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Externalised asylum and migration policies
European Parliament Subcommittee on Human Rights (DROI)

Introductory remarks by Michael O'Flaherty
Council of Europe Commissioner for Human Rights

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Chairperson,

Honourable Members,

Thank you for the invitation to engage with you today.

Migration is a phenomenon as old as humanity and people continue to migrate primarily by regular means, to seek asylum typically in their region of origin, and to return voluntarily when they no longer have a right to stay. This is demonstrated by the fact that, drawing on data from the European Commission, only some 4.5% per annum of all those who seek to migrate into the European Union (with the exclusion of Ukrainians) are to be considered for return. Yet, much emphasis is put on the purported need to provide "tough" responses and deter people from coming to Europe, and this is used to justify legalising previously unlawful measures or shifting asylum and migration functions elsewhere, often in the guise of so-called "innovative solutions".

And indeed, such solutions either exist today or are in development across a number of EU legal and policy files. Many of them are well summarised in the communication from the European Commission dated 29 January last, which insists that all actions of member states and of the Union itself be in full compliance with relevant EU, regional and international law.

To help states, and indeed the EU, to honour this commitment, I published a report last September examining three forms of "innovative solutions", all taking the form of externalisation of asylum and migration policy. First, looking at externalised asylum procedures. Second, at externalisation of return procedures. And third, at externalisation of border management.

I studied European and other practice. In so doing, I demonstrated that, as a matter of fact, little current practice is innovative. It follows on many precursors, including the experience of Australia with Nauru and Papua New Guinea, of the United States and Guantanamo Bay, of Israel and Rwanda.

And my key finding is that all such areas of cooperation are replete with human rights risk. Where externalisation initiatives have been implemented, serious human rights violations have been documented systematically.

Where they are being developed now, they may have wide-ranging harmful effects, extending from diminished procedural safeguards to fostering measures that can expose people to ill-treatment or

arbitrary detention. This does not mean that such external cooperation is never possible, but we need to face the risks with eyes wide open.

Turning then to each of the three areas.

First, externalised asylum procedures. I look at two distinct forms. First of these is the situation where the asylum procedures are undertaken by the country to which the asylum seekers are relocated. And the second concerns situations where the procedures are still conducted, albeit on foreign soil, by the externalising state. Both forms of externalisation raise multiple human rights risks, and according to UNHCR, should be exceptional. What is more, alternatives to territorial asylum are unlawful if they lead to responsibility-shifting or where they are not accompanied by adequate human rights safeguards. In theory, the second model could mitigate against some of the concerns, however some violations may still ensue, as in practice applying safeguards extraterritorially – think about access to judicial remedy – poses almost intractable challenges.

Turning to the second area, externalised return procedures. I refer in particular to the so-called “return hubs”. Among the principal human rights concerns are those arising where the removing state does not take into adequate consideration the individual risks in the country where the return hub is located, in terms, for instance, of respect for human rights and human dignity. There is also a clear risk that returnees may be left in circumstances of protracted uncertainty.

The third form regards externalisation of border management. And my concern here is with situations where states assist another state, for instance, with equipment, training or financial support, in circumstances where such assistance is likely to lead to serious human rights violations. Think, for instance, of when Libya, equipped with European speedboats, equipment and intelligence, attacks migrants in the sea and then subjects them to torture on land. I know that a colleague from OHCHR will shortly present a new report on this matter, which I welcome.

Now, across the various contexts and risk areas, I have issued, as a conclusion to my report, a number of key recommendations.

First, I recommend that states should explicitly adopt a precautionary approach. In other words, embed attention to human rights from the very outset. This can be done in particular by engaging transparently in human rights risk assessments and matching these with adequate mitigation strategies.

Second, states should assiduously honour clear legal principles, such as those prohibiting refoulement and torture, respecting the rights of the child, and employing detention only as a last resort.

Third, all externalisation actions should be on the basis of legally binding agreements providing for robust safeguards, on the basis of which specific externalisation initiatives can be challenged. And furthermore, externalisation strategies should assiduously avoid responsibility shifting to the receiving state.

Finally, states should develop adequate transparency, monitoring, and accountability mechanisms.

Allow me to conclude with two additional comments.

The first is an invitation to keep in mind the bigger picture: that migration is an area, a gateway, through which the rule of law can be eroded. As states search for innovative solutions, their glance is

currently turned to the European Convention on Human Rights and the practice of the Strasbourg Court. I urge states to proceed with great caution, consequent of the risks along the route they are embarked on.

My second comment is that, while we decry unchecked migration control enforcement on the other side of the Atlantic, we should no less reflect on our own practice. We must pause and ask whether the laws, policies and practices that we are introducing in Europe are consistent with our human rights obligations and respect the dignity of the people they are directed to.

I thank you for your attention, and I look forward to entering into more detail in any Q&A that we might have. Thank you.