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**The Politics of Extraterritorial Processing:
Offshore Asylum Policies in Europe and the Pacific**

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INTRODUCTION

Many politicians and policy makers argue that the current refugee regime is inefficient and ill suited for contemporary refugee realities and advocate reform of the 1951 Geneva Convention on the Status of Refugees (hereafter Geneva Convention). Tony Blair, for instance, argues that the Geneva Convention ‘was drawn up for a vastly different world, in which people did not routinely travel huge distances across multiple borders’ (2004). Also the former Australian Immigration Minister, Philip Ruddock echoes this sentiment: ‘[D]id the founders of the Convention envisage that it would become the enabling tool of organized crime?’ he asks (2001a).

Amidst such rhetoric, extraterritorial asylum policies have risen to considerable prominence in western discourse on asylum. These policies can be described as initiatives that seek to ‘deterritorialize’ the asylum system by providing protection to refugees and processing asylum claims outside the territory of the state implementing the policy (Betts, 2004). Western politicians and policy makers increasingly consider such policies as a legitimate and viable response to the strains placed upon their domestic asylum systems.

These developments are highly significant as they challenge fundamental features of the global refugee regime. By locating the provision of protection and asylum processing outside the state in question, offshore policies circumvent states’ international obligations under the Geneva Convention. The rights invoked by a refugee’s physical presence in a signatory state are effectively undermined by ‘contracting states’ in the extraterritorial asylum framework.

As they are easily conflated with the non-entrée rhetoric of western politicians, extraterritorial asylum policies are often criticized for being instrumental and inhumane (Taylor, 2005; Amnesty International (AI), 2001; 2003; Human Rights Watch (HRW), 2001; 2003). However, these policies also include seemingly compassionate initiatives to address the ‘root causes’ of forced migration and to assist refugees who are unable to leave their region of origin in search of safety.¹ Such objectives are hard to dismiss or condemn (Crisp, 2003a; Boswell, 2003). This duality and moral complexity make extraterritorial asylum policies a fascinating albeit contentious research topic.

Regardless of how one may judge these policies, it is nevertheless clear that they play a central role in contemporary asylum policy in Northern states and will continue to do so in the future. Some academics argue that they signify a ‘paradigm shift’ (Crisp, 2003a:13) in the global refugee regime and that they represent a sign of ‘deep transition’ (Noll, 2003:341) in the asylum systems of western states.

Yet this notion of ‘paradigm shift’ obscures the historical development of these policies, which can be traced back to the early 1980s (Noll, 2003; van Selm, 2003). In 1981 the United States implemented offshore asylum procedures by processing Haitian asylum claims at sea. By the 1990s, thousands of Haitians and Cubans were held by the Americans at Guantanamo Bay naval base in Cuba where their asylum applications were processed (van Selm, 2003). In the European context, offshore policies have been discussed since the mid 1980s, when Denmark proposed the establishment of UN processing centres for asylum seekers in their regions of origin. Similar ideas were also discussed at the Intergovernmental

¹ This is reflected in recent UNHCR initiatives such as the Strengthening Protection Capacity Projects (UNHCR, 2005a; 2005b) and Comprehensive Plans of Action (UNHCR, 2005c).

Consultation on Asylum, Refugees and Migration Policies (IGC) during the 1990s (Noll, 2003).

Although not new, offshore asylum policies have gained unprecedented popularity among politicians and policy makers in the early 2000s. Two cases in particular illustrate this trend. In 2001 Australia implemented its ‘Pacific Solution’ which entailed the offshore processing of several hundred asylum seekers in neighbouring Nauru and Papua New Guinea (PNG). A few years later, in 2003, the UK government, partly inspired by the Australian policies, proposed the establishment of ‘Transit Processing Centres’ (TPCs) and ‘Regional Protection Areas’ to the European Union. Although not fully implemented, these proposals have coloured EU discourse on asylum policy ever since.

Most writing on offshore asylum policies focuses on the nature of these policies and their potential consequences for global refugee protection. Undoubtedly, this is important in order to understand the future implications of current policy measures. Several human rights organizations, such as Amnesty International (2002; 2003) and Human Rights Watch (2002a; 2002b; 2003) have published critical reports, highlighting the human rights violations associated with offshore asylum initiatives in Europe and the Pacific.

Academic commentators have also pointed out the potential legal hazards of these developments. Noll argues that extraterritorial asylum policies create an entrenched ‘state of exception’ (2003:338) in the refugee regime which undermines refugees’ claim to protection. He contends that the establishment of offshore processing centres and protection zones renders refugees ‘beyond the domain of justice’ (2003:338). Other scholars argue that states’ extraterritorial activities may constitute ‘a legal black hole’ where international legal obligations do not apply (Koh, Priest and Gellman cited in Wilde, 2005; Landau, 2005).

The legal and human rights-centred debates on extraterritorial asylum policies are undoubtedly of utmost importance. However, as this paper seeks to illustrate, it is also vital to develop a social and political understanding of this phenomenon. In section one I shall briefly outline the emergence of these policies in Europe and Australia. I will then seek to address two questions, largely unexplored in the prevailing literature. Firstly, why did extraterritorial asylum policies in the UK and Australia rise to prominence in the early 2000s? And secondly, what are the political conditions under which extraterritorial asylum policies may take place?

In section two I will address the first question by referring to the broader political context in which these policies emerged, focusing particularly on the drastic geopolitical changes of the 1990s. This response has been promoted by many authors who seek to explain the growing prominence of extraterritorial asylum policies (see Crisp, 2003a; Schuster, 2005).

However, failing to explore more case-specific and domestic factors which have spurred states to embrace offshore asylum policies, these explanations remain unsatisfactory. In section three I hope to address this shortcoming by focusing on the specific domestic factors which contributed to the emergence of offshore asylum policies in Australia and the UK in 2001 and 2003, respectively.² As Freeman points out; ‘[t]o appreciate state responses to the unparalleled migration pressures in recent years, it is necessary to examine *both*

² Whilst I acknowledge that UNHCR has been an important actor in the development of extraterritorial asylum policies in both cases, I shall not discuss its role in any depth, due to the limited scope of this paper.

national political dynamics and international pressures and constraints operating on particular states' (Freeman, 1992:1145, my emphasis).

My analysis in this section will consider an argument put forward by Gibney, who suggests that the growing 'culture of human rights' may paradoxically have contributed to the elaboration of extraterritorial asylum policies in liberal democratic states (2005b). As human rights discourse has expanded in these states, asylum seekers and non-citizens have come to enjoy greater rights. Responding to these growing 'rights constraints', states thus seek to extraterritorialize their asylum systems (Gibney, 2005b). This contention will be evaluated in the light of other factors which may also have contributed to the emergence of offshore policies in UK and Australia.

In section four and five I will turn to address the second question posed in this paper: what are the conditions in which offshore asylum arrangements can exist? Section four will discuss the supranational institutional structure in which the UK's proposals for offshore asylum policies were put forward, and the impact this had on the development of such policies in the region. In section five I will turn to discuss the bilateral relationship between 'host' and 'contracting' states in both the Australian and EU cases.

Although some authors do consider the conditions in which extraterritorial arrangements exist (Taylor, 2005; Betts, 2004), most concentrate on only one case study. By comparing and contrasting the European and Australian experiences of offshore processing, I hope to reflect more generally upon the political circumstances that make offshore asylum policies possible and viable as well as ways in which such policies may develop in the future.

1. AN OVERVIEW OF EXTRATERRITORIAL ASYLUM POLICIES IN AUSTRALIA AND THE EU

Before commencing the discussion on offshore asylum policies in Australia and the EU, it is necessary to outline briefly how these policies developed in the two regions. This will serve as an empirical backdrop for the analysis and discussion in the subsequent sections. We shall see that whilst Australian policies are mainly related to the establishment of offshore processing centres, comparable EU policies encompass a broader range of initiatives, from detention centres to regional protection areas.

1.1. The 'Pacific Solution'³

The arrival of 433 'boat people', rescued aboard MS *Tampa* in August 2001, marked the beginning of drastic policy changes in the Australian asylum system. However, this was the culmination of a long-standing trend. Boat people have been arriving in Australia since the early 1980s, when several thousand Indochinese arrived by sea from Vietnam and Cambodia (DIMIA, 2004). In the 1990s Indonesian smugglers facilitated the arrival of 'boat people' from central Asia and the Middle East. Between 1989 and 2001 a total of 259 'unauthorized' boats arrived in Australia, carrying a total of 13,500 people (Mares, 2002:27; Brennan, 2002:2).

³ Although the term 'Pacific Solution' refers to a range of deterrence measures, such as 'excising' territory and other legislative changes implemented by the Australian government in September 2001, in this paper it will refer particularly to Australia's policy of extraterritorial asylum processing.

On 26 August 2001 the Norwegian cargo ship MS *Tampa* rescued 433 asylum seekers, mainly of Afghan and Iraqi origin, about 140 km north-west of Christmas Island. Upon the request of the desperate asylum seekers the *Tampa* captain, Arne Rinnan, headed towards Christmas Island (AI, 2002).

Determined to keep the *Tampa*'s destitute asylum seekers outside their jurisdiction, the Australian authorities refused permission to enter Christmas Island harbour. The *Tampa* was ordered to return to international waters (Taylor, 2005). As Rinnan refused the Australian Special Air Services (SAS) troops boarded the boat and took control of the ship. On 1 September 2001 the Australian Prime Minister, John Howard, announced that New Zealand and Nauru had agreed to process the *Tampa* asylum seekers (Howard, 2001a; AI, 2002), and so the 'Pacific solution' came into existence.

A month later, the Australian parliament introduced a 'new legislative scheme' relating to asylum seekers (Mathew, 2002; Hancock, 2001; Philips and Millbank, 2003). One of the items was the Migration Amendment Act 2001 Consequential Provisions, which permitted the detention of unauthorized arrivals and allowed Australian officials to take these people to so-called 'declared countries' (Mathew, 2002:663). This provided the legal framework for the implementation of offshore policies.

In the wake of this new act, Australia entered into extraterritorial asylum arrangements with Nauru and PNG. On 10 September 2001, Nauru signed a 'Statement of Principles and First Administrative Agreement' with Australia, in which it officially accepted the 283 *Tampa* asylum seekers as well as 237 other asylum seekers intercepted at sea. In return, Australia promised to provide an A\$20 million aid package and cover all costs for the processing of asylum seekers (Taylor, 2005). Later Nauru signed a Memorandum of Understanding (MOU) whereby it agreed to host up to 1,200 asylum seekers. A second MOU was agreed on 11 December 2001, extending the aid and time frame of the agreement to June 2003. In February 2004 this agreement was extended yet again (Taylor, 2005).

Australia's MOU with PNG was agreed on 10 October 2001, where PNG agreed to host 225 asylum seekers (Howard, 2001b). This agreement was renewed in January 2002 and in August 2002, as PNG agreed to host greater numbers of asylum seekers in exchange for more Australian aid (Taylor, 2005). In July 2003, however, the detention facilities in Manus Island, PNG, closed down. The Australian government stated that the facilities would be 'on standby', ready for new arrivals if necessary (*The Age*, 2003)

The policy of extraterritorial processing has been a mixed success for the Australian government. On the one hand, the harsh deterrence measures implemented against unlawful arrivals in September 2001 has served to significantly reduce the number of people smuggled ashore the Australian continent (Ruddock, 2003b). As Phillips and Millbank note, only two boats have reached Australia since September 2001 (2003).

On the other hand, policies of extraterritorial processing were never extensively used by the Australian authorities and were never of a permanent character; a total of 1544 asylum seekers were accommodated at the offshore protection units between September 2001 and 2003 (Ruddock, 2003a). Following a peak in February 2002, numbers of offshore detainees have been declining and one centre in Manus Island, PNG is now closed.

1.2. Extraterritorial asylum policies re-invented in the EU context

Extraterritorial asylum policies in the EU differ from the Australian policies outlined above. While the Australian policy relates to the establishment of extraterritorial processing centres, the EU approach has been more broad-ranging, covering issues such as the establishment of ‘regional protection areas’ and providing ‘development assistance’ to sending countries.⁴

In February 2003, a UK Cabinet Office and Home Office policy paper, outlining the so-called ‘safe havens concept’ and protection in the region of origin, was leaked to the *Guardian* newspaper. In early March of the same year, a more polished paper entitled ‘A New Vision for Refugees’ was informally circulated.

On 10 March 2003 Prime Minister Tony Blair, in a letter to the EU presidency, requested a discussion on ‘how to improve management of the asylum process’ in the March European Council meeting in Brussels. This letter was accompanied by a document, reflecting ideas set out in the ‘New Vision’ document, outlining UK’s proposals to process asylum seekers in processing centres outside Europe and the establishment of ‘Regional Protection Zones’ (Blair, 2003).

In response to a request from the European Council, the European Commission presented a response to the UK’s proposals in June 2003 entitled ‘Towards more Accessible, Equitable and Managed Asylum Systems’. Here, the Commission clearly distanced itself from the UK vision by reasserting the importance of the Common European Asylum system and by proposing alternative measures such as Protected Entry Procedures and Resettlement Schemes (Noll, 2003; European Commission, 2003b).⁵ The EU Justice and Home Affairs Council also examined the UK proposals as well as the Commission Communication.

Member states’ reactions to the proposals were diverse. Sweden, for instance, was adamantly against the UK’s suggested scheme, whilst Denmark and the Netherlands were strongly in support of it. The Danish government, in particular, has been a consistent supporter of the UK proposals (Noll, 2003).

Although the 2003 Thessaloniki Summit of the European Council rejected the UK’s proposals to establish ‘TPCs’, the issue was not laid to rest. The idea was revived as soon as 2004 when the German and Italian interior ministers, Otto Schilly and Giuseppe Pisanu, suggested establishing ‘TPCs’ in North African transit states (Dietrich, 2004).

The 2004 ‘Hague programme’ (see Council of the European Union 2004), implemented by the EU in the aftermath of the 1999 ‘Tampere programme’ (Council of the European Union 1999), also seeks to externalize the ‘burden of territorial admission’ (Peral, 2005:2). A new budget line, B7-677, has also been developed in the EU to fund ‘innovative projects on co-operation with third countries on migration issues’. In 2003 a total of €20 million was budgeted to fund ‘projects within the external dimension of migration and asylum policy’ (Peral, 2005:2). This programme has now been replaced by the AENAS programme which provides financial and technical assistance to countries and regions of origin (Peral, 2005; Betts, 2005b).

⁴ For a more thorough outline of the development of extraterritorial asylum policies in the EU, see Noll (2003).

⁵ The UNHCR High Commissioner at the time, Ruud Lubbers, presented what he saw as an ‘alternative’ ‘three pronged’ model at a meeting in London, see Noll (2003), UNHCR (2003a).

Extraterritorial protection schemes are also set up by the Hague programme in the context of 'Regional Protection Programmes'. These programmes seek to improve regional 'protection capacity' as well as protect refugees by exploring a variety of durable solutions (European Commission, 2005c; 2006c; 2004b). Although this programme does not cover offshore processing facilities per se, it relies on cooperation with third countries in the regions of origin (Peral, 2005).

The European Commission has also been supportive of UNHCR initiatives such as Convention Plus and the Agenda for Protection (2004b). In collaboration with the Netherlands, Denmark and the UK, the commission is seeking to establish five pilot projects, implemented by UNCHR, that seek to improve the asylum system of countries such as Mauritania, Morocco and Libya (Schuster, 2005). The implementing agencies have stressed that these projects seek to bolster regional asylum systems and not to create detention centres (Schuster, 2005). However, despite this rhetoric, there are strong political links between such initiatives and the establishment of extraterritorial processing centres.

2. CONTEXTUALIZING EXTRATERRITORIAL ASYLUM POLICIES

Although this paper will focus mainly on the domestic factors which led to the emergence of extraterritorial asylum policies in Australia and the EU in the early 2000s, it is necessary to consider the broader geopolitical developments which contributed to the prominence of such policies. Below I shall outline factors which led to the emergence of the non-entrée regime in the 1980s and 1990s. This will be followed by a discussion of 'regionalization' policies in the late 1990s and 2000s.

2.1. Non-entrée regime

The non-entrée regime can be described as a series of policy measures introduced by western states from the 1980s onwards, aimed at preventing asylum seekers from entering their territory and claiming asylum. This regime, we shall see, is closely linked to the rise of the extraterritorial asylum agenda and has been a response to the sweeping and global economic and political changes of the last three decades (Crisp 2003b).

Before I outline the main factors which spurred the non-entrée regime, it is necessary to remember that 'there was never a golden age of asylum' (Crisp, 2003a:4). Asylum provision has always been political and states have sought to manoeuvre the global refugee regime according to domestic interests. The non-entrée regime thus represents merely a shift in interests, and not necessarily in the political dynamic of asylum provision.

The 1980s and early 1990s saw a dramatic rise in the numbers of asylum seekers arriving in the west and this prompted restrictionist government policy. In western Europe, asylum applications increased from under 70,000 in 1983 to 200,000 in 1989 (UNHCR, 2000), although asylum seekers were never evenly distributed amongst western states. This marked rise in asylum applications was the outcome of many factors. Firstly, the world economic recession in the late 1970s reduced states' incentive to accept migrants and this had a negative impact on their asylum systems. As avenues for labour migration to the west were closing, migrants resorted to national asylum systems for entry. This increase in numbers seeking asylum, in turn, reinforced the concept of a 'failing' asylum system and facilitated the introduction of restrictionist policies (Crisp, 2003b).

Secondly, globalization processes also resulted in increasing numbers of non-western asylum seekers arriving in the west. The dissemination of information about western lifestyles in the non-western world and the decreasing cost of long-distance travel played an important role in fostering south-north migration flows.⁶ The rising numbers of new arrivals led to a re-thinking of western asylum policy and facilitated a wide range of deterrence measures (Collinson, 1996).

Thirdly, the break up of communist and socialist states in the late 1980s led to political turmoil and a rise in ethnic nationalism, as exemplified by the conflicts in the former Yugoslavia. Kaldor argues that access to 'surplus arms' and the lack of post-Cold War superpower support to 'client regimes' led to an increase in new types of warfare characterized by identity politics and the increased use of civilians as 'weapons of war' (2001). These dynamics created increasing numbers of refugees and asylum seekers arriving in the west.

However, it was not only the rising number of asylum applications which prompted western governments to close their borders. The end of the Cold War also meant that refugees lost their 'ideological value' in the west (Chimni, 1998). Whilst Cold War refugees, such as Cubans in the United States,⁷ were welcomed for ideological reasons during the 1960s and 1970s (Salomon, 1991), refugees in the 1990s had little ideological value for the hosting states. This diminished interest in hosting refugees translated into restrictionist and deterrence policies in most western states.

The fall of the iron curtain also resulted in the increasing 'securitization' of asylum and migration issues. As the security concerns of the Cold War had disappeared, politicians and security strategists started considering more wide-ranging, 'soft' security issues (Collinson, 1996; Boswell, 2003). This trend was reinforced in the wake of terrorist attacks on the west in the 1990s and early 2000s and led to the hardening of non-entrée asylum policies (Gibney, 2005b).

Although far from comprehensive, the discussion above has highlighted some important factors which contributed to the development of the non-entrée regime in the west. We shall now turn to consider how this regime has evolved in the latter part of the 1990s and early 2000s.

2.2. Regionalization policies

An extension of the non-entrée regime, the 'regionalization' of asylum policies refers to an increase in policies seeking to respond to refugees in the region of origin or transit. Boswell outlines two distinct facets of 'regionalization' policies. On the one hand, she argues, regionalization can be manifested as preventive approaches, seeking to address root causes of forced migration. On the other hand, this policy also represents containment strategies that 'essentially externalize traditional tools of domestic or EU migration control' (Boswell, 2003:619).

The preventive facet of 'regionalization' policies set out to address the 'root causes' of migration. Such initiatives are reflected in various EU Commission communications (see e.g. European Commission 2003b), as well as in UNCHR initiatives such as Comprehensive

⁶ Although the largest refugee flows in the world remain inter-regional (Collinson, 1999).

⁷ See Gibney (2004) for a more nuanced discussion on American asylum policy and the Cubans.

Plans of Action (UNHCR, 2005c). The 2002 Seville Presidency of the EU reflected this sentiment clearly: ‘an integrated, comprehensive and balanced approach to tackling the root causes of illegal immigration must remain the European Union’s constant long-term objective’ (Council of the EU, 2002:10). The previous High Commissioner for Refugees, Ruud Lubbers, also expressed hope that European states would provide ‘more development assistance specifically towards refugees in the regions of origin’ (UNHCR, 2003b). The frequent rhetorical allusion to the ‘root causes’ approach, however, has not translated into extensive and concrete initiatives on the ground and this strategy remains largely unexplored (Betts, 2005a; 2005b; Boswell, 2003).

The rise of the ‘root cause’ approach can be linked to the post-Cold War political landscape in which western intervention has become a feasible and, to some extent, legitimate course of action for western states. In order to establish ‘regional protection areas’, humanitarian intervention is sometimes necessary (Boswell, 2003). This willingness is reflected in a 1995 IGC report which states, ‘forced intervention may be appropriate ... to establish [international protection areas] in countries of origin’ (IGC, 1995:12).

The other facet of ‘regionalization’ is the ‘containment’ strategy (Boswell, 2003). These policies do not address the causes of flight, but seek to limit the arrival of asylum seekers to the west (Shacknove, 1993). Far more developed than the ‘preventive’ approach, such policies range from the establishment of ‘safe havens’ in the regions of origin to the use of extraterritorial processing centres. It may also include sending asylum seekers to third countries (not countries of transit), as was the case in the ‘Pacific Solution’. This ‘containment’ agenda is reflected in a 2003 EU Commission Communication which states that ‘The EU should ... assist in developing the asylum systems of transit countries in order to turn these states into first countries of asylum’ (European Commission, 2003b:16).

The ‘regionalization’ agenda fails to distinguish clearly between containment and preventive policies, and this is reflected in much of the discourse. The IGC, for instance, stated that ‘efforts of containment cannot be isolated from the need for political, financial and perhaps military measures to address (and try to redress) the root causes of conflict’ (1995:11). Notions of protection and containment are bundled rhetorically together and this ‘softens’ the way extraterritorial asylum policies are conceived, making them appear morally legitimate as they are combined with a commitment to dealing with the ‘root causes’ of flight.

Extraterritorial asylum policies, while theoretically encompassing all ‘regionalization’ policies, reflect mainly the ‘containment’ facet of this broader trend. This is due to the fact that policy initiatives focusing on ‘containment’, such as strengthening migration control in transit countries and establishing offshore processing centres, far outnumber the ‘preventive’ approaches implemented (Betts, 2003; Peral, 2005). Boswell notes that institutional structures and electoral pressures ‘have militated in favour of the prevalence of “externalization” approaches over preventive ones’ (2003:620).

‘Regionalism’ is, in a way, antithetical to a globalized world where international travel has decreased in cost and increased in ease. Although most refugees live in their regions of origin, increasing numbers also leave their regions of origin in search for refuge, aided by improved international communication and transportation networks (legal and non-legal). In this context, movement has to be curtailed by restrictive policies and this creates what Gibney terms ‘engineered regionalism’ (2005a). It is here that extraterritorial asylum policies have come to play a significant role.

Having briefly (and far from comprehensively) mapped the development of the non-entrée regime which emerged in the late 1980s and 1990s, it is perhaps no longer surprising that extraterritorial asylum policies gained prominence in this period. The establishment of extraterritorial processing centres and ‘regional protection areas’ merged seamlessly with western states’ interventionist and containment policies.

3. THE ‘DOMESTIC POLITICS’ OF EXTRATERRITORIAL ASYLUM POLICIES

Whilst highly international in scope and implementation, extraterritorial processing policies are deeply embedded in the domestic politics of the ‘contracting’ state. What are the domestic factors which triggered Australia and the UK to consider extraterritorial asylum strategies?

Gibney (2005b) argues that the ascendancy of these policies may partly be explained as a response to the growing importance of human rights in western states. Since the early 1990s the human rights discourse has grown in prominence worldwide. Although conceived in the aftermath of World War II, human rights remained ‘subordinate to state sovereignty’ (Ignatieff, 2003:229) throughout the Cold War period, reflecting the strategic geopolitical needs of the time. As the iron curtain fell, the human rights agenda has risen to global prominence and a growing body of international case law favours the human rights paradigm (Birrell, 2004).

Thus, asylum seekers living in liberal democratic states enjoy considerable more rights today than they did in the past. This paradoxically has spurred some states to seek offshore asylum policies, in order to evade the legal responsibilities which territorial presence may incur (Gibney, 2005b). Jack Straw lamented the adverse impact of the growing ‘rights culture’ by stating that ‘multiple opportunities for argument and appeal are a godsend to the opportunistic claimant’ (Straw in European Conference on Asylum, 2000:137). Below I shall discuss the extent to which this explanation corresponds to the realities of extraterritorial asylum policies in the UK and Australia.

I shall also discuss alternative factors which may have contributed to the emergence of offshore policies. Acknowledging that asylum policies are moulded by a wide range of complex and interrelated social, economic, historical and political factors (Jupp, 1993), I shall not attempt to provide an exhaustive explanation. Instead I aim to discuss a few prominent issues and look at how they have (or have not) contributed to the formulation and legitimization of offshore solutions.

3.1. Australia⁸

Human Rights Pressure

Has a growing ‘culture of rights’ in Australia, represented by human rights lobby groups and judicial institutions, prompted the government to extraterritorialize its asylum system? To some extent. The country’s harsh deterrence measures have been widely criticized by human rights advocates (AI, 2002). In 1997, the UN Human Rights Committee

⁸ For a more general overview of immigration in Australia see Price (1986) and Jupp and Kabala (1993).

made a significant decision in the case of *A. vs. Australia*. *A* was a Cambodian ‘boat person’ who had arrived in 1989 and been detained for three years by the Australian authorities. The Committee ruled unanimously that his detention was ‘arbitrary and in breach of Articles 9(1) and 9(4) of the ICCPR’ (Poynder, 1997). The Australian detention policy has also been under scrutiny by UNHCR, represented by Justice Bhagwati and the UN Working Group on Arbitrary Detention (Bhagwati, 2002, Niarchos, 2004).

By locating asylum seekers offshore, Australia successfully diluted its human rights obligations towards these people and hindered public scrutiny of their living conditions. This was exemplified in 2001 when the Australian Human Rights and Equal Opportunity Commission (HREOC) commenced its ‘National Inquiry into Children in Immigration Detention’. Although the study encompassed all national detention centres, the Commission was unable to investigate conditions for children detained in Nauru and Manus Island, as they were situated outside its jurisdiction (AI, 2002).

However, human rights’ influence on the Australian immigration system must not be overstated. Australia has not incorporated any human rights instruments into national, domestic laws⁹ and it does not have its own bill of rights (Brennan, 2002). Although the government has signed the International Bill of Human Rights,¹⁰ none of these are legally binding as long as they are not incorporated into domestic law. Thus, Australian authorities have considerable freedom to implement harsh domestic immigration policies, compared to countries such as the United States (Freeman and Birrell, 2001). The absence of a national Bill of Rights in its constitution has permitted the development of legislation which violates Australia’s obligations under international law, such as arbitrary immigration detention (Niarchos, 2004).

The weight of human rights norms in Australia has also been diminished due to the reduced role of the national HREOC. In the 1990s ‘its advocacy role has diminished ... and its more activist appointments have been replaced’, as a result of recent government policy towards migrants and asylum seekers (Freeman and Birrell, 2001:544). Furthermore, the work of the HREOC was significantly reduced following a 40% budget cut under the Howard government (Niarchos, 2004). Thus, the absence of a national human rights legal framework and recent reduction of the HREOC’s role in advocating such rights arguably provides Australian authorities with significant room to manoeuvre and implement stark domestic immigration policies. The government arguably had limited need to resort to offshore processing in order to avoid human rights constraints.

Judicial interference in immigration matters also plays a limited role in Australia. Until the 1970s, Australian immigration policy was highly bureaucratized, removed from judicial scrutiny and opportunities for judicial review were limited (Ozdowski, 1985). However, by the 1970s and 1980s, the judiciary expanded its role in immigration matters and posed a strong challenge to the restrictionist thrust of the bureaucracy (Birrell, 1994; Ozdowski, 1985; Freeman and Birrell, 2001). This was partly due to the rising political power of ethnic minorities in the 1980s as well as the emerging debate on human rights and immigration (Ozdowski, 1985; Betts, 1993; Warhurst, 1993). In this period, administrative

⁹ Although the Legislative Assembly of the Australian Capital Territory did pass the Human Rights Act in March 2004, the scope and power of this Act is limited (Niarchos, 2004).

¹⁰ This Bill of Human Rights refers to the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two optional protocols.

law was ‘extended to immigration decisions’ and the government found it difficult to shield immigration matters from the ‘larger movement for administrative accountability’ (Birrell, 1994:111).

However, this progressive development was reversed in the 1990s. Throughout the 1990s, the Australian government wrestled control on immigration matters back to the bureaucracy. This was done mainly through the 1989 Migration Act, where the government listed specific ‘migrant categories’ with specified admissions criteria. This reduced asylum seekers’ ability to ‘evade the [restrictionist] policy’s intent’ (Freeman and Birrell, 2001:534). This ‘re-bureaucratization’ made the Australian immigration system less vulnerable to judicial challenge and, I would argue, limited the government’s need to resort to offshore strategies. Thus, in the case of Australia, it is clear that Gibney’s argument, whilst not irrelevant, is less applicable.

Policy failure

Thus, it is necessary to turn to other explanations of why extraterritorial asylum policies were implemented in Australia in 2001. One possible explanation relates to the failure of preceding domestic deterrence policies. Like most western countries, the Australian government implemented a wide range of deterrence policies in the 1990s. These included measures such as mandatory detention for all asylum seekers¹¹ and dissemination of videos and posters in transit countries, such as Malaysia and Indonesia, discouraging individuals from seeking asylum in Australia (Hatton and Lim, 2005). Another measure introduced in 1999 was the Temporary Protection Visa (TPV) scheme, which curbed the rights of recognized refugees by providing them three-year visas instead of permanent residence permits (HRW, 2002b; CCJDP, 2001).

However, these measures did not curb the number of asylum seekers arriving in Australia. While less than a thousand ‘unauthorized arrivals’ applied for humanitarian protection in 1999, the number rose to more than 4,000 in 2001 (DIMIA, 2004). Between November 1989 and 2001, 259 boats carrying a total of 13,489 individuals landed in Australia without prior authorization. 70% of these arrived after July 1999, when larger boats were taken into use by the smugglers (Mares, 2002:29). Thus, the overall failure of Australia’s deterrence policy may have prompted the government into developing the ‘Pacific Solution’.

Of all the deterrence policies, the failure of domestic immigration detention in particular may have contributed to the formulation of the ‘Pacific Solution’. As the *Tampa* asylum seekers entered Australian waters, the domestic detention centres were filled beyond capacity, due to the sharp increase in asylum applicants. Prime Minister Howard admitted that ‘our capacity ... is reaching the ceiling, it is reaching breaking point’ (cited in AI, 2002:5). Building new centres was politically and financially costly and would be unpopular with locally affected communities.

It appears plausible that the political cost of rioting and unrest in domestic detention centres encouraged Australian politicians to consider offshore possibilities. By 2001, the unrest in domestic detention centres coupled with rising numbers of boat arrivals arguably brought asylum seekers to the fore of public consciousness. Headlines such as ‘Woomera fire

¹¹ Although mandatory detention for all unauthorized boat arrivals had existed since the 1958 Migration Act, this provision was extended to all unauthorized arrivals in the 1992 Migration Reform Act (Birrell, 1994).

bill \$ 500,000: Criminal gangs inside detention centre' (*Daily Telegraph*, 2001) made detention centres icons of government policy failure. In August 2000 a riot broke out at the Woomera detention centre in southwest Australia. Around 80 detainees participated in the unrest, attacking police and guards with spears and clubs made from fence posts. Four buildings were set on fire and more than 40 guards were injured (BBC, 2000, Mares, 2002). In the following year, eight 'major disturbances' were reported in detention centres across the country (Mares, 2002).

Electoral politics

Electoral politics is another factor which arguably facilitated the development of extraterritorial asylum policies in the Pacific. The *Tampa* incident took place in September 2001, and became a contentious political issue in the run-up to the Australian federal elections which were held in November of the same year (Mares, 2002). We shall see that, to a large extent, Australian electoral politics contributed to, if not sparked, the impetus to develop extraterritorial processing centres in Nauru and PNG.

Seeking a third term in office, Prime Minister Howard had, in the months prior to the *Tampa* incident, suffered very low ratings in the opinion polls. Public confidence in the asylum and immigration system was at a record low as the country prepared for the November elections. Unrest in overfilled detention centres and increasing numbers of 'unauthorized' boat arrivals did not allay these feelings. In addition, Howard and his government were painfully aware of the 1998 Queensland state elections, where the populist anti-immigration 'One Nation' party won nearly a quarter of the vote and 11 of the 89 seats.¹²

The arrival of the *Tampa*, carrying more than 400 unauthorized, desperate asylum seekers, was potentially another blow to the government's reputation on immigration policy. However, Howard skilfully used the episode to score important electoral points. By refusing admission and pursuing extraterritorial asylum policies, he demonstrated to the public that his government was capable of exerting control and acting rapidly in response to unexpected migration influxes. The political impact of his policy would not have been the same if he had resorted to a policy of domestic detention, as this had already been pursued with limited success since 1991.

The *Tampa* can arguably be regarded as a political symbol which demonstrated the resoluteness of the Howard government. Howard's ability to respond resolutely and dramatically to the *Tampa* standoff resembles what Edelman terms a 'political spectacle', defined as the 'creation and circulation of symbols in the political process' (Edelman in Huysmans, 2000:762; Edelman, 1985). Such symbols, Edelman points out, 'legitimizes political decisions often through the evocation of threats or reassurances' (Edelman in Huysman, 2000:762). Howard constructed the arrival of 'boat people' as a threat and skilfully merging this into electoral rhetoric. In this context, offshore asylum policy became more expressive and symbolic than practical or economical.

Howard's strategy paid off. Popular polls showed that 77% of Australians supported the government's decision to refuse asylum seekers entry to Australia. In the weeks following the *Tampa* incident support for the Coalition went up 5.5% and eventually the government won a victory 'that had appeared unlikely just a few months earlier' (Mares, 2002:134). It

¹² For further studies on the rise of the populist Right in both UK and Australia see Lloyd (2003), De Angelis (2003).

was clear that Howard's tough stance towards the *Tampa* asylum seekers had provided electoral dividends. The rise of extraterritorial asylum policies in Australia can therefore partly be explained with reference to the political dynamics of the 2001 electoral campaign (Roy Morgan, 2001a; 2001b).

The 2001 'Pacific Solution' was the outcome of multifarious factors. The analysis above has shown that human rights and judicial pressures on the Australian government did not play a prominent role in provoking offshore asylum policies. However, it is my contention that the failure of domestic asylum policies in the 1990s (especially the policy of mandatory detention) and the political logic of the 2001 elections both contributed strongly to the development of the 'Pacific Solution'.

3.2. The United Kingdom

We shall now turn our attention to Europe, where in 2003 the UK proposed 'offshore'¹³ asylum strategies to the EU. I shall firstly consider the importance of human rights pressures in this context, followed by other factors such as failing domestic asylum policies and the growing 'securitization' of asylum seekers in the early 2000s. By concentrating on domestic UK issues, this discussion fails to consider an important feature of the country's offshore proposals; the EU context in which they were forwarded. This will be addressed in section five.

Human Rights pressure

The increasing prominence of human rights in the UK debate on asylum seekers may partly explain the government's interest in extraterritorial policy proposals. The awareness surrounding migrant and asylum seeker rights in the UK has increased in recent decades and lawyers and judges are increasingly taking human rights into account (Clements and Young, 1999).

Perhaps the most important UK development in recent years has been the incorporation of the European Convention on Human Rights (ECHR) into domestic legislation as the 2000 Human Rights Act (HRA) (Morris, 2002). This has been a groundbreaking development in the UK. The HRA requires that the British executive demonstrate the 'legality' of certain laws to the High Court, which will ascertain that it does not contravene the ECHR (Clements and Young, 1999). As Gibney points out, the HRA has the potential to impose severe constraints on the UK government's ability to implement policies unilaterally, without regard for the ECHR provisions (2004). This constraint on the government's ability to act may therefore be an incentive to seek extraterritorial, multilateral 'asylum solutions', ideally outside the purview of the ECHR.

Human Rights pressure for a broader recognition of asylum seekers' rights has also come from a growing 'Sanctuary Movement', described in detail by Cohen (1994). Since 1988 this movement has developed a unique collaborative and multi-faith character. Furthermore, groups such as Amnesty International have also focused on how UK policy breaches the country's international human rights obligations (AI, 2005b). UK asylum policy has also come under fire from UNCHR which has stated that 'Britain is "walking a tightrope" in terms of human rights for refugees' (*Independent*, 1998).

¹³ By 'offshore' in this section, I refer to territory beyond the EU borders.

In the light of these pressures, it may not be surprising that the UK government is seeking alternative solutions, in order to evade its human rights obligations. The government argues that the provision of various appeals and safeguards leads to '[o]ver-elaborate, over-legalistic, costly, delay-prone [asylum] processes' (Straw in European Conference on Asylum, 2000:137).

However, one cannot assume that the growing importance of human rights discourse in the UK is translating into practical changes on the ground. Morris reminds us that human rights also 'contain their own hierarchy of absolute, limited and qualified rights which is largely defined in terms of national interests' (2002:414). Rather than a shift towards post-national rights, Morris argues that human rights can more aptly be described as 'negotiated pragmatism', in which states can retain considerable power and authority (2002). As human rights rose to ascendancy in the UK, the government simultaneously imposed a harsh regime of deterrence policies, removing access to welfare provisions for asylum seekers (Morris, 2002). It thus becomes less clear whether the UK government's support for extraterritorial asylum policies emerges from a wish to evade human rights pressures.

Policy failure

As in the Australian case, the failure of domestic asylum policies may also have spurred political support for extraterritorial asylum policies in the UK. The UK implemented a wide range of restrictive asylum policies in the 1980s and 1990s. However, such policies failed to drastically reduce the number of new asylum applications. By 2002, the government readily admitted that 'many parts of the [asylum] system are not working effectively' (Home Office, 2002:14).

While immigration policy in Britain has long been coloured by restrictionism, policies aimed particularly at reducing the number of asylum seekers were introduced in the 1980s. A strict visa regime was implemented from 1985 onwards, aiming to prevent arrivals from countries such as Sri Lanka, India and Nigeria (Koser and Salazar, 1999). In 1987 the Carriers Liability Act was implemented, imposing heavy fines on transportation companies for carrying passengers without valid visas and passports (Koser and Salazar, 1999; Cohen, 1994). Such policies clearly aimed at limiting individuals' ability to make the journey to Britain and invoke rights acceded under the 1951 Geneva Convention (Morris, 1998).

These restrictionist policies were extended and elaborated in the 1990s, largely as a response to the unprecedented increase in asylum seekers arriving in Britain in this decade. The 1993, 1996 and 1999 Asylum and Immigration Acts extended the visa and Carriers Liability regime and dramatically reduced the welfare provisions afforded to asylum seekers (Cohen, 1994; Schuster and Solomos, 1999; Dallal, 1998). The 1996 Act, for instance, constrained asylum seekers' access to child benefits, housing benefits and social security benefits (Schuster and Solomos, 1999; Bloch, 2000). The establishment of the National Asylum Support Service in 2000 also isolated asylum seekers from national welfare schemes (Morris, 2002). The former Home Secretary, Michael Howard, pointed out; '[These policies] will ... save taxpayers money and greatly reduce the incentive for people to enter this country illegally and make bogus claims for benefit' (cited in Morris, 1998:959).

The wide array of deterrence policies implemented in the 1980s and 1990s failed to deliver. The number of asylum applications lodged in the UK increased from 29,640 in 1996 to 71,160 in 1999. By 2002 the number of applications reached a total of 84,130. Although this number was halved in 2003 to 49,405 (ICAR, 2005), this was not known in 2003, when

the 'New Vision' proposals were first leaked. This may have prompted new measures of deterrence and containment, such as offshore processing.

However, the failure of deterrence policies can be traced back to the 1980s, while the 'New Vision' proposals were only tabled by the UK government in 2003. Why did policy failure constitute such a strong impetus for change at this particular time? Two policies in particular exasperated the sense of policy failure in the late 1990s and early 2000s; dispersal policy and the policy of immigration detention (Betts, 2004). Attracting widespread negative media attention and public discontent, these two policies provided the final impetus for the UK government to consider drastic changes to the asylum system.

The UK's dispersal policy, seeking to distribute the 'burden' of hosting asylum seekers (Robinson et al., 2003), was introduced in March 2000 (Malloch and Stanley, 2005). Ill-conceived, this measure led to an increased tension between local populations and asylum seekers manifested in racist attacks on asylum seekers and public dissatisfaction. Many asylum seekers were dispersed to deprived areas such as Glasgow, Hull, Coventry, Sunderland and Liverpool, causing resentment among local populations (Malloch and Stanley, 2005). Some dispersal sites had 'little experience of inter-ethnic relations' (Boswell, 2001:29) and were consequently ill equipped to respond adequately to the arrival of asylum seekers. The failure of the dispersal policy can be considered as an impetus for the UK government to consider alternate, extraterritorial solutions.

A second deterrence policy which exacerbated the sense of policy failure in the late 1990s was the practice of immigration detention. Although such detention is not mandatory in the UK, as in Australia, the Home Office has increasingly utilized immigration detention in order to deter, control and contain asylum seekers (Ashford, 1993). Similarly to Australia, the political cost of running domestic detention centres in the UK has prompted the government to seek offshore solutions.

As in Australia, immigration detention in the UK has led to riots and disturbances among 'inmates' and this has heightened public anxiety and distrust in the government's ability to 'manage' asylum issues efficiently. In 1997, rioting in Campsfield detention centre near Oxford had to be quelled with the assistance of 'riot squads equipped with shields and batons, police officers with dogs, and private security reinforcements' (*Guardian*, 1998). In 2002, the £80 million Yarl's Wood detention centre was partly destroyed by fire, leading to rumours that people had died. 20 detainees escaped amidst the chaos (Malloch and Stanley, 2005). Such incidents led many to argue that the government's detention policy was 'in chaos' (*Guardian*, 2002a) and 'in shambles' (*Independent*, 1998).

Government plans to establish a string of managed accommodation centres in rural Britain attracted widespread local opposition (*Guardian*, 2002b) and this may also have fuelled official interest in establishing 'offshore' centres and protection areas in 'region of origin'. In 2002, for instance, a detention centre was planned by the Home Office in Bicester, resulting in the setting up of the 'Bicester Action Group' which argued that the establishment of the centre would lead to an increase in local crime, 'a threat to our culture and drop in house prices' (BRS, 2006). The plans were put on hold by the Home Office in response to this local opposition (BBC 2005).

Despite pursuing a rigid non-entrée regime throughout the 1980s and 1990s, the UK government's policies have failed to stem arrival numbers (Koser and Salazar, 1999). If

anything these policies have facilitated the growth of transnational human smuggling networks. The sense of policy failure is exacerbated by the violent and fatal outcomes of dispersal and detention policies during the late 1990s and public confidence in the government's ability to control and contain asylum seekers is at a record low. The Home Office acknowledges in a 2002 White Paper, 'we need radical changes to our asylum system to ensure its effectiveness, fairness and integrity' (Home Office, 2002:14). In this context, it is perhaps not surprising that extraterritorial asylum policies have gained political currency.

Security Discourse

A third factor which may have contributed to the growing debate on extraterritorial asylum 'solutions' in the UK and elsewhere¹⁴ is the 'securitization' of asylum seekers in the 1990s (Wæver, 1995). Arguably, processing asylum applications in offshore locations would enable the government to screen arrivals and thus reassure the public that new arrivals do not pose security threats.

In the EU context, the 'securitization' of migration emerged in the aftermath of the 1987 Single European Act, which sought to abolish internal borders. This policy increased concerns regarding national security and resulted in measures to strengthen the EU's external borders (Gibney, 2002). This was clearly expressed in the 1997 Amsterdam Protocol which embraced free internal movement granted that 'appropriate measures' were taken on issues such as 'external border controls, asylum, immigration and the prevention and combating of crime' (Amsterdam Treaty, 1997).

Security concerns regarding asylum seekers and immigrants were heightened in the aftermath of terrorist attacks in various western countries during the 1990s, and this was further aggravated by the 9/11 attacks in the USA (Gibney, 2002; Malloch and Stanley, 2005). Levy argues that this terror incident 'deepened the strains and fissures in the ... European refugee and asylum regime' (2005:31) and points out that it gave the issue a new sense of urgency. After the 9/11 attacks, the EU Justice and Home Affairs met to discuss measures to combat terrorism. Policies to strengthen border controls were one of the most prominent responses to this new amorphous 'threat' (Guild, 2003).

These developments in the EU are also reflected at the domestic UK level. In 2001, the UK introduced the 2001 Anti-Terrorism Crime and Security Act, a harsh infringement on civil liberties (Haubrich, 2003). It required the UK to derogate from both the ECHR and ICCPR as it permitted detention of individuals deemed to be 'security risks' to the state (Guild, 2003). This Act also allows the Secretary of State to deny a person's asylum claim on the grounds that they are a threat to national security (Gibney, 2002).

However, were the UK's proposals for extraterritorial asylum policies a product of this new 'securitization' discourse? The government's own writings on extraterritorial processing policies are remarkably silent on the topic. Neither the 'New Vision' proposals nor additional documentation, such as Tony Blair's letter to Costas Simitis in 2003, make the link between extraterritorial asylum processing and the 'war on terror'. The only mention of security issues in these documents relates to the issue of organized crime and how offshore processing may combat transnational smuggling networks. Thus, whilst the 'securitization' of

¹⁴ 'Securitization' arguably also affected Australian immigration policy in the 1990s. See Burke (2001); Government of Australia (2003).

asylum seekers may have exacerbated general public anxiety, there is little evidence that it served as a direct impetus for offshore asylum policies in the UK.

The UK government's motivations appear somewhat similar to the Australian authorities' reasons to develop extraterritorial asylum policies. It seems that both countries pursued offshore policies largely as a reaction to the failing deterrence policies of the 1980s and 1990s, particularly the failed detention (and in the UK case, dispersal) policies. The pressures of human rights norms in the two countries seem to have been less important in provoking offshore asylum strategies. The 'securitization' of asylum in the UK, whilst not insignificant, also did little to spur offshore asylum policies directly.

4. EXTRATERRITORIAL ASYLUM POLICIES AND THE EUROPEAN UNION

Above, I have outlined the geopolitical and domestic factors which may have contributed to the emergence of extraterritorial asylum policies in Australia and the UK in the early 2000s. However, states' motivation to pursue such policies differs from their ability to implement and sustain them. I shall therefore turn to consider the political circumstances in which such extraterritorial policies may be realized.

I will begin by examining how differing institutional environments impact upon states' ability to pursue offshore asylum policies, looking particularly at the role of the EU. In Australia, these policies were implemented unilaterally whilst in the UK case, proposals were presented in a supranational political structure. This is a significant difference. Below I shall address the question: did the EU institutional structure impede the development of offshore policies in the European context?

I shall begin by firstly discussing the UK's 'New Vision' proposal in the context of historical EU cooperation on asylum and immigration affairs. Secondly, I will discuss ways in which the EU's supranational structure has affected the fate of the UK proposals. We shall see that the EU has served as both an obstacle and enabling structure for the implementation of extraterritorial asylum policies and that this institutional framework has caused offshore policies to develop differently than comparable Australian policies.

4.1. EU cooperation on immigration and asylum matters

Asylum and immigration in the EU has, in the last two decades, evolved from a purely domestic affair to a 'first pillar' issue (Niessen, 1996). Below I aim to outline this process of 'harmonization' and its impact on the development of extraterritorial asylum policies. This section will also provide a backdrop to consequent sections which are concerned specifically with extraterritorial asylum policies in the EU.

The first significant intergovernmental cooperation on European asylum can be traced back to 1985, when France, Germany and the Benelux countries acceded to the Schengen agreement (Geddes, 2003). As internal borders were eroding, increased emphasis on external borders and cooperation on migration and asylum issues came to the fore of intergovernmental debate. This trend was reinforced with the introduction of the Single European Act in 1987, which created a single European market (Butt, 1994). Immigration and asylum questions emerged as central foci for intergovernmental cooperation, perhaps more due to practical necessity than political will (Noll, 2003; 2000).

This intergovernmental framework for migration cooperation was increasingly formalized in the 1990s. The Dublin Convention, signed by all member states in 1990, was the first European instrument dealing primarily with asylum and migration law (Noll, 2000; Kloth, 2001). The convention was signed independently from the EC framework and it served to determine European states' responsibilities towards asylum seekers. Several other non-binding agreements, such as the 'London resolutions', were developed as well.

Following cooperation on immigration issues outside the institutional framework of the European Community, the Maastricht treaty sought to formalize immigration cooperation in Europe by bringing immigration and asylum issues into EC law and Union law (Noll, 2003). The Amsterdam Treaty of 1999 further increased the importance of supranational structures in European asylum cooperation by transferring asylum and immigration matters to the first pillar of the EU. This was a powerful move, as the first pillar signifies matters that are subject to 'undisputed bindingness, justiciability and under certain preconditions even direct effect' (Noll, 2003). The Amsterdam treaty also gave the European Court of Justice (ECJ) competence of interpretation. Although these developments are highly contested, by the turn of the century, a clear shift had taken place in European asylum policy (Noll, 2000). Asylum had moved from a purely domestic issue, to an issue of intergovernmental concern to a 'community' issue under the EU.

However, it is important to qualify such a conclusion. European cooperation on immigration and asylum was far from a smooth development. Firstly, the harmonization process has been characterized by a considerable degree of secrecy (Geddes, 2003; Noll, 2003). This, Butt argues, is due to the sensitive nature of the issues as well as the intergovernmental nature of discussions (1994). He points out that the 'negotiators are not accountable to EC institutions, nor frequently to national parliaments' (1994:178).

Secondly, the process of harmonization within the EU framework has been hindered by the reluctance of states to yield power on border control/immigration issues to a supranational institution (European Commission 2004a). As Geddes accurately notes '[t]here has been a slow move towards communitarization of migration issues, coupled with reluctance among member states to empower supranational integration in these areas' (2003:142). This has resulted in a 'variable geometry' of integration, whereby member states have highly differing commitments to the integrationist impetus (Geddes, 2003). Countries, such as the UK, have consistently been reluctant to hand over power to the Union on these matters. This was perhaps most clearly demonstrated by its decision to opt out of Title IV of the Treaty establishing the European Union,¹⁵ thus retaining '[its] right to exercise [its] own external frontier controls' (Geddes, 2003:137).

The increasing communitarization of asylum policy in the EU structure has, I argue, accelerated the need for extraterritorial asylum policies, while the abolition of internal borders has demanded strong external ones. However, it appears that, although there has been a process of 'communitarization' of asylum policy, certain reluctant individual states such as the UK have managed to retain much of their sovereignty in this matter, leaving open the possibility of bilateral measures outside the EU-framework. Furthermore, the diversity of opinion on this issue amongst the member states must also be recognized.

¹⁵ This title covers co-operation in the area of asylum and immigration as well as judicial co-operation in civil matters.

4.2. Impact of the EU structure

What impact have EU structures had on the development of extraterritorial processing policies in the region? Conventional globalization theorists often assume the supranational realm to be a site of openness and liberalism, a contrast to the 'national', which is regarded as a site of protectionism and conservatism (Lahav, 2004; Geddes 2003). Employing these assumptions, one would expect the multilateral framework to work against the development of extraterritorial processing policies. However, this section will challenge such a view.

Drawing inspiration from Lahav's work (2004), we shall see that cooperation between European Member states on immigration matters is not inherently liberal and that the multilateral structure has been both a restricting and enabling factor in the development of extraterritorial processing policies in the European context. It is my contention that although the supranational structures brought the UK's 'New Vision' policies to a halt in 2003, the EU framework has also accommodated a wide range of extraterritorial asylum policies in recent years.

We shall firstly examine how the EU has provided an institutional framework conducive for the development of extraterritorial processing policies. Noll has pointed out that, transparency, accountability and judicial control has been lacking from the intergovernmental fora (Noll, 2003). Thus, cooperation at the intergovernmental level may be a way for policy makers and politicians to escape the limelight of national decision-making structures and related judicial constraints (Hollifield, 1992; Geddes, 1993).

Taking this argument further, Guiraudon (2003) points out that European bureaucrats pursued international policy cooperation 'primarily to escape domestic adversaries' (2003:264). Boswell also points out that the venue of transnational cooperation allowed bureaucrats to avoid 'judicial checks or public scrutiny' (2003:623).

As the moral and judicial legitimacy of extraterritorial processing policies is ambiguous at best, the EU can be considered a suitable venue for the development of such a controversial policy. The lack of transparency and accountability which characterizes intergovernmental cooperation at the EU level, makes European asylum policies susceptible to 'anti-immigration and populist political forces' (Hollifield, 1992:199). Thus, there is the possibility that EU-wide policy making on immigration and asylum embraces a highly restrictionist non-entrée regime.

The EU today remains a venue where decisions and policies can be developed in a less transparent manner (Monar, 2004). Thus the 'democratic deficit' of this multinational institution appears to have facilitated the development of controversial policies such as extraterritorial processing.

However, this is only part of the picture. Below I shall explore ways in which the EU structures may also have limited the development of non-entrée policies, such as extraterritorial processing. Whilst intergovernmental cooperation prior to the Treaty of Amsterdam was undeniably secretive and unaccountable, the role of the European Commission, the European Parliament and the European Court of Justice has increased in importance since the Treaty of Amsterdam (Boswell, 2003). Guiraudon suggests that the bureaucrats who considered the EU a space free of constraints 'were perhaps too successful' (2003:272) as their engagement in EU structures led to the increasing importance and influence of EU institutions, which in turn imposed new constraints.

For instance, the Treaty of Nice and the European Council Decision 3004/927/EC extended 'qualified majority voting' to all 'communitarized JHA areas under Title IV TEC apart from legal immigration and family law' (Monar, 2005:145) as of 1 January 2005. Moving away from the unanimity requirement, Member States are thus bound by the decisions of the supranational collective. This, one would imagine, could impede some states' ability to implement extraterritorial processing policies. According to Monar, this indicates 'a major strengthening of both the "Community method" and parliamentary control in these areas' (2005:145).

The multilateral nature of EU decisions, also impedes the implementation of controversial extraterritorial processing policies. Betts points out that the 'norms and ethics' of some EU states, such as Germany and Sweden at the Thessaloniki summit impeded the further development of the UK's TPC proposals (2004). The diverse 'normative structure' of the EU, then, can be contrasted to the unilateral framework which permitted both the Australian and US governments to implement extraterritorial processing policies (Betts, 2004). Betts states that 'the norms and ethics of some EU states may positively constrain the initiatives by other member states to place restrictions on asylum provisions' (Betts, 2004:65). Thus, the multilateral environment in which the 'New Vision' proposals were forwarded was a clear hindrance to their development, as there was no consensus among member states on this drastic new policy initiative

The European Commission has been identified as the institutional body which hindered the realization of the UK 2003 'visions'. It is widely acknowledged that the EU executive is far more progressive than national executives (Geddes, 2003). One would therefore expect recommendations from the European Commission, for instance, to be highly critical of harsh non-entrée policies, such as extraterritorial processing.

Responding to the UK proposals the Commission distanced itself from the 'New Vision'. Although it noted that the UK paper did highlight important challenges and shortcomings of the asylum system, it argued that 'care needs to be taken' when considering these new initiatives (European Commission, 2003b:22). Furthermore, the Commission stated that any 'new approaches' must fully respect international legal obligations and that '[a]ny new approach to the international protection regime should first and foremost not result in shifting, but in genuinely sharing the asylum burden' (European Commission, 2003b: 22). In its response to the UK proposals, the Commission rejected the TPC plans and promoted Protected Entry Procedures and Resettlement Schemes as alternative 'new visions' (European Commission, 2003b).

When the UK government proposed the implementation of extraterritorial processing policies in 2003, it was the first time such policies were formally proposed in a supranational institution. Thus, the development of extraterritorial asylum policies in the EU context has differed significantly from similar policies in the Australian and US context, where they have been implemented unilaterally. This section has sought to consider how this supranational forum has affected the debate on extraterritorial policies in the European context. Has it limited or enabled such policies?

There are no clear-cut answers here. On the one hand, it appears that certain elements of the EU framework, such as the European Commission and the diverse agendas and values of the Member States, have impeded the development of extraterritorial asylum policies in general and TPCs in particular. As Noll rightly points out 'while multilateral initiatives have

regularly failed, “TPCs” have been used unilaterally by resettlement countries such as the US and Australia’ (Noll, 2003:312). Perhaps unilateral action is the best way for a state to implement extraterritorial processing policies.

On the other hand, several observers have noted that the EU provides a far more suitable venue for highly restrictive asylum politics than the state. Removed from domestic judicial and public scrutiny, policies emerging from the EU structure have the potential to be highly restrictionist, such as extraterritorial processing. And indeed, in recent years, many developments in EU asylum policy, particularly relating to its relations to non-EU states such as Libya, have taken place in secrecy.

The EU embodies hybrid and multifarious structures (Geddes, 2003) and assessing its impact on the emergence and development of extraterritorial processing policies is therefore a complex task. My findings are not conclusive in either direction. Whilst the supranational governing structure clearly limited the UK's ability to implement TPCs as swiftly and affirmatively as the Australian government did in 2001, the EU is not inherently an obstacle to restrictionist measures to limit immigration.

In the years following the 2003 proposals, we have witnessed the development of an EU asylum agenda which places ‘extraterritorial solutions’ at the core of its asylum and immigration agenda. Indeed, a Commission Communication in 2003 states that ‘serious thought be given to possibilities offered by processing asylum applications outside the European Union’ (European Commission, 2003a:15).. Thus, it appears that extraterritorial asylum policies are not necessarily confined to the realm of unilateral initiative, but may thrive and evolve in a supranational structure such as the EU.

5. BILATERAL RELATIONS

The ‘bilateral’ relationship between ‘host’ and ‘contracting’ states in extraterritorial asylum arrangements is another important area to consider when seeking to understand the broader political circumstances that make these policies viable. Below I shall examine the inter-state relationship between Australia and Nauru/PNG on the one hand and the EU and two Maghreb states on the other. Do offshore asylum policies require particular bilateral configurations between ‘host’ and ‘contracting’ states? If so, what may these be?

5.1. Australia’s relations with PNG and Nauru

I shall commence by considering Australia’s historical and contemporary political relationship to the ‘host’ states PNG and Nauru.¹⁶ We shall see that these two countries’ relationship to Australia has been, and continues to be characterized by considerable economic dependency, a fact which has deprived them of any significant bargaining power in the ‘Pacific Solution’.

Nauru’s historical relationship to Australia has been shaped by colonialism. Annexed by the Germans in 1888 as part of German New Guinea, the island was handed over to Allied powers following the First World War. In 1920 Australia assumed administrative power over

¹⁶ While New Zealand also accepted a number of asylum seekers in the wake of the *Tampa* episode, it has a somewhat different relationship to Australia and did not establish semi-permanent processing centres; hence I have chosen to omit a discussion of New Zealand from my analysis.

Nauru which lasted until independence in 1968.¹⁷ Nauru was attractive to the colonizers as it contained valuable phosphate deposits, required as fertilizer in Australia and New Zealand (Anghie, 2003). Between 1920 and 1968 the British Phosphate Company, a joint venture between the UK, New Zealand and Australia, extracted up to a third of Nauru's phosphate reserves¹⁸ (Anghie, 2003; Government of Australia, 2005).

PNG also shares a colonial history with Australia. In the late 19th century the country was annexed by the British and Germans respectively, forming British New Guinea in the south and German New Guinea in the northeast. Following the Germans' defeat in the First World War, Australia was given a mandate to govern the territory by the League of Nations. After the Second World War, the region was named 'Territories of Papua and New Guinea' and became Australian trust territory. Independence from Australia was gained in 1975.

This historical relationship of dependence has pervaded PNG and Nauru's relationship to Australia in contemporary times. By the late 1980s it was clear that Nauru's phosphate reservoirs were near depleted and since then the country has depended greatly on Australian aid. Economic mismanagement and lack of other revenue rendered the country 'virtually bankrupt' at the time of the *Tampa* crisis (Taylor, 2005). Acutely aware of this, the Australian government did not hesitate in providing the country with urgently needed foreign aid, in exchange for offshore processing.

Australian economic aid to Nauru increased dramatically after the country decided to accept asylum seekers on behalf of Australia. While the 2000-2001 Australian development aid budget to Nauru was A\$3.4 million, this rose to a total of A\$22 million after Australian and Nauruan government officials signed a Memorandum of Understanding on the *Tampa* issue in 2001 (Government of Australia, 2002; AUSAID, 2000). Thus, in the Nauru case, there is a clear link between the country's cooperation on asylum detention and increased levels of aid.

Like Nauru, post-Independence PNG has also faced considerable political and economical challenges (Government of PNG, 2004). The country remained politically unstable throughout the 1980s with a string of no-confidence votes against political leaders (US Department of State, 2005). PNG was also troubled by a secessionist rebellion started by the Bougainville Revolutionary Army in 1988, lasting through most of the 1990s.¹⁹ Throughout this period, the country relied heavily on Australia which at times provided up to 50% of the government budget (Baldwin, 1978). Australia is also the sole provider of military aid to the country (Connell, 1997).

Despite this high level of dependency, the link between aid and cooperation on offshore processing in the PNG case is not as clear as with Nauru. The official aid flows from Australia to PNG remained relatively constant before and after the 'Pacific Solution'.²⁰

¹⁷ The League of Nations appointed Australia, New Zealand and the UK as co-trustees of Nauru in 1920.

¹⁸ In the 1990s, Nauru took Australia to the International Court of Justice 'seeking to recover its fair share of phosphate profits from the pre-independence period as well as compensation for damage caused by phosphate mining' (Taylor, 2005:20). The dispute was settled out of court and Australia agreed to pay AUS\$57 million immediately in compensation as well as \$50 million over the course of twenty years (Taylor, 2005; McLennan, 2002)

¹⁹ The BRA opposed the mining contracts offered to foreign corporations such as the Australian owned Bougainville Copper Ltd. In 1997 New Zealand brokered a ceasefire which brought an end to the rebellion.

²⁰ In 1997-98, the country received A\$339 million. This was actually reduced to A\$327 million in 2001-02.

However, PNG is the largest recipient of Australian foreign aid, receiving around A\$300 million annually (Government of Australia, 2002; AUSAID 2003). Connell notes that ‘No other aid donor has provided budgetary support to a former colony to the extent that Australia has done for PNG’ (1997:308). Prior to the ‘Pacific Solution’ the country had just received A\$20 million to reform the PNG defence forces (Taylor, 2005).

Although a clear link between financial dividends and cooperation on asylum cannot be drawn in the PNG case, it is highly plausible that the country’s willingness to host asylum seekers on Australia’s behalf was motivated and coloured by its long-standing economic dependency on Australia. As Connell points out, PNG’s relationship with Australia has involved ‘substantial elements of neo-colonial “big brother” domination’ (Connell, 1997:305). The political and financial repercussions of rejecting Australia’s asylum request would have been too grave for the PNG authorities.

In the case of PNG, trade statistics also highlight the country’s limited bargaining power *vis à vis* Australia.²¹ In 1997-1998, Australian goods worth A\$1,272 million were exported to PNG. Although not entirely insignificant, this does not compare to Australia’s Japanese export market worth A\$15,377 million or the European export market worth A\$10,232 in the same year (Government of Australia, 1998; 2002). Its relative unimportance as a trade partner for Australia may also have stripped PNG of any bargaining power in the negotiations on extraterritorial asylum processing.

Thus, it is my contention that Nauru and PNG’s economic dependence on Australia has shaped and perhaps even determined their involvement in Australian offshore asylum policies. In the case of Nauru we see a clear link between exponential growth of Australian development aid and the country’s decision to host asylum seekers. In PNG, the link between increased aid levels and cooperation on asylum matters is less evident; however, the country’s long-standing economic dependence on Australia indicates that the politics of aid also affected its decision to host Australia’s asylum seekers. PNG’s relative unimportance as a trading partner may also have limited its bargaining power *vis à vis* Australia.

5.2. The EU’s relations with Libya and Morocco

Extraterritorial asylum policies in the Mediterranean region have also relied on unequal economic relations between ‘host’ and ‘contracting’ states, yet the nature and level of dependency between ‘host’ and ‘contracting’ states is somewhat different. Below I shall focus my discussion on two North African states central to the current European offshore initiatives; Morocco and Libya. I shall firstly outline these states’ historical ties to Europe and secondly, turn to consider their contemporary cooperation with the EU on migration management.

Historically, Libya’s formal and political relationship with Europe started in 1912, when the country became an Italian colony under the Treaty of Lausanne. Its colonial history was darkened by exploitation and suppression as well as the death of 80,000 Libyans in the first decades of colonialism. In the aftermath of the Second World War, Italy gave up its claim to the country, and the territory came under the rule of the Allied powers. The country eventually gained its independence in 1952, when the ‘Libyan’ monarchy was reinstated.

²¹ Trade statistics for Nauru were not available.

Morocco did not experience the same level of violence and colonial suppression as Libya. The country has historically been wealthy and in the 15th century its rulers managed to undermine Portuguese attempts at colonizing the territory. The Treaty of Fez signed in 1912, however, made the country a protectorate of France whilst Spain was in charge of policing the Saharan zones. A Nationalist Moroccan movement gained strength in the 1950s, and full independence was achieved in 1956. Although social unrest and economic decline has marred the post-independence period, the country is considered stable compared to other Maghreb states (Escribano, 1992; Pennell, 2000).

Morocco has also enjoyed close ties with Europe in the contemporary period. The country has a long-standing partnership with the European Community, signing the first Association Agreement with Europe in 1976 (Gil-Bazo, 2005; White 1999) and is today considered Europe's most 'legitimate' partner in the region (Schuster, 2005). This Association Agreement was renewed in 1996 and came into force in 2000, paving the way for intensified economic and political cooperation between Morocco and EU Member States. Political reforms instigated in the 1990s have also signalled its desire to gain legitimacy in the west.

In recent years, Morocco has been the main target country in the EU's efforts to extraterritorialize its asylum policies (European Commission, 2006a). In 1999 it was targeted by the EU's High Level Working Group on Migration, which sought to develop 'Action Plans' to ease migration pressure in the south. Although these plans were never implemented, due to limited funds and a lack of coordination and dialogue with the countries involved (Gil-Bazo, 2005; Schuster, 2005), Morocco is still considered central to the EU's migration policies.

Compared to Morocco, Libya's engagement with the EU is less developed and formalized. Due to its historically troubled relations with the west,²² the country did not participate in the EU-Mediterranean talks in the 1990s, and it has only observer status in the Barcelona process (Gil-Bazo, 2005, European Commission 2006c). Without formal membership in this Process, the EU cannot engage with Libya at official levels. However, this has not prevented Member States and EU bodies from entering into informal and bilateral dialogue with the country on a wide range of matters, particularly migration (Gil-Bazo, 2005; Hamood, 2006). Libya's relations with the EU are improving and in October 2004, the EU announced that it would end sanctions against Libya (*Guardian*, 2004).

In recent years Libya has attracted considerable attention from the EU on migration matters. A leaked European Commission report noted in 2005 that 'Libya has become a key country as regards to illegal immigration, which is a priority area for cooperation in the Mediterranean region' (European Commission, 2005a:8). The country has received considerable support from European states to bolster its immigration system. For instance, Italy and Libya have agreed to cooperate on border surveillance, especially along Libya's 400 km long desert border (Dietrich, 2004).

In order to understand the way in which these two countries cooperate with the EU on migration, it is necessary to examine their broader economic ties to the continent. It is clear

²² The military officer al-Qadhafi led a coup d'état in 1969 and established a Socialist Arab Republic. The state was consequently boycotted by the US. This antagonism with the west peaked with the 1988 Lockerbie bombings. Sanctions were maintained against Libya until 1993 when Qadhafi accepted responsibility for the bombing and agreed to pay compensation to the victims' families (Library of Congress, 2006).

that both states are dependent on the EU for economic progress. The EU is a principal trade partner for Morocco and the main destination for 70% of its exports, such as foods, flowers and finished consumer products. 65% of Moroccan imports also originate in the EU and the EU is the second largest source of Foreign Direct Investment in the country, providing FDI worth €0.7 billion in 2003 (European Commission, 2006b).

Morocco also relies on aid from the EU. Interestingly, much of this aid has been closely tied to EU asylum and migration agendas. The EU's support for Moroccan economic transition is largely channelled through the MEDA (*Mésures d'Accompagnement* or Accompanying Measures) programme. Although the programme primarily aims at economic and political development, €40 million of its 2002-2004 budget was also spent on 'migration management' (European Commission, 2005b). As in the Pacific, we see how the politics of aid and offshore asylum policies are closely intermingled and used by 'contracting' states to foster goodwill from 'host' states.

Although Libya has yet to fully develop economic and political links with the EU, the country is also highly dependent on trade with European Member States. Italy, Germany, the UK and France provide about 50% of all Libyan imports and Italy, Germany, Spain, France and Greece absorb 78% of Libya's exports²³ (European Commission, 2006c). Petroleum plays a central role in Libya's economy, providing 95% of the country's export earnings, nine tenths of which goes to Europe (Takeyh, 2001). The country produces more than 500 million barrels oil per year. After most of the sanctions on the country were lifted in 2004, Libya eagerly sought to attract EU foreign direct investment to the country, hosting numerous trade fairs and investment conferences.

It is clear that both Libya and Morocco are economically reliant on the EU through trade, aid and foreign investment (Collinson, 1996). This dependency has been used by EU states to elicit cooperation on migration issues. The EU does pursue a strategy of positive conditionality, in which countries are offered financial sweeteners in exchange for cooperation on immigration (Peral, 2005). Furthermore, negative conditionality is also implemented whereby 'host' states are financially penalized for non-cooperation on migration issues. This is implicit in the 2002 European Council Conclusions from Seville:

'If ... the Council may unanimously find that a third country has shown an unjustified lack of cooperation in the joint management of migration flows... [it] may, in accordance with the rules laid down in the treaties, adopt measures or positions under the Common Foreign and Security Policy and other European Union policies' (Council of the European Union 2002:11)

Thus, Collinson may be right when she contends that Maghreb countries' interest in cooperating with the EU on extraterritorial asylum policies is arguably not related to migration as much as other, economic interests (1996).

Yet, the level of dependency that exists between Libya/Morocco and the EU is not total. These countries wield considerable more bargaining power *vis à vis* the EU than Nauru and PNG do in the 'Pacific Solution'. This is firstly due to their geographical location. As the Maghreb region is a vital transit zone for migrants from sub-Saharan Africa heading towards Europe, it is essential for the EU to obtain these countries' cooperation on migration issues if they wish to reduce arrivals in Europe. Nauru and PNG, in contrast, are not particularly important transit zones for asylum seekers headed for Australia. If they do not cooperate with

²³ 2001 figures.

Australian authorities, this will have few consequences for irregular migration to Australia per se.

A second reason for Morocco and Libya's relative bargaining power *vis à vis* the EU is oil. Both 'host countries' hold considerable oil deposits and are regarded as attractive countries of investment for the EU. In the case of Libya, EU Member States have been particularly attracted by the country's petroleum reserves, especially in the light of recent energy shortages on the continent. The country has served as Germany's prime oil provider since the mid 1990s (Monar, 2005). Also the UK has shown interest in the country's oil reserves. In the aftermath of Tony Blair's visit to Qadhafi in 2004, the Dutch-British company Shell received a €165 million contract in Libya which was described as the beginning of a 'long term strategic partnership' (Dietrich, 2004). The former colonizer, Italy, also has considerable investments in the country; an Italian company recently invested US\$6.6 billion into the 'West Libyan Gas Project' currently underway (Monar, 2005; Dietrich, 2004).

Although Morocco's oil industry is not as developed as Libya's, the recent discovery of rich oil deposits in the north eastern region of Talsint as well as the occupied territories of Western Sahara has also made Morocco highly attractive to western oil companies (Szczesniak, 2001), and this has given the country considerable bargaining power in talks on trade and immigration. In 2001, Morocco signed two reconnaissance deals for oil exploration in the Western Sahara with the French TotalFinalElf and American Kerr McGee (BBC, 2003).

It is clear that, although dependent on the EU for aid and trade, Morocco and Libya do exert some degree of bargaining power in extraterritorial asylum arrangements. In this context, relations between 'host' and 'contracting' states may best be described as *interdependent* whereas in the Pacific context the relations are more *dependent*. This suggests that the political relationship between 'host' and 'contract' state in offshore asylum arrangements need not necessarily be characterized by complete dependency, but may also exist in less unequal bilateral relations.

CONCLUDING REMARKS

Offshore asylum policies are here to stay. They are likely to fundamentally shape future asylum policies and they are already changing the way asylum is conceptualized, especially in western states. This paper has focused on the political factors which have caused states such as Australia and the UK to pursue such policies in the early 2000s, as well as the circumstances in which they have been implemented. What can be learned from the two case studies? Below, I seek to reflect upon the implications of my findings as well as suggesting how these policies may develop in the future.

Although Australia and the UK had somewhat similar motivations to pursue offshore policies, the way these policies have developed in the two regions differs considerably. Australia's policies have concentrated on asylum processing in two 'third countries' initially unconnected with asylum seekers. The EU, on the other hand, has pursued a broader range of policies in asylum transit countries such as Libya and Morocco.

The institutional structures and bilateral relationships also differ greatly in the two cases. Whilst the Australian policies were implemented unilaterally, the UK's 'New Vision' was put forward in a supranational structure, the EU. Although the EU's impact on offshore policies is inconclusive, it is clear that such policies may be pursued in varying institutional contexts, arguably with differing outcomes. I have also demonstrated how the relations between 'host' and 'contracting' states in the two cases differ. PNG and Nauru's relationship with Australia is characterized by a greater degree of dependency than Morocco and Libya's equivalent relationship to the EU.

All these findings support van Selm's contention that extraterritorial asylum policies are the product of particular 'cultural, historical and societal factors' and that states have used 'the same or similar terminology to mean different things' (2003:88). It is my contention that this heterogeneity prevents us from constructing blanket assumptions and judgements upon these policies. Instead, it invites a more constructive understanding of the phenomenon.

Speaking in 2000, the Secretary General of the European Council for Refugees and Exiles, Peer Baneke, asked 'can [there] be any balanced discussion between the North and South given the unequal bargaining positions of the two sides[?]' (European Conference on Asylum, 2000:72). The inequality between 'host' and 'contracting' states in offshore asylum arrangements has been lamented by human rights organizations and other lobby groups since the inception of these policies (AI, 2001, 2003; HRW, 2001, 2003; Oxfam, 2002). They argue that this power imbalance only serves the interests of powerful states and reinforces the prevailing non-entrée regime.

Although this state of affairs is not likely to be fundamentally altered in the near future, this paper has highlighted that different offshore asylum arrangements embody different degrees of inequality. In the case of Libya and Morocco, extraterritorial asylum policies have evolved in a way that grant some agency to 'host' states. Although these states' relationship to the EU remains unequal, extraterritorial asylum policies have also spurred cooperation and dialogue.

In the case of Morocco, there has been a clear process of negotiation between the 'host' and 'contracting' country on matters of immigration cooperation embodied in the country's various agreements with the EU. The Moroccan foreign minister meets regularly with EU Foreign Ministers in order to 'monitor the application of the Barcelona Declaration and define actions enabling the objectives of the partnership to be achieved' (European Commission, 2006d). Political dialogue between other Moroccan ministries and the EU is also commonplace.

Although not part of the Barcelona Process, Libya is also engaging in close cooperation with the EU. The EU reports that 'consultations are being held [with Libya] with a view to ... adopting a joint action plan for cooperation on migration issues' (European Commission, 2006c). A European Commission delegate who visited the country in 2004 also urged increased EU cooperation with Libya on issues such as training Libyan immigration personnel and institution-building (European Commission, 2005a, 2006c). This level of consultation and participation is not reflected in the 'Pacific Solution'. Australia saw no need to consult the 'host' states on the nature of its offshore policies, 'let alone involve[...] them in a meaningful way' (Taylor, 2005:31). The language of 'partnership' and 'cooperation' was virtually absent from the Pacific asylum arrangements.

Whilst the EU's rhetoric of 'cooperation' and 'partnership'²⁴ may not always be translated into practice, Libya and Morocco do nevertheless enjoy a greater degree of agency and involvement in the 'Mediterranean solution', whilst Nauru and PNG have little choice but to accept Australia's policies. Thus, however imperfect, extraterritorial asylum policies do have the potential for enhancing communication and cooperation across the north-south divide in the global refugee regime, and this is a significant and long overdue development.

This development may also contribute to the expansion of an international 'culture of rights'. As mentioned earlier in this paper, Gibney partly explains the rise in offshore asylum policies by referring to the increased importance of a domestic 'culture of rights' in liberal democratic states such as the UK (2005b). Although I have questioned the importance of this as an explanatory factor for the rise of offshore asylum policies in Australia and the UK, there is little doubt that the human rights' discourse has played a central role in ensuring rights for refugees in these states, especially at a time when the 1951 Geneva convention is under attack.

Gibney is right in asserting that, in the contemporary world of extraterritorial asylum initiatives, there is a profound need to 'spread the culture of rights abroad' (2005b:19) in order to ensure continued refugee protection. Somewhat paradoxically, extraterritorial asylum policies may provide the vehicle by which such rights are disseminated. In the Barcelona declaration, for instance, states explicitly undertake to 'respect human rights and fundamental freedoms and guarantee the effective legitimate exercise of such rights and freedoms' (Barcelona Declaration, 1995). Arguably the human rights of refugees and asylum seekers in some 'host' countries have improved as offshore asylum policies have developed.

However, the extension of rights is by no means an uncontroversial or straightforward process and the proliferation of extraterritorial asylum policies will not cease to be related to widespread rights abuses and injustice. It appears that Moroccan and Spanish authorities will continue to forcibly prevent individuals seeking entry to the Spanish enclaves of Ceuta and Melilla (AI, 2005b) and it is unlikely that Libya will cease to detain and deport sub-Saharan migrants returned unlawfully from Italy.

Nevertheless, the publicity and pressure generated by national and international NGOs, academics, journalists and human rights organizations may serve to change this trend. 'Contracting' states may find themselves accountable for human rights abuses in extraterritorial asylum arrangements and 'host' states may have to abandon inhuman measures towards asylum seekers en route to the west (see ECRE, 2005; AI, 2005a). It is hoped that, one day, extraterritorial asylum initiatives may cease to serve only the interests of the powerful and contribute to the extension of rights for asylum seekers and refugees in the parts of the world where most of them live.

²⁴ The European Commission has called for a 'a partnership on migration stemming from a definition of common interests with third countries' (2002:46).

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