COMPAS BREAKFAST BRIEFING SUMMARY

The UK and the CEAS – A Leaving Matter?

What is the UK's position in the Common European Asylum System? What difference, if any, would BREXIT make?

This talk has five parts. In Part I, I first sketch the evolution and contours of the Common European Asylum System. Part II examines the UK's current position in this policy area, in particular its freedom to decide whether to participate in any or all aspects of the Common European Asylum System. I contrast the UK position with that of Denmark and Norway, to assess the position of an EU Member State with a different form of opt-out, and a non-Member State who nonetheless accepts some EU asylum measures. Part III then examines the aspect of the CEAS the UK seems most in favour of maintaining, the Dublin System. Dublin is of contemporary relevance, as it illustrates the shortcomings in the CEAS, and is currently under revision. Dublin reform is contextualised in light of the responses to the 'refugee crisis' of 2015. In Part IV, I include a short discussion of immigration detention, a matter where the UK has chosen not to be bound by EU norms. Finally, in Part V, BREXIT and the CEAS are discussed. What is the relevance of asylum policy for the BREXIT debate? Is this just a policy area where the UK's already exceptional position means that 'In or out' is not all that significant? Or are there lessons for other states position vis-à-vis the CEAS that should be taken into account in this debate?

Throughout this talk I highlight some of the tensions, even perhaps paradoxes of being or staying out. There is often a potential trade-off between influence and autonomy: States that stay out of a particular policy or process for autonomy reasons, often find themselves opting in afterwards for practical reasons, but without having had the opportunity to influence the policy in question. I illustrate this phenomenon using examples from the practices of other states.

Secondly, I try to identify some of the complexities of the idea of preserving autonomy over asylum practices, which intimately affect the rights of others. As I illustrate by reference to immigration detention, staying out of EU measures may be construed as preserving autonomy, but perhaps that autonomy is really a mask for excessive executive discretion? Admittedly, 'excessive' is a value judgment, but one that is legally sound concerning UK immigration detention.[1]

I. Understanding the CEAS

The EU's engagement with asylum policy is deeply intertwined with the project of liberalising intra-EU mobility. In that respect, it differs from other regional refugee protection projects, which are often motivated by the need to adapt refugee protection to particular regional contexts and establish greater cooperation for refugees from within particular regions. For instance, in both Africa and Latin America, regional initiatives expanded the definition of the refugee and created new cooperative frameworks, on the assumption that refugees were from within the region and that the region in question was mainly responsible for their protection.[2]

In contrast, the EU engagement with refugee issues came first emerged alongside other external migration issues in the early years of Schengen, and then in particular in the 1990s,

Please note this text was based on a talk given on 13 November 2015, but updated to consider some subsequent legal developments.

when the concern was that increasing numbers of asylum seekers were availing of protections which previously had been limited by Cold War division of Europe. Western European states developed their own means to limit and deflect, notably safe country practices (safe country of origin; safe third country). The Balkan wars produced hundreds of thousands of refugees, but these were mainly granted temporary protection, rather than asylum (which had tended to be viewed as entailing a path to permanent residence until then, although this is not a feature of international refugee law under the 1951 Convention on the Status of Refugees ('CSR' or 'Refugee Convention').[3] The EU Accession to integrate central and eastern European countries often involved extending the non-binding EU asylum measures eastwards. The Dublin Convention was signed in 1990, but entered into forced in 1997, with the aim of making clear which state was responsible for asylum claims, ostensibly to eliminate multiple claims.

The Treaty of Amsterdam in 1997 was the milestone for the formal lawmaking on asylum, with the Tampere Summit pledging that the EU would create a 'Common European Asylum System.' The EU Treaties specify the content of the CEAS, and that requires that EU policy be 'in accordance with the [Refugee Convention] 'and other relevant treaties.'[4] Acting unanimously, the then 15 national governments in the Council adopted the key legislation on asylum. The first measure adopted was the Temporary Protection Directive to deal with 'mass influxes', based on the experiences in responding to the Kosovar refugee arrivals. For good or ill, it has remained dead letter. The CEAS also encompasses directives harmonising 'qualification' as an international protection beneficiary, the reception conditions that should be provided to applicants while their claims are being examined, and the procedures applicable to these processes.[5] Trying to get consensus across 15 governments meant the first phase Directives, in particular that on asylum procedures, meant low standards with many exceptions and gaps, hardly harmonising procedures at all. The studies on the implementation of the first phase instruments showed quite varied impacts and approaches.[6]

Each of these measures has since been 'recast', using the 'ordinary legislative procedure' that is, entailing qualified majority in the Council and the important co-legislative role of the European Parliament. Significant too is the increased role of the Court of Justice, which now has full jurisdiction of asylum and migration matters. To simplify and exaggerate, the second iteration – the recasts, because they involve the European parliament in the process, are probably a little bit better from a refugee protection point of view but they've also become much more complicated: they're much longer, they have very complex provisions on, let's say, the protection of the vulnerable, the protection of children in asylum procedures.[7]

These are the measures that comprise the CEAS. We could also add in some of the EU funding on asylum, migration and borders. The current Asylum Migration and Integration Fund (AMIF) is not just a refugee protection fund, in contrast to its predecessor, the European refugee fund.

II. The UK's Selective Participation

The UK participates selectively in EU asylum policy. In part, this reflects its status as non-member of Schengen, but also reflects other policy priorities also. During the first phase of the CEAS, the UK tended to opt in to the asylum legislation, but has taken a different view of the second phase, staying out of the second phase, with the exception of the Dublin III Regulation.[8] The UK remains subject to the first phase of EU asylum legislation, even as the rest of European member states have moved into the second phase.

Rather than dwell on the UK position, which is familiar to many readers, I will draw some comparisons with other countries that participate selectively.

Denmark and Norway differ in that the former is an EU Member State, while the latter is not. In some ways they're very different to the UK because they're both in Schengen- and Schengen matters to them a lot. Nonetheless, their cases are instructive.[9]

The Danish opt-out to EU policies on asylum were secured in response to the Danish 'No' vote to the Maastricht treaty, along with opt-outs on many other policy domains. Including security and defence, economic and monetary union, and the Justice and Home Affairs domain in general. Justice and home affairs includes immigration and asylum, and police and judicial cooperation in criminal matters. Under the terms of its Protocol to the EU Treaty, Denmark cannot opt

in. Instead, they use other legal mechanisms to adopt the EU measures, including Dublin, after the measures are adopted. This is in contrast to the UK (and Ireland) who have a right to opt in at any stage of an asylum measure being adopted. That has really put the Danes at what they see as a disadvantage. A referendum was held in December 2015, to allow the Danes to have an opt-in facility, but it was rejected.[10]

Norway in contrast is not an EU member state. But it places much value on the maintenance of the Nordic passport union, which has been in existence since the 1957. Perhaps this should make the UK pause and consider its common travel area with Ireland, which may not mean much in London, but from the perspective of Belfast and Dublin, is of crucial economic, political and cultural value. The Nordic passport union prompted Norway to associate with Schengen, quite early on.[11] As a result, Norway has several bilateral agreements with the EU, to opt in into some measures on asylum. Again, it participates, but has no say in the adoption process.

This brief discussion of Denmark and Norway illustrates that they face a trade-off between influence and autonomy. In sharp contrast, if the UK decides to opt-in to an EU measure on asylum, it can do so at the beginning of the legislative process. But if a non-EU member states opts-in, it has to take it or leave it, 'it' being the finished product. Non-EU Member States preserve their autonomy in a formal sense, but have little or no influence on the content of the policies.

III. Dublin – Deflection, Deterrence, and Distance

The idea behind the Dublin System is that asylum seekers are assigned to particular states to assess their claims.

The first principle is meant to be family reunion: e.g., if an asylum-seeker arrives in Greece, and her spouse is in the UK, then Dublin requires that her claim is heard in the UK. In practice, this rarely occurs, so in practice the main criterion becomes the state which admits the asylum-seeker to enter the EU. Of course that the vast bulk of asylum seekers arrive irregularly, as there are few legal means to claim asylum. So instead, they arrive mainly by boat to Italy and Greece, or other countries at the so-called 'frontline of Europe.' Dublin thus potentially overburdens states on the periphery. But most asylum seekers, as we know, just move on anyway of their own volition. Dublin allows states a discretion as to whether to send people back to the frontline countries, but that if a state decides to do that the other state, the first state, is under an obligation to take them back. Dublin is built on a false premise or presumption of the quality of protection systems and mutual trust and recognition across the EU. The travel route nowadays is verified by fingerprinting, but both individuals and states evade this practice.

Originally conceived of with the modest aim of preventing what was framed as asylum 'shopping' (meaning multiple asylum claims being lodged by the same individual), the Dublin System now also serves to supress asylum-seekers' mobility, justify detention, and create perverse incentives for both states and asylum-seekers. Now in its third iteration, with a proposal for the fourth,[12] it is the most troubling aspect of the CEAS. It was never meant as a responsibility-sharing mechanism. In fact, the rules are quite perverse from that point of view. If Dublin really determined responsibility for asylum claims, no refugees from 2015 would be in Germany – they would all be stuck in Greece. In practice, as has always been the case, Dublin doesn't work, and claimants move on and seek protection elsewhere, mainly in Germany, Sweden. They are free riders on the protection offered by others, in particular Germany, Sweden, Austria, Italy and France. These 5 Member States together account for more than 75% of all first time applicants in the EU-28.[13]

The UK insulates itself with juxtaposed border controls in France, and few legal access routes.

The other institutions that really matter in the Dublin context are courts. National courts and then both European Courts, the EU Luxembourg court and the Strasbourg Human Rights court, deal with thousands of cases brought by those seeking to resist Dublin returns. In 2014, the ECtHR effectively barred Dublin returns to Greece, due to living conditions deemed to be inhuman and degrading.[14]

Another case I wanted to highlight, a lesser known one, is that the High Court of Northern Ireland, precluding a Dublin return of children to Ireland, as it was not in their 'best interests'.[15] Part of the reasoning related to Ireland failure to opt into the EU Reception Conditions Directive, which means asylum-seekers live for protracted periods in hostels without any means of supporting themselves. Ireland has secured

freedom to deny asylum seekers the right to work – autonomy to oppress. The High Court of Northern Ireland refused to return the children to Ireland due to these reception conditions.

Pause to consider the implications of both rulings: In the case of both Greece and Ireland, they can avoid having to take back asylum-seekers by treating asylum-seekers badly. There is a reward for rights violations, one of the perverse incentives of Dublin.

If the UK seeks to remain out of the EU legislative standards on asylum, it may also find its standards falling below the acceptable minimum. In that case, one would have to question whether the cooperative dimension would continue to work. The UK sends back many more asylum-seekers than it takes in under Dublin. Could it continue to rely on the full 'benefits' of Dublin, if it remains outside the common standards of the CEAS?

The CEAS and the Refugee Crisis

It seems that 2015 was a 'refugee crisis'. The EU could have responded very differently, but was divided. It sought to supress smuggling on the Central Mediterranean, a secured a UN Security Council Resolution (affording it some limited additional powers) to supports its military-humanitarian mission, EUNAVFOR Med. Regarding arrivals in Greece, it secured some limited support to relocate people directly from Italy and Greece, in temporary derogation from the Dublin system, but this proved ineffective. In order to stem arrivals, it finally entered into a 'deal' with Turkey, to return and contain refugees there, in exchange for aid and some resettlement.

The UK has stayed out of these measures. To claim asylum in the UK means to reach UK territory, which for those making land journeys across Europe, usually means a further treacherous crossing via Calais. The UK government supports refugees outside the UK via aid, and has made a commitment to resettle 20,000 people over 5 years. In contrast, the EU relocation mechanisms are premised on a collective responsibility for refugees who arrive in Italy and Greece.

The refugee crisis appears in the tiny pockets of appalling suffering in Calais and Dunkirk. In January 2016, a UK Tribunal ruled in ZAT that children with close family members in the UK should be granted swift admission to the territory. At the time of writing, the ruling was being appealed by the UK government.

IV. Immigration Detention

Immigration detention has been subject to a great legal and political controversy in the UK. The UK has not opted into many of the EU measures that regulate immigration detention, such as the Recast Reception Conditions Directive, and the Returns Directive. Nonetheless, of late, UK courts using domestic legal principles have repeatedly condemned much detention as illegal. While the UK government remains unregulated by EU standards on this topic, the constraints that EU law would bring (clarity, proportionality, necessity) instead end up having to be developed by British judges.

There are different possible interpretations of this practice. Some may look at immigration detention, and see an autonomy gain for the UK in being out of the EU measures. Others, myself included, would point to the risks of this vision of 'autonomy'. Immigration detention in the UK has expanded, and it has taken protracted litigation, frequent awards of damages, and several public inquiries to clarify the applicable legal standards. I am not sure I would wish to defend this as democracy and the rule of law in action.

The addition of EU legal rules and judicial scrutiny could helpfully bolster the rule of law in the UK. This claim depends on a different sort of understanding of democracy and the rule of law, characterised by multilevel governance and sites of rights contestation. For instance, on pre-deportation detention, EU law sets an outer time limit, a matter that the UK Parliament continues to debate. There would be added value if the UK were part of these of these provisions from a rights-protective point of view.

V. On BREXIT

These reflections lead to two phenomena of relevance to BREXIT. The first is an integration paradox – that remaining 'out' may under circumstances offer greater autonomy only in a symbolic sense. In reality, states often later adopt EU policies for practical reasons, but in that case, having no say about their contents. Autonomy is apparently preserved, but real influence diminished. Of course, this is not always the case, but it seems clear that it is a risk in some policy areas, in particular when staying out may undermine the possibility of achieving other

goals. Secondly, remaining out may be a way of apparently preserving autonomy, but really it just demands domestic or human rights legal correction in order to check executive excesses.

So what is the relationship between the CEAS and BREXIT? The UK already has a opt-out/ opt-in facility as regards EU asylum law. As it already has this relationship of selective participation, what difference would not being a non-EU member be?

The difference would be that at the moment the UK can opt in at an early stage and be part of the negotiation of the measures. The Dublin System is up for revision again, and the UK government can be involved in that process. If it was a non-EU member state, like Norway or Switzerland – it wouldn't have any say in the content of the measure, but it might very well then want to join it afterwards. In the name of autonomy, it would have less influence.

Further reading

- C Costello 'EU law and the detainability of asylum-seekers' (with Minos Mouzarakis) (2016) Refugee Survey Quarterly 35 (1), 47–73.
- C Costello The Human Rights of Migrants and Refugees in European Law (Oxford University Press 2016)
- C Costello 'Immigration Detention: The Grounds Beneath our Feet' (2015) 68(1) Current Legal Problems 143.
- C Costello & E Hancox 'The Recast Asylum Procedures Directive: Caught between the Sterotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee' in V Chetail, P De Bruycker & F Maiani (eds) 'Reforming the Common European Asylum System: The New European Refugee Law' (Martinus Nijhoff, 2016).
- R Adler-Nissen, 'Through the EU's Back and Front Doors: Norway's and Denmark's Selective Approaches in the Area of Freedom, Justice and Security' in C Grøn, P Nedergaard, and A Wivel (eds), Still the 'Other' European Community? The Nordic Countries and the European Union (Routledge 2015) 188.

1. My previous work on immigration detention makes clear that I find much of the practice legally and ethically dubious. See C Costello 'Immigration Detention: The Grounds Beneath our Feet' (2015) 68(1) Current Legal Problems 143.

2. K Jastram Regional Refugee Protection in Comparative Perspective Kaldor Centre Policy Brief (November 2015).

3. See further J.-F. Durieux, 'Temporary Protection: Hovering at the Edges of Refugee Law' (2014) 45 Netherlands Yearbook of International Law 221.

4. Article 67 TFEU CHECK.

5. See generally, V Chetail, 'The Common European Asylum System: bric-à-brac or system?' in P de Bruycker and F Maiani (eds), Reforming the Common European Asylum System: The New European Refugee Law (Martinus Nijhoff 2016).

6. K Zwaan (ed), The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States (Wolf Legal Publishers 2007); Asylum in the European Union: A Study on the Implementation of the Qualification Directive (UNHCR November 2007), 13; ECRE, The Impact of the Qualification Directive on International Protection (ECRE October 2008); UNHCR, Improving Asylum Procedures Comparative Analysis and Recommendations for Law and Practice: A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States (UNHCR 2010).

7. For an assessment, see V Chetail, P De Bruycker & F Maiani (eds) Reforming the Common European Asylum System: The New European Refugee Law (Martinus Nijhoff, 2016).

8. See generally C Costello & E Hancox 'Policy Primer: The UK, the Common European Asylum System and EU Immigration Law' (Migration Observatory at Oxford, May 2014).

9. R Adler-Nissen, 'Through the EU's Back and Front Doors: Norway's and Denmark's Selective Approaches in the Area of Freedom, Justice and Security' in C Grøn, P Nedergaard, and A Wivel (eds), Still the 'Other' European Community? The Nordic Countries and the European Union (Routledge 2015) 188.

10. T Ibolya 'A vote of no confidence: explaining the Danish EU referendum' Open Democracy 17 December 2015.

11. Norway, Iceland Association Agreement with Schengen (1997), revised post-Amsterdam.

12. European Commission Press Release: Towards a sustainable and fair Common European Asylum Policy, Brussels, 4 May 2016.

13. Eurostat, Asylum and first time applicants Annual aggregated data, migr_asyappctza. While Hungary received 177,135 applications that year, the overwhelming majority of cases were closed due to the asylum seekers' departure from the country.

14. App No 29217/12 MSS v Belgium and Greece (ECHR, 4 November 2014).

15. ALJ and A, B and C, Re Judicial Review [2013] NIQB 88 (14 August 2013)- link.

About the speaker: Cathryn Costello is Andrew W. Mellon Associate Professor in International Human Rights and Refugee Law at the University of Oxford

COMPAS Breakfast Briefings present topical, cutting edge research on migration and migration related issues. This research is made accessible every month to an audience of policy makers and other research users.

Thumbnail: Chidozie Godson, COMPAS Visual Arts Competition 2015