Synthesis

International comparative research on access to (extra)territorial asylum and humanitarian protection

In Search of Control
Synthesis Report

Stefan Kok
Myrthe Wijnkoop

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The Clingendael Institute
P.O. Box 93080
2509 AB The Hague
The Netherlands

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Clingendael Institute

Email: info@clingendael.org
Website: www.clingendael.org

About the authors

Stefan Kok is a senior lecturer in the HBO Law programme at Leiden University of Applied Sciences and coordinator of the Migration Lab and an associate fellow of the Clingendael Institute. He was previously a senior lecturer and researcher at the Institute of Immigration Law of Leiden University and senior international policy officer at VluchtelingenWerk Nederland (the Dutch council for refugees). Stefan has very broad experience as a researcher in the field of asylum and immigration law and access to justice. He previously led projects for the European Council on Refugees on Exiles (ECRE) on European asylum procedures and responsibility sharing. In Canada, he led a project on access to justice for the Law Commission of Ontario.

Myrthe Wijnkoop is a senior research fellow at Clingendael's EU & Global Affairs Unit and a cum laude graduate in public international law and Dutch law. Her areas of expertise include international, European, and national refugee and asylum law, and the politics of asylum and migration in an EU and European context. Myrthe has more than twenty years of legal and political-strategic experience in the asylum domain from the perspective of politics, governance, civil society, international organisations as well as (policy) research. She is currently project leader of the Ukraine migration and return study and has been involved as a migration advisor in the State Commission on Demographic Developments 2050.

Contents

Introduction

Context of the research project

Currently, the number of asylum seekers[1] using unsafe and irregular routes to reach the European Union (EU) is on the rise, after an interruption caused by the COVID-19 period. Of the record-high number of 2 million asylum applications in OECD-countries in 2022, nearly one million were made in the EU – an increase of 50% compared to 2021.[2] Around 40% were granted protection status in the first instance.[3] Furthermore, over 4 million Ukrainian refugees[4] were offered temporary protection in the EU. In 2022, 330.000 migrants entered Europe irregularly, the highest measured number since 2016.[5] Mostly due to the dangerous Mediterranean Sea routes used in attempts to reach Europe, more than 28.000 migrants[6] have gone missing since 2014.[7] Migrants that do reach Europe safely are often stuck in overcrowded refugee reception facilities and are confronted with long and costly procedures resulting in protracted situations of uncertainty and inactivity.

Destination countries are facing challenges with respect to managing spontaneous (asylum)migration of persons who claim asylum at the borders or

1 In the report, some words or expressions are used frequently. The following definition for 'asylum seeker' is used in the context of this research project: a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken.

2 TPV World, "OECD countries record highest-ever recorded permanent migration in 2022," 24 October 2023.

3 EEUA, "Almost 1 million asylum application in the EU+ in 2022," 22 February 2023.

4 In the report, some words or expressions are used frequently. The following definition for 'refugee' is used in the context of this research project: 'Refugee' is used in a broader sense, indicating a person who is in need of international protection and is outside their country of origin/country of habitual residence. 'Convention refugee' specifically means a person who falls under the definition of the 1951 Geneva Convention and its 1967 Protocol.

5 Frontex, "EU's external borders in 2022: Number of irregular border crossings highest since 2016," 13 January 2023.

6 In the report, some words or expressions are used frequently. The following definition for 'migrant' is used in the context of this research project namely to refer to the wider category of persons who are outside the country of origin/habitual residence, irrespective of the reasons for leaving this country.

7 IOM Missing Migrants Project, "28,248 Missing Migrants recorded in Mediterranean (since 2014)."

inland, sometimes to avoid forced removal. Whether these persons indeed qualify for international protection needs to be determined in an asylum procedure on the territory of the state (hence territorial asylum), unless another state assumes responsibility. The spontaneous arrival of asylum seekers is stretching the capacity of both governmental agencies and local communities. Destination states' efforts to manage the influx of asykum seekers through procedures outside their territory (hence extra-territorial asylum), have so far not resulted in a more predictable influx. Responsibility sharing between destination states, countries of first asylum and transit states has also not yielded significant results in this respect. Considering the instability in the respective regions where migrants depart from, it can be expected that the number of asylum seekers in OECD countries will remain high. Asylum migration is volatile and is determined by various factors such as persecution and conflict, lack of economic perspective, and climate change. This makes it challenging for destination countries to deal with fluctuating pressure on their external borders and numbers of asylum applications.

In this light, ongoing European and national political and public debates revolve around the organisation of asylum systems and the effective implementation of migration policies to gain (more) control on migration. Clear examples are the deal between Rwanda and the United Kingdom,[8] the new Danish safe third country legislation,[9] the Italian plans to externalise its national asylum procedure to Albania,[10] and the German and Austrian announcement that they will 'examine' the possibilities of externalisation.[11]

In the Netherlands, there have recently been several parliamentary discussions on the subject matter of externalisation, with the most recent motion supported by the majority of parliament requesting the government to align with the Danish

8 Monika Sie Dhian Ho and Francesco Mascini, *Dealen met Rwanda: dilemma's bij bescherming van vluchtelingen in derde landen*, Clingendael Institute, 30 October 2023.

9 Nikolas Tan and Jens Vedsted-Hansen, "Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law," EU Immigration and Asylum Law and Policy, 15 November 2021.

10 Lorenzo Tondo, "Italy to create asylum seeker centres in Albania, Giorgia Meloni says," *The Guardian*, 6 November 2023.

11 Jessica Parker, "Germany agrees to consider UK-style plan on processing asylum abroad," *BBC News*, 7 November 2023; Rayeev Syal, "Austria to work with UK on Rwanda-style plan for asylum seekers," *The Guardian*, 2 November 2023.

government on outsourcing asylum procedures to third countries.[12] In response, the Dutch government stated that international legal obligations are the basis of the national asylum policy and that the Netherlands has to, and will, adhere to the EU asylum acquis.[13] Meanwhile, both the Supreme Court of the UK and the Australian High Court have declared (parts of) the externalisation policies of the UK and Australia respectively to be unlawful. A balance must thus be struck between upholding fundamental legal principles, such as the right to asylum and the principle of non-refoulement, and the search for control on migration.

In December 2022, the Dutch government initiated a working group focusing on the 'fundamental reorientation of the current asylum policy and design of the asylum system'. Its aim is to further structure the asylum migration process, to prevent and/or limit irregular arrivals, and to strengthen public support for migration.[14] One of the questions is whether the externalisation of the asylum procedure could be a feasible policy option through effective procedural cooperation with a country outside the EU that 'passes the legal test',[15] in other words, a country that is in conformity with international legal standards. In that context, the working group expressed the need for more insight into how other governments, with legal frameworks differing from that of the Netherlands as an EU Member State, deal with the issue of access to asylum – whether territorial or extra-territorial. This insight aims to provide ideas or angles for evidence-based policy choices by the Dutch government, both at the national and/or the European level.

Research purpose

The purpose of this comparative research project is to collect existing knowledge about the asylum systems of Australia, Canada, Denmark, the Netherlands and

12 Parliamentary documents, *Kamerstukken II*, 32317 no. 813, February 2023, submitted by Eerdmans (JA21), highlighting the promising opportunities migration partner strategies allow for. The request was additionally made for the government to engage with the Danish government with regards to moving asylum reception and procedures to partners outside of the EU. See also previously: Parliamentary documents, *Kamerstukken II*, 19637, no 2866, April 2022. This motion, submitted by Brekelmans (VVD), called on the government to work within the EU to increasingly develop migration partnerships with third countries and to contact the UK government to learn from their experiences with the Rwanda deal received a majority vote in the parliament.

13 Parliamentary documents, *Kamerstukken II*, 19637, no. 3079, March 2023.

14 Parliamentary Documents, *Kamerstukken II*, 19637, no. 3053, 23 December 2022, p. 2.

15 Central Dutch Government Information (Rijksoverheid), "Bijlage 15 BWO Presentatie deelsessie Asiel," 17 February 2023, p. 13.

the United States, and to complement this with an analysis of national legislation, policy, and implementation practices, focusing on access to (extra-)territorial asylum. This synthesis report provides a comparative analysis of the respective legal frameworks and the asylum systems of those countries, and will conclude with some reflections on potential directions for Dutch policies.

The five countries for the study are selected because of their role in the global or regional asylum context. The countries represent three regions: North America, Europe, and the Pacific, and are immigration countries that currently (claim to) face challenges in managing migration. They are simultaneously dealing with the challenges posed by an ageing population and labour market shortages and increasing irregular migration pressure on their external borders. In the global context of refugees, the five countries have a tradition of being a destination for refugees, either from their own region or from other regions. They are parties to the 1951 Geneva Convention and/or its 1967 Protocol,[16] amongst other human rights instruments and need to adhere to the principle of non-refoulement. All countries have functioning territorial asylum procedures.

While there are similar challenges and experiences, each of the asylum and refugee protection systems in the study operates in different geographical situations and political contexts.

The United States plays a central role in the western hemisphere's migration and asylum movements. It has long land and sea borders that are hard to monitor. In light of the substantial number of asylum seekers arriving at the border (2.5 million in 2023) and the scale of its programmes, the impact of US policies is very considerable, and its experiences are of importance to other blocs. The US asylum system relies on spontaneous asylum procedures, although it also has a large resettlement programme. In this, it is different from the other two resettlement countries in the study, Australia and Canada, where resettlement is the main avenue for refugee protection.

Canada is shielded by oceans and by the US, with which it has concluded a safe third country agreement. Canada is a global frontrunner and innovator in the area of resettlement and complementary pathways on labour and education.

16 The United States is still bound by most of the obligations of the Convention through its accession to the Protocol.

It also has developed strong planning instruments and conducts extensive research on migration and integration, including refugees. The Canadian asylum system is, in the first and second instance, conducted by an independent tribunal, the Immigration and Refugee Board, and there are further appeals with the courts. It has a 'single status' system, meaning that refugees under various admission grounds receive the same rights.

The Netherlands is part of a broader bloc of states, the EU, that takes in many refugees from neighbouring and close conflict countries and human rights crises. Within the EU, the Netherlands is a destination country for asylum seekers. The Dutch asylum context is greatly influenced by, and dependent on, border and asylum practices in other EU countries. Within the bloc, the Netherlands is a leader in the design of asylum procedures, but also an advocate for the Dublin system, which contains binding EU-criteria for allocating responsiblty for an asylum claim,[17] and exploring extra-territorial solutions for refugees with a group of like-minded states. The Dutch asylum system is a 'single status system' and is firmly rooted in EU asylum law. The jurisprudence of the EU Court of Justice is shaping its asylum practice. Dutch courts have been active in asking preliminary questions to this court, thus contributing to a growing body of European asylum law. This is also influencing the wider European region (Council of Europe) including Denmark and the UK, and thus for example Canada's case law on safe third countries.

Denmark, although an EU state, is only partially connected to the EU asylum system, due to its 'opt out' of the Common European Asylum System acquired after initially rejecting the Maastricht Treaty in a referendum in 1992. Although the opt out means that Denmark is exempt from EU asylum standards, in practice, Denmark is embedded in the EU bloc through its participation in the Dublin and Schengen system (an area without inner borders and shared external borders) and, as an EU Member State, through its constant relations with other EU-countries. Despite this, Denmark has some policy autonomy to deviate from EU standards, and arguably to adopt innovative approaches. In its asylum policies Denmark has moved towards the notion of temporary rather than permanent protection and integration for refugees.

17 The criteria are based on the principle that the state responsible for the entry into their combined territory – whether through granting a visa, a residence permit, or in other cases, because of being the physical point entry – is also responsible for processing the asylum request.

Australia is not part of a bloc of destination countries, placing it in a unique situation. It is surrounded by seas and oceans. Australia has experienced two peaks in the numbers of asylum seekers by sea, in 1999-2001 (up to 5,500 persons per year) and 2012-2013 (up to 20,500).[18] The country strongly responded to this and has virtually closed its borders for spontaneous arrivals via sea through Operation Sovereign Borders. This entails maritime interdictions, a system of "offshore processing" and a policy of immigration detention, sometimes indefinitely. By lack of a supranational court and due to bipartisan support of such policies, such policies are possible in Australia. If the High Court rules a certain practice unlawful, legislation is often quickly passed (retrospectively) in response to court rulings to still enable such practices.[19] As Australia's asylum system is practically only open to persons who arrive on a valid visa by air, which are solely granted to persons not originating from countries dealing with conflict and persecution, grant rates for protection claimed by overstayers have been low. In the other countries in the study, the vast majority of asylum seekers enter the asylum system via land or sea.

Central research question and focus

The similarities and differences between the five selected countries make it interesting to analyse how each of the countries provides access to asylum procedures or other legal pathways, and to which extent operational circumstances and the legal framework influence the policy choices on asylum. Through the country reports insight is provided into how destination countries navigate access to (extra-)territorial asylum in search of control on migration. Additionally, the synthesis looks at the EU system more generally since this legal framework binds the Netherlands asylum policies.

The main question answered in the national reports is: *Which instruments are applied or proposed by Australia, Canada, Denmark, the Netherlands and the US concerning or affecting access to asylum procedures and humanitarian protection?*

Therefore, the country research focuses on several central elements of the national asylum systems, including their access to, and implementation of,

18 Janet Phillips, "Boat arrivals and boat 'turnbacks' in Australia since 1976: a quick guide to the statistics," Australian Parliamentary Library, 17 January 2017.

19 In response to the Australian High Court ruling of November 8 deeming indefinite detention unlawful, the government is busy initiating legislation to still enabling such detention practices.

interdiction practices, border and asylum procedures and other legal pathways. These were put in a broader public, political and legal context, taking into account the countries national policy aims and objectives.

What lessons can be learned from those instruments? The central question for the synthesis report is: *To what extent can current or proposed national instruments in Australia, Canada, Denmark and the United States with respect to access to asylum procedures or humanitarian protection be used in an EU context considering international legal obligations, the government agencies' capacity, and public support?*

This question will be answered through an analysis of four main policy domains and/or types of instruments:

- 'Non-entry regimes', preventing spontaneous access to the asylum procedure: (1) 'general interdiction measures', (2) pushbacks and offshore processing in excised areas, (3) safe third country concept and (4) extra-territorial processing;
- Legal pathways: (5) through resettlement, (6) humanitarian visas or similar (humanitarian) legal pathways;
- Procedural measures to manage national asylum systems: (7) measures to give rapid access to protection or to discourage spontaneous arrivals: planning, funding and quota, (8) (border) procedures, detention and reception; and (9) outcomes of systems;
- Strategic communication, both aimed at an internal (domestic) audience and an external audience of asylum seekers and third countries (10).

Research methods and quality control

The study is based on desk research (examination of the applicable legislative and policy framework, an analysis of case law and a broad literature review), semi-structured interviews with national officials, organisations and/or researchers, and readily available expertise of Clingendael experts involved. An external advisory board, consisting of authoritative experts in the field of refugee and asylum law, linked to the selected countries, was set up for the purpose of peer review and quality control. The members of the board were: Nils Coleman, Elizabeth Collett, Maarten den Heijer, Madeline Garlick, Nikolas Tan, Huub Verbaten. The research has been conducted in the period July-October 2023, and has been updated with the most recent relevant developments until the 30th of November 2023.

In this synthesis report, current developments will be discussed per country first, to thereafter compare the policies of these countries along relevant themes and specific topics. A short concluding chapter will sum up the main lessons and remaining questions in an area that is rapidly developing.

Recent policy approaches in the five selected countries – an introduction

As described above, the specific geographical and political situation of the researched countries may explain varying approaches with respect to access to asylum procedures. Some countries in the study are considering, or have adopted, measures of discouragement if not outright deterrence of spontaneous asylum. In other researched countries the approaches are more mixed, combining restricted access to territorial asylum with the provision of alternative legal pathways. Canada, the Netherlands and the US face big pressures on their asylum systems, resulting in significant backlogs and long processing times. For Denmark and Australia this pressure is less.

This paragraph gives a brief overview of relevant policy developments in the various countries and provides insight into the national context of asylum legislative and policy approaches. The EU context is also highlighted as a relevant legal and policy framework for the Netherlands.

Australia

Australia's policies have since 2014 led to a drastic decline in the number of asylum seekers arriving by sea. Its main framework is 'Operation Sovereign Borders (OSB)', upheld with bipartisan support. This policy includes interception and return of irregular maritime arrivals, where safe to do so. If not, asylum seekers are put in immigration detention, either onshore in Australia, or offshore in regional processing centres in Nauru, a microstate in the Pacific. Until 2016, there were similar reception centres in Papua New Guinea (PNG), but these had to close after the PNG High Court ruled it unconstitutional. In addition, deterrence campaigns are run under OSB in transit countries to help prevent anyone coming to Australia by boat. Due to OSB, the relatively small number still applying for protection onshore has entered Australia via air. Recognition rates for these asylum seekers are low, partly because persons from conflict areas usually do not have the possibility to obtain a valid visa to enter Australia. The biggest part of Australia's Refugee and Humanitarian program offers protection through its offshore program for resettlement.

Canada

Canada has a longstanding tradition of welcoming migrants. It has a considerable resettlement scheme for refugees from other parts of the world and seeks support for its private sponsoring model. It has expanded its Private Sponsoring Programme at the expense of Government Assisted Resettlement. It has also added an Economic Mobility Pathways Pilot to its refugee resettlement scheme.

Although territorial asylum procedures are not the main avenue for asylum in Canada, the country operates an asylum procedure with significant resources and safeguards. There have been significant backlogs, for which the authorities were given more funding. After an increase of irregular entries and asylum requests, the country has successfully negotiated an expansion of the Canada US Safe Third Country agreement (STCA). The amended STCA, which came into force in March 2023, now also applies between points of entry. This means that asylum seekers who are intercepted at the borders may be sent back to the US. The Canadian Supreme Court held that the STCA was not unconstitutional but formulated legal conditions. The impact of the expanded agreement on access to asylum procedures still has to crystallise.

For Canada, part of the negotiated expansion of the Canada US Safe Third Country Agreement was a programme to grant 15,000 'humanitarian visas' for nationals from the American region, in particular from Colombia, Haiti and Venezuela.[20] Thus, Canada has followed the US programmes on humanitarian paroles, albeit under its own policies for permanent residence.

Denmark

In Denmark, territorial asylum procedures are the primary pathway for protection. Despite Denmark's opt-out from EU asylum standards, in practice, it largely aligns with EU asylum law and maintains a solid asylum procedure. Sometimes Denmark deviates from EU standards, for example, by setting lower standards on cessation of protection status and family reunification than the EU legislation. Despite the relatively low numbers of asylum seekers (4,500 in 2022, the highest

20 Office of the Prime Minister of Canada, "Working with the United States to grow our clean economies and create good, middle-class jobs on both sides of our border," 24 March 2023; Government of Canada, "Statement from Minister Miller on Canada's commitment to support migrants in the Americas," 10 October 2023.

number since 2016), the government has focused on withdrawal of the permanent protection status.

Denmark has, at least in its communications, but also in policy measures, adopted a "paradigm shift". Traditional norms of integration and long-term residence have given way to a new approach, wherein residence permits, including for resettled refugees, are now granted on a temporary basis with a strong emphasis on returning refugees to their countries of origin as soon as possible. The Danish 'paradigm shift' is to be distinguished from Denmark's efforts to develop an external dimension of asylum policies, which has not yet been fully clarified or implemented. Notably, a 2021 amendment to the Danish Aliens Act allows asylum-seekers to be transferred to a third state outside Europe for both processing and protection. The amendment specifically refers to Denmark's international obligations. No agreement with a third country for this kind of far-reaching cooperation has been reached yet. Although Denmark has signed a Memorandum of Understanding with Rwanda, focusing on cooperation and dialogue, there is no explicit mention of the possibility of transferring asylum seekers to Rwanda who have no connection with that country.

The Netherlands

For the Netherlands, the territorial asylum procedure is the formal main pathway for protection, but 'reception in the region' has also been a longer-term policy goal.[21] The attitudes towards refugees are mixed. On the one hand, there is significant support in society for refugees, including through many NGOs at the national and local level, exemplified by the openness to provide temporary protection to Ukrainian displaced people. On the other hand, asylum and, for the first time, also labour, study and family migration were important issues during the 2023 election campaigns. The elections resulted in a victory of the PVV-party, led by Geert Wilders, advocating an asylum stop and restrictive labour migration policies. A coalition has yet to be formed.

Considering the relatively high numbers of first asylum requests (35,000 in 2022)[22] and temporary protection for Ukrainians (100,000 in 2022), coupled with a general housing crisis, Dutch society is increasingly divided over asylum.

21 See for example the coalition agreement 2021-2025: VVD, D66, CDA and ChristenUnie, "Omzien naar elkaar," 15 December 2021.

22 CBS, "Asielverzoeken met ruim 40 procent toegenomen in 2022," 30 Januari 2023.

A 2022 Dutch government decision on asylum contained a policy delaying family reunification for refugees unless the refugee had found adequate housing.[23] This policy was, however, rapidly annulled by the courts.[24] In 2023, the Dutch coalition government 'Rutte IV' fell over a disagreement between coalition partners concerning granting less rights to beneficiaries of subsidiary protection in relation to family reunification. This would mean abandoning the Aliens Act 2000's system of a uniform asylum status on multiple grounds, giving the same set of rights to all beneficiaries of international protection.

On the external dimension the Netherlands seeks cooperation within the EU-context and with European partners. The country has especially been active in brokering the EU-deals with Turkey in 2015 and the Tunisia MoU in 2023. It has long advocated (strengthening) reception in the region and is discussing 'innovative partnerships with third countries' with a group of like-minded EU countries. The Netherlands was also one of the eight countries involved in the EU's Regional Development and Protection Programmes in Lebanon, Jordan, and Iraq for Syrian refugees.[25] There are, as of yet, no concrete suggestions if and how these regional initiatives should develop into further programs for more managed migration.

The European Union

The EU bloc is in the process of revisiting and renegotiating its asylum legislation. The so-called EU asylum acquis is based on asylum procedures in the EU Member States, as well as standards for reception and return. The EU's long-term agenda as formulated in 2016 by the European Commission is to replace 'irregular and dangerous movements with "safe and legal ways to the EU for those who need protection."[26] However, the European Commission makes it clear that for the medium- and short-term territorial asylum – often after irregular entry – remains the main channel and that '*...those who do claim asylum should have their claim processed efficiently, and be assured decent reception facilities...*'. For the first time since the adoption of the Temporary Protection Directive in 2001, the EU has

23 Ministerie van Veiligheid en Justitie, Brief besluitvorming opvangcrisis, Kamerstukken II, 19637 nr. 2292, 26 August 2023.

24 Dutch Council of State, "Uitspraak 202207360/1V1," 8 February 2023.

25 EEAS, "RDDP (Regional Development and Protection Programme for refugees and host communities in Lebanon, Jordan and Iraq)," 8 August 2016.

26 European Commission, "Proposal for a Regulation of the European Parliament and of the Council," 4 May 2016.

applied the Temporary Protection Directive with respect to Ukrainians. About 4,1 million Ukrainians in the EU have received temporary protection since the start of the war in Ukraine.[27]

The EU has, in comparison with North America, not been very proactive in providing access to its asylum procedures or providing legal pathways, for example, through resettlement and humanitarian visas. Indeed, in July 2023 the EU Fundamental Rights Agency raised its concerns about the EU's efforts to prevent and respond to deaths at sea.[28] It called for investigations, improved search and rescue at sea, clear disembarkation rules and more solidarity, as well as better protection for survivors in the asylum context, independent border monitoring and more accessible legal pathways.

The 2016 EU-Turkey deal[29] is still the clearest case of an agreement with a third state intended to manage access to asylum procedures in the EU. The agreement had a readmission and a resettlement ("1:1") component for Syrian refugees and also consisted of a financial contribution to Turkey for the reception and protection of Syrian refugees. However, a consequence in practice was that asylum seekers who arrived on the Greek islands were forced to stay in below standard and detention-like reception facilities on the islands. There were few returns. Thus, the deal mostly had a strong deterrent effect, especially for the specific route via the Greek islands. It did not have the intended significant resettlement component: about 40,000 Syrian refugees were resettled under the Deal. The Deal has, at times, also led to tensions with Turkey. In recent years many Syrians have spontaneously moved from and through Turkey to the EU states, but also chose other, and potentially more dangerous routes.[30] The legal basis of the EU-Turkey deal, the way the deal was implemented and the impact on Turkey, Greece and refugees have not been thoroughly evaluated yet.[31] The EU-Turkey deal, despite its very problematic aspects, has inspired other agreements of EU Member States with third states, for example a Memorandum

27 European Council, "Infographic - Refugees from Ukraine in the EU," 27 October 2023.

28 EU Fundamental Rights Agency, "Preventing and responding to deaths at sea: what the European Union can do," July 2023.

29 European Council, "EU-Turkey statement," 18 March 2016.

30 Frontex, "EU's external borders in 2022: Number of irregular border crossings highest since 2016," 13 January 2023.

31 See for example Kyilah Terry, "The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint," Migration Policy Institute, 8 April 2021.

of Understanding with Tunisia.[32] So far, there is no similar deal to the EU-Turkey deal.

The United States (US)

The US is facing a large influx of asylum seekers: more than 2,6 million. It operates territorial asylum procedures and resettlement schemes and is currently exploring new ways to give access to protection, through the 'Safe Mobility Initiative'. The 2023 Initiative specifically targets third country nationals in the Americas. Access is granted through humanitarian paroles and other legal pathways.[33] Part of the initiative are Safe Mobility Offices which are located in the regions from where asylum seekers move to the US. They are meant to assist (potential) migrants in accessing legal pathways. The policies also include a potentially more restrictive side for those spontaneously arriving at the US-border without using legal pathways. The 'Circumvention of Lawful Pathways regulation' contains a (rebuttable) presumption of ineligibility for asylum seekers who do not enter through the legal pathways available to them. So far in practice, most asylum seekers are deemed eligible. In addition, many persons at the borders are granted permission to enter the US through a temporary 'humanitarian parole'. After entering the country with such a parole, they would still have to seek lawful status, for example by applying for asylum.

This overview of the researched destination countries initially indicates varying contexts with respect to asylum, but also a considerable amount of policy convergence and similarities in instruments developed, or at least proposed. Furthermore, it is evident that a high level of policy activity aimed at managing spontaneous territorial asylum migration is an additional similarity. It is, therefore, of interest to compare the experiences and debates in the various regions and put these in a wider context. Can the (proposed) policies be used by other individual countries and what would the impact be on global refugee protection if the EU bloc and partners would adopt these?

32 European Commission, "Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia," 16 July 2023.

33 US Homeland Security, "Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration," 27 April 2023.

Preventing access to territorial asylum procedures

1. Non-entry measures

In the selected countries access to territorial asylum procedures (meaning that a person in need of international protection has ccess to the territory of a state and has unimpeded access to its asylum procedures) is not a given. Together with other destination countries, they engage in a wide range of measures which are meant to prevent irregular migration to their territory. These include visa-requirements, 'carrier sanctions', 'International Liaison Officers', and other forms of border policies in third countries. For example, in October 2023 the EU Commission proposed a mechanism to suspend visa-free travel for 60 countries, if these countries do not "align their visa policy with the EU's and continue their efforts to prevent unfounded asylum applications."[34]

NGOs have remarked that the accumulation of these measures have made legal travel for many refugees virtually impossible, playing into the hands of human smugglers while forcing refugees to choose even more dangerous routes.[35] Observers have also pointed to the invisibility of these measures.

In light of the scrutiny of the asylum systems and statistics in the country reports, it can be concluded that a general opening of borders followed by increased numbers of migrants could negatively impact public support and would rapidly put high pressures on asylum systems. National and international courts have accepted that border control outside the territory of states is allowed, as long as measures are not discriminatory.[36]

For EU Member States, the most important legal framework in this respect is provided by the ECHR, complemented by EU law. The ECtHR has declared

34 European Commission, "Commission proposes a more robust suspension mechanism to visa-free travel," 18 October 2023.

35 See for example: Neil Falzon and Myrthe Wijnkoop, *Protection in Europe, Safe and Legal Access channels*, ECRE, February 2017.

36 See for example: House of Lords, *Regina v. Immigration Officer at Prague Airport*, 9 December 2004.

that states have the right to control the entry and residence of third country nationals.[37] There is, for example, no legal obligation under the ECHR or under EU law for a state to grant a humanitarian visa outside the territory if there is no connection or link of the third country national with the state.[38] As a consequence, it is common practice that asylum seekers travel to the EU via land and sea in order to apply for asylum.

Regarding Spain's enclaves in North-Africa, the European Court of Human Rights held in *N.D. and N.T. v. Spain*[39] that Spain was allowed to deny entry to irregular migrants at the borders, provided that there are other legal pathways and official points of entry which could be accessed by the migrants to apply for asylum. However, the judgement does not specify the requirements for the legal pathways. If these are merely theoretical or not effective, it is doubtful under refugee law and international human rights law, that a state can deny an asylum seeker access to its territorial asylum procedure and refer the asylum seeker back to an 'extra-territorial' procedure, on the ground that this was available to the person and should have been used.

The dangers of irregular routes for refugees are reported in all the selected countries/regions. The situation in the Mediterranean has especially led to a tragic loss of lives, traumatising experiences for refugees and migrants and overburdened arrival states. EU responses to this crisis have been mixed. On the one hand, the importance of strengthening protection of external borders and breaking the business cases of smugglers is highlighted.[40] On the other hand, there is a call for improving search and rescue operations and enlarging legal pathways.[41] In Australia, where a visa is mandatory for all incoming individuals, the imperative to curtail the loss of life at sea has been the justification for its strict interdiction measures. This strategy involves breaking the business model

37 ECtHR, *N. v. the United Kingdom*, Grand Chamber Decision, Application no. 26565/05, § 30, 27 May 2008; ECtHR, *Ilias and Ahmed v. Hungary*, Grand Chamber Decision, Application no. 47287/15, § 125, 21 November 2019.

38 ECtHR, *M.N. and Others against Belgium*, Grand Chamber Decision, Application no. 3599/18, 5 March 2020. In this specific case Denmark and the Netherlands had intervened, successfully, that in the absence of ties there is no state responsibility at, for example, embassies.

39 ECtHR, *N.D. and N.T. v. Spain*, Grand Chamber, Application nos. 8675/15 & 8697/15, 13 February 2020.

40 European Council, "Saving lives at sea and fighting human smuggling," 13 November 2023.

41 See for example: EU Fundamental Rights Agency (FRA), *Preventing and responding to deaths at sea: What the European Union can do*, 6 July 2023.

by preventing any irregular entry and sending everyone back, aimed to dissuade anyone from undertaking the journey in the first place. However, legal avenues in Australia remain limited, as the only legal option for nationals of most countries is to wait for resettlement, given that spontaneous asylum can only be applied for by people who have arrived with a valid visa.

Assessment

Although non-entry measures are tools for border and immigration management and control, the *de facto* result is that refugees and other migrants take extremely dangerous routes to access asylum procedures in destination countries. The effects of accumulated non-entry measures in the EU context in combination with territorial access to asylum can be seen in tragic statistics on dead and missing persons at its borders.[42] Furthermore, asylum statistics also tell a story as most asylum seekers entering the EU are young men and minors,[43] who by their families are likely to be considered better able to undertake the dangerous journey.

In the EU, as well as the US and Canada, the political and public debate frequently underscores the necessity for interdiction measures to be accompanied by safe legal pathways for individuals in need of protection. 'Legal pathways' refers to avenues for safe and legal access to the territory of a state, for example through a visa or permit granted outside the territory of the state. For persons in need of international protection who enter through a legal pathway, this can either directly be followed by granting international protection or another form of temporary protection, or by access to a territorial (in land) asylum procedure. The US and Canada are acting on this idea through concrete measures such as the US Safe Mobility Initiative as well as significant resettlement programmes.

2. Pushbacks and offshore processing

Pushbacks

Pushbacks are measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back without an individual assessment of their human rights

42 IOM, "Migration flow to Europe - Dead and Missing," Missing Migrants Project.
43 Eurostat, "Annual Asylum Statistics," 2022.

protection needs. This can be to the country or territory or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.[44]

Pushbacks occur at the external borders of the bigger blocs and Australia, especially at the sea borders and high seas.[45] They often take place outside public and judicial scrutiny, although in Australia for example, they are openly part of its policy to deter irregular arrivals.

The specifics of Australia's pushback practices are shared in a limited manner with the public, as such operations at sea are considered a matter of national security. It does, however, publish the mere number of executed maritime interdictions and actual unauthorised maritime arrivals.[46] In some maritime cases, Home Affairs Protection Officers execute a pre-entry on board screening, in which an enhanced procedure should clarify whether the principle of non-refoulement brings in obligations for Australia. In the case that Australia would have protection obligations based on this assessment, asylum seekers can be brought to an offshore regional processing centre in a third country (see below) where they enter the standard protection assessment process, however, without a chance to permanently settle in Australia.[47] If asylum seekers are not deemed in need of protection, boats are returned out of Australian waters toward their country of origin or departure.[48]

44 See UNGA, *Report on the means to address the human rights impact of pushbacks of migrants on land and at sea*, A/HRC/47/30, para. 34, 21 June – 9 July 2021.

45 See also Advisory Council on Migration, *EU Borders are also our borders*, January 2022.

46 Australian Government Department of Home Affairs, *The Administration of the Immigration and Citizenship Programs*, May 2023, p. 42; Also see for example Refugee Council of Australia, *Pushback practices and the impact on human rights of migrants, submission to the United Nations special rapporteur on the human rights of migrants*, March 2021; Australian Border Force, "Operation Sovereign Borders Monthly Update: September 2023," 27 October 2023.

47 Australian Human Rights Commission, *Tell Me About: The 'Enhanced Screening Process'*," 26 June 2013.

48 The UNHCR criticises these enhanced procedures for being unfair and unreliable, with additional risks when executed at sea, see: High Commissioner's Dialogue on Protection Challenges, "Protection at Sea – Background Paper," 11 November 2014, par. 18.

In general, the EU and its Member States practices are less out in the open and even denied by the state authorities,[49] as pushbacks are considered in violation of the prohibition of a collective expulsion under ECHR and EU law, and potentially also of the principle of non-refoulement. Pushback practices in the Mediterranean by EU Member States and with the support of the EU Border and Coast Guard Agency (Frontex), are under constant scrutiny from the media, NGOs and the European Parliament. The Court of Justice of the EU (CJEU) held that the individual Member States remain responsible for violations at the external borders vis-à-vis individual migrants, even if Frontex played a significant role.[50] This complicates the attribution of state responsibility when pushbacks are implemented by actors consisting of multi-state border guards.[51]

In the landmark case of *Hirsi Jamaa and others v. Italy*, the ECtHR held that Italy's pushbacks to Libya regarding a group of migrants at high seas had violated both the principle of non-refoulement (direct and indirect) under article 3 ECHR and the prohibition of a collective expulsion under article 4 of Protocol 4 ECHR. In Libya, the human rights of asylum seekers from Eritrea and Somalia were abused and they ran a risk of refoulement. Factors considered relevant by the ECtHR were that Libya did not provide adequate protection against the risk of ill-treatment and that there were no trained staff, interpreters, and legal assistance on the boat of the Italian coast guard to assess the individual protection claims. The legal framework of the ECHR and EU-law thus contains many procedural safeguards. This has however not put an end to the pushback practice and human rights violations at the external borders, nor has that practice led to decreasing migration pressure there.

Interdiction measures and offshore processing

'Offshore processing of asylum claims', mostly in the context of arrivals by sea, refers to state practices of transferring intercepted asylum seekers to defined areas inside or outside homeland territory, and processing their claims without giving access to asylum on their territory. When this happens inside the territory, this is usually accompanied by a legal fiction that there is no full jurisdiction.

49 Helena Smith, "Greek government under fire after video shows 'pushback' of asylum seekers'," *The Guardian*, 19 May 2023.

50 Helena Smith, "Greek government under fire after video shows 'pushback' of asylum seekers'," *The Guardian*, 19 May 2023.

51 Advisory Council on Migration, *EU Borders are also our borders*, January 2022.

When this happens outside the territory, this entails an agreement with a third country.

Both Australia and the US employ special 'interdiction' mechanisms for arrivals by sea, with the US utilizing Guantanamo and Australia relying on offshore facilities in Nauru.

In the case of the US, interdiction measures by the US Coast Guard in the Caribbean are accompanied by some, but very limited, access to asylum procedures in Guantanamo Bay and potential resettlement to a third country. This is based on a perfunctory screening of the individual case. The Coast Guard reports that only one percent of people interdicted are found to be in need of protection. Generally, migrants are returned to their country of origin (mainly Haiti or Cuba) or transferred to third countries with which the US has bilateral agreements. The US 'Guantanamo' interdiction measures have a long history and were litigated since the 1990s. Recently, there have been thousands of interceptions and interdictions per year. The US case law of the Supreme Court upholds that these measures occur outside the jurisdiction of the US and that neither US law nor the Refugee Convention have extraterritorial effect.[52]

Australia's interdiction measures are openly aimed at deterring asylum seekers and migrants arriving by sea.[53] This also includes pushbacks and legal fictions of 'excised territories', through which both mainland Australia, but also Australian islands such as Christmas Island,[54] are excluded from the migration zone. This means anyone entering Australia and wanting to apply for asylum is barred from doing so, without the Minister lifting the bar first.

Both the Australian offshore processing approach and the US Guantanamo approach have an element of collective push backs. They do, however, in certain

52 David E. Ralph, "Haitian Interdiction on the High Seas: the Continuing Saga of the Rights of Aliens Outside United States Territory", *Maryland Journal of International Law*, 17:2, 1993; Inter-American Commission on Human Rights (IACHR), *The Haitian Centre for Human Rights et al. v. United States*, Case no. 10.675, 13 March 1997; US Supreme Court, *Sale v. Haitian Centers Council*, 509 U.S. 155, 1993.

53 Katrina Stats, "The Australian Way: A Critiical Review of Australia's Response to Refugees and Asylum Seekers 1901-2013," *The University of Adelaide*, June 2017.

54 Christmas Island was often used as a destination to apply for asylum in Australia, as it brings the Australian borders way closer to Java, a popular place of departure for asylum seekers coming by boat.

cases contain an element of asylum processing on 'offshore territories' next to a transfer to third countries for resettlement or return to the country of origin. The reported standards for the procedures are low. There is, in any case, a denial of access to protection in the destination state even if the refugee claimant is found to be in need of protection. As such, these approaches are also to be seen as deterrence with respect to irregular arrivals.

Assessment

From a legal perspective, it is hard to envisage that 'offshore territories' would pass regional and national judicial scrutiny in the EU context. The ECHR, in cases when there is jurisdiction (*see hereunder*), and EU law which is territorially applicable, have formulated strict legal requirements with respect to collective expulsions, the scrutiny of asylum requests, detention, safe third country arrangements and refugee rights.

From a European – and arguably also Canadian – perspective, the concept of non-jurisdiction on excised territory is not legally tenable when there is effective control of agents of a state over an asylum seeker or migrant. Once migrants establish contact with the European states' agencies at the external borders, including at high seas, the ECHR applies if the agencies exercise effective control over the migrants.[55] On EU territory, EU asylum law requires that asylum status is granted in case asylum criteria are met, unless there is a safe third country with which the asylum seekers have ties and readmission is guaranteed.

In 2011 Den Heijer, in his dissertation "Europe and extraterritorial asylum", wrote: "*...the physical and procedural 'containment' of asylum seekers raises a number of key human rights issues which have not been satisfactorily addressed in the Australian and United States' offshore processing programmes. Apart from a system which does not secure essential requirements of the rule of law (especially obstacles in the sphere of judicial review and an insufficient level of guarantees against arbitrary human rights interferences), the Achilles' heel of previously employed external processing lies in the absence of meaningful and lasting solutions for persons being processed in an extraterritorial facility.*"[56]

55 ECtHR, *Hirsi Jamaa and Others v. Italy*, Grand Chamber, no. 27765/09, §74 and 75, 23 February 2012. See on this subject matter also: Advisory Council on Migration, *EU Borders are also our borders*, January 2022.

56 Maarten den Heijer, "Europe and extraterritorial asylum," *Leiden University*, 2011.

The ECtHR's and the CJEU's consistent and recent case law in the context of the Dublin system and safe third countries confirm this view for the European context.

3. Safe third country agreements

Safe Third Country (STC) agreements are an instrument for asylum protection responsibility allocation by states, meaning that the responsibility for the assessment of the asylum claim can, other certain conciditions, be shifted by one state to another. All five countries apply the safe third country concept. Except for Australia, the researched states do not have a functioning automatic STC agreement, other than a Dublin-type agreement. Australia makes use of STC agreements with neighbouring states as part of its 'shield' to prevent sea arrivals.

Under EU law there are two types of STC agreements. The first is the Dublin-system within the EU (Dublin III Regulation), which is based on the principle that the state responsible for the entry into the territory is also responsible for processing the asylum request. Some exemptions apply because of family ties or unaccompanied minors. This means that, by and large, migration movements and geographic situation determine which state is responsible for the asylum claim. The presumption underlying this system is that each states offers a similar, at least adequate, level of protection. This is also known as the principle of mutual trust or interstate confidence. Dublin type STC agreements do not require a real connection between the responsible state and the asylum seeker. A simple entry or transit or a visa is sufficient.

The second type of EU STC agreements are bilateral agreements as provided in the (current) Procedures Directive. The main difference, apart from the presumption of mutual trust among Dublin states, is that article 38 (2) of the current applicable Procedures Directive requires that the concept shall be subject to "rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country".

The newly proposed EU Procedures Regulation that is currently being negotiated in tripartite dialogues between Commission, Council and Parliament, still contains a reference to the connection requirement. Despite discussions within the Council on possible deletion of the requirement or to explicitly stating that 'mere transit' would not suffice, the wording remained similar "only referring to "stay" (albeit in the recitals) as a possible criterion to consider in assessing the fulfilment of the reasonable connection requirement. However, as the Council

has also stated that the Regulation will be regularly evaluated, the option of retablement of the discussion remains.[57]

The connection requirement follows from UNHCR Excom Conclusion 15, a non-binding but authoritative text. The prevailing idea is that asylum should not be refused on the sole ground that protection could be granted in another state. The fear was that in that case there would be a risk that no state would take responsibility and that the refugee would be left in limbo. This would undermine the fundamental idea of refugee protection, namely that a refugee would get protection somewhere (however not per se in a country of choice). This Conclusion must be seen in the light of the 1951 Refugee Convention's aims to grant rights to refugees, but also its recognition that "the grant of asylum may place unduly heavy burdens on states" and that international cooperation between states is needed. The idea arose that if an asylum seeker already has ties with another state before applying for asylum, it would be reasonable to refer the asylum seeker to that other state to apply for asylum.

Non-EU countries have not codified the Excom Conclusion 15 and its connection requirement, nor is it directly applicable to Denmark due to its EU acquis opt-out status. It is not part of Australia's agreements with neighbouring countries. Also Canadian legislation does not distinguish between 'Dublin type' and other STC concepts. The main criteria in the Canadian (Immigration and Refugee Protection Act (IRPA)), similar to article 38 (1) of the EU procedures directive, refer only to human rights and an agreement. It does not contain a connection requirement.

Functioning of the Dublin-type agreements in the EU and North America

The Canada-US STC Agreement is currently central to Canada's national asylum procedure. The Dublin-type system is especially of great importance for the current asylum practices of Denmark and the Netherlands. This means also that, by and large, migration movements and geographic situation determine which state is responsible for the asylum claim. In the EU and North-America these movements tend to be South-North, and in the case of the EU also East-West.

57 Council of the Euroean Union, Outcome of Proceedings of the Justice and Home Affairs Council, 14 June 2023.

In theory, Denmark, the Netherlands and Canada are relatively shielded by their safe third partner states, provided that migrants are registered at the external borders or the countries themselves can provide evidence of border-crossing through a partner country. In practice, this is complicated by the abolition of internal borders in the EU. For Canada, the length of the Mexico-US and US-Canada land borders mean that asylum seekers can access its territory without being detected or stopped earlier *en route*. Thus, these three countries occasionally experience asylum pressures despite their geographical situation and the application of the Dublin system.

In the EU context there is a large discrepancy between practice and the formal criteria. Although the system's criteria for allocation of responsibility seem to heavily burden the Member States at the EU's external borders, in practice the destination Member States further North-West receive the majority of asylum requests.[58] There is also a clear 'push' for secondary movement. Many EU-states at the external borders have such deficiencies in their asylum and reception systems, that Courts in other EU countries consider that transfers back to these countries would be in violation of the prohibition of ill-treatment.[59]

In Canada, deficiencies in the US asylum and housing system have also led to an increase of asylum seekers in Canada. The 2023 expansion of the Canada-US STC agreement has given Canada the possibility to intercept asylum seekers at their borders between points of entry and apply the STC agreement more widely. The effects of the expansion are not yet clear, although a change of routes (via air rather than land) was seen after the expansion of the agreement.

58 In 2022, Germany and France received the most asylum requests in 2022 (24,7% and 15,6% respectively). Combined with Austria (12,1%), and also the Netherlands and Belgium in the top 7, the traditional "destination Member States", not at the external borders, received the most requests by far. Spain ranked third (13.2%), but this was because of Venezuelan, Colombian and Peruvian asylum seekers (45,000, 35,000 and 8,800 respectively) who had arrived by air. Thus, of the external border states only Italy (ranking 5th) received a significant number of asylum requests and also transfer requests under the Dublin III regulation because of entry via this country.

59 See on the subject matter of secondary movements also Advisory Council for Migration, *Secundaire Migratie*, 5 November 2019.

Legal Considerations – mutual trust

Both in Europe and Canada the concept of 'mutual trust' has been challenged before the courts. This case law is also relevant for other 'extra-territorial' STC mechanisms and will thus be discussed in more detail.

In the landmark judgment, *M.S.S. v. Belgium and Greece*, the ECtHR considered not only the safeguards in asylum procedures but also living conditions for asylum seekers in the responsible state (Greece) to which Belgium intended to transfer the asylum seeker. The ECtHR held that, in light of the applicant's living conditions in Greece combined with the prolonged uncertainty in which M.S.S. remained and the total lack of any prospects of his situation improving, his situation had attained the level of severity required to fall within the scope of Article 3 of the Convention. Based on the situation in Greece, the ECtHR considered that Belgium as the transferring state should have refrained from a transfer to Greece under article 3 ECHR as *...at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities.*

After this judgement, the ECtHR and national courts have held various times that asylum seekers may not be transferred to other EU Member States (mostly at the external borders) as this would be in breach of article 3 ECHR. In Dutch case law, for example, Croatia, Cyprus, Greece, Italy and Malta have at some point been considered 'unsafe' Dublin countries for asylum seekers, because of structural deficiencies in their asylum or reception systems. Bulgaria's reception capacity was deemed adequate by the Dutch Courts, as the country mainly 'serves as a transit country' and there are sufficient reception places for this reason.[60] In the case of Poland preliminary questions to the Court of Justice of the EU were asked with respect to Dublin transfers, in light of the overall situation for asylum seekers at Poland's external borders and the rule of law. Also Denmark was considered unsafe for Syrian beneficiaries of protection, until it became clear that Denmark does in fact not return Syrians.

60 According to an AIDA-report many asylum seekers in Bulgaria abscond due to the length of procedures and low recognition rates.

The concept of mutual trust has also been challenged with respect to beneficiaries of international protection. In *Jawo*[61] *v. Bundersrepublik Deutschland* the Court of Justice of the European Union (CoJEU) made it clear that no transfer may take place when *on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, [that] risk is real for that applicant, on account of the fact that, should he be transferred, he would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty.*"

Following the Jawo-judgement, the Dutch Council of State[62] held that, based on the information about the conditions for beneficiaries of international protection in Greece, a transfer to Greece would expose them to extreme material poverty. In the specific case, it was recognized that the large number of recognitions in Greece meant that the Greek authorities could not provide housing and basic needs to beneficiaries of international protection.
Thus the EU 'mutual trust'-principle does often not apply, or is being undermined in practice. This is partly due to the limited capacity of the Member States to host refugees in relation to the asylum pressures they face, especially for the states at the external borders. But there may also be a lack of political will of states to improve the asylum system and reception conditions, whereby asylum and a strategic position at the external borders could be used as a bargaining instrument within EU policy debates.[63]

Despite the many problems regarding the functioning of the Dublin system, the EU has not questioned the Dublin's underlying principles. However, the European Commission's 2016 Dublin IV proposal[64] did acknowledge its shortcomings and proposed solidarity mechanisms and sanctions to complement the Dublin regulation. The new proposal for a Regulation on Asylum and Migration

61 CoJEU, ECLI:EU:C:2019:218, 19 March 2019,

62 Dutch Council of State, ECLI:NL:RVS:2021:1626 and ECLI:NL:RVS:2021:1627, 28 July 2021;

63 See for example Gerasimos Tsouroupas and Sortirios Zartaloudis, Leveraging the European Refugee Crisis: Forced Displacement and Bargaining Greeces bailout Negotiotions, Journal Common Market Studies, 8 June 2021.

64 Proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) COM (2016) 270 final, 4 May 2016.

Management also contains disembarkation and solidarity mechanisms to complement the system.[65]
This includes the relocation of eligible applicants for international protection who are rescued at sea: Under the coordination of the Commission, the European Union Asylum Agency and the European Border and Coast Guard a list of eligible persons to be relocated will be made, indicating the distribution of those persons among the contributing Member States.

These legal developments are not just European business. The Canadian Supreme Court held in 2023 that the Canada-US STCA was not unconstitutional.[66] The Court however also considered that if the Canadian authorities knew or ought to have known that – through a transfer to the US – harm could arise, this should lead to refraining from applying the agreement. The Supreme Court of Canada considered that there may be protection issues in the US, also due to detention standards and a more restrictive interpretation of the 1951 Geneva Convention. However, it held that in general the Canadian system has "safety valves" in place to address protection deficits because of the STCA.

Safe third country practices outside the 'Dublin context' – refoulement and chain refoulement

The 'mutual trust' arrangements of the Dublin system and the Canada – US STC Agreement are concluded among destination countries, on the rebuttable presumption of safety. They are to be distinguished, if not legally than practically, from safe third country arrangements with states that do not have a tradition of asylum procedures. Outside the scope of 'mutual trust' arrangements, among the countries in this study only Australia makes more extensive use of the safe third country concept with respect to third countries which are not destination countries per se.

Canada only considers the US a safe third country, with which it thus has concluded an agreement. The US also had agreements with other third counties, including Honduras, Guatemala and El Salvador, but only the agreement with Guatemala was actually implemented. The Biden Administration has suspended all three agreements.

65 See Proposal for a Regulation on Asylum and Migration Management, COM (2020) 610 final, 23 September 2020 and, for example, ECRE, *Solidarity: the Eternal Problem*, January 2023.

66 Canadian Supreme Court, *Canadian Council for Refugees v. Canada* (*Citizenship and Immigration*), 2023 SCC 17, 16 June 2023.

The concept of safe third countries is applied on a case-by-case basis in the Netherlands and Denmark. In general, the concept is in many EU MS not used widely outside of the Dublin context.[67]
EU-states at the external borders have indeed applied the STC concept with respect to their neighbouring states, thus also increasing risks of chain refoulement after Dublin transfers. Both the CJEU and the ECtHR in its judgment of *Ilias and Ahmed v. Hungary*[68] made it clear that also in the general context of STC practices European states need to thoroughly examine the standards in the third country.

As stated earlier, the legal STC framework of the EU, to which Denmark is not bound, is laid down in the Procedures Directive (2013/32) and is restricted through the connection clause (article 38 (2)). During the negotiations on the new Asylum Procedures Regulation the Netherlands, together with several other MS, intended to delete the connection criterium from this STC provision, in order to lower the threshold to broker deals with third countries. This attempt however failed for the time being.

Australia's safe third country policy

With respect to STC policies, Australia takes a rather unique position. It applies the concept of a safe third country both before and after arrival. Before arrival, Australia can send asylum seekers to Nauru (and previously, PNG), where it has set up offshore processing and detention centres. In case of a positive decision on an asylum claim in these centres, resettlement here, or else in third countries would be sought. This process often leaves the refugees in limbo for a long time. For application of the concept after arrival, Australia is deemed not to have any protection obligations when someone owed protection has the possibility to reside in another safe country. The Australian model raises issues regarding refoulement with respect to the transfer to the processing and detention centres in the partner country and indirect refoulement through returns or resettlement in yet another country. Unlike the European courts and potentially Canadian courts, the Australian High Court did not stop extremely restrictive practices with respect to transfers to the third countries Nauru and PNG. Although the High Court, in an earlier judgment, had not allowed an agreement with Malaysia, the transfers to regional processing centres in Nauru and Papua New Guinea were

67 EUAA, *Applying the concept of safe countries in the asylum procedure*, December 2022.
68 ECtHR, *Ilias and Ahmed v. Hungary*, case *47287/15* of 21 November 2019.

held to be constitutional. This was in a controversial 2014 ruling, in which the international law perspective was disregarded.[69]

In practice, Australia's arrangements with third countries have not been implemented to a large extent. In 2017, detention facilities in Manus Island, PNG, were closed following a Papuan High Court decision deeming the detainment of asylum seekers unconstitutional, violating the detainees' basic right to liberty. Although the Australian High Court did not share this view, the Australian government closed the detention centre in late 2017. Most of the detainees were forcibly relocated to alternative accommodations on the island pending a final resolution of their situation. As for the recognized refugees, some were offered resettlement in the United States under the 2016 agreement. Those whose claims were rejected were ordered to return to their countries of origin. The Australian Government ended its deal with PNG in December 2021, leaving PNG in charge of all remaining asylum seekers on their territory.

The contract with Nauru has recently been renewed to maintain the possibility of offshore detention and processing until at least 2025, even though the arrangements with Nauru and PNG have attracted a lot of criticism.[70] For nine years no asylum seekers had been sent to Nauru. In October 2023, however, the Border Force confirmed that 11 people have been sent offshore to Nauru, because they could not be sent back safely to the country of origin. While the Australian safe third country practices are very costly, the effects of sole STC agreements, which were also intended to deter arrivals by sea are not entirely clear. It is foremost the (combination with) maritime interdictions that seem to have prevented asylum seekers from entering Australia.

The 'Rwanda – option'

The United Kingdom (UK), which is not part of this research project but is in this context a relevant example, has a Memorandum of Understanding with Rwanda allowing for the transfer of asylum seekers to Rwanda where their claims would be processed and followed by a return, protection or other status in

69 High Court of Australia, *Plaintiff S156/2013 v Minister for Immigration and Border Protection & Anor*, HCA 22, 18 June 2014.

70 HRW, "Australia: appalling abuse, neglect of refugees on Nauru," 2 August 2016.

Rwanda.[71] Under this MoU the UK government intends to transfer asylum seekers to Rwanda, despite the fact that they have no connection with this country. Due to intervention of the ECtHR[72] and UK courts, including the Supreme Court,[73] no transfers have taken place thus far.

In its judgment of 15 November 2023, the UK Supreme Court follows the jurisprudence of the European Court of Human Rights. The Supreme Court considers that a (lower) court dealing with transfers must make its own assessment of whether there are substantial grounds for believing that there is a real risk of refoulement. This (lower) court is not required to accept the government's evaluation of assurances unless there is compelling evidence to the contrary. In the specific case of Rwanda, the Court put considerable weight on UNHCR's assessments. Based on UNHCR's assessment of the quality of the Rwandan asylum system the Supreme Court concludes that there is a risk of refoulement for asylum seekers. Importantly, the Supreme Court, holds that monitoring in the Rwandan context is insufficient, as '*the suppression of criticism of the government by lawyers and others is liable to discourage the reporting of problems, and so undermine the effectiveness of monitoring.*' The political context and the rule of law in the third country are relevant factors for the assessment of 'safety', according to the UK Supreme Court (under 93 and 106).

EU Member States have closely followed the outcome of the legal and political developments in the UK. Prior to the Supreme Court's ruling, Germany stated to explore whether processing outside of the EU is possible under the 1951 Convention and the ECHR.[74] However, it has not made clear whether this would indeed be 'extra-territorial processing' (see below) or the UK-Rwanda model.

Because of the opt-out, Denmark is, like the UK since Brexit, not (directly) bound by the STC concept under EU law. Denmark currently considers a UK-style agreement with Rwanda (plus some form of resettlement) and is exploring

71 UK Home Office, "Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland And the Government of the Republic of Rwanda," 13 April 2022.

72 ECtHR, *N.S.K. v. the United Kingdom*, application no. 28774/22, (formerly K.N. v. the United Kingdom) 14 June 2022.

73 UK Supreme Court, *AAA (Syria) and HTN (Vietnam) v Secretary of State for the Home Department*, UKSC 42, 15 November 2023.

74 German Government, "Einigkeit zu Migration und Deutschland-Pakt," 7 November 2023.

whether these ambitions can be realized within the EU context with likeminded countries. In June 2021 Denmark passed a legislative amendment to its Aliens Act which allows for the transfer of asylum seekers to a third state outside the EU for processing the asylum claim, protection in that state or return from there to the country of origin. The amendment entails that such transfers must take place under an international agreement between Denmark and the third country and that asylum seekers are to be transferred unless it would be in breach of Denmark's international obligations. This means that the non-refoulement principle and the right to family life, would indeed limit the possibilities to transfer asylum seekers who are already on the territory and within jurisdiction of the Danish authorities.

The Italy – Albania proposal

In November 2023 Italy has announced that it intends to set up processing centres in Albania.[75] Italy is reported to pay for the construction of two centres in Albania which can receive up to 3,000 people at a time, under the deal. If Italy rejects the asylum applications, Albania will deport them. Albania would also provide external security for the two centres, which would fall under Italian jurisdiction.

A transfer to the Italian processing centre would take place in case of 'rescue at sea' when asylum seekers fall within the jurisdiction of the Italian authorities. While being practically more feasible in practice than a processing centre that can be accessed by any person claiming protection, as Italy has control over the number of asylum seekers to be transferred to the Albanian centres, the legality of such a construction under EU law which involves a non-EU state, and the requirements under international human rights law, is unclear and needs to be further researched. This would also depend on the safeguards and conditions in the centre. In the 2014 case of *Sharifi v. Italy and Greece*[76] for example, the European Court of Human Rights held that a collective expulsion at sea from Italy to Greece was in breach of article 4 of Protocol 4 and article 3 ECHR, as it was established (by the ECtHR) that the Greek asylum procedure did not provide safeguards against refoulement.

75 *Euronews*, "Albania to host asylum seekers arriving to Italy pending processing of asylum applications," 7 November 2023.

76 ECtHR, *Sharifi v. Italy and Greece*, Application No. 16643/09, 21 October 2014.

From the outset, the Italy-Albania proposal, from what is known, would circumvent EU-asylum law and potentially Italy's obligations of non-refoulement under EU-law, as Albania would be responsible for the return of persons whose asylum application is rejected. In a first reaction EU Commissioner Yiva Johansson said that the construction would be outside the scope of EU law.[77] Other reports say the Commission cautions the agreement will have to be in compliance with international law and EU-law.[78]

Assessment

STC mechanisms are an important instrument for asylum protection responsibility allocation by states. In the EU and North-America this is executed through 'mutual trust' agreements. This can be an effective instrument for managing asylum when they are based on registration of asylum claims and preventing unjustified multiple applications by the asylum seeker ('forum shopping') or 'secondary movement' / onward travelling through safe third countries to other safe third countries.
However, when the protection standards in a country that is part to a 'mutual trust' agreement are not guaranteed, because of pressures on asylum and reception systems or due to more or less deliberate policy choices of that country not to improve the system, the agreement cannot be fully effectuated and (secondary) destination states are legally not allowed to transfer the applicants. This is currently the case in the EU: the broken Dublin system needs to be replaced or fixed by additional safeguards and solidarity mechanisms.

Outside of the context of 'mutual trust' agreements between 'destination countries', safe third country agreements are concluded on a bilateral basis. Destination countries are exploring whether cooperation with a safe third country and externalization of the asylum procedure to that third country could discourage irregular migration towards the destination country. EU law (still) contains a 'connection criterium' for this type of agreements that requires that the asylum seeker can only be sent to the third country if he or she has a connection with that country. The rationale behind the connection criterium goes back to the underlying idea of refugee law that protection must be provided so that refugees are not left in limbo, and that responsibility for refugee protection

77 Jorge Liboreiro, "Italy-Albania migration deal falls 'outside' EU law, says Commissioner Ylva Johansson," *Euronews*, 15 November 2023.
78 Alice Taylor and Federica Pascale, "Italy, Albania migration deal divides both sides of Adriatic, caution from EU," Euractiv, 7 November 2023.

should be shared between states.[79] Such a connection criterium is notably lacking in Australia's transfers to regional processing centres in third countries and in the UK's agreement with Rwanda.

Furthermore the protection in that third country should be effective ('safe'). Based on the EU acquis and interpretation thereof by the European jurisprudence the threshold of determining a country sufficiently 'safe' are high (although within the current negotiations on the Asylum Procedures Regulation under severe strain).[80] The risks for asylum seekers need to be assessed based on general and up-to-date information on the third country situation, and in individual cases on a case-to-case basis, taking the individual circumstances into account. The overall process can thus become very costly and inefficient.

In light of the above, the Australian models of offshore processing in third countries followed by resettlement in other countries, although effective from the intended objective of deterring spontaneous sea arrivals, would, from a European law perspective, be problematic. The European legal framework would require legal procedural guarantees and effective remedies, a rigorous scrutiny of risks of refoulement, and access to asylum, including living in safety and dignity, after a positive decision. Establishing processing centres in a third country with the aim of providing refugee protection in that third country could also lead to complex questions of state responsibility and jurisdiction for states that set these up. They can lead to complex challenges in the domestic jurisdiction of the transferring states. This makes 'Rwanda-type' agreements equally problematic, as has become clear from the UK-Rwanda case.[81] The political and public support for such constructions could come under strain, both from a moral perspective and from losing the public trust as political promises are not followed by actions.

79 See more on this subject matter in The Netherlands country report (paragraph on externalization).

80 ECRE, Reforming EU Asylum Law: Final Stage, August 2023.

81 See also Francesco Mancini and Monika Sie Dhian Ho, "Dealen met Rwanda, Dilemma's met bescherming van vluchtelingen in derde landen," Clingendael Institute, October 2023.

Legal pathways for access to the territory and humanitarian protection in destination states

4. Extra-territorial processing

'Extra-territorial processing of asylum applications' refers to the procedure of refugee status determination or otherwise granting international protection by a state outside its territory, giving access to its territory and national system of international protection after a positive decision.
None of the five selected countries have applied 'extra-territorial processing', in line with the Blair proposal of 2003. This entails a fully developed asylum procedure on the territory of a third state through so-called Transit Processing Centres (TPCs), followed by resettlement to the processing country or bloc of countries itself.[82]

The background of the Blair proposal was similar to some of today's analyses that support for refugee protection through large-scale irregular arrivals is lacking, that most vulnerable refugees do not have access to territorial asylum, that national asylum procedures spend considerable resources on persons not in need of protection, and that return policies are hardly effective. In the Blair-proposal, so-called transit processing centres outside the EU were suggested to address these issues. They would physically transfer the asylum procedure (and returns) outside the EU territory, accompanied by resettlement to the EU states after a positive asylum decision. The proposal has not been implemented for many practical and legal reasons. Operating such procedures would be very complex for implementing agencies. Essential procedural guarantees, such as trained staff, interpreters, legal assistance and judicial scrutiny are hard to incorporate. In an EU context they would require an agreement with a third host state and at least coordination with the EU partners and EU agencies.

82 Statewatch, "UK asylum plan for "safe havens": full-text of proposal and reactions," 1 April 2003.

The first experiences with US Safe Mobility Offices (SMOs) in third countries in South and Central America (see also below) show that even a light version of information services may experience pressures, not only on the system itself but also on host communities. In the context of processing centres, which the US SMOs are not at present, such pressures could soon lead to delays and additional pressures on reception and the host communities.

Germany has called for research on whether processing outside of the EU is possible under the 1951 Convention and the ECHR.[83] An important question related to Blair's Transit Processing Centres is whether asylum seekers can be denied access to "territorial asylum" or face other sanctions in a destination country when they did not apply for legal access at an earlier opportunity and moved on irregularly to the territory of the destination country. As these centres have not been developed, there is no jurisprudence of the European courts. In the US, this question could be raised under the the 'Circumvention of Lawful Pathways regulation.'[84]

It is still unclear how the earlier mentioned Italy-Albania agreement would work for asylum seekers who are found to be in need of protection in Italy's processing centre in Albania. If they were to be granted protection status in Italy, this would technically create an extra-territorial processing followed by access or resettlement. Since the arrangement concerns asylum seekers who were intercepted at sea by Italy itself, it is however not a complementary legal pathway, but rather a version of a safe third country agreement.

Unlike in the Blair-proposal, a transfer to the Italian processing centre would take place at the borders, when the Italian authorities already have control over the asylum seekers. While being practically more feasible, as Italy has control over the numbers of asylum seekers to be transferred to the centres, the legality of such a construction under EU law which involves a non-EU state, and the requirements under international human rights law, need to be further researched. This would also depend on the safeguards and conditions in the centre. In the 2014 case of *Sharifi v. Italy and Greece*[85] for example, the European Court of Human Rights held that a collective expulsion at sea from Italy to

83 German Government, "Einigkeit zu Migration und Deutschland-Pakt," 7 November 2023.

84 DHS, 'Fact Sheet: Circumvention of Lawful Pathways Final Rule', May 2023. See also more extensively the US country report.

85 ECtHR, *Sharifi v. Italy and Greece*, Application No. 16643/09, 21 October 2014.

Greece was in breach of article 4 of Protocol 4 and article 3 ECHR, as it was established (by the ECtHR) that the Greek asylum procedure did not provide safeguards against refoulement.

For example, the Italy-Albania processing centres, from what is known, would raise a fundamental issue of state responsibility with respect to the prohibition of refoulement, as Albania would be responsible for the removal. In a first reaction the European Commission said that the construction would be outside the scope of EU law.[86] This preliminary, legalistic response fails to address other aspects of the arrangement that would fall under EU-law, such such as border procedures, possible consequences for joint operations with EU-agencies and the principle of sincere cooperation under article 4 of the Treaty on European Union.

Lastly, it can be mentioned that the EU has given funding to UNHCR's Emergency Transit Mechanism (ETM) for refugees in Libya who were given shelter in Rwanda and Niger from where resettlement to other countries takes place.[87] Between September 2019 and 2023 about 1500 refugees and asylum seekers were evacuated out of Libya to Rwanda. About 900 refugees were resettled, notably in Sweden, France, Belgium and Finland. Since 2017 3812 persons were evacuated from Libye tot Nigerm and subsequently resettled in third countries. Due to the coup, interviews are currently only taking place remotely.[88]

Assessment

Thus far, the selected countries have not implemented external processing in the form of Transit Processing Centres (TPCs). In light of current developments in the EU, the feasibility of such centres may be of interest in the near future.

From the outset, it seems rather complicated to set up such centres in third countries, that are equipped with sufficient trained staff and facilities, and guarantee procedural justice outside a country's territory. It would require significant logistical processes and the consent of the host country, which must itself be able to protect asylum seekers during the asylum process.

86 Jorge Liboreiro, "Italy-Albania migration deal falls 'outside' EU law, says Commissioner Ylva Johansson," *Euronews*, 15 November 2023.

87 UNHCR Rwanda, "European Union increases support to people in need of international protection with additional grant of €22 million to UNHCR to operate the Emergency Transit Mechanism in Rwanda until 2026," 9 February 2023.

88 UNHCR, Operational Update Niger, October 2023.

Especially if TPCs are used to limit access to territorial asylum procedures, they would raise many complex legal questions. For EU-states it would require a basis in EU-law. For this, there are also questions to be answered with respect to state responsibility and human rights standards. For example, which state would be responsible under international law if standards in the TPC are not met or if a flawed decision results in refoulement? Which court should deal with this? If an asylum seeker whose application is rejected moves on to the 'destination state' and applies for asylum in that state, would this have to result in a review of the case? The reported recent Italy-Albania agreement on processing centres in a border context, also raises questions and needs further scrutiny as well in respect of its legality under EU law and state responsibility.

As a complementary pathway to legal avenues and resettlement, TPCs may be considered. As the US example of Safe Mobility Office shows, the centres in third countries may become overwhelmed by applications, however. Therefore, clear parameters for TPCs should be set out, so that they could be workable and indeed become an effective legal pathway, which can give access to safety, alleviate pressures on a country of first asylum, UNHCR, border controls and national asylum systems. UNHCR's ETM mechanisms could serve as an example of this.

5. Resettlement

Resettlement is the transfer of refugees from an asylum country to another State, that has agreed to admit them with a legal status ensuring international protection and ultimately grant them permanent residence, foremost in cooperation with UNHCR. Australia, Canada and the US are the world's main refugee resettlement countries. The resettlement policies are widely supported in these countries, and they are an essential part of the refugee protection narrative. Three new developments in national resettlement policies draw attention:

- Resettlement (and other legal pathways) for refugees within the Western Hemisphere;
- Private sponsorship in all three countries;
- A mixed economic migration and refugee protection approach in Canada through the 'economic mobility pathways-pilot'.

Canada

Canada is a frontrunner of refugee resettlement. Resettlement refugees form a larger part of the asylum statistics in Canada than asylum after spontaneous

arrivals. In Canada there are two main resettlement streams: private sponsorship and government assisted resettlement. The proportion of private sponsoring is currently increasing. Private sponsors can consist of larger organizations that are recognized partners of the Canadian government (sponsorship agreement holders) or smaller private groups. Sponsors are responsible for the reception of resettled refugees. Of the approximately 44,000 refugees to be resettled in Canada in 2025, 64% would be privately sponsored as opposed to 54% in 2023.

Canada has also recently introduced a resettlement programme for human rights defenders with a clear protection objective, and an "economic mobility pathways pilot". The latter is a new approach, mixing refugee resettlement and economic immigration: refugees outside Canada (for example recognized through UNHCR) can apply under a provincial stream (meeting specific criteria for provincial labour markets) or a federal stream. The federal stream normally requires a job offer.

The US

The US has an annual cap set by the president. The refugee resettlement cap for 2024 is 125,000 people. Upon arrival, refugees are geographically distributed across the United States and receive resettlement assistance. As part of the new Safe Mobility Program, there are more resettlement places from the western hemisphere, namely 40,000 in 2023 and 50,000 in 2024. Resettlement is thus part of other efforts to manage migration in the region, including the Safe Mobility Offices, which are discussed below. A further increase to 50,000 slots for refugees from the western hemisphere is anticipated in the President's FY 2024 refugee resettlement plan.

In 2023, the Biden administration also launched a smaller private sponsoring program, based on the Canadian model. The State Department aims to recruit 10,000 private sponsors to resettle 5,000 refugees in the first year of the program.

Australia

Australia has a policy for resettlement as part of its Humanitarian Program. The total program is set at 17,875 (FY 2022-2023) humanitarian visas per year. Unlike in Canada the resettlement program is not additional to in-land applications (submitted for example by visa overstayers), instead, the target is for onshore and offshore (resettlement) applications combined. As part of this number, Australia also introduced a specific quota for private sponsoring of around 1,400 places.

EU Resettlement Framework and policies

EU Member States combined do not have a significant resettlement quota. In 2023, the overall EU numbers barely reached 23,000 refugees.[89] The Netherlands has a small quota of 500 places per year. Denmark has in recent years lowered it resettlement numbers, also restricting the rights and status granted to resettled refugees. The most significant EU resettlement programme related to the EU-Turkey deal, in the context of which 40,000 Syrian refugees were resettled.

Although 'relocation' within the EU is technically not the same as resettlement, this can be seen as a complementary solidarity mechanism with Member States facing asylum pressure. However, the number of those relocations - from for example Italy to other Member States - has been extremely low.[90]

Assessment

There is no legal obligation to resettle refugees. Refugee resettlement is part of international solidarity within the refugee protection system, and is meant to give a durable solution to vulnerable refugees and share the burden of refugee protection within the international community.

The trend towards a more strategic use of resettlement (as is the case in North America and earlier in the EU under the EU –Turkey deal) could lead to fewer resettlement places from other regions facing refugee crises that are of less strategic relevance for destination countries, which is a concern from the perspective of global protection space. The same goes for a mixed economic pathway for refugees and the trend towards resettlement through private sponsorship. According to for example UNHCR[91] this may lead to a selection based on other criteria than vulnerability and international solidarity, such as a focus on integration possibilities. Where economic criteria and/or private sponsorship are used in a complementary manner, it can however strengthen support for refugee protection and benefit refugee communities. A balance must, therefore, be found between solidarity with vulnerable refugees and countries facing pressures and state and community interests in resettlement countries.

89 European Commission Migration and Home Affairs, "Resettlement and other pathways to protection."

90 Statewatch, "EU: Tracking the Pact: Only 207 refugees relocated so far via "voluntary solidarity mechanism", 31 January 2023.

91 UNHCR, Projected Global Resettlement Needs 2024, April 2023.

EU Member States have small resettlement quota compared to the US, Canada and also Australia The US and Canada face asylum pressures, but have maintained and in the case of Canada even increased resettlement quotas. EU Member States such as the Netherlands could thus increase resettlement quota for vulnerable refugees and, in addition, consider the strategic use of resettlement as part of a strategy for legal pathways and discouraging irregular access to territorial asylum. Community sponsoring could add to support for refugee protection in the EU. For example, in Germany a pilot of complementary community sponsoring was evaluated positively. The 'Neustart im Team' (NEsT)-pilot for 200 vulnerable refugees concluded that there was great support from civil society, as has been the experience in Canada for many years.[92]

6. Humanitarian visas or similar (humanitarian) legal pathways

With humanitarian visa or similar pathways refer to avenues for safe and legal access to the territory of a state, for example through a visa or permit granted outside the territory of the state, for the purpose of applying for or be granted asylum within that state. This is considered a complementary route to resettlement procedures through UNHCR. Especially North-American countries have opened pathways for nationals from the Americas, i.e. for the countries from where asylum seekers would normally move, including transit countries. In addition to 'regional visas' the states/blocs in the study also have humanitarian visa programmes for nationalities outside their own region.

Visas for the nationalities in the region

There is an increase of 'paroles' (permission for lawful entrance on a temporary basis)in the US and humanitarian visas in Canada for the "own region" of the US and Canada. The new US nationality-based parole programs have resulted in hundreds of thousands of migrants taking flights to enter the United States legally. Among these is a special program for Cubans, Haitians, Nicaraguans, and Venezuelans. These countries are experiencing severe political or economic turmoil and are not accepting returns of their nationals. Under the program, more than 168,000 people from these countries had been vetted and approved for travel to the United States as of mid-July. The paroles themselves do not provide for permanent residence in the US, however.

92 German Federal Office for Migration and Refugees, "Das Aufnahmeprogramm 'Neustart im Team'," 21 June 2023.

Apart from the parole programs, the US administration has started new family reunification programs for migrants from Colombia, Cuba, El Salvador, Guatemala, Haiti, and Honduras who already have filed family-based green-card applications. The program will allow an estimated 73,500 people to be considered for parole as of May, letting them enter and remain in the United States while their application is processed. The family reunification programs grant three years of parole.

Canada, with a much smaller population than the US (38 million compared to 338 million) has offered 15,000 humanitarian visas to persons from Colombia, Haiti and Venezuela. Of these, 11,000 visas will be processed as of October 2023. The countries of origin for this program are among the top asylum countries of origin for Canada. According to the Canadian government information, the visas, upon arrival, would lead to permanent residence. This means that recipients would qualify for the same rights as Convention Refugees. The Canadian scheme was part of the expansion of the Canada-US Third Country Agreement, which will be discussed below.

The US and Canadian approach to offer legal pathways as part of the Safe Mobility Pathways is new. None of the other countries in the study seem to have a visa programme for the bloc's or country's own region. Australia's policies are aimed at sending asylum seekers to the neighbouring countries rather than offering access to its own territory and protection.

Humanitarian visa for nationals from other regions

Australia, Canada and the US offer humanitarian visas of some form to nationals from other regions, i.e. regions from where they do not receive many asylum applications. These can also be part of resettlement schemes or general visas.

Australia, Canada and the US all have visa programme for Ukrainians. Perhaps somewhat different are visas for Afghans, as these concern persons who had ties with the countries' military and other organizations in Afghanistan, before the fall of Kabul.

Through *Uniting for Ukraine* (operational since April 2022), the US had paroled in more than 141,000 Ukrainians as of July 13, welcoming individuals who fled Ukraine after Russia's invasion in February 2022. Additionally, Operation Allies Welcome (operational from August 2021 to September 2022) evacuated and paroled in 76,200 Afghans after the withdrawal of the U.S. military from Afghanistan and fall of the country to the Taliban.

In the Australian system there is no clear additional stream of humanitarian visas. In 2022-2023 the country had reserved 17,875 humanitarian visas. These were allocated to the resettlement programme and particular streams under this programme. However, Australia offered visas to Ukrainians. According to government information, since 24 February 2022 the department has granted over 11,500 visas to Ukrainian nationals in Ukraine and thousands more to Ukrainian nationals displaced elsewhere. Nearly 11,400 Ukraine national visa holders have since arrived in Australia.

Canada also has visa programs for Afghans and Ukrainians. As of February 2023, it received 28,010 Afghans. Following the Russian invasion of Ukraine in 2022, Canada allowed Ukrainian nationals and their families to enter Canada and reside here as temporary visitors. The CUAET – Canada Ukraine Authorization for Emergency Travel – was announced on 22 March 22, 2022.[93] Between 17 March 2022 and 17 August 2023, over 173,000 Ukrainians entered the country under the CUAET.[94] In August, out of 1,1 million applications, over 858,000 were approved under this scheme. The CUAET ended on July 15, 2023.[95] Persons accepted can enter Canada until March 31, 2024.[96]

The Netherlands has no (formal) national policy regulating the issuance of humanitarian visas according to Article 25 (1) of the Visa Code. Also Denmark does not offer visas or other pathways from conflict regions. Granting a humanitarian visa is no legal obligation under European law and is considered to be at the national government discretion.[97] Spain for example has offered humanitarian visas to nationals from Venezuela.[98] In 2022, around 90,000 nationals from Venezuela, Colombia and Peru applied for asylum in Spain.

93 Immigration, Refugees and Citizenship, "Canada launches Pathway to reunite families and support Ukrainians," 15 July 2023.

94 Immigration, Refugees, and Citizenship Canada, "Canada-Ukraine Authorization for Emergency Travel."

95 Immigration, Refugees and Citizenship Canada, "Immigration measures and support for Ukrainians and their families."

96 Immigration, Refugees and Citizenship Canada, "Immigration measures and support for Ukrainians and their families."

97 See CJEU, *X. and X. v. Belgium*, C638/16, 7 March 2017; ECtHR, *M.N. and others v. Belgium*, Grand Chamber Decision, Application no. 3599/18, 5 March 2020.

98 UNHCR, "UNHCR welcomes residency on humanitarian grounds for Venezuelans with rejected asylum claims in Spain," 1 March 2019.

Information and access to legal pathways, including visas

Both the US and the EU have information services in third countries. In the case of the EU, such offices did not assist potential asylum seekers to access asylum, because of a lack of legal pathways.[99]

The US Safe Mobility Initiative does offer additional legal pathways. Safe mobility offices (SMOs) in countries throughout Latin America assess ('vet') possible candidates for refugee resettlement, as well as those eligible for other existing lawful pathways, such as the parole programs, and employment or family-based visas. Presently, offices with a limited set of services are open in Colombia, Costa Rica, and Guatemala. The offices are run by the International Organization for Migration and the United Nations High Commissioner for Refugees, with U.S. State Department and USCIS personnel assisting. The administration plans to open more offices in the western hemisphere, and the Canadian and Spanish governments have joined the initiative and offer refugee resettlement and employment-based visas through the offices.

Safe mobility offices only do not increase the visas available to migrants, only the US Congress can provide for those. Therefore, the primary function of the offices at present is to provide information about the limited visa options that are available to migrants, and to refer those in need of protection for screening by the United Nations High Commissioner for Refugees. Noncitizens access the SMOs via an online platform – walk-ins are not permitted. While the parole programs offer a new manner of entry, they require that migrants have sponsors, valid passports, and pay for flights into the country, limiting them to migrants with connections and resources. Safe mobility offices are not doing asylum pre-screening, likely due to legal limitations.

Host countries have expressed concerns that safe mobility offices could generate expectations about legal pathways that cannot be met. This is a critical issue in Latin America and the Caribbean, where over 6.5 million displaced Venezuelans already live in other countries. Several of these host countries have made substantial efforts to integrate them into schools, labour markets, and local communities.

99 For example African Press Organization, "Inauguration of the Migration Information and Management Centre (CIGEM) in Bamako, Mali," 6 October 2008.

Under the '*Circumvention of Lawful Pathways regulation*' the US can impose penalties, including ineligibility, for asylum seekers who have not used the lawful pathways and made online appointments.[100]

Assessment

Currently there are many initiatives offering complementary humanitarian pathways for refugees or offering prima facie temporary protection. The initiatives offer safe legal pathways and potentially access to durable solutions. One of the questions is, however, if they are followed by a refugee status or an equivalent permanent status or a temporary status with less security and fewer rights and support.

For government agencies at the borders and potentially for the agencies dealing with asylum requests, these extra-territorial pathways may decrease the operational burden to deal with territorial asylum. The use of safe and legal pathways may lead to less public protests or concerns in the destination countries, because they provide 'regulated and controlled' access to protection for those in need.

For third countries, the additional pathways could serve to alleviate the large responsibility burden they face, but as seen in the case of the SMOs, there are also concerns about 'pulls' for people not yet residing in these countries and a 'drain' with respect to integration efforts they have already made. Close cooperation and coordination with these countries and responsiveness to their concerns will be a critical success factor for these programs.

Insofar humanitarian visa programmes may be used in the future to replace asylum procedures or be accompanied by punitive measures for those who do not access such pathways at the earliest moment possible, this would raise complex legal issues vis-à-vis the burden of proof and effective remedies. An additional current point of concern is that temporary (protection) status could lead to longer term precarious immigration status and subsequent risks of exploitation and poverty.

100 See more detailed the US country report.

National (Territorial) Asylum Procedures

7. Planning, funding and quotas

Planning

Canada has a system of setting annual levels and targets, which is done in consultation with stakeholders. For the consultations stakeholders are invited to respond, and the outcomes of this consultation process are published.[101] Together with surveys among the public and labour market analyses, the outcomes of the consultations are then used for levels and targets. Provincial interests and needs for immigration are taken into account, as well as a Francophone component.

The Canadian 2023-2025 migration saldo targets for example are respectively 465,000 persons in 2023, 485,000 in 2024 and 500,000 in 2025. Of these, the economic immigration categories take up close to 60%. The 'Federal high skilled class" and the Provincial Nominee Programs make up the majority of the economic migration classes. Furthermore, family-related immigration amounts to close to 100,000 persons per year, including about 30% for parents and grandparents. Refugees, either through in-country access to asylum or resettlement, make up close to 15% of the targets.

The other countries in the research project make use of levels and targets as well. In Australia the "caps" are used in a more restrictive manner. Through an amendment aimed at limiting the asylum caseload, the number of permanent protection visas can be capped, which can lead to recognized refugees not receiving a visa until the following financial year. This has led to people having to wait years for a (decision on) a visa. On 31 August 2023, 29,246 people were awaiting their decision on their permanent protection status.

The Dutch Advisory Council on Migration recently reported on planning for the Dutch context. It mentioned the Canadian system specifically and recommended

101 See for example Immigration, Refugees and Citizenship Canada, *2023 Consultations on Immigration Levels, Final Report*, 2023.

that a planning system which sets "soft targets" would be preferrable rather than defined quotas.[102] A quota for asylum seekers as suggested by some Dutch political parties would be incompatible with EU law when applications would exceed quotas and access to asylum would be denied in individual cases. None of the countries in the research has a hard quotum for "spontaneous asylum".

Backlogs and planning

A good planning process could ensure that the government agencies dealing with asylum have sufficient capacity. Four of the five countries in the study, Australia, Canada, the Netherlands and the US, experience significant backlogs in the processing of asylum requests.

Processing times in Australia are also long, despite low numbers. The average amount of days that applicants need to wait for a decision on their permanent protection application has been rising, amounting to an average of 903 days in 2022. In appeal, the number of unresolved cases was relatively low, at 5,747 on 31 March 2023.

The numbers in the US are enormously high in absolute numbers. Two million asylum applications were pending in 2022. In the light of the US population (331 million) per capita these numbers are high in comparison with the other two countries in the study facing backlogs, but not completely incomparable. Canada with 38,2 million inhabitants had a backlog of 80,000 asylum applications and the Netherlands with 17,8 million inhabitants almost 30,000 applications.

In part, the backlogs can be related to the asylum systems, based on individual asylum procedures including appeal procedures for any person that reaches the territory of the destination country and asks for asylum. In recent years the capacity and funding were insufficient to deal with the expected number of asylum seekers. While the prognosis in the Netherlands was in 2022 a scenario between 38.700 en 55.700,[103] the budget was set for 30.000, and 31.750 in the following years, (with some additional (spare) budget).[104] The total asylum

102 Advisory Council on Migration, *Realism about Numerical Targets. Exploring immigration targets and quotas in Dutch Policy*, 21 December 2022.
103 Parliamentary Documents, "MPP-2022-2", 4 November 2022.
104 Minstry of Justice and Security, "Budget 2022", 21 September 2021.

influx was almost 48.000[105], and this year 45.000 until December 2023.[106]
In Canada, the Immigration and Refugee Board (IRB) has permanently received more funding.[107] In the US in 2022, Congress appropriated 250 million dollars additional funding to tackle the asylum backlog, but there still is a mismatch between incoming cases and funding. In 2023, USCIS proposed funding asylum adjudications by levying a 600-dollar surcharge on over 700,000 employment-based visa petitioners and beneficiaries each year.
In the Netherlands, the authorities can be confronted with a fine when time-limits are not met in asylum procedures (and administrative law procedures in general). This, however, has not clearly led to speedier decision-making, as the main problem was insufficient means and capacity which needed to be repaired.

Level and target setting – public consultations and participation

The Canadian system of setting immigration and asylum levels and targets is a good example of a participatory process, involving many stakeholders and including surveys among the public. The number of participants in the process is high and leads, likely, to an immigration and asylum policy that is more widely supported.

For a wider EU instrument, the Canadian model of incorporation of regional needs and linguistic needs could be of interest. This is especially the case if the EU would coordinate legal pathways, including with an economic element.

Hard quotas maximizing the number of asylum applications would not be compatible with international and EU refugee law. The Australian cap for granting a permit would under EU law also raise legal issues under the Qualification Directive and, for example, the European legal framework with respect to family reunification.

Assessment

The importance of adequate planning and sufficient funding is recognized in all countries of the study. Despite this, backlogs do occur. Timely responses to an increasing caseload and keeping buffers for situations of an increased influx due to the international security situations, are essential for an efficient procedure.

105 IND, "Asylum Trends", December 2022.
106 IND, "Asylum Trends," November 2023.
107 Immigration and Refugee Board of Canada, "2023-24 Departmental Plan."

In the Netherlands, the discrepancy between the capacity in the asylum system and the number of asylum applications has probably negatively impacted support for the asylum and reception systems and contributed to the fall of the cabinet and the 2023 general elections that were dominated by immigration and asylum.

The Canadian system of annual 'soft' target and level setting on all types of permanent immigration can inform policy makers and contribute to public support for resettlement and territorial asylum. In a more volatile and polarized political societal context, this process needs a clear framework, however, and be accompanied by public information on the refugee situation and challenges for agencies. Quotas on territorial asylum would be incompatible with international and EU law. For the sustainability and conherence of resettlement programmes, it is important to also set longer term targets, in close cooperation with UNHCR, third countries, civil society and provincial/municipal governments.

On an EU-level the Canadian system of incorporating provincial immigration needs, including economic pathways for refugees, could be used for an EU wide responsibility sharing or resettlement system.

8. Procedures, border procedures, detention and reception

Procedures general

Despite considerable challenges due to a disbalance between resources and numbers of applications, all five countries operate asylum procedures that are accompanied by legal safeguards such as legal assistance, interpreters, trained staff, expert advice, (some) mechanisms for swift decision making, effective remedies and adequate reception, and leading to refugee status or subsidiary protection.

There are many similarities in the asylum systems in the selected countries. This is not surprising as legal criteria are largely the same, as well as the methods for establishing the facts through interviews. Despite pressures, the asylum systems of Australia, Canada, Denmark and the Netherlands are perceived as solid, i.e., there is generally a system of high-quality decision-making if the necessary capacity is indeed in place. The US asylum system operates under significant strain.

In all countries in the study there are elements in the procedure which are specific to the systems. Canada, for example, has a system of Pre-risk removal assessment (PRRA) after, but also sometimes instead of, the regular asylum procedure. The regular asylum procedure is conducted by an independent tribunal, the Immigration and Refugee Board. The PRRA is processed by the Canadian Border Services Agency. The PRRA is critically assessed because of lower standards and quality of decision making.[108]

In the US system there is a distinction between 'affirmative' and 'defensive' claims which are examined by different agencies. In the Netherlands asylum and return decisions are made by the same agency, the IND. All systems have a form of judicial review, but the way the judiciary gives access to scrutiny and the efficiency of the process can vary. In the countries of the study there is an active civil society, and asylum lawyers organizations, NGOs and academics also engage in strategic litigation.

Especially in the US, the various systems of assessing risks and asylum claims can be internally competing. The recent focus on border management has meant that asylum officers have been redirected to conducting credible fear (upon return) interviews for recent arrivals, instead of asylum interviews for those with long pending applications.

The US and Canada do not seem to make a wide use of differentiation vis-à-vis accelerated or fast track (inadmissibility) procedures, although certain offshore and border procedures in the US described above can be considered a fast-track procedure. Canada has abandoned the use of safe country of origin legislation. By contrast, backlogs in the asylum procedures, lead to very long waiting times. In the Netherlands, extending time-limits, insofar EU legislation allows for this, has also been used as a deterrent for asylum seekers whose claim is likely to be successful, while at the same time inadmissibility 'tracks' have been prioritized. In Denmark the procedure also differentiates clearly between various categories of application based on country of origin.

Border procedures

Border procedures are different in the countries of the study, also due to their geographical situation and legal context. The Netherlands and Denmark have

108 See for example Macklin and Blum, *Country Fiche Canada*, Asile project, January 2021.

no significant external land borders as they are part of the Dublin and Schengen system. Border procedures are thus limited to a relatively small number of arrivals at the airports and by sea. For the Netherlands, the EU Asylum Procedures Directive provides guarantees for asylum seekers.

The abolition of internal borders in the Schengen area means that Denmark and the Netherlands cannot rely on border procedures for territorial asylum claims. Denmark however, until 2023, re-introduced its land borders as an exception under the Schengen system because of alleged threats, related to terrorism, the Russia and Ukraine war and the situation at the external borders. Also it has a so-called Emergency Break related to deficiencies in Dublin countries. This has not been applied in practice.

Unlike the Netherlands and Denmark, the US and Australia have their own external land and sea borders from where asylum seekers can enter directly. In Canada the situation is again different, as. in order to reach Canada by land, asylum seekers have to transit the US, with which Canada has a STC agreement.

The United States currently faces the most significant pressures at the borders of the countries under study. It has abolished the restrictive 'Remain in Mexico'-programme with detention and pushbacks at the borders, but it has adopted its 'Circumvention of Lawful Pathways regulation.' Under this policy, asylum seekers who do not enter via points of entry and make an appointment can be declared ineligible, unless they can show they submitted an asylum request in a transit country which was rejected. In other cases, the bar for a risk of persecution or torture is raised. In such cases asylum seekers can only qualify for parole or protection under the Convention Against Torture, which can result in a lesser rights i.a. lower standard of protection after acceptance. To avoid this situation, asylum seekers need to make an appointment at points of entry.

In practice, however, the US authorities often do not have the capacity to deal with applications at the borders and asylum seekers, also those who have not made an appointment and for whom a 'credible fear' assessment must be made. As a result, many noncitizens are released into the U.S. interior with a charging document known as a notice to appear (NTA) in immigration court, which schedules them for deportation proceedings. This court process typically takes years; some recent arrivals in New York City have been scheduled for initial hearings in 2027. Noncitizens can also be allowed to enter the United States temporarily via parole, which permits them to remain in the country for

a designated period. At the border, officials have used short grants of parole, up to 60 days, to alleviate overcrowding at border facilities during times of high arrivals. From January 2021, when President Joe Biden took office, to June 2023, border authorities granted parole to about 718,000 individuals encountered between ports of entry.

The impact of the Safe Mobility Initiative, combined with the Circumvention of Lawful Pathways Regulation, on a more managed immigration and asylum system needs to crystallize and requires further study.

(Border and removal) detention

Detention is part of border procedures. This can be imposed because of irregular entry for screening purposes, but also for removal purposes. With the exception of Australia, border detention does not seem to take place on a large scale or for very long period. In the European context, thus the Netherlands and Denmark, this is related to EU legislation and ECHR standards: unaccompanied minors and families with children may not be detained for example. In Canada detention is not frequently used and not for a long time.

The US have a capacity of 23,000 detention places. Recently it amended its detention policies and practices. Under the 2023 'Family Expedited Removal Management' families are not detained anymore. They are released into the interior and the head of household is placed on an ankle monitoring device and given a nightly curfew. The families are screened for credible-fear of persecution within 6 to 12 days of their arrival in the United States, and if no credible-fear is found, they are quickly removed, with the goal being removal within 30 days after their arrival. If credible fear is found, families may proceed with filing asylum applications.

Australia also makes use of detention in the Regional Processing Centres in Nauru and PNG. Australia's model of detention in regional processing centres in third countries has been deemed unconstitutional by the Supreme Court of Papua New Guinea and the detention centre was closed. However, both in Australia and in Nauru, Australia has been mandatorily detaining anyone who arrives without a visa, irrespective of age or status. This group of people remains in detention facilities for an average of about 700 days, with some having to stay there for over 10 years. However, an Australian High Court ruling on 8 November

2023 ended the legality of indefinite detention, resulting in 140 people being released from immigration detention by the end of November 2023 already.[109]

Reception

Reception conditions for asylum seekers vary in the five countries. For example, in the Netherlands reception is provided for in larger centres, for which the Reception Agency (COA) has to negotiate with private parties and municipalities. Other countries, such as Canada and the US, operate through subsidized shelters and hotels for example. The affordable housing shortage in the five countries can lead to different situations for asylum seekers, such as inadequate large scale emergency reception in the Netherlands and risks of homelessness or destitution in the US and Canada.

In the US a more complex situation exists because of the paroles. Persons granted parole at the borders have limited rights, including emergency health care and the possibility to apply for a work permit. They can freely move within the US. To secure lawful status they may have to apply for asylum. In the US, asylum seekers can only apply for a work permit 180 days after arrival. There is no federally organized distribution scheme for asylum seekers, who generally are not eligible for public benefits apart from emergency medical services. In practice this has led to risks of destitution for many migrants and local authorities urged the federal government to respond to a situation of emergency. In 2023, the government expedited the process for work permits. In addition, the government granted prima facie temporary protection to 500, 000 Venezuelans.

Some countries in the study provide some form of reception in the return stage. In Denmark, there are return centres where persons have limited rights. In the Netherlands a similar system of limited reception is given to families pending the removal process. In Canada, persons who cannot be removed for reasons beyond their control, can apply for a work permit.

Assessment

The five countries in the study all have asylum procedures in place with safeguards. However, especially at the external borders of Australia and the USA

109 Hannah Ritchie, "Australia indefinite detention unlawful, High Court rules," *BBC*, 8 November 2023; Daniel Ghezelbash and Anna Talbot, "High Court reasons on immigration ruling pave way for further legislation," *The Conversation*, 28 November 2023.

there are expedited procedures where safeguards are more problematic. For Australia and Canada, resettlement is the main avenue for refugee protection, but territorial (in land) asylum procedures are an important part of the refugee protection system in all countries in the study except Australia, as well as in the EU in general.

Especially the US has border procedures in place, which deal with the numerous asylum seekers. Offices at the external border often do not have the capacity to process a high number of arrivals, however. Practically it is hard to envisage that in the European context a system of exclusive or significant processing at the external borders could work. Practically, there are constraints due to the numbers of arrivals by sea and land. From a legal perspective, a high pressure on government agencies in "hotspots" at the EU's external borders, has led to human rights violations. The experiences with EU hotspots in the Mediterranean show that in these small areas the asylum systems could not cope with the numbers. There is extensive case law of the ECtHR on the situation at the borders, on detention but also on reception conditions on EU hotspots. These have been found to be in breach of the ECHR, for example, in the case of *A.D. v. Greece* (April 4, 2023), regarding the Samos Reception and Identification Centre and also with respect to the hotspot of Moria in Lesbos, Greece.[110]

In the EU, "hotspot solutions" also have put a lot of pressure on hosting communities, and led to public indignation about the conditions on the Greek islands. Therefore, a hot spot approach for the process of registration and first screening, for example after rescue at sea, must normally be followed by a speedy referral to (in land) centres with more resources for processing claims and adequate reception standards.

Although the asylum systems in the study do have a possibility to fast-track procedures, this does not play a significant role. The Australian system for irregular entries and the US border procedure can be considered fast-track. Inland fast track processing, for example for safe countries of origin, is limited. In some cases delaying the procedure can be a strategy. In the Netherlands, for example, extending time-limits in the asylum procedure and family reunification

110 See for example ECtHR, *H.A and others v. Greece*, Application nos. 4892/18 and 4920/18 (13 June 2023H.A. and others); and European Court of Auditors, *EU response to the hotspot approach*, Special Report, June 2017.

procedure was used as a measure of discouraging asylum seekers to enter the Netherlands.

It is hard to compare the systems or draw general conclusions, as each operates in its own legal and societal context. In general, procedural measures do not seem to be widely used for "asylum management" purposes. However, Australia does make use of very long (and until recently indefinite) immigration detention. The US Circumvention of Legal Pathways Regulation does entail a procedural punishment on irregular entry. Under the ECHR and EU law such practices would be problematic.

The reception conditions and social support for asylum seekers are a main concern in countries facing pressures, especially in Canada, the Netherlands and the US. In the return stage, denial of support or placement in return centres with limited rights can be seen as an intentional measure to pressure migrants to return. This could lead to human rights violations and in particular impact vulnerable persons, including children.

The effect of procedural discouraging measures is not always clear-cut. Denmark experienced a decline in the, already low, numbers, but these are rising again. The same goes for the Netherlands. In some cases measures could lead to burden-shifting to neighbouring countries (waterbed-effec)but this would also depend on the conditions in these other countries.

9. Eligibility grounds, rates and returns

The outcomes of the procedures are not always easy to analyse and compare as the statistics can be different and the systems can be complex. As was mentioned earlier, the absolute numbers of claims and decisions in the US asylum system are very high, compared to the other countries in the study but in relation to its population size the numbers are more comparable. In Canada, Denmark and the Netherlands, recognition rates (Refugee Convention status and subsidiary status) are relatively high. This is more than 60% in Canada in 2022, 59% in Denmark and 69% in the Netherlands. In the latter this is for a large part due to the more recent processing of the caseload with a high recognition change, amongst other Syrians, who were 'backtracked' in orde to prioritize the more unfounded applications, and the Dutch caseload does in fact consists for a larger part of applicants from war thorn region of the world. In the United States there is a very large caseload pending. For "defensive claims", which are made in removal proceedings (instead of directly upon arrival), the acceptance rate was

as low as 15% in 2023. In Australia acceptance rates for current applications are low (11%) because Australia has cut off routes for asylum seekers from conflict countries and other "refugee producing" countries. Thus, asylum seekers can only apply for asylum if they enter regularly.

There is significant variation in the way protection is provided. Canada and the Netherlands give the same rights to Convention Refugees and other beneficiaries of protection, whereas the Netherlands applies a different protection framework to Ukrainians who have a prima facie temporary status. In the United States there is a complex situation of persons with different status or a "parole", which is not a lawful status. Thus there are: humanitarian parolees, persons who have temporary protection, Convention Refugees (after resettlement), and "asylees", each status or non-status with different outcomes in terms of permanent residence. The United States provides asylum and refugee status based on the refugee definition of the 1951 Refugee Convention and the 1967 Protocol, and subsidiary protection under the Convention Against Torture. US law also allows officials to grant humanitarian parole, which enables lawful entrance into the United States, and temporary protected status may be granted for migrants already in the country. Apart from asylum and refugee status though, these protections provide no path to permanent residence in the United States.

A noncitizen in the US who has been granted asylum is called an asylee and may work indefinitely and receive approval to travel abroad. An asylum grant does not expire, but it may be terminated under certain circumstances, such as if a noncitizen is determined to no longer meet the Immigration and Nationality Act (INA) definition of a refugee. After one year as a refugee or asylee, an individual can apply to become a U.S. lawful permanent resident. Asylees and admitted refugees may petition for their spouse and/or unmarried children who are under 21 years old. Recipients of CAT protection can not petition for their family members. The goals of the U.S. protection system are to provide lawful status for those in need, and to return those deemed ineligible.

In Denmark, a new temporary subsidiary protection ground was introduced in the Aliens Acts (article 7(3)) applicable to situations of generalized violence, whereby the right to family reunification is withheld for the first two years of residence. This protection ground is mostly used for Syrians. Also, the threshold for revocation of asylum protection other than Convention refugee status was lowered: a durable improvement of the security and human rights situation in the country of origin is no longer necessary. However, in practice the re-assessment

of protection needs, revocation and return has thusfar not been very effective, although detrimental for some refugees. There are about 30.000 Syrians in Denmark: 1200 cases have been re-assessed, only a few hundred revoked, and these persons have not been returned and are still in legal limbo in the country.

In the Netherlands there is a discussion on granting less rights to beneficiaries of subsidiary protection. This would mean abandoning the Aliens Act 2000's system of a uniform asylum status on multiple grounds, giving the same set of rights to all beneficiaries of international protection.

Removals

The US has used their geopolitical power and significant partnering possibilities to leverage for brokering or providing new impetus to return agreements with countries of origin. The other countries in the study have been less successful. In Australia, despite low numbers, 75.430 people are waiting for deportation after a negative decision on their application. In Canada, Denmark and the Netherlands removals are also problematic. In Canada the Auditor General was critical about this. Also, in the Netherlands the removal practice is under scrutiny, although the complexity of the return process is recognized.

Assessment

The outcomes of asylum procedures vary because of different caseloads. In Canada, Denmark and the Netherlands the acceptance rates are fairly high, although Denmark has started to revoke protection status of Syrians, the main country of origin.

The main differences and policy approaches can be seen with respect to the uniform asylum status versus a diversified system of protection status. Canada and the Netherlands grant the same rights to all holders of protection status. This is effective for the integration of refugees, and in the Netherlands has reduced procedures for a "higher status". In a more diversified system of statuses, states have more room of manoeuver to discourage asylum seekers. Indeed, that seems to be the main purpose. There are contrasting trends in destination countries. While Denmark has introduced a stronger diversification in status and the Netherland is contemplating this, Germany – not part of the study – is reconsidering its policies and intends to give access to family reunification to holders of subsidiary protection. In the Netherlands this topic even led to the fall of the cabinet Rutte IV. Limited or delayed access to family reunification is used as an instrument by some states. However, the effectiveness of this is not clear.

Granting less rights to certain categories of international protection, does not seem to be a very effective measure from a legal, practical or moral perspective. The same is true for Denmark's system of lower standards revoking protection status. In the case of Syrians, this led to a legal limbo for refugees and questions from neighbouring states.

The countries under study face problems with the removal of persons who are found not to be in need of protection. The US seems to have had some success in removing persons, as part of the Safe Mobility Initiative that also allows for legal pathways. For the EU context it would be important to follow this development.

Strategic Communication and narratives

10. 'Stratcom'

All countries in the research have at some point engaged in strategic communication on asylum, either for external effects to stem asylum flows or to gain international political leverage or for internal effects to appease the public, give a sense of control or electoral gain.

Despite the asylum numbers being relatively low, even in times of significant global refugee crises, Australia and Denmark have formulated and continue to communicate very sound messages to advertise their restrictive asylum policies. They receive strong and broad support thereof by the general public, even 'nurturing' their 'outsider position', at least in their communication. There is at least some correlation between rhetoric, policies and asylum claims: strategic communication on the number of asylum claims may feed into the public opinion, which lead to public debate ending up in political parties initiating new policy measures which resonates the public sentiment, and are then passed in parliament. More restrictive policies may be followed or accompanied by a decrease of numbers (which can be the result of multiple circumstances) and then claimed as a success (Australia). Or it may not lead to the wanted result (Denmark: 'zero territorial asylum procedures') which only emphasizes the need for even more restrictive measures to deal with 'insufficient policies'
By contrast the current government of Denmark does not intent to be or remain 'an outsider' and it seeks EU-partners in the development of its external dimension plans, for example with respect to Rwanda. Australia also asked for international support for its restrictive asylum policies. And both Denmark and Australia have formulated a need for more immigrants, but asylum is not part of this.

In Canada, a period of more restrictive policies and messages under the Harper government was followed by more positive messages under the Trudeau government. The wider debate on migration and asylum seems more positive in Canada, also among opposition parties. The country's narrative of welcoming migration seems to resonate better than a restrictive message, provided that there is a sense of control among the public. The amendments to the Safe

Third Country Agreement aimed to do this. On a more regional and municipal level the pressures on hosting communities have been a political issue. On the international level Canada is using its positive image, also to interest other states in its 'private sponsoring programme'.

The Netherlands has been more divided, and the public opinion is more volatile on the issue of asylum. Research in 2022 showed that a majority of the Dutch population considered humane and decent reception of asylum seekers a moral obligation.[111] However, the Dutch cabinet fell over asylum in 2023, after having adopted symbolic legislation on family reunification in 2022 as a means to impose measures to control the number of asylum applications. There is at least a correlation between public support for the asylum system and the political messages of political parties and media: when a situation is consequently called or framed as a 'crisis', it is eventually starting to be a crisis which necessitates firm decisions. The local context plays a role as well, especially since reception of asylum seekers in centres, spread over the country has a direct impact on local communities.

In the US the debate is more polarized with Democrats representing a more liberal and open view and Republicans representing a more restrictive view. This is evidenced in real Republican policies, but also political rhetoric like "build the wall" under former president Trump. The US is still an immigration country and the view that there is a need for labour migration is shared by many Americans. This is also reflected in policies in support at the local level. Democrats have declared emergencies due to high migrant arrivals in major cities. In response, the Biden administration announced plans to speed the issuance of work permits and granted temporary protection to almost half a million Venezuelan migrants in September 2023, conveying the eligibility to apply for work authorization. The US have exercised significant leverage internationally among countries of origin and transit by negotiating its Safe Mobility Plan with third countries.

The internal and external dimension of 'stratcom' are not researched in-depth. There are many factors which shape public opinion, narratives and policy.[112]

111 Asher van der Schelde, "Meeste Nederlanders zien fatsoenlijke opvang asielzoekers als morele plicht," I&O Research, 18 September 2022.

112 See for example Natalia Banalescu-Bogdan, *From Fear to Solidarity - The Difficulty in Shifting Public Narratives about Refugees*, MPI, May 2022.

Assessment

It is unclear to what extent strategic communication strengthens policies and influences asylum flows. Refugees and their networks, including smugglers, will pick up on the information and the policies, and may adapt strategies, including changing their routes. In the Netherlands and the US the messages have been changing according to political developments, whereas Australia, Denmark and Canada have been more constant in their communication over the last decade. In Australia and Denmark the consistency in messaging and policy has been accompanied by consistently low asylum numbers, but this was in a context where they could shift the asylum movements onto other blocs and countries, which served as destination countries.

It should also be borne in mind that negative messaging can negatively impact support for asylum and put pressure on asylum agencies. This is seen in the Netherlands where local protests against new reception centres, have impacted the reception capacity of the Reception Agency COA.

Conclusion

This synthesis report compares and analyses the asylum systems of five destination countries varying in geographical and legal contexts, encompassing a comprehensive review of recent and proposed legislative and policy measures that impact access to asylum and humanitarian protection. It proves that all these states are dealing with similar experiences in providing access to their asylum systems. A common humanitarian duty to protect those in need exists, showing solidarity with regions facing heightened challenges. In addition to this, destination states are experiencing labour shortages due to an ageing population, for which migration forms a part of the solution. At the same time, however, countries want to remain in control over their borders, partly driven by the willingness of the population to take in asylum seekers and other migrants as concerns exists within host communities, in particular against a backdrop of global instability, economic uncertainty, demographic changes, budgetary choices, staffing shortages and housing crises. As these challenges are interrelated and part of a global issue, further solutions should be based on cooperation and solidarity. Mutual interest needs to be considered, of people seeking protection, of host countries in the region of conflict, of transit countries, of communities in destination states, and of other destination states. To come to workable solutions, destination states should therefore also share best practices in combining different approaches in order to learn from each other, rather than try to find a quick fix to this global challenge themselves.

This synthesis identifies ten policy approaches that have either been implemented or are under consideration by the researched destination states in the context of (extra)territorial access to asylum procedures or humanitarian protection. They vary from 'non-entry measures' to 'legal pathways', and from 'procedural measures' to 'strategic communication'. *To what extent can these instruments be useful for a balanced and effective approach on border control and asylum protection in the EU context taking into account legal, practical and moral considerations?*

Although there are no quick fixes to acquire control within global refugee protection and national asylum systems, there are in fact some promising initiatives for a more regulated and better managed system to give access to territorial asylum or humanitarian protection. Other measures are more

problematic, either from the perspective of international legal obligations in general and/or in the specific EU legal and practical context. When analysing the various measures within abovementioned policy domains, some more specific conclusions can be drawn.

Preventing access to territory: non-entry measures

First, although states have a sovereign right to control and protect their borders and decide who is legally allowed to enter the territory, this right is conditioned by international legal obligations states have chosen and/or need to adhere to, such as the principle of non-refoulement. In practice, the non-entry regime of the researched contexts, among others measures aimed at preventing access to the territory, has had various negative consequences: high pressure at certain points of the external borders; high costs to maintain border control; the risk of instrumentalization of migration and difficult relations with neighbouring countries; increasing criminal enterprises in the form of human smuggling; and importantly refugee human rights violations and loss of too many lives.

The extent to which measures preventing access to territory are legally possible largely depends on the specific applicable legal framework. The European and EU legal framework is built on the 1951 Geneva Convention and further specifies and complements it. It is also further detailed than other regional systems, and is complemented by supranational judicial scrutiny. The ECHR gives access to an individual complaint system and the ECtHR's judgments are binding for the member states. This is different in other regions in the world. The judgments of international committees and tribunals overseeing the UN human rights instruments are not considered binding, although they are authoritative texts for national courts. Australia and the US have or had practices which use preliminary screening processes to establish protection needs of persons arriving by sea. If not, they are rejected and returned. Such procedures would be legally problematic in an EU context, as the ECHR and EU law require a rigorous scrutiny of claims, safeguards and effective remedies. Moreover, regarding jurisdiction, the ECHR has extraterritorial effect, thereby enlarging the scope of the obligations deriving thereof.

Legislation, including EU law, can be adapted though the appropriate processes to change the parameters, such as those governing border procedures or fast track procedures. In this respect, reference can be made to the current tri-partite dialogues on the Asylum Procedures Regulation. Such a process necessitates time and compromises, and can subsequently be subjected in

itself to legal review by the European Courts to consider the conformity of the provisions with international legal standards. National legislation can be developed, nevertheless this will also be tested according to the same standards. Furthermore, Denmark, despite its 'opt-out' of the EU asylum acquis, is still bound by international and ECHR standards and indirectly, through Dublin, by EU law. For example, they had to shorten the waiting time for family reunification of person granted subsidiary protection based on article 8 of the ECHR.

From a practical perspective, there are the obvious geographical differences between the five researched countries: Australia is more difficult to reach as it is surrounded by the ocean; the US has a long and vulnerable land border with the rest of the Americas; Canada is mostly 'shielded' by the US; and the EU has both vulnerable land and sea borders, as the Mediterranean is a relatively 'small' barrier to cross (whereby it must be taken into account that both Denmark and the Netherlands do not have external borders except for (air)ports). Especially considering the high numbers of spontaneous arrivals, particularly in regions like the US or the Mediterranean, the usage of specific points or 'hot spots' where cases could be processed would lead to practical challenges. Authorities would likely not be able to cope with the numbers, putting all sorts of pressures on asylum and reception agencies and local communities. Investments in planning, sufficient capacity and the ability to provide for effective frontloading (focus all efforts at the start of the procedure in order to prevent larger cost at the end) are thus necessary to make such (pre-)border processing function effectively.

Another measure which all researched states have in their toolbox is the '(re-)allocation of responsibility', or in other words, the transfer of asylum seekers to the territory of another state which is deemed responsible for processing the asylum claim. In North-America (Canada-US safe third country) and the EU (Dublin system) these are 'mutual trust' agreements. Even within the contexts of these arrangements between states presumed to have advanced and relatively comparable asylum systems, problems remain in meeting legal standards vis-à-vis asylum seekers. These systems have thus been legally challenged, which led to extended jurisprudence of the European courts and national courts. But also Canada's Supreme Court has formulated preconditions for transfers under the Safe Third Country Agreement with the US, which could lead to an actual ban of transfers, making the allocation systems 'out of order'. In some cases, this even led to an actual ban of transfers, making the allocation systems 'out of order'. To ensure the effective functioning of 'mutual trust' agreements, significant capacity building and flanking solidarity mechanisms for states facing pressures is necessary.

Currently, in the EU, the concept of safe third country (STC) agreements is given new impetus through ongoing legal discussion on the 'connection requirement' and concrete plans to refer asylum seekers to certain third countries, exemplified by the agreement between Italy and Albania. As is the case with the 'mutual trust' agreements, a legal scrutiny of STC agreements, concerning the refugee protection and human rights situation in the third country, along with continuous monitoring of the implementation practice, can prevent the agreement from 'not passing the legal test'. See in this context the November 2023 assessment by the UK Supreme Court, which concluded that, given the current situation in Rwanda, respect for the principle of non-refoulement could not be guaranteed. Due to challenges associated with the feasibility of independent monitoring of the situation in Rwanda, the UK currently cannot send asylum seekers to the country. The fact that STC agreements currently hardly exist in practice[113] has to do with the fact that they are difficult to conclude, implement, monitor and sustain. However, it is not impossible as the legal basis for such agreements does exist: it is mostly an issue of the pre-conditions and safeguards.

In the countries in this study, there are no examples of extra-territorial asylum processing, whereby the national (or EU) asylum procedure is conducted outside its territory, and persons granted protection are subsequentially transferred to the destination state. While, in theory, it could complement other legal pathways, in particular resettlement, many legal and practical complications remain. While it is not per se prohibited by international refugee law to replace territorial asylum with this, there is no legal basis yet in regional or national law. It would require significant resources and the transfer of complete legal structures, making it hard to imagine them as a replacement for territorial asylum. In practice, such application centers could have a 'pull' affect in the region and be accessed by a large group of persons, exerting pressure on the quality of the process and the host communities.

Legal pathways

Second, to establish an effective and balanced asylum system in which the international responsibility to protect refugees is shared among countries,

113 Australia's offshoring agreement with Nauru has recently been very rarely applied, and the agreement with Papua New Guinea (PNG) was discontinued. The Biden administration in the US has suspended safe third country agreements with Nicaragua, El Salvador and Guatemala. Denmark has so far not implemented legislation allowing for processing outside Denmark. The Netherlands has no significant safe third country arrangement and Canada has only designated the US as a safe third country.

measures to prevent spontaneous asylum claims and alleviate high pressure on the borders of destination countries must be combined with more regulated legal pathways to protection. These avenues are not based on international legal obligations, but are left to the national discretion of states. The region which is most active in terms of legal pathways is the Americas.

Canada and the US, and additionally Australia, have had significant resettlement programmes for many years. Lessons can be learnt in the EU context, i.a. Denmark and the Netherlands, with far more modest frameworks and programmes. This includes resettlement from the own region as a migration management instrument; a focus on, or pilots, towards community private sponsorship; and complementary economic resettlement programmes with a regional component. While resettlement should also remain a solidarity instrument with countries facing pressures and an avenue for vulnerable refugees who cannot find protection in their own region, the EU could establish additionally complementary resettlement programmes. Experience indicates that community resettlement, in particular, has positive effects on societal support.

In 2023, the US, in cooperation with Canada and other countries in the region, is spearheading a Safe Mobility Initiative, consisting of a large number of resettlement places, humanitarian visas and complementary economic pathways for refugees from the Americas. The impact on refugee movements towards the US and the practical consequences for border agencies, as well as the agencies further in-land after entry parole, is still to be assessed and necessitates further monitoring and research. In contrast to Canada, the humanitarian visas and paroles at the US border do not per se lead to permanent residence, highlighting the need for a clearer understanding of the longer-term consequences.

Procedural measures to manage national asylum systems

Third, all researched countries apply various procedural measures to manage national (territorial) asylum systems and/or use restrictive measures aimed at decreasing the number of asylum applicants. The usage of so-called ‘caps’, restricting the number of asylum applications to a specific target number and automatically rejecting subsequent applications is incompatible with international legal standards and is not applied in the selected countries.

This, however, does not mean that working with all forms of numerical targets to retain more control over migration is unlawful. As we have seen, Canada serves as an interesting example of an inclusive and participatory planning process

through its annual and multi-annual setting of targets and levels. This is not a guarantee for a managed asylum system (as Canada currently also deals with asylum backlogs), but it does allow for a rather quick and adequate response when targets and levels are not met or exceeded.

Despite having rather robust asylum systems, next to Canada also Australia, the US and the Netherlands are dealing with backlogs. In Canada, the Netherlands and the US, the reception system is under significant pressure. In Denmark this appears to be less of a problem, as the numbers are relatively low (although on the rise again recently). Nevertheless, the Danish government aims to have 'zero' inland asylum applications, focussing on alternative measures (see hereunder). The backlogs and reception shortages in the related countries may create a certain 'crisis mode', leading to a call for more (stringent) measures in order to decrease the number of applications. However, the analysis indicates that, for instance, in the Netherlands, the backlogs were a direct consequence of policy choices as there were sufficient (legal) possibilities to improve the functioning of the system.

Legal issues do, however, arise when addressing measures such as increased fast track border procedures and detention. The EU asylum acquis and the ECHR have established clear procedural standards. Consequentially, long detention and preliminary/fast tracks border procedures with burden of proof standards akin to those in Australia and the US would not align with European legal standards. As changes are currently being made to EU legal framework on asylum procedures, it remains to be seen whether these would be legally tenable. It can, however, be concluded that the application of such procedures do not necessarily deter asylum applications, taking into account the high numbers in the US and also ongoing inland claims in Australia.

Another measure which drew attention in the comparative analysis deals with the duration of the protection status. When considering the cessation/ revocation clauses in the Geneva Convention, refugee protection is initially always temporary (also in the Netherlands it is initially five years). With the passing of time, a more durable solution such as integration and permanent residence is foreseen. However, lately, the focus of national asylum systems seems to be moving towards more temporary protection. In Denmark, there has been a recent paradigm shift from permanent residence to temporary (and more limited) protection, and from a focus on integration to an emphasis on return. Additionally, the US and Australia have complex systems of protection statuses, including temporary status and restricted rights for those who reach and access

the respective countries. Canada, similar to the Netherlands, has a single status system.[114] Such a system has indeed several advantages. The diversification of status, particularly the limited access to family reunification and the potential for withdrawing protection, could lead to more appeal procedures. These procedures, as well as increased revocation assessments, exert pressure on the system. The return of persons who have been residing for an extended time and/or come from unsafe conflict areas has additionally proven to be difficult (e.g. the Danish example).

Strategic communication

Countries such as Australia and Denmark have been very vocal in their strict 'not here' narrative, consistently maintaining both the message and the policies over the years. Negative messaging may influence public support for refugees, consequentially fostering increased support for restrictive policies, as we have seen in these countries. However, this approach comes at a cost, as it positions these countries as 'outlaws', and subjects them to scrutiny from various actors vis-à-vis moral standards. Nevertheless, this seems to be the price these countries are willing to pay. However, the question remains whether the impact on numbers is solely attributed to the negative messaging or if it is also related to geographical location and practical barriers in applying for asylum.

On the other hand, Canada has been quite consistent in its welcoming message, which also allows to focus and select those allowed to enter. Focussing on providing legal pathways as part of a managed immigration system is commendable from a moral and public perspective. This is especially true if it leads to a solid protection status and if the process does not exacerbate pressures on transit countries and host communities, in particular at the borders.

Final remarks

Can it be concluded that the measures taken in various geographical and legal contexts to deal with asylum migration management lead to a more regulated migration system? The statistics themselves do not point in that direction.

114 The EU asylum acquis entails in various legislative instruments, such as the Qualification Directive which allows a distinctive status for refugees and persons in need of subsidiary protection, so-called more favourable clauses. This means that a Member State is allowed to implement in its national legislation provisions which are considered 'more favourable' towards the applicant. This follows from the idea that the first-phase instruments were considered minimumstandards to which Member States could rise above.

The majority of asylum applicants still enter the researched countries in an irregular manner (unless intercepted and pushed back at sea like in Australia). This results in high pressure on the borders of the destination states, fosters free-rider behaviour of transit countries and leads to unwanted humanitarian consequences.

The ongoing current political and public debate in the EU context remains focussed on the notion of even higher walls and shifting the responsibility for asylum and humanitarian protection outside European territory. However, if these efforts do not go hand-in-hand with a solid legal foundation and adherence to refugee law and human rights standards, it may backfire on the European Union.

Legislation is not set in stone and can be adjusted, and jurisprudence evolves over time. However, as we have experienced in the development of the Common European Asylum System, these processes are long and complex, without any assurance of the outcome. Meanwhile, it would be (more) beneficial to invest in well-equipped and robust national asylum systems and and empirical based prognoses. The emphasis should be on exploring migration cooperation options and learning from innovative ideas and new models, such as those introduced in the US. The US is seeking a more holistic immigration approach in the region, consisting of cooperation with countries in the region, legal pathways, legislation addressing 'circumventing legal pathways' and return agreements. As developments are still ongoing and evolving rapidly, the first results of this initiative need to be monitored and researched to assess their potential applicability in a European context – considering legal, practical and public support perspectives.

The importance of the last element in this narrative should not be under-estimated. If we are building even higher walls, it is imperative that it is accompanied by substantially larger gates to realise legal and regulated pathways that are substantial and accessible. The right to asylum is a fundamental human right, and for a more effective global protection system, solidarity must form its foundation. Solidarity with those seeking protection, with host countries in the region, with transit countries becoming destination countries, and with communities within traditional destination countries such as the researched countries. Transforming the system for the better, encompassing all perspectives, requires long term investments and a solid, positive and visionary narrative. Yes we can.

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