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Lavenex, Sandra

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2 The cat and mouse game of refugee externalisation policies

Between law and politics

Sandra Lavenex

Long considered a matter of domestic affairs and a genuine prerogative of the state, refugee policy has evolved into a matter of foreign affairs. This evolution has altered the relationship between law and politics, refugee rights and states' discretion in refugee policy. As a matter of domestic affairs, liberal democracies have strongly codified their refugee policy in national and international law, thereby circumscribing the scope for political intervention. In foreign affairs, in contrast, legal norms have limited reach. As a result, politics tends to trump legal constraints, and a widening gap has emerged between what liberal democracies conform to on their territory and what they do elsewhere.

This chapter examines the interactions between the evasion of legal constraints by liberal democracies through externalisation strategies, as well as their legal efforts to catch up with these developments. This interaction is often depicted as a 'game of cat and mouse', in which states attempt to circumvent their legal obligations, stimulating normative action on the part of legal activists and courts which may spur an expansion in jurisprudence. However, this normative expansion rarely remains uncontested and often inspires new evasion practices. Refugee law's advances into the realm of foreign policy thus constitute legal evasion. While refugee policies spread beyond state borders, legal expansion remains limited in scope, and its substance falls well below the standards of the rule of law that were once at the core of the post-Second World War refugee regime.

After briefly introducing the notion of refugee externalisation policy, this chapter identifies four stages in the evolution of this phenomenon from its emergence in the 1980s until today. This analysis draws on the distinction between entities in charge of refugee policy (authority) and where refugee policy takes place (territory). A change of stage occurs when the constellation between law and politics, authority and territory is changed. Accordingly, refugee externalisation policy started with unilateral policies of non-admission exercised by liberal democratic destination countries on their own territory (for example visa policies and safe third country rules). They then moved to collaborative policies of non-arrival exercised by destination countries in cooperation with third countries on both territories

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(for example carrier sanctions, deployment of liaison officers in third countries and readmission agreements). Externalisation policies then evolved into delegated policies of non-arrival, in which destination countries delegated authority to third countries for measures taken on the latter's territory (by providing training, funding and policy transfer to third-country officials). Finally, in the current stage, externalisation has culminated in outsourced policies of non-departure, in which both authority and territory concentrate in the region of origin of refugees, under strong mobilisation of international organisations and NGOs. In essence, this latest stage of externalisation consists in the redefinition of the international community's responsibility towards refugees. In contrast to the post-Second World War refugee regime, which anchored responsibility with the destination country and conceived of protection in terms of re-establishing the legal status of the individuals concerned, externalisation policies promote an approach that diffuses responsibility across countries and actors. In this approach, protection is re-defined away from a legal individual status towards the state, into support for livelihoods and development opportunities for both host and refugee communities in the regions of origin of refugees.

Externalisation and responsibility in the international refugee regime

The notion of refugee policy externalisation takes its point of departure in the traditional architecture of the international refugee regime. Under the international refugee regime, the state on whose territory or at whose border an asylum seeker presents has the responsibility for providing access to an asylum procedure (Goodwin-Gill 1996). The dominant mode to seek asylum under the 1951 Geneva Convention has been spontaneous arrival in the destination state, and protection has taken the form of territorial asylum in that state. Except in ad hoc resettlement schemes, international cooperation and responsibility sharing have remained aspirational at best. No binding rules regulate the rapidly expanding realm of foreign refugee policies.

The anchoring of legal responsibility in state sovereignty and the absence of cooperative norms open opportunities for states to evade their commitments through foreign policy. 'Refugee externalisation policy' thereby develops a double meaning. The first meaning denotes the *territorial externalisation* of refugee protection on the part of the destination country towards other countries, usually transit countries or the first countries entered after flight. Newer developments point at the extension of externalisation towards the territory of the source country itself. So-called inland flight alternatives and 'safe zones' in the country of origin have entered the repertoire of refugee policies, whereby turning into internally displaced persons (Ni Ghráinne 2020). The second meaning of 'refugee externalisation policy' expresses *legal externalisation.* This denotes the process by which the authorities in the destination country seek to evade responsibilities under refugee

law, shifting the refugee beyond the reach of this country's jurisdiction and eventually beyond the scope of law altogether. Both the territorial and legal dimension of externalisation can go together but, as we will see, need not.

Even though refugee law places responsibility for protection with the country where the refugee seeks asylum, this responsibility is not a duty of the state, but a right to grant asylum. This right to grant asylum derives from a states sovereign right to control admission into their territory (Goodwin-Gill 1996:172ff). This is in contrast with the letter of the 1948 Universal Declaration of Human Rights which provides that 'everyone has the right to seek and enjoy in other countries asylum from persecution' (article 14). Despite several attempts, this right to seek asylum has never been included in a legally binding instrument, nor has it been matched with a right to obtain asylum.[1]

In order to specify the scope and implications of refugee externalisation policies, it is useful to distinguish state responsibilities regarding the *access to asylum* determination procedures from the *rights in asylum*, i.e. once a person has been granted refugee status. Most of the literature on the topic focuses on the first aspect, while the second has hitherto been much less examined. The focus on access is expressed in the early notions of externalisation in terms of 'remote control' (Zolberg 1997) or policies of 'non-entrée' (Hathaway 1992). From a legal perspective the main constraint on state sovereignty to admit a person on its territory is the principle of *non-refoulement*. This principle is defined in article 33 of the 1951 Convention and has been codified in numerous international human rights treaties including the 1984 UN Convention Against Torture (article 3), the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance (article 16) and various regional conventions (Chetail 2019:194ff.). In short, the principle provides that no person shall be returned to any country where he or she fears persecution or serious human rights violations, irrespective of legal status. Referred to as the 'principle of civilisation' (Grahl-Madsen 1982:438), the principle of non-refoulement is now generally considered to be part of customary international law (Chetail 2019:120; Goodwin-Gill and McAdam 2007:345ff.). In the absence of a right to asylum, this principle plays a pivotal role in the international refugee regime and has been interpreted as implicitly requiring from states a de facto duty to admit the refugee' on their territory (Goodwin-Gill and McAdam 2007:384; Hathaway 2005:301). As will be discussed below, a predominant feature of refugee externalisation policies and the focus of most literature on the topic is the redefinition of this relationship between state territory, responsibility and judicial accountability towards asylum seekers and refugees.

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Access to protection is a necessary condition for an international refugee regime, yet it would be meaningless without a definition of the substance of protection, which is the second aspect of externalisation policies. While states have consistently opposed a duty to grant asylum, they have gone quite far in determining what their right to grant asylum actually encompasses.

This is codified in the 1951 Convention which 'provides an incremental continuum of protection' in which entitlements expand, the longer the refugee remains in the territory of the asylum country (Chetail 2019:178 see also Hathaway 2005). Entitlements range from non-discrimination between and among refugees, access to courts, administrative assistance, the issuance of identity papers and travel documents, the prohibition of penalties for illegal entry or presence, protection from expulsion and non-refoulement, to more encompassing ones such as the right to take up employment or work as self-employed, the right to move freely within the territory of the host state and the facilitation of refugees' naturalisation (Chetail 2019:179). Even though the Geneva Convention provides for a cessation clause, classically, obtainment of refugee status has entailed an unlimited right of residence in the asylum country.

One can summarise that externalisation policies denote the policies by which state parties to the 1951 Convention seek to circumvent their legal commitments, by shifting territorial and legal responsibility for admitting and hosting refugees towards countries of transit and origin. An important aspect in this dynamic is that legal commitments as well as protection standards in these third countries are lower. Indeed, most of them are not or are only partially bound to the 1951 Convention, which facilitates externalisation and allows for the hosting of refugees at lower costs.

Four stages of refugee externalisation policies

By externalising their refugee policies, rich liberal democracies seek to evade their responsibilities under refugee and human rights law by mobilising the authority and territory of other states, typically states that have not ratified the 1951 Convention or have less inclusive asylum regimes. In retracing the shifting landscape of refugee externalisation policies from the 1980s until today, this section draws a distinction between the agent, i.e. who exercises authority towards an asylum seeker and under which jurisdiction, and the locus of the policy, i.e. on which territory the policy takes place. On this basis four stages of refugee policy externalisation can be distinguished. The first stage are *unilateral policies of non-admission*, adopted by the destination country on its own territory and under its own jurisdiction. The second stage are *collaborative policies of non-arrival*, conducted by the destination country in shared authority with a third country of transit either on the territory of that country or on the high seas. The third stage consists of *delegated policies of non-arrival*, whereby authority over the asylum seeker is delegated to the third country on its territory (or the high seas), beyond the jurisdiction of the destination country. The latest stage of refugee externalisation policies can be termed *outsourced policies of non-departure*, whereby asylum seekers are kept in their region of origin in so-called countries of first asylum or within 'safe zones' in their home country. With each stage the relationship between legal rights, authority

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and territory becomes weaker. Policies of non-departure privilege development assistance and operational support to public authorities in countries of first asylum or so-called 'safe areas' that are within the country of origin, while promoting host societies' and refugees' self-reliance. In doing so, policies of non-departure shift the notion of refugee protection away from one in which state authorities re-establish a person's individual rights based on legal status and judicially enforceable entitlements, towards a more general policy of humanitarian and development support for host communities and refugees alike.

Unilateral non-admission

While refugee externalisation policies look back on a long history (FitzGerald 2020), under the post-Second World War refugee regime the first type of 'non-entrée' (Hathaway 1992) policies were unilateral measures adopted by wealthy liberal destination states precluding admission to their asylum systems. This trend started with the imposition of visa requirements on countries producing refugees and irregular migrants from the 1980s onwards (Mau et al. 2015). Together with the refusal to offer visas for the purpose of demanding asylum (Hathaway and Gammeltoft-Hansen 2015:244), unless they can be granted a visa on other grounds, asylum seekers from practically all refugee-producing countries are precluded from lawfully entering a country to ask for asylum. In order to enforce visa requirements, countries have also introduced sanctions on carriers transporting migrants lacking the required documents, thereby externalising immigration control to private actors (Guiraudon and Lahav 2000).

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Also from the 1980s onwards, states have expanded the grounds for non-admission to asylum procedures by determining that asylum seekers could be returned to 'safe third countries', where they would be safe from persecution even if they had not been granted asylum there (Lavenex 1999). In 1986 Denmark became the first state to introduce this practice, and the 1990 Dublin Convention then generalised this practice to all EU members and associated states such as Norway and Switzerland. The Dublin Convention (later turned into EU Regulation) and EU Asylum Procedures Directive of 2004/2011 allow member states to apply the safe third country rule to non-EU countries according to national legislation, which most of them do. Reform proposals tabled in 2016 provide for a mandatory European safe third country rule that would take precedence over the Dublin system of responsibility allocation within the EU, and be based on a yet to define common list of such third countries (Lavenex 2018). While Europe can be seen as a precursor of the safe third country rule, Australia followed suit in 1994. Applying it to Canada since 2004, the US recently declared Mexico, Guatemala, El Salvador and Nicaragua as 'safe', thereby preventing 'most foreigners arriving at the U.S. southern border from being able to seek asylum if they had passed through another country' (FitzGerald 2020:9).

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In parallel with these legal developments, destination states have tightened their border control practices in an effort to thwart unauthorised immigration. Although refugee law specifies that access to an asylum procedure must be given regardless of illegal entry (article 31 (1) Geneva Convention), strict enforcement practices at land and sea borders have gone along with the multiplication and systematic exercise of 'push-backs', that is refusals of entry and expulsions without any individual assessment of protection needs, with high risks of refoulement (Council of Europe 2019). Aware of their obligations under refugee and human rights law, where possible states have shifted these practices beyond their jurisdiction to the high seas, an international zone under international law. The first documented explicit push-back policy in international waters initiated with the US against Haitian boat refugees in 1992, with Australia, European and also some African countries following suit (Hathaway and Gammeltoft-Hansen 2015:245). States' attempts at sealing the seas have been circumscribed by civil society actors providing humanitarian aid and rescuing migrants and refugees in distress. In reaction, states have not only closed their ports to rescue ships but also introduced legislation criminalising humanitarian aid (Carrera et al. 2018).

In the absence of an equivalent to international waters, a particularly inventive unilateral move to evade normative constraints on land has been the exclusion of critical spaces such as airports, harbours, coastlines and island or so-called transit border zones from a country's territory for the purpose of protection (Basaran 2008). These transit zones have been defined as 'an area that its host nation state places outside of its territory for the purpose of some local laws, leaving other such laws and applicable international obligations in force'. Such 'special international zones' constitute a subterfuge by which states avoid fulfilling their obligations under human rights and refugee law. Usually created by mere administrative decree, these zones allow states 'to roll back human rights while leaving police powers in place', or considerably augmenting them (Bell 2018:277, 291). A particular case of extraterritorial zone practised by the US is the transfer of asylum seekers intercepted by sea to the Migrant Operations Centre on Guantánamo Bay for the asylum determination procedures. As Guantánamo falls outside the statutory definition of 'the United States' under the Immigration and Nationality Act, its provisions do not apply there, and asylum seekers cannot avail themselves to the protections set out in the US Constitution, and are precluded from accessing legal advice, administrative appeals or judicial review (Ghezelbash 2020:8).

Some legal scholars have argued that the notion of extraterritorial 'fictions' has 'simply been rejected' (Hathaway and Gammeltoft-Hansen 2015:247) and refer instead to corresponding judgements by the European Court of Human Rights and the High Court of Australia for direction.[2] However, these practices persist, and find new expressions in detention centres or 'hotspots' established at the EU's external borders (Markard and Heuser 2016).

In a recent article, Daniel Ghezelbash characterises these legislative moves as instances of 'hyper-legalism': 'a formalistic bad-faith approach to interpreting and implementing international obligations. It allows states to claim ostensible compliance with the letter of international law, while at the same time subverting its purpose and substance' (Ghezelbash 2020:5). Beyond legislative imaginativeness, states have also returned to very basic means of unilateral border enforcement with the erection or fortification of physical fences such as at Ceuta and Melilla in 2005, between Turkey and Greece (with EU funding) in 2011, at Hungary's southern borders in 2015, and at the US-Mexican border.

While unilateral non-admission policies continue to flourish, some of them have faced practical and legal constraints, prompting states to find new ways to evade their legal obligations. In practical terms, implementation of the safe third country rule, the return of asylum seekers and unauthorised migrants, and also the difficulty to unilaterally patrol the border have motivated a wide range of bilateral arrangements to ensure the cooperation of third countries. These practical needs have been backed by legal developments. A key judgement compromising the unilateral application of the safe third country rule was the ruling of the German Constitutional Court of 1996, which provided that German authorities denying admission on grounds of this rule were bound to establish the possibility of effective protection under the 1951 and European Human Rights Conventions in that country (Lavenex 1999, 2001).[3]

Cooperative non-arrival

From the mid-1990s onwards, rich destination countries of asylum seekers and refugees have turned to foreign policy in seeking to secure the cooperation of countries of transit in minimising arrivals of asylum seekers on their territories.

In Europe, cooperative non-arrival policies started with the adoption of the safe third country rule in the 1990 Dublin Convention and the first readmission agreement between the Schengen states and Poland signed in 1991. This marked the beginning of an expanding web of intergovernmental and EU-led cooperation involving policy transfer, training, equipment, financial aid, deployment of border officials, operational cooperation and joined enforcement including through cooperation arrangements with the EU's border control agency Frontex. Originally limited to candidates qualifying for EU membership, this cooperation was widened to other EU neighbourhood countries and countries further afield via the European Neighbourhood Policy launched in 2004 and the EU's New Partnership Framework adopted in 2016 (Lavenex 1999; 2006; 2018). A key instrument in this cooperation has been the conclusion of readmission agreements with third countries allowing for swift and un-bureaucratic (forced) returns. Given that the EU insists on committing third countries to also take back non-nationals staying

irregularly in a member state, it has had to mobilise substantive incentives to gain the cooperation of these countries. These incentives reach from technical cooperation and development aid to visa facilitations, enhanced cooperation in so-called mobility partnership and, most recently, trade facilitation (Jurje and Lavenex 2014).

In the US, the start of cooperative policies of non-arrival is associated with the operation 'Global Reach' which in 1997 deployed US immigration officers in several Central American and Caribbean countries to assist local authorities in migration control operations (Hathaway and Gammeltoft-Hansen 2015:249). In the Pacific, cooperation between Australia and Indonesia on immigration control started in the late 1990s. Starting with the transfer of technology and migration control policies, cooperation involved paying the Indonesian government for detaining asylum seekers awaiting resettlement and soon developed a wider scope with the 2000 Regional Cooperation Agreement and the 'Pacific Solution' adopted between 2001 and 2007 and again since 2013 (Nethery and Gordyn 2014; Dastyari and Hirsch 2019).

The Australian model of extraterritorial processing and detention departs from earlier forms of push-back conducted by the US or European countries insofar as Australia can forcibly transfer any asylum seekers and migrants seeking to enter Australia without valid authority by boat to other sovereign countries (predominantly Nauru and Papua New Guinea). Because no prior connection between the asylum seekers with these countries is required, the practice can be termed (safe) 'fourth country' policy (Bar-Tuvia 2018). While Australia has been paying Indonesia to detain asylum seekers on its territory, in Nauru and Papua New Guinea it has established so-called asylum processing centres itself. Established in 2001, the facilities on Nauru and Papua New Guinea's Manus Island were temporarily closed in 2008, before becoming operational again in 2012. Since 2012, refugees and asylum seekers transferred to Nauru and Papua New Guinea by Australia have been processed pursuant to Nauruan and Papua New Guinean law, 'purportedly placing the procedures completely outside the scope of Australian legislative and constitution legal protections' (Ghezelbash 2020:10), and under the administration of private companies paid by Australia (O'Brien 2016). Accusations of gross human rights violations in these centres are numerous; however, the High Court of Australia has repeatedly maintained the legality of the arrangements (*Plaintiff S156/2013 v. Minister for Immigration and Border Protection & Anor* (2014) 254 CLR 28). Open centre arrangements were introduced in Nauru in 2015, providing asylum seekers and refugees the opportunity to leave the closed facilities on the island and to enter the Nauruan community. In the absence of a supranational court comparable to the European Court of Human Rights and due to limited human rights protection under the Australian Constitution (Dastyari and O'Sullivan 2016), it was finally the Papua New Guinea Supreme Court which hastened the end of the closed detention facility on Papua New Guinea's Manus

Island by unanimously declaring it to be unconstitutional (*Namah v. Pato* [2016] PGSC 13 (26 April 2016)), although closure was ultimately a political decision made more than a year later. This ruling is remarkable insofar as it stems from a country that has acceded to the 1951 Convention only in 1986, has no working asylum legislation and has never ratified central human right treaties such as the International Covenant on Civil and Political Rights or the Anti-Torture Convention. Although Australia has officially ceased detaining refugees and asylum seekers in closed detention facilities in Nauru and Papua New Guinea,[4] refugees and asylum seekers transferred to the two countries by Australia continue to be denied access to Australian territory except in exceptional cases such as for health care. While some refugees from the two countries have been resettled in countries such as the US and Canada, others remain in the community in Nauru and Papua New Guinea.

'Safe third' or 'fourth' country practices have kept proliferating and in this process the notion of 'safe' has progressively been watered down. In the Australian context, Nauru and Papua New Guinea are exceptions in having ratified the 1951 convention; however, Cambodia, Indonesia, Malaysia and other countries in the region towards which Australia has been returning asylum seekers are not. As elaborated in detail by Bar-Tuvia (2018), Israel is another country perpetuating systematic push-backs at its borders and has struck secret deals allowing for the transfer of asylum seekers to 'fourth' countries such as Uganda and Rwanda which, although party to the 1951 Convention, hardly provide protection qualifying as 'safe' by Western liberal standards.

Under the impression of a crisis of the European asylum system, related practices have also diffused to Europe, a self-declared vanguard of human rights (Lavenex 2018). A case in point is the 2016 deal with Turkey which provides that asylum seekers who enter Greece via Turkey shall be returned to Turkey on the ground that it is a 'safe third country'. Not only is the deal not legally binding, thereby limiting the reach of judicial control, it has also been found by the EU Court of Justice to be 'not attributable' to an EU institution – despite being recurrently presented by the EU Commission and the Council as an 'EU' deal.[5] Hereby the deal is shielded from the jurisprudence of the EU court. This however is problematic, as Turkey maintains the geographic limitation to the Geneva Convention and therefore excludes Syrian refugees from refugee status under the Convention. This contrasts with the criteria of a 'safe third country' laid down in the EU Asylum Procedures Directive, and therefore run counter to EU law. The current EU Asylum Procedures Directive defines as 'safe', a country in which asylum seekers encountered 'the *possibility to be recognised as a refugee*, and, if so, to receive *protection in accordance* with the Geneva Convention' (Art. 38(1)e EU Asylum Directive, emphasis added). The EU Commission and its member states are well aware that Turkey does not fulfil these conditions. The reform proposal for an Asylum Procedures Regulation tabled in 2016 significantly

waters down the criteria for determining a country as safe and merely stipulates: 'the possibility to receive *protection in accordance with the substantive standards* of the Geneva Convention' (Art. 45(1)e, emphasis added) – and no longer the formal refugee status guaranteed by the Geneva Convention. This reformulation opens the door to the designation of all those countries in the EU's neighbourhood that have not ratified or implemented the 1951 Convention but where safety is presumed on other grounds. Notwithstanding this legal extension of the safe third country rule, it is long documented that EU countries practise systematic push-backs to countries which manifestly cannot be taxed as 'safe', such as Libya – a country in the midst of civil war regularly accused of grave abuse of refugees and migrants.

As for the unilateral practices of non-admission, cooperative push-backs have not remained unchallenged by the law. In a much regarded case, the ECtHR held in its so-called Hirsi judgement (*Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97) that the norm of non-refoulement applies also extra-territorially in international waters. In this concrete case, Italy was found liable under the ECtHR even though it was operating the push-backs in international waters with the cooperation of Libyan officials, because the applicants were under the 'de facto and de jure control of Italian authorities'. With this dissociation of the functional scope of the norm of non-refoulement from the territorial scope of members states' jurisdiction, the ECtHR went beyond an earlier US judgement that denied the extraterritorial applicability of the norm (*Sale v. Haitian Cntrs. Council, Inc.*, 509 U.S. 155 (1993)). Legal interpretation and jurisprudence has thought to have caught up with the political evasions from normative commitments also by other means, namely by widening the choice of legal instruments from which to draw in condemning state practices. A salient evolution is the treatment of asylum and in particular refoulement cases by human rights treaty bodies, including the Human Rights Committee, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women and the Committee against Torture (Chetail 2019:194f.). Other new sources of law mobilised to counter the exploitation of legal loopholes in the high seas are the Law of the Seas, with its duty to rescue (Bhargava Ray 2020), or, for forced deportations and detention more generally, international criminal law (Chetail 2016).

These legal developments, in particular the 2012 ECtHR Hirsi case, have promoted new practices to evade legal constraints. In short, these practices rest in a stronger responsibilisation of the third countries of transit of asylum seekers and refugees, thereby moving externalisation outside the scope of destination states' jurisprudence.

Delegated non-arrival

The shift from cooperative to delegated non-arrival policies is most visible in the Italian and EU reactions to the Hirsi judgement. Rather than

stopping the illegal push-backs, Italy and allegedly Malta have resulted to indirect techniques of financial, logistical, legal and technical assistance and training of Libyan authorities and militias, thereby moving to 'contactless control' (Giuffré and Moreno-Lax 2019) and 'breaking the legal link' with their own jurisdiction (Müller and Slominski 2020). These bilateral practices receive support from EU institutions in the form of material capabilities and training including through the Frontex operation 'Sophia', the EU Border Assistance Mission in Libya (EUBAM), the Trust Fund for Africa, the 'Seahorse Mediterranean Network program' and through support for the establishment of a Libyan search and rescue (SAR) Region, including the creation of a Libyan Maritime Rescue Operation Centre. Hereby the EU has also helped establish the legal requirements for granting Libyan forces authority over maritime operation in their SAR region, allowing it at the same time to gradually suspend its direct involvement in extraterritorial maritime operations. Additional measures to 'break the legal link' with European destinations include manipulation of the ship's flags, place of registration and ownership. In parallel, states have started obstructing private safe and rescue operations by civilian actors and have passed legislation criminalising the action of humanitarian NGOs (see above).

As with the Turkey deal discussed above, arrangements with Libya are purely soft law, based on a non-legally binding Memorandum of Understanding (MoU) signed between Italy and the Libyan Government of National Accord in 2017. Unlike its predecessor, the 2008 Treaty of Friendship, the MoU is not legally binding and was adopted without the formal approval of the Italian parliament. The legal contestability of the Memorandum is further undermined by its rather generic and imprecise language which further reduced the potential accountability of Italian actors. While like for the Turkey deal, the EU is not party to the agreement, it has endorsed the MoU in its legally non-binding Malta Declaration of the same year and sustains its implementation with various activities mentioned above.

Hereby, the practice of non-arrival policies via cooperative *push-backs* was transformed into a practice of delegated *pull-backs*, whereby the third country becomes responsible for obviating access to asylum systems. In the current international system, these countries of transit constituting the 'buffer zone' towards the wealthy liberal democratic destination countries also happen to be less liberal and less democratic, and therefore less constrained under international refugee and human rights law.

These developments at Europe's borders have many parallels with the Australian case. As pointed out by Ghezelbash (this volume) the Australian government distinguishes between 'turn-backs' and 'take-backs', whereby the latter 'involve the direct transfer of intercepted asylum seekers to the sovereign authority of the country of departure'. In the absence of supranational jurisprudence, the 'legal link' with Australian authorities has not been undermined, as Australian government vessels remain involved and Australian authorities participate together with military and coast guard

officials from the third countries in the returns. An interesting practice has developed with Indonesia that is motivated less by legal than by political constraints. As Indonesia has refused to admit returned boats, Australian border guards have gone over to return asylum seekers only to the edge of Indonesian territorial waters, 'where they are directed to make their own way back to Indonesia' (Ghezelbash this volume).

In promoting cooperative and delegated policies of non-arrival, destination countries have quickly realised that push-backs and pull-backs necessitate reception capabilities on the part of the transit countries. Externalisation policies have therefore moved behind the border of the partner countries. They now include next to the strengthening of border control capacities also infrastructure and facilities to host returnees, as well as support for the conclusion of readmission agreements with countries further down the migration routes. As part of its 'Global Approach to Migration' the EU has been supporting regional protection programmes hosting refugees in Eastern Europe and Africa since 2005. Set up with the aim to promote 'durable solutions' to the refugees, the emphasis of these programmes has been the promotion of voluntary returns to home countries and local integration in the host region (European Commission 2005). In a similar move, the EU has supported Turkey with more than 6 billion euro for the containment and hosting of refugees under the EU-Turkey Deal. In Libya, return operations in the Mediterranean have gone along with increasing support for detention centres, and an effort to repatriate stranded migrants and asylum seekers to their home countries.

A comparable shift from migration control cooperation and delegation to support for reception capacities in transit countries is also observable in Australian externalisation practices. In Nauru and Papua New Guinea, such support has become necessary after the dissolution of the closed asylum processing centres, while in Indonesia, Australia has been financing immigrant detention centres and migrant care programmes via the IOM since 2001. As pointed out by Missbach (this volume), after Australia's withdrawal from these programmes in 2018, Indonesia has decided to abolish the detention centres and to support migrants through community shelters instead, however without providing the necessary funding nor introducing measures to address the special needs of asylum seekers and refugees.

The responsibilisation of third and transit countries of migrants and asylum seekers has gone along with the establishment of a dense network of plurilateral initiatives commonly dubbed Regional Consultation Processes (RCPs). RCPs have proliferated on all continents from the mid-1990s onwards and play a key role in the diffusion of migration control practices and the fight against human smuggling and trafficking. Presented as informal consultative mechanisms, the vast majority of RCPs are in fact dominated by rich destination countries and act as venues for the transfer of policies, capacities and ideas. European countries have established such transgovernmental networks with their Eastern, Southern and African neighbours.

The EU sponsors RCPs among African countries via the IOM, the US promotes strict migration policies through the Puebla process in the Americas, and Australia, although formally sharing the lead with Indonesia, dominates the Bali Process in Southeast Asia (Lavenex 2018).

As these developments show, cooperative and delegated non-arrival policies move further and further into the territory of third and transit countries. The result is a shifting geography of border controls and an increasing approximation of non-arrival with non-departure practices.

Outsourced non-departure

Non-departure policies comprise all measures whereby asylum seekers are dissuaded and hindered to depart from one country to reach the asylum system of another country. The intensive transfer of migration control technology implies that non-arrival policies by cooperation or delegation have moved well behind the borders of transit countries, and involve measures deep inside the latter's territory. These countries then need to accommodate growing numbers of stranded asylum seekers and migrants. This has motivated support for new types of measures encouraging and facilitating the containment of these populations which we refer to as policies of non-departure. These policies are distinct from cooperative and delegated non-arrival because they do not target asylum seekers and migrants who have already attempted to reach the destination country, but rather people who might intend to do so.

This pre-emptive shift results in part from the limited success and considerable (human and material) costs of push- and pull-backs, but also by the 'ripples' of externalisation (Lavenex and Uçarer 2002). Transit countries' discontent with their role as a buffer zone hav[illegible]pported the extension of non-departure policies closer to the places of origin of asylum see[illegible]. Consequently, the newest generation of externalisation policies focu[illegible] promoting hosting capacities in so-called first countries of asylum, that is countries contiguous to the place of origin, or, more recently, in so-called safe zones within the territory of the source state.

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An intriguing aspect of this dynamic is the gradual shift of authority and accountability away from the destination or transit country towards non-state actors such as international organisations, NGOs and private companies acting on the basis of international soft law frameworks on delimited territories. Prime examples of this are the humanitarian packages and compacts set up by the EU with Jordan and Lebanon in the wake of the war in Syria. As instruments adopted under the EU's New Partnership Framework, the compacts stand out for coordinating across EU foreign policies in order to incentivise cooperation on the part of the third country and for attempting to strengthen the capacity of host communities to integrate refugees in their societies and labour markets. Aid concessions and trade facilitations are among the many instruments deployed to achieve these goals.

These instruments aim to transform refugee populations into opportunities for development, and to foster resilience and 'self-reliance' of displaced populations living 'as close as possible to refugees' country of origin' (European Commission 2016:3; Lavenex and Fakhoury 2021). Adopted in reaction to the large inflow of refugees to Europe following the collapse of humanitarian aid in first countries of asylum, the objective of the compacts to avert onward migration is indisputable.

Again, as with other deals struck in the context of non-admission policies, the compacts are non-legally binding instruments adopted by executive actors under circumvention of the European or national parliaments and thus outside democratic procedures. As frameworks for operational cooperation they contain only few and relatively general provisions laying down the scope of cooperation. As in the case of other deals, they promote the hosting of refugees by countries that are not party to the 1951 Convention, and which, in the case of Lebanon, openly reject the idea to give the refugees a resident status and integrate them in the host society and labour market (Lavenex and Fakhoury 2021). On the one hand, one can argue that such external incentives promote reception capacities in countries that would otherwise give only minimum support to displaced persons, and thereby promote the extension of the international refugee regime. On the other hand, these measures come at the expense of accession possibilities to established asylum systems, and entail the watering down of protection standards enshrined in the 1951 Convention. The emphasis on refugee self-reliance in the EU's New Partnership Framework and in recent international initiatives such as the Global Compacts on Refugees and Migrants add this transformation of the substance of protection, and thus the gradual dilution of refugee rights.

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Given the combination of intensifying root factors of forced migration and the decreasing commitment on the part of the international community to offer protection, the search for 'external solutions' is likely to move further away from Convention states, in terms of both territory and law. This trend suggests that the eventual move will be the establishment of 'safe zones' in first countries, i.e. within the territory of refugees' country of origin. For example, Turkish President Erdogan has advocated to establish such a zone in Syria, where Syrian refugees would be relocated. Although this proposal has hitherto not received much support, the idea of in-country protection has gained prominence as an extension of the notion of Internally Displaced Persons (IDPs) (Ni Ghrainne 2020). Another example is the increasing use of the notion of the Internal Protection Alternative (IPA) in destination states' asylum procedures. The IPA posits that an individual is not a refugee if there is a safe place within his or her country where he or she could relocate. As pointed out by Ni Ghrainne (2020:note 13), the notion of IPA does not figure in the 1951 Convention, 'but it is firmly established in the practice of states'. It is contained in article 8 of the EU Qualification Directive of 2011 and its application is likely to become mandatory if the current reform proposal is adopted (Ni Ghrainne 2020:340).

These policies of non-departure constitute a further step not only in the outsourcing of authority in the name of a vague notion of international community but also in the regression of the territorial scope of asylum to the borders or even back into the country of origin of refugees. The notion of protection itself becomes transformed away from one which is anchored in the notion of individual rights and the re-establishment of legal status, towards a much fuzzier generalised notion of community support and development aid. Driven by states' often uncoordinated foreign policies, this approach has been sanctioned by the international community through the two Global Compacts adopted on Refugees and Migrants in December 2018. While upholding the human rights of migrants, the compacts and in particular the Refugee Compact embrace the emphasis on protection in regions of origin and international cooperation focused on development aid and help for self-reliance – thereby tacitly backing the trajectory of externalisation (Gammeltoft-Hansen 2018; Lavenex 2020).

Conclusion

This chapter has retraced the evolution of refugee externalisation policies as a cat and mouse game between politics and the law in which liberal democracies gradually evade their normative commitments towards refugees. In the interplay between structures of authority and territory, the basic principles of the international refugee regime are transformed from one based on individual rights and state responsibility towards a much fuzzier notion of international support for development opportunities.

This statement is not to say that the international refugee regime establishing refugee status on the basis of individual persecution in the context of the post-Second World War period is not in need of transformation. Indeed, one may ask whether a protection regime based on group determination and support for livelihoods as close as possible to the place of origin of the refugees would not be more appropriate to today's reasons for forced migration. That being said, the externalisation policies examined in this chapter have been specifically designed as subterfuge from normative commitments rather than as modification of, or complement to, these commitments. And rather than extending the standards of protection to countries that were hitherto not party to the 1951 Convention, they tolerate and sometimes support the downgrading of protection standards, thereby depriving the notion of protection from much of its substance. Liberal democracies have hitherto been wary not to openly denounce their commitment to the international refugee regime – and indeed they recognise very well that if they want externalisation and third-country participation to work they need to uphold this vocation. This, however, implies that extending responsibility for protection to new countries and actors cannot work without maintaining responsibility in liberal democracies, and that the type of protection granted in other territories may not be in blatant contrast with what protection would mean

in these countries. Legal activists and court judgements have been instrumental in trying to maintain minimum levels of normative coherence and have mobilised universal human rights and other international law standards such as the law of the seas, when the narrower limits of refugee law were beyond reach. These islands of legal expansion may inspire a glimpse of optimism for the future of the externalisation game. In the long run, however, liberal democracies need to reconcile their politics with their legal commitments if they don't want the latter to be overtly undermined.

Notes

1 For failed attempts to enshrine a right to asylum in the negotiations leading to the 1951 Geneva Convention and later in the 1967 Declaration of the UN General Assembly on Territorial Asylum and the ensuing 1977 UN Conference on Territorial Asylum see Goodwin-Gill 1996: 172ff.
2 Amuur v. France, 17 Eur. Ct. H.R. 523, 609 (1996) and Plaintiff M61 & Plaintiff M69 v. Commonwealth of Australia [2010] HCA 41(Austl.).
3 2BvR 1938,2315/93 of 14.5.1996.
4 However, as of December 2020, nearly 300 refugees and asylum seekers were still living on Nauru and in PNG, sometimes in detention-like conditions, see https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/#:~:text=As%20of%2031%20July%202020,and%20live%20in%20Port%20Moresby.
5 Orders of the General Court of the EU in Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council of 28 February 2017.

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