# External Processing

## A Tool to Expand Protection or Further Restrict Territorial Asylum?

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February 2023

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# Executive Summary

In many parts of the world, asylum systems are facing immense pressure and the principle of territorial asylum is under threat. Crises from Afghanistan to Ukraine have driven millions of people to seek safety in other countries, often after dangerous journeys, highlighting the need for protection options closer to home. At the same time, pushbacks at borders and COVID-19-related mobility restrictions have prevented many asylum seekers from reaching destination states, while growing numbers of spontaneous arrivals and difficulties returning those whose asylum claims are rejected have led some countries to search for ways to deter people from reaching their territory in the first place.

This has led to renewed interest in external processing as a migration and asylum management tool. In some cases, external processing is intended to be *additional* to territorial asylum, meaning that it would offer another opportunity to access protection alongside the traditional route of applying for asylum after reaching the border or from within the territory of a country. In others, the intention is for external processing to be *conditional*, meaning its introduction would be accompanied by restrictions on access to territorial asylum, often with the aim of deterring spontaneous arrivals.

"External processing" itself has no clear definition in law or policy, and the term has been used to describe a wide variety of policies and programs that involve conducting some aspects of the asylum procedure outside a destination state's territory. This report uses the phrase as an umbrella term for the *pre-arrival* (full or preliminary) processing of an asylum claim by the authorities of a destination country while a protection seeker is in another state. External processing models implemented or proposed to date have fallen into three broad categories, which are flexible and may overlap in practice. These categories each provide different benefits to both protection seekers and destination states, but also come with legal, practical, and political challenges. All of these cases provide valuable lessons for policymakers.

> *"External processing" itself has no clear definition in law or policy, and the term has been used to describe a wide variety of policies and programs.*

> ▶ **Humanitarian visas** offer protection seekers a way to enter a destination country legally and give destination-country authorities a head start on screening individuals before arrival. Such visas work in two ways: either an applicant who applies for and receives a visa while abroad is granted direct access to a protection status after arriving in the destination state or, alternatively, the applicant undergoes a preliminary protection assessment abroad, receives a visa, and is then able to file a claim through the national asylum procedure after arrival. While there are some examples of these visas being used in a broad manner, such as Switzerland's since-abolished protected entry procedure, most are ad hoc, time-limited, and target specific populations such as Syrians, Afghans, or Ukrainians. This narrow targeting of specific vulnerable populations risks excluding others in need of protection but may also make such visas more politically viable than programs with broader criteria, given concerns about maintaining control over who enters the destination state and about not overwhelming processing capabilities. Other humanitarian visa models, such as Germany's humanitarian admission programs, help facilitate other protection mechanisms including family reunification and private sponsorship

but run the risk of blurring the lines between external processing and other pathways. In addition, humanitarian visas may restrict access to territorial asylum when used for expressly conditional purposes, as with the model contained in the EU-Turkey Statement. Finally, humanitarian visas need built-in safeguards to address practical considerations, including the physical safety of applicants who remain in their origin country while the visa is processed and the legal status of applicants who are in a transit country.

▶ **Emergency evacuation mechanisms** offer flexibility to destination countries by enabling them to quickly get at-risk individuals to safety without necessarily first going through lengthy refugee status determination procedures. Evacuations can also be wound down once immediate protection needs are met. But this flexibility requires substantial cooperation, especially when third countries act as staging grounds before protection seekers' onward movement to a destination country. Examples are the Emergency Transit Mechanisms in Niger and Rwanda, run by the United Nations High Commissioner for Refugees; the Protection Transfer Arrangement in Central America; and the 2021 Afghanistan evacuation. This cooperation requires addressing concerns that protection seekers will be left in transit countries, including with a contingency plan for those who are evacuated but ultimately do not qualify for protection in the destination state. Other evacuations involve processing individuals while they are still in their origin country, often amid chaotic and dangerous circumstances. Such was the case for the U.S. evacuation program from Haiti in the 1990s, which required protection seekers to repeatedly pass security checks and travel near police and military facilities to complete the application process. Additionally, the wide margin of discretion that states have in emergency evacuations and the chaotic settings in which they take place can result in access to evacuation being dependent on arbitrary criteria or connections rather than who is most in need of protection.

▶ **External processing centers** are an often-proposed but yet-to-be implemented concept. Such centers would receive asylum seekers along common migration routes and could involve conducting some or all of an asylum procedure, while providing humanitarian assistance and temporary shelter. This model is distinct from *post-arrival* practices such as the offshore processing facilities run by Australia in Papua New Guinea and Nauru and the UK-Rwanda agreement that allows the UK government to transfer responsibility for the asylum process and subsequent protection; these practices involve transferring protection seekers intercepted en route to or after arriving at a destination state's territory to a third country, are deterrence rather than protection driven, and fail to provide solutions for protection seekers. Operationalizing proposals for protection-sensitive external processing centers would, among other things, require resolving issues of extraterritorial jurisdiction and the human rights and procedural obligations that accompany it, robust cooperation with hosting states, and implementable plans for all asylum seekers when their claims are either approved or rejected.

This review of external processing practices to date concludes that more protection opportunities exist when:

▶ **External processing is additional to territorial asylum.** However, given the political draw of conditional models with direct or indirect deterrence aims, introducing external processing without any implications for subsequent territorial asylum applications would likely make the policy politically

unworkable. Still, international legal obligations prevent countries from excluding all individuals who have had protection claims processed extraterritorially and rejected from also submitting a territorial asylum application. At a minimum, states would have to assess new risks or changes of circumstance that have emerged since the extraterritorial claim was processed. The challenge will be identifying and resolving the trade-offs between these competing priorities.

► **Protection seekers are guaranteed robust procedural rights.** For an external processing system to be protection-sensitive, asylum seekers should have access to fair and nondiscriminatory procedures, including access to independent information and legal remedies should they encounter discriminatory practices or have a claim rejected. Yet, the legal and fiscal cost of these measures may discourage policymakers from considering a protection-sensitive model in the first place. This will depend in part on whether the external processing state (or in the case of the European Union, regional) entity exercises extraterritorial jurisdiction, which obliges it to uphold fundamental rights such as the principle of nonrefoulement,[1] prohibition of arbitrary detention, reception and asylum procedure standards, and the right to an effective remedy. Because these principles form the bedrock of what would constitute a protection-sensitive external processing system, the challenge is getting states to comply with these minimum standards whether or not they are under legal obligation to do so.

► **Implementation of external processing is done in a coordinated, localized manner.** External processing programs should be sensitive to the local context of countries that host protection seekers and others involved in the process, and ensure that safety issues for protection seekers are accounted for in the program's design. This will require robust consultation with local stakeholders, including the targeted populations, host-country governments, and international actors that can help facilitate safe passage and processing.

In sum, although restrictive proposals have received the most attention in policy discussions, external processing can also be used to facilitate and expand safe, legal, and attainable access to protection. Because external processing models can be conducted closer to protection seekers' countries of origin, they hold the potential to minimize loss of life on dangerous flight routes, as well as smuggling and trafficking. They can also provide time for destination states to conduct thorough security and health screenings of protection seekers and prepare local administrative structures before arrivals in situations of large-scale movements. Making good on these potential benefits requires exploring the legality, risks, and feasibility of external processing schemes and the trade-offs that come with them.

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1    The principle of "nonrefoulement" prohibits the return of protection seekers to a place where they face a real risk of persecution or other serious ill treatment.

# 1    Introduction

Access to territorial asylum is under significant pressure in many high-income countries. Pushbacks at borders as well as mobility restrictions related to the COVID-19 pandemic have prevented many asylum seekers from reaching their destinations, while growing numbers of spontaneous arrivals and difficulties returning those with rejected asylum claims have led some countries, such as Denmark and the United Kingdom, to search for solutions that would deter people from reaching their territory. At the same time, new and ongoing crises—including those in Afghanistan, Syria, and, most recently, Ukraine—have highlighted the need to offer protection closer to where vulnerable populations live. This, in turn, has raised questions about how high-income countries can share responsibilities with the low- and middle-income countries that host the overwhelming majority of people in need of international protection.[2] And in light of continued large-scale mixed migration, for example in the Americas and Europe, governments are recognizing the importance of regional cooperation and offering protection at multiple opportunities along migration routes.[3]

On the one hand, these developments have re-enlivened proposals for external processing of protection claims as a tool for *restricting* access to asylum. Under these approaches, states attempt to limit the number of asylum seekers spontaneously arriving at their territory, either by deterring them from attempting the journey or physically relocating them during the asylum process. On the other hand, while restrictive proposals have taken much of the oxygen in policy discussions, external processing could also be used to facilitate and expand safe and regulated access to protection by providing protection opportunities closer to countries of origin and allowing destination states to conduct security and health screenings and prepare local administrative structures before protection seekers' arrival.

*While restrictive proposals have taken much of the oxygen in policy discussions, external processing could also be used to facilitate and expand safe and regulated access to protection.*

"External processing" has no clear definition in law or policy, and the term has been applied to many different models in which some aspects of asylum procedures are conducted outside a destination state's territory. This includes, for example, the evacuation of protection seekers from dangerous situations to a third country where they then have their asylum claim processed, as well as models that provide protection seekers easier access to visas. This also includes proposals such as transit or regional processing, which would involve a bilateral or multilateral agreement to process asylum claims along a migration route. And other uses of the term can apply to post-arrival offshore processing facilities, such as those run by Australia in Papua New Guinea[4] and Nauru or the U.S. processing of Haitian asylum seekers in Guantanamo Bay in

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2    Despite the Global Compact on Refugees' aim for "more predictable and equitable responsibility-sharing" for the world's refugees, more than 80 percent still reside in their countries or regions of origin. See United Nations, "Report of the United Nations High Commissioner for Refugees, Part II: Global Compact on Refugees" (UN Doc. A/73/12, Part II, 2018); United Nations High Commissioner for Refugees (UNHCR), "Refugee Data Finder," accessed April 2, 2022.

3    See, for example, Ariel G. Ruiz Soto and Andrew Selee, "Beyond the Border: Opportunities for Managing Regional Migration between Central and North America" (commentary, Migration Policy Institute, April 2022).

4    The Papua New Guinea regional processing center closed in December 2021.

the 1990s. This report uses "external processing" as an umbrella term for the *pre-arrival* (full or preliminary) processing of an asylum claim by the authorities of a destination country or region in another state.[5]

Understanding whether external processing can be used to extend, rather than restrict, protection requires exploring the legality and feasibility of these and similar arrangements, and the trade-offs that come with them. By drawing lessons from previous practice, this report highlights the opportunities that external processing offers as well as the challenges to its implementation and the risks it could pose to territorial asylum. First, the report examines the history of external processing and the crosscutting legal and political considerations that underpin the debate. It then analyzes three models of external processing: humanitarian visas, emergency evacuations, and external processing centers. Under each, this analysis explores examples of how the model has been implemented or proposed to date as well as the legal and practical benefits, limitations, and key considerations for how the model could be used in a protection-sensitive manner. The report concludes with recommendations for how to ensure external processing provides more, rather than fewer, opportunities for individuals in need to access protection.

# 2    External Processing: A Brief History and Key Issues

External processing, in various guises, has been proposed and implemented for more than half a century. Beginning in the 1970s with evacuations from Vietnam and onward resettlement (discussed further in Section 3.B.), destination states have sought ways to alleviate pressure placed on their asylum systems by spontaneous arrivals and the dangers protection seekers face along the way. In some cases, when politically feasible, this has resulted in expanding access to protection and an orderly arrival process. Other approaches are intended to restrict access to asylum, as was the case with U.S. interdictions and external processing of Haitian asylum seekers in the 1990s. No matter the intention, the different forms of external processing all contain some aspect of processing an asylum claim by authorities of a destination country or region in another state.

This common thread distinguishes external processing systems from other forms of offshoring, where there is no prospect for gaining protection in the destination state. Since 2012, Australian-led centers in Papua New Guinea and Nauru have operated under the latter logic, with the aim of deterring future asylum seekers from trying to reach Australia by boat. In 2021, Denmark passed legislation providing a legal basis for the transfer, processing, and protection of asylum seekers arriving in Denmark outside Europe, in pursuit of a state of "zero asylum seekers."[6] And in April 2022, the United Kingdom entered an agreement with Rwanda

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5    This conceptual approach to external processing draws on a robust literature examining practices of "extraterritorial," "transit," "regional," and "externalized asylum" processing. See further Riona Moodley, "Rethinking 'Regional Processing': Could the Lessons Learned from the Comprehensive Plan of Action for Indochinese Refugees (CPA) Offer a Roadmap for International Cooperation in Response to 'Regional' Refugee Situations?" (University of New South Wales Law Research Paper No. 22-4, January 1, 2022); Riona Moodley, "Rethinking Regional Processing: The Comprehensive Plan of Action for Indochinese Refugees as a Roadmap for International Cooperation," Asylum Insight, August 2020; Jane McAdam, "Extraterritorial Processing in Europe: Is 'Regional Protection' the Answer, and If Not, What Is?" (policy brief, Kaldor Centre for International Refugee Law, University of New South Wales, May 2015); Madeline Garlick, "The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims" (commentary, Migration Policy Institute, March 2015); Netherlands Advisory Committee on Migration Affairs, *External Processing: Conditions Applying to the Processing of Asylum Applications Outside the European Union* (The Hague: Netherlands Advisory Committee on Migration Affairs, 2010).

6    Danish Parliament, *Forslag til lov om ændring af udlændingeloven og hjemrejseloven (Indførelse af mulighed for overførsel af asylansøgere til asylsagsbehandling og eventuel efterfølgende beskyttelse i tredjelande)*, L 226 (June 3, 2021); Megan Specia, "Denmark Would Push Asylum Seekers Outside Europe for Processing," *The New York Times*, June 3, 2021.

that allows the UK government to wholesale transfer responsibility for the asylum process and subsequent protection.[7] In these last cases, for example, asylum seekers would not be able to apply for asylum in Denmark or the United Kingdom, but rather they would have to apply for asylum in a third country, such as Rwanda.

While these approaches differ from external processing as they foreclose the option of protection in the destination state, the political justification—to deter spontaneous arrivals—fits with the tradition of using external processing to place conditions on access to territorial asylum, rather than using it to provide an additional way to access protection. Indeed, governments have often used external processing in a *conditional* manner, restricting access to asylum by controlling who can and cannot gain protection. Many have developed narratives that conflate spontaneous arrivals of asylum seekers with illegal migration, that there is a "right way" and a "wrong way" to seek protection, with the former involving "waiting their turn" for resettlement opportunities, while "queue jumpers" seek protection the wrong way.[8] This is despite Article 31 (1) of the Refugee Convention generally, though not unconditionally, protecting asylum seekers from penalties for the manner in which they enter countries.[9] States also frequently argue that protection seekers should seek asylum earlier along their route. By implementing external processing, these governments can argue that they are facilitating the movement of the "correct" types of protection seekers, while disincentivizing irregular arrivals—a strategy that is not necessarily borne out by the evidence.[10]

Yet it is possible for external processing to be *additional* to territorial asylum and, in fact, to expand access to protection to those at risk of persecution. External processing approaches that allow people at risk to apply for visas from beyond a state's borders would both help asylum seekers avoid some of the dangers faced during irregular journeys and ease pressure on destination states by allowing them to conduct health and security screenings and prepare reception facilities prior to protection seekers' arrival. To accomplish this, such policies should not be paired with new restrictions on territorial asylum.

External processing may occur in a protection seeker's country of origin or in a third country. When external processing takes place in a country of origin, such as the process for obtaining protection under the U.S. Central American Minors Refugee and Parole program, it is referred to as "in-country processing." As will be discussed in Section 3.B., in-country processing poses unique challenges because, while their applications are processed, protection seekers remain in a place where they may be exposed to the various dangers they are attempting to flee. On the other hand, as discussed in Sections 3.A. and 3.C., processing that occurs on a third country's territory poses its own set of challenges, including that it requires significant international cooperation to ensure that transit countries are not left bearing unfair responsibility for individuals who do not ultimately receive protection in a destination country.

7    Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement, April 14, 2022; Nikolas Feith Tan, "Externalisation of Asylum in Europe: Unpacking the UK-Rwanda Asylum Partnership Agreement," EU Immigration and Asylum Law and Policy, May 17, 2022.

8    See, for example, Catherine Ann Martin, "Jumping the Queue? The Queue-Jumping Metaphor in Australian Press Discourse on Asylum Seekers," *Journal of Sociology* 57, no. 2 (June 2021): 343–61.

9    Refugees must "present themselves without delay to the authorities and show good cause for their illegal entry or presence." See further Cathryn Costello with Yulia Ioffe and Teresa Büchsel, *Article 31 of the 1951 Convention Relating to the Status of Refugees* (Geneva: UNHCR, 2017).

10   See, for example, Thomas Gammeltoft-Hansen and Nikolas Feith Tan, "The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy," *Journal on Migration and Human Security* 5, no. 1 (2017): 28–56.

External processing programs across all three of the models this report will consider—humanitarian visas, emergency evacuation, and pre-arrival external processing centers—raise a range of crosscutting legal and policy issues. The remainder of this section will focus on two in particular: the relationship between external processing and territorial asylum, and the extraterritorial application of human rights. These issues will be explored in more depth in the discussion of each external processing model in Section 3.

## A.      The Relationship between External Processing and Territorial Asylum

A fundamental question in any external processing model is whether having had one's application processed by a potential destination country in another jurisdiction denies the individual access to territorial asylum in the same destination state. This issue will arise when an asylum seeker goes through an external procedure, receives a negative decision, and subsequently arrives at the border of the destination state and claims asylum. From an international law standpoint, these two processes would ideally be separate: external processing would be completely *additional* to territorial asylum, and one's rejection under an external processing system would not be factored into the decision on an asylum claim filed after reaching the country's territory. However, most of the models that have emerged, such as those proposed in Denmark and the United Kingdom,[11] have been *conditional* models of external processing, which see these processes as an "either-or" and aim to use external processing to reduce the number of arrivals in the destination country's territory.[12] In order for any external processing model to be politically feasible, it will likely have to aim to reduce spontaneous arrivals and deter repeat claims by previously rejected protection seekers.

Addressing this political roadblock is challenging, as opening the door to conditionality runs the risk of legitimizing restrictions on access to territorial asylum, as a state might argue that the presence of these pathways negates the need for protections for spontaneous arrivals.[13] After all, there is no general and definitive "right to choose" a country of asylum,[14] and international human rights and refugee laws are generally silent on the question of how a protection seeker may safely reach a state of refuge. While Article 12 of the International Covenant on Civil and Political Rights (ICCPR) affirms individuals' right to leave any country, there is no explicit, binding international law guaranteeing a right to enter a specific country to seek protection. This leads to contradictions, where states such as Australia

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11    Hanne Beirens and Samuel Davidoff-Gore, "The UK-Rwanda Agreement Represents Another Blow to Territorial Asylum" (commentary, Migration Policy Institute, April 2022).

12    See, for example, the discussion on extraterritorial processing proposals put forward in the European Union in the 2000s. See Garlick, "The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims."

13    When announcing the UK-Rwanda asylum processing agreement, the UK government pointed to existing "safe and legal routes" as justification for the new scheme. See UK Home Office, "Migration and Economic Development Partnership" (fact sheet, April 14, 2022).

14    See further James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 48; James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge, UK: Cambridge University Press, 2014), 30–32.

resettle a substantial number of refugees but have closed their own territory to asylum claims for those arriving by sea.

But international law does place limits on the ability of states to close their borders to protection seekers. In order to ensure that asylum seekers are not refouled (i.e., returned to a place where they face a real risk of persecution or other serious ill treatment), states must assess each individual's asylum claim.[15] Leading scholars argue that this obligation "amounts to a de facto duty to admit the refugee" while a claim is processed.[16] And although states could in theory conduct these assessments outside their physical territory, for example on board a vessel or aircraft, even then, such practices would need to meet minimum international human rights standards.[17] Further human rights obligations can limit the ability of a destination state to simply refuse an asylum seeker's claim on its territory. For example, the right to family life may prevent the rejection of asylum seekers with family already residing in the destination state.[18] And decisions surrounding unaccompanied children must take into account their best interests.[19]

To balance these priorities, international organizations, legal scholars, and civil society may need to accept that individuals may not always be entitled to a full asylum procedure after having a claim rejected in an external processing system.[20] If that system is fair, efficient, and protection sensitive, an accelerated screening at the border of the destination state may be sufficient to abide by international law. Such a screening could be narrowed down to assessing any *new* risks or a change of circumstances since the external procedure as well as an assessment of any risk of refoulement in the transit state. Where an asylum seeker does present evidence of new risks or a change of circumstances, the individual should then be afforded access to a full asylum procedure on the destination state's territory. By the same token, if an applicant for protection via an external processing model has not been afforded such procedural rights, an accelerated screening upon arrival in the territory or at the border would be in breach of their right to seek asylum.

The requirement that external processing systems offer sufficient procedural safeguards, however, places many of the systems currently in practice or in proposal outside of this balance, as they are not sufficiently sensitive to the requirement for such safeguards under international law. The challenge explored in

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15   Jens Vedsted-Hansen, "The Asylum Procedures and the Assessment of Asylum Requests," in *Research Handbook on International Law and Migration*, eds. Vincent Chetail and Céline Bauloz (Cheltenham and Northampton, MA: Edward Elgar, 2014); Álvaro Botero and Jens Vedsted-Hansen, "Asylum Procedure," in *The Oxford Handbook of International Refugee Law*, eds. Cathryn Costello, Michelle Foster, and Jane McAdam (Oxford, UK: Oxford University Press, 2021), 597–606.

16   James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge, UK: Cambridge University Press, 2005), 301.

17   Azadeh Dastyari and Daniel Ghezelbash, "Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures," *International Journal of Refugee Law* 32, no. 1 (2020): 1.

18   Article 8 of Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols No 11 and No 14" (European Convention on Human Rights), adopted November 4, 1950, entered into force September 3, 1953.

19   Article 3 of the United Nations, "Convention on the Rights of the Child," adopted November 20, 1989, entered into force September 2, 1990. In 2005, the Committee on the Rights of the Child issued a general comment about the treatment of unaccompanied minors in relation to the Convention on the Rights of the Child, attempting to address the increasing number of unaccompanied migrant children as well as protection gaps that had emerged. The comment noted that children who are not eligible for refugee status should still enjoy complementary forms of protection. The comment also noted that return to country of origin should not be used as a durable solution if it is not in the best interests of the child, unless in exceptional circumstances other rights-based considerations override. Arguments such as migration control cannot be used to override best interest considerations. See Committee on the Rights of the Child, "Treatment of Unaccompanied and Separated Children Outside Their Country of Origin" (General Comment No. 6, 2005).

20   Garlick, "The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims."

the remainder of this report is identifying what is needed to ensure external processing is protection sensitive, whether and how these obstacles can be overcome, and if they are immutable, what trade-offs policymakers must make to achieve the goal of expanding protection.

## B.     *Extraterritorial Jurisdiction and Protection Sensitivity*

A further key question relevant to any external processing model is: When do the procedural rights and guarantees afforded asylum seekers by international and, in Europe, European law apply? And in cases when they do apply, who is responsible for upholding them? This question turns on whether the state conducting external processing exercises jurisdiction.

Jurisdiction is a threshold requirement, meaning it can be activated if certain criteria are met, and this then triggers state obligations under international law.[21] States may exercise jurisdiction outside of their territory, or extraterritorially; this depends on whether and how a state's agents are legally and factually involved in external processing. Extraterritorial jurisdiction is generally triggered where a state exercises "effective control" over a defined territory or "authority and control" over persons beyond its borders.[22] For example, as will be discussed in Section 3.A., at least in Europe a state's extraterritorial jurisdiction is not presently triggered by the processing of a humanitarian visa application because the state is not exercising sufficient control, according to recent case law.[23] However, a destination state may have effective control over the geographic area on which an external processing center is placed, which will trigger extraterritorial jurisdiction (see Section 3.C.).[24] Equally, where a destination state exercises force or other physical authority and control, such as detention, over asylum seekers, it will exercise extraterritorial jurisdiction.[25]

The finding of extraterritorial jurisdiction means that human rights obligations apply. As such, destination states must ensure respect for a number of human rights, notably:

▶  the principle of nonrefoulement as enshrined in, among others, Article 33(1) of the Refugee Convention, Article 3 of the European Convention on Human Rights (ECHR),[26] Article 7 of the ICCPR, and Article 3 of the Convention against Torture;[27]

21   *Al-Skeini and Others v. the United Kingdom*, Application no 55721/07 (European Court of Human Rights, 2011), para 138.
22   See further Marko Milanovic, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties," *Human Rights Law Journal* 8, no. 3 (2008): 417; Samantha Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to," *Leiden Journal of International Law* 25, no. 4 (2012): 857, 860.
23   The decision to submit an application is voluntary and the act of processing an application does not amount to control for the purposes of triggering jurisdiction. *M.N. and Others agaisnt Belgium*, Application no. 3599/18 (European Court of Human Rights, 2020).
24   See, for example, International Court of Justice, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (an Advisory Opinion of 9 July 2004)," *ICJ Reports 2004*, p. 136 (2004), para 111; UN Committee Against Torture, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by State Parties" (general comment, January 24, 2008), para 16; *Al-Skeini and Others v. the United Kingdom*, para 138.
25   See, for example, *J.H.A. v. Spain*, CAT/C/41/D/323/2007 (Committee Against Torture, November 21, 2008), para 8.2; *Hassan v. the United Kingdom*, Application no. 29750/09 (European Court of Human Rights, Grand Chamber, 2014), para 136.
26   The European Convention on Human Rights is only applicable to Council of Europe states.
27   See, for example, Article 7 of the United Nations, "International Covenant on Civil and Political Rights," adopted December 16, 1966, entered into force March 23, 1976; Article 3 of the United Nations, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," adopted December 10, 1984, entered into force June 26, 1987; Articles 6 and 37 of the Convention on the Rights of the Child; and Article 3 of the European Convention on Human Rights.

► the prohibition against arbitrary detention from Article 9 of the ICCPR as well as Article 5 of the ECHR;

► standards relating to the reception and the asylum procedure flowing from Article 3 of the ECHR; and

► the right to an effective remedy flowing from Article 13 of the ICCPR and Article 13 of the ECHR.

In addition, fundamental rights stemming from the EU Charter of Fundamental Rights (EU CFR) may apply. The EU CFR is binding on EU agencies wherever they operate (including extraterritorially) and EU Member States wherever EU law is being implemented, including in a third state.[28] This, in turn, relies on there being EU law governing the respective issue.[29] Where the EU CFR applies, EU agencies and Member States are, among other things, extraterritorially bound to respect the principle of nonrefoulement (Articles 4 and 19(2) of the EU CFR) and the right to an effective remedy (Article 47 of the EU CFR).

Hypothetically, this means that when a government runs an external processing center, and protection seekers stay within the center, the government is prohibited from arbitrarily detaining them and must allow them to access the national legal system should they claim their rights have been violated. If the destination government is a member of the Council of Europe or of the European Union, the human rights guarantees ensured by each bloc must also be upheld.

Irrespective of whether extraterritorial jurisdiction is triggered, there are rights and guarantees that form a base set of the minimum procedural rights for external processing to operate in a protection-sensitive way. Following the recommendation of the European Council on Refugees and Exiles,[30] these are:

► respect for the principle of nonrefoulement,

► access to a fair and nondiscriminatory procedure (including a right of appeal),

► no arbitrary detention, and

► safeguarding safety and security of individuals as far as possible.

When external processing incorporates these criteria, it can offer a safe and regulated way to access protection in a destination state. However, as will be discussed below, existing practices struggle to meet these criteria. The challenge is getting states to comply with these minimum standards both when they are and are not legally obliged to do so.

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28    Article 51 (1) EU Charter of Fundamental Rights provides that: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties." See European Union, "Charter of Fundamental Rights of the European Union," *Official Journal of the European Union* C 326/391, October 26, 2021.

29    The issue of when EU law is considered to be implemented has been in the focus of European Court of Justice case law, which followed the landmark decision *Åklagaren v. Hans Åkerberg Fransson*, C-617/10 REC (European Court of Justice, 2013).

30    European Council on Refugees and Exiles, *Protection in Europe: Safe and Legal Access Channels—ECRE's Vision on Europe's Role in the Global Refugee Protection Regime* (Brussels: European Council on Refugees and Exiles, 2017), 16.

# 3    Models of External Processing

Each external processing system differs in its design and underlying rationale. Still, they have historically fallen into the following three broad models, though these categories often overlap in practice.

► **Humanitarian visas** allow an individual to approach a potential asylum state outside its territory with a protection claim and, if (*prima facie*) found to be in need of protection, be granted an entry permit to that country. Sometimes referred to as "protected entry procedures,"[31] humanitarian visas may provide protection seekers a safe and legal pathway into a country of asylum. Examples include those visas Brazil has offered to protection seekers fleeing conflict in Syria, Afghanistan, and Ukraine, which require less documentation than other types of visas and do not have associated fees.

► **Emergency evacuations** allow for the immediate rescue of protection seekers in imminent situations of risk or when the capacity to conduct a *prima facie* determination of need in a country is low. As a discretionary and flexible policy response, evacuations can be stood up quickly in times of crisis and wound down once immediate protection needs are met. These include the evacuation efforts from Afghanistan that were rapidly set up in August 2021,[32] as well as evacuations of vulnerable asylum seekers in Libya to Niger and Rwanda. These efforts can expand access to protection when undertaken *in addition* to territorial asylum.

► **Pre-arrival external processing centers** have been proposed a number of times as coordinated ways of allowing protection seekers to make claims closer to home while providing all the necessary processing capabilities from the destination state. These would allow for part or all of an asylum procedure to be conducted prior to arrival in the destination state, as well as providing humanitarian assistance and shelter while a claim is being processed. While these centers have yet to be implemented, lessons can be learned from the challenges these proposals have faced in moving toward implementation as well as from *post-arrival* extraterritorial processing approaches. Examples of post-arrival approaches include the U.S. policy in the 1990s of intercepting and transferring Haitians to Guantanamo Bay, Cuba, as well as two iterations of Australia's "Pacific Solution," which has seen the transfer of intercepted asylum seekers to offshore processing centers in Papua New Guinea and Nauru.[33]

The subsections that follow explore each of these models in more depth, including a look at examples of how they have been implemented and a discussion of legal, practical, and political challenges they have faced.

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31    Gregor Noll with Jessica Fagerlund, *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests* (Copenhagen: Danish Centre for Human Rights, 2002).

32    Nikolas Feith Tan, "The Temporary Hosting of Evacuated Afghans in Third Countries: Responsibility Sharing or Externalisation?" Refugee Law Initiative Blog on Refuge Law and Forced Migration, September 15, 2021.

33    Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge, UK: Cambridge University Press, 2018), 103–10; Madeline Gleeson and Natasha Yacoub, "Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia" (policy brief, Kaldor Centre for International Refugee Law, University of New South Wales, August 2021).

## A.    Model I: Humanitarian Visas

Humanitarian visas are a crucial tool that can facilitate safe, regulated, and legal access to territorial protection. Physical access to a state's territory is a necessary component of territorial asylum; however, as discussed in Section 2, there is no international human right to enter a specific state to seek protection. This means protection seekers are either dependent on visa-free travel or a visa to be able to enter a destination state safely and legally. Visa-free travel has been integral for Ukrainians to access protection during the ongoing conflict with Russia, as they enjoy visa-free travel to a wide range of countries worldwide, including those in the European Union.[34] The majority of the world's protection seekers, however, come from lower- and middle-income countries whose nationals need a visa to legally enter high-income destination states.[35] While the humanitarian visa model offers benefits to both protection seekers and states, it comes with a number of legal and practical challenges that may limit its efficacy as a protection-sensitive pathway.

### Humanitarian Visas in Practice

Humanitarian visa programs can work in two ways: they can provide beneficiaries with direct access to a protection status after arrival in a destination state or, alternatively, grant access to the national asylum procedure after a preliminary assessment of a protection claim at an embassy. This allows protection seekers to travel legally and safely to a state of refuge, avoiding the risks of irregular flight routes, such as becoming victims of smuggling and trafficking or relying on precarious vessels to attempt dangerous sea crossings. Meanwhile, states can regulate access and conduct health and security screenings prior to the arrival of an applicant.

At their broadest, humanitarian visas can be institutionalized as part of a destination state's asylum laws, allowing protection seekers to apply for such a visa independent of belonging to a specific group of people or an admission quota. For example, Switzerland accepted asylum claims at its embassies until 2012. Asylum seekers were able to apply for a Protected Entry Visa, which required applicants to provide an explanation of their claim, which would then be forwarded to the Swiss national asylum authority. The authority would determine whether the application had merit and, if deemed so, the asylum seeker would be allowed to travel to Switzerland for the full determination process.[36] These types of broad programs may be able to offer protection seekers facing acute danger or persecution the opportunity to safely flee.[37]

More often, humanitarian visa programs focus on a specific group of applicants, with narrow eligibility criteria targeting certain nationalities or groups of people. For example, Brazil has launched humanitarian

34    Schengen Visa Info, "Ukrainian Nationals Can Travel Visa-Free to 90 World Countries," Schengen Visa News, March 8, 2022.

35    On the impact of visa requirements on seeking asylum in the European Union, see John Morrison and Beth Crosland, "Trafficking and Smuggling of Refugees: The End Game in the European Asylum Policy" (New Issues in Refugee Research Working Paper No. 39, UNHCR, Geneva, April 2001).

36    Shalini B. Ray, "Optimal Asylum," *Vanderbilt Journal for Transnational Law* 43, no. 5 (November 2013). For more on the Swiss example, see Outi Lepola, "Counterbalancing Externalized Border Control for International Protection Needs: Humanitarian Visa as a Model for Safe Access to Asylum Procedures" (European Commission Seventh Framework Programme, Paper FP7-SECT-2007-217862, 2011), 15.

37    Ray, "Optimal Asylum."

visas specifically for protection seekers from Syria,[38] Afghanistan,[39] and Ukraine.[40] Under each of these programs, protection seekers are required to submit fewer documents than they would for a tourist visa, do not need to pay visa fees, and have access to an accelerated review process. While the visa does not come

> *Brazil has launched humanitarian visas specifically for protection seekers from Syria, Afghanistan, and Ukraine.*

with financial support, it does grant the ability to live and work in Brazil.[41] Similarly, Canada's Ukraine Authorization for Emergency Travel grants Ukrainians a free tourist visa valid for up to three years and allows them to apply for an open work permit for free.[42] And in the United States in 2014, the Obama administration established the Central American Minors (CAM) Refugee and Parole program, which allowed children

and youth who were under the age of 21 and had a qualifying parent in the United States to be assessed for protection needs in Central America by U.S. officials and, if found to require protection, to be granted access to the United States.[43] In the Brazilian, Canadian, and U.S. cases, restrictive eligibility criteria have had the effect of excluding populations that may otherwise qualify for protection. In addition, the ad hoc nature of these programs means they are time-limited and subject to changes in destination state politics. For example, the CAM program was discontinued under the Trump administration, only to be revived under the Biden administration.

In the European Union, there is no bloc-wide humanitarian visa.[44] There are, however, a few Member States with humanitarian visas at the national level that reflect discretionary and exceptional state practice,[45] with many humanitarian visas issued due to illness or family relations, rather than with a focus on protection-related claims.[46] Nevertheless, these visas can be used for granting protection by blurring the lines between humanitarian visas, emergency evacuation, and private sponsorship (see Box 1). For instance, Section 22 of the *German Residence Act* allows a visa applicant to either be granted a humanitarian status or access to the national asylum procedure upon arrival. This serves as the legal basis for the admission of protection seekers from Afghanistan. Similarly, Section 23 of the act provides a legal basis for setting up large-scale

38    UNHCR, "UNHCR Welcomes Brazil Humanitarian Visas for Syrians Fleeing Conflict" (briefing note, September 27, 2013).

39    Brazilian Ministry of Foreign Affairs, "Humanitarian Visas for Afghans" (press release, December 1, 2021).

40    Agência Brasil, "Brazil Announces Humanitarian Passport for Ukrainian Refugees," Agência Brasil, March 1, 2022.

41    See Liliana Lyra Jubilut, Camila Sombra Muniños de Andrade, and André de Lima Madureira, "Humanitarian Visas: Building on Brazil's Experience," *Forced Migration Review* 76 (2016); Eduardo Campos Lima, "Afghan Refugees Struggle in Brazil," Arab News, March 1, 2022.

42    Immigration, Refugees, and Citizenship Canada, "Backgrounder: Canada-Ukraine Authorization for Emergency Travel," updated March 22, 2022.

43    Claire Higgins and Molly Fee, "The Risks of 'In-Country' Processing: An Assessment of the US Central American Minors Program" (World Refugee & Migration Council Research Paper, October 2021).

44    While the European Parliament introduced a proposal to establish a European Humanitarian Visa in 2018, this did not lead to any further legislative steps, and the policy focus at the EU level has remained on resettlement (see Box 2) as secondary access route. See European Parliament, "Resolution of 11 December 2018 with Recommendations to the Commission on Humanitarian Visas," (2018/2271(INL), December 11, 2018). 429 members of the European Parliament voted in favor, 194 against, and 41 abstained. See also Wouter van Ballegooij and Cecilia Navarra, *Humanitarian Visas: European Added Value Assessment Accompanying the European Parliament's Legislative Own-Initiative Report (Rapporteur: Juan Fernando López Aguilar)* (Brussels: European Parliamentary Research Service, 2018).

45    For an overview, see Marie-Claire Foblets and Luc Leboeuf, eds., *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden, Germany: Nomos, 2020). See also Gregor Noll, Jessica Fagerlund, and Fabrice Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (Brussels: European Commission and Danish Centre for Human Rights, 2002); Ulla Iben Jensen, *Humanitarian Visas: Option or Obligation? Study for the LIBE Committee* (Brussels: European Union, 2014).

46    Jensen, *Humanitarian Visas: Option or Obligation?*, 48.

humanitarian admission programs (HAPs) at the federal or *Länder* level.[47] The German HAPs set up at the federal level from 2013 to 2015 for individuals fleeing Syria, for instance, were tailormade for a specific conflict and group of beneficiaries, including individuals who were considered to be able to contribute to the rebuilding of Syria after the conflict. Meanwhile, the HAPs established at the *Länder* level since 2013 tied admissions to the existence of a sponsor in Germany.[48] Similar programs, such as the humanitarian corridors put in place by Italy,[49] make admissions dependent on the existence of a sponsor in the destination state. This requirement qualifies these programs as so-called private sponsorship.

As an alternative to creating new pathways, governments could

> ## BOX 1
> ## Sponsorship Programs as Complementary Pathways to Refugee Resettlement
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> Private sponsorship programs are part of a larger category of "complementary pathways" to admission, defined by the United Nations High Commissioner for Refugees (UNHCR) as "safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met." These programs make admission dependent on nonstate actors taking on financial and integration responsibilities. Sponsorship can add to existing resettlement efforts, thereby increasing national protection capacities. The most prominent example is the Canadian private sponsorship program, which serves as a role model at international level. Sponsorship programs can facilitate local integration and social acceptance of refugees. However, this privatization of protection, with responsibility shared between the state and civil society, does not go without criticism of the potential of shifting government responsibility to overburdened private actors.
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> Sources: UNHCR, *Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations* (Geneva: UNHCR, 2019) 5; Judith Kumin, *Welcoming Engagement: How Private Sponsorship Can Strengthen Refugee Resettlement in the European Union* (Brussels: Migration Policy Institute Europe, 2015).

consider broaden existing ones. For example, instead of relying on the CAM program to provide a pathway for minors with a qualifying relative in the United States, the U.S. government could have widened eligibility for family reunification—a legal pathway already in existence for those with legal status, although backlogged—to reach some of the children and youth who have benefited from CAM.[50] There are some recent examples of governments thinking more creatively about family definitions and reunification pathways. Beginning in fiscal year 2023, for example, the U.S. government has allowed extended and nontraditional family members of resettled refugees to apply for family reunification through the resettlement program.[51]

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47    See Section 23 of the *German Residence Act*: German Federal Ministry of Justice, *Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory*, as amended by Article 4b of the Act of February 17, 2020 (Federal Law Gazette, page 166).

48    See further Pauline Endres de Oliveira, "Chapter 5: Humanitarian Admission to Germany - Access vs. Rights?" in *Humanitarian Admission to Europe: The Law between Promises and Constraints*, eds. Marie-Claire Foblets and Luc Leboeuf (Baden-Baden, Germany: Nomos, 2020).

49    Carola Ricci, "The Necessity for Alternative Legal Pathways: The Best Practice of Humanitarian Corridors Opened by Private Sponsors in Italy," *German Law Journal* 21, no. 2 (2020): 265–283.

50    See Faye Hipsman and Doris Meissner, *In-Country Refugee Processing in Central America: A Piece of the Puzzle* (Washington, DC: Migration Policy Institute, 2015), 13; the authors point out that "how many Central Americans may benefit from CAM will depend to a large degree on how USCIS administers the program's parole provisions, which allow for a broader degree of discretion."

51    U.S. Department of State, *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2023* (Washington, DC: U.S. Department of State, 2022).

## Legal, Practical, and Political Challenges

While limiting humanitarian visas to particular groups may exclude large numbers of those who stand to benefit under a process open to all applicants, this is by design. States are reticent to implement broad programs, wary that permanent humanitarian visas, independent of quotas or restrictive eligibility criteria, would open them up to lengthy and resource-intensive human rights and procedural obligations. They fear an overwhelming number of protection seekers and a risk of straining the capacities of embassies or national administrative structures.[52]

States address the fear of overwhelming legal requirements by not providing individual rights in humanitarian visa procedures, including access to a fair and nondiscriminatory procedure (with a right of appeal). Providing for the right to appeal against the rejection of a visa, for example, would obligate the state to lengthy legal procedures for potentially every rejected visa applicant, which would erode the ability of states to choose which noncitizens' entry they want to facilitate.

States are able to avoid providing individual rights because extraterritorial jurisdiction (and for European states, EU law) is not considered to apply during "asylum visa" procedures. This has surfaced in recent European case law, such as the *X. and X.* case of 2017, in which a Syrian family applied for humanitarian visas at the Belgian embassy in Beirut, with the aim of accessing the national asylum procedure upon arrival in the European Union. The European Court of Justice found that the EU CFR was not applicable in this case because there was no relevant legal basis for such a visa in the EU Visa Code, and thus that EU law did not provide a legal ground to grant a visa to seek asylum upon arrival.[53] In a case with a similar factual background, the European Court of Human Rights found in 2020 that the processing of a visa application of an asylum seeker did not trigger a destination state's jurisdiction under the ECHR.[54]

Even without individual rights or extraterritorial jurisdiction, states may fear the sheer number of applications an embassy might receive for broad-based humanitarian visas. States could attempt to mitigate this issue by coordinating with other states that have embassies in countries with large numbers of potential applicants to distribute humanitarian visa claims across their respective embassies; however, this would require either that protection seekers have no preference in the country where they are granted protection or that their preferences be discounted. On the other hand, the fear of large application numbers may be overblown, or could be mitigated by rolling out pilot programs to gauge interest and assign resources.[55]

In addition to hesitating to use humanitarian visas to provide *additional* protection opportunities to wider populations, some states have used them *conditionally* to restrict access to territorial asylum. The EU-Turkey Statement of 2016 instrumentalized humanitarian visas as an incentive for Turkey to halt asylum seekers'

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52   Such an argument was, for instance, brought forward by Belgium and other EU Member States in the case *X. and X. v Belgian State*, C-638/16 PPU (European Court of Justice, 2017).

53   *X. and X. v Belgian State.*

54   *M.N. and Others against Belgium.*

55   Claire Higgins, "Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees" (policy brief, Kaldor Centre for International Refugee Law, University of New South Wales, November 2019).

attempts to enter the European Union and to accept returns of Syrians from Greece.[56] This manifested as the "one-to-one scheme," which would "resettle" one Syrian from Turkey to the European Union for each Syrian returned to Turkey from Greece, up to 50,000. This was intended to restrict Syrians' access to Greek territorial asylum, as any new arrivals would be returned to Turkey, thereby deterring them from attempting the crossing. In practice, however, the one-to-one nature of the program has not been realized, as the number of Syrians resettled from Turkey has far outpaced the number returned from Greece, and it is unclear to what extent the program has had a deterrent effect.[57]

Finally, humanitarian visa programs raise practical concerns. A key issue is providing applicants physical safety and a legal status during the procedures. Even though there are occasional cases of individuals remaining on embassy premises when seeking diplomatic asylum, embassies are unsuitable for the reception and shelter of people. Humanitarian visa procedures at embassies therefore generally do not provide for any kind of accommodation. When people apply for a humanitarian visa at an embassy in a third state, they remain responsible for finding accommodations during the procedure and for regulating their legal status in that state. In such cases, international cooperation between the third country and the intended destination country is a key concern, given the latter's limited operational presence

*Humanitarian visa programs raise practical concerns. A key issue is providing applicants physical safety and a legal status during the procedures.*

and lack of territorial sovereignty in the host state; where such cooperation is absent, protection seekers may find it challenging to find safe accommodations, regulate their legal status during the application process, and gain safe passage to exit the country in case of a positive decision on their claim.

Issues of physical safety during humanitarian visa procedures are particularly challenging when procedures are conducted by embassies in countries of origin. For example, an assessment of the CAM program found that "children continued living in the dangerous environments they were seeking to leave while awaiting their case outcomes. The fact that CAM appointments were conducted in capital cities also meant that applicants would have to make nearly half a dozen trips with major safety risks."[58] Taking these considerations into account calls for setting up specific safeguards. For instance, utilizing online application forms and video interviews and streamlining procedures as much as possible can spare certain applicants potentially dangerous journeys. These measures would, however, require reliable access to digital devices and the internet, as well as a level of digital literacy. This taken into account, these measures could also have the potential to address concerns about overburdening embassies' capacity by allowing embassy staff to receive more support from national asylum authorities, who could for instance step in by assessing online application forms or conducting video interviews.

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56    European Council, "EU-Turkey Statement" (press release, March 18, 2016). On the contested legal nature of this "deal," see Mauro Gatti and Andrea Ott, "Chapter 10: The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law," in *Constitutionalising the External Dimensions of the EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, eds. Sergio Carrera, Juan S. Vara, and Tineke Strik (Cheltenham, UK: Edward Elgar Publishing, 2019).

57    Prior to the pandemic, the number of protection seekers admitted to Europe (25,560 between April 2016 and December 2019) by far exceeded the numbers of individuals returned from Greece to Turkey (2,140 between April 2016 and March 2020). See Statewatch, "EU-Turkey: 369 Syrians Deported to Turkey through EU Fund for Refugees," updated May 18, 2020; UNHCR, "Returns from Greece to Turkey (under EU-Turkey Statement) as of 31 March 2020" (fact sheet, April 1, 2020).

58    Mark Greenberg et al., *Relaunching the Central American Minors Program: Opportunities to Enhance Child Safety and Family Reunification* (Washington, DC: Migration Policy Institute, 2021), 4.

## B.    *Model II: Emergency Evacuations*

External processing can serve as a rescue mechanism through emergency evacuations, which often involve some form of in-country processing. Such evacuations are particularly useful when the outbreak of a conflict or the overthrow of a government leads to urgent protection risks for large groups of people, or when an individual faces immediate danger or risk of persecution. In these situations, ordinary humanitarian visa procedures can take too long or be too administratively burdensome to meet protection needs. As an immediate response to a specific crisis, evacuations allow destination countries to admit individuals directly from their countries of origin or transit on an accelerated timeline—and to wind down operations after the immediate protection needs have been resolved. Emergency evacuations can occur without a detailed and lengthy screening, and may be independent of a formal recognition of status under the Refugee Convention.[59] Establishing these initiatives often relies on robust cooperation with third countries and, in some cases, countries of origin. And while they may be able to rescue a large number of protection seekers quickly, they run the risk of creating additional dangers if the logistics are not carefully considered and may lead to discrimination against certain protection seekers.

### Flexible but Dependent on Cooperation

The highly discretionary and ad hoc nature of evacuations can allow destination-country policymakers to nimbly respond to an emergency situation, with the support and cooperation of third countries. For example, while the situation in Afghanistan worsened over the course of 2021 and the United States prepared to withdraw its forces, it was only when the Taliban takeover of Kabul became imminent that several countries implemented a large-scale emergency evacuation of individuals from Afghanistan. On August 15, 2021, the U.S. Department of State published a joint statement in which more than 100 countries pledged to accept Afghans fleeing the country after the U.S. military withdrawal.[60] In the months that followed, more than 82,000 people were evacuated from Afghanistan by the United States,[61] more than 15,000 by the United Kingdom,[62] and around 28,000 by EU Member States.[63] The evacuations were intended to primarily target individuals who had ties to their respective destination country, for instance local staff members of Western forces or international organizations, as well as their immediate family members. However, the swiftness with which the evacuation started combined with the ongoing drawdown of international personnel meant the operation quickly became chaotic. Many of those evacuated did not fit into the targeted categories, and many who did were left behind.[64]

> *The highly discretionary and ad hoc nature of evacuations can allow destination-country policymakers to nimbly respond to an emergency situation.*

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59    Article 1(A)(2) of the Refugee Convention states that a refugee is a person who is "outside the country of his nationality." See United Nations, "Convention Relating to the Status of Refugees," July 28, 1951.

60    U.S. Department of State, Office of the Spokesperson, "Joint Statement on Afghanistan" (press release, August 15, 2021).

61    See U.S. Department of Homeland Security, *Operation Allies Welcome – Afghan Evacuee Report* (Washington, DC: U.S. Department of Homeland Security, 2021).

62    See oral statement to parliament of Dominic Raab, Foreign Secretary of the United Kingdom, *Afghanistan Response*, House of Commons, London, September 6, 2021.

63    See information available at Monica Pronczuk, "After Chaotic Evacuation, Afghans in the Netherlands Struggle to Find Stability," *The New York Times,* December 26, 2021.

64    See, for example, Dan De Luce, "U.S. 'Left Behind' 78,000 Afghan Allies in Chaotic Withdrawal: NGO Report," NBC News, March 1, 2022.

Evacuations can also be used when there is limited capacity in a country of origin or transit to process protection claims. For example, two Emergency Transit Mechanisms (ETMs)[65] have emerged in cooperation with the United Nations High Commissioner for Refugees (UNHCR) to evacuate vulnerable protection seekers from Libya, which UNHCR calls evacuation transit facilities.[66] The first began in November 2017, facilitating the evacuation of vulnerable protection seekers from detention in Libya to Niger.[67] As of February 2022, 3,710 protection seekers had been evacuated to Niger under the program.[68] The second began in 2019 based on a joint memorandum of understanding (MOU) between the Government of Rwanda, the African Union, and UNHCR to facilitate evacuations from Libya to Rwanda.[69] As March 30, 2022, approximately 900 protection seekers had been evacuated under this program.[70]

In the Americas, a variant of the ETM model known as the Protection Transfer Arrangement (PTA) was initiated in 2016 by the United States and UNHCR in response to the increasing number of people fleeing El Salvador, Honduras, and Guatemala.[71] Based on a MOU between UNHCR, the International Organization for Migration (IOM), and Costa Rica, the arrangement has three aims: first, to provide protection to individuals at high risk; second, to spare them from undertaking dangerous journeys in search of protection and mitigate risks of trafficking; and third, to foster regional responsibility-sharing for humanitarian needs. The PTA offers 200 particularly vulnerable nationals from the three countries transit facilitated by UNHCR through Costa Rica at any one time, with a maximum stay in Costa Rica of six months while their cases are processed. However, the limited numbers allowed to be evacuated to Costa Rica, the length of time it takes for protection seekers to be resettled from Costa Rica to third countries, and associated costs limit the PTA's reach to only those most at risk.[72]

These various humanitarian evacuations all rely on international cooperation with third countries willing to act as transit sites and temporarily admit protection seekers following an accelerated screening in the country of origin. In its evaluation of the PTA, for example, UNHCR concluded that the capacity and acceptance of transit countries, in this case Costa Rica, are crucial factors for determining the effectiveness of such mechanisms.[73] The importance of international cooperation with transit countries is also reflected in recent evacuations from Afghanistan, during which countries ranging from Albania to the United Arab Emirates, with various levels of experience hosting refugees and some with no ties to the conflict in Afghanistan, have temporarily hosted evacuated Afghans on behalf of the United States.[74] And the ETMs

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65 Emergency Transit Mechanisms allow for the safe transit of asylum seekers to a third country without hosting individuals in specific locations, as opposed to emergency transit centers, which house asylum seekers in specific locations. These centers are similar to external processing centers, discussed in Section 3.C.

66 See UNHCR, "Establishing Temporary Evacuation Facilities for Onward Resettlement" (information note, Annual Tripartite Consultations on Resettlement, Geneva, June 28–30, 2007).

67 See UNHCR, "Emergency Transit Mechanism" (fact sheet, May 2021). See also Laura Lambert, "Extraterritorial Asylum Processing: The Libya-Niger Emergency Transit Mechanism," *Forced Migration Review* 68 (2021): 18–21.

68 UNHCR, "Niger" (operational update, February/March 2022).

69 See further Hanson Gandhi Tamfu, "Rwanda, the African Union and UNHCR Extend Agreement to Support the Emergency Evacuation of Refugees and Asylum-Seekers from Libya," UNHCR, November 5, 2021.

70 UNHCR, "First Evacuation Flight of 2022 from Libya to Rwanda Brings over 100 Asylum Seekers to Safety," updated March 30, 2022.

71 See further Emmanuelle Diehl, *Evaluation of Effectiveness of the Protection Transfer Arrangement in Central America* (Geneva: UNHCR, 2018).

72 Susan Fratzke and Andrea Tanco, *Humanitarian Pathways for Central Americans: Assessing Opportunities for the Future* (Washington, DC: Migration Policy Institute, 2022).

73 Diehl, *Evaluation of Effectiveness of the Protection Transfer Arrangement*.

74 This list includes Albania, Bahrain, Canada, Chile, Colombia, Costa Rica, Ecuador, Guyana, India, Kuwait, Mexico, Netherlands, North Macedonia, Poland, Portugal, Qatar, Rwanda, Singapore, Uganda, and the United Arab Emirates. See Tan, "The Temporary Hosting of Evacuated Afghans in Third Countries."

for migrants in Libya would not exist without UNHCR's paramount role in conducting the procedures, along with EU funds through the Emergency Trust Fund for Africa.[75]

Getting third countries to agree to these mechanisms often requires addressing concerns that protection seekers will be left in transit countries and responsibility for them to those countries' governments. These arrangements therefore depend on resettlement as a follow-up mechanism after evacuation to transit countries,[76] and thus on destination countries providing sufficient resettlement places so that eligible protection seekers are not left in transit countries. But due to the nature of evacuations, especially in contexts such as Libya where it may not be possible to conduct status determination before evacuating migrants, some evacuees may not qualify for protection upon vetting of their claims and may thus be ineligible for onward resettlement. Niger encountered this issue, left to assume responsibility for rejected asylum seekers, especially those who posed security risks.[77] By contrast, the Rwandan ETM envisions some protection seekers being able to integrate into Rwandan communities, a provision that has since been included in the UK-Rwanda deal.[78] But for many countries, the possibility of some protection seekers being left behind and becoming their responsibility can act as a disincentive to participate.

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**BOX 2**
**Secondary Access to (Long-Term) Protection: The Role of Resettlement as a Follow-up Mechanism in External Processing Models**

Resettlement is one of UNHCR's three "durable solutions" for displacement, together with local integration into the communities where displaced individuals receive protection and voluntary repatriation to their countries of origin. Traditional UNHCR-run resettlement screenings involve individuals who are already found to be in need of protection. These protection seekers have found at least temporary refuge in a first country of asylum. Resettlement of such individuals offers secondary access to longer-term protection in a destination state.

Resettlement can also be a necessary follow-up mechanism in external processing models. A prominent example is the resettlement process following the Comprehensive Plan of Action (CPA), a multilateral framework in place from 1989 to 1997 that sought to tackle the maritime flight of Indochinese refugees. The CPA addressed the situation of Vietnamese and Laotian individuals displaced in Southeast Asia through refugee screenings in countries of first asylum in cooperation with UNHCR, followed by resettlement or return procedures, depending on the outcome.

Sources: Alexander Casella, *Managing the "Boat People" Crisis: The Comprehensive Plan of Action for Indochinese Refugees* (New York: International Pease Institute, 2016); W. C Robinson, "The Comprehensive Plan of Action for Indochinese Refugees, 1989 - 1997: Sharing the Burden and Passing the Buck," *Journal of Refugee Studies* 17, no. 3 (2004): 319–333; Riona Moodley, "Rethinking 'Regional Processing': Could the Lessons Learned from the Comprehensive Plan of Action for Indochinese Refugees (CPA) Offer a Roadmap for International Cooperation in Response to 'Regional' Refugee Situations?" (University of New South Wales Law Research Paper No. 22-4, January 1, 2022).

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75  UNHCR, "Emergency Transit Mechanism."
76  This is different from "emergency resettlement," a form of UNHCR-led resettlement with shorter deadlines and faster processing times.
77  Laura Lambert, "Who Is Doing Asylum in Niger? State Bureaucrats' Perspectives and Strategies on the Externalization of Refugee Protection," *Anthropologie & Développement* 51 (2020).
78  Tamfu, "Rwanda, the African Union and UNHCR Extend Agreement"; Leonie Jegen and Franzisca Zanker, "Spirited Away: The Fading Importance of Resettlement in the Emergency Transit Mechanism in Rwanda" (commentary, Centre for Africa-Europe Relations, October 28, 2019).

## Practical and Procedural Challenges

As emergency evacuations take place during situations of urgent human rights risks and are often conducted directly from countries of origin, they raise several legal and practical challenges. The effectiveness of in-country processing depends, among other things, on the scope of eligibility criteria and the structure of the application process, including processing times and the existence of individual safeguards.[79] This section focuses on two key issues: the need for specific safeguards and international cooperation to mitigate the risks of in-country processing, and the potentially discriminatory effects of narrow eligibility criteria in emergency evacuations.

### In-Country Procedures and Their Dangers

The safety and effectiveness of emergency evacuations that rely on in-country processing depend on how responsive the program's design is to its context. Two historic examples of U.S.-led in-country processing highlight this contrast: the Orderly Departure Program (ODP), which ran from 1979 into the 2000s, for the screening and resettlement of protection seekers following the Vietnam war and the in-country processing program for individuals fleeing Haiti after a military coup d'état in 1991. The ODP saw 523,000 Vietnamese protection seekers admitted into the United States (and more to other countries) and was operated on the basis of an MOU between UNHCR and Vietnam, with the close involvement of the U.S. government.[80] While the ODP was initially restricted to family members of U.S. citizens, former U.S. government employees, and other individuals with close ties to the U.S. presence in Vietnam before 1975, it initiated a longer history of in-country processing from Vietnam and movement to the United States with broader admission criteria after 1989. The ODP is generally seen as an in-country processing success story, given its key role in resolving this displacement and finding durable solutions for a large population, although its success only materialized after several years of operation, continuing long after the end of the Vietnam war and of any emergency situation.[81]

The in-country processing program for protection seekers from Haiti operated from 1992 to 1995, with U.S. application centers at three different locations in Haiti. In contrast to the Vietnam case, this program operated under difficult political and safety conditions, with protection seekers exposed to threats to their physical safety due to the ongoing conflict.[82] In particular, applying for in-country processing at the U.S. embassy in Port-au-Prince carried significant danger, requiring protection seekers to repeatedly pass security checks to enter the city and to risk accessing the U.S. embassy for multiple interviews close to police and military facilities.[83]

The cases of Haiti and Afghanistan reveal further challenges for in-country processing programs operating in the face of an ongoing conflict. The operation of evacuations can be complicated by general security risks as well as a destination state's lack of operational presence in the country. When programs do not use accelerated procedures and instead require in-person applications and/or rely on lengthy processing times with several interviews and screenings, for instance, this can perpetuate dangerous situations or even place

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79    See Hipsman and Meissner, *In-Country Refugee Processing in Central America*, 1.
80    Higgins, "Safe Journeys and Sound Policy," 13–14.
81    Higgins, "Safe Journeys and Sound Policy," 14.
82    For an overview of both programs, see Hipsman and Meissner, *In-Country Refugee Processing in Central America*.
83    Bill Frelick, "In-Country Refugee Processing of Haitians: The Case Against," *Refuge: Canada's Journal on Refugees* 21, no. 4 (2003): 66–72.

applicants under additional threats, as in the case of Haiti. To mitigate these risks, application procedures need to be accelerated, streamlined, and digitalized as far as possible, much in the same way this is needed for humanitarian visas processed at embassies (see Section 3.A.). The challenge is balancing this flexibility and swiftness with sufficient vetting and state discretion.

*Selectivity during Crisis*

While an asset for rapidly responding to crisis situations, the wide margin of discretion states have when implementing emergency evacuations is in tension with the dangerous and often-chaotic circumstances surrounding them. Narrow eligibility criteria and a lack of transparency in the admission process can undermine access for individuals most in need of evacuation. The operation of evacuation programs may be discriminatory where they arbitrarily grant access to selected individuals and not otherwise eligible persons. For instance, the Haiti evacuation model focused on Haitian elites, such as former government officials and journalists, denying access to safety to lower-class Haitians equally in need of protection.[84] Similarly, the UNHCR evaluation of the PTA concludes that the admission criteria may not match "the socio-political context of heightened risks" in the countries of origin and therefore not benefit those most in need of an evacuation.[85] In contrast, while the ODP initially prioritized certain Vietnamese protection seekers, over time its scope became far broader, allowing a larger population to apply. Finally, in the Afghanistan evacuation, the situation was so chaotic that it was unclear what the eligibility requirements were, how one could get on an approved list, and whether those lists were being consistently used to determine departures.

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As a German court has found, the risk of discrimination is high. An Afghan who served as local staff for the German development cooperation agency (GIZ) was denied a visa, along with his family, under the German evacuation for local staff members. Upon appeal, the Administrative Court of Berlin ruled that Germany's discretion was limited in this case and the visas had to be granted based on the right to equal treatment as enshrined in Article 3(1) of the *German Basic Law*.[86] While this is a successful case of enforcement of individual rights in an evacuation, there is nonetheless a de facto lack of individual rights in many programs.[87]

## C.    *Model III: External Processing Centers in Third Countries*

External asylum processing centers are often considered highly controversial policy approaches identified with deterrence-driven models involving the forcible transfer of protection seekers to third states after reaching a destination country. However, the establishment of processing centers that at-risk individuals

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84    See Hipsman and Meissner, *In-Country Refugee Processing in Central America*, 13.
85    Diehl, *Evaluation of Effectiveness of the Protection Transfer Arrangement*, iv.
86    See Administrative Court of Berlin, "Beschluss der 10. Kammer vom 25 August 2021 (VG 10 L 285/21 V)," August 25, 2021.
87    See Section 2.B., pointing out that the lack of procedural rights is a general issue of external processing schemes.

can reach *before* arriving in a destination state or region may hold potential to expand rather than restrict access to protection.[88] Such a center would receive asylum seekers along the migration route and could involve destination-country authorities conducting some or all of an asylum procedure, as well as providing humanitarian assistance and shelter while a claim is being processed. While this type of external processing center remains unrealized, the proposals that have been discussed as well as the practices from related deterrence-focused models highlight an array of legal and practical challenges that would need to be overcome for such a center to succeed.

## External Processing Center Proposals and Practices

The most fertile political debate on external processing through the establishment of extraterritorial asylum centers has occurred in the European Union since the 1980s.[89] However, European authorities have never implemented the concept, due in part to the absence of a joint processing mechanism at the EU level, which renders external processing "technically, legally, and practically complicated."[90] While the EU Agency for Asylum (EUAA) has a mandate to assist Member States in conducting asylum procedures, the power to grant protection remains with Member State authorities. This means that without an agreement among Member States to either collaborate on such a center or cede authority for granting protection to EU institutions, a fully-fledged EU-run external asylum center is legally unworkable at present.

Nevertheless, proposals for external processing centers have persisted. In 2003, the British government put forward its New Visions for Refugees,[91] proposing extraterritorial processing as a way of decreasing the number of asylum applications in EU territory.[92] In 2009, France and Italy suggested partnerships with countries of origin and of transit to find "innovative solutions for access to asylum procedures," including by taking people back to Libya to process their claims extraterritorially.[93] This discussion reignited after the boat tragedy of Lampedusa in October 2013, when hundreds of people lost their lives trying to reach the European Union.[94] Once more, the Italian prime minister called for the establishment of refugee camps in Libya,[95] and the German interior minister suggested the implementation of "welcome centers" in North

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88   Moodley, "Rethinking 'Regional Processing.'"

89   See UN General Assembly, "International Procedures for the Protection of Refugees: Draft Resolution/Denmark" (Denmark draft resolution. November 12, 1986). See further Gregor Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones," *European Journal of Migration and Law* 5, no. 3 (2003): 312; Violeta Moreno-Lax, "The External Dimension," in *EU Immigration and Asylum Law (Text and Commentary): Volume 3: EU Asylum Law*, eds. Steve Peers, Violeta Moreno-Lax, Madeline Garlick, and Elspeth Guild (Leiden: Brill Nijhoff, 2015), 649 ff. See also Carl Levy, "Refugees, Europe, Camps/ State of Exception: 'Into The Zone,' the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-Seekers (Theories and Practice)," *Refugee Survey Quarterly* 29, no. 1 (2010): 92, 109.

90   Martina Stevis, "The EU at a Migration Crossroads: Speaking with Cecilia Malmström," *The Wall Street Journal*, June 26, 2014.

91   UK Home Office, "A New Vision for Refugees" (summary, March 7, 2003).

92   Alexander Betts, "The International Relations of the 'New' Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR," *Refuge: Canada's Journal on Refugees* 22, no. 1 (2004): 58.

93   Council of the European Union, "Migration Situation in the Mediterranean: Establishing a Partnership with Migrants' Countries of Origin and of Transit, Enhancing Member States' Joint Maritime Operations and Finding Innovative Solutions for Access to Asylum Procedures" (council document 13205/09, Brussels, September 11, 2009), 11; Marion Jaillard et al., *Setting up a Common European Asylum System: Report on the Application of Existing Instruments and Proposals for the New System* (Brussels: European Parliament, 2010), 481 ff.

94   UNHCR, "UNHCR Shocked by Boat Tragedy Off Lampedusa" (press release, October 3, 2015).

95   ANSAmed, "Italian Premier Renzi Calls for UN Refugee Camps in Libya," ANSAmed News, May 20, 2014.

African countries.[96] In 2017, French President Emmanuel Macron called for the establishment of asylum "hotspots" in North Africa as an extension of the EU hotspot approach, which contained asylum seekers in Greek and Italian points of entry.[97] Discussions of external processing were revived once again in 2018, this time by a UNHCR-IOM proposal for "regional disembarkation arrangements," through which individuals rescued at sea while trying to reach Europe would be transferred to non-EU third states where their asylum claims would be processed.[98] As recently as February 2023, the German government floated plans to establish external processing centers for protection seekers en route to Europe.[99] Invariably, however, these proposals have raised controversy for overly restricting access to territorial asylum, or not received the necessary support from proposed host or EU states.

*These proposals have raised controversy for overly restricting access to territorial asylum, or not received the necessary support from proposed host or EU states.*

While this report focuses on external processing *before* protection seekers reach a destination state, there are a number of lessons to be learned from previous practice of external processing *after* arrival. Most notable are the U.S. transfer of Haitians and other asylum seekers to Guantanamo Bay, Cuba, since the 1990s[100] and two iterations of Australia's "Pacific Solution." Under the latter approach, asylum seekers intercepted at sea en route to Australia have been forcefully transferred to Nauru, and previously also Papua New Guinea, to process their asylum claims and supposedly receive protection. At the time of transfer, both countries lacked a domestic legislative framework for refugee status determination, and neither had prior direct experience processing asylum claims.[101] Individuals transferred to these countries have been detained in closed detention centers operated and serviced by private companies contracted by the Australian government, in conditions that breach international human rights law.[102] Such approaches generally aim to deter further arrivals or to shift responsibilities from a destination state to another country, and thus to restrict rather than expand refugee protection.

## Legal and Practical Challenges

The lack of progress toward establishing protection-sensitive external processing centers is a reflection of the numerous obstacles to their successful design and implementation. First, as discussed in Section 2.B., external processing centers are subject to extraterritorial jurisdiction, provided that the destination state controls the area on which an external processing center is placed. For example, the United States

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96    Torsten Kleditzsh, "Die haben gelernt zu töten: Interview with Thomas de Maizière," *Die Freie Presse*, November 27, 2014. For a critical view of this idea, see, among others, Pro Asyl, "EU Justice and Home Affairs: Sham Debate about 'Camps in Africa'" (press release, March 12, 2015).

97    BBC News, "EU Migrant Crisis: France Plans Asylum 'Hotspots' in Libya," BBC News, July 27, 2017. The hotspot approach was a Union–Member State hybrid method for registering, identifying, and filtering new arrivals into asylum and return procedures. See Danish Refugee Council, *Fundamental Rights and the EU Hotspot Approach* (Copenhagen: Danish Refugee Council, 2017).

98    European Council, "Non-Paper on Regional Disembarkation Arrangements" (nonpaper, 2018).

99    Ben Knight, "Germany Mulls Sending Refugees to Africa," Deutsche Welle, February 10, 2023.

100   Ghezelbash, *Refuge Lost,* 103–10; Gleeson and Yacoub, "Cruel, Costly and Ineffective."

101   UNHCR, *UNHCR Mission to the Republic of Nauru, 3–5 December 2012* (Lyons, Australia: UNHCR Regional Office, 2012). See also UNHCR, *UNHCR Mission to Manus Island, Papua New Guinea 15-17 January 2013* (Lyons, Australia: UNHCR Regional Office, 2013).

102   UN Human Rights Council, "Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru" (UN Doc. A/ HRC/35/25/Add.3, April 24, 2017), paras 72–84; UN Human Rights Committee, "Concluding Observations on the Sixth Periodic Report of Australia" (UN Doc. CCPR/C/AUS/CO/6, December 1, 2017), paras 35–36.

exercises extraterritorial jurisdiction over Guantanamo Bay on the basis of a territorial lease.[103] Equally, where a destination state exercises force or other physical control, such as detention, over asylum seekers, it exercises extraterritorial jurisdiction.[104] For example, UN treaty bodies have determined that Australia exercised extraterritorial jurisdiction over asylum seekers transferred to Nauru and Papua New Guinea.[105] This means that the United States and Australia have legal obligations to protection seekers; however, these have not been upheld in practice—and are not necessarily acknowledged by the countries themselves. In the Pacific, for example, the use of arbitrary detention in the Nauru and Papua New Guinea centers has been a major source of human rights violations.[106] In the case of the UK-Rwanda agreement, where the expectation is that the asylum procedure will be conducted entirely by Rwandan authorities, the United Kingdom will likely not exercise jurisdiction after asylum seekers' transfer to Rwanda.

The question of extraterritorial jurisdiction is more complicated in the EU context, as the EU CFR may apply should an external processing center be operated by an EU agency, such as the EUAA or Frontex (the European Border and Coast Guard Agency). However, because only individual EU Member States have the legal capacity to make asylum decisions, any EU-operated external processing center would need to include Member State decisionmakers who would make the final decision on individual claims. EU agencies, notably the EUAA and Frontex, could play important operational and support roles. While the EU CFR can apply extraterritorially, key components of the European Union's body of asylum laws are territorially bound and only enter into force within EU territory, notably the Asylum Procedures Directive and Reception Conditions Directive.[107] Still, EU asylum law provides guidance on important areas of regulation, such as procedural rights and reception standards.

A second set of practical, political, and legal challenges is rooted in the level of cooperation required between a destination country or region and the state hosting the external processing center. A formal agreement between the destination and host countries would be necessary to establish clear lines of legal and operational responsibility, including with respect to adequate reception, accommodation, and security arrangements. Clear lines of responsibility over asylum seekers transferred under the Pacific Solution were badly lacking, with UNHCR reporting a "lack of clarity as to the legal and operational roles and responsibilities" in Nauru.[108] These agreements should also address asylum seekers' legal status in the host country while their claims are being processed. Moreover, an independent monitoring mechanism is a necessary safeguard to ensure respect for the rights of asylum seekers during external processing.

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103  Governments of the United States and Cuba, "Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations," February 23, 1903.

104  See, for example, *J.H.A. v. Spain*, para 8.2; *Hassan v. the United Kingdom*, para 136.

105  Committee Against Torture, "Concluding Observations on the Fourth and Fifth Periodic Reports of Australia" (CAT/C/AUS/CO/4-5, November 26, 2014); UN Human Rights Committee, "Concluding Observations on the Sixth Periodic Report of Australia."

106  *Namah v. Pato (Minister for Foreign Affairs and Immigrations), National Executive Council, and Independent State of Papua New Guinea* (Papua New Guinea Supreme Court of Justice, 2016), 13.

107  "Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)," *Official Journal of the European Union* 2013 L180/60, June 26, 2013, articles 3(1) and (2). According to Article 3(2), the directive shall not apply to requests for diplomatic asylum. "Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast)," *Official Journal of the European Union* 2013 L180/96, June 26, 2013, article 3(1).

108  UNHCR, *UNHCR Mission to the Republic of Nauru*, 1.

Finally, as with emergency evacuations that rely on the engagement of third countries through which evacuees transit, the agreements underpinning external processing centers must plan for all asylum seekers to have a final outcome. Deterrence-focused practices, such as the Pacific Solution, emphasize that asylum seekers—even those deemed to have a valid claim—will not be able to access the desired destination country, in this case Australia. Yet, because this arrangement lacks durable solutions for individuals recognized as refugees in Nauru and Papua New Guinea, it has left many in limbo for years on end.[109] This highlights the need for destination states to guarantee solutions for the asylum seekers they process. Additionally, cooperating states would need to closely coordinate to ensure the effective return of individuals whose asylum claims are rejected to their countries of origin following due process, in full respect of their human rights.

# 4    Conclusion and Recommendations

With policymakers increasingly looking to extend migration and border controls beyond the bounds of their nation's territory, external processing could provide a form of access to protection that holds benefits for protection seekers, states, and the international community. It could offer individuals legal and safe access to protection without having to first travel irregular and dangerous flight routes, as envisioned under the United States' Central American Minors program, and could potentially help combat smuggling and trafficking. States, for their part, would have an opportunity to establish effective responsibility-sharing, such as the relationship facilitated by UNHCR for Niger and resettlement states under the Emergency Transit Mechanism, which could help to build more robust migration partnerships. And external processing can help streamline operations, allowing for more orderly arrivals following security and health checks, such as under the U.S.-led Orderly Departure Program in the wake of the Vietnam war. In turn, this could enhance receiving societies' acceptance of the newcomers and prevent the criminalization of irregular migrants.

*The extent to which external processing provides more rather than fewer opportunities for protection depends on the model and manner of implementation.*

But the extent to which external processing provides more rather than fewer opportunities for protection depends on the model and manner of implementation. In particular, more opportunities exist when:

► **External processing is additional to territorial asylum.** When governments effectively and lawfully implement external processing programs and these exist in addition to territorial asylum, they can be a valid alternative to irregular migration. Given the political draw of conditional models that have direct or indirect deterrent intentions, however, policymakers will need to show that the benefits of an additional model and the costs of a conditional model, including the severe infringements of individual human rights, outweigh the perceived benefits of conditional models. This may require compromise on certain aspects of additionality, such as how to process territorial asylum applications from individuals who have already been denied protection under external processing procedures.

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109  Gleeson and Yacoub, "Cruel, Costly and Ineffective."

► **Protection seekers are guaranteed robust procedural rights.** Granting protection seekers access to fair and nondiscriminatory procedures, including access to independent information and legal remedies in case they encounter discrimination or have a claim rejected, is crucial to ensuring that external processing is used in a protection-sensitive manner. But the legal and fiscal costs of these measures may discourage policymakers from considering a protection-sensitive model in the first place. Sharing responsibility between destination countries and host or third countries could help mitigate potential costs and overcome some of these objections.

► **Implementation of external processing is done in a coordinated, localized manner.** The design of external processing programs should be sensitive to the local context in host and partner countries and address likely safety issues for protection seekers. This will require robust consultation with local stakeholders, including targeted populations, host governments, and international actors that can help facilitate safe passage and processing.

As policymakers navigate the political, legal, and practical challenges presented by different external processing models, they may have to prioritize some aspects of protection over others. But in the long run, external processing could help expand protection overall. For example, while restrictive eligibility criteria can limit the scale of external processing programs, this limitation may be critical to getting governments to implement such programs in the first place. The challenge moving forward will thus be to find the appropriate balance between these considerations and, where possible, to expand narrow programs to reach a wider population.

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# Acknowledgments

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