their way to the EU. A procedure taking place in a North African state, preceding the actual asylum procedure, would examine whether the person in question had a good chance of being granted some form of international protection. Those who did not seem eligible for such protection would be referred to the regular immigration procedures. The Scandinavian countries in particular reacted fiercely to the proposal.[45] Their criticism focused primarily on the proposal to transfer irregular immigrants who had been intercepted by an EU member state to a North African state for the preliminary procedure. They also questioned the legal basis for transferring asylum seekers to countries outside the EU. This proposal was generally similar to that made by the UK government but would apply only to asylum seekers who had been intercepted at an early stage of their flight to the EU. Only in 2005, after the proposal had been rejected without a formal examination, was the text published. This text, which remains silent on the subject of a number of inter-

40 European Commission, COM(2003)315: *Communication from the Commission to the Council and the European Parliament: towards more accessible, equitable and managed asylum systems.*

41 G. Noll, J. Fagerlund & F. Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside of the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, 2002.

42 Interim supplement to the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*)2003/33, C5/25. Asylum applications made at foreign diplomatic missions.

43 In theory what is known as 'diplomatic asylum' (i.e. the possibility of applying for asylum at a country's embassy) still exists, but there is no national legal framework catering for this; see the Aliens Act Implementation Guidelines 2000 (VC 2000), C2/2.14.

44 For an up-to-date description of the situation see T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Offshoring and Outsourcing of Migration Control* (dissertation), Aarhus, 2009.

45 M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', *International Journal of Refugee Law,* 2006, p. 619.

national obligations, states that the preliminary procedure could in no way be deemed a fully-fledged asylum procedure. It also states that any form of acknowledgement of status during the preliminary procedure would not entitle the asylum seeker to admission to an EU member state.[46]

In 2004, the Commission published its Communication on improving access to durable solutions,[47] on the basis of which the Commission and the Netherlands concluded partnerships with five states to create 'safe third countries'.[48] The Commission and UNHCR then emphasised that the aim was not to establish application centres, but to achieve capacity-building and to help set up and strengthen local asylum procedures. According to Schuster,[49] the confusion arose because the same countries were designated as transit countries. These projects were funded by the EU and carried out by NGOs and UNHCR.[50]

Perhaps partly as a result of the fruitless attempts to introduce external processing at European level, Italy attempted to limit the burden of international protection and irregular migration to a minimum at bilateral level. As early as 2004 it reached an accord with Libya to combat 'illegal migration'.[51] Early in 2009, the two countries concluded a further agreement. Italy is confronted with a large number of irregular migrants who try to reach Italian territory via Libya and the Mediterranean Sea.[52] The agreements between Italy and Libya allow the Italian authorities to patrol in Libya and its territorial waters to intercept at an early stage irregular migrants on their way to the EU.[53] Spain has reached similar agreements with Morocco, Senegal, Mauretania and Cape Verde.[54] These accords strongly resemble the German-Italian proposal, the difference being that the Italians do not have anything like a preliminary procedure in which the question of whether the irregular migrant is entitled to international protection is evaluated. As far as can be ascertained, an asylum seeker has no possibility of submitting an asylum application to the Italian authorities when he/she encounters them on Libyan territory. Although it is extremely difficult to reach irregular migrants intercepted by Italy in Libya and to provide them with legal assistance, an NGO helped a group of Somali asylum seekers in 2006 to submit an application to the European Court of Human Rights (ECtHR).[55] In an earlier case a group of asylum seekers claimed that as a result of Italy's sending them back to Libya, they had become victims of a violation of the European Convention for the Protection of Human

46 Bundesministerium des Innern, *Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration – Überlegungen des Bundesministers des Innern zur Errichtung einer EU-Aufnahmeeinrichtung in Nordafrika*, Berlin, 2005.

47 COM(2004)410. 'Durable solutions' was understood to mean arrangements whereby persons seeking international protection can reside somewhere on a long-term basis. This could take the form of return, local integration or resettlement.

48 Schuster, 2005, p.4. The countries in question were Mauretania, Algeria, Morocco, Tunisia and Libya.

49 Schuster, 2005, p. 4.

50 European Commission, *Communication from the Commission to the Council and the European Parliament on regional protection programmes, COM(2005)388.*

51 Schuster, 2005, p.11.

52 For background see Feruccio Pastore, *Libya's Entry into the Migration Great Game. Recent developments and Critical Issues*, Rome, 2007 at http://www.cespi.it/PDF/Pastore-Libia-great%20game.pdf.

53 See the friendship treaty between Libya and Italy, Legge 6 febbraio 2009, n. 7 'Ratifica ed esecuzione del Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 agosto 2008' available at http://www.parlamento.it/parlam/leggi/09007l.htm.

54 P. Garcia Andrade, 'Extraterritorial Strategies to Tackle Irregular Migration by Sea: A Spanish Perspective', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges*, Leiden and Boston, 2010, pp. 281-310.

55 See the pending case of Hirsi and others v. Italy, case number 27765/09.

Rights and Fundamental Freedoms (ECHR). However, this case was struck off the list after it transpired that the asylum seekers were no longer in contact with their representatives or the Court because they had been deported.[56]

The successor to the Tampere programme, the 2004 Hague Programme,[57] called for a study of the feasibility of external processing both outside the EU and in one or two member states.[58] The European Commission was also asked to investigate protection in the region. The Commission responded to these requests with a proposal calling for capacity-building in the region and an EU resettlement policy for member states ready to participate in such a programme.[59] These proposals were less ambitious than the British and German-Italian proposals but adopted some of their elements.

At the end of 2009, the Treaty of Lisbon entered into force and the Stockholm Programme, a policy programme drafted by the Justice and Home Affairs Council, was adopted by the European Council for the coming five years.[60] During the preparations for the Stockholm Programme, the Netherlands had advocated a broader resettlement policy and a study of the scope for external processing,[61] but neither of these were included in the programme. On the basis of the policy programme, the European Commission drew up an Action Plan translating the Stockholm Programme into concrete measures. Earlier, in September 2009, the Commission had published a Communication in which it made a new proposal for the adoption of a common resettlement policy for the EU.[62] Alongside a detailed discussion of the Resettlement Programme, the Annex to the Stockholm Programme Action Plan contained under the heading 'The external dimension of asylum' a 'Communication on new approaches concerning access to asylum procedures targeting main transit countries', timetabled for 2013.[63] This could be understood to mean a form of external processing.

The above overview shows that over the last decade calls have come from a number of quarters to make it possible to evaluate the merits of applications for international protection by the EU or an EU member state outside the territory of the EU. For a variety of reasons, none of these proposals has led to concrete measures. Nevertheless, the idea was put forward again and again.

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56 ECtHR 19 January 2010, case nos 10171/05, etc., (*Hussun and others v. Italy)*.

57 The Justice and Home Affairs Council (JHA) establishes a policy programme every five years. The 2004-2009 programme was adopted during the European Council meeting in The Hague in 2004. The 2009-2014 programme was adopted during the European Council meeting in Stockholm in 2009.

58 Council of the European Union, Presidency Conclusions of the Brussels European Council on 4 and 5 November 2004. Annex 1: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union. (2004), para. III.1.3.

59 European Commission, *Communication from the Commission to the Council and the European Parliament on regional protection programmes, COM(2005)388.*

60 Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Brussels, 2009, available at http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf.

61 For the Netherlands' disappointment in July 2009 at the 'meagre ambitions of the Commission' in this respect, see the letter from the State Secretary for Foreign Affairs concerning new Commission proposals and initiatives of the member states of the European Union, in *Parliamentary Papers, House of Representatives* 2008/09, 22112, no. 892.

62 European Commission, COM(2009)456, *Proposal for a decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC.*

63 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering an area of freedom, security and justice for Europe's Citizens Action Plan implementing the Stockholm Programme*, COM(2010)171, pp. 61-62.

It is worthy of note that the preparation of most of these plans did not involve third countries. This has led to criticism from those countries and in some cases to a lack of willingness to work with the European Union on implementing the plans.[64] This lack of willingness was primarily influenced by the fact that the third countries in question wanted a European resettlement plan in return for their cooperation. As stated above, a plan of this nature has been on the agenda since the adoption of The Hague Programme, but has not yet got under way.[65]

2.5 A closer look at certain elements of external processing

Despite obvious differences, most of the proposals discussed here contain a number of elements which distinguish external processing from current asylum procedures in the member states.

Unlike the usual asylum procedures, external processing is characterised by a geographical subdivision of the procedure. Whereas in the former, everything takes place in the same state, under external processing the application for international protection may be submitted outside the state where it is ultimately granted. In addition, the place where such an application is submitted may not be the one where it is assessed.

This geographical subdivision is not entirely new. In resettlement too, assessment of applications takes place in one country and protection granted in another. Application of the Dublin Regulation can also mean that an asylum application is processed by a different state from the one in which it was submitted. In the former case, the assessment is not carried out by a member state, while in the second both states are EU members.

In addition, financial considerations may play a role: processing applications outside the EU is possibly much cheaper than doing so within the EU, while if migrants do not have to travel to the EU but can submit their applications close to the country of origin, it will save them travel and other costs.

Assessing applications for international protection extraterritorially focuses attention more clearly on efforts to improve the effectiveness of immigration controls. Another aim that external processing may serve is that of guaranteeing the safety and security of asylum seekers. By giving persons eligible for international protection the opportunity to submit their applications closer to areas of conflict or on transit routes, vulnerable groups can be more easily accessed. But before this can be put in place, a sound legal framework must be created regulating clearly the responsibilities of the member states involved and guaranteeing the prohibition on refoulement and other relevant treaty obligations. This legal framework will be discussed in the following chapter.

2.6 Conclusion

This chapter described what the term external processing, or extraterritorial assessment of applications for international protection, means. In doing so, it discussed the background, aims, initiatives and proposals for external processing. Different EU member

64 Sterkx, 2004, pp.13-14.

65 Schuster, 2005, p. 5. It was however announced in the Stockholm Programme Action Plan; see COM(2010)171, pp. 62.

state governments have proposed various forms of external processing. The aim was on the one hand to control and restrict irregular migration, and on the other to offer protection to groups of refugees who under the current system have been unable, or barely able to obtain international protection within the EU. Nevertheless, the concept of external processing has never enjoyed broad support within the EU or among civil society organisations.

CHAPTER 3

Legal framework

This chapter explores the scope under current international and European law for changing over to a system of external processing. First, the regulation of the responsibility of a state vis-à-vis an asylum seeker and then a number of themes relevant to external processing are discussed. These themes are: non-refoulement, standards applying to the granting of asylum status and asylum procedure, and the powers available under EU law to draw up rules governing external processing. Next, specific legal conditions that external processing must meet are distilled from these themes. In addition, the committee identifies legal obstacles to external processing. Finally, possible solutions to these problems are listed.

3.1 Responsibility

With regard to external processing an important question is which country or countries is or are responsible for a particular individual seeking international protection. To answer this question, it must be established which states and organisations are involved in the external processing. A variety of options is conceivable. One is that the EU sets minimum rules and the member states carry out external processing. This option would be in line with the current structure of European asylum law. A second option is that the EU not only sets rules, but also takes responsibility for all or some of the implementation (by for example setting up an agency for this purpose). A third option is for implementation to be transferred, wholly or partly, to a third state where the external processing will take place. The question of the responsibility borne by the actors involved depends in these options on the various aspects of external processing. In the first option, for example, the responsibility of the EU is confined to the rules it sets; the responsibility of the member states relates to the implementation (or non-implementation) of those rules.

As long as there are no concrete plans to introduce external processing, one option is no more probable than another. The discussion below is therefore not confined to elaborating a specific option. Instead, the doctrine of state responsibility for acts performed outside the borders of the state or the EU is considered in relation to each option in turn.

According to the definition given in section 2.2, under an external processing regime the assessment of applications for international protection is conducted by the member state of the EU but outside the borders of the EU, usually on the territory of another state. In this construction it remains unclear where responsibility lies. What is more, the instruments most relevant to international protection, such as the International Covenant on Civil and Political Rights (ICCPR), the Refugee Convention, the ECHR and EU law contain no clear provisions on extraterritorial state responsibility.

The concept of external processing thus gives rise to a number of complex questions concerning the scope of state responsibility under the instruments referred to above. Let us first look at territorial scope. The obligations under international and European law relevant to international protection apply to all persons who seek asylum on the territory of the member states or close to their borders.[66] They therefore automatically apply to trans-

66 See further section 3.2.

fers from a member state to an external processing centre outside the EU. But do they also apply to the actions of member states or their officials in that centre? For example, in relation to asylum seekers who report to the centre without first entering the EU? A second question concerns responsibility in the context of cooperation between several or all EU member states. Who is responsible if the obligations in question are applicable and an official in the external processing centre acts in breach of those obligations? Only the state of which the official is a national or the other participating member states as well? A third question relates to the involvement of the EU. Who is responsible for the acts of the EU in the context of external processing? These three questions are addressed below. The question of the extent to which the EU is competent on the basis of the EU Treaties to adopt legislation on external processing is discussed separately in section 3.3.

State responsibility

The Draft Articles on State Responsibility' (Draft Articles) drawn up by the International Law Commission (ILC) offer a general framework for determining state responsibility under international law. The Draft Articles have not as yet been laid down by treaty, but are generally deemed to be a reflection of customary law and can on that basis be considered as binding.[67] Article 2 of the Draft Articles defines an act of state and contains provisions on what acts of a state can be attributed to that state. An act or omission of a state is a wrongful act if that conduct meets two criteria, i.e. it:

(1) is attributable to the State under international law; and
(2) constitutes a breach of an international obligation of the State.[68]

An act or omission can be attributed to a state if it is an act or omission of an organ of the state as defined by international law.[69] It follows from this that acts or omissions of a state outside its territorial borders can be attributed to the state if they are performed by an official of that state. States thus bear responsibility for the acts of their officials in the context of external processing.

The second criterion which has to be met if conduct is to be deemed a wrongful act concerns the question of whether the act constitutes a breach of an obligation under international law. The issue of whether the treaty obligations referred to above also apply to acts performed outside the borders of a state must therefore be addressed. It is after all inconceivable that the instruments in question limit the obligations they impose to the territory of the states parties. In that case, an extraterritorial act would not constitute a breach under current law nor would it therefore constitute a wrongful act as defined in the Draft Articles, even if the act can be attributed to an official of the state in question.

Responsibility where several states are involved

There is another aspect to state responsibility. It is perfectly conceivable for external pro-

67 For an analysis of the drafting and status of the Draft Articles, see J. Crawford & S. Olleson, 'The Continuing Debate on a UN Convention on State Responsibility', *International and Comparative Law Quarterly*, 2005, p. 971.

68 Article 2, Draft Articles.

69 Article 4 of the Draft Articles states: '1. The conduct of any state organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

cessing to be carried out by several states working together, by member states working with the EU, by the EU alone, or by the member states or the EU with a third state partly implementing the process. If a particular act forming part of external processing proves to be incompatible with a treaty obligation resting on all the participating states, which state is then responsible? Only the state whose official performed the contested act, or other member states as well? And what if the act (e.g. expulsion to the country of origin) is performed by an organ of a third state where the external processing centre is established, and one or more member states are involved, for example because they have assessed the asylum application and denied it?

According to the Draft Articles a state may also be held responsible if it cooperates with other states in the violation of international obligations. Article 16 provides that states are responsible if they assist another state in the violation of its international obligations.[70] Article 17 determines that a state is responsible for the acts of another state if the latter is acting under the control of the former.[71] This means that a state also has obligations if it induces other states to perform certain acts. This might be the case with external processing if a state assists another state in implementing such processing without being directly involved itself. Furthermore, joint acts by states which are in breach of international obligations may also, according to the Draft Articles, constitute a wrongful act which is attributable to all the states participating in the act.[72] The idea underlying such individual state responsibility is that it must not be possible to evade responsibility for wrongful acts by acting in concert with other states. This is relevant to external processing because all participating states can be held responsible if wrongful acts are committed during processing. Logically, this shared responsibility implies that the person whose rights have been violated can take legal action against all the states involved.

State responsibility and acts of international organisations

The obligations under international law that are relevant to asylum law rest on the member states, not on international organisations such as the EU. The consequences of the transfer of powers to an international organisation in an area in which a state has international obligations is a complex legal issue.[73] On the one hand, holding a state responsible for breaches over which it has no control is problematic. According to current international law, an international organisation with legal personality bears sole responsibility for an unlawful act, even if the act constitutes a breach of the obligations of its members, if one or more of those members performed the act in question.[74] This may be the case if external processing is carried out by the European Commission or an EU agency. On

70 Article 16 of the Draft Articles reads: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that state.'

71 Article 17 of the Draft Articles reads: 'A State which directs and controls another state in the commission of an internationally wrongful act by the latter is internationally responsible if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that state.'

72 See Article 47 of the Draft Articles: 'Where several States are responsible for the same internationally wrongful act, the responsibility of each state may be invoked in relation to that act.'

73 See among others R. Lawson, *Het EVRM en de Europese Gemeenschappen, bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties* (The ECHR and the European Communities: building blocks for a responsibility regime governing the acts of international organisations), Leiden 1999, pp. 504 ff.

74 See J. d'Aspremont, 'Abuse of Legal Personality of International Organizations and the Responsibility of Member States', *International Organizations Law Review*, 2007, p. 91.

the other hand, problems also arise if member states can evade their treaty obligations by transferring powers to international organisations. The question is, therefore, to what extent can member states transfer powers related to processing asylum applications to the EU without acting in contravention of their obligations under the Refugee Convention?

Dissatisfaction with the sole responsibility of international organisations for their acts has been growing in recent years. The Draft Articles shed no light on this issue because they contain no provisions on state responsibility for acts performed by international organisations.[75] The ILC has been engaged since 2002 in drawing up draft articles on this subject. These propose giving states far-reaching responsibility for wrongful acts committed by international organisations of which they are members.[76] This document is however still at the drafting stage.

Nevertheless, state responsibility for the acts of international organisations has been at issue in several judgments of the ECtHR, with particular reference to the responsibility of EU member states under the ECHR for the exercise of competences that have been transferred to the EU. The case law shows that the responsibility of a member state under the ECHR depends on the extent to which it has control over the acts in question. In this context, the following distinctions may be drawn.

First, there is the question of acts performed by a state or one of its organs which are subject to European legislation, but that legislation grants the state a certain degree of discretion. This is the situation with regard to virtually all current European asylum law.[77] In this case the member state is fully responsible under the ECHR, since it can use its discretion in such a way as to conform with its obligations under the Convention.

Second, there is the situation in which a member state acts in implementation of a European instrument which allows no room for discretion. In such a case, provided there is protection within the EU of fundamental rights and freedoms that is equal to that offered by the ECHR, the ECtHR will declare an application concerning a violation inadmissible. Only if there are serious indications that the Convention has been violated will the ECtHR assess the merits of the application.[78] In principle, therefore, no individual legal protection is offered by the ECtHR in such cases, though the Court retains the right to offer it should there be serious indications that a violation has occurred. Here too, state responsibility under the ECHR remains intact.

Third, there is the situation in which an organ of the EU, rather than a member state, performs the act in question, for example by adopting legislation that is incompatible with the ECHR, or a de facto administrative action by an official of the European Commission. Applications brought against the EU will in such cases be declared inadmissible since the

75 Article 57 of the Draft Articles excludes acts of international organisations and states within international organisations from the scope of the Articles. The UN has been engaged since 2002 in drawing up draft articles on the responsibility of international organisations but these are not yet ready. See P. Kuiper and E Paasivirta, Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations', *International Organizations Law Review*, 2004, p. 111.

76 For information on these draft articles see the ILC site : http://untreaty.un.org/ilc/guide/9_11.htm. On the issue of state responsibility, see the report written by G. Gaja, UN document no. A/CN.4/564/Add.1. However, for a critical commentary see N. Blokker, 'Comparing Apples and Oranges? Reinventing the Wheel? Schermers' Book and Challenges for the Future of International Institutional Law', *International Organizations Law Review*, 2008, p. 211.

77 Admittedly, the obligation to act in accordance with international law obligations in such cases also arises from EU law.

78 ECtHR 30 June 2005, case 45036/98 (*Bosphorus v. Ireland*).

EU is not as yet a party to the ECHR.[79] Applications concerning acts of the Union directed against all the member states together have to date been unsuccessful. Once the imminent accession of the EU to the ECHR is completed, however, the EU can directly be held responsible for the conformity of its acts (or those of its officials) with the ECHR.[80]

However, the EU cannot accede to UN instruments such as the Refugee Convention, the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) because these instruments allow only states to become parties.[81] As stated earlier, member states cannot evade their obligations under international law by transferring powers to an international organisation.

3.2 Relevant obligations under international and European law

Obligations under international and European law may be applicable to external processing, depending on the form it takes. If such processing is carried out by an EU agency implementing EU legislation, for the present at least, only obligations under European law are relevant. If the EU introduces rules for external processing which is then carried out by the member states, obligations under European law are the primary yardstick for those acts of the member states which fall within the scope of the relevant EU law. However, because member states can also be responsible under international law (see above) when implementing EU law, international law is also a yardstick for such acts. International law is the only yardstick for acts of the member states which fall outside the scope of EU law.

Relevant obligations under European law derive from the Charter of Fundamental Rights and from the principles of EU law.[82] Since the entry into force of the Treaty of Lisbon, the provisions of the Charter are binding not only on the organs of the EU, but also the member states in implementing EU law. A number of provisions appear immediately relevant to external processing and are discussed below. Nevertheless, the exact content of the obligations contained in the Charter remain for the present unclear because there is little case law in this field.

The principles of EU law are unwritten. In the past, the European Court of Justice (ECJ) derived such principles from the common constitutional traditions of the member states and more in particular from their human rights obligations. Accordingly, the member states' obligations under international law also serve as a yardstick for acts falling under the scope of EU law, even though the EU is not bound by these instruments. Principles of EU law may contain obligations that go further than similar obligations under international law. However, no such obligations have as yet been identified by the ECJ in the field of asylum law.

In short, obligations under European law in the field of asylum law are at the very least equivalent to the obligations under international instruments to which the member states are parties, and in some cases they are more far-reaching. But the content of such obligati-

79 ECtHR 10 July 1978, case 8030/77 (*CFDT v. EC alternatively, their member states*).

80 See article 6, paragraph 2 of the Treaty on European Union (TEU).

81 See article 48, paragraph 1 and 3 of the ICCPR, article 39, paragraph two of the Refugee Convention and articles 25 and 26 of the Torture Convention.

82 Article 6, paragraph 3 TEU (see footnote 79).

ons under specific European law in the field of asylum law is as yet unclear. International obligations regarding asylum which may be relevant to external processing on the other hand are more or less settled. For this reason, the discussion of relevant obligations below is based on obligations in international instruments, whereby these same obligations may also constitute principles of EU law.

Non-refoulement

The cornerstone of asylum law is the prohibition on returning a person to a place where he/she will be persecuted or where his/her life and safety are in danger in some other way. This is known as the prohibition of refoulement, laid down in article 33, paragraph 1 of the Refugee Convention.[83] This provision forbids the expulsion of a refugee to a country where he/she fears persecution. This means that an asylum seeker may not be expelled if he/she claims to fear persecution in the country in question without a careful procedure to assess whether that claim is correct. Other provisions in the Convention prohibit refoulement either implicitly or explicitly.

The prohibition of refoulement can also be inferred from the ICCPR. The UN Committee on Human Rights (the Human Rights Committee),[84] which monitors compliance with the Covenant, has stated that articles 6 and 7 of the ICCPR prohibit the expulsion of persons who run the risk, after their expulsion, of being subjected to torture or inhuman treatment.[85]

The Torture Convention contains an explicit prohibition of refoulement.[86] The UN Committee against Torture monitors compliance with the Torture Convention and once again, its findings carry great weight but are not legally binding.

The ECHR has an implicit prohibition of torture. The ECtHR has inferred such a prohibition from article 3 of the Convention.[87] This means that a state which is a party to the ECHR may not expel a person if there is a 'real risk' that the person concerned will be subjected, following his/her expulsion, to torture or inhuman or degrading treatment.[88] The

83 Article 33, paragraph 1 reads: 'No Contracting State shall expel or return ("refouler") 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, member- ship of a particular social group or political opinion'.

84 The Human Rights Committee consists of 18 experts and its findings carry great weight, even though they are not legally binding.

85 Article 7 ICCPR reads:'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'. Article 6, paragraph 1 reads: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'; Human Rights Committee, General Comment no. 20 (1992), para. 9 states: 'State parties must not expose individuals to the danger of torture, cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.

86 Article 3, paragraph 1 of the Torture Convention reads:'No State Party shall expel, return ("refouler") 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'.

87 Article 3 of the ECHR reads:'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. In ECtHR 7 July 1989, case 14038/88 (*Soering v. United Kingdom*) the Court stated that the United Kingdom could not expel Soering because he would run a real risk of a violation of the article 3 ECHR if returned to the United States. In ECtHR 30 October 1991, case 13163/87 (*Vilvarajah and others v. United Kingdom*) and in later cases, the Court applied the same reasoning to expulsions in asylum cases.

88 ECtHR 20 March 1991, case 15576/89, (*Cruz Varas and others v. Sweden*).

treatment must be of a 'minimal level of severity' to fall within the scope of article 3.[89]

In addition to direct refoulement, whereby a person is expelled directly to their country of origin, these provisions also prohibit indirect refoulement. This is the case if a state expels an asylum seeker to a third state[90] which does not respect the prohibition of refoulement. In such a case, article 33 of the Refugee Convention, article 3 of the Convention against Torture (CAT) and article 3 of the ECHR prohibit expulsion to that third state.[91]

Finally, the prohibition of refoulement has a firm basis in EU law. Not only is it referred to in all the asylum-related directives, it can also be seen as a general principle of EU law. The Asylum Qualification Directive,[92] the Asylum Procedures Directive[93] and the Return Directive [94] all contain the obligation to observe the principle of non-refoulement in accordance with the Refugee Convention. Finally, the prohibition of refoulement is laid down in article 19 of the EU Charter of Fundamental Rights.

This prohibition is relevant to various stages in external processing. First, it may be applicable to an intention to transfer asylum seekers from an EU member state to an external processing centre. Asylum seekers can then contest their transfer on the grounds that they will be persecuted or subjected to inhuman treatment in the country where their application for international protection will be processed extraterritorially. Second, asylum seekers whose application is denied in an external processing centre and who are threatened with expulsion can appeal against expulsion.[95] In the first case, the asylum seeker may have recourse to the domestic courts in the member state. In the second, there is as yet no clear legal avenue. In any case, the asylum seeker may submit an application to international forums offering the individual right of petition, such as the ECtHR, the Human Rights Committee or the Committee against Torture. These bodies will assess the expulsion on the basis of the treaty in question, including the question of whether the member states are responsible under the prohibitions of refoulement for expulsion from the third state to the country of origin (see section 3.1).

89 ECtHR 30 October 1991, case 13163/87, (*Vilvarajah and others v. United Kingdom*), para 107.

90 To be distinguished from the first state (country of origin), and the state where he/she has applied for asylum (the second state).

91 For article 33, paragraph 1 of the Refugee Convention this follows from the wording: the provision prohibits expulsion 'in any manner whatsoever'; for article 3 of the ECHR it follows from case law of the ECtHR, including ECtHR 11 January 2007, case 1948/04 (*Salah Sheekh v. the Netherlands*) paras. 141-143; for article 3 of the Torture Convention from the views of the Committee against Torture (General Comment on the implementation of Article 3 of the Convention in the context of Article 22, 21/11/97, comment 1 (2). The Human Rights Committee has expressed no views on this matter.

92 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Preamble (2) and article 21.

93 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Preamble (2) and article 20, paragraph 2.

94 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Preamble (8), article 5 and article 9, paragraph 1(a).

95 Whether a complaint submitted by an asylum seeker whose asylum application has been denied during external processing is admissible or not depends on whether the member states or states concerned has/have extraterritorial jurisdiction in the external processing centre.

Standards applying to the granting of status

The prohibitions of refoulement protect persons against expulsion but do not oblige states to grant residence rights. Even the Refugee Convention does not confer the right to a residence permit. It does however confer certain rights, for example the right to access to education and to the labour market.

The Asylum Qualification Directive does establish the right to a residence permit and associated rights for persons to whom the prohibition applies. Refugee status must be granted to refugees as defined in the Refugee Convention.[96] 'Subsidiary protection' must be granted to persons to whom the prohibition of refoulement contained in article 3 of the ECHR applies.[97]

Asylum procedure

During an asylum procedure it is established whether the asylum seeker is entitled to international protection. International law provides very little basis for specific requirements with which asylum procedure must comply. The Refugee Convention does not explicitly deal with the procedure to establish whether a person has a right to the protection described in the Convention. However, the international law principle of effectiveness obliges states to give 'full effect' to the treaties which bind them and therefore also to the prohibition of refoulement in article 33 of the Refugee Convention.[98] That does not in itself mean that article 33 obliges states to establish an asylum procedure along particular lines, since as long as the person concerned is not expelled, the prohibition on refoulement does not arise. If however a state has the intention to expel an asylum seeker and this person invokes article 33, the state will then have to investigate whether that invocation is well founded. After all, if the state expels the person without such an investigation, it would deprive article 33 of all meaning.[99] That investigation must be conducted in such a way as to give the asylum seeker a real and sufficient opportunity to substantiate his argument that he is a refugee.[100]

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) provides guidelines on the organisation of the asylum procedure. In itself, the Handbook is not binding but is an authoritative source for the interpretation of the Refugee Convention.[101] Furthermore, some standards can be inferred from the principle of effectiveness. First, an asylum application must receive an individual assessment. Second, the asylum seeker must be given a reasonable period of time in which to

96 Article 13 in conjunction with article 2 (c) Directive 2004/83/EC. The latter provision provides a definition of the term 'refugee' which is equivalent to that in article 1A (2) of the Refugee Convention, excluding exceptions which are not relevant here.

97 Article 18 in conjunction with article 2 (e) of Directive 2004/83/EC. As transpires from ECJ 17 February 2009, case C-465/07 (*Elgafaji*), 'Article 15(b) of the Directive corresponds in essence to Article 3 of the ECHR'.

98 H. Battjes, *European Asylum Law and International Law*, 2006, Boston and Leiden: Martinus Nijhoff Publishers, p. 292.

99 S. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law*, 2003, pp. 73-74.

100 See for example The Hague Court of Appeal, 31 October 2002, RV 2002, 22, consideration 5.2; see too Battjes, European Asylum Law, p. 293.

101 In this context the declining respect that courts worldwide seem to have for the UNCHR Handbook should mentioned. Hathaway puts this down to activist judges who have given partly differing interpretations of refugee law; see Hathaway, *The Rights of Refugees under International Law*, pp. 115-116.

apply for review of an administrative decision denying his/her application. Depending on the system, the asylum seeker must apply either to the same or to a different authority, whether administrative or judicial.[102]

In 1977, the UNHCR Executive Committee made a number of recommendations to states regarding compliance with the obligations arising from the Refugee Convention. These too are not binding, but are authoritative. For example, an official who is processing an asylum application must receive clear instructions concerning the procedure. The asylum seeker must receive the necessary guidance during the procedure. There must be a central authority responsible for the disposal of asylum applications. Furthermore, asylum seekers must be able, where necessary, to call on the services of interpreters and must be given the opportunity to contact UNHCR. If asylum seekers are entitled to protection, they should be informed accordingly and issued with documentation attesting to their status. Finally, asylum seekers whose application is denied at first instance must be given a reasonable time in which to ask for formal reconsideration of the decision.[103]
ECtHR case law regarding article 3 of the ECHR also obliges states to conduct a 'rigorous scrutiny' of any violation of the prohibition of refoulement in the event of expulsion.[104]

Furthermore, article 13 of the ECHR sets standards for asylum procedures. This provision confers a right to an 'effective remedy' against a decision to expel an individual. The remedy must entail an assessment of the individual facts and circumstances of the case.[105] It should however be noted that an invocation of article 13 of the ECHR is only possible if the person concerned has an 'arguable claim' that article 13 will be violated if he/she is expelled.[106] An asylum seeker cannot therefore derive a right to an asylum procedure from article 13, merely a legal remedy against expulsion.

In EU law the right to asylum and to an effective remedy is enshrined in articles 18 and 47 of the Charter. In addition, minimum standards for asylum procedures are laid down in the Asylum Procedures Directive.[107] The latter directive does not deal with extraterritorial asylum procedures, being written at a time when the option of external processing was not on the agenda.[108] If the decision was taken to introduce extraterritorial assessment of asylum applications, further standards would be necessary with regard to the specific characteristics of asylum procedures taking place extraterritorially.[109]

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102 Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paragraph 192 (vi), see http://www.unhcr.org/refworld.

103 See UNHCR Executive Committee Conclusion No. 8 (1977).

104 ECtHR 11 July 2000, case no. 400035/98 (*Jabari v. Turkey*).

105 ECtHR 27 April 1988, case nos. 9659/82 and 9658/82 (*Boyle and Rice v. United Kingdom*), para 55.

106 Cf. *Silver and others v. United Kingdom*, para. 113.

107 OJEU 2005 L 326/13.

108 External processing was mentioned in connection with the UN and during discussions, but it played no role in the drafting of the directives. For example, article 7 of Directive 2005/85/EC could be interpreted to the effect that the asylum seeker may only remain on the territory of the member state pending examination of the application if the procedure is also taking place in that state ('for the sole purpose of the procedure'). Nor does the Directive at any point state that the procedure must take place on the territory of the member state. At the time it was drafted, this was simply assumed.

109 For a discussion of this point see section 3.5.

3.3 Conditions for external processing

The previous section discussed the provisions of international and European law relevant to external processing. This section will look at the conditions they impose, in other words, for which acts performed in the context of external processing they impose obligations on the member states. This must be considered against the background of the general doctrine on state responsibility discussed in section 3.1. There we saw that acts performed by officials outside the territory of their member state can in certain circumstances be attributed to that state. However, whether such an act constitutes a breach of a provision under international or European law depends on the terms of the provision. This may for example place geographical limits on the obligations it enshrines.

Just as was the case in the previous section, where the relevant acts fall under the scope of European law, European law standards (in particular general principles of EU law and the provisions of the Charter) form the primary yardstick and international law standards are mainly relevant where the acts fall outside the scope of European law. Because the content of the Charter provisions relevant to external processing have not yet been elaborated or fully elaborated and the relevant principles of EU law will be grafted on to international standards, the latter will constitute the guiding principle of what follows.

Non-refoulement

The obligations imposed by the prohibitions on refoulement with regard to persons submitting an asylum application in the member states are clear. The prohibitions must also be complied with in external processing. If the safety of asylum seekers cannot be guaranteed during transfer to the external processing centre or within the centre, the act of transferring them from the member states constitutes a breach of the prohibition. That also applies to the prohibition of indirect refoulement: if there is a real risk or well-founded fear that after transfer the person in question will be expelled to his/her country of origin, even though the non-refoulement prohibitions forbid this in his/her case, transfer is not permitted. This also applies to asylum seekers who prove to have no right to protected status because they represent a danger to public order or who are excluded from protected status because there are serious grounds for assuming that they have committed a serious offence. For this group too, the absolute prohibition of refoulement in article 3 ECHR and article 3 of the Torture Convention must be respected. This can give rise to situations in which the member states do not wish to admit a particular person but still have to ensure that he/she is not expelled to a country where he/she will be persecuted. Such an asylum seeker cannot be handed over to the authorities of the state where external processing is taking place if it is not clear that the authorities in question will respect the prohibition of refoulement. This is a problem that needs addressing and for which a solution will have to be found before external processing can go ahead.

What is less clear is which rules apply if an asylum seeker travels directly to an external processing centre and has thus never been present on the territory of the member states. Do the prohibitions of refoulement apply in this situation?

Article 2, paragraph 1 of the ICCPR is relevant to a determination of responsibility under the Covenant for acts performed in a third state. This provision reads: 'Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant [. . ..; italics ACVZ]'. This can be interpreted in two ways. According to the one interpretation, both control over the asylum seeker and his/her presence on the territory of the state

party is required.[110] According to the other, the Covenant applies both when the person concerned is located within the territory of the state and when he/she is outside that territory but under the jurisdiction of the state in question.[111]

The Refugee Convention has no provision regulating its territorial application. However, according to the US Supreme Court, among others, a territorial limit can be inferred from article 33, paragraph 2, which states that the prohibition of refoulement does not apply to a refugee who represents a danger to the security of the country where 'he is'.[112] This could imply that the prohibition of refoulement laid down in paragraph 1 of this article only applies to the state where the refugee is located. According to others, however, no conclusions regarding the territorial scope of the main rule can logically be drawn from the exception contained in article 33, paragraph 2. This latter view leads to illogical results.[113] It would mean that if an asylum seeker invokes article 33, paragraph 1 in the external processing centre, the question of whether he/she is a danger to the state where the centre is located must be examined. If that is the case, the application may be denied, even if the person is not a danger to the public order or national security of EU member states. Finally, it should be noted that state practice is not clear when it comes to the applicability of article 33 of the Refugee Convention to acts performed outside a state's borders.

Nor does the Torture Convention contain a provision explicitly defining the geographical scope of the prohibition of refoulement. The Committee against Torture does however assume that the prohibition applies to acts that take place in international waters or on the territory of another state.[114]

There is more clarity regarding the scope of application of the ECHR because the ECtHR has repeatedly pronounced on the subject. Article 1 of the ECHR states that the High Contracting Parties must secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. By definition, a state has jurisdiction within its territorial borders. But even when a state acts outside those borders it may be exercising jurisdiction. This is the case, for example, if a state has 'effective control' over acts taking place in another country. If a state has effective control over external processing outside its territorial borders, the obligations arising from the ECHR must be respected. The degree to which effective control may be said to exist is the decisive factor in deciding whether a state has jurisdiction. A state acting in another country only has effective control if it has taken over some or all of the public powers of the state in which it is acting. Some authorities question whether external processing falls within the scope of the definition of jurisdiction under article 1 of the ECHR. The existence of jurisdiction depends on the degree of effective control over external processing exercised by the contracting party. This in

110 See Noll et al. 2003, *Study on the Feasibility of Processing Asylum Claims Outside of the EU*, p. 40. For the opposite view see M. Shaw, *International Law*, Cambridge, 2008, p. 322.

111 For example, M. Shaw, *International Law*, Cambridge, 2008, p. 322 and C.W. Wouters, *International Legal Standards for the Protection From Refoulement*, pp. 369 ff. In fact the International Court of Justice (ICJ) has explicitly recognised the applicability of the ICCPR to acts of states performed outside their own territory; see ICJ 9 July 2004 (*Advisory Opinion on the Wall*) and ICJ 19 December 2005 (*Armed Activities on the Territory of the Congo*; *Congo v. Uganda*), paras. 216-217.

112 USSC *Sale, Acting Commissioner, INS v. Haitian Centers Council* [1993] 113 S. Ct 2549.

113 Noll et al., *Study on the Feasibility of Processing Asylum Claims Outside of the EU*, pp. 37-40 and Moreno Lax, 'Must EU Borders have Doors for Refugees?', p. 340.

114 Committee against Torture, 10 November 2008, CAT/C/41/D/323/2007 (J.H.A. v. Spain), section 8.2. See too C.W. Wouters, *International Legal Standards for the Protection From Refoulement*, p. 435 ff.

turn depends on the organisation and structure of external processing, and in particular on agreements made with the third state where the external processing centre is established.

It may be concluded that article 33 of the Refugee Convention is probably not applicable to acts performed in an external processing centre. Conversely, articles 6 and 7 of the ICCPR, article 3 of the Torture Convention and articles 3 and 13 of the ECHR may well apply.

Standards applying to the granting of status

The applicability of the Asylum Qualification Directive also gives rise to questions. Unlike other asylum directives, this instrument contains no provision defining its geographical scope. It could be argued that it follows from this that the Directive is applicable to acts of the member states performed in third states and therefore also contains an obligation to grant a residence permit to those who qualify for refugee or subsidiary protection status in such states. However, the Asylum Qualification Directive contains no provision obliging states to ascertain whether asylum seekers are eligible for such status. That obligation is laid down in article 28 of the Asylum Procedures Directive, which means that the obligation to assess the application in the light of the qualification standards and possibly grant a residence permit is dependent on the geographical scope of the Asylum Procedures Directive (see below) and cannot be inferred from the absence of a specific definition of geographical scope in the Asylum Qualification Directive. Nevertheless, the question remains of whether external activities of the member states which fall within the scope of EU law should be exempted from the application of the general principles of EU law such as the prohibition of refoulement and the principle of effective access to a court. A further question concerns the extent to which it would be permissible in the case of external application of EU law to give those principles a different interpretation offering fewer safeguards than those offered by the interpretation on which these two Directives are based.

Asylum procedure and legal protection

The standards for asylum procedures discussed in section 3.2 apply to the decision to transfer a person seeking asylum in the European Union to the external processing centre. The situation with regard to the actual processing of the application in the centre is different. As discussed above, article 3 of the Torture Convention and articles 3 and 13 of the ECHR may be applicable, while the relevant provisions of the ICCPR and article 33 of the Refugee Convention are probably not.

Whether and if so to what extent the Asylum Procedures Directive is applicable to asylum procedures during external processing is unclear. First, it is not clear whether the EU is competent to set standards for external processing (see 3.4). If it is not, the Asylum Procedures Directive cannot contain any standards relating to external processing. If the EU is competent, then the Asylum Procedures Directive is in fact decisive. On the one hand, article 1 of the Directive states that it aims to set minimum standards for 'procedures *in* the member states' [italics ACVZ]. This could be reason to assume that the provisions of the Directive cannot be applicable to procedures taking place outside the member states. On the other hand, article 3 of the Directive states that it is applicable to all asylum applications made on the territory or at the border of a member state. It can be argued that if a person has submitted an asylum application in the EU and is subsequently transferred to the external processing centre, on the basis of article 3 the Directive's standards also apply to procedures taking place there. If that is correct, the question arises of whether these

standards also apply to the processing of an asylum application from a person who did not first travel to the EU, but went directly to the external processing centre. The principle of equality before the law might possibly oblige the state to treat the latter application too in line with the Asylum Procedures Directive.

To sum up, the applicability of the Asylum Procedures Directive to acts taking place outside the borders of the member states within the framework of external processing is unclear. Admittedly, the question is whether this lack of clarity needs to be resolved at all. As argued above,[115] a separate instrument will have to be adopted as part of further work on external processing which does justice to its special characteristics. Whether the EU is competent to adopt such an instrument will be discussed in the next section.

3.4 Legal obstacles

In this section a number of obstacles are discussed which in the view of the ACVZ make external processing legally problematic. At issue are the provisions in the Asylum Procedures Directive which state that an asylum seeker may remain in the member state where he/she is seeking asylum while his/her application is being processed and that an asylum seeker must have a meaningful connection with the country to which he/she is transferred. Most important is the question of whether, and if so, to what extent EU law offers a legal basis for external processing.

Right to remain

According to article 7 of the Asylum Procedures Directive, an asylum seeker has the right to await the decision at first instance on his/her application in the member state that is handling his/her application.[116] Apart from exceptions irrelevant to the present discussion, such as repeated applications, this decision is concerned either with a decision on the merits of the asylum application, or transfer to a safe third country.[117] This provision therefore stands in the way of transfer to an external processing centre for an assessment of the merits of the application. The only possibility would be to consider such transfer as an application of the safe third country concept. Although external processing differs from this, the transfer element is the same.

Article 27, paragraph 2 (a) of the Directive determines that an asylum seeker may only be transferred to a safe third country if he has a meaningful connection with that country. This legal safeguard is intended to prevent member states from transferring asylum seekers to any safe third country. This means that transfer is only permitted if the asylum seeker has, for example, spent some time in the country where the external processing centre is located. If this is not the case, transfer is unlawful, according to this provision. Hence amendment of the Directive will be necessary if any meaningful form of external processing is to be set up.

115 See section 3.2.

116 Article 7, paragraph 1 of Directive 2005/85/EC reads:' Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.'

117 See article 25 in conjunction with article 28 of the Asylum Procedures Directive.

Competences under the Treaty on the Functioning of the European Union (TFEU)

Another legal issue is whether the EU is competent to regulate external processing. The distribution of competences between the EU and the member states is based on the principle that the EU is only competent to enact legislation if the member states have conferred this competence on the EU.[118] This may be exclusive to the EU or may be shared between the EU and the member states.[119] Shared competence means that the member states are competent to develop (and implement) legislation if the EU has made no use of its competences.[120]

In establishing the distribution of competences, the first question is whether EU law confers on the EU the competence to develop an external processing system. If the answer is yes, the second question is the extent to which any applicable EU legislation leaves room for national legislation.

A first possible legal basis for external processing could be article 78 of the TFEU. Paragraph 1 of this article states that the EU will develop a common asylum policy. The second paragraph reads as follows:
'For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
(c) a common system of temporary protection for displaced persons in the event of a massive inflow;
(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or people applying for subsidiary or temporary protection.'

Does article 78 of the TFEU offer a basis for adopting external processing measures? That specific area is not mentioned. On the other hand, paragraph 2 (unlike its predecessor in article 63 of the Treaty establishing the European Community) contains no territorial restrictions, as a result of which the basis for standards regarding reception and procedure, among other things, allows for this provision to be applicable outside as well as within the territory of the member states. Nor does the provision state that this list is exhaustive. It is possible therefore that Article 78 paragraph 1 in conjunction with paragraph 2, first sentence, offers a sufficient basis for the adoption of measures to develop a common asylum policy in respect of aspects which are not mentioned as such in paragraph 2.[121]

118 Article 5 (1) TEU.

119 Article 4, paragraph 2 (j) TFEU.

120 Article 2, paragraph 2 TFEU.

121 Furthermore, according to article 352 TFEU the EU may develop legislation if this is necessary to attain an objective set out in the Treaties, and the Treaties have not provided the necessary powers.

A complicating factor, however, is formed by subparagraph (e): the criteria and mechanisms for determining which member state is responsible for considering applications. It could be argued that this provision serves as a basis for a regulation whose primary aim is to prevent the member states shifting their responsibilities onto other member states. If that is correct, an external processing regime under which they accept joint responsibility would not be incompatible with article 78. If however the provision is interpreted as a safeguard for the asylum seeker that he/she can invoke the obligation to process their asylum application vis-à-vis at least one member state (and given the provision in the first paragraph, among others, that is highly likely), then what the provision amounts to is that before the application is processed it must already have been established which state is responsible. This would mean that any regulation of external processing must indicate a responsible member state for every asylum seeker.

In brief, the question of whether the EU is competent to regulate external processing has no straightforward answer. If the answer is no, it would not only mean that the Council may not adopt any measures on this issue, but also that the current Asylum Qualification and Procedures Directives are not applicable to acts performed in the external processing centre (see above, section 3.2). If the EU is competent, article 78, paragraph 1 (e) may enshrine an obligation relating to the design of the regime: a specific member state must always be charged with and responsible for the processing of the asylum application.

Another uncertainty concerns the extent of the freedom of member states to develop policy on external processing. If, due to the lack of a basis for competence, current legislation cannot apply to acts taking place within an external processing centre, the member states would be completely free to draft legislation in this area. This does not affect the conclusions of the previous section. In designing and implementing policy on external processing, the member states are bound by the current treaties and European legislation. As a result, transfer prior to an assessment of the merits of an application can only take place to a safe third country with which the asylum seeker has a meaningful connection.

3.5 New legislation

If and to the extent that current legislation is an obstacle to introducing external processing, the question arises of whether it is possible to adopt new legislation or amend existing legislation. This section examines what new legislation would be necessary to make external processing possible and what legislation requires amendment.

Legal basis for external processing in EU law

Article 78 TFEU possibly offers no basis for EU law on external processing, or if it does, article 78, paragraph 2 (e) imposes far-reaching limitations. In the latter case, article 78, paragraph 2 (e) requires amendment. Furthermore, article 27 of the Asylum Procedures Directive would have to be amended to the effect that it is no longer required for the asylum seeker who reports in the territory or at the border of an EU member state to have a meaningful connection with the safe third country where the centre is located. And third, specific secondary legislation is needed for an EU-wide external processing policy. The specific elements of external processing would have to be laid down in a Regulation.

Agreement with third state

In addition to the legal basis in EU law it is necessary to obtain the agreement of the third state where external processing will take place, since external processing involves sub-

stantial interference in the legal order of that state. For example, EU officials charged with implementation will have to be posted to the third state. Asylum seekers will have to be admitted to and allowed to travel through the territory of the state. What is more, there must be guarantees that the third state will not violate the fundamental rights of asylum seekers.

On account of their doubtful reputation in the field of human rights, some states will not be credible partners in external processing. One example is Libya. This state is not a party to the Refugee Convention and has in the recent past engaged in refoulement and collective expulsions. Libya has thus demonstrated that it attaches no importance to the protection of refugees and to respect for international standards. It is not advisable for the EU work together with such states in the framework of external processing.

National legislation

In addition to amendments to primary and secondary EU law and negotiations on agreements with third states, amendments to the national legislation of member states will also be necessary. For example, national law will have to offer a basis for the transfer of persons seeking asylum in the Netherlands to the external processing centre outside Dutch territory.

3.6 Conclusion

There are numerous legal complications associated with assessing asylum applications outside the EU. External processing can take a number of forms. The EU can establish a legal framework within which the member states carry out external processing. Alternatives include processing by an organ of the EU or by the member states without any intervention from the EU. Finally, it can be wholly or partially left to the state where the centre is located. The fact that it is unclear whether the TFEU offers an adequate basis for EU legislation on the issue is a complicating factor.

The relevant legal framework depends on the form chosen. If the EU does not set rules, the applicable obligations under international law will constitute the yardstick. If the EU does set rules, the primary yardstick is EU law, including the Charter and the principles of EU law. We do not as yet know what these entail for external processing, but it is clear that the principles will involve the same obligations as the ECHR and other applicable international law.

On the basis of international law, states can be held individually or collectively responsible for internationally wrongful acts that take place within the framework of external processing. The EU will accede to the ECHR within the foreseeable future and will thus be bound by the asylum-related obligations arising from that Convention. In the current circumstances, however, the EU cannot accede to other relevant instruments, such as the Refugee Convention, the Torture Convention and the ICCPR. The extent to which member states can be held responsible under these instruments for acts performed by the EU is unclear.

What is also unclear, or not entirely clear, is which obligations under refugee law are applicable to acts performed by the member states outside their territory. The prohibition of refoulement contained in article 3 of the ECHR and possibly also in articles 6 and 7 of the ICCPR and article 3 of the Torture Convention can also be binding beyond a state's borders. However, it is unclear if that is true of the relevant EU law. The Asylum Qualifi-

cation Directive and the Asylum Procedures Directive were drawn up without taking into account the possibility of assessing asylum applications extraterritorially. In some aspects therefore, their wording and content are difficult to apply to external processing. In this context, the issue of asylum seekers who travel directly to an external processing centre should be noted; they do not fall under current EU law, though considerations related to equality before the law make that desirable.

Other possible legal obstacles include the provision in the Asylum Procedures Directive which allows asylum seekers to await the outcome of the procedure in the member state handling the application and the question of what body within the EU is competent to draft legislation regarding external processing.

Finally, new EU legislation (if the EU proves to be competent) and the national states will be necessary. International agreements will also have to be concluded with the countries that are willing to set up external processing centres.

CHAPTER 4

Practical aspects and conditions

The previous chapter identified a number of legal complications with regard to external processing. But in addition to these legal obstacles, there are also a number of practical conditions with which external processing must comply. In this chapter we discuss the major practical conditions on the basis of six themes. These are:

1. *access* to external processing
2. the *location* where the external processing centre will be established
3. *reception* of asylum seekers in the external processing centre
4. *procedural conditions* governing the asylum procedure
5. the *distribution* of asylum seekers entitled to international protection, and
6. the *way* in which failed asylum seekers are dealt with.

4.1 Location of the external processing centre

A variety of locations could be candidates for hosting the external processing centre. If the choice is made to limit access to asylum seekers transferred from the EU to the centre, the choice of location would logically be based on logistical factors, such as whether the centre is easily accessible from the EU. If it is decided to allow asylum seekers to travel on their own initiative to a centre, it would be more logical to establish it close to a region from where many refugees come or on a migration route. In addition, a number of other conditions are relevant to the choice of location.

a. Agreement with a third state

A basic condition enabling external processing to take place, as discussed in the previous chapter, is an agreement with the third state where external processing will take place. This agreement has to regulate a variety of practical matters such as the location, security and the accommodation offered to asylum seekers.

Another condition for an agreement is that the wishes of the third country are adequately considered. As became clear in Chapter 2, it is by no means sure that third states will be willing to cooperate with requests to establish external processing centres on their territory. A relevant issue in this context is the far-reaching cooperation between Italy and Libya for the purpose of combating irregular migration. Financial incentives might also be employed to facilitate cooperation with a third state in the field of external processing.

b. Third state must be capable of hosting an external processing centre

An important condition for the location of an external processing centre is the capacity of the third state both materially and socially to host such a centre.

In material terms, the society within which the centre is located must have a level of prosperity that is not too different from that in the centre. Otherwise it will be difficult to provide the necessary resources for the centre.

In social terms too, it would be preferable for the difference in standard of living between the external processing centre and the community around it to be a limited one. It is in

the interests of asylum seekers that the local community regard their presence as positively as possible.[122] Furthermore, a large difference might lead to the local population trying to gain access to the centre. An integrated development policy could be helpful in meeting these conditions.

4.2 Access to external processing

The access of asylum seekers to extraterritorial asylum procedures can be structured in two ways. First, persons who apply for asylum in the EU can be transferred to an external processing centre outside the EU. Second, asylum seekers who have not reached the EU could be given the opportunity to apply for asylum at the external processing centre. Those who prove to be entitled to international protection can then be transferred to one of the member states. Finally, there is an intermediate form in which asylum seekers who are intercepted en route to the EU are transferred to an external processing centre outside the EU. The form of access chosen by the member state concerned would seem to depend on its guiding principle regarding external processing. If controlling immigration is the guiding principle, the likely choice will be to transfer asylum seekers from its territory to an external processing centre. If improving protection is the priority, the state is likely to opt for offering asylum seekers an asylum procedure outside the EU before they reach EU territory. The choice between the principles of control and protection is a political one, with legal and practical implications.

a. Large numbers of asylum seekers

Sufficient capacity to transport large numbers of asylum seekers and to house them in the external processing centre is a pre-condition. UNHCR figures show that 80% of all refugees remain in the region. Over ten million persons have refugee status under the UNHCR mandate.[123] If in respect of access for asylum seekers the choice is for asylum seekers to apply at a location outside the EU for asylum in an EU member state (and external processing is thus open to asylum seekers who have not first entered the EU), it is quite possible that huge numbers of persons will apply to the centre. This can cause capacity problems.

It is difficult to estimate how many asylum seekers would report to an external processing centre. A rough idea can be obtained from the number of irregular migrants currently in the transit countries in North Africa. The European Commission estimates that somewhere between 750,000 and 1.2 million irregular migrants are at present in Libya alone. Every year, an estimated 75,000 to 100,000 foreign nationals travel to that country.[124] Most come in order to work for a short period. Other North African states are also

122 European Commission officials also emphasise the need to listen to the wishes of third countries in making agreements on migration. For a similar approach see S. Zimmerman, 'Irregular Secondary Movements to Europe: Seeking Asylum Beyond Refuge', *Journal of Refugee Studies* 2009, pp. 74-96.

123 See *UNHCR Statistical Yearbook 2009*, Geneva, 2001, p. 7, at http://www.unhcr.org/4ce530889.html.

124 European Commission, *Technical Mission to Libya on Illegal Immigration 27 Nov – 6 Dec 2004: Report*, 2004, http://www.statewatch.org/news/2005/may/eu-report-libya-ill-imm.pdf. See too Sara Hamood, 'EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' *Journal of Refugee Studies* 2008, p. 25.

confronted with irregular migration, though the flows into Libya are the largest.[125] For all these irregular migrants the opportunity to apply for asylum (and reception) at the external processing centre could be an attractive alternative to illegal residence in the transit country.

b. Transport problems

Another major practical condition governing access to an asylum procedure in a external processing centre is that minimum standards regarding safety and care must apply to transport.

In some cases transfer to an external processing centre may be permissible in legal terms, but undesirable from a humanitarian point of view. When deciding to make such transfers, account must therefore be taken of the personal circumstances of the asylum seekers involved. For some of them, for example particularly vulnerable groups such as parents with young children, people with psychological or health problems and the elderly, transfer will be undesirable in humanitarian terms. For these groups, an asylum procedure within the EU must remain a possibility.

In addition, it would be desirable procedurally and efficient in organisational terms not to transfer asylum seekers who manifestly either have or do not have a right to international protection to an external processing centre but to offer them an accelerated procedure in the member state. One way to guarantee a careful procedure would be to maintain rather than abolish national procedures in the case of asylum seekers for whom it would be a disproportionate or inefficient measure. In this way, asylum seekers who cannot be transferred to an external processing centre can undergo asylum procedures in the member state where they have applied. This will enable manifestly well-founded and manifestly unfounded applications to be processed all the faster. It is in most cases better to accommodate vulnerable asylum seekers in the EU member state. Criteria to determine who will be transferred to a centre and who will have their application assessed in the member state would therefore have to be developed and implemented.

c. Preliminary procedures in the member states

It became clear in the previous chapter that it must be possible to contest a decision to transfer a person from a member state to an external processing centre. This means that there must be a procedure in the member state alongside the procedure in the external processing centre which examines the lawfulness of the transfer itself. If there is doubt about the safety of transfer or within the external processing centre, legal proceedings against transfer could be lengthy, which in turn could impact on transfers. During the preliminary procedures against transfer asylum seekers must be accommodated and receive other necessary facilities. This would undermine a possible advantage of external processing, that it would make national procedures and facilities redundant. The introduction of external processing will not therefore mean that national procedures and reception facilities in the member states can be abolished.

125 For an overview see H. de Haas, *The Myth of Invasion: Irregular migration from West Africa to Maghreb and the European Union*, IMI Research Report, 2007, at http://www.imi.ox.ac.uk/pdfs/Irregular%20migration%20from%20West%20Africa%20-%20Hein%20de%20Haas.pdf. and N. Sørensen, *Mediterranean Transit Migration*, Copenhagen: Danish Institute for International Studies, 2006, at http://www.diis.dk/graphics/Publications/Books2006/mediterranean_transit_migration/mediterranean_transit_migration_web.pdf?bcsi_scan_BBC5F9F623E34C49=0&bcsi_scan_filename=mediterranean_transit_migration_web.pdf.

d. Illegality as alternative to transfer

If the choice is made for a form of external processing under which practically all asylum applications are examined extraterritorially, another condition necessary for good access to the procedure is effective enforcement. If virtually all persons who seek asylum in an EU member state are transferred to a state outside the EU for external processing, this creates an incentive to reside illegally in the member state rather than to submit an asylum application and be transferred to an external processing centre. Asylum seekers will estimate their chances of a successful application, and weigh them up against transfer to another state. Combating illegal residence has in the past proved extremely difficult.

4.3 Reception in an external processing centre

Assuming that the standards applying to reception in the external processing centre must be equivalent to the standards in force within the EU, a number of practical minimum standards thus apply. First asylum seekers must be treated as individuals and held in detention as little as possible. Particular attention must be paid to respecting family ties. The same applies to the rights and interests of minors.[126]

Major aspects of reception include accommodation and other primary needs, such as food and medical care. The reception of asylum seekers must meet minimum standards for accommodation as drawn up by UNHCR and other organisations. UNHCR and the Red Cross have considerable experience with the reception of refugees in conflict areas. Living standards in refugee camps are usually poor.[127] It is important to be able to guarantee an acceptable level of reception and thus protection.

4.4 The asylum procedure in the external processing centre

The asylum procedure has to comply with a number of legal safeguards. These were discussed in Chapter 3. In addition, there are a number of practical aspects and conditions that must be taken into account.

First of all, the infrastructure necessary for carrying out asylum procedures must be in place. An external processing centre must have sufficient capacity for the physical accommodation of asylum seekers and of staff.

Another requirement is that sufficient trained staff are recruited who will be responsible for the reception of asylum seekers during the procedure. In addition to the staff implementing the procedure itself, staff responsible for the facilities and ensuring decent living conditions in the centre will also have to be recruited, as well as medical staff to provide asylum seekers with medical care. To guarantee safety and security inside the centre sufficient security staff are needed, as well as interpreters and lawyers to facilitate procedures and legal proceedings. Finally, information must be provided in all relevant languages to asylum seekers concerning procedures and options for review/appeal.

126 See in particular article 17, Directive 2003/9/EC, OJEU L31/23.

127 See for one of many examples Human Rights Watch, *'Human Rights in Western Sahara and in Tindouf Refugee Camps'*, 2008, http://www.hrw.org/sites/default/files/reports/wsahara1208web.pdf.

Courts and legal aid

Another practical condition is that courts will have to be set up with sufficient capacity and asylum seekers must have recourse to legal assistance. The legal framework described in Chapter 3 gives asylum seekers the right to a fair and independent examination of their asylum application. Necessary to this is a means of contesting a decision denying an application. This means that a court must be set up to deal with review proceedings that has sufficient capacity to ensure that asylum applications are dealt with within a reasonable period.

Asylum seekers must also be able to access some form of legal aid. There must be agreement on practical matters such as the way and the points at which asylum seekers are informed about the course of their procedures. It is important in this connection that asylum seekers remain in contact with their legal representatives.

Substantial investment in the host countries will be necessary to meet these practical conditions.

4.5 Distribution

An important practical condition is the existence of a properly functioning distribution system for asylum seekers whose applications are granted. If during an asylum procedure in the external processing centre it is decided that an asylum seeker is entitled to international protection, it must then be determined where he/she will given such protection. If the EU or its member states are directly involved in external processing, it would seem logical for a person eligible for international protection to be given asylum in a member state.

Under current EU law there is a mechanism, known as the Dublin system, which determines which member state is responsible for a specific asylum seeker.[128] Under this system, family ties and an earlier stay in a member state are the decisive factors. In the case of asylum seekers who are transferred from a member state to an external processing centre, this distribution mechanism could be applied to persons proving eligible for international protection, since the Dublin Regulation prescribes which state was responsible for the asylum seeker at the moment when the decision to transfer him/her was taken. The fact that the asylum application was externally processed is irrelevant. Given that the Dublin Regulation takes no account of extraterritorial processing of asylum applications, it will possibly have to be amended for asylum applications within the EU.

The distribution mechanism of the Dublin Regulation is not, however, applicable to persons who are eligible for international protection but have not applied for asylum in an EU member state but have travelled to an external processing centre on their own initiative. An alternative distribution mechanism will have to be developed for this group.

To date, it has not proved possible to establish criteria within the EU which would distribute the burden of international protection proportionately among the member states. If external processing is also to be open to persons who have applied for asylum outside the

128 Regulation (EC) no. 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJEU 2003, L 50).

EU, such criteria are vital. It might take the form of a quota system, for example, whereby the relative capacity of the member states is regularly reviewed. Account could also be taken in such a system of the wishes of the persons who are eligible for distribution.

4.6 Application denied: what then?

Finally, an important practical condition for implementing external processing is that solutions must be found for asylum seekers whose application is denied, since the outcome of the procedure may be that the person concerned has no right to international protection. If this is the case, the asylum seeker cannot remain in the centre, even if he/she has no right to be transferred to an EU member state. The prohibition on refoulement presents no obstacle to returning to the country of origin. Although this was traditionally the preferred option, in practice, the return of asylum seekers to their country of origin is a difficult process.[129] In addition to return, residence in the country where the centre is located or a third country could be a sustainable solution. A pre-condition would therefore be that failed asylum seekers can leave the external processing centre.

An asylum seeker whose application is denied in an external processing centre falls under the jurisdiction of the third state where the centre is located. This state has sovereign powers to decide whether foreign nationals may be granted lawful residence within its borders. If this is not possible, the state in question can expel the failed asylum seekers. However, it is obliged to respect the human rights to which it has bound itself. Attention should be focused on the treatment of failed asylum seekers, even if and insofar as they fall outside the legal responsibility of the member states. If the solutions found are not in accordance with international and EU law, the legitimacy and effectiveness of external processing could be seriously undermined.

The problems surrounding failed asylum seekers will be an important issue for the state where external processing takes place. There is a chance that these migrants will decide to remain and work in the state in question, if necessary without valid residence rights. The EU can provide assistance through economic or financial aid. Another option would be for failed asylum seekers to settle for the longer term in a third country. The EU and the country providing reception could conclude readmission agreements with other countries.

4.7 Conclusion

This Chapter discussed the most important practical conditions applying to external processing. From this, it emerges that considerable effort and investment will be necessary in virtually every phase in order to meet these conditions. Efforts must be made to ensure that in the case of access to the extraterritorial procedure the circumstances during transport and in the centre are such that the transfer is in accordance with current international and EU law. In certain cases, transfer will not be compatible with international law. There must therefore be an examination in the member states to distinguish between asylum seekers who can be transferred to the external processing centre and those whose procedure will take place in the member state. Reception facilities must be available in the

129 See for example the comparative survey on return policy in the EU member states commissioned by the ACVZ, *'Return migration: Policies and Practices in Europe'*, IOM: 2004, at http://www.ch.iom.int/fileadmin/media/pdf/publikationen/return_migration.pdf.

member state both during and after this examination. A country must be found which is in material and social terms capable of hosting the external processing centre and is willing to do so. Reception will have to comply with minimum standards regarding living conditions and human dignity, and must be appropriate to conditions in the host state. There must be adequate facilities and qualified personnel to staff and maintain the centre. Bodies such as courts, and legal aid and interpreting agencies must be housed in the centre. Finally, those who are eligible for a form of international protection must be transferred to the EU and those whose application is denied must be given a sustainable solution to where they are to reside. For all these aspects, a large number of agreements with other countries is necessary.

CHAPTER 5

Conclusions and recommendations

5.1 Conclusions

On the basis of various discussions on external processing that have taken place over the last decade and within the framework of relevant international and EU law, this advisory report has examined the practical and legal conditions with which external processing will have to comply.

As stated earlier, nowhere in the EU does external processing actually take place at present, and it is in general unclear what is understood by the term. External processing can serve two aims which have provided the basis for the definitions used in this report. These can be summed up as 'control' and 'protection'. On the one hand, external processing can be seen as an attempt to control irregular migration flows. An external processing policy under which persons seeking asylum in an EU member state are transferred to an external processing centre might have a deterrent effect in that migrants with few prospects of obtaining an asylum residence permit would be less likely to follow irregular migration routes. On the other hand, the idea of external processing can be seen as an endeavour to improve the protection of refugees, in that asylum seekers can submit an application for international protection outside the EU and close to their region of origin. Elements of both aims can be found in some proposals and in the literature. For this reason it is not always obvious what aim is intended to be served. The basic principle behind the proposal made in 2002 by the UK government, for example, is not the same as that behind the concept of external processing formulated in the report published by Noll c.s.[130]

In this report, the ACVZ did not opt for one of these aims. Instead, on the basis of the request for advice, it adopted an approach in which the international and EU legal framework and the legal and practical conditions applying to external processing were discussed. In the process, both aims were considered. This is mainly evident from the two different ways in which access to external processing can be regulated. If the principal aim is control, it would be logical to choose the option in which persons seeking asylum in an EU member state are transferred to an external processing centre. If the aim is primarily to improve the protection of asylum seekers, then external processing will first and foremost be used to encourage asylum seekers who have not yet set foot on EU territory to seek protection as soon as possible without obliging them first to travel to the EU. Both options have different legal and practical aspects which are described in the report.

The general conclusion of Chapter 3 is that there is at present no legal basis for external processing in EU law, since a variety of its provisions do not align well with external processing or actually form an obstacle to it. If the decision is taken to proceed with external processing, the responsibility of the EU and the member states would have to be clearly established through new legislation and EU law would have to be amended so that existing procedural and substantive standards of asylum law would also apply to external processing. Parts of the existing Regulations and Directives relating to asylum would also have to be amended to enable external processing to be adopted. Chapter 3 also shows

130 See section 2.4.

that it is unclear who has the competence to adopt the necessary amendments: the member states, the member states and the EU together, or the EU alone. This question of law has not yet been answered. Also unclear is the question of competence to negotiate on agreements with third states.

Chapter 4 revealed that substantial effort and investment is necessary in virtually every phase if the practical conditions for external processing are to be met. In providing access to an extraterritorial procedure the conditions during transport and in the centre must be such that the courts will approve transfer. There will also have to be an examination to distinguish between asylum seekers who will be processed extraterritorially and those who will be allowed to pursue their procedure in a member state. During and after this examination, reception will have to be available in the state concerned. The centre must be located in a country which is both capable and willing in social and material terms to act as host. There must be adequate facilities, and trained personnel available to staff and maintain the centres. Bodies such as courts, legal aid offices and interpreting agencies will have to be housed within the centre. Asylum seekers who are entitled to a form of international protection must be granted such protection in an EU member state. Finally, a solution must be found to the problem of migrants who in the course of the procedure prove ineligible for international protection.

In both legal and practical terms, it can therefore be concluded that at present, the conditions that would allow external processing to take place have not been met. This would require a great deal of work, and in some respects the question remains of whether it is actually feasible.

5.2 Recommendations

On the basis of continuing developments in European asylum law, and in view of the nature and extent of potential plans to develop external processing, a purely national approach to the issue seems undesirable and in the longer term unachievable. In other words, asylum policy has been harmonised to such a degree that certain provisions of EU law make such an approach undesirable and sooner or later unfeasible. The ACVZ would therefore recommend that if it is decided to proceed with external processing, the concept should be developed at EU level.

Recommendation 1:
If the decision is taken to develop external processing, it should be done at EU level.

External processing may take a number of forms. One option is for the EU to create a legal framework, while either the member states or an EU organ are responsible for implementation. In both cases, legislation on the subject must be designed and adopted. Another option would be for the Netherlands to develop external processing together with other member states without an EU legal framework. Drafting EU legislation on external processing is hampered by the fact that it is unclear whether the current TFEU provides a sufficient basis for such legislation. This means that amendments to the Treaty may be required. In addition, all forms of external processing are hampered by uncertainty regarding the responsibility of EU member states and other actors involved.

This does not necessarily mean that until the Treaty is amended no steps can be taken towards establishing external processing. But to do so, a number of enabling factors are required which at present do not exist. For example, further harmonisation of the qualifi-

cation standards is needed as well as criteria for distributing persons eligible for international protection among the member states.

Recommendation 2:
Until there is clarity concerning the legal basis for EU action in the area of external processing, focus on achieving the conditions for external processing, including harmonisation of European asylum policy and a quota arrangement for the distribution of persons in need of international protection.

ANNEXE I

Related terms

There are a number of terms whose meaning is partly the same as or is linked to the concept of external processing: 'protected entry procedures' (PEPs), 'resettlement', 'pre-entry clearance', 'protected transit zones' and 'burden-sharing'. Some authors refer to the 'outsourcing' of asylum applications.[131]

These terms all have one element in common: the mere fact that a person seeks asylum in a particular state does not in any way establish that state's responsibility for protecting the person in question. The reason for this is that the application is always submitted outside the territory of the state in question. As Thomas and Hans Gammeltoft-Hansen put it, there is a division between the right to an asylum procedure and the right to asylum or international protection.[132]

PEPs would allow asylum seekers to submit an application for international protection to EU member states outside their borders. Once a positive decision is given on such an application, following an exploratory or definitive evaluation, the person would be given access to the member state. In contrast to external processing, it is unclear in these procedures where and in what way the procedure will take place. A minimal form of PEP strongly resembles diplomatic asylum, where a foreign national can seek asylum at a country's embassy or consulate.[133]

Resettlement can fall under this heading. In its most extensive form, whereby the asylum seeker can move to a centre outside the EU for a full assessment of his/her application, it is comparable to external processing. Under resettlement policy, states may allow migrants entry after UNCHR has determined in a transit country that they are eligible for refugee status. Unlike in the case of external processing, it is not the state that ultimately offers protection which assesses the application for such protection but UNHCR. The state which then processes the application for resettlement may refuse that application without the applicant having a legal remedy against that decision. Eighteen states conduct an active resettlement policy.[134] To date, the United States have taken in the largest number of refugees: almost 50,000 in 2008, 75% of all resettled refugees.[135] In addition to the national asylum procedure, the Netherlands has adopted a quota of 500 places for

131 T. Gammeltoft-Hansen, *Outsourcing Migration Management: EU, Power, and the External Dimension of Asylum and Immigration Policy*, DIIS Working Paper no. 2006/01.

132 Thomas and Hans Gammeltoft-Hansen, 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' *European Journal of Migration and Law*, 2008, p. 456.

133 A 2003 report commissioned by the European Commission discussed such a procedure: see Noll et al., *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and Goal of a Common Asylum Procedure*, Brussels, 2003.

134 Migration Policy Institute, *Study on the feasibility of setting up resettlement schemes in EU Member States or at EU level, against the background of the Common European Asylum system and the goal of a common asylum procedure*, 2003, p. vii.

135 UNHCR, *UNHCR Global Resettlement Statistical Report 2008*, 2009, p. 6. It should be noted that the US and Canada hardly grant any asylum applications outside the resettlement procedure; see James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge, 2005, p. 157.

the resettlement of recognised refugees.[136] The reasons for adopting a resettlement policy are varied. Originally, resettlement was a way of proportionately sharing the burdens and responsibilities of international protection. A second reason has more to do with refugees who cannot enjoy durable protection in the first country in which they were granted asylum. A third and increasingly important reason is a strategic one, based on the idea that increasing the number of resettlement places will lead to a decline in the number of persons seeking asylum in EU member states on their own initiative.[137] This is in line with migration management policy, but there is no evidence that more resettlement means less undocumented migration.[138]

Pre-entry clearance is a form of immigration control, whereby an official of the state in question determines at an airport or seaport outside the territory of the state whether a foreign national has a right to access to that state. In such cases, the official applies the national law of his/her state extraterritorially. The emphasis in this method, unlike in external processing, is on border control and not on international protection, and it has been criticised on these grounds in the past.

The terms protected transit zones or regional protection areas refer to areas outside the EU where migrants could safely reside. Comparable terms are 'protection in the region' and 'safe third countries'. Alongside reception in third countries and return to the country of origin, protection in the region is one of the three durable solutions repeatedly proposed in international asylum law.

Burden-sharing is usually termed 'responsibility-sharing' by NGOs.[139] It consists largely of measures to distribute asylum seekers among the various countries. These may take the form of funding or quotas. In financial burden-sharing (or 'money-sharing') other countries may offer support. In 'people-sharing', a mechanism is established to distribute asylum seekers among the countries according to a certain formula.

As is clear from the foregoing, external processing combines elements present in other concepts in international refugee law: the opportunity to submit an asylum application in a safe area outside the EU and if it is accepted to be granted access to the EU.

136 See Ministry of Justice, *Beleidskader hervestiging 2008-11* (2008-2011 Resettlement Policy Framework), The Hague, 2008, p.2. The framework can be found at http://www.justitie.nl/images/. For a further explanation see Dutch Refugee Council, *Vluchtelingen in getallen nader beschouwd* (Further consideration of refugee numbers), Amsterdam, 2009, p. 4; available at http://www.vluchtelingenwerk.nl/pdf-bibliotheek/.

137 Executive Committee of the High Commissioner's Programme, Standing Committee, *The Strategic use of Resettlement (A Discussion Paper Prepared by the Working Group on Resettlement)*, WGR/03/04/Rev3, 3 June 2003, para. 26.

138 J. Van Selm, 'The Strategic Use of Resettlement: Changing the Face of Protection', *Refuge* 2003, p. 44.

139 See the recent study commissioned by the European Parliament, Thielemann c.s., *What system of burden-sharing between Member States for the reception of asylum seekers?*, Brussels, 2010, available at http://www.europarl.europa.eu/activities/committees/studies/.

ANNEXE 2

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Composition of the Advisory Committee on Migration Affairs as of 1 May 2010

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Vice-chairperson:
- mr.dr. H.H.M. Sondaal, former Dutch ambassador

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- prof.mr.dr. C.C.J.H. Bijleveld, senior researcher at the Dutch Institute for Crime and Law Enforcement (NSCR), professor of criminological methods and techniques at the Free University of Amsterdam
- prof.mr. P. Boeles, emeritus professor of Migration Law
- drs. R.J. Glaser, advisor for strategic policy recommendations and government strategy, Glaser Public Affairs
- dr. M.S. Menéndez, member of the Board of Directors of The Hague University
- prof.dr. W. Shadid, emeritus endowed chair professor of intercultural communication attached to the University of Tilburg and the University of Leiden.
- prof.mr. dr. A.B. Terlouw, professor of sociology of law, Radboud University Nijmegen
- dr. L.H.M. van Willigen, physician, consultant on health care for refugees and human rights

Secretary:
- mr. W.N. Mannens

Annexe 3

Acronyms

CAT	Convention against Torture
ComAT	Committee against Torture
ECtHR	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
HLWG	High Level Working Group
IOM	International Organization for Migration
ICCPR	International Convention on Civil and Political Rights
JHA	Justice and Home Affairs
MVV	authorisation for temporary stay
NGO	non-governmental organisation
OJEC	Official Journal of the European Communities
OJEU	Official Journal of the European Union
PEPs	Protected Entry Procedures
UNHCR	United Nations High Commissioner for Refugees
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union

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