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Executive summary

The loss of over 700 lives in a single incident in the Mediterranean on 18 April 2015, following a six-day period in which over 10,000 migrants were rescued, has sparked renewed debates about whether extraterritorial processing – sometimes called ‘offshore processing’ – might save lives at sea.¹

Despite a plethora of European proposals over the past 20 years, none has ever been sufficiently fleshed out to receive adequate support to be implemented. Legal and practical concerns have proven insurmountable. There is also recognition that while regional or other external processing arrangements may provide a useful complement to other protection mechanisms, they are not a solution in and of themselves.

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1 Introduction

Since the mid-1990s, European States have perennially raised the idea of regional processing centres. This idea gained momentum in 2003 when the UK put forward a proposal to create centres outside Europe in which asylum seekers could have their protection claims considered, which was ultimately rejected. With very large numbers of people crossing the Mediterranean, the establishment of such centres has again been mooted as a way to assist people closer to their countries of origin and thereby prevent dangerous boat journeys. At the same time, there are concerns that this will contract the protection space within Europe even further.

The development of an externalized processing regime for the EU would mark a ‘paradigm shift in EU asylum and migration policies’.² Legally, it is difficult to see how such a scheme could comply with EU Member States’ obligations under international and EU law. Practically, it is highly unlikely that the creation of external processing centres will stop dangerous boat journeys and loss of life at sea. Unless and until processing standards in such centres are consonant with those required by EU law, and durable solutions are forthcoming, then asylum seekers will continue to risk their lives in search of protection – especially since the European Charter of Fundamental Rights guarantees the right to seek asylum within the EU.³ And for migrants crossing the Mediterranean in search of better opportunities, asylum processing centres will provide no solution at all. It is therefore naive to assume that the creation of an external processing regime would stop people from getting on boats.

Arguably, the EU already has its own form of regional protection in place: the Common European Asylum System, which seeks to create a harmonized EU-wide approach to asylum seekers and refugees. The focus of the present paper, however, is on proposals to process asylum seekers outside the EU.⁴ Whether described as ‘external’, ‘extraterritorial’, ‘offshore’, ‘transit’ or ‘regional’ processing, the proposals have generally been based around two main ideas:

- x the creation of regional processing areas or zones in regions close to asylum seekers’ countries of origin.⁵ These would be ‘safe’ areas to which people could flee and remain until either return home or resettlement elsewhere was possible;
- x the creation of transit processing centres in countries just outside the EU. Asylum seekers arriving in, or intercepted en route to, EU Member States would be transferred there for processing, according to burden-sharing principles.⁶

Indeed, despite some media and political interest in the idea of extraterritorial processing in the aftermath of the April 2015 Mediterranean incident,⁷ it is telling that this has not featured in any of the formal responses by the EU, the European Council, or the European Parliament.⁸ Whether this indicates recognition that it may be inconsistent with EU Member States' legal obligations, or simply that States are not prepared to commit themselves to accepting refugee quotas, it highlights the legal and practical challenges of creating such a scheme.

2 Policy rationale

At the heart of the EU's regional processing proposals lies a tension between protection and control.⁹ Tighter border controls may limit the numbers of irregular migrants reaching the EU, but they create obstacles for asylum seekers in need of protection.¹⁰ In 2014, 600,000 people applied for asylum in the EU, which was a record high.¹¹

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there was some interest from the UK, Poland and Austria. However, the Scandinavian countries condemned it, questioning in particular the legal basis for transferring asylum seekers to countries outside the EU.³⁵

To date, no regional or external processing arrangement has received sufficient support to be implemented – either by EU Member States, or potential host States. Concerns have been raised about various matters, including:

The European Court of Human Rights has made clear that States' non-refoulement obligations apply wherever their officials act, whether inside a State's territory or outside it, including on the high seas.⁴⁶ This obligation means that States must not expose individuals to a real risk of being persecuted, tortured, arbitrarily deprived of life, or exposed to inhuman or degrading treatment or punishment – either by sending them directly to the country in which such harm is feared, or to any other country where they might be at risk (including via removal to the place where harm is feared). It means that States cannot lawfully remove an individual to other territories for processing unless it can be shown, on a case-by-case basis, that the particular territory is 'safe'.⁴⁷

In effect, this means that there needs to be a separate procedure to examine the legality of a decision to transfer an asylum seeker to a processing centre.⁴⁸ This may undercut any deterrence message that a regional scheme might be designed to send.⁴⁹ It may also be very time-consuming and resource intensive. For example,

- x what would happen after the refugee status determination procedure? How would burden sharing operate in relation to settlement, resettlement or return of failed asylum seekers? What would happen to those whose country of origin could not be identified? What would happen to those who could not be returned?
- x where should the centres be located?
- x in what conditions should persons be held? Should these centres be open or closed facilities, and what should the level of reception and accommodation be?⁵²

Participating States would need to provide assurances that they would respect decisions and act on the outcomes. There would also need to be a clear process for distributing refugees in the EU, as well as for returning those found not to have a protection need.

5 Comparisons with Australia and the United States

While the idea of creating external processing centres is neither new nor unique, its practical implementation is less common. Australia has pioneered the systematic use of offshore processing in third countries (Nauru and Papua New Guinea) which entails violations of international law. Indeed, far from providing satisfactory answers to the legal concerns raised above, Australia's offshore processing arrangements with Nauru and Papua New Guinea have reinforced why they are such pressing matters. Concerns about refoulement, coercion

Neither the US nor Australia's externalized processing regimes can be easily equated with EU proposals. First, they are not true 'regional' approaches pursued by a number of States with a common objective. The US has a special lease over Guantanamo Bay which enables it to operate a processing centre there. Australia's system is premised on bilateral agreements with each participating State, rather than a multilateral process in

Finally, bringing the discussion back to Europe, Professor Guy S Goodwin-Gill from the University of Oxford has proposed the creation of a European Migration and Protection Agency. His vision is not about externalized processing, but rather about enhancing protection within Europe itself: in other words, how the 28 EU Member States might themselves create a functional regional processing regime. Such an agency would replace the national procedures of the EU Member States to provide a truly regional approach to protection.⁶⁶ This is reminiscent of a 2003 UNHCR

Endnotes

¹ European Parliament, Joint Motion for a Resolution on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies 2015/2660(RSP) (28 April 2015)

<[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BMOTION%2BP8-RC-2015-0367%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=ENm\(o\)3\(n\)-1/ FEa R-1\(T\)-17\(\)-9\(on \)3\(-1\(T\)-17\)-8\(i\)3](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BMOTION%2BP8-RC-2015-0367%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=ENm(o)3(n)-1/ FEa R-1(T)-17()-9(on)3(-1(T)-17)-8(i)3)

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0367%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=ENm(o)3(n)-1/ FEa R-1(T)-17()-9(on)3(-1(T)-17)-8(i)3

European Council, 'Special Meeting of the European Council, 23 April 2015: Statement (23 April 2015) <<http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/>>; European Parliament, Joint Motion for a Resolution on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies 2015/2660(RSP) (28 April 2015) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BMOTION%2BP8-RC-2015-0367%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN>>; European Commission, 'A European Agenda on Migration' (Communication) COM (2015) 240 final, 13 May 2015 <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf>. The Agenda (at 5) includes a statement about the planned establishment of a 'pilot multi-purpose centre' in Niger by the end of 2015: 'Working with the International Organisation for Migration (IOM), the UNHCR and the Niger authorities, the centre will combine the provision of information, local protection and resettlement opportunities for those in need. Such centres in countries of origin or transit will help to provide a realistic picture of the likely success of migrants' journeys, and offer assisted voluntary return options for irregular migrants.' It is unclear precisely what its function would be, but it is clear that this is envisaged as something very different from an extraterritorial processing centre for the EU.

⁹ See eg, Advisory Committee on Migration Affairs (Netherlands), External Processing: Conditions applying to the Processing of Asylum Applications outside the European Union (Advisory Report No 32, 2010) 46 <<http://www.acvz.org/publicaties/Advies-ACVZ-NR32-ENG-2010.pdf>>.

¹⁰ Ibid 13.

¹¹ 'A European Agenda on Migration', above n 8, 12.

¹² See eg Committee on Migration, Refugees and Population, Parliamentary Assembly of the Council .-15(32)JTJ 0 T

¹⁷ Summary Record of the 39th Meeting, UN GAOR, 3rd Comm, 41st sess, 39th mtg, UN Doc A/C.3/41/SR.39 (7 November 1986) para 33.

¹⁸ Ward, above n 5

³⁴ Ward, above n 5, 21.

³⁵ Advisory Committee on Migration Affairs, above n 9, 17.

³⁶ 'Towards More Accessible, Equitable and Managed Asylum Systems', above n 26, 6.

³⁷ Advisory Committee on Migration Affairs, above n 9, 18. See also EU Mobility Partnerships with Morocco (June 2013), Tunisia (March 2014), Moldova and Cape Verde (2008), Georgia (2009), Armenia (2011) and Azerbaijan (2013): <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements/index_en.htm>.

³⁸ See *Hamza & Ors v Italy* (C-69/02) [2003] ECR I-1163, paras 12-14. 021[auo)-1epo12(n) -6(-) .337

⁴⁹ Noll et al, above n 19, 61.

⁵⁰ UNHCR, 'UNHCR Recommendations on Important Aspects of Refugee Protection in Italy' (July

⁷⁵ For example, by triggering the 2001 EU Temporary Protection Directive: Council Directive 2001/55/EC of July 2001 on Minimum Standards for Giving Temporary Protection in the event of a Mass Influx of Displaced Persons [2001] OJ L 212/12.

⁷⁶ See eg Noll et al, above n 19; Italian Refugee Council, Access to Protection: A Human Right (October 2013) <<http://www.cir-onlus.org/images/pdf/rapporto%20epim.pdf>>; European Union Agency for Fundamental Rights, Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox (FRA Focus Document, February 2015) 5–6 <http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf>; Canada's 2015 resettlement target includes 4,500 to 6,500 privately sponsored refugees; Germany permits families to sponsor their Syrian relatives (by committing to covering transport and living costs).

⁷⁷ See generally European Council on Refugees and Exiles and Italian Council for Refugees, Exploring Avenues for Protected Entry in Europe (2012) 28–29 <<http://www.ecre.org/component/downloads/downloads/468.html>>; Noll et al, above n 19, 4. Austria, Denmark, France, the Netherlands Tes//n E /us7,an indsl(i)9(v)15(et)-1-9(v)orv Prok,4(i)-9(ng)-8(i(unc)pJ /

