

Challenging the legality of externalisation in Oceania, Europe and South America: an impossible task?

Luisa Feline Freier, Eleni Karageorgiou and Kate Ogg

Recent legal developments in different continents exemplify the near impossibility of using courts to challenge the legality of externalisation practices.

This article highlights the ways in which various actors have engaged in externalised migration management cooperation in a manner that leaves little room for judicial scrutiny and accountability. It builds upon prior research by the authors which examined how externalisation practices have resulted in a dilution of refugee protection standards.¹

Oceania

Australia's offshore processing policy has been challenged in court in Australia, Papua New Guinea and Nauru. While the first Australian case was successful, subsequent legislative reforms and judicial decisions have rendered futile any further court challenges to the validity of offshore processing. Individual asylum seekers and refugees can start legal proceedings based on tort law – that is, law that deals with cases where a person commits a wrong against another person – but only to apply for urgent transfers to receive medical treatment.² These medical transfer cases do not directly challenge the validity of offshore processing.

The saga of offshore processing litigation commenced with a 2011 challenge to Australia's externalisation agreement with Malaysia.³ The High Court of Australia ruled that the Minister for Immigration's decision to declare Malaysia a safe place to which asylum seekers and refugees could be sent was invalid. Key to the decision was that the Migration Act 1958 stipulated that the Minister could only make such a declaration if the third country provided protection. The Court interpreted 'protection' as rights enshrined in the 1951 Refugee Convention including, but not limited to, *non-refoulement* and concluded that Malaysia did not provide these protections in law or practice. In response, Australia's

parliament amended the Migration Act to remove the reference to 'protection' and to state that the only condition required for the Minister to designate a third country as a regional processing centre is that it is 'in the national interest'.

All subsequent cases before Australian courts in which refugees have attempted to challenge offshore processing have not only been unsuccessful but have also closed off the prospect of future successful litigation. In 2014, an Iranian asylum seeker detained on Manus Island challenged the Minister's decision to designate Papua New Guinea as a regional processing centre.⁴ He argued that the Minister is obliged to take into account Australia's and Papua New Guinea's international legal obligations, Papua New Guinea's domestic law and practice, and the conditions in which asylum seekers were being detained. In a brief judgment, the High Court of Australia rejected this submission on the grounds that – as per the Migration Act – the only condition for the Minister's exercise of power is that the Minister thinks it is in the national interest, which is a political as opposed to a legal question. By designating the 'national interest' as a political consideration, the Court has closed off such legal challenges.

In 2015, a Bangladeshi asylum seeker attempted to challenge Australia's offshore processing regime by seeking a declaration that her detention in Nauru was unlawful.⁵ The High Court of Australia found that although she was detained by Australia it was only for the purpose of transferring her to Nauru; thereafter she was detained by Nauru (despite Australia being heavily involved in the administration of Nauruan detention centres). In ruling against the applicant, the Court held that constitutional

limitations on Australia's power to detain her did not apply once she was transferred to Nauru. Further, the Court ruled that it could not make a determination as to the validity of her detention in Nauru under the Constitution of Nauru. Pursuant to this decision, asylum seekers subject to offshore processing can challenge detention that occurs in Australia before Australian courts and can challenge the legality of their detention in Nauru or Papua New Guinea in courts in those countries.⁶ However, the prospect of undermining Australia's externalisation practices through challenging the validity of offshore detention in Australian courts has been diminished.

In 2016, refugees detained on Manus Island successfully argued against their detention in the Supreme Court of Papua New Guinea on human rights grounds. However, their subsequent action in the High Court of Australia challenging the validity of the agreement between Australia and Papua New Guinea failed, with the High Court concluding that "neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to the domestic law of another country".⁷

Europe

Unlike Oceania's institutionalised offshore processing, the EU's externalisation strategy favours a model of deterrence based on informal cooperation with key countries of origin and transit. Framed as part of the EU's longstanding objective to combat irregular migration and as a life-saving tool designed to put an end to perilous refugee journeys, such cooperation has intensified during and after the so-called European refugee crisis. The most emblematic example of this strategy is the infamous EU-Turkey deal. Its main objective was "to remove the incentive for migrants and asylum seekers to seek irregular routes to the EU"⁸ with Turkey committing to readmit migrants who had not applied for asylum in Greece or whose application had been found 'inadmissible' under the EU's Asylum Procedures Directive (APD). Turkey also committed to prevent

irregular migrants from using new sea or land routes to enter the EU in exchange for visa liberalisation for Turkish citizens and the disbursement of €3 billion for humanitarian aid to refugees in Turkey.

Under the APD, EU States have the right to reject an asylum application as inadmissible on the basis that the applicant could have sought protection in a 'safe' non-EU country. The non-EU country is not required to have ratified the Refugee Convention, yet the applicant must have the possibility to acquire refugee status and to receive protection "in accordance with" the Refugee Convention. Turkey has ratified the 1967 Protocol to the Refugee Convention but maintains a geographical limitation, whereby it is only obliged to consider as refugees those individuals who have fled from events taking place in Europe. This effectively excludes the majority of those currently seeking refuge in Turkey. Despite the fact that Turkey has, as a result of the deal, amended its domestic legislation so as to enable access to rights for Syrian refugees, reception conditions in Turkey are considered not to be compatible with international standards. Furthermore, the EU-Turkey deal has been criticised for legitimising the confinement of refugees to first countries of asylum, undermining the right to asylum and the principle of solidarity as enshrined in European and international law.

In terms of judicial scrutiny, the deal has been challenged before the Court of Justice of the European Union (CJEU) by two Pakistani nationals and one Afghan national, all located in Greece. That would have been an opportunity for the Court to clarify the formal rules applicable in the adoption of such agreements within the EU as well as their human rights implications. Unfortunately, the EU General Court did not go into the substance of the complaint, holding that it had no jurisdiction to decide the case.⁹ The key question at stake was whether the deal, which took the form of a press release under the title 'EU-Turkey Statement', has been adopted by an EU institution. Recognising the ambiguity of the language of the press release, the Court turned to the EU institutions

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involved in the process, namely the European Council, the Council of the EU and the Commission, and asked about the authorship of the deal. Following a barrage of denials of responsibility,¹⁰ the Court concluded that the agreement has been adopted by the individual EU Member States and Turkey, and thus the Court had no jurisdiction to rule on its lawfulness. The main critique of this conclusion is that the Court did not acknowledge that EU Member States would not have had the power to conclude an agreement covering matters (such as border control and asylum) already regulated by EU law. The other major criticism is that the Court ignored evidence which indicated that the European Council had in fact adopted the agreement. The applicants' appeals were declared inadmissible.

The EU-Turkey deal reflects the EU's informalised, ad hoc decision-making process and crisis-led migration governance, allowing for the possibility of escaping democratic checks and balances and thus creating spaces of liminal legality. It is worth noting that the practices which facilitate the implementation of such agreements – including detention and border procedures – have been the subject of a number of judgements by the European Court of Human Rights (ECtHR), yet the legality of these agreements has not

been questioned. It is also striking that the existence of readmission agreements between the EU or individual Member States with third countries (for example, EU–Turkey, Italy–Libya, Italy–Tunisia) in combination with the 'exceptional' migratory pressure put on national authorities of so-called frontline European States has been used by the ECtHR to justify lower standards in national asylum and reception systems and to effectively reject any claims for redress.

South America

NGOs and UNHCR representatives have reported use of 'safe third country' practices – often lacking any legal basis – in the South American region. Since 2015, the Venezuelan displacement crisis has put the region's relatively progressive refugee protection system to the test. Based on the refugee definition found in the Cartagena Declaration, South American countries are obliged to recognise most displaced Venezuelans as refugees.¹¹ However, many States have implemented increasing restrictions on legal access, residence and the asylum procedure.

For example, prior to mid-2019, many Venezuelans applied for asylum at the Peruvian border before entering and continuing their asylum process. However, between mid-2019 and the closure of borders



Venezuelan refugees and migrants arrive at the border town of Tumbes, Peru.

at the beginning of the COVID-19 pandemic in early 2020, Peru introduced pre-screening interviews at the border, leaving many applicants stranded for extended periods of time while awaiting a response. In most cases, asylum claims were rejected. Between June and December 2019, only 13% of claimants were admitted into the country at the Ecuador-Peru border, leaving applicants in a legal limbo as they could neither enter Peru nor legally return to Ecuador since re-entry to Ecuador after 48 hours, without documentation, is not allowed.¹² Peruvian immigration authorities in some cases rejected asylum applicants if they could not explain why they had not applied for asylum in Colombia or Ecuador, citing a safe third country (STC) provision in the country's refugee legislation. These decisions have not been challenged in Peruvian courts.

This policy shift violates asylum seekers' right to due process, as the ad hoc mechanisms in place do not ensure that pre-screenings comply with international legal standards. It ignores the principle of *non-refoulement* and also goes against UNHCR's Refugee Status Determination guidance of 1977 which emphasises that States must allow asylum seekers to remain in their territory throughout the asylum procedure. Although UNHCR officials have reported informal STC practices in other countries in the region (such as in Chile and Ecuador), Peru represents the first case of a South American country systematically implementing a unilateral STC measure to limit the inflow of asylum seekers. It has done so without respecting minimum standards of effective protection.

Conclusion

This article has discussed recent developments in externalisation practices in Oceania, Europe and South America. Each case-study highlights the near impossibility of judicially challenging the legality of externalisation practices. In the Oceanic context, the difficulties stem from the lack of a regional human rights system. However, in Europe, where such regional rights protections exist, judges have been reticent to arbitrate the legality of externalisation

agreements. In South America, STC policies are being applied non-systematically and informally, which makes it difficult to use the court system to challenge these practices.

A central question for refugee law scholars to explore in the future is how to realign understandings of effective protection with the Refugee Convention rights regime, supplemented by international human rights law and due process guarantees. Our findings suggest that there also needs to be greater emphasis on comparative scholarship. Finally, there is a need for further investigation of how international solidarity can be harnessed to inform and influence policymaking, legislative change and judicial proceedings.

Luisa Feline Freier lf.freierd@up.edu.pe

Associate Professor, Universidad del Pacifico

Eleni Karageorgiou eleni.karageorgiou@jur.lu.se

Ragnar Söderberg Postdoctoral Fellow, Lund University

Kate Ogg kate.ogg@anu.edu.au

Associate Professor, Australian National University

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