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## Legal challenges and the practicability of disembarkation centres for illegal migrants outside the EU

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### Theme

This paper analyses the legal challenges and practicability of establishing of disembarkation centres for illegal migrants outside EU territory.

### Summary

To ensure the EU does not again face a situation like the refugee crisis of 2015-16 various options are being discussed. One solution might be the establishment of disembarkation centres for illegal migrants outside EU territory. This paper analyses the legal challenges and practicability of such centres, taking into account the following: (1) the establishment of disembarkation centres outside the EU by international treaties; (2) the exercise of sovereign powers in these centres; (3) the establishment of a common mechanism of distribution and compensation for the admission of migrants; and (4) the readmission of refused migrants from these centres.

### Analysis

#### Introduction

In the aftermath of the migration crisis of 2015 within the EU and its Member States, many ideas were discussed as to how to get the uncontrolled mass immigration into EU territory under control. All players, no matter whether officials from the EU or its Member States, agreed that there should be no repeat of the situation of 2015-16.

Although all relevant players, apart from some human-rights activists, shared the same goal, the way to reach it remained controversial. Some countries preferred a common European solution to the challenges of illegal mass migration, some relied on themselves, or on cooperation with other countries with similar political convictions, in order to stop incoming illegal migrants. The most prominent measure on the EU level was the conclusion of the so-called Refugee Deal with Turkey of 18 March 2016. On the national level, the closure of the Balkan route by the Eastern European countries of Macedonia, Slovenia, Serbia and Croatia on 9 March 2016 marked the most prominent measure against the uncontrolled flow of illegal migrants into the EU.

Echoing the discussions elsewhere in the developed world on how to outsource the contentious asylum process and how to cut down on the flow of arrivals of illegal migrants, the heads of State or government of the EU Member States discussed at the

EU summit in Brussels on 28 June 2018 the possibility of establishing centres for illegal migrants outside EU territory. The heads of State or government of the EU Member States agreed on exploring ways to build new centres, probably in Africa, where migrants could be screened for asylum and from where only legitimate refugees might move on to the EU. Although they said that these centres in outside countries would operate in ‘full respect of international law’,<sup>1</sup> the European Council addressed neither the question of the legal admissibility and practicability of their establishment nor the question of how and where refugees would be resettled. Exploring the legal and political practicability of the so-called concept of regional disembarkation platforms was left to the Council of the EU and the EU Commission. The answer to both open questions remains crucial to further EU asylum policy. In the event of non-conformity with international law, the EU’s concept of regional disembarkation platforms will not serve as a possible resort for a common asylum strategy at all. But even if these regional disembarkation platforms outside the EU are in conformity with international law, it would continue to be difficult to establish them because some countries in the bloc have refused to accept them<sup>2</sup> and swift handling of asylum seekers is necessary to prevent a backlog.

It is the aim of this paper to provide an analysis of the legal challenges and practicability of centres for illegal migrants outside the EU, or, in the words of the European Council: regional disembarkation platforms. This paper should serve as a solid legal basis for further discussion about whether these centres can be a possible option for a common asylum strategy within the EU to provide a more effective handling of illegal migration to EU countries. The paper does not aim to assess the political chances of success of the EU’s concept of regional disembarkation platforms.

Our examination of the legal practicability of disembarkation centres for illegal migrants outside the EU starts with the question of whether these centres for illegal migrants to the EU –for example in Africa– can be established by international treaties. Secondly, we examine if the EU can exercise sovereign powers in these centres, ie, apply asylum procedures on its own authority. Thirdly, we discuss the possibility of a common EU mechanism of distribution and compensation for the admission of migrants. Finally, we demonstrate how the re-admission of refused migrants from the centres can be carried out in compliance with international law.

### Is the establishment of disembarkation centres for illegal migrants outside the EU subject to international treaties?

As the establishment of disembarkation centres for illegal migrants outside the EU would concern the exercise of sovereign power outside EU territory, these proposed centres could only be legally created if created by an international treaty. An international treaty is an international agreement concluded between States or international legal

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<sup>1</sup> *European Council meeting (28 June 2018) – Conclusions*, EUCO 9/18, p. 2, <https://www.consilium.europa.eu/media/35936/28-euco-final-conclusions-en.pdf> (accessed 14/1/2019).

<sup>2</sup> See Alfred Hackensberger & Christian Putsch (2019), “Asylzentren außerhalb der EU – das sagen die betroffenen Staaten”, WELT Online, <https://www.welt.de/politik/ausland/article178467814/Asylzentren-fuer-Migranten-in-Afrika-Das-sagen-die-Laender.html> (accessed 15/1/2019).

(cont.)

personalities in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>3</sup> The basic rules for the signing of international treaties are laid down in the Vienna Convention on the Law of Treaties (VCLT) of 1969.

Accordingly, the establishment of disembarkation centres for illegal migrants outside the EU would have to be an approvable subject of an international treaty between the EU and the host countries for the proposed centres. In general, States and other international legal personalities can freely determine the subject matter of their international treaty to be signed. However, according to Arts. 34 and 35 of the VCLT, such a treaty may not create any obligations for a third State without its consent, unless the third State expressly accepts that obligation in writing. As a treaty on the establishment of a centre for illegal migrants outside the EU would be signed by the EU as one party to the treaty and the host State of the disembarkation centre as the other party, it would not create any obligation for a third State. As such, there is no problem with third States not being involved in the agreement. Therefore, these Articles do not serve as an obstacle to such a treaty.

Furthermore, a treaty on the establishment of disembarkation centres for illegal migrants outside the EU must not violate public international law. According to Art. 53 of the VCLT the treaty must not conflict with a peremptory norm of general international law. A peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Consequently, a treaty on the establishment of disembarkation centres for illegal migrants outside the EU would have to be in conformity with a peremptory norm of general international law, the so-called *ius cogens*. Part of the internationally recognised *ius cogens* are first and foremost the minimum standards of human rights that can be derived from the core constituents of international documents on the protection of human rights. These include, for instance: the prohibition of the use of violence (Art. 2 IV of the UN Charter); the prohibition of genocide and crimes against humanity (Art 3 of the Geneva Conventions); the right to life (Art. 6 of the ICCPR); the prohibition of race discrimination (Art. 4 of the ICCPR); and the prohibition of torture and of slavery ( Arts. 7 and 8 of the ICCPR). As the establishment of disembarkation centres for illegal migrants outside the EU does not imply the violation of any of these human rights, it is not in breach of any peremptory norm of general international law. There is currently no newly emerging peremptory norm of general international law that might lead to the nullification and termination of the treaty, as stated in Art. 64 of the VCLT.

In addition, Art. 42 I of the Geneva Convention must be taken into account. Due to that provision, in an international treaty on refugees no reservations to Articles 1, 3,4, 16 I, 33 and 36-46 may be made. These articles forbid the treaty to narrow the definition of the term 'refugee' as laid down in Art. 1 of the 1951 Refugee Convention. Likewise, they prohibit the treaty from violating the equal treatment of refugees (Art. 3), their right to practice their religion and freedom as regards the religious education of their children (Art. 4), and their free access to the courts of law on the territory of all Contracting States

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<sup>3</sup> Art. 2 VCLT.

of the 1951 Refugee Convention (Art. 16 I). Furthermore, and this is a crucial point for any international treaty on the establishment of disembarkation centres for illegal migrants outside the EU, the treaty cannot violate the *non-refoulement* principle. This principle is guaranteed in Art 33.1 of the 1951 Refugee Convention and states that ‘no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. Arts. 36-46 of the 1951 Refugee Convention are procedural final clauses with no relevance to the content of any international treaty on the establishment of disembarkation centres for illegal migrants outside the EU. Accordingly, any international treaty on the establishment of disembarkation centres for illegal migrants outside the EU has to guarantee the illegal migrants in these centres (ie, refugees and asylum seekers) equal treatment, freedom of religion, free access to courts of the EU and *non-refoulement* in the event of their lives or freedom being threatened in another territory. Complying with these requirements, an international treaty establishing disembarkation centres for illegal migrants outside the EU could be signed if in line with the aforementioned requirements of international law.

The next question is if the EU, as an international governmental organisation, has the competence for signing such an international treaty with a possible host country. Article 47 of the Treaty on the European Union (TEU) explicitly recognises the legal personality of the EU, making it an independent entity in its own right. Accordingly, as laid out in Art. 216 of the Treaty on the Functioning of the European Union (TFEU), the EU has the ability to negotiate and sign international agreements ‘with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties’. As opposed to individual Member States, the EU is not a State party to the Geneva Convention of 1951. To date, the EU’s formal accession to the Convention has not been realised. Therefore, the EU itself is not bound by the Convention as a matter of public international law. Nevertheless, Art. 78 I of the TFEU states that the EU’s ‘common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection... must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’. These other relevant treaties include the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights, the Convention on the Rights of the Child, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. In line with the general principles of EU law, this also encompasses other potential treaties that might be signed in future by all EU Member States.<sup>4</sup> Accordingly, any EU asylum acquis must be in compliance with the Geneva Convention and the 1967 Protocol. Non-compliance constitutes an infringement of Art. 78 I of the TFEU. As an integral part of EU law, the Geneva Convention of 1951 remains a subject to the interpretative principles of public international law.

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<sup>4</sup> See Kay Hailbronner & Daniel Thym (2016), ‘Constitutional framework and principles for interpretation’, in Kay Hailbronner & Daniel Thym (Eds.), *EU Immigration and Asylum Law*, 2<sup>nd</sup> edition, München, MN 55.

Article 78 of the TFEU (signed in Lisbon in 2007) raised the Common European Asylum System (CEAS), first introduced by the European Council in Tampere in 1999, to a legally-binding objective of the EU's primary law. According to Art. 78 II of the TFEU, the EU legislation on asylum is part of the shared competences between the EU and its Member States. This requires that any EU legislation in this area must comply with the principles of subsidiarity and proportionality. A shared competence consequently limits EU action to initiatives that cannot be sufficiently achieved at the national level and remain limited in terms of regulatory intensity to what is necessary to achieve legitimate policy objectives. However, as the far-reaching Common European Asylum System is a specific objective of the Lisbon Treaty, the application of these principles of subsidiarity and proportionality requires a certain generosity.<sup>5</sup> In other words: in this case, the principles cannot be applied strictly, because otherwise the Treaty objective could not be reached at all. Article 78 II (a) of the TFEU explicitly allows the agreement on a 'uniform status of asylum'. Consequently, the objective of a uniform asylum status implies that the principles of subsidiarity and proportionality do not prevent EU action in normal circumstances. As the drafting history and the general scheme of the EU Treaties argue in support of a substantive congruence of the EU's asylum status and the refugee status of the 1951 Geneva Convention, the Common European Asylum System is, therefore, founded on the Convention.<sup>6</sup> This is confirmed by the reference in Art. 78 I of the TFEU. Thus, EU legislation on the basis of Art. 78 II (a) of the TFEU must specify the meaning of the 1951 Geneva Convention. EU secondary legislation concerning asylum, such as the Asylum Qualification Directive 2011/95/EU, the Asylum Procedure Directive 2013/32/EU, the Asylum Reception Conditions Directive 2013/33/EU, the Dublin III Regulation (EU) No 604/2013 and the Regulation (EU) No 439/2010 establishing the European Asylum Support Office (EASO) in Malta must be interpreted in the light of the 1951 Geneva Convention.

The TFEU does not restrict the geographical scope of the provision on asylum procedures. In particular, it does not specify whether common 'procedures for the granting and withdrawing of uniform asylum or subsidiary protection status' should necessarily apply within the territories of the Member States. Specifically, the drafting history of Art. 78 II (d) of the TFEU shows that the extraterritorial processing of asylum applications is also covered by the TFEU, always taking into account that these procedures, wherever they take place, must comply with international refugee law and human rights.<sup>7</sup> However, in accordance with the EU's supranational structure, the EU is only authorised to legislative harmonisation and administrative support in cases of asylum. The decisions on granting asylum to an individual are still taken at the national level by the Member States. At present, Art. 78 of the TFEU does not provide a sufficient legal basis for examining asylum applications by EU authorities, such as EASO, instead of national authorities of each Member State. Establishing a specific EU authority to decide upon asylum applications replacing the Member States' asylum bureaucracy, would require a Treaty change in accordance with Art. 48 of the TFEU. However, on the

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<sup>5</sup> See Steve Peers (2016), *EU Justice and Home Affairs Law: EU Immigration and Asylum Law*, 4<sup>th</sup> edition, Oxford, p. 393; and Matthias Rossi (2016), 'Article 78 TFEU', in Christian Calliess & Matthias Ruffert (Eds.), *EUV/AEUV*, 5<sup>th</sup> edition, München, para. 11.

<sup>6</sup> Hailbronner & Thym (2016), *op. cit.*, p. 1032, FN 54.

<sup>7</sup> *Ibid.*, p. 1037.

basis of the existing Art. 78 II (d) of the TFEU, the EU can support transnational cooperation between the Member States.

Article 78 II (g) of the TFEU established an explicit legal basis for 'partnership and cooperation with third countries'. This offers the EU the possibility of cooperating with third countries even in situations in which the adaptation of secondary legislation does not result in an exclusive external treaty-making competence. However, Art. 78 II (g) of the TFEU itself does not provide sufficient legal basis for the establishment of disembarkation centres for illegal migrants outside the EU on the territory of third countries. It only serves as a legal basis for cooperation with third countries on the level of EU competences. As mentioned above, the EU does not have the competence to run asylum procedures on its own instead of the Member States' authorities. Therefore, only in combination with Art. 78 II (d) of the TFEU could the EU justify future EU legislation providing for external asylum processing centres that would have to be run by the Member States. Art. 78 II (g) of the TFEU could be used to guarantee a favourable political and administrative context by cooperation with the possible host States of the disembarkation centres for illegal migrants, to enable its Member States to run the centres outside the EU themselves with the financial and operative support by the EU. For that purpose, the EU would have the competence to sign an international treaty with a possible host country on the establishment of disembarkation centres for illegal migrants outside EU territory.

Fulfilling all the aforementioned requirements of an international treaty, the signing of a treaty on the establishment of centres for illegal migrants outside the EU would be in accordance with international law and would be binding to its parties, according to Art. 26 of the VCLT. None of the parties, ie, neither the EU nor the country hosting the disembarkation centre, could, according to Art. 27 of the VCLT, invoke the provisions of its internal law as justification for its failure to execute a treaty. The binding effect for the EU and its Member States is explicitly guaranteed in Art. 216 II of the TFEU that states that 'agreements concluded by the Union are binding upon the institutions of the Union and on its Member State'.

### Can the EU exercise sovereign powers in these centres?

In its international treaty with a possible host country on the establishment of disembarkation centres for illegal migrants outside EU territory, the EU could receive the permission of the host State to exercise its own sovereign powers in these disembarkation centres. Within the freedom of contract, the host State is entitled to assign this power to the EU. However, as the EU –on the basis of the existing TEU and TFEU– currently does not have the competence to run asylum procedures on its own instead of the Member States' authorities, it could only provide its Member States with the financial and operative support to establish and run these external asylum processing centres. Within the Common European Asylum System (CEAS), the EU could only function as contract party to the host State for the establishment of such disembarkation centres, which would be run by the Member States and its asylum authorities. The sovereignty in these disembarkation centres for illegal migrants would, in fact, be exercised by the Member States as long as there is no Treaty change in accordance with

Art. 48 of the TEU replacing the Member States' asylum bureaucracy and giving the authority to decide upon asylum applications to the EU.

Exercising their sovereign rights in these disembarkation centres, the EU Member States would be responsible for the organisational and institutional framework. In accordance with their national asylum law, they could either operate the centres on their own using their national administrative staff or they could licence Intergovernmental Organisations (IGOs) like the [United Nations High Commission on Refugees \(UNHCR\)](#) with the operation. Crucial for the operation of these disembarkation centres for illegal migrants outside the territory of the EU is that they are run in accordance with the obligations of fundamental and human rights laid down in international human rights documents, such as the [Universal Declaration of Human Rights \(UDHR\)](#), the [European Convention on Human Rights \(ECHR\)](#) and the [Geneva Convention](#), as well as in the national constitutions of the Member States.

The EU Member States that run these disembarkation centres outside the EU would have to decide for themselves if the extra-territorial asylum procedure carried out in these centres should complement, or replace, their national asylum procedure. This decision is crucial as regards the legal consequences of the asylum decisions being made in the disembarkation centres outside the Member State's own territory.

The first option is a complementary extra-territorial asylum procedure. This could serve either as an additional offer, or as a freely selectable alternative to the existing national asylum procedure. If the services of the Member States in the disembarkation centres are not only offering help or advice, it means that the services performed are acts of sovereignty. In this case, as acts of sovereignty, they must be in accordance with the fundamental rights guaranteed in the constitution of that Member State. Making use of this complementary extra-territorial asylum procedure, the asylum applicant's domestic position in the Member State must not deteriorate. It may only be applied to give the applicant an additional option strengthening his legal position. The complementary extra-territorial asylum procedure could be operated in analogy to the airport procedure of asylum cases (Art. 43 of [Directive 2013/32/EU on common procedures for granting and withdrawing international protection](#)), where the asylum procedure is conducted in a transit zone before the asylum seeker is allowed to enter the country in which he or she applies for asylum. According to Chapter II of [Directive 2013/32/EU](#), in this transit zone the asylum seeker has to be given free access to effective legal remedies, such as independent consulting and advisory services in the national asylum law (Art. 8, 12 I (c), Arts. 20-23). Accordingly, in the extra-territorial disembarkation centres each EU Member State would have to guarantee the asylum seekers the same amount and quality of legal remedies as on its own State territory. The complementary extra-territorial asylum procedure would have to be in compliance with the minimum procedural requirements laid down in Chapter II of [Directive 2013/32/EU](#), such as free access to interpreters, legal consultancy and official hearings. All legal remedies being offered in the Member State's asylum law must be guaranteed, including the access to the appropriate administrative courts. In addition, the disembarkation centres would have to offer the asylum seeker accommodation and services (eg, food and healthcare) for the duration of the entire asylum procedure.

The second option is a replacing extra-territorial asylum procedure. This option would relocate the entire asylum procedure from the territory of the EU Member State to the territory of a third country. Consequently, all asylum seekers who seek asylum in a specific Member State would be expelled, or deported, from that Member State's territory to the disembarkation centre abroad where they could only apply for asylum and where their asylum procedure would be executed. As no asylum procedures would be carried out on the Member State's own territory anymore, each EU Member State would have to establish an entry ban for newly incoming asylum seekers to its own State territory and an obligation to leave the State territory for the duration of the asylum procedure in the event of the asylum seeker having already entered the country. This would also apply in the complementary extra-territorial asylum procedure. In replacing the extra-territorial asylum procedure the disembarkation centres in third countries would have to be operated in compliance with the Member State's national asylum laws, guaranteeing the asylum seeker an asylum procedure in accordance with the rule of law, including free access to interpretation services, legal consultancy and official hearings, as well as offering him or her accommodation and services for the duration of the entire asylum procedure.

However, there would be no need for the protection of the EU and its Member States in the event of the asylum seeker entering from a safe third country, or in the event he or she enjoys sufficient protection in a third country from where they enter the EU.

It could be argued that disembarkation centres for illegal migrants outside the territory of the EU fulfil the requirements of safe third countries, with the consequence that no EU Member State would have to grant asylum to asylum seekers who apply for it in these centres. According to Art. 3 III of the Dublin III Regulation 'any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU'. However, the concept of a safe third country in Art. 38 of Directive 2013/32/EU explicitly mentions only a 'safe third country'. A disembarkation centre in a safe third country is not a country in the formal sense of the term, because it does not fulfil any of the legal requirements of a State (State territory, State population and government authority). Therefore, a disembarkation centre outside the EU cannot be considered as being covered under the term 'safe third country' in Art. 38 of Directive 2013/32/EU. This interpretation would go beyond the wording of the Article.

Not falling under the concept of safe third country of Art. 38 of Directive 2013/32/EU, disembarkation centres for illegal migrants outside the territory of the EU could be considered a 'flight alternative' in the sense of the Directive. In that case, EU Member States could consider an asylum seeker's application for asylum inadmissible if he or she comes from 'a country which is not a Member State [and which] is considered as a first country of asylum for the applicant'. According to the concept of safe third country in Art. 35 (b) of Directive 2013/32/EU, 'a country can be considered to be a first country of asylum for a particular applicant if he or she enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*'. An asylum seeker in a disembarkation centre run by an EU Member State would definitely enjoy sufficient protection in that centre. However, under Art. 38 of Directive 2013/32/EU, the disembarkation centre does not fulfil the legal requirements of a country. Therefore, a



disembarkation centre outside the EU, where EU Member States run extra-territorial asylum procedures, cannot be considered a country providing the asylum applicant with sufficient protection. Consequently, the EU Member States would be obliged to proceed with any asylum application being made in these centres as if the application had been received on their own national territory.

### How can the EU legally establish a common mechanism of distribution and compensation for the admission of migrants?

To prevent 'forum shopping' and the phenomenon of 'refugees in orbit',<sup>8</sup> where asylum seekers are referred from one Member State to another by claiming it is not responsible for them, the EU was in need of determining which Member State is responsible for examining asylum applications. Article 78 II (e) of the TFEU gives the EU legislator (the European Parliament and the Council of the EU) the competence to set up 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection'. On these legal grounds the so-called Dublin III Regulation was enacted. Using the terms 'criteria' and 'mechanisms', and Art. 78 II (e) of the TFEU itself, does not set narrow confines for modifying existing rules. For instance, it enables the EU legislator in accordance with the ordinary legislative procedure to establish a quota system allocating asylum seekers among Member States on the basis of a specific distribution key, or certain relocation mechanisms.

Therefore, parallel to the establishment of disembarkation centres for illegal migrants outside the EU, an appropriate common EU mechanism for the distribution of the incoming legal migrants could be created, taking into account the factual burden of each Member State in terms of asylum applicants in the disembarkation centres. In realisation of the purpose of a Common European Asylum System (CEAS) such a mechanism would be subject to EU secondary legislation in accordance with Art. 78 II (e) of the TFEU. On the initiative of the EU Commission, the European Parliament and the Council of the EU could adopt appropriate measures in accordance with the ordinary legislative procedure. The EU legislator would have to agree on a specific distribution or relocation mechanism, including a distribution/relocation key among the EU Member States that participate in the disembarkation centres for illegal migrants outside the territory of the EU.

In the event that not all EU Member States participate in running these disembarkation centres and allow recognised asylum seekers to enter their territory, the EU could oblige the non-participating Member States to contribute to handling the asylum issue. In this respect, the EU could refer to the principle of solidarity laid down in Art. 80 of the TFEU, which generally obliges other Member States to support those that take more responsibilities upon themselves in managing the Common European Asylum System. Art. 80 of the TFEU refers to the policies of the EU laid down in Arts. 77-79 and states that 'their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'. The implementation of this obligation can be effected in various ways, for instance, by financial or operational support. Accordingly, the EU could agree on a certain

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<sup>8</sup> Hailbronner & Thym (2016), *op. cit.*, p. 1024.

compensation mechanism for the Member States that do not participate in running the disembarkation centres. They could be obliged by the EU legislator in accordance with the ordinary legislative procedure to pay financial compensation for not taking part in the asylum procedure run in the disembarkation centres, or to provide operational or logistical support for the participating Member States.

### How can readmission of refused migrants from the centres legally take place?

At the end of each asylum procedure being conducted by the EU Member States in the disembarkation centres for illegal migrants outside EU territory EU according to their national asylum law, there will be a final decision: either the asylum seeker is granted asylum or the application is rejected. In cases of asylum being granted, the asylum seeker is entitled to enter the country that granted him or her asylum status and he or she is given residence status. In the other cases, when the asylum seeker's application is rejected in a legally binding way, he or she would have to leave the disembarkation centre. In these cases, the EU Member States must have ways of deporting the rejected applicants.

An agreement on repatriating rejected asylum seekers to their transit countries, or countries of origin, must be a subject in any international treaty regarding centres outside the EU. As with the establishment of disembarkation centres for illegal migrants outside the EU, the agreement would have to be in accordance with the relevant provisions of the VCLT of 1969. As the rejected asylum seekers' transit countries, or countries of origin, would sign the readmission agreement voluntarily and as it would create obligations only between the signatory States, the agreement would be in accordance with Art. 34 & Art. 35 of the VCLT, according to which a treaty may not create any obligations for a third State without its consent unless the third State expressly accepts that obligation in writing. According to Art. 53 VCLT, a readmission agreement may not conflict with a peremptory norm of general international law. As the readmission of rejected asylum seekers does generally not imply the violation of any of the human rights mentioned above, it is not in breach of any peremptory norm of general international law. However, since the principle of *non-refoulement* is not only part of international customary law but also laid down in Art. 33 I of the 1951 Refugee Convention, in EU primary law in Art. 19 of the EU Charter of Fundamental Rights, in Art. 78 I of the TFEU and as in EU secondary law in Art. 5 of the EU Repatriation Directive 2008/115/EC, these laws have to be adhered to in the text and implementation of any readmission agreement. Accordingly, such an agreement would not violate any norm of international law and could, therefore, be signed effectively into law. Due to Art. 26 of the VCLT, it would be binding to its parties and none of the signatories could, according to Art. 27 of the VCLT, invoke the provisions of its internal law as justification for its failure to perform a treaty.

As the signing of readmission agreements with rejected asylum-seekers' transit countries, or countries of origin, is in accordance with international law, it is questionable who is competent to conclude these agreements: essentially, whether it is within the competence of the Member States who run the disembarkation centres or within the competence of the EU? Due to Art. 79 III of the TFEU, 'the [European] Union may conclude agreements with third countries for the readmission to their countries of origin

or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States'. Accordingly, the EU has the competence to sign readmission agreements with third countries in order to return rejected asylum seekers from the disembarkation centres abroad to either their countries of origin or their transit countries. According to Art. 4 I (j) of the TFEU, this competence to sign readmission agreements with third countries is part of the shared competence between the EU and its Member States. That means that the Member States can conclude their own readmission agreements with third countries in accordance with the principles of subsidiarity and proportionality, as long as the EU does not negotiate, or sign, a readmission agreement with the same country. EU agreements precede the agreements of Member States in this area.

The EU has already negotiated and signed readmission agreements with several countries of origin and transit with a view to returning illegal migrants and cooperating in the fight against trafficking in human beings.<sup>9</sup> Usually, these agreements are linked to visa facilitation agreements, which aim to provide the necessary incentive for readmission negotiations in the third country concerned, without increasing illegal migration. In practice, for its readmission agreements with third countries the EU Commission uses an unpublished model readmission agreement which is constantly adapted and developed further in coordination with the Member States.<sup>10</sup> In its eight chapters, these EU readmission agreements with third countries deal with procedural and technical arrangements concerning readmission, the obligation of receiving, the means of providing proof and furnishing *prima facie* evidence, deadlines and time targets, as well as the distribution of costs in the readmission procedure.

## Conclusion

As result of the legal analysis presented in this paper, it can be stated that the EU, as an international governmental organisation with its own legal personality, has the competence for signing an international treaty with a possible host country on the establishment of disembarkation centres for illegal migrants outside EU territory. This treaty would be in accordance with the Vienna Convention on the Law of Treaties (VCLT) of 1969, and its content would have to be in compliance with the Geneva Convention of 28 July 1951 and the 1967 Protocol. However, in accordance with the status quo of the Common European Asylum System (CEAS), where –on the basis of the existing TEWU and TFEU– the EU currently does not have the competence to run asylum procedures on its own instead of the Member-State authorities, it can only sign a treaty with a third country on the establishment of disembarkation centres for illegal migrants outside EU territory. As long as there is no Treaty change replacing the Member States' asylum bureaucracy and giving the authority to decide upon asylum applications to the EU, the EU can only function as a contract party to the host state for the establishment of such

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<sup>9</sup> So far the EU has signed readmission agreements with the following States, all being now in force: Albania (1/V/2006), Bosnia and Herzegovina (1/I/2008), Georgia (1/III/2011), Hong Kong (1/III/2004), Macao (1/VI/2004), Macedonia (1/I/2008), Moldova (1/I/2008), Montenegro (1/I/2008), Pakistan (1/XII/2010), Russian Federation (1/VI/2007), Serbia (1/I/2008), Sri Lanka (1/V/2005), Ukraine (1/I/2008), Armenia (1/I/2014), Azerbaijan (1/IX/2014), Turkey (1/X/2014) and Cape Verde (1/XII/2014). The readmission agreement with Kazakhstan was signed on 10/XII/2009 but has not yet entered into force.

<sup>10</sup> Nils Coleman (2009), *European Readmission Policy*, Leiden, p. 88.

centres. The disembarkation centres themselves would have to be run by the EU Member States and their asylum authorities. As such, only the EU Member States can exercise their sovereignty in asylum issues in these disembarkation centres for illegal migrants. The Member States –no matter if they opt for a complementary or replacing extra-territorial asylum procedure– would have to provide the asylum applicant with sufficient rights and protection during the entire asylum procedure and they would be obliged to proceed with any asylum application being made in these centres as if the application had been received on their own national territory. The EU can only financially and operatively support the Member States in this procedure but is not entitled to interfere in their asylum procedures. However, the EU legislator can agree on a specific distribution, or relocation mechanism, including a distribution/relocation key among the EU Member States that participate in the disembarkation centres for illegal migrants outside EU territory. The Member States that do not participate in running the disembarkation centres can be obliged by the EU legislator to pay a financial compensation for not taking part in the asylum procedure run in the disembarkation centres or to provide operational or logistical support for the participating Member States. For cases where, in accordance with the Member State's national asylum law, the asylum seeker's application in the disembarkation centres is rejected in a legally binding way, the EU has the competence to sign readmission agreements with third countries in order to return the rejected asylum seekers from the disembarkation centres abroad to either their countries of origin or their transit countries. In conclusion, from the legal point of view, there are no obstacles to the European Council's plan of establishing disembarkation centres for illegal migrants outside EU territory. However, whether the plan is also politically practicable and can find the necessary support among EU institutions, the Member States and the possible contractual partners, remains unclear.