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Danish desires to export asylum responsibility to camps outside Europe

AMIS Seminar Report

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List of abbreviations

AI	Amnesty International
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EC	European Commission
EU	European Union
EUTF	EU Emergency Trust Fund for Africa
Frontex	The European Border and Coast Guard
HRW	Human Rights Watch
IOM	International Organization for Migration
PNG	Papua New Guinea
UN	United Nations
UNHCR	United Nations High Commissioner for Human Rights
US	United States

Foreword

Marie Sandberg, Associate professor, Director of AMIS, University of Copenhagen

On February 26th, the Centre for Advanced Migration Studies (AMIS) organized the online seminar *Danish desires to export asylum responsibility to camps outside Europe: A research-based discussion* focusing on the legislative proposal of February 4th 2021: "Lov om ændring af Udlændingeloven (Indførelse af mulighed for overførsel af asylansøgere til asylsagsbehandling og indkvartering i tredjelande)" which translates into "Legislative reform of the Aliens Act (launching the possibility to transfer asylum seekers to case processing and residency in third countries)".

AMIS is an interdisciplinary migration research centre based at the Faculty of Humanities, University of Copenhagen, with a research focus on moving populations and mobility practices including irregularized and forced migration. Our aim with hosting the seminar was to contribute with research-based and multidisciplinary perspectives in order to discuss the proposal in light of recent developments in the Danish asylum system, and in a comparison with international practice, while the legislative proposal was still in its public hearing phase.

Thanks to an excellent line-up of presenters: PhD Researcher at the Danish Institute for International Studies, Ahlam Chemlali, Associate Professor at AMIS, Martin Lemberg-Pedersen, senior researcher at the Danish Institute for Human Rights, Nikolas Feith Tan, and Associate Professor at AMIS, Zachary Whyte, the seminar succeeded in casting a much-needed research perspective on the current and past developments in Danish asylum politics.

The seminar proved a very timely intervention, with an online audience of over 200 persons. These included academics from all over the world, Danish and international organizations and non-government organizations, as well as policy makers and representatives from several countries´ ministries and agencies, national and international monitoring bodies and also journalists.

This would not have been possible without the hard work of AMIS coordinator Maria Frantzoulis and the assistance of the AMIS Master students Elena Patsy Horton, Othilia Christina Annie

Pedersen, Teresa Alma Sigfusdottir and Simona Stejskalová, who helped by doing transcription and commentary.

My sincere appreciation goes to Dr. Martin Lemberg-Pedersen for taking the initiative and smoothly organizing this timely event, also taking the lead in ensuring its materialization into this AMIS Seminar Report.

Preface

Martin Lemberg-Pedersen, AMIS, University of Copenhagen

This report is the result of a collaborative effort based on the seminar convened at the Centre for Advanced Migration Studies´ (AMIS), the University of Copenhagen on Friday February 26th, 2021, entitled *Danish desires to export asylum responsibility to camps outside Europe: A research-based discussion*. The starting-point for the seminar was the ambition to shine a research-based, multidisciplinary and critical discussion on the Danish government's legislative proposal to externalize Danish asylum processing and refugee responsibilities away from Danish territory, and through this, to inspire and impact the ongoing legislative hearing process.

The seminar gathered four researchers, Ahlam Chemlali, Zachary Whyte, Nikolas Feith Tan and Martin Lemberg-Pedersen, who through their individual research were well positioned to engage with the proposal based on their in-depth knowledge of Danish and international asylum and migration policy. Scientifically, their backgrounds span the disciplines of sociology and political economy, ethnography and anthropology, law and international relations. In the seminar and now in this AMIS report, the presentations engaged with the proposal through discussions of the evolution of externalization in Danish and international contexts, of the intertwined dynamics of externalization, control and smuggling, with European-North African relations, of Danish asylum and integration policies involving camps, and of the international legal regimes concerning transnational asylum and border control. Each of these presentations has subsequently been converted into stand-alone, but complementary, written interventions designed to inform the public and political debate following the proposal. I would like to express my gratitude to the speakers, the participating audience, the AMIS team, and Marie Sandberg, director of AMIS, for hosting the event.

Danish Desires for Externalization and Non-Integration

Dr. Martin Lemberg-Pedersen, Associate professor, AMIS, University of Copenhagen

Introduction

This paper assesses with the Danish Frederiksen-government´s legislative proposal to externalize asylum processing and refugee obligations from Danish territory. A challenge with this task is the absence of much information in the proposal. Several crucial questions remain unanswerable, including: Where the extra-territorial facilities are to be located; who has responsibility for them; which authorities Denmark will collaborate with; which standards the asylum processing will be exported to; the domestic or geopolitical context of the host country; how the hosts will treat minorities, and many more. This lack of information illustrates a circular justification in the proposed legislation: It posits that the policy will be in accordance with Danish international obligations and human rights standards, simply because *if* the Danish government decides to externalize asylum processing and refugees´ stay *then* it will be because it is in compliance with international obligations and human rights. At the current stage, such circular guarantees remain utterly hypothetical. Still, an analysis of the proposal helps to ascertain the rationale of policy-makers, allow for contextualization of the policy drive, and also adds the case study of current Danish politics to the existing research literature on externalization. In what follows, I first explain the components of the proposed policy in more detail. Second, I introduce, define and reflect upon the concept of externalization, as a conceptual framework for understanding the Danish policy development. Third, after this, I turn back to consider the debates, framings and discussions, which have surrounded this particular externalization policy as it has evolved through both Danish and international contexts. Finally, I end up with some concluding remarks.

The Danish proposal for externalization

On February 4th, 2021, the Social Democrat Frederiksen-government sent out a legislative proposal for public consultations from a range of stakeholders, public agencies and civil society actors and organizations. It was accompanied by a legal note prepared by a Task Force working to realize the externalization of Danish asylum obligations, under the Ministry of Immigration and Integration. The consultation process was set to last one month. The proposal aims at shutting down Danish authorities´ processing of asylum claims, and granting of stay for refugees, on Danish territory.

Instead, these will be exported abroad to extraterritorial facilities in one or several unnamed and thus hypothetical countries. According to the legislative proposal, people filing asylum applications in Denmark should undergo an accelerated procedure assessing their "transferability" [*overførselsposition*] to extra-territorial facilities or camps outside Europe[1], where the host country is allegedly required to act in accordance with certain rights standard. These are derived from what appears to be a minimalistic reading of the 1951 Refugee Convention.[2] Two models are proposed, where the facilities are placed either under the authority of Denmark or under that of a host country.

The proposal envisions a significant upscaling of incarceration and detention of asylum seekers as early as possible in their processes, for the purpose of ensuring asylum seekers´ "transferability". The extraterritorial facilities will not allow for successful asylum applicants to travel to Denmark, nor would people be allowed to file asylum applications at these facilities. If such a facility is located in Country *X*, then it won't be possible for people to show up at the camp in Country *X* and apply for asylum on Danish territory. And whether people get asylum or not, they are to remain in Country *X*. In the words of the proposal:

> Through such a transfer to a third country, an asylum application originally launched in Denmark will no longer lead to a residency permit in Denmark. The model is therefore built on a presupposition that Denmark would not offer protection in cases where foreigners are granted asylum after due processing of asylum applications in the third country. The protection will, on the contrary, be granted by the third country in question. If the applicant´s asylum application is refused, it will similarly be the third country in question, who will ensure the return of the person.[3]

According to the proposal, the processing facilities are to be constructed after an "agreement or equivalent arrangement with a third country" requiring that country to act in accordance with

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[1] Danish Ministry of Immigration and Integration 2021: 29.

[2] The proposal mentions some possible exceptions, such as the right to privacy and family life, seriously ill foreigners, Dublin transfers, as well as other poorly defined "groups of foreigners," which can be exempted due to "resource or other factual considerations." Danish Ministry of Immigration and Integration 2021: 11.

[3] Danish Ministry of Immigration and Integration 2021: 5, author´s translation.

certain obligations.[4] It is difficult to say anything substantial about the concrete rights and obligations postulated in the proposal due to its hypothetical character. But as the proposal is accompanying a stated government vision of halting spontaneous refugee movement to Denmark through a large-scale, transnational system of migration control, such a legislation will, if attempted realized, have vast implications for the Danish policies on refugee protection.

Understanding Externalization

The legislative proposal can be understood as an instance of border externalization. This concept can be defined as a series of actions or steps whereby actors compliment policies to control migration across their territorial boundaries with initiatives for extraterritorial management through other public, private or non-state agencies than their own.[5] The above definition is derived from just about two decades of research into externalization processes. We can refer to this literature via the shorthand *externalization studies*. From the perspective of the externalizing actor or state, the policy works through a preventive logic, so that people´s ability to arrive on a territory where they can exercise the right to apply for asylum is pre-empted. Although externalization studies typically concern relations between countries from the global north and south, such policies are also pursued in north-north and south-south relations. For instance, the EU´s Dublin Regulation effectively transforms countries such as Greece, Italy and Spain into the externalized border guards of the North-Western member states.

But with the Danish proposal, this logic seems to be coupled with an intention to empty the country´s protection system of content in Denmark, by exporting it to another location. But it is worth noting that while the current legislative proposal constitutes a fundamental break with the Danish and most other countries´ asylum system, Danish migration control policies already rely on the externalization of border control. This happens for instance through Frontex operations in the Union´s border regions as well as via bilateral agreements with countries like Ghana and Tunisia. Indeed, such forms of externalized control are far from new. Horrific examples continue to occur across regions like the Maghreb and Sahel, and in countries like Libya, Morocco, Niger, Algeria,

[4] Danish Ministry of Immigration and Integration 2021: 10.

[5] Lemberg-Pedersen, ”*Effective protection or effective combat?*”; Moreno-Lax and Lemberg-Pedersen, ”*Border-induced displacement*.”

and outside Europe also in Australia´s Pacific Solution, which have involved camps on Nauru and Papa New Guinea. The legality, functionality and issues of accountability of externalization for human rights has been dealt with extensively in the research literature.[6] Some analyses have dealt with the contentious discussions between EU Member States about the locations of such migrant camps.[7] Other works have dealt with the political cross-fertilization of ideas between geographical regions such as Australia, USA and Europe.[8] Externalization is often portrayed as the *decoupling* and *export* of border policing beyond the territorial boundaries of the nation-state. However, the particular Danish policy envisioned would in fact *multiply* the levels of border control. The addition of an extraterritorial layer of control outside Denmark will not serve its purpose unless it is tied to a domestic system that upscales both the incarceration and deportation of asylum seekers. This particular externalization proposal would therefore more accurately *double down* on territorial migration controls.

Irregularity, economic incentives and issue-linkages in externalization

There has been close to no engagement from the Danish government side with the body of research in externalization studies. Instead, after 2017, it contracted a small consultancy firm Migration Management Advice (MMA) to conduct a media campaign, write pieces in the Social Democrats member magazine, perform talks and presentations of the proposal, and publish comments in national media outlets. This led to peculiarly circular justifications where the party´s politicians would refer to comments from the consultancy firm as proof of independent expert support of their externalization policy. Here, it will not be possible to accurately relate the proposal to all possible points of relevance in the burgeoning externalization literature. But we can focus on three such points: The creation of border-induced displacement, the link between externalization and markets for border control, and the role of issue-linkages and policy transfers.

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[6] cf. Gammeltoft-Hansen, "*Access to Asylum*"; Bialasiewicz, "*Off-shoring and out-sourcing the border of Europe*"; Casas-Cortes et al., "*Riding routes and itinerant borders*"; Moreno-Lax, "*Accessing Asylum in Europe*."

[7] Noll, "*Visions of the exceptional*"; Hansen, "*EU migration policy in the post-Amsterdam era*"; Lemberg-Pedersen, "*Losing the right to have rights*."

[8] Hyndman, and Mountz, "*Another brick in the wall?*"; Mussi and Feith Tan, "*Comparing Cooperation on Migration Control*."

First off, externalization seems to facilitate irregular forms of displacement. For years, a large number of reports have linked the policy to undocumented existence, reliance on smugglers, massive rights violations[9] and what I have elsewhere called border-induced displacement.[10] Briefly, this concept denotes how states´ control policies are not just reactive responses to displacement. They are also engines of their own distinct and dangerous forms of (re)displacement. If realized, the Danish proposal could facilitate such movements, in the form of the reliance on smugglers, the administrative transfers to detention facilities in third countries, and the extraterritorial mobility control over exercised there.

Second, externalization studies have also dealt with the kinds of incentives that this policy drive creates when it comes to border security and the militarization of migration control. A lot of control and surveillance equipment is necessary in order to realize the goals of pre-emptive migration control and containment of potential asylum seekers. Here, an important literature examines the contractual regimes underpinning such infrastructures, and how such political economies map onto European policies imposing control on and outside European territory.[11] Of course, markets of border control are not always equivalent to spheres of externalization. States and organizations typically reap numerous contracts for control technologies within states´ own territories. But externalization constitutes a troublesome corner of such industrial relations because it requires engagement with the military and security sectors of so-called third countries. Often these are already involved domestic repression, rights violations, population and minority persecution and violent control of migrants. When these institutions are turned into lucrative export markets for European and other military, security and ICT sectors, this can escalate cycles of violence, abuse and exploitation. A particularly damaging dynamic is the way in which many arms companies do not just export border infrastructure, but also conventional weapons. Such actors thereby derive

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[9] cf. Human Rights Watch, "*Pushed Back, Pushed Around*"; Amnesty International, "*The human rights risks of external migration policies*"; Carrera et al., "*Offshoring asylum and migration.*"

[10] Lemberg-Pedersen, "*Forcing Flows of Migrants*"; Lemberg-Pedersen, "*Effective protection or effective combat?*"; see also Moreno-Lax and Lemberg-Pedersen, "*Border-induced displacement.*"

[11] Lemberg-Pedersen, "*Private security companies and the European borderscapes*"; Kumar, "Securing through Technology"; Baird, "*Interest groups and strategic constructivism*"; Lemberg-Pedersen et al., "*The political economy of entry governance*"; Salas-Lopez and Godenau, "*In private hands?*"

profit not just from the original causes of displacement, but also from states subsequent control of the displaced through surveillance and control technologies. The way in which lucrative economic incentives are increasingly weaved into the fabric of externalized control also highlight predictable challenges with accountability and lacking political desires to investigate such violations. As such, the policy is associated with great risks for populations and migrants alike.

While the current Danish proposal is both significantly underdetermined and may also not be realized other measures could follow such a track. Thus, alongside its Austrian counterpart, the Danish government already announced a partnership on border security with Tunisian security forces in early 2020.[12] Awareness of the political economy of border control help clarify that any political vision of extraterritorial pre-emption, containment and deportation, will require material infrastructures and contractual relations and associated economic incentives. This point is often lost on national politicians who talk of upscaled control regimes through generic and state-centric analogies which blur the political-diplomatic, contractual, and legal implications of policy.

Regarding the third point, an emergent part of the literature on externalization arrangements concerns issue-linkages and policy transfers reflecting the diplomatic relations necessary to enact this kind of policy.[13] Existing arrangements illustrate that externalized control policies are often linked to other issues, such as economic compensation (demanded by Gaddafi from the EU in 2010), visa liberalisation and membership (demanded by Turkey after the controversial EU-Turkey Statement). In the case of Morocco, Spain and the EU, the issues have been fisheries agreements as well as the Moroccan colonial occupation of Western Sahara. Even though the latter flies in the face of the EUs own policy, it has been tacitly accepted by the union, because of Morocco´s strategic role in migration control. From European states´ perspective it has also often revolved around the conditional transfer of development aid, if non-European states align themselves with restrictive European migration policies. Externalization is thus not an isolated policy venue.

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[12] Danish Ministry of Immigration and Integration. 2020. Danmark og Østrig vil stoppe migrantstrøm, før den når EU [Denmark and Austria will stop migration flow before it reaches the EU]. Available at: https://uim.dk/nyheder/danmark-og-ostrig-vil-stoppe-migrantstrom-for-den-nar-eu.

[13] cf. Cassarino, "*Beyond the criminalization of migration*."

It is impossible to flesh out the political venues affected by the Danish proposal, as the legislation is void of candidate countries and thus of crucial contexts. But at a general level, any international arrangement transfers political and often also financial capital between the transactional partners. The case of Turkey illustrates how the EU abruptly changed its own policy by categorizing the country as a safe for returns. This is not to say that externalization deals are situations where passive and humanitarian European states are blackmailed by unscrupulous non-European ones. Although a standard narrative in European media, it is important to acknowledge that European countries are often initiating such arrangements, and that the *quid pro quo* between externalization partners follows from how European governments seem willing to avoid asylum seekers *at any cost*. These risks also hover over the Danish government´s externalization plans. Finally, while it is clear that much literature has operationalized the concept of externalization for critical inquiry, it is worth noting its inherent risk of Western-, Euro- or state-centrism.[14] This may lead to flawed assumptions of a particular directionality in such policies, for instance from Denmark of Europe outwards. But the implications of externalization arrangements often run both ways. In what follows, the proposal will be analyzed through four claims asserted by the Frederiksen-government and the criticisms these have faced.

Tracing the Danish policy drive: Innovation or recycling?

A first claim has been that the externalization proposal is a ground-breaking and innovative fix for a broken global asylum system. In fact, however, the rationale is anything but new. Both in short-term Danish politics, and in the longer span of (failed) Northern European initiatives. Thus, in 2014, the Danish People´s Party suggested that all Syrian asylum seekers should be immediately deported to camps in Uganda, which they claimed, could serve as a region of origin for them. The same year, the Liberal Alliance party presented a vision of carving out "small pieces of Denmark" in Lebanon and Jordan to which all war refugees should be sent.[15] None of these initiatives were realized.

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[14] El Qadim, "*Postcolonial Challenges to Migration Control.*"

[15] Gjertsen, M. N., & Kaae, M. 8.10.2014. Liberal alliance: Afvis alle krigsflygtninge. [Liberal Alliance: Reject all war refugees]. Jyllandsposten. Retrieved from https://jyllands-posten.dk/politik/ECE7093609/Liberal-Alliance-Afvis-alle-krigsflygtninge/.

But already back in 1986, the Danish Schlüter-government proposed the creation of extraterritorial "processing centres" during a session in the UN´s Third Committee. Here, however, the idea was fiercely rejected as lacking solidarity, and calls were made for countries from the global North to exhibit genuine solidarity instead. In 1993-5 the Dutch minister Aad Kosto then revived the idea. During intergovernmental consultations he suggested extraterritorial "reception centres," and explicitly referred to the US Guantanamo Bay camp as a model to be replicated. These calls to rally his counterparts were, however, in vain. Then, in 2002-3, the British Blair-government, seconded by its Danish and Dutch counterparts, launched a large campaign for "regional protection areas" and "transit processing zones" in Eastern Europe and North Africa. This took place during the incredibly contentious run-up to the American invasion of Iraq, where the three countries controversially abandoned the German and French, stance, in favor of the American Bush II-government. The externalization proposal was coupled with the invasion and the need for an "interventionist" foreign policy, but Blair had miscalculated, and faced a barrage of criticism from other European countries, humanitarian organizations and the European Parliament, whereafter the initiative quickly collapsed.[16]

Subsequent discussions have revolved around "EU reception centres" and whether these should be located within or outside the Union, and in 2018, the Council of Ministers issued a press release with a vision of "regional disembarkation platforms" in North Africa to which all boat migrants should be administratively deported.[17] However, this press release was, surprisingly, presented without previous consultations or negotiations with African states. Moreover, it was never followed up with concrete measures, and seemed to run counter to the views of the European Commission, who has repeatedly emphasized that asylum obligations should not be exported outside European territory. The fact that the Council consists of the Justice and Home Affairs ministers and civil servants of the Member States lends itself to an interpretation where the press release reflects a continuing European desire to reap political capital of externalization visions in the domestic politics of some Member States. As such, the policy is thus far from innovative, but rather represents a decade-long dream recycled by political and civil servant-networks from some

[16] Noll, "*Visions of the exceptional*"; Hansen, "*EU migration policy in the post-Amsterdam era*"; Lemberg-Pedersen, "*Losing the right to have rights*"; Lemberg-Pedersen, "*Effective protection or effective combat?*"

[17] Lemberg-Pedersen, "*Manufacturing displacement.*"

Northern European countries. But while a small group of countries have pursued the idea, thus far many more European countries have rejected it as lacking realism and pragmatism.

The humanitarianization of externalization policy

Another claim is that the envisioned policy is humanitarian, since it can disrupt the cynical and deadly Mediterranean smuggling networks, and offer good living standards in the so-called third countries. Partnerships with named host countries, the EU and the UNHCR were repeatedly referenced in order to accentuate the proposal´s humanitarian flavour. Several points can be discussed when assessing this claim.

First, the notion that the tragic deaths of migrants can be disrupted by preventing people from reaching the Mediterranean is of course peculiar, and possibly reflects the Frederiksen-government´s lacking engagement with existing research literature on the complex linkages between displacement, border control and smuggling dynamics. After all, according to several analysis of fatality data and the measurement of unsafe migration, many more migrants lose their lives before they ever reach the Mediterranean, which is also more monitored relative to practices of state authorities in f.i. North Africa.[18] Authorities lacking will to record migrant deaths is inextricably linked to the kinds of securitized and militarized control regimes pursued through the aforementioned externalization measures, and the ripple effects of border-induced displacement they create through regions.

Second, a certain trajectory is observable when comparing early and later Social Democrat campaign discourses. In 2016, the politician Peter Hummelgård Thomsen referred to the idea as a vision of "enormous refugee cities with hospitals, schools, universities, farms and companies."[19] However, quickly confronted with the lacking realism of identifying willing hosts for such grand-scale projects, his colleague, Henrik Sass Larsen, shortly after toned down ambitions, talking instead to massive "asylum camps" operated in partnership with the EU and the UNHCR. He

[18] Singleton, Laczko and Black, "*Measuring unsafe migration*": IOM, "*Fatal Journeys*."

[19] Hummelgaard, P. 6.1.2016. Nej, vi socialdemokrater er ikke Dansk Folkeparti light. Politiken. [No, we Social Democrats are not Danish Peoples Party light]. Available at: https://politiken.dk/debat/kroniken/art5605975/Nej-vi-socialdemokrater-er-ikke-Dansk-Folkeparti-light.

specifically referred to Libya or Algeria as prospective hosts. Unfortunately for the campaign, both the UNHCR and the EU refused to be drafted into the lofty Danish visions.[20] Accordingly, in early 2018, the vision was downscaled once more, to concern the more welcome-sounding "reception centres" in North Africa. However, a string of countries, who were surprised to suddenly find themselves to be centre-pieces of a Social Democratic campaign across Denmark, spoke up against the idea in no uncertain terms. As would also be the case with the Council of Ministers´ 2018 press statement of regional disembarkation platforms, Morocco, Tunisia, Algeria, Jordan, Libya and Egypt refused the assigned host duties, and communicated in no uncertain terms that they found the plan undesirable, hypocritical and harmful.[21] Put bluntly, every country named by various politicians has refused. It was after this point that the Social Democratic Party decided to stop naming specific host countries in their campaign. This is presumably also the reason why this crucial aspect of the externalization policy is absent from the legislative proposal. Still, the policy drive continued into early 2021, where the ambitions received another notch down, when Minister of Immigration and Integration, Mattias Tesfaye, explained that the goal was now to construct an experimental "mini-centre" in the – now unnamed – host country.[22] The quick spiral of the externalization vision from "enormous refugee cities" to experimental "mini-centres" can be seen as testifying to the lacking cohesion between the political campaign and the reality of displacement contexts.

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[20] Damkjær, O. 5.2.2018. Tvivl om FNs rolle i socialdemokratisk asylforslag. [Doubt about the United Nation´s role in Socialdemocratic asylum proposal]. Berlingske Tidende. Available at: https://www.berlingske.dk/politik/tvivl-om-fns-rolle-i-socialdemokratisk-asylforslag.

[21] See f.i. Mansø, R.G. 6.2.2018. Tunesien vil ikke huse Mette Frederiksens lejr. [Tunisia does not want to host Mette Frederiksen´s camp]. dr.dk. Available at: https://www.dr.dk/nyheder/politik/tunesien-vil-ikke-huse-mette-frederiksens-lejr; Ritzau. 7.2.2018. Marokko afviser S-forslag om dansk modtagecenter. [Morocco rejects Socialdemocratic proposal for a Danish reception centre]. Jyllandsposten. Available at: https://jyllands-posten.dk/international/Afrika/ECE10288134/marokko-afviser-sforslag-om-dansk-modtagecenter/.

[22] Klarskov, K. 24.1.2021. Mattias Tesfaye er gået på jagt hos "en god håndfuld" lande for at finde et sted til et modtagecenter for asylansøgere. Politiken. [Mattias Tesfaye has gone hunting after "a good handful" countries to find a place for a reception centre for asylum seekers]. Available at: https://politiken.dk/indland/art8073671/Mattias-Tesfaye-er-g%C3%A5et-p%C3%A5-jagt-hos-%C2%BBen-god-h%C3%A5ndfuld%C2%AB-lande-for-at-finde-et-sted-til-et-modtagecenter-for-asylans%C3%B8gere.

Third, the legislative proposal´s openly stated intention to upscale incarceration of asylum seekers seems problematic given the Frederiksen-government´s humanitarian appeals. This incarceration is to happen in two ways: First in Denmark, where pre-removal detention is to ensure quick and efficient "transfers" outside Danish territory. But it also features after such transfers, where third country authorities presumably are to *keep people in the facilities* during their case processing. And they would also be responsible for ensuring their deportation after asylum rejections. Such a policy measure seems to create powerful incentives for displaced people to avoid registering in the Danish asylum system altogether, both in its European and potentially extraterritorial manifestations. Already today, an increasing number of people targeted for returns in the Danish asylum system go underground in order to avoid the hopeless, controlled and surveilled existence in the new departure centres and -prisons such as Kærshovedgaard and Ellebæk. If all asylum seekers are to be processed through this system of despair, it seems likely that such escapes to irregularity in Denmark or elsewhere would only escalate. This could accelerate the expansion of irregular and precarious migrant populations forced to reside in the shadows of one of the world´s richest countries. And given that this irregularity is already pervasive also in Europe´s external border regions, the insertion of more extraterritorial structures of containment and deportation would appear not to lead to a more humane migration system, but instead to exacerbate the dynamics of precarity. This incentivization of irregular existence would of course be tantamount to the loss of the very ability of authorities to humanely manage migration, that the Danish government has used to justify its externalization proposal.

A fourth claim is that the policy will fix a broken and dysfunctional asylum system because it will deter asylum seekers from travelling to Denmark in the first place. Thus, according to this line of thinking, when people realize the dire prospects of being immediately deported to processing facilities outside Europe, they will make better choices (understood as the choice not to come to Denmark). However, this claim too faces multiple problems. This is connected to deep-seated assumptions about the effect of deterrence measures, which permeate Danish asylum politics. On this view, migrants´ inability to reach Denmark safely, and the threat of automatic deportation to a third country if they do, is not understood as undermining the system of protection. Instead, it is seen as a clever way to minimize the number of people entering the Danish asylum system. As such, the administrative transfers to extraterritorial facilities can be seen as another stage of the deterrent effect desired also by the departure centres.

Underneath this deterrence logic we find an assumed relevance of the neoclassical push-pull model. This has been problematized in much migration research,[23] and it also appears unnuanced and generic when applied to the transnational geographies, histories and political economies of (externalized) border control. This is illustrated by the externalization proposal´s creation of incentives for people to avoid the Danish asylum system altogether, mirroring people´s current choices to move underground to avoid the departure centres. Even if extraterritorial facilities and administrative transfers were set in motion, the quality of the accompanying statistical data would be fundamentally flawed.

Moreover, the combination of this deterrence logic with the government´s humanitarian discourse also leads the proposal into nonsensical terrain. For it is puzzling that it actually seems to require people to travel to Danish territory in order to access the asylum processing in the unnamed third country. This is so because several of the government´s ministers have been adamant that people would not be allowed to apply for asylum at the extraterritorial facilities, nor be resettled from these to Danish territory. This aspect appears paradoxical given the government´s repeated emphasis on the humanitarian argument that people should avoid dangerous (smuggler) routes across the Mediterranean.

Conclusion

The Frederiksen-government´s legislative proposal claims to address a broken asylum system that is increasingly dysfunctional. But organizations, researchers, scholars and activists have long argued that the system suffers from serious problems and is increasingly challenged. A crucial difference between these two discourses, however, is that the latter does not mean that its humanitarian rationale has seized to work. Such a claim would disregard the many tens of thousands of people who every year experience the benefits of receiving protection through asylum systems. It is possible both to acknowledge the humanitarian value of European countries´ territorially based asylum systems, and shining a critical light on why the global asylum system is challenged and dysfunctional. But this requires looking at the systemic causes.

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[23] cf. De Haas, "*Migration transitions*."

Arguably, a prime reason for the system´s current challenges is how states from the global North have turned towards deterrent and externalized migration control policies, and enacted a systematic closure of legal escape and protection corridors between the world´s poorest and richest countries. Until the mid-2000s, people could apply for asylum on Danish embassies. If the Frederiksen-government´s goal is to undermine the business of the smugglers, and ensure safe migration routes, then reviving this idea seems an obvious candidate. But the proposal´s political emphasis is more on avoiding than protecting asylum seekers in Denmark. And it assumes that hypothetical host countries can host many asylum seekers and refugees despite the fact that all countries proposed by Denmark and other European countries have rejected the plans. Externalization efforts do not take place in state-centric vacuums, but within political-economic contexts. Despite a focus on the flawed push-pull logic and its incentives, the Danish government´s lacking engagement and knowledge of research on externalization means that it disregards a series of systemic and political economic incentives that the policy would create in and beyond Europe. The likelihood that the policy will accelerate regional and commercial incentives for border militarization and irregular mobility, violations of migrant rights and domestic repression poses serious risks to long-term European and international solidarity when it comes to collaborating on mass displacement policies.

Recent postcolonial analysis of the political imaginary of European externalization efforts has examined its longer continuities and reoccurrence. Contingent parallels exist between rationales as expressed in the Danish proposal, and those of colonial and imperial policies. Cases include nineteenth century extraterritorial projects related to the management of slave trade refugees "recaptured" during abolitionist naval interventions. The deeply racialized American and British societies deemed it undesirable to integrate the emancipated slaves, and instead pursued the externalization of their residence to so-called philanthropic colonies in Africa, such as Sierra Leona and Libera.[24] The chasm between the proposal´s deterrence logic and its humanitarianized discourse is aligned with the ongoing transformation of the Danish asylum system from one of protection to one of temporariness and deportation. The political desire to exhibit real deterrence effects of strongly symbolic initiatives is coupled with a claimed impossibility of receiving and integrating

[24] Lemberg-Pedersen, "*Manufacturing displacement*."

even low numbers of asylum seekers and refugees. But even if the externalized policy were to be realized in some form, the aforementioned risks of (un)intended side-effects and incentives, such as irregular mobility and precarious existence, would greatly undermine any ability to accurately monitor and evaluate its actual outcome. Any evaluation requires consistent criteria, and it can be argued that the externalization proposal is in fact opposite of an innovative and humanitarian break with a dysfunctional protection system. Rather, it seems a radical step in a decade-long process draining the Danish asylum system of its protection substance, instead turning it towards the goal of non-integration. The proposal can be seen as the attempt to *negate and outsource the reception and integration of refugees into society*.

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North African dynamics and European partnerships on border control

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Introduction

The Danish Frederiksen-government legislative proposal aims to close Danish authorities´ processing of asylum claims on Danish territory. Asylum seekers are instead to be transferred to camp-structures outside Europe, where those granted refugee statuses will also stay. While the proposal has yet to name a host country, the Social Democrats, have for years used "North Africa" explicitly in their campaigns as a potential site for constructions of camps outside Europe. This paper contextualizes the Danish discourses on exporting asylum and border facilities to non-European third countries, such as "North Africa," by discussing dynamics in North African countries when it comes to European attempts to conclude partnerships on border control and security. The first section outlines the externalization of migration controls, followed by the dynamics in the Maghreb region. A third section investigates the claims and justifications made in the legislative proposal by the Danish government and finally a closing remark draws out the unintended consequences and unanswered questions.

Irregular migration and border control

Irregular migration, and migration from and through North Africa in particular, has been rendered synonymous with the European Unions purported "loss of control" of its borders. This has supplied the pretext for what has in fact been not only a continuous intensification of militarized control of the southern border, but also an externalization of the borders into Africa.[1]

The externalization of migration controls to third countries has become one of the central pillars of the European Union's (EU) migration policy.[2] Since the late 1990s, the EU has sought to outsource "migration management" to third countries in order to prevent irregular migrants, including asylum

[1] Akkerman, "*Expanding the fortress*."; Fine, "*All At Sea*."

[2] European Commission, "*Improving Migration Management in the North of Africa Region*."

seekers, from reaching EU territory.[3] This is particularly true for the policies in North Africa – especially in the Maghreb countries.[4] The Social Democrats, both before and after they were voted into office, have been very explicit about North Africa being a potential host region. Despite the current proposal not mentioning any region, this merits a closer look at externalization dynamics in this region.

After the 2000s, a massive acceleration in border externalization measures has taken place. As the Council of Europe has noted, this involves outsourcing "border controls to third-countries with notorious human rights records."[5] As a result, the United Nations (UN) and human rights organisations have catalogued a spectrum of violence and human rights abuses in North Africa by State as well as non-State actors.[6] This has however not prompted the EU to halt the externalization policies, on the contrary, the EU continues funneling millions of Euros into North Africa,[7] prompting a set of financial incentives created under the EU Emergency Trust Fund for Africa (EUTF), including suggestions from Member States of opening migrant reception centres, particularly in Morocco and Tunisia.[8] This has however quickly been rejected by Maghrebi states, as this idea has long been resisted by countries in the global South and North Africa in particular.[9] European Member States have been pressing to get Morocco and Tunisia onto a list of so-called "safe third countries" on to which to offload people seeking asylum. Here, Algeria, Morocco and Tunisia are particularly targeted as potential countries to be listed despite the concerning human rights situation that prevails in these countries. The use of the notion of "safe countries" has serious consequences for the rights of asylum seekers. Some of these include expedited examination of

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[3] Badalič, "*Tunisia's Role in the EU External Migration Policy*."

[4] Gazzotti and Hagan, "*Dispersal and dispossession as bordering*."

[5] Council of Europe, "*Council of Europe member states must assume more responsibility for rescuing migrants at sea and protecting their rights*"; Limmam and Del Sarto, "*Periphery Under Pressure*."

[6] Oberoi et al., "*The Enemy at the Gates*."; Casas-Cortes et al. "*'Good Neighbours Make Good Fences'*" Chemlali, "*Migranter i Libyen befinder sig i en stadigt vanskeligere situation, som Danmark og EU har et medansvar for*" cf. Human Rights Watch, "*World Report 2021*"

[7] Zanker, "*Managing or restricting movement?*"; Abderrahim, "*A Tale of Two Agreements*"; European Parliament, "*The European Neighbourhood Policy (ENP)*",

[8] European Commission, "*Improving migration management in the North of Africa region*"

[9] Witschge, "*European proposals to outsource asylum centres condemned*"

applications, non-suspensive appeals, likely rejection of the claim or, in the case of «safe third countries», inadmissibility of the asylum application. However, no country can be presumed safe, including Maghreb countries or even Member States of the European Union (EU).[10]

Dynamics in the Maghreb region

The fragility of the rule of law in the Maghreb countries does not guarantee the rights of people within their jurisdiction, and numerous rights violations are regularly reported by international organizations and civil society. [11] Nevertheless, some European countries, including Denmark still plan to consider them as "safe countries", regardless of the deterioration of the political situation and even increase in rights violations against migrants and refugees in recent years. Additionally, no asylum legislation or refugee status exists in Morocco or Tunisia. Moreover, no person in need of international protection can have their situation investigated by an institution with national competence. Furthermore, mass arrests by law enforcement, forced displacement, detention of migrants, even when in a regular situation, and collective expulsions are on the rise in Morocco and Algeria.[12]

While the number of people arriving on EU shores each year has decreased, the already poor protection standards for migrants and asylum seekers have only been further exacerbated. Morocco and Tunisia's migration and asylum systems have remained largely unreformed and outdated and offer little structural legal protection to migrants and asylum seekers.[13] As Tunisia continues to lack migration and asylum legislation, no national authority has been designated to register, assist, or integrate refugees, asylum seekers and migrants into the country.[14]

This point to the fact that the border control policies of both countries have been pushed by the EU and implemented with very low regard for the rights of migrants and refugees, leading to violations

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[10] International Federation for Human Rights, European Association for the defence of Human Rights, EuroMed Rights, "*'Safe' countries: A denial of the right of asylum*"

[11] EuroMed Rights "*Maghreb countries « Safe » countries?*"

[12] *Ibid*.

[13] Uzelac, "*The Real Common Interest*."

[14] Chemlali, "*Mellem Håbet og Havet*"

of international refugee law and further erosion of global human rights and refugee protection standards. This has been documented in Tunisia, as illegal practices are regularly used by Tunisian security forces. These include pushing back irregular migrants at Tunisian borders, detaining irregular migrants to prevent them from making asylum claims, depriving irregular migrants of their right to seek asylum, and refusing to allow irregular migrants to have access to lawyers and interpreters.[15] This raises two fundamental question, if the Danish proposal would take place: who are the actors and authorities to cooperate with? And how will Denmark ensure international human rights?

The justifications and loopholes

The legislative proposal by the Danish government is framed as a humanitarian approach, with the objective to disrupt migrant smuggling networks. However, this stands in stark contrast to existing academic research on migration dynamics and smuggling, which have shown that smuggling networks have close ties to authorities responsible for migration control.[16] Several UN reports have concluded that smuggling networks are inseparable from local authorities, including the links between the Libyan Coast Guard and Libyan smuggling networks, and similar cases have taken place in Morocco and Tunisia and Niger.[17] Both EU co-operation with Libya and Turkey have also illustrated that when European governments delegate or outsource responsibility for border control, it creates political and economic incentives, which perceive Member states as willing to avoid asylum seekers, whatever the cost.

This one-sided focus on smugglers in current European policy debates and border control measures tends to overshadow how other, public actors conduct violent abuse. Furthermore, new research shows how the majority of the money spent on smuggling is often used to bribe the authorities, thus indirectly contributing to migrant insecurity.[18] Studies also show that the closure of borders has

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[15] Badalič, "*Tunisia's Role in the EU External Migration Policy*."

[16] Sanchez, "Beyond militias and tribes"; Mixed Migration Center, "*Players of many parts*"; Vammen et al. "*Does information save migrants' lives?*"

[17] Michael et al., "*Making Misery Pay*"; UN Security Council, "*Panel of Experts on Libya established pursuant to resolution 1973 (2011)*"

[18] Sanchez, "*Beyond militias and tribes*."

increased the demand for, and use of, smugglers. They have in effect become the only option for people otherwise unable to use legal channels, like visas, to leave their countries or enter countries in which protection might be available to them. This is not only the case in North Africa but can also be documented across the Balkan Routes.[19] Paying a smuggler is often the only way for migrants or asylum seekers to avoid border guards and pass barriers. One could argue that this development is caused in large part by the very security measures rolled out to stop it.

The one-sided policy narrative of the 'unscrupulous violent smuggler' hides the fact that migrants also use smugglers to avoid the abuses of local authorities.[20] In Tunisia for instance, there is little indication that irregular migration is rising due to heightened availability of smugglers. In contrast, a growing trend in Tunisia is 'self-smuggling', where Tunisians pool their money and buy boats traveling independently of hired smugglers.[21] This points to the Danish proposal´s serious research gaps and lack in incorporating existing evidence and research informed policies.

The Unintended Consequences?

Existing research indicate that externalization of borders and migration regulatory efforts have several unintended consequences. This includes a risk of accepting poor governance in the countries that externalizing states depend on in relation to migration cooperation. This risk strengthening authoritarian regimes and repressive forces and forcing migrants out on more dangerous routes. Furthermore, the prevalence and risk of smuggling is increasing, as is the establishment of migration partnerships with countries not necessarily sympathized with, undermining the ability of refugees to receive the protection they need.[22] A range of actors and agreements, technologies and infrastructures have led to migrant deterrence, pushbacks, and incarceration both at sea and on land. The increased securitization, surveillance, and border control both in North Africa and the Mediterranean Sea have however not prompted a decrease in migrant deaths and fatalities. Actually, quite the contrary is the case. Despite the fact that the number of people arriving on EU shores each

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[19] Paynte, "*Europe's refugee crisis explains why border walls don't stop migration*"; Karakoulaki and Tosidis, "*Closed borders boost people smuggling across Balkans*."

[20] Vammen et al., "*Does information save migrants' lives?*"

[21] Ford, "*Tunisia Tries to Help Migrants Avoid Slavery*."

[22] Sørensen, "*Migration og udviklingsbistand*."

year has decreased, the migration itself has become more deadly. Put differently: In total numbers the annual death toll has been falling in recent years, however, it is often argued that the "rate of migrant deaths" remains high, and that the risks that migrants face on their journeys have increased.[23] Calculations indicate that the probability of dying while crossing the Central Mediterranean has increased in recent years despite a decrease in the absolute number of deaths and disappearances recorded on the crossing.[24]

The Danish legislative proposal argues that this model would save people from drowning in the Mediterranean. But this claim does not take the existing data into account, which indicate the land journey across Sahara as far more dangerous than the Mediterranean.[25] It is estimated that at least twice as many migrants die attempting to reach the Mediterranean as those who die attempting to cross the sea.[26] The proposal´s insistence that people cannot apply for asylum in outsourced camps in third countries, but only by entering the asylum process on Danish territory, seems to do very little to change the incentive to travel irregularly, as the asylum seekers then have already made the journey.

Conclusion

Using the case of North Africa as a potential site for hosting extraterritorial asylum camps, points to several critical concerns and short fallings in the Danish legislative proposal. Including how the already poor protection standards for migrants and asylum seekers in the region have not only worsened in recent years, but also how human rights abuses, mass arrests and detention of migrants and refugees are on the rise. This low regard for the rights of migrants and refugees, can potentially lead to violations of international refugee law and further erosion of global human rights and refugee protection standards. Furthermore, some claims and justifications made in the proposal points to the disregard for existing data and research on smuggling and migration dynamics. To summarize, the Danish desires to export asylum responsibility to camps outside Europe leaves us with more questions than answers.

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[23] IOM, "*Calculating 'Death Rates' in the Context of Migration Journeys.*"

[24] *Ibid*.

[25] IOM, "*Fatal Journeys*"

[26] UNHCR, "*Operational Portal: The Mediterranean Situation 2021*."

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Three developments in the Danish asylum regime and the proposal to externalize: Thinking through camps

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Introduction

The Frederiksen government's proposal to externalize the Danish asylum system both builds on and breaks with developments in the Danish asylum regime over the past decades. In this paper, I draw out three of these developments, exemplified by three kinds of camps. These are: a shift towards the carceral (departure centers), the expansion of asylum policy priorities into the integration phase (temporary housing), and a concern with symbolic – or what I call "spectral" – politics of asylum (tent camps). My aim is to use these developments as domestic starting points from which to consider the new proposal to externalize the Danish asylum process, providing a different and complementary perspective on the proposal than more international analyses.

Before I begin, let me make a quick terminological note: I am calling these various housing units "camps" not to imply that they are all camps in exactly the same way, but because that is the name used by most of the people living in them. So though there are clear and important distinctions to be made – and which I will be making – between the different kinds of camps, there is a certain experiential continuity between them for their residents, which I want to keep front of mind.

[1] In this text, I'm drawing on my own research as well as a collaborative research project called The Carceral Mobility Project (CAMP) with Simon Turner (PI), Katrine Syppli Kohl, and Cecilie Jakobsen, housed at AMIS.

Departure centers and the carceral

Figure 1: Kærshovedgaard Departure Center in 2017. Photo: Zachary Whyte

The first kind of camp is what the Danish Immigration Service calls a "departure center" [*udrejsecenter*], which I use to illustrate the increasingly carceral and punitive trend in the Danish asylum regime. Kærshovedgaard departure centre (figure 1) is run by the Danish Prison Service to house rejected asylum seekers, as well as a variety of other people who do not have a right to remain in Denmark. These can include both those who have not renewed their residence permits in time, people who are not eligible for family reunification, and people who have had their rights to remain revoked as part of a criminal conviction. The center is a former prison, which was reopened as a departure center in 2016. While the residents are required to check in daily and are offered no benefits, they are not technically locked up there. The red building pictured originally formed part of a former asylum center, moved to provide additional capacity when Kærshovedgaard was still functioning as a prison[2]. This thus provides a fairly literal exemplification of the shifting political focus of Danish asylum policy from residence and activation[3] to spectacles of detention and deportation[4].

[2] Whyte and Ulfstjerne, "*Flexible shelters, modular meanings*"

[3] Kohl, "*Ambiguous encounters*"

[4] Amit and Lindberg, "*Performing states of crisis*"

One striking recent development in the Danish asylum system is the remarkable fall in the number of asylum seekers – paralleled all over Europe through the combination of the the EU-Turkey deal and the COVID-19 pandemic – from the high point around 2015-17. From 94 operating asylum centres in the beginning of 2016, there are now only 12. The number of new arrivals seeking asylum is at the lowest mark since the current registration system was implemented in 1998. In 2020, the Immigration Service registered 1547 asylum seekers, down from 21,316 in 2015. Despite this fall in the number of people seeking asylum, waiting times in the asylum phase have increased significantly from an average of 4,2 months in 2014-2015 to an average of 19,1 months in 2018-2019.[5] However, the number of departure centers has not fallen – indeed new ones have opened and the Danish asylum detention estate is now close to the capacity for ordinary housing of asylum seekers. As of 21st January, 2021, the Danish Immigration Service reports that it has a capacity of 1450 spaces in residence centers, including specialized centers, catering to unaccompanied minors and women, and 1200 spaces in departure centers. (In addition there are 300 spaces in the reception centre, Sandholm). This is not to say those spaces are all filled, but the capacity levels certainly speak to the increasing carcerality of the Danish asylum system. The Danish asylum detention estate is growing in relative and absolute terms.

It has been a feature of new Danish governments over the past two decades that they have regularly announced a firm commitment to increasing efforts to deport rejected asylum seekers. However, this continual and increasing political focus on removal and deportation has not been reflected in relatively high rates of success. In a recent article, Leerkes and Van Houte[6] compare rates of deportation and assisted return between Denmark, Norway, Netherlands, Belgium, Germany, Sweden. Drawing on Eurostat figures, they find that Denmark unsurprisingly has the lowest rates of assisted or voluntary return – unsurprising, because this has not been a consistent policy priority[7].

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[5] Rockwool Foundation Research, https://www.rockwoolfonden.dk/app/uploads/2021/02/RFF_NYT-Ventetiden-i-asylsystemet-marts-2021.pdf. Two things should be noted here: First, the waiting time was at an all-time low in 2014-15 in part because many Syrians were granted a special humanitarian protection very quickly. Second, the average waiting time masks significant experiential variation for individual asylum seekers.

[6] Leerkes and Van Houte, "*Beyond the deportation regime*"

[7] Whyte and Hirslund, "*International experiences with the sustainable assisted return of rejected asylum seekers"*

But rates of forced return were also very low compared to the other Northern European countries. Leerkes and Van Houte “hypothesise that the Danish government’s anti-immigration and anti-Muslim rhetoric, which may partially be aimed at warding off the competition by populist anti-immigration parties, hampers the development of positive return incentives”[8], and that this has knock-on effects on rates of compliance with forced return.

The new proposal would almost certainly involve an acceleration of this trend. It establishes a new kind of removal, that the supplementary legal analysis is calling "accompanied forced transfers" [*ledsaget tvangsmæssig overførsel*] from Danish territory to the as yet unnamed country, where the asylum process is to take place. This adds to the wider typology of departures in use in Denmark, which include Dublin removals, deportations of various kinds (often called “accompanied departures” [*ledsaget udrejse*] by the police), "observed departures" [*påset udrejse*], “voluntary” repatriation, and what the Police calls "dropouts" [*frafald*], meaning asylum seekers who simply disappear from the system. Having made the risky and often expensive journey in to Europe, one has to presume, that a good number of new asylum seekers would object to being moved out of Europe again and would look to ”drop out”, rather than be transferred. This would entail either living in Denmark without documents or crossing borders irregularly to other European countries. If the authorities want to stop them from doing so, it will require the further expansion of the Danish asylum detention estate and a system of closed camps. The proposal would thus likely either mean an increase in irregular stays and border movement or would entail an even more strict locking up of those in line to be transferred. Perhaps most likely both.

[8] Leerkes and Van Houte, op.cit., page 333.

Temporary housing and integration as deterrence

Figure 2: A temporary housing unit for refugees in Næstved in 2017. Photo: Zachary Whyte

The second kind of "camps" are temporary housing units for recognized refugees. I use them to illustrate the ways in which the uncertainties of the asylum phase have been making their way in to the integration phase for recognized refugees.[9] At the same time, Danish integration policy is increasingly also being used as part of a deterrence regime. That is to say, that the conditions under which recognized refugees live are presented as part of a system designed to deter would-be asylum seekers from coming to Denmark in the first place.[10]

Under Danish law, asylum seekers who are recognized as refugees in Denmark are assigned to a municipality, which is then responsible for their integration program and for finding them suitable housing. The temporary housing unit illustrated above forms part of a pavilion system (figure 2) which is used in some municipalities to house these refugees, because they can be quickly put up and moved. These kinds of housing units have regularly been used to house asylum seekers for the

[9] See also Kohl et al., "*I Danmark kommer mange flygtninge aldrig ud af lejren*"

[10] Brekke, "*The struggle for control*", Gammeltoft-Hansen, "*Refugee policy as 'negative nation branding'*"

same reasons across the past decades[11]. However, repurposed municipal buildings, such as retirement homes, schools, or even town halls, are also in common use. These sorts of buildings were regularly used as asylum centers in the past decade, especially in rural municipalities, where centralization and demographic change emptied many of them out[12]. However, as asylum centers are closed down to reduce costs as the number of arrivals wanes, these sorts of buildings are increasingly being pressed in to use as temporary housing for refugees, meaning that refugees may literally be housed in the same kinds of buildings they lived in while their asylum cases were being processed. This in turn entails some of the same rounds of life as those offered in asylum centers, living with strangers in tight circumstances[13].

This is in part a result of the combination of the extremely low levels of social benefits available to refugees and the lack of cheap housing in most municipalities. The changing names given to these social benefits are instructive: from "start aid" [*starthjælp*] in 2002 to "integration benefits" [*integrationsydelse*] in 2015 to "self-support and repatriation benefits" [*selvforsørgelses- og hjemrejseydelse*] in 2020.[14] Symbolically, then, they move from beginnings to integration to return. Researchers at The Rockwool Foundation calculated that the original "start aid" made refugees the poorest group in Danish society[15]. Since then – and with each name change – rates have been further reduced.

Physically, then, recognized refugees are increasingly living in camp-like spaces. But the fundamental uncertainty that characterizes the asylum phase and life in the camps has also been on the rise for refugees in Denmark. In recent years, there has been an increased effort to revoke resident permits for refugees, expanding what Nicholas de Genova calls deportability – the precariousness of life that comes with the continuous risk of being deported.[16] Denmark has been a

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[11] Whyte and Ulfstjerne, "*Flexible shelters, modular meanings*"

[12] Whyte et al., "*New neighbours in a time of change*"

[13] Whyte, "*In process*"

[14] These lower rates for refugees were rescinded under the Social Democratic Thorning Schmidt government (2011-2015) as part of their elimination of so-called "poverty benefits" [*fattigdomsydelser*]. They were re-instituted in 2015.

[15] Andersen et al., "*Lowering welfare benefits*"

[16] De Genova, "*Migrant 'illegality' and deportability in everyday life*". See also Rytter and Ghandchi, "*Workers for free*" for a description of the lived effects of everyday deportability on Afghans in Denmark; Vitus and Jarlby, "*Between*

frontrunner in designating parts of Syria, Somalia, and Eritrea as safe for return. These assertions have been forcefully disputed not only by the refugees themselves, but also by international organizations and country experts. In some cases, as with the notorious Eritrea country of origin report[17], Denmark has been the only European state taking this stance, though other countries have been following developments with interest. At the same time, the sheer velocity and volume of legal changes in itself creates uncertainty for refugees, as for example expanding requirements for permanent residence can render the work done to live up to previous rules obsolete. It is worth reiterating that this sort of extended uncertainty does documented damage to mental health[18].

The externalization proposal proposes something quite radical here, namely doing away with the asylum phase on Danish ground altogether. The explicitly stated goal of the Frederiksen government is to have no asylum seekers arrive in Denmark at all and thereby to also stop the recognition of new refugees in Denmark. (Note that this might not preclude the arrival of quota refugees) Now, the consequences of this are a little hard to get a grip on. If effected – and as I shall return to, it is far from certain that the proposal presently has enough substance for anyone to really speculate on its effects – it certainly would also tear out the refugees from the systems that, after all, are working to some extent. One of the rather unheralded bits of news on Danish integration is that despite the disruption entailed by deterrence as a policy priority, on many parameters, including rates of education and employment, things are improving, especially for the second generation.[19]

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integration and repatriation" for an account of the impact of conflicting policy goals on the lives of young refugees; and Turnbull, "*Living the spectre of forced return*", for a description from the UK.

[17] Rosset and Liodden, "*The Eritrea report*"

[18] Hvidtfeldt et al., "*Prolonged periods of waiting for an asylum decision and the risk of psychiatric diagnoses*"; von Werthern et al., "*The impact of immigration detention on mental health*"

[19] European Web Site on Integration: https://ec.europa.eu/migrant-integration/governance/denmark

Tent camps and spectral politics

Figure 3: Tent camp in Næstved in 2016. Photo: Rebecca Campbell

The third and last kind of camp I will mention are the now-defunct Danish tent camps, in active use for about a year in 2016, which I use to illustrate what I'm calling "the spectral politics of asylum", which starts from the understanding that the presentation of asylum policy increasingly is part of its functioning. The Danish tent camps were put up very quickly, at the beginning of 2016, but they were emptied more or less by the end of the year. However, some of them still stood for a number of years after, heated and inflated behind wire fences. They were controversial from the beginning and became mired in scandal amid stories of abuses of power in one of the tent camps in particular. But as colleagues and I have argued, this controversy was an important part of the functioning of the tent camps[20]. In our work on these tent camps, we have thought of them in terms of two paradoxes: spectacular obscurity and successful failure. Spectacular obscurity captures the contrast between the great fanfare under which they were presented and the fact that everyday life in the tent camps was largely obscured. At the same time, and as was well documented, they were full of small bits of failure, everything from the hot water not working to sewers backing up. And all of these failures, in a sense, undergirded some of the explicit policy goals. The idea was precisely to make

[20] Whyte et al., "*Paradoxical infrastructures of asylum*"

the stay at asylum centers as uncomfortable as possible.[21] In this sense, the failures of humane treatment were part of how the system was meant to work. They were successful failures.

Much of this resonates with current Danish asylum policy. The spectacularity of the Danish jewelry law, which mandated the confiscation of jewelry worth more than a certain value from arriving asylum seekers, contrasted with the obscurity of the actual jewelry: Indeed, the law has barely seen use. Similarly, newspaper ads were taken out in Lebanese newspapers describing the difficulties of life in Denmark. There was a plan for establishing a departure center on the island of Lindholm, previously used for as a research center for animal diseases. And all of this is what Thomas Gammeltoft-Hansen together has called negative nation branding, like a reverse tourist campaign whereby prospective asylum seekers are told not to come, that things are awful, you will hate it. Further, these sorts of policies may serve to obscure other, less dramatic, restrictions being rolled out, like the steady ratcheting up of the requirements for permanent residence permits or citizenship. Some of these policies have foundered or been retracted and have in that sense failed. But at the same time, and in part because of the outrage they stoked, they can also be seen as successes from the perspective of a Danish government, whose aim is to communicate a forbidding image so as to deter asylum seekers.

One of the striking features of this new externalization proposal is precisely its spectral or ghost-like nature. It looks fearsome, a harbinger of a radical relocation of the Danish asylum regime, but is at the same time essentially insubstantial in its present form. It is unclear which if any state could be enticed to take over the running of the Danish asylum system, under what conditions, what legal and policy repercussions it might have, let alone something as mundane as how much it would cost. But in a sense, the effect of the proposal is precisely detached from its tangibility. Which is to say, that even if it were to fail to materialize as policy, it will still have made an impact on Danish asylum politics, in part through the very controversy it engenders. And if it were to fail, it would have allowed the government to position itself as radically restrictive in a political marketplace, where this is understood to be valuable, at no financial cost and without an actual change in policy.

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[21] As Kohl notes, this concern with keeping standards low in the asylum phase, so as to discourage additional asylum seekers, was part of the original thinking when the Danish asylum system was instituted in 1984 (Kohl, "*Asylaktivering og ambivalens*").

Conclusion

In this short paper, I have presented three current developments in Danish asylum policy as illustrated by three kinds of camps. I have used departure centers to illustrate the carceral trend in the Danish asylum system; temporary housing for refugees to illustrate the seepage of asylum dynamics and policy priorities into the integration phase; and tent camps to illustrate the increasingly spectral nature of Danish asylum politics. The new proposal to externalize the asylum system in some ways builds on these developments. For example, it would likely expand the asylum detention estate in Denmark further. But in other ways, it would radically reshape Danish asylum policy, by attempting to shift it out from the domestic sphere altogether. Because the specifics of the proposal are so nebulous, it is hard to confidently evaluate its possible effects. Central questions are not just unanswered but barely asked in the current proposal. These issues notwithstanding, the proposal can also be understood as what I have called a spectral politics of asylum. In this sense, the domestic debates sparked by the proposal may be understood as part of its functioning.

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Denmark and extraterritorial asylum: International law and lessons from practice

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Introduction

The idea of externalising asylum processing and/or protection to another state is not new. Indeed, 'destination' states in the Global North have been proposing and, in some cases, implementing such approaches since as early as 1986.[1] In this contribution I focus on four aspects of extraterritorial asylum policy, international law and lessons learned from such approaches in other jurisdictions. The intervention first addresses responsibility sharing under the 1951 Refugee Convention; second compares international practice on extraterritorial asylum; third outlines the various extraterritorial asylum processing models from practice; and, finally, sets out relevant human rights and refugee law standards applicable to both extraterritorial *processing* of asylum seekers and *protection* of refugees.

Responsibility sharing and shifting

The transfer of a person from one state to another for the purposes of the asylum processing is not, in and of itself, a breach of international law. But such arrangements can and have resulted in serious breaches of international human rights and refugee law. A primary purpose of the 1951 Refugee Convention is to 'assure refugees the widest possible exercise of their fundamental rights and freedoms'.[2] The Convention preamble further acknowledges that sharing responsibility for refugees between states is possible, given that refugees can place an undue burden on specific states. Such responsibility sharing should provide a real set of rights and protections and not amount to a system that simply shifts responsibility for protection from one state to another that is incapable of providing such protection, as we have seen in the past.[3]

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[1] Nikolas Feith Tan, "*The Manus Island Regional Processing Centre*."

[2] Preamble to the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), (1951).

[3] James C Hathaway, "*The Michigan Guidelines on Protection Elsewhere*."

Comparing international practice

Considering the Danish proposal in international context, the following examples are the most closely related to the current law proposal and have informed the Danish policy process. Some of these have been extensively covered in the literature, while others are less well known:

- US extraterritorial processing in Guantanamo Bay, Cuba, since the 1990s;[4]
- Australia's Pacific Solution in place from 2001 to 2007;[5]
- Australia's Operation Sovereign Borders from 2012 onward;[6]
- EU-Turkey Statement in operation since 2016;[7]
- US and Guatemala's Asylum Cooperative Agreement.[8]

There are key differences between the Australian and US approaches flagged above and Denmark's proposal for extraterritorial asylum. Both Australia and the US have extensive maritime borders that can be used to directly defend against irregular migration. As a result, deflecting asylum seekers from both Australia and the US, in fact, does contribute to stopping departures of asylum seekers. On the other hand, while extraterritorial asylum policy undertaken by Denmark would almost certainly reduce arrivals in Denmark, it would not reduce dangerous journeys to other European states, given Denmark's geography.

Moreover, there are key legal differences between the Danish context and the Australian and the US. Most notably the European Convention on Human Rights offers binding protections against, for example *refoulement* and collective expulsion, while the absence of the binding regional treaty

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[4] Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (Cambridge University Press, 2015).

[5] See, for example, Susan Kneebone, "*The Pacific Plan*."

[6] Madeline Gleeson, "*Offshore*."

[7] Daniel Thym, *'Why the EU-Turkey Deal can be Legal and a Step in the Right Direction*', Verfassungsblog, 9 March 2016; Maximilian Steinbeis, 'Three legal requirements for the EU-Turkey deal: An interview with James Hathaway', Verfassungsblog, 9 March 2016.

[8] Daniel Ghezelbash, "*Hyper-legalism and Obfuscation*."

body in both Australia and the US is notable. In short, the models undertaken in Australia and the US would be unlawful if undertaken by Denmark.

Finally, there are some important geopolitical factors at play here. Both Australia and the US are regional powers with immediate Global South neighbours, which has made the selection and identification of a relevant and approachable 'partner' state far more accessible than in the Danish case.

Conceptualising extraterritorial asylum

Externalization has been usefully defined as 'measures taken by states beyond their borders to obstruct or deter the arrival of foreign nationals lacking permission to enter their intended destination country.'[9] Other definitions specify that these measures may also include pre-emptive and indiscriminate containment of people beyond a state´s territory, outsourced through public, commercial and other non-state venues.[10] While externalization thus refers to a broad suite of extraterritorial migration control measures, encompassing visa controls, carrier sanctions, maritime interception and pushbacks, extraterritorial asylum is just one example of such approaches. I want to conceptualize three distinctive legal models of extraterritorial asylum to assess which state that has what level of responsibility for persons transferred.[11]

First, extraterritorial asylum processing may be conceived of on the basis of *exclusive partner state jurisdiction.* Under this model, cooperation is primarily focused on the transfer of asylum seekers from one state to another. After transfer, the partner State assumes complete responsibility for the asylum seeker, including the asylum procedure and reception conditions. This model commonly employs the 'safe third country' concept, encapsulated in both the EU-Turkey Statement and the Asylum Cooperative Agreement.[12]

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[9] Jeff Crisp, "*What is Externalization and Why is it a Threat to Refugees?*"

[10] Lemberg-Pedersen, "*Manufacturing displacement*".

[11] Tan, "*The Manus Island Regional Processing Centre*."

[12] Ghezelbash, "*Hyper-legalism and Obfuscation*."

Second, extraterritorial asylum may take place on the basis of *joint jurisdiction* between destination and partner state. This model is characterised by a high level of destination and partner state involvement in the reception or processing of asylum seekers. The Australian-led regional processing centres on Nauru and Papua New Guinea are a good example of such an approach.[13]
Third, in rare cases extraterritorial asylum may take place on the basis of *exclusive destination state jurisdiction.* Such a situation will only take place where the partner State's role is limited to offering the use of its territory to the destination State. The US-Guantanamo arrangement is an example of this practice whereby, under a perpetual lease agreement, Cuba has granted the US exclusive jurisdiction over the Guantanamo Bay area. As a result, human rights obligations fall exclusively on the US.

Processing standards

Currently Denmark is considering two possible models. Under Model 1, Denmark will have jurisdiction over the centre. Under Model 2, the third country will have jurisdiction. Here I flag the key rights that I would be particularly concerned about under both models.[14]

Firstly, the principle of *non-refoulement* is flowing from, among others, Article 3 in the European Convention on Human Rights (ECHR), preventing the transfer of any person to a well-founded fear or persecution or a real risk of serious harm. It is worth noting here that when Denmark has jurisdiction over the centre, Denmark will also owe *non-refoulement* obligations in the centre.[15] The Danish Institute for Human Rights has emphasized that Denmark must consider its *non-refoulement* obligations when persons present themselves spontaneously to such a centre. That is not to suggest that Denmark must provide asylum processing to those arriving spontaneously, but simply that Denmark owes obligations to everyone under their control in a third country centre.[16]

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[13] Committee Against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*; Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*.

[14] Danish Ministry of Immigration and Integration, *Juridisk analyse af mulighederne for overførsel af asylansøgere til asylsagsbehandling i et tredjeland inden for rammerne af international ret*, 1.

[15] See, for example, *Al-Skeini v United Kingdom*, Application no. 55721/07, 7 July 2011 (European Court of Human Rights).

[16] See further Danish Institute for Human Rights, *Human Rights Obligations and Third Country Asylum Processing* (January 2021).

Secondly, there is the access to fair and efficient asylum procedures as provided for in the case law of the European Court of Human Rights with respect to Article 3 ECHR. Individuals must receive adequate information about the asylum procedure, a reliable system of communication between the asylum seeker and the authorities, effective access to interpreters and legal aid as required, and a fair and effective asylum system in the third country.[17]

Thirdly, there is the right to an effective remedy under Article 13 ECHR. Denmark must asylum seekers with the ability to appeal their cases and ensure that appeal goes to an independent, competent authority with suspensive effect.[18] Finally, there are questions of liberty and security. Past extraterritorial asylum policies have involved arbitrary detention for very long periods of time.[19] Here Article 5 ECHR protects against arbitrary detention and other unlawful restrictions on freedom of movement.

Past practice has been problematic in this area. At the Australian-run centres in both Nauru and Papua New Guinea, there were no functioning asylum systems when people were transferred. As a result, the asylum seekers waited in detention for about two years before the first decisions were made.[20] Under the US-Guatemala Asylum Cooperative Agreement, 939 asylum seekers were transferred to Guatemala for the purposes of asylum processing. Guatemala's asylum system only had six employees, and it has presently not finalized any asylum decisions yet.[21]

Protection standards

Moving from extraterritorial asylum *processing* models and standards, I want to finally address the *protection* element of such third country approaches. It is important to think beyond the procedural

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[17] *MSS v Belgium and Greece*, Application no 30696/09 21 January 2011 (European Court of Human Rights).

[18] *A.M. v. the Netherlands*, Application no. 29094/09, 5 July 2016 (European Court of Human Rights).

[19] See, for example, Azadeh Dastyari and Maria O'Sullivan, "Not for Export."

[20] UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013*; UNHCR, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*; Patrick van Berlo, "*The Protection of Asylum Seekers in Australian-Pacific Offshore Processing*."

[21] Refugees International and Human Rights Watch, *Failure of Protection under the US-Guatemala Asylum Cooperative Agreement*; Ghezelbash, "*Hyper-legalism and Obfuscation*."

and rights questions arising in the fairly short time that an asylum process takes, to the equally important question of how refugees can be afforded protection in the third country and to what degree Denmark would have responsibility for that protection. The key question is what obligations does the Refugee Convention oblige Denmark to live up to when transferring a person to a third country? Articles 2-34 of the Refugee Convention are structured in a such a way that rather than being given a universal set of rights upon arrival, the refugee gains or accrues rights as the connection to the asylum state grows over time.

What is often lost beyond questions of *non-refoulement*, is the series of civil and socioeconomic rights set down in the Refugee Convention. To my mind, there are three possible interpretations of the Refugee Convention with respect to Denmark's potential obligations at the point of transfer. The first is that Denmark might only owe the *non-refoulement* obligation. It is clear from both the proposal and the literature that *non-refoulement* is a baseline obligation under any such extraterritorial asylum policy.

The second possibility is that, as well as *non-refoulement*, Denmark would also owe asylum seekers the 'acquired rights' that they already entitled to in Denmark, that is to say, the few rights that a person receives within a state's jurisdiction and territory, for example the right to freedom of religion.[22]

The third interpretation holds that it is not just *non-refoulement* or 'acquired rights' but that Denmark must respect all rights contained in the Refugee Convention.[23] If the Convention is designed to provide a maximal set of protections to refugees, then to transfer someone obliges a state to ensure that the full set of rights are, in fact, available.[24] The High Court of Australia seemed to agree with this approach in the *M70* case, finding that there were obligations well beyond *non-*

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[22] Hathaway, "*The Michigan Guidelines on Protection Elsewhere*."

[23] Hathaway, "*The Michigan Guidelines on Protection Elsewhere*."

[24] Michelle Foster, "*The Implications of the Failed 'Malaysian Solution'*."

refoulement, extending to access to courts of law, freedom from discrimination, and treatment at least as favourable as nationals with respect to employment, education, and religious freedom.[25]

While the jury is still out on this interpretative question, I would argue that the core rights contained in the Refugee Convention must be available in the third country. In particular, the right to primary education (article 22), right to work (article 17), access to housing (article 21), freedom of movement (article 26) and right to identity documents (article 28) are essential for the realisation of protection in any asylum state.

Previous extraterritorial asylum policies have not met these standards. In Papua New Guinea, for example, even once refugees were free from detention, many could not integrate in the host community because of religious tensions between the local community and the refugees.[26] Similarly, hundreds of refugees have, in fact, ended up in Australia because of the need for medical care not available in Nauru and Papua New Guinea.[27] Others have been resettled to Canada and Europe because of the lack of durable solutions in Nauru and Papua New Guinea.[28]

Conclusion

In closing, it is worth returning to the Refugee Convention's *raison d'etre* as providing the *greatest possible protection* to refugees. While the current system of territorial asylum is flawed, equally transferring asylum processing and protection to a third country would represent a massive shift in the Danish and international asylum system. Moreover, as a matter of international human rights

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[25] *Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*, [2011] HCA 32 (High Court of Australia 31 August 2011). See also Hathaway, "*The Michigan Guidelines on Protection Elsewhere*." and Foster, "*The Implications of the Failed 'Malaysian Solution'*."

[26] JC Salyer, "*The Denial of Human Dignity in the Age of Human Rights under Australia's Operation Sovereign Borders*."

[27] Gabrielle Holly, "*Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights*."; Gabrielle Holly, "*Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation*.".

[28] Hannah Ryan and Michael Green. 16.12.2020. *'Suffered more than many': how Canada and Europe are resettling Australia's refugees*, The Guardian. Available at: https://www.theguardian.com/australia-news/2020/dec/17/canada-europe-resettling-australia-refugees

and refugee law, Denmark cannot simply delegate its responsibility to asylum seekers and refugees to a third country.

In sum, for extraterritorial asylum to work, it must provide for international protection, not simply the absence of a fear of persecution. While international law does not forbid extraterritorial asylum, such policies have a track record of breaching human rights and refugee law.

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