Externalised asylum and migration policies and human rights law

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Externalised asylum and migration policies and human rights law

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Contents

Introduction 5

Key recommendations 9

Chapter 1 - Externalised asylum procedures 13

1.1 Introduction 13

1.2 Externalised asylum procedures carried out by the authorities of the country to which asylum seekers are transferred 16

1.3 Externalised asylum procedures carried out under the jurisdiction of the externalising member state itself 21

Chapter 2 - Externalised return procedures 23

2.1 Introduction 23

2.2 Gaps in fairness and efficiency of contemporary territorial asylum procedures as an impediment to externalised return procedures 24

2.3 Circumvention of procedural safeguards leading to unlawful expulsions 25

2.4 Persons left in protracted legal uncertainty 26

Chapter 3 - Overarching issues regarding externalised asylum and return procedures 29

3.1 Introduction 29

3.2 Detention 29

3.3 Transfers to externalised procedures following an extraterritorial rescue or interception 31

3.4 Risks to vulnerable groups 34

3.5 Council of Europe member states as hosts of externalised procedures 36

Chapter 4 - Externalisation of border management 37

4.1 Introduction 37

4.2 Containment policies and human rights impact 38

4.3 External migration control cooperation and the jurisdictional link in the case law of the Court 38
4.4 Actions aiding and assisting human rights violations by other countries 41
4.5 The expanding role of Frontex outside the EU area 42
Chapter 5 - Transparency, monitoring and accountability gaps 45
5.1 Introduction 45
5.2 Issues impacting on transparency 45
5.3 Inadequate or insufficiently elaborated human rights clauses 47
5.4 Barriers to effective monitoring 47
5.5 Accountability gaps 49
Chapter 6 - Conclusions 51
Chapter 7 - Recommendations 53
Endnotes 61

Introduction

External co-operation in relation to asylum and migration, especially when focusing on border securitisation, deterrence and the shifting of responsibility for providing protection, is often termed 'externalisation'. However, the term lacks a specific, legal definition, and is used differently by different actors; for example, the United Nations High Commissioner for Refugees (UNHCR) uses externalisation to refer to unlawful practices that lack safeguards and result in responsibility shifting where refugees and asylum seekers are concerned, which is distinct from lawful practices involving the transfer of responsibility for international protection.[1] Others, including in academia, use this concept more broadly for any shifting of state functions outside their territory, which can either be lawful or unlawful.[2]

Regardless of definition, external co-operation focusing on coercive measures – such as involuntary transfers, preventing departures from a country, limiting access to asylum, or detention – can have a serious impact on human rights.

Where already implemented, such measures have been found in specific situations to result in human rights violations in various countries worldwide. For example, there is abundant evidence of the harmful human rights impacts of Australia's policy of offshore processing of asylum seekers arriving by sea without a visa in Papua New Guinea and Nauru. On the basis of bilateral accords with the two countries, enacted first between 2001 and 2007 and then again from July 2013, thousands of people, including children, were subjected to prolonged and indefinite arbitrary detention in facilities built by Australia in the two countries, held in inhumane living conditions, deprived of appropriate medical care, exposed to physical and sexual assault, and left in uncertainty about their fate and the duration of their detention – which resulted in widespread, severe deterioration of their physical and mental health, and in the death of at least 12 people.[3] Similarly, Israel's attempts in the 2010s to force asylum seekers – mainly from Eritrea and Sudan – to go to Uganda or Rwanda, where they had no specific links, were the source of extensive criticism from a human rights perspective. Asylum seekers were pressured to accept a 'voluntary' return to the above-mentioned countries. Those who did, were often subjected to

abuse and forced to move onwards or left in a situation of protracted legal uncertainty in the destination state. Those who refused were faced with indefinite detention in Israel. Following intense domestic and international criticism, the policy was eventually abandoned.[4] Another example can be found in the interdictions of Haitian boat refugees by the United States in the 1990s, which involved efforts to keep them outside of US jurisdiction by transferring them to Guantánamo Bay, where US courts found they had "no substantive rights".[5] Reconfirmed and reinvigorated by successive administrations, the Guantánamo Migrant Operations Center continues to operate.[6]

As will be discussed in this report, currently Council of Europe member states appear to increasingly engage elements of such approaches, complementing other forms of externalisation that have been pursued by them over a much longer period.[7]

Externalisation policies may engage the responsibility of states, in particular with regard to the principle of non-refoulement, the right to life, freedom from torture and inhuman or degrading treatment, the prohibition of collective expulsion and arbitrary detention, as well as the right to access effective remedies, as guaranteed not only by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), but also under relevant United Nations (UN) treaties, as well as European Union (EU) primary legislation, including the Charter of Fundamental Rights.

This report examines key areas where the externalisation of asylum and migration policies by Council of Europe member states may lead to violations. It takes a holistic approach, focusing both on direct action by member states towards refugees, asylum seekers and migrants, and indirect action where member states support or act through other states. This indirect action raises jurisdictional questions under various legal instruments, especially the Convention, regarding member states' responsibility for violations ensuing from their support. While certain externalisation policies and practices may attempt to break or limit this jurisdictional link, approaches to jurisdiction differ along a range of human rights legal instruments to which member states are bound, and general international law prohibits them from aiding or assisting human rights violations of others. As such, even indirect action may trigger the responsibility of member states.

The Commissioner is aware of the various political and policy considerations that drive member states' pursuit of action in this area. These include arguments that such steps are necessary for security reasons, to ease pressures on asylum or reception systems, or to address wider public concern about levels of immigration. Furthermore, there are important

questions about the financial viability of external co-operation, which has seen enormous investments in recent years. While these arguments are often central in ongoing discussions about current and future activities by member states, this report limits itself to assessing the human rights impact of states' actions.

It does so in relation to three particularly prominent areas of international co-operation, where serious human rights issues are already evident or likely to arise: (1) external processing of asylum claims; (2) external implementation of return procedures; and (3) externalisation of border management to prevent irregular border crossings towards Europe. In all these areas, member states – individually and collectively, including through the EU – have recently accelerated their quest to find new solutions to the asylum and migration policy challenges they face. While these are sometimes referred to as *innovative* solutions, their core ideas have been debated for a long time. Some of these are characterised by the removal of human rights guarantees.

The specific activities carried out by member states vary widely in approach within each area, and, therefore, in their (current or potential) impact on human rights. This field is in constant flux, with new approaches being constantly developed and experimented with, especially in the areas of external asylum and return procedures. However, the relatively limited instances of actual implementation to date reflect the complexity and limited viability of some proposed approaches. This report does not examine each individual current or proposed externalisation activity in detail; instead, it draws on current examples that provide an evidentiary basis for concerns about human rights violations and then extrapolates potential risks inherent in future models. Neither does it purport to set out all human rights issues that may arise from externalised asylum and migration activities; rather, it focuses on key issues that the Commissioner has been able to identify from both current practices and recent proposals. He does this based on Council of Europe standards, as well as other international legal instruments binding on member states.

While not providing a comprehensive analysis of EU law or policy, this report touches upon certain aspects of EU-level law and policy as these intertwine with a significant number of Council of Europe member states' actions and responsibilities.

This analysis builds on guidance and comments already provided by others, including the EU Fundamental Rights Agency (FRA),[8] UNHCR,[9] academics and civil society organisations,[10] as well as the Commissioner's and his predecessors' analysis and perspective based on their extensive work in, and engagement with, member states around asylum and migration.[11]

It takes into account developments up to 15 August 2025.

Chapter 1 discusses key human rights implications resulting from externalised asylum procedures; Chapter 2 focuses on externalised return procedures; Chapter 3 addresses specific human rights issues arising more generally from the transfer of people to externalised (asylum or return) procedures, such as the role of detention and the impact of externalised measures on vulnerable groups; Chapter 4 covers the co-operation established with other states to prevent irregular border crossings; and finally, Chapter 5 deals with the overarching issue of a lack of transparency, monitoring and accountability relating to externalised policies. This is followed by the Commissioner's conclusions and then by detailed recommendations – an extract of which is reproduced here below.

Key recommendations

Member states should adopt a precautionary approach to external co-operation in relation to asylum, return and the prevention of irregular migration.

Such a precautionary approach would require member states to:

- Ensure that human rights play a decisive role in the choice of co-operation model and partner countries.
- Give consideration to whether certain models of externalisation are appropriate at all.
- Ensure that all co-operation activities are subjected to comprehensive human rights risk assessments and risk mitigation strategies.
- Review all existing externalisation activities to modify those adversely impacting on human rights, and to suspend or terminate those that cannot be modified to eradicate adverse impacts.
- Invest in rights-enhancing forms of international co-operation.

Member states should acknowledge clear, non-negotiable principles underpinning external co-operation.

In particular, member states should commit to:

- Refrain from any form of externalisation that would lead to refoulement, including any activity that would undermine access to territorial asylum procedures, result in people being transferred without having had access to a fair and effective asylum procedure, or expose people to torture, inhuman or degrading treatment or other serious violations.

- Not undertake any activities that would foreseeably exacerbate risks to human life and dignity along migration routes.
- Not subject children or other vulnerable persons to externalised procedures.
- Not develop externalisation activities that are reliant on deprivation of liberty, unless as a measure of last resort and in line with the principles of lawfulness, necessity and proportionality.

Member states should design activities with adequate human rights preconditions and safeguards in place, adapted to the specific model of externalisation.

Such preconditions should include:

- A clear legal basis for all transfer arrangements to externalised procedures, and any transfer being subject to an individualised assessment of risks in the host country and an effective opportunity to challenge the transfer decision.
- That externalised asylum procedures do not result in responsibility shifting, with transfers always subject to a rigorous and up-to-date assessment of the accessibility and functioning of the asylum system in the host state, including safeguards against onward refoulement.
- Limiting the use of externalised return procedures/return hubs to very specific cases (after a final decision on the merits of an asylum claim, and if a transfer would objectively increase the likelihood of an effective return), and with clear rules to prevent transferred individuals from being left in prolonged legal uncertainty in the host country.
- That people intercepted at sea are transferred to an externalised procedure only after an adequate assessment of individual circumstances and relevant risks, while ensuring full compliance with search and rescue obligations and prioritising the prompt delivery of shipwreck survivors to a place of safety over migration-related considerations.
- That co-operation on border control is not used to contain people in countries where they are exposed to serious human rights violations, and that such co-operation is subject to a legal and policy framework explicitly providing for human rights conditionalities.

Member states should develop enhanced transparency, monitoring and accountability mechanisms to accompany any externalised asylum processing, return procedures, or migration control activities.

To do so, member states should:

- Ensure that co-operation activities are underpinned by formal agreements that are binding under international law and that set out clear, specific and enforceable human rights safeguards.
- Set up independent and effective mechanisms to monitor human rights compliance.
- Define clear triggers for the suspension or termination of co-operation in the event of human rights violations.
- Ensure that parliamentary and public scrutiny of co-operation activities is possible.
- Establish adequate accountability mechanisms.
- Ensure that any division of responsibilities between member states and partner states, or member states and EU bodies, do not result in accountability gaps.

Chapter 1
Externalised asylum procedures

1.1 Introduction

Discussions about transferring asylum seekers to other countries where their claims can be processed are not new.[12] Over the years, different legal frameworks have emerged that, in certain forms, already allow for this. The Dublin system, under the EU acquis, provides for a formalised system for transfers, but this is limited to states covered by the acquis, and on the basis of harmonisation of asylum rules. Beyond this, most Council of Europe member states, including under EU law, provide for the possibility to declare an asylum application made on their territory inadmissible and expel the person to a country where protection is deemed available, although this has mainly remained confined to countries where people had a prior stay and a specific connection.

This type of framework has also been enacted through the EU-Turkey statement of 2016. It provided for the forcible return to Türkiye of persons arriving on Greek islands irregularly from Türkiye and who had either not sought asylum or had had their asylum application declared unfounded or inadmissible. This was based on the assumption that such applications should have been submitted in Türkiye. Further elements included a "one-for-one" arrangement that would resettle one Syrian refugee to the EU for every person returned to Türkiye, and a commitment from Türkiye to take "any necessary measures to prevent new sea or land routes for illegal migration opening".[13] Underpinning these arrangements was a commitment from the EU to disburse € 6 billion to Türkiye, which was subsequently expanded.

The agreement was met with concerns about the lack of sufficient human rights safeguards, which different actors have continued to express throughout its implementation.[14] Greek courts have adopted a number of decisions that led to the suspension of many expulsions to Türkiye on

the basis of apparent misapplication of the safe third country concept. Furthermore, the implementation of the agreement has generated serious human rights impacts, as it was premised on the containment of thousands of asylum seekers on Greek islands, held or restricted in severely overcrowded facilities, in undignified conditions, particularly in the former Moria camp on Lesvos.[15] Such cross-border co-operation with so-called transit countries – involving agreements envisaging not only readmissions but also transfers of people from the transit country to the country of origin, while enhancing border control measures – continues to be explored in other settings too.[16]

However, proposals that have emerged recently go further from models focused on return to transit countries and foresee the transfer of asylum seekers to countries where they have never been and where they have no connection, on the basis that their asylum claim will be processed there, rather than in the member state where they intended to seek asylum. These proposals follow more closely the attempts by non-European states referred to in the introduction, where key human rights issues have already been identified.

For example, the abandoned United Kingdom-Rwanda Migration and Economic Development Partnership (hereinafter referred to as "the UK-Rwanda agreement") and related legislation set up a system to deny access to the UK asylum procedure to most people arriving irregularly, and providing for their transfer to Rwanda, which had agreed to process their claims and provide protection, with support by the UK government.

Already in 2021, Denmark had passed Bill L 226, which introduced legislative changes to enable a 'Rwanda-style' transfer scheme, by allowing asylum seekers to be brought to a non-EU country for asylum processing and to receive protection there. Denmark was able to do so because of its opt-out from the EU asylum acquis.[17] However, such a scheme has not yet been implemented as the Danish government is presently prioritising a common EU approach over a bilateral one.[18]

Another recent example – although with notable differences from those previously mentioned – is the 2023 Italy-Albania Protocol, allowing the transfer of persons intercepted by the Italian authorities in international waters to processing centres in Albania managed by Italy. From March 2025, however, the implementation of this protocol has shifted to focus on the detention of individuals subjected to a return order (see Chapter 3 for further discussion).

Schemes providing for the transfer of asylum seekers to countries where they have no prior connection remain rare, although both the UK-Rwanda and Italy-Albania co-operation have attracted significant attention across

Europe, with various governments expressing interest in them. For example, Austria was reported to have been working with the UK to explore further possibilities to implement its own 'Rwanda-style' plan,[19] while the federal government of Switzerland indicated it might consider externalising asylum procedures under certain conditions, including compliance with human rights standards[20]

In 2023, the German government set in motion a process to examine the possibility of carrying out the determination of refugee status in transit or third countries, while respecting the 1951 Convention relating to the Status of Refugee (hereinafter referred to as "the 1951 Convention) and the European Convention on Human Rights. However, following a series of expert hearings, a 2024 report (published in May 2025) preliminarily concluded that, while international law did not fundamentally rule out such a course of action, there were numerous legal and practical obstacles. It found that "extraterritorial models such as the so-called British Rwanda model and the so-called Italy-Albania model would not be transferable [to Germany] in this form under the existing legal and practical framework".[21] Nevertheless, the report also indicates that this would remain open to examination as the implementation of such schemes in other countries progressed.

At the EU level, there have also been notable developments. Transfers to countries without the link of prior stay or transit and further connections are currently not covered by EU law. However, the European Commission's proposal to reform the 'safe third country' concept, in conjunction with its proposal on returns (see Chapter 3), would appear to lay the groundwork for this to change.

While there has been a lot of discussion about such externalised asylum procedures, only the UK-Rwanda and Italy-Albania models (in their original conceptions) have seen any kind of attempt at implementation in recent years. The two models differ in many ways, not least with regard to who is ultimately carrying out the asylum procedure – the Rwandan authorities in the former, but Italy itself in the latter. As this has specific implications for potential human rights violations, the following paragraphs will deal separately with asylum procedures carried out by the country to which asylum seekers are transferred (1.2), and those implemented extraterritorially by a Council of Europe member state (1.3).

1.2 Externalised asylum procedures carried out by the authorities of the country to which asylum seekers are transferred

1.2.1 Impact on territorial protection and likelihood of responsibility shifting

The international protection regime is built upon the understanding that any person may seek asylum in any country where he or she finds him or herself. A person who arrives in a Council of Europe member state falls under that state's jurisdiction and it is, therefore, incumbent on that state to secure all Convention rights. Similarly, while the international refugee regime does not provide complete freedom of choice on where persons seek protection, there is also no requirement for them to only do this in the first country where this is possible, and UNHCR has emphasised that the "primary responsibility to provide protection rests with the State where asylum is sought."[22] It has furthermore reiterated that "asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them."[23] As such, the first – and generally most appropriate – option is for the member state where a person applies for protection to assess such an application, by examining the merits of each case through a fair and efficient asylum procedure.

Exceptions to this principle are not necessarily unlawful but have always been narrowly construed. As noted, the Dublin system allows for a far-reaching exception, but this is based – at least theoretically – on a highly harmonised system, underpinned by shared legal principles and procedures, which cannot be replicated with third countries outside the EU acquis. As will be discussed, exceptions to territorial asylum, based on the notion that another country is safe and a person could claim protection there, need to be supported by clear safeguards. Member states have a clear obligation to ensure that such safeguards are provided, both in law and practice.

UNHCR has further noted that for transfer arrangements to be lawful and appropriate, they should be aimed at enhancing responsibility sharing and international or regional co-operation, contributing to the enhancement of the overall protection space.[24] By contrast, the types of externalised asylum procedures that some Council of Europe member states have recently pursued appear to exclude large groups of people from applying for protection on their territories and are primarily conceived as deterrents and to shift responsibilities, contrary to the 1951 Refugee Convention and principles of international co-operation and solidarity.[25] This would most notably have been the case had the UK-Rwanda agreement been

implemented, since the scheme explicitly aimed at shifting onto Rwandan authorities the responsibility for providing protection to persons seeking asylum in the UK. It would therefore be incumbent upon the externalising member state to demonstrate that externalisation would not entail responsibility shifting that would be detrimental to the international protection system, that it is pursuing this in good faith, and that this does not frustrate access to territorial asylum in the member state or result in other human rights violations.[26] Merely pointing to a deterrent effect as a prospective policy benefit for the member state does not fulfil these requirements.

Furthermore, while processing and reception of asylum seekers may sometimes represent a challenge for Council of Europe member states, on a global scale, the vast majority of refugees stay in countries close to their country of origin.[27] Often, these host countries lack the capacity to provide adequate protection for these refugees and have difficulty in meeting their needs. Council of Europe member states proposing externalised asylum processes, on the other hand, are often amongst the countries with the largest GDP per capita, with the strongest asylum systems, and in a position – at least in terms of availability of resources – to provide adequate reception facilities for the relatively low numbers of refugees and asylum seekers on their territory. While there may be nuances, in the current context, it is difficult to see how transferring potential asylum seekers from Council of Europe member states to externalised procedures in other countries – especially when the latter lack the prerequisite reception capacity and means of protection – would not amount to responsibility shifting.

1.2.2 Human rights issues related to the treatment of transferred persons in the host country

Transfers to externalised asylum procedures would be prima facie unlawful if they failed to meet minimum safeguards as regards treatment under the Convention, UN treaties, or – as the case may be – EU law.[28]

The non-refoulement principle prohibits the transfer of any person to a country where they would be at real risk of being exposed to threats to their right to life or subjected to torture or inhuman or degrading treatment or to other serious human rights violations, such as blatant violations of the right to a fair trial or of the prohibition of arbitrary detention. With regard to the right to life and the prohibition of torture and inhuman or degrading treatment, the principle of non-refoulement bars transfers not only when human rights violations result from specific actions by the state to which people are transferred, but also when these result from the general situation which may put a person at risk, including in view of their specific circumstances, such as health conditions or other vulnerabilities.

On the basis of the existing case law of the European Court of Human Rights (hereinafter "the Court"), before any transfer takes place, a member state should carry out, of their own motion,[29] a rigorous assessment of the risks the person would be exposed to if removed to a country.[30] This assessment must be conducted primarily with reference to the facts which were known at the time of expulsion, and the authorities must seek all generally available information to that effect. General deficiencies well-documented in authoritative reports, notably from UNHCR, Council of Europe and EU bodies, must, in principle, be considered to have been known.[31] Such own motion assessments should not exclude the possibility of the individual bringing forward further facts, including as to specific circumstances in which a country that may have been designated as 'safe' in general might not be safe in their individual case.[32] Importantly, all this cannot just relate to the formal, legal framework in the third country, nor the commitments which that country might have made on paper. It is also about the extent to which guarantees against (direct or chain) refoulement are provided *in practice*.[33] In this sense, in cases where member states decided to transfer asylum seekers to other countries, they should continue monitoring their situation following the transfer in application of their due diligence obligations to prevent and not contribute to violations. Furthermore, to be compatible with the Court's case law, there should be effective means for a decision to transfer a person to a different country to be challenged and reviewed by an independent court or tribunal, with the possibility of suspensive effect. Such suspensive effect must, at any rate, be automatic if an arguable claim is made that the transfer would put the person's rights under Articles 2 or 3 of the Convention at risk.[34]

However, consideration of the appropriateness of transferring persons to a country must go beyond such minimum safeguards. For example, as UNHCR has highlighted, facilities must also be in place to ensure that those found to be in need of protection are granted appropriate protection and treatment in such a way as to ensure that these individuals are afforded a standard of treatment commensurate with the 1951 Convention and international human rights law.[35] This must therefore go beyond the mere guarantee of non-refoulement and issuance of a residency permit.[36]

While agreements on externalised asylum procedures may provide for specific conditions to be granted to transferred persons, these must be adequate and effective in practice. Furthermore, an individual assessment of the appropriateness of conditions in the host country must always be made and take into consideration all relevant individual and contextual circumstances. As noted earlier, many prospective co-operation partners may lack adequate frameworks to provide protection in line with international norms, as well as reception capacities – especially as they may

already have to cope with large numbers of refugees or displaced persons. Some of them are not signatories of the 1951 Refugee Convention or have not ratified its 1967 Protocol, and do not provide access to relevant rights in practice to people receiving protection on their territory. Even within the harmonised EU system, significant gaps in the ability to provide fair asylum procedures and adequate reception have sometimes made transfers between EU member states unlawful.[37] Such gaps are likely to become bigger, the more divergence there is in the legal systems of, and protection provided by, the member state and the partner country.

Clear arrangements also need to be in place in relation to livelihoods, access to healthcare and other key rights, if it is foreseen under the relevant agreement that transferred persons are to remain in the receiving country, rather than being relocated back to the member state. Similarly, facilities need to be in place for those not found to be in need of protection, at least until they can be returned, and especially if they have no choice other than to face a long term stay in the host country. For example, in the now-defunct UK-Rwanda scheme, it was eventually foreseen that no one would be expelled by Rwanda – even if they were not found to be in need of protection. While this was done to deflect onward refoulement claims, this would have raised other issues, such as the risk of rejected asylum seekers being left in legal uncertainty indefinitely (see 2.4). These arrangements also raise questions about the extent to which human rights compliant treatment of both refugees and persons who should stay in the host state following an asylum procedure is linked to financial or other support provided by the Council of Europe member state; if commitments are made only for limited periods, this may undermine long-term solutions.

1.2.3 The risk of onward refoulement

Ensuring appropriate conditions in the country where people are transferred is not, by itself, sufficient. Guarantees must also be in place to ensure that people transferred are not exposed to the risk of chain-refoulement – i.e. of being returned to their countries of origin or to other destinations where they would face persecution (as defined by the 1951 Convention), a real risk to their right to life or exposure to torture or inhuman or degrading treatment, as well as to other serious human rights violations.

The Court has dealt extensively with the question of member states declaring asylum applications inadmissible on the basis that the applicants could have sought asylum in a safe country through which they had already passed, something which has resulted in them being removed to that country. At the moment of writing, the Court has not yet delivered judgments dealing with transfers as foreseen in recent external asylum processing schemes such as those discussed above. However, it must be

assumed that the safeguards set out in its judgments on transfers to safe countries through which a person had previously transited – described in the previous section – provide the requirements that should be observed in such cases as well. Furthermore, the fact that this would involve a transfer to a country where an asylum seeker has never been and where they have no connection, may give rise to further issues (see 3.4.2).

On this basis, before any transfer takes place, a member state should at the very minimum carry out, of their own motion, a rigorous assessment of the accessibility and functioning of the asylum system in the third country and the safeguards it affords, in view of the individual situation of the person involved.[38]

The UK-Rwanda agreement provides a clear example of how legal safeguards may be disregarded in pursuit of externalised asylum options. Legislation enabling transfers significantly restricted access to judicial remedies against decisions to remove persons to Rwanda, by severely limiting the possibilities of appealing against transfers and by preventing UK courts from considering the safety of Rwanda as a destination.[39]

It is of concern that member states may consider partnering in externalised asylum procedures with countries that have very limited or poorly developed asylum systems, often compounded by a scarcity of qualified legal aid providers and well-trained or sufficiently independent judges. As also reflected in the UK Supreme Court's findings on Rwanda, even if a member state invested heavily in the partner country's asylum processing capacity in all its aspects, this would often be a complex endeavour that would not only take significant investment in resources, but also significant time to yield sufficient results to ensure that all necessary safeguards were in place.[40]

Even assuming that asylum procedures in the receiving country are generally fair, other issues might arise. For example, the type of protection given may be an issue, as the legal basis for protection in the receiving country may be different, and potentially more restrictive, thus excluding persons who might have otherwise been recognised as deserving of subsidiary protection or humanitarian protection if they had been processed in the member state. People in such a situation would therefore be subjected to expulsion under circumstances that would not be applicable and lawful if they had not been transferred to externalised procedures.

1.3 Externalised asylum procedures carried out under the jurisdiction of the externalising member state itself

As just highlighted, models transferring asylum seekers from Council of Europe member states to 'safe' countries, where the host state's authorities would have to assess protection needs, give rise to a number of human rights concerns, and some of the obstacles could be very difficult to surmount. As an alternative, member states may choose to conduct asylum procedures themselves, but extraterritorially, keeping the process within their jurisdiction.

In theory, a model based on the member state itself carrying out asylum procedures on the territory of another state could mitigate some of these risks and provide a way to overcome certain concerns, by enabling those transferred to exercise rights – in particular, to seek asylum and remedy – in a way that is comparable to what people of the same status would enjoy if they had been processed on the member state's territory. However, such a model does not exclude that human rights violations may still ensue. Indeed, there are important caveats that should be given thorough consideration.

First, if the asylum systems of member states already have significant weaknesses, these risks are transferred to and potentially even extended within the externalised procedure (on existing weaknesses, also see 2.2). This is all the more likely when externalisation initiatives are introduced in order to apply border or other accelerated procedures which by themselves severely reduce guarantees against refoulement and other serious human rights violations.

Second, even when all the rules normally in force for asylum seekers on the member state's territory are fair and effective, and equally applicable extraterritorially, it is difficult to see how in practice it would not be more difficult to uphold all the necessary safeguards. Externalised procedures make contact between asylum seekers and lawyers more difficult, with those with expertise of the member states' asylum rules being based in the member state and thus having to provide assistance remotely or having to travel (with virtually no notice and potentially severe limitations to their possibility to have relevant expenses covered).[41] The greater the distance between the sending state and the host state, the greater are likely to be the difficulties of access and communication. Ensuring access and availability of qualified interpreters can also be an issue in such circumstances. Such a model may also negatively impact on access to effective remedies, as the possibility for the judiciary to conduct on-site hearings might be excluded or severely limited, whilst remote hearings might not always be the most

suitable for a proper assessment of appeals. The initial implementation of the Italy-Albania model showed how these issues materialise in practice, therefore also raising questions as to the compatibility of relevant procedures with state obligations.[42] On this basis, differences in the level of protection between asylum procedures carried out on the territory of member states, and those implemented extraterritorially, could arise, possibly leading to reasonable claims that those transferred are treated discriminatorily.[43]

Finally, externalised asylum procedures of this type will likely be combined with externalised return procedures (as is the case under the Italy-Albania Protocol); the human rights impacts of these are analysed in the following section. Issues also arise concerning the key role of deprivation of liberty in such models; these are discussed in 3.2.

Chapter 2
Externalised return procedures

2.1 Introduction

Member states may expel foreigners who do not, or no longer, have the right to reside on their territory. However, they must do so in compliance with aforementioned obligations, in particular regarding the principle of non-refoulement and the need to ensure that all people are afforded dignified treatment and adequate legal guarantees.

In recent times, difficulties in enforcing returns to countries of origin, or to reach agreement on readmission to transit countries, have prompted calls to push the boundaries of return procedures. In May 2024, fourteen Council of Europe (and EU) member states – Austria, Bulgaria, Cyprus, Czechia, Denmark, Estonia, Finland, Greece, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, and Romania – wrote to the European Commission calling for new solutions on migration and return.[44]

Since then, 'innovative solutions'[45] and the introduction of externalised return procedures have been a primary topic of EU-level discussions.[46] In particular, EU member states and institutions are discussing the establishment of so-called 'return hubs', which would be facilitated by the European Commission's proposed Returns Regulation.[47] This would enable EU member states to transfer persons to a non-EU country other than their country of nationality or a transit country, based on agreements or arrangements to this effect.[48]

Meanwhile, bilateral action continues to be pursued in parallel. The Italy-Albania agreement, as implemented since late March 2025, is the only example currently in operation.[49] Under it, Italy transfers persons subject to an expulsion order, and already held in a detention centre on Italian territory, to a detention centre operated by Italian authorities in Albania, for their onward return.[50] Other member states have also pursued this type of policy. For example, in October 2024, the government of the Netherlands

announced that it was exploring an agreement to set up a 'return hub' in Uganda,[51] although this has not come to fruition at the time of writing. The United Kingdom is reportedly also pursuing return hub-style agreements.[52]

This chapter addresses some specific human rights issues that may arise in implementing such models: the impact of the lack of fair and efficient asylum procedures and the lawfulness of externalised return processing (2.2); the circumvention of safeguards in transferring people to return hubs (2.3); and the risk of people being left in protracted legal uncertainty in the partner state (2.4).

2.2 Gaps in fairness and efficiency of contemporary territorial asylum procedures as an impediment to externalised return procedures

As noted, historically, member states have primarily focused return policy on countries of origin or transit. Consequently, European and international jurisprudence on transferring people to countries where they have never been for return procedures, as under the return hub model, is generally lacking. However, as a form of expulsion under international law, such transfers must meet all necessary human rights standards. Foremost is the prevention of refoulement, ensuring that individuals do not face serious human rights violations in the return hub nor when returned onwards. Refoulement risks are primarily assessed during asylum procedures. Such assessments will normally focus on the risks associated with a possible return to the person's country of origin, or a first country of asylum or a safe country where the person could have claimed asylum, as the case may be. This will lead to a decision on whether the member state should offer international protection. Return hub-style arrangements, however, add another country into the mix, namely the country where a person is transferred – and which will be different than the country or countries in relation to which a claim to international protection is assessed. Yet, the risk of refoulement must be assessed in *all* procedures leading to the transfer of a person outside of a country's jurisdiction, including expulsion procedures. Therefore, the lawfulness of transfers to return hubs or externalised return procedures closely depends on whether the same rigorous risk assessment detailed in chapter 1 is adequately implemented and expanded to also cover risks upon transfer to the partner country. This is particularly important if persons have never indicated a need for protection in relation to their country of origin, and thus may not have gone through an asylum procedure.

For persons who have made an asylum claim, UNHCR notes that return

hubs should only be used for individuals whose claims have been finally rejected on the merits through a fair and efficient asylum procedure, and have no other ground for legal stay.[53]

In this regard, some Council of Europe member states face problems with the fairness and efficiency of their asylum procedures, as illustrated by judgments of the Court[54] and the Court of Justice of the EU (CJEU),[55] delays in the execution of the Court's judgments, and the European Commission's infringement procedures. Many reports from international bodies and civil society also confirm this.[56]

Moreover, access to asylum has become increasingly difficult in many member states due to summary returns ('pushbacks') or legislation that severely restricts, or even suspends, the acceptance of asylum claims.[57] This situation will be further impacted by the introduction of new rules, including those approved under the so-called EU Pact on Migration and Asylum, which expand the use of accelerated border procedures. Furthermore, the situation will be exacerbated by member states resorting to exceptional measures in relation to asylum, enabling border guards to enforce summary returns of persons without an individual assessment of protection needs,[58] also in view of the potential disapplication of guarantees under secondary EU law.[59]

It has to be concluded that, even for member states with strong asylum systems, externalising return procedures entails multiple human rights risks, as further elaborated below. For member states preventing – by law, policy or practice – access to asylum on their territories, or otherwise lacking fair and efficient procedures, the use of externalised return procedures is even more problematic, as they will not be able to implement them without serious risk of violating their non-refoulement obligations.

2.3 Circumvention of procedural safeguards leading to unlawful expulsions

Beyond refoulement, externalised return procedures raise questions regarding essential safeguards to ensure expulsions are lawful, non-collective, and ensure access to effective remedies. In the case of externalised return procedures these safeguards must apply at both stages of the process: firstly, when transferring people from the member state to the state hosting the externalised procedure; and secondly, when a person is expelled from the state hosting the externalised procedure to their country of origin or other destination.

Such double safeguards may not always exist in current practice. Under the Italy-Albania agreement, as implemented from late March 2025,

transferring people from Italy to Albania's Gjadër detention centre follows internal Italian transfer procedures as used when moving people between administrative detention centres in Italy, which do not require formalities. The forcible transfer to Albania is thus not subject to a specific expulsion order, presumably because the return procedure continues under Italy's jurisdiction.[60] Nevertheless, the Court has espoused a broad understanding of 'expulsion' ("to drive away from a place").[61] In this context, it should be noted that, while Italy considers that people remain under Italian jurisdiction following the transfer, they will also be subjected to (joint) Albanian jurisdiction as long as they are on Albanian territory.[62] Furthermore, Albanian authorities carry out identity checks upon arrival and provide security during transfers and around the detention centres. Treating these transfers differently from normal expulsions therefore raises issues in view of state obligations, and limits access to remedy against transfer decisions. Indeed, the legal basis for transfer to an externalised procedure must be open to challenge and judicial scrutiny. As FRA notes, this requires individuals considered for transfer to be subject to an enforceable return or refusal of entry decision.[63] Without this, the lawfulness of the expulsion cannot be tested, denying effective remedies and rendering the expulsion collective, and therefore in breach of state obligations, including under the Convention and the EU Charter of Fundamental Rights.

More broadly, member states must ensure that the transfer (as a form of expulsion) has a clear basis in the applicable legal framework. While general international law permits expulsions to any country willing to admit an expelled person,[64] national or EU law may differ. For example, despite 'return hub' proposals, current EU law only permits member states to forcibly return people to their country of origin, or a transit country under a relevant agreement or arrangement.[65] Furthermore, legal safeguards must remain in place also in relation to the second expulsion – normally to the country of origin.[66] These should include an up-to-date assessment of the risk of refoulement, as well as adherence to rules on the use of force in the execution of returns.[67]

2.4 Persons left in protracted legal uncertainty

Member states frequently face difficulties in carrying out forced returns, following the adoption of expulsion decisions. This can happen for a multitude of reasons, including because the country of return refuses to readmit them, or because a change in circumstances in the country of return, or in the situation of the person subjected to expulsion, bars removal. These types of situations often lead to a situation of protracted legal uncertainty for the people who are not returned nor formally allowed to stay.

Low return rates represent a key reason for member states' push for new solutions.[68] However, it is not clear that externalising return procedures will increase states' ability to eventually return people to their countries of origin or other destination.[69]

Therefore, it is to be expected that, where return hubs proposals are implemented, situations of legal uncertainty may also be reproduced also in the country of first return (i.e. the partner country hosting the return hub). This would carry important human rights implications, for example regarding access to adequate medical care and other basic necessities.[70] Indeed, while people without the right to stay but who remain on member states' territories are covered by certain human rights protections, for instance under the European Charter of Social Rights[71] or EU secondary law,[72] these protections do not apply extraterritorially. As a consequence, the risk of human rights violations occurring to a person who cannot be returned from a return hub is greater. Apart from individual implications, lack of clarity on non-return situations risks leading to the 'warehousing' of persons in host states, which in turn imposes significantly increased responsibilities on them – often offset by significant financial aid from the externalising state, which can make the venture extremely expensive for the latter. Agreements with countries where return hub-style arrangements are to be located should, therefore, at a minimum, clarify which accommodations and guarantees are put in place to avoid people falling in situations of protracted legal uncertainty and ensure everyone is able to enjoy the necessary protection and access to rights. Clear arrangements for re-transferring persons back to the Council of Europe member state, when they cannot be returned to their country of origin, are also crucial. For example, the Italy-Albania agreement provides that stay in Albania is linked to the maximum detention period, and that therefore, when this period ends or detention is no longer justified, people are to be transferred back to Italy.

Chapter 3
Overarching issues regarding externalised asylum and return procedures

3.1 Introduction

The previous chapters have discussed issues that arise specifically in relation to externalised asylum processing and externalised return procedures, respectively. However, there are further human rights questions that cut across both these areas. This chapter focuses on some of them, namely: the imposition of detention (3.2); the specific implications of extraterritorial interceptions before transfer (3.3); implications for vulnerable groups, including children (3.4); and the responsibilities of Council of Europe member states that act as hosts to externalised procedures (3.5).

3.2 Detention

As already noted, many models of externalised asylum or return procedures rely on the detention of people transferred to the relevant partner country. This raises issues of the potential arbitrariness of detention and the conditions and treatment whilst in detention.

3.2.1 Automatic nature of detention and other issues leading to arbitrariness

In general, externalised procedures heighten the risk of arbitrary deprivation of liberty, as detention is likely to be imposed automatically, rather than as a measure of last resort based on a careful, individual assessment of the individual circumstances of the relevant person. Deprivation of liberty seems to be inevitable when member states operate extraterritorial procedures while keeping people under their jurisdiction – as is the case, for instance, under the Italy-Albania scheme – since in practice this may require placing people in a restricted area.[73] This precludes the application of less restrictive

alternatives to detention within the host state, despite consideration of alternatives being crucial to ensure that detention is a measure of last resort.[74] Under such circumstances, even if detention may be lawful in most cases, any transfer to the partner state that is not preceded by a thorough assessment of the lawfulness of the consequent deprivation of liberty, based on the individual circumstances of the person the authorities seek to transfer, may breach the prohibition of arbitrary detention.[75] In addition, in view of the fact that the person cannot be released on the territory of the partner state, it is to be assumed that persons transferred there will be subjected to deprivation of liberty also during periods of time when no legal grounds would justify such deprivation of liberty – for instance, following a judicial decision ruling that the detention is not lawful in the instant case, and before a transfer out of the country can be arranged. The potentially automatic imposition of detention is especially problematic if applied to asylum seekers with pending requests, as detention solely for seeking asylum is incompatible with refugee and human rights law.[76] External procedures carried out by the state to which people are transferred may provide better opportunities to offer alternatives, since confinement is not necessary to maintain jurisdiction. But such possibility depends largely on the agreed framework. If detention is imposed automatically and without individual consideration, then the risk of exposing a person to serious human rights violations should bar Council of Europe member states from executing the removal.[77]

Differences in the situation and safeguards for those who remain in asylum or return procedures on the member state's territory and those singled out for detention in a partner country may also lead to discriminatory treatment.[78]

3.2.2 Enhanced risks of inadequate conditions of detention

Within the territory of member states, inadequate conditions of detention often play a prominent role in violations of Article 3 and 5 of the Convention. A wide range of applicable standards on immigration detention conditions has been laid down by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), as well as in the case law of the Court, among other sources. These clarify that places of detention must provide, amongst others, appropriate (non-carceral) settings, sufficient space, access to adequate medical assistance, cleanliness, and open-air access.[79] Such standards apply in any detention facilities under member states' jurisdiction. Similarly, if these standards are not respected in places of detention operated by a partner state, this could prevent transfer to such a country.

In externalised settings, there are various ways in which specific risks

manifest themselves. Relying on existing infrastructure in the host state is particularly problematic in several countries with which member states closely co-operate, as conditions in migrant detention centres are often poor and sometimes clearly unacceptable, while torture may be a real issue. New, purpose-built centres – under the control of either the partner country or externalising states – may alleviate some concerns, but not all. For example, administrative detention centres within member states sometimes have problematic regimes; replicating these extraterritorially will also replicate the risks of human rights violations involved.

Furthermore, even well-equipped, rights-respecting detention settings can become inadequate when overcrowded. This is evident from Council of Europe member states' attempts to contain asylum seekers and irregular migrants at borders, where capacity has frequently become overstretched, leading to serious human rights violations. Given the difficulties in ensuring returns to countries of origin already discussed above, together with the likely non-availability of alternatives, overstretching detention capacity in host countries is a realistic prospect. This must be a core consideration when assessing human rights risks in externalised procedures.[80]

Whether externalising asylum or return procedures, or both, one area that appears consistently affected is the possibility for persons detained abroad to effectively exercise their right to remedy and to avail themselves of adequate legal assistance and counsel. On the one hand, relying on the domestic remedies of partner countries presents risks, since in many cases such remedies may be inadequate and ineffective, due to lack of adequate legal frameworks, infrastructure, independence, or resources. On the other hand, where member states exercise their relevant jurisdiction extraterritorially, serious practical impediments emerge. In particular, the issues already addressed in 1.3 as regards physical distance of the relevant person from judges and lawyers, as well as from other professionals providing legal information, interpretation or cultural mediation services, may also hinder access to remedy as regards arbitrariness of detention or detention conditions.[81]

Similar considerations apply to the provision of adequate healthcare services, which is necessary both to identify pre-existing conditions that may be incompatible with (extraterritorial) detention, and to ensure adequate assistance to people in detention.[82]

3.3 Transfers to externalised procedures following an extraterritorial rescue or interception

Having so far focused primarily on transfers from member states' territories, it is appropriate to also consider transfers immediately following

extraterritorial interventions by member states, such as rescue operations or interceptions at sea. In 2018, the possible setting up of 'disembarkation platforms' for people rescued in the Mediterranean was raised and soon abandoned. However, in execution of the Italy-Albania Protocol adopted in November 2023, Italian authorities initially used the facilities in Albania to detain persons who were transferred there directly after being rescued or intercepted by Italian state ships in international waters.[83]

In such situations, applicable legal frameworks may differ because persons remain outside of member states' territories. However, persons intercepted extraterritorially still come under the jurisdiction of member states for the purpose of the Convention and other human rights instruments, since authorities holding them clearly exercise effective control over them.[84] After all, as the Court has acknowledged, the special nature of the maritime environment cannot be used to justify having an area outside the law where individuals are not covered by any legal system capable of affording them enjoyment of the rights and guarantees protected under the Convention.[85]

Apart from those highlighted earlier, extraterritorial interceptions and transfers carry specific human rights concerns. As the Commissioner's Office has detailed, the disregard of either maritime or human rights law obligations – in particular, through the disengagement of member states' naval capacity, the prioritisation of border control considerations over search and rescue obligations, and the obstruction of rescue activities by non-governmental organisations (NGOs) and other private actors – remains a key concern when member states act at sea.[86] Such disregard may well increase if transfers to externalised procedures are prioritised, leading to delayed, inadequate maritime interventions, and therefore exposing people in distress at sea to the risk of death or other harm.[87] For example, the fact that under the Italy-Albania Protocol only Italian state ships can transfer to Albania people rescued or intercepted at sea could put pressure on officers coordinating rescue operations not to call upon the assistance of private or NGO vessels, even when these might be better suited to intervene.[88] More broadly, prioritising interception over rescue could lead to dangerous practices and disincentivise people in distress from making distress calls. Furthermore, travel to states hosting externalised procedures may be much farther than a relevant place of safety, even though search and rescue standards require states to "make every effort to expedite arrangements to disembark survivors from the ship",[89] and to ensure that people are disembarked in a place of safety "as soon as reasonably practicable".[90] Delaying disembarkation imposes unnecessary suffering on people onboard, particularly shipwreck or torture survivors and other people with special needs.[91] Longer journeys to host countries also mean that ships focusing on search and rescue take longer to return to areas

along key migration routes where their interventions are most needed and rescue capacity is limited. In short, externalisation may undermine the integrity of the search and rescue system, and, therefore, add unnecessary risks for people in danger.

As discussed in relation to transfers from member states' territories, the safety of persons to be taken to partner countries must be guaranteed through a rigorous and individualised assessment. This should provide the relevant persons with an effective opportunity to express objections and to access judicial remedies, which should have suspensive effect, in view of the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises.[92] Beyond risks upon transfer, such individualised assessment should also cover other issues, such as appropriateness of imposing detention – if this is the regime foreseen upon disembarkation – as well as any specific needs and vulnerabilities (see 3.4), and potential healthcare and public health concerns.

In practice, however, selection for transfers from international waters is more likely to rely on general criteria like gender and nationality,[93] rather than on an individualised assessment. Indeed, conducting such assessments aboard a ship imposes potentially insurmountable challenges. Ships generally lack a suitable environment and time is limited, since disembarkation should be as prompt as possible following a rescue to provide people with urgent assistance, unhindered by screening for transfer purposes.[94] Matters not directly related to rescue and humanitarian assistance should be resolved *after* the survivors have been delivered to a place of safety.[95] The limited space available onboard is also unlikely to provide a safe environment for confidential interviews and assessments. Also, the availability of professionals needed to provide adequate legal assistance, like legal advisors and interpreters with a command of the relevant foreign languages, will likely be extremely limited.[96] Given these limitations and practical impediments, it is virtually impossible to provide fair and effective status determinations on board vessels at sea,[97] but also to ensure an adequate screening to select people for externalised procedures.

This means that member states that have rescued or intercepted people at sea and directly disembark them in another state – as opposed to disembarking them in a place of safety – risk violating the necessary safeguards under Articles 3, 5, 13 and Article 4 of Protocol 4 of the Convention.[98]

In this regard, it is also of concern that member states appear, at times, to refer to legal obligations regarding search and rescue as a means to justify actions at sea which focus on containment – through rescue at sea and disembarkation in the country hosting an externalised process – even if

such actions result in human rights violations in the host country. Saving lives and protecting rights cannot be framed as mutually exclusive, as member states have a legal responsibility to protect the right to life *as well as* other rights. When addressing the situation of refugees and migrants finding themselves in a situation of emergency at sea, states must fulfil their obligations under the law of the sea in a way that also gives effect to their obligations under human rights and refugee law, in line with the principle of harmonisation in the interpretation of international law.[99]

3.4 Risks to vulnerable groups

Persons belonging to certain groups would be particularly vulnerable to human rights violations if they were to be transferred to externalised procedures. Member states should generally exclude members of these groups from externalised procedures or at least provide them with access to specific guarantees effectively capable of mitigating against risks in practice. This requires mechanisms to identify members of such groups, which may be challenging in view of the specific operational conditions in which the screening is undertaken – as illustrated in the previous section. This section outlines some concerns regarding children specifically (3.4.1), while also discussing wider issues related to other vulnerable persons (3.4.2).

3.4.1 Children

The Court recognises the extreme vulnerability of children as a decisive factor in relation to the protection of their rights, taking precedence over considerations relating to the child's migration status,[100] including in expulsions.[101] Under the UN Convention on the Rights of the Child (UNCRC), binding all Council of Europe member states, the best interests of the child must be a primary consideration in any action involving children.[102]

Certain transfer procedures, such as after extraterritorial interception, will likely impede proper consideration of the child's best interests and accurate age assessment. Special consideration should be granted to children's specific needs, in particular for what concerns reception conditions, including accommodation, subsistence, and education. Again, it is highly unlikely that the conditions available in the partner country may be adequate and in line with those available ordinarily in the member state. Insecurity about the long-term fate of persons in externalised procedures is also heightened when it comes to children. Differential treatment between children processed territorially and those in externalised procedures is particularly difficult to justify given the special protections they enjoy.

Detention as a part of externalised procedures adds particular risks of

violations. While the Court has not ruled out children being subjected to expulsion procedures, detention of migrant children should only be used as a measure of last resort by the state authorities after establishing that less restrictive alternatives are not available.[103] The UN Committee on the Rights of the Child has further clarified that "the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child".[104] UNHCR has also stated that "children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests".[105]

UNHCR has urged against the transfer of children to return hubs, unless this has been determined to be in their best interest.[106] FRA has added that "[f]or unaccompanied children, it is virtually impossible to imagine situations where the transfer to a return hub could be in the child's best interest."[107] The European Commission's proposal for a Common European System for Returns also excludes minors from return hubs.[108]

Externalisation poses multiple, serious human rights risks that would particularly impact on children. These are in addition to the general risks associated with the transfer of any person to externalised asylum or return procedures discussed in detail in Chapters 1 and 2. For this reason, the Commissioner believes that children should not be subjected to transfers to externalised procedures.

3.4.2 Other groups

Other vulnerable groups, including pregnant women, older people, victims of torture, victims of trafficking in human beings, persons with physical or mental disabilities, and LGBTI persons, require specific consideration before and after transfer to an externalised procedure.

Even when applying safe third country concepts, this should never override a proper assessment of the specific impacts of a transfer to an externalised procedure on vulnerable groups. Account should be taken of all elements of the conditions in which people might find themselves, including health circumstances that could lead to severe human rights violations.[109] This assessment should be made in view of all relevant obligations on member states, including those to prevent trafficking under the Council of Europe Convention on Action against Trafficking in Human Beings, or other exploitation under Article 4 of the Convention.

FRA notes that "[p]ersons in a vulnerable situation require particular attention, which makes their lawful transfer to a return hub unlikely".[110] This caution should also be extended to externalised asylum procedures. In this regard, it is to be welcomed that some existing transfer schemes – including

the Italy-Albania scheme – exclude certain categories of vulnerable persons.

While any person would face heightened risks if they were to be transferred to a country where they have never been before, bringing a person with specific needs to such a country may particularly create or exacerbate vulnerabilities.[111] Such issues could include, but are not limited to, the increased risks faced by women and girls, people with disabilities, or LGBTI people of social exclusion, exploitation and abuse, including sexual violence. Further difficulties arise from much more limited contacts with the outside world and the limited ability to seek and receive healthcare assistance and support from civil society actors.

3.5 Council of Europe member states as hosts of externalised procedures

While the main focus of this report is on Council of Europe member states transferring persons to externalised procedures, Council of Europe member states hosting other states' externalised procedures have their own human rights obligations. Jurisdiction under the Convention is "primarily territorial",[112] and the Court has repeatedly clarified that states cannot simply declare specific spaces on their territory as not triggering jurisdiction.[113] This requires consideration of whether the activities undertaken by the host state would violate human rights, including any restrictions it imposes on the movement of persons transferred to its territory in view of the right of an individual to leave any country.[114]

When a member state allows another state to carry out activities on its territory, the host state should proactively ensure that such activities are carried out in compliance with human rights standards. Indeed, a member state can be "responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or the connivance of its authorities".[115] The retention of jurisdiction and responsibility for human rights violations of the host state has also been confirmed under UN instruments.[116] Thus, whenever allowing other states to implement procedures on their own territories, member states have a responsibility to ensure that this meets human rights standards. As a minimum, the host state should obtain clear and verifiable information about the other state's activities and their impact on human rights, ensuring effective preventative measures and remedies in case of violations, as well as withdrawing consent to host externalised procedures where necessary. National authorities should uphold their prerogatives as regards monitoring, effective investigations, judicial proceedings, and parliamentary scrutiny.

Chapter 4
Externalisation of border management

4.1 Introduction

While efforts to externalise asylum and return procedures currently garner much attention, other forms of international co-operation, aimed at tackling irregular border crossings, have been ongoing for years. Member states regularly assist other states to deter or prevent migratory movements towards Europe, at points of entry or exit, on their territories, or in international waters. In effect, such activities shift the focus of border control from member states' own borders to international waters and into the territories of other states. Such co-operation has a long history and human rights concerns have been flagged for decades. For example, reports of unlawful arrests, collective expulsions, excessive use of force and other human rights violations as a result of Spain's migration co-operation with Mauritania and Morocco date back to the 2000s.[117] Spain continues to pursue co-operation with these countries to date.[118]

North African countries such as Libya, Tunisia and Egypt have been key recipients of support to enable this, but co-operation extends to many other places of strategic importance, including the Western Balkans, the Sahel, West Africa, and the Middle East.[119] The alignment among European states regarding such co-operation enables its rapid intensification and expansion.[120]

Member states' programmes, often deploying EU resources, encompass diverse actions, which include: providing material means (boats, drones, vehicles, engines and spare parts, IT infrastructure, satellite phones, thermal cameras, night vision goggles, uniforms, etc.); establishing operational co-ordination centres and liaison offices; capacity building (including through training of border control personnel); deploying member state or the European Border and Coast Guard Agency (Frontex) personnel or assets in the partner country (including to conduct joint surveillance activities); information sharing (including information from aerial surveillance or other sources on the position of people attempting to cross borders or at sea); financial assistance directly or indirectly linked to commitments to reduce irregular departures; assisting in the definition and declaration of a search

and rescue region; and transferring the co-ordination of search and rescue operations.

This co-operation raises numerous human rights issues. Subsequent sections focus on the following: the impact of policies containing refugees and migrants in countries with poor human rights records (4.2); external cooperation on migration control and the jurisdictional link with member states (4.3); aid and assistance to other states violating human rights (4.4); and the expanding role of Frontex outside the EU area (4.5).

4.2 Containment policies and human rights impact

Council of Europe member states' activities frequently aim at, and result in, the containment of refugees and migrants in partner countries, often through their interception and return (e.g. 'pullbacks' at sea). Such forms of co-operation are in tension with the prohibition of refoulement and torture, the right to asylum, and other human rights.[121] Their implementation has significantly harmed refugees and migrants on a regular basis, as has been widely documented. Indeed, serious human rights violations have been found to occur in many of the countries which are key partners, closely linked to border control operations carried out using resources provided by member states and pursuing policy objectives set under formal or informal agreements.[122]

Human rights harms are especially evident when externalised migration and border control activities are implemented by host countries with weak governance and adherence to rule of law, poor human rights records, or weak or non-existent asylum systems. Yet, member states co-operate extensively with such countries, potentially exposing people to practices such as prolonged arbitrary detention, torture and other ill-treatment, arbitrary killings, sexual violence, summary removals in violation of the principle of non-refoulement, and various forms of exploitation.[123]

4.3 External migration control cooperation and the jurisdictional link in the case law of the Court

While the occurrence of serious human rights violations against refugees and migrants by co-operation partners is well documented, member states dispute the link between their support and these violations. The informality and opacity of co-operation activities, which are often part of broader packages – as discussed in Chapter 5 – make it more difficult to attibute violations to support from member states or the EU. Research is increasingly able to track the consequences of member states' involvement in human rights violations, yet even when such links are clear, accountability for

violations may be difficult to establish. This is largely due to limited external oversight and weak accountability mechanisms. A further significant factor undermining human rights protection is in the fact that member states increasingly operate outside the limits of the jurisdictional clauses in instruments such as the Convention.[124]

The Court has so far favoured a narrow approach to extraterritorial jurisdiction. It has acknowledged that "in exceptional circumstances the acts of Contracting States performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention".[125] It has also recognised that "[a] State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."[126] However, these principles have been applied to address very specific circumstances. In migration-related cases, the Court has generally found this principle applicable where a member state exercised de facto control over individuals, including when state authorities rescued or intercepted people at sea.[127] In such circumstances, the Court has clarified, immediate return to a country where a person would be exposed to serious violations would entail legal responsibility, in particular for breaches of the principle of non-refoulement.[128] Other circumstances in which extraterritorial jurisdiction may be established include, for example, where a member state controls a foreign territory by exercising decisive influence over separatist forces,[129] or where it has engaged in military action resulting in the accidental death of civilians in a foreign country.[130] In the context of migration management, if member states were to deploy personnel in partner countries, and such agents committed human rights violations while having effective control over people they sought to stop from migrating to or seeking asylum in Europe, this may well lead to a finding of the exercise of extraterritorial jurisdiction. However, the Court's guidance has been more limited where a state's control over persons is more indirect.[131]

In recent years, member states have externalised border control activities, expanding operations outside the jurisdictional scope of the Convention and thereby breaking the accountability link between the member states and potential violations in partner countries. They have done so by providing assistance that does not entail direct contact with refugees and migrants, but facilitates and encourages border control measures by the authorities of the partner state, which carry similar implications for the lives, physical integrity, dignity and liberty of persons subjected to them. As a result of this shift towards externalised border control, people subjected to harmful actions by partner states, whether in their territories or in international waters, have been unable to avail themselves of the

protection of the Convention, even when those violations were in practice facilitated by member states.

In the particular context of maritime interceptions, it is necessary to consider the decision of the Court in *S.S. and Others v. Italy*, adopted on 12 June 2025. The Court declared inadmissible a complaint alleging "refoulement by proxy" during a maritime operation in international waters, launched by the Rome Maritime Rescue Coordination Centre (MRCC) but conducted by Libyan authorities in an area that Libyan authorities were in the process of declaring as the Libyan Search and Rescue Region (SRR). The Court did not find that Italy exercised jurisdiction *ratione loci,* considering that the area in which the applicants were intercepted was not under the effective control of Italy.[132] It also did not find that Italy exercised jurisdiction *ratione personae,* considering that the captain and crew of the Libyan vessel had acted autonomously and that Italian officials had no control or influence over their conduct.[133] The Court therefore considered that the support provided by Italian authorities to Libya – including the provision of several vessels, the training of officials and crew members, the assistance in the declaration of the Libyan SRR, and the deployment of an Italian Navy ship in the port of Tripoli to assist in the coordination of maritime interventions – was not sufficient to engage Italy's responsibility under the Convention.

While noting that the transfer of responsibility for the coordination of the rescue fell under international rules governing search and rescue, the Court did not consider the extent to which these rules were applied in the specific case in a manner compliant with human rights obligations.[134] In doing so, the Court did not address the concern that the legal framework for search and rescue could have been used to circumvent human rights obligations,[135] particularly given the closely interwoven nature of search and rescue and migration control activities in the Mediterranean. It also did not consider that Italy's far-reaching engagement with Libya, which had created the precondition for the Libyan vessel's intervention (a vessel provided by Italian authorities) combined with with the well-known nature of human rights violations by Libyan coastguards, might at least have prompted Italy to take certain actions to mitigate the risk of contributing to violations – such as offering to disembark rescued people in Italy rather than in Libya.

Since the Court's findings are closely tied to the facts of the case, this decision should not be interpreted as a general endorsement of states' externalisation practices. Furthermore, as the Court itself noted, absence of jurisdiction under the Convention does not automatically make such actions and omissions lawful.[136] Relevant obligations arise from multiple sources to which member states are bound, in addition to the Convention, including peremptory norms of international law, norms recognised as customary

international law, and obligations established by the International Covenant on Civil and Political Rights (ICCPR) and other relevant treaties ratified by member states. In addition, broader rules of state responsibility are applicable, as illustrated in the following section.

It should be noted that other bodies may take a different approach to jurisdiction.[137] The UN Human Rights Committee has adopted a broader approach in its communications on individual complaints. For instance, in *A.S. and Others v. Italy*, it found that a state could be held responsible when its actions form "a link in the causal chain that would make possible violations in another jurisdiction, where the risk of an extraterritorial violation is a necessary and foreseeable consequence judged on the knowledge the State party had at the time."[138] All Council of Europe member states have ratified the ICCPR, to which the Human Rights Committee's findings relate, and they could therefore be found in breach of their obligations under that treaty.

The Commissioner also notes UNHCR's consideration – expressed in the Agency's submissions before the Court in the case *S.S. and Others v. Italy* – that member states providing assistance to another state, in circumstances where they have actual knowledge that such assistance is likely to be used to facilitate serious human rights violations, should, at minimum, closely and systematically monitor and evaluate the human rights impacts of that assistance, and take appropriate steps, where necessary, to avoid, prevent, or mitigate them. Without such measures, particularly when significant risks persist, co-operation arrangements may be incompatible with member states' international refugee and human rights obligations.[139]

4.4 Actions aiding and assisting human rights violations by other countries

Specific questions of jurisdiction aside, general international law contains a principle that "a State cannot do by another what it cannot do by itself", as a key part of secondary rules of international law on state responsibility.[140] Rules on state responsibility work both in parallel to jurisdictional considerations, and in addition to them.[141] These rules centre on the notion of internationally wrongful acts, which encompass breaches of international human rights obligations. Under these rules, responsibility is triggered when wrongful conduct can be attributed to a state, but also when the state has aided or assisted in the commission of the wrongful conduct by another state.

In the context of external co-operation on border control, the prohibition on aiding or assisting another state in the commission of an internationally

wrongful act is of importance. This is applicable if a state provides support to a country committing a wrongful act (if it were wrongful if committed by the supporting state) and if that support is provided with knowledge of the circumstances of the wrongful act.[142] Directing or controlling another state in the commission of an internationally wrongful act also entails responsibility.[143] Whenever responsibility is engaged, including on the basis of aiding and assisting a wrongful act, the state is under an obligation to cease actions that lead to this and, as required, to offer appropriate assurances and guarantees of non-repetition.[144] It must furthermore make full reparation for the injury caused by the internationally wrongful act.[145]

Whether responsibility is indeed triggered when specific forms of support are provided by Council of Europe member states requires a case-by-case assessment. However, as noted, the human rights implications of many external co-operation activities are by now well documented and may be presumed known to member states.[146] Furthermore, risks in externalisation schemes are often foreseeable, and a lack of strong human rights conditionalities, ongoing monitoring, and enforceable guarantees will only increase the possibility that Council of Europe member states could be found responsible. While the rules on state responsibility provide for certain circumstances in which the wrongfulness of an act is precluded (consent of the other state, self-defence, countermeasures in respect of an internationally wrongful act by another state, force majeure, distress, or necessity), these are narrowly construed and unlikely to arise when a Council of Europe member state has engaged wilfully in co-operation with a third country.[147] Importantly, such circumstances can never preclude the wrongfulness of violations of peremptory norms of international law,[148] including crimes against humanity (which the UN has documented in the context of migration and border control measures adopted in Libya),[149] as well as torture – again, a well-documented practice in various partner countries. [150]

4.5 The expanding role of Frontex outside the EU area

As noted, actions by many Council of Europe member states are closely entwined with measures adopted through the EU. These include operations by Frontex, the European Border and Coast Guard Agency, which has considerably expanded its reach over the past decade.[151] Beyond increases in resources and operational capacity, this has involved an expansion of deployments outside of EU territory, reflecting Frontex's strategic priority of fostering partnerships with non-EU countries.[152] Consistent with this, innovations introduced in the Frontex Regulation of 2019 – such as the removal of territorial limitations previously applicable to the Agency's joint

operations, which can now take place in any country – have enabled Frontex to expand the scope of its activities well beyond the European continent.[153]

Frontex's co-operation with third countries covers various aspects of border management, including border control and return activities.[154] Key tasks of Frontex officers include collecting and analysing information from a variety of sources on the situation at the EU's external borders, through the European Border Surveillance (EUROSUR) system and various risk analysis networks deployed to gather and exchange information, including with non-EU countries. Frontex also supports non-EU countries through capacity building efforts to enhance their border management capabilities.

Moreover, Frontex can carry out operational activities with executive powers on the territory of non-EU countries that have concluded Status Agreements with the EU under the 2019 Frontex Regulation. Currently, it operates in Moldova, North Macedonia, Montenegro, Albania, Serbia, and Bosnia and Herzegovina.[155] Further status agreements are currently being negotiated with Mauritania and Senegal. In such operations, Frontex can deploy the European Standing Corps and technical equipment to support partner countries in border and migration management tasks, including border control, identification and registration of migrants, screening and debriefing, and coast guard functions. Deployed Standing Corps officers take up functions defined in an Operational Plan and can exercise executive powers on the territory of the partner non-EU country in the presence of national officers. Frontex has nearly 500 officers in the Western Balkans, with ongoing joint operations in Albania, North Macedonia, Montenegro and Serbia. In other cases, Frontex deploys Liaison Officers to non-EU countries to facilitate co-operation with the border management authorities of the host country, including in Türkiye, Niger, Senegal, Serbia and Albania, as well as in the context of EU missions in other countries.[156] Over the years, several steps have been taken to address concerns about the human rights implications of Frontex's external activities. For example, in 2021 the European Commission reviewed the model status agreement to be used by Frontex to establish co-operation with partner countries, defining relevant human rights obligations in greater detail.[157] In parallel, the strengthening of Frontex's independent Fundamental Rights Officer has enabled it to play a crucial role in monitoring compliance with human rights obligations.[158]

Despite these measures, commentators have identified continuing concerns as regards the human rights impact of, and accountability for, Frontex's external co-operation activities.[159]

The exercise of executive powers in partner countries – including the use of force and weapons, with the consent of the home state – is one of the most sensitive aspects in the status agreements.[160]

Questions also arise from the fact that the states hosting joint operations retain control over their implementation and can instruct Frontex officers on the activities to be carried out, which may limit the ability of Frontex and EU member states to ensure compliance with fundamental rights.[161] It is also relevant that partner states include countries not bound by the same legal obligations as EU or Council of Europe member states, where guarantees against refoulement are limited, and where human rights violations may be prevalent.[162]

In addition, the fragmentation of responsibilities – some entrusted to Frontex, others to EU member states – may lead to lack of accountability for the overall impacts of the combined actions of the different actors, and render Frontex unable to adopt measures necessary to enhance human rights protection. For example, member states may request Frontex to undertake activities such as aerial surveillance, which can increase the likelihood of rescue operations, but also have the effect of aiding other states' pull-back operations, despite foreseeable human rights consequences. Member states can also restrict Frontex's deployment of vessels at sea and its co-operation in identifying suitable places of safety for disembaration, undermining Frontex's potential to mitigate the adverse human rights impacts of its own actions.[163] Similarly, the attribution to EU member states of competence to issue return and asylum decisions may prevent accountability for return operations conducted in breach of international law guarantees against refoulement, even when these have been materially carried out by Frontex.[164]

Questions have been raised about whether the reach and effectiveness of Frontex' internal monitoring and accountability mechanisms is commensurate with the human rights concerns arising from external operations. These mechanisms are complex, involving, inter alia, the investigation of alleged human rights violations through serious incident reports and individual complaints. However, unless wrongdoing has been directly committed by Frontex staff, the Agency has limited means - beyond pressure exerted by the Fundamental Rights Officer - to ensure that its findings regarding partner-country actions lead to accountability, even when partner countries are EU member states.[165] Under EU law, the Executive Director of Frontex is bound to suspend or terminate any activity, in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist.[166] Frontex has so far, however, not triggered this provision in the context of external co-operation.

Chapter 5
Transparency, monitoring and accountability gaps

5.1 Introduction

Any co-operation initiative should integrate preconditions to ensure human rights compliance. Their absence is an overarching issue in current approaches, whether on externalised asylum, return, or co-operation on border control. This chapter focuses on four interconnected preconditions: adequate transparency (5.2); sufficiently elaborated human rights clauses (5.3); independent monitoring (5.4); and effective accountability mechanisms (5.5).[167]

5.2 Issues impacting on transparency

Various factors have led to a lack of transparency where externalisation is concerned. In some cases, certain co-operation agreements have remained secret, inherently preventing the necessary scrutiny, and often requiring a concerted effort on the part of parliamentarians, civil society or media to bring them into the public domain.[168] Even when agreements are made public, co-operation is frequently carried out on an informal basis,[169] curtailing public and parliamentary scrutiny, which has serious implications for human rights. Concerns about this led to the UK government eventually concluding a legally binding treaty with Rwanda, after initially basing the transfer scheme on a non-binding Memorandum of Understanding.[170] The 2017 Memorandum of Understanding between Italy and Libya was never submitted to the Italian Parliament for ratification and does not provide for any mechanism or criterion to decide its extension.[171] Malta's co-operation with Libya is also based on a bilateral Memorandum of Understanding with similar terms.

A similarly informal approach can be observed at the EU level. As the EU has concluded a number of partnerships focusing on migration, co-operation arrangements are frequently advanced through instruments that mimic the

procedural and substantive legitimacy of formal agreements but represent non-binding, political agreements. These do not undergo the same processes, and typically fail to delineate the specific modalities and scope of the co-operation being pursued, notwithstanding their potential impact on the rights of significant numbers of people.[172] The use of instruments of a non-binding legal nature – such as memoranda of understanding, [173] statements,[174] action plans, [175] partnerships,[176] joint declarations,[177] and similar informal arrangements – illustrates a preference for mechanisms perceived as "pragmatic, flexible, and tailor-made"[178] but that are not fully transparent in terms of attribution of responsibility for the actions being pursued.[179]

These approaches intertwine actions by EU institutions or agencies with those of member states, obscuring the lines of institutional responsibility and complicating the attribution of decisions and accountability.[180] This is the case despite the obligation of member states to uphold their human rights commitments at all times, including when engaging in collective action or exercising shared sovereignty through the EU or other international organisations.[181] In this respect, the human rights obligations enshrined in the Convention are explicitly recognised within EU primary law, notably through the Charter of Fundamental Rights and the Treaties. The previous chapter's discussion on the prohibition of aiding or assisting wrongful acts, including via international organisations, is also of particular relevance here.[182] While EU institutions have gradually implemented measures to monitor EU-funded co-operation programmes, these efforts have often only begun after co-operation has started, rather than as part of a prior assessment, and usually there has been a lack of transparency on relevant procedures, as the findings of the EU Ombudsman have revealed in relation to the EU engagement in Tunisia,[183] and those of the EU Court of Auditors have revealed in relation to the EU-Turkey agreement.[184] Furthermore, Operational Plans agreed by Frontex and partner countries, which are the documents detailing operational objectives, implementation plans, the command and control arrangements, and provisions regarding respect for human rights, are not publicly accessible.[185]

Finally, transparency around specific activities related to asylum, return or border control, and their impacts, can be undermined by these being embedded within much broader co-operation frameworks involving substantial financial disbursements, as seen in arrangements with Tunisia in 2023 and Egypt in 2024.[186]

5.3 Inadequate or insufficiently elaborated human rights clauses

Apart from their lack of transparency, the content of agreements often only provides limited possibilities for ensuring compliance with human rights obligations. Although human rights references are common in agreement texts, they are rarely operationalised through concrete safeguards. In practice, they are almost never accompanied by transparent ex ante human rights impact assessments, nor by the establishment of effective and independent monitoring mechanisms (also see 5.4 below). Moreover, these agreements typically lack clear, publicly accessible criteria for evaluating adverse human rights consequences and fail to define remedial measures, including the potential suspension or termination of co-operation. This shifts the onus onto operational implementation, where jurisdictional limits or legal ambiguities hamper attribution of responsibility to member states for actions that adversely affect human rights.[187] While some recent agreements have introduced improvements, significant concerns regarding transparency and accountability persist.[188]

EU law also provides for relevant obligations, particularly when EU funding is used in migration-related co-operation. Indeed, EU funds should not be used to support actions that are at odds with the provisions of the Charter of Fundamental Rights of the EU and international human rights law,[189] whereas Regulation 2021/947 establishing the Neighbourhood, Development and Internal Cooperation Instrument (NDICI – i.e. the most important vehicle for the provision of international aid by the EU) provides that funds should be used to address human rights and democratisation issues.[190]

5.4 Barriers to effective monitoring

Even with clear human rights safeguards and conditionalities in external co-operation activities, their effectiveness relies on independent and effective oversight to assess the risks of human rights violations during implementation and to trigger corrective steps, including suspension or termination of co-operation. Some arrangements include reference to monitoring mechanisms, such as the UK-Rwanda scheme's monitoring committee, composed of persons appointed by both states. Other agreements are silent on the matter, or simply refer to a general possibility for international agencies and national authorities to carry out monitoring. When EU funds are involved, a standard monitoring process applies, which in some cases is integrated with additional monitoring exercises and may involve independent third parties. But such guarantees are often absent

from agreement texts, are not applied universally or transparently, fall short of fully-fledged human rights assessments – while mostly focusing on the effective implementation and financial management of projects –, or lack complaint mechanisms allowing individuals to report alleged breaches of their human rights.[191]

While states may establish ad hoc mechanisms, it is crucial that monitoring is also conducted by international and national bodies specifically mandated to carry out independent and effective oversight, including of forced removals and detention.[192] As in other areas of human rights monitoring of asylum and migration practices, there is a danger that new, ad hoc mechanisms displace the key role of such independent actors.[193]

Foreseeing a role for domestic bodies is simpler when member states themselves implement procedures extraterritorially, as seen with Italy's National Preventative Mechanism (NPM) in principle being able to carry out oversight of centres in Albania, as these are under Italian jurisdiction. However, this should not remain theoretical. Monitoring of extraterritorial places of detention requires additional resources, especially as the scope of work will be broader and it will require travel and stays abroad. While carrying out unannounced visits is a key tool for independent monitoring,[194] independent bodies may not be able to do this in the same way extraterritorially since it may require, for example, visas or other formalities for the monitoring team.

Furthermore, giving access only to the member state's bodies may be insufficient, and the involvement of independent bodies within the host state may be necessary.[195] In this respect, the UN Sub-Committee on the Prevention of Torture (SPT) has noted that double monitoring by the NPM of the sending state and of the receiving state may be required when states rent prison space in other countries.[196] This general principle may very well be relevant to extraterritorial asylum or return centres.

Issues of access and competence relating to independent bodies become more problematic when the member state does not exercise jurisdiction in the host state, making monitoring dependent on bodies in the host state – this is presuming that such human rights bodies exist in the first place and that they have the requisite independence or effectiveness to carry out their work properly. When this is not the case, new mechanisms should be set up under the relevant co-operation agreement, with the required independence, powers, resources and access to ensure monitoring in line with internationally accepted standards.

In setting up new mechanisms, or expanding existing ones to cover externalised activities, member states may draw inspiration, *mutatis*

mutandis, from existing guidance on monitoring mechanisms – be it from the Council of Europe, especially the CPT, or other institutions, such as FRA,[197] while not overlooking the fact that the lack of extraterritorial applicability of relevant legislation may jeopardise the ability of relevant bodies to operate effectively and independently.

5.5 Accountability gaps

Accountability for human rights violations arising from external co-operation is crucial. Member states have obligations, including providing adequate remedies to anyone who claims to have suffered a violation while under their jurisdiction. However, in practice accountability may be hindered by a number of factors.

First, compliance may be affected by the above-mentioned informality and opacity of approaches, which obscure attribution of facts and related responsibilities. Ensuring that co-operation is based on transparent and legally binding instruments, with adequate human rights clauses and monitoring mechanisms, would represent a crucial step towards making accountability possible. Co-operation should conform to member states' requirements for human rights impact assessments, monitoring, and suspension/termination mechanisms, which should be subject to objective criteria.

Second, as discussed in the previous chapter, jurisdictional limitations may result in situations where authorities cannot be made accountable for actions that may have contributed to human rights violations. To address this, special arrangements for enabling extraterritorial investigations should be explicitly incorporated in external co-operation agreements.

Third, obstacles generally hindering accountability at domestic level, such as a lack of effectiveness or independence,[198] would likely be compounded by the extraterritorial nature of externalised activities. If exercising jurisdiction extraterritorially, the accountability mechanisms already in place in the member state – such as judicial authorities, administrative mechanisms and national human rights bodies – should be able to intervene effectively and without any limitation to investigate alleged violations and, where appropriate, punish those responsible in line, for example, with state obligations under Articles 2 and 3 of the Convention.[199] However, more significant challenges emerge when externalised procedures are implemented by host states, as such states may have weaker accountability mechanisms. For this reason, before any transfer arrangement comes into effect, member states should ensure that clear procedures for accessing remedies and accountability mechanisms are in place and that they can

operate in practice. Moreover, EU actors responsible for overseeing member states' compliance with EU human rights legislation should use all available accountability mechanisms to ensure EU member state co-operation does not directly or indirectly contribute to human rights violations.

Chapter 6
Conclusions

Co-operation with other countries on asylum and migration may be a legitimate and sometimes even necessary activity for states. However, their actions must not conflict with their international obligations or otherwise undermine the human rights protections that they have collectively committed to uphold.

Externalisation of border controls, asylum processing and returns may have wide-ranging harmful effects on human rights, either as a result of direct action by member states vis-à-vis refugees, asylum seekers and migrants, or because of member states' support to third countries. Negative impacts may vary from diminishing certain procedural safeguards to fostering measures that may result in serious human rights violations, including exposing people to ill-treatment or arbitrary detention. In some cases, these risks do not stem simply from how these models of externalisation are implemented; rather, they are inherent in them. The serious impacts on human rights may even be built into the model, in certain cases, for the sole purpose of deterring migrants and refugees.

While this report has focused on the direct and individual impacts of externalisation policies, there are also important wider, systemic effects to be acknowledged and considered. Externalisation tends to reduce access to adequate international protection and relevant guarantees across countries, as asylum seekers often have no choice other than to use irregular means to find safety.[200] This problem is often exacerbated by the very limited, and ever decreasing, ways of accessing protection through safe and regular pathways. The influence exerted by member states on foreign countries may also incentivise a race to the bottom and create an international domino effect: in the extreme, this could lead to an "upstreaming" process that ends up cutting off any possibility of people finding or even seeking the protection they may be entitled to. In addition, in the absence of sufficient safe alternatives to dangerous irregular crossings, externalisation policies fostering more robust border control measures often result in people being pushed to take more dangerous irregular routes to travel, which may result

in an increase in the number of deaths.[201] An approach that prioritises migration management over human rights considerations is also likely to undermine member states' legitimacy in advocating for a rules-based international order,[202] and to increase member states' dependency on such partners to achieve migration and border control objectives, at the expense of human rights protection. In the medium or long term, this may, in fact, end up triggering more displacement, rather than less. This also confirms that the idea that human rights considerations can be addressed during the implementation phase of an externalisation agreement – as opposed to the negotiation phase – may be unfortunate. Finally, and importantly, the leveraging of international aid as a bargaining tool to enhance migration control can lead to diverting funding away from co-operation programmes addressing poverty and other human rights challenges.[203] Given the limited control over how funds may be used, the provision of financial aid to repressive governments may even result in resources being deployed to carry out actions against the rights and freedoms of their own populations.

There have been numerous warnings from international bodies, national human rights watchdogs, civil society organisations and academics about the human rights implications of externalisation. Given the amount of evidence available, it should be assumed that member states are aware of the serious human rights violations suffered by refugees and migrants in a number of countries with which they are partnering.

The Commissioner believes that externalisation without sufficient consideration of its human rights impacts is not a viable option for member states that are serious about upholding their international obligations. In order to abide to those obligations, member states should give consideration to the recommendations in this report.

Chapter 7
Recommendations

The Commissioner considers that a change in approach is needed in relation to external co-operation on asylum and migration to improve respect of human rights. Member states should review any existing initiatives, and build any future engagement in this area, based on the following four pillars:

Member states should adopt a precautionary approach to external co-operation in relation to asylum, return and the prevention of irregular migration.

In view of the human rights risks posed by extraterritorial asylum processing, return procedures and border control measures, member states should apply a precautionary approach in their policy making, taking into consideration their obligation to *prevent* human rights violations.

Should member states consider engaging in co-operation involving externalised procedures, they must demonstrate that these are human rights compliant. In this respect, they should ensure that:

- **Human rights considerations play a decisive role in the choice of co-operation model and partner countries.**
- **They consider whether certain areas of externalisation are appropriate at all.**
    - In this respect, considering that the externalisation of asylum procedures creates both specific risks for individuals and general risks for the protection system overall, a precautionary approach would dictate that member states prioritise carrying out asylum procedures themselves and refrain from pursuing this form of externalisation, focusing instead on enhancing their own capacity to ensure fair and efficient asylum procedures on their territories.

- **Human rights risks are appropriately assessed and mitigated**, by:
    - Carrying out a comprehensive prior human rights risk assessment, which would provide a thorough analysis of potential negative human rights impacts. This should be broad-based and not only focus on how the proposed activity would impact on the state's direct obligations under human rights instruments, but also the risk of aiding and abetting internationally wrongful acts or creating wider effects that put the human rights of refugees, asylum seekers and migrants at risk.
    - Accompanying such an assessment with a risk mitigation strategy, setting out which measures member states and their partners would take to ensure that adverse human rights impacts do not materialise. This strategy should also set out concrete mechanisms to ensure transparency, monitoring, and accountability (see in more detail below), and define a clear process and substantive trigger for suspending or terminating external co-operation in cases where human rights impacts arise that cannot be effectively eliminated.

- **Existing externalisation activities are adequately reviewed** to assess any direct or indirect adverse impacts on human rights, modify activities as necessary to eradicate such impacts and, where this is not possible, immediately suspend or terminate any externalisation activities directly or indirectly leading to human rights violations.
- They act in conformity with the principles of international co-operation and solidarity as a precondition for the effective protection of people on the move (as encompassed, for example, in the 1951 Refugee Convention) by **investing in rights-enhancing forms of international co-operation on asylum and migration**, moving beyond policies primarily aimed at containment, and adopting strategies that prioritise the protection of human life and human rights and ensure a functioning global system of international protection. This involves:
    - Developing safe and regular migration pathways, especially by expanding resettlement and humanitarian admission programmes, opportunities for employment, study or other visas for refugees and asylum seekers, and enabling family reunification for relatives of persons who have received protection, and considering expanding opportunities for legal migration for other categories.
    - Increasing provision of assistance to other states to enhance their reception systems and asylum procedures.
    - Enhancing search and rescue capabilities, ensuring that

humanitarian objectives are not secondary to deterrent measures.

- Addressing the inequalities in accessing human rights that are at the root of migratory movements.

Member states should acknowledge and set out clear non-negotiable principles underpinning external co-operation.

Such principles should include:

- **Not engaging in any form of externalisation that would result in refoulement.** This would include, at a minimum, a firm commitment to:
  - Avoid implementing any activities that would undermine access to fair and effective territorial asylum procedures.
  - Refrain from transferring people from their territories to externalised procedures or return hubs if member states' domestic laws, policies or practices do not guarantee access to a fair and efficient asylum procedure.
  - Abstain from supporting other countries' border control activities in ways that may result in people facing torture, inhuman or degrading treatment or other serious human rights violations, or conflict with any peremptory norm of international law.
- **Not undertaking activities that would foreseeably exacerbate risks to human life and dignity along migration routes**, including undermining search and rescue obligations.
- **Not subjecting children or other vulnerable persons to externalised procedures**.
- **Not developing externalisation activities reliant on deprivation of liberty**, unless this is a measure of last resort, only applied when lawful, necessary and proportionate, and always ensuring that less restrictive alternatives are made available and effectively considered in each individual case.

Should member states decide to engage in co-operation involving externalised procedures, they should design relevant activities with adequate human rights preconditions and safeguards in place, adapted to the specific model of externalisation.

Whenever, despite the above considerations, a member state decides to engage in externalisation, it should do so only if adequate preconditions are put in place. These may differ according to the specific model of co-operation being pursued.

- When engaging in **transfer arrangements to externalised procedures**, the following elements should be in place as preconditions for any transfer to be lawful:
    - A clear legal basis for the forced removal, accompanied by clear rules, applicable in the context of externalisation measures, establishing the division of responsibilities between relevant actors, governing the treatment and potential detention of foreigners, and providing legal remedies.
    - The application of the full range of protections relevant to expulsions, particularly as regards non-refoulement, the prohibition of collective expulsions, the prevention of arbitrary detention and ill-treatment, and access to effective remedies. Access to suitable opportunities to claim protection, with such claims promptly received, adequately processed, and fairly decided, should also be guaranteed.
    - An individualised assessment, carried out prior to any transfer – both from the externalising member state to another state, and from the latter to a country of origin or any other country – focusing on the safety of the country to which a transfer is envisaged, taking into account the risks associated with a possible return, in view of the specific circumstances of each person. Even when member states apply safe country concepts, individuals should still be able to submit reasons why assumptions about safety do not apply in their case, and to have these assessed with all necessary safeguards.
    - Adequate conditions of detention, in compliance with the case law of the Court and with standards set by the Committee for the Prevention of Torture, which include adequate material conditions, a purposeful regime, appropriate provision of healthcare and a robust system of legal safeguards.
    - An effective opportunity to challenge the transfer decision

before an independent court or tribunal, with suspensive effect automatically granted in cases of arguable claims of violations of Articles 2 or 3 of the Convention.

- In addition, as regards the implementation of **externalised asylum procedures**, the following preconditions should apply:
  - Evidence that the transfer scheme does not entail shifting responsibility, that authorities are pursuing it in good faith, and that the transfer scheme does not frustrate access to asylum in the member state in general.
  - A rigorous and up-to-date own-motion assessment of the accessibility and functioning of the asylum system in the third country and the safeguards it affords.

- When implementing **externalised return procedures**, including in 'return hubs', these should be subject to:
  - Limitation of transfers to persons who have not applied for asylum or those whose application has been finally decided on the merits through a fair and efficient asylum procedure in the member state, with the applicant having had an effective opportunity to have the decision reviewed by an independent court or tribunal.
  - Application only to persons for whom there are objective reasons to believe that the transfer may increase opportunities to effectively execute the return decision, in line with relevant guarantees.
  - Clear rules on re-transfer or the long-term status of persons who are not returned to their countries of origin, to prevent situations of protracted legal uncertainty in the host state.

- When a transfer to externalised procedures occurs following **interception by member states in international waters**, they should ensure:
  - Compliance with the obligation to co-ordinate search and rescue operations at sea, prioritising the preservation of life, and ensuring that any rescued individuals are disembarked in a place of safety as promptly as possible, in line with international search and rescue standards.
  - In the case of each individual subjected to interception or transfer, an adequate assessment of:
    - Risks faced by relevant individuals due to the potential disembarkation in a certain country, including risk of

onward refoulement;
    - Lawfulness, necessity and proportionality of any deprivation of liberty, in view of individual circumstances, in case this is the regime imposed on people transferred to another state; and
    - Specific needs and vulnerabilities.

- Measures ensuring that all assessments are carried out with the participation of the necessary professionals and at an appropriate place and time.

- That matters not directly related to rescue and humanitarian assistance, including decisions on who can be transferred to an externalised procedure, are resolved *after* any shipwreck survivors have been delivered to a place of safety.

- When engaging in co-operation as regards **border control measures**, member states should, in addition to safeguards set out elsewhere:

    - Refrain from using externalised border control as a means of containing people in countries where they are exposed to serious human rights violations.

    - Establish appropriate legal and policy frameworks that, explicitly provide for the imposition of human rights conditionalities, the deployment of adequate external monitoring and accountability mechanisms, and the application of enforceable guarantees to prevent and address human rights violations.

Member states should develop enhanced transparency, monitoring and accountability mechanisms that accompany any externalised asylum processing, return procedures, or migration control activities.

In particular, member states should:

- **Ensure that relevant co-operation initiatives are underpinned by formal agreements that are binding under international law**, and that these set out human rights safeguards in a clear, specific and enforceable manner.
- **Establish independent and effective mechanisms to monitor human rights compliance in any external co-operation activity**. Such monitoring should not only rely on ad hoc inter-state monitoring mechanisms, but also involve independent institutions, including

the National Preventative Mechanisms of both externalising and host states, as well as other independent human rights bodies, such as National Human Rights Institutions and Ombudsman institutions, with appropriate, as well as working closely with civil society.

- **Define transparent, clear and enforceable triggers for the suspension or termination of activities** found, through such monitoring mechanisms, to contribute, directly or indirectly, to human rights violations.
- **Ensure that parliaments are able to scrutinise co-operation activities and the allocation of budgets** for relevant programmes, and that any human rights risk assessments and risk mitigation strategies prepared prior to the establishment of co-operation arrangements, as well as monitoring reports prepared during their implementation, are made public.
- **Ensure that adequate mechanisms for accountability are in place, including prompt and effective investigations** by competent judicial bodies, inquiries by independent human rights bodies, and internal administrative investigations by relevant entities.
- **Ensure that any division of responsibilities** between member states and partner states, or between member states and EU bodies, **does not result in accountability gaps**.

Endnotes

1. See UNHCR, Note on the 'externalization' of international protection, 28 May 2021, paragraphs 5-6.
2. See, in particular, Refugee Law Initiative Declaration on Externalisation and Asylum, 2022, paragraph 2, and UN Special Rapporteur for the Human Rights of Migrants, Call for inputs: Externalization of Migration and the Impact on the Human Rights of Migrants, 10 June 2025.
3. See, inter alia, 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, A/HRC/35/25/Add.3, 24 April 2017; UNHCR, UNHCR appeals to Australia to act and save lives at immediate risk, 23 October 2018; Australia must prevent looming humanitarian emergency in Papua New Guinea, 18 October 2017; and UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing, 24 July 2017; OHCHR, Press briefing note on Australia, 6 December 2019; Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2749/2016, *M.I. et al. v. Australia*, CCPR/C/142/D/2749/2016, 23 January 2025; and Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3663/2019, *Mona Nabhari v. Australia*, CCPR/C/142/D/3663/2019, 22 January 2025; Committee on the Elimination of Discrimination Against Women, Concluding observations on the eighth periodic report of Australia, CEDAW/C/AUS/CO/8, 20 July 2018, paragraphs 53-54; Australian Human Rights Commission, Statement on ending offshore processing in PNG, 6 October 2021; and Asylum Seekers, Refugees and Human Rights: Snapshot Report (2nd Edition) 2017, 30 March 2017; Amnesty International, Punishment not protection: Australia's treatment of refugees and asylum seekers in Papua New Guinea, 1 February 2018; Richard Ewart, UNHCR calls for immediate transfer of refugees out of Manus Island, Nauru to 'humane conditions', ABC News, 5 May 2016.
4. See, for example, Amnesty International, Forced and unlawful: Israel's deportation of Eritrean and Sudanese asylum-seekers to Uganda, June 2018; International Refugee Rights Initiative (IRRI), "I was left with nothing": 'Voluntary' departures of asylum seekers from Israel to Rwanda and Uganda, September 2015; Shani Bar-Tuvia, Israel's plan to deport Eritreans and Sudanese is a wake-up call for Europeans, op-ed, European Council on Refugees and Exiles, 15 December 2017; Shahar Shoham, Liat Bolzman and Lior Birger, Moving under Threats: The Treacherous Journeys of Refugees who 'Voluntary' Departed from Rwanda and Uganda and Reached Europe, Oxford Border Criminologies Blog, 12 October 2018; Daisy Walsh, What happened when Israel sent its refugees to Rwanda, BBC, 23 June 2022.
5. See, for example, the Guantánamo Public Memory Project, Haitians and GTMO: Who is a Refugee? What Makes a Refugees? (last accessed 7 July 2025), and Jeffrey S. Kahn, Guantánamo's Other History, Boston Review, 15 October 2021.
6. International Refugee Assistance Project (IRAP), Offshoring Human Rights: Detention of Refugees at Guantánamo Bay, September 2024.

7. See, for example, Vincenzo Genovese, Many EU countries endorse Commission's migrant outsourcing plans, Euronews, 22 July 2025. See also: Monique Pariat, Externalisation of migration management: a need for clarification, Institut Jacques Delors, policy brief, May 2025.
8. FRA, Planned return hubs in third countries: EU fundamental rights law issues, 6 February 2025.
9. See, in particular, UNHCR, Note on the 'externalisation' of international protection, 28 May 2021; UNHCR, The need for effective return systems and the potential role of return hubs, March 2025; and UNHCR, International agreements for the transfer of refugees and asylum-seekers, 7 August 2025.
10. See references throughout the text.
11. See, among others, Commissioner for Human Rights, Serious human rights concerns about United Kingdom's Rwanda Bill, 23 April 2024; Protecting the Defenders: Ending repression of human rights defenders assisting refugees, asylum seekers and migrants in Europe, February 2024; Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures, 13 November 2023; A distress call for human rights: The widening gap in migrant protection in the Mediterranean, March 2021; Third party intervention in the case of *S.S. and Others v. Italy*, application no. 21660/18, CommDH(2019)29, 15 November 2019; Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean, June 2019; Report on the visit to Denmark from 30 May to 2 June 2023, 25 October 2023.
12. For an overview of early suggestions, including Danish proposals for UNHCR-run processing facilities in regions of origin in the 1980s, the 2003 'new vision for refugees' espoused by UK Prime Minister Tony Blair, and more recent suggestions for disembarkation platforms, see Frowin Rausis and Konstantin Kreibich, Externalizing refugee protection: less a vision than a mirage, National Center of Competence in Research – The Migration Mobility Nexus, 5 July 2022. Also see Gabija Leclerc and Maria-Margarita Mentzelopoulou, Extraterritorial processing of asylum claims, European Parliamentary Research Service (EPRS), PE 757.609, July 2025.
13. European Council, EU-Turkey statement, 18 March 2016.
14. For example, see the then-Commissioner for Human Rights, Nils Muižnieks, Safeguards needed for EU-Turkey migration deal, Huffington Post/Euractiv, 22 March 2016. See also, among many others, Amnesty International, A blueprint for despair: human rights impact of the EU-Turkey deal, 14 February 2017; and EU Ombudsman, EU must continue to assess human rights impact of EU-Turkey deal, 18 January 2017;
15. Commissioner for Human Rights, Greece must urgently transfer asylum seekers from the Aegean islands and improve living conditions in reception facilities, 31 October 2019; and Greece: immediate action needed to protect human rights of migrants, 29 June 2018.
16. For a recent example, see several similar elements, including what has been described as a "one in, one out" approach that seeks to balance returns to France and subsequent admissions to the United Kingdom in the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic on the Prevention of Dangerous Journeys, London, 29 July and Paris 30 July 2025.
17. Gabjia Leclerc and Maria-Margarita Mentzelopoulou, Extraterritorial processing of asylum claims, European Parliamentary Research Service (EPRS), PE 757.609, July 2025, page 3.
18. Commissioner for Human Rights, Report on visit to Denmark from 30 May to 2 June 2023, 25 October 2023, paragraph 14.

19. Rajeev Syal, Austria to work with UK on Rwanda-style plan for asylum seekers, The Guardian, 2 November 2023.
20. AFP/Tribune de Genève, «La Suisse pourrait externaliser des procédures d'asile", 21 September 2024.
21. German Federal Ministry of Interior, "Asylverfahren in Drittstaaten": Sachstandsbericht der Bundesregierung, 20 June 2024 (unofficial translation).
22. UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, paragraph 1.
23. Ibid.
24. Ibid., paragraph 3; UNHCR, International agreements for the transfer of refugees and asylum-seekers, 7 August 2025, paragraph 14. See also United Nations, Global Compact For Refugees, section III-A.
25. See, for example, UNHCR, Note on the externalisation of international protection, 28 May 2021, paragraph 4; International agreements for the transfer of refugees and asylum-seekers, 7 August 2025, paragraph 15. See also Parliamentary Assembly of the Council of Europe, Ensuring human rights-compliant asylum procedures, Doc. 15997, 7 June 2024; UNHCR, UNHCR warns against "exporting" asylum, calls for responsibility sharing for refugees, not burden shifting, 19 May 2021; UN Human Rights Council, Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea: Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/HRC/47/30, 12 May 2021.
26. Notably, in relation to access to territorial asylum, in 2023 the Court of Justice of the EU (CJEU) ruled that "forcing third-country nationals or stateless persons residing in Hungary or presenting themselves at the borders of that Member State to move to the embassy of that Member State in Belgrade or Kyiv in order to be able, subsequently, to return to Hungary to lodge an application for international protection constitutes a manifestly disproportionate interference with the right of those persons to make an application for protection". See CJEU, European Commission v Hungary, Case C-823/21, 22 June 2023, paragraph 59. UNHCR has also noted that states, when transferring a person, must still uphold the right to seek and enjoy asylum and cannot relinquish responsibility for all asylum seekers, see UNHCR, International agreements for the transfer of refugees and asylum-seekers, 7 August 2025, paragraph 16.
27. UNHCR, Global Trends Report 2024, 12 June 2025, page 2.
28. See, among others, European Court of Human Rights, *Salah Sheekh v. The Netherlands*, 1948/04, judgement of 11 January 2007. For an overview of EU law preconditions, see Gabija Leclerc and Maria-Margarita Mentzelopoulou, Extraterritorial processing of asylum claims, European Parliamentary Research Service (EPRS), PE 757.609, July 2025.
29. See European Court of Human Rights, *F.G. v. Sweden* [GC], 43611/11, judgement of 23 March 2016, paragraph 127; *Amerkhanov v. Turkey*, 16026/12, judgement of 5 June 2018, paragraphs 52-58; *Batyrkhairov v. Turkey*, 69929/12, judgement of 5 June 2018, paragraphs 46-52; *M.D. and Others v. Russia*, 71321/17, judgement of 14 September 2021, paragraphs 97-99.
30. See European Court of Human Rights, *M.S.S. v. Belgium and Greece* [GC], 30696/09, judgement of 21 January 2011, paragraph 293; *Chahal v. United Kingdom* [GC], 22414/93, judgement of 15 November 1996, paragraphs 95-107; and *Soering v. United Kingdom*, 14038/88, judgement of 07 July 1989, paragraph 91.
31. European Court of Human Rights, *Ilias and Ahmed v. Hungary* [GC], 47287/15, judgement of 21 November 2019, paragraphs 139-41; and *M.S.S. v. Belgium and Greece* [GC], 2011 paragraphs 346-50.

32. In this context, it should also be noted that the CJEU has found that the designation of a country of *origin* as 'safe' must be subject to effective judicial review as regards compliance with the material criteria laid down by EU law, and that the sources of information on which that designation is based must be accessible to the applicant and to the national court or tribunal, see the joined cases of *Alace*, case C-758/24, and *Canpelli*, case C-759/24, judgment [GC] of 1 August 2025. It may be presumed that the same safeguards would need to be observed by member states as regards their designation of safe *third* countries.

33. European Court of Human Rights, *M.S.S. v. Belgium and Greece* [GC], 2011, paragraph 359.

34. Ibid., paragraph 293; *Abdolkhani and Karimnia v. Turkey*, 30471/08, judgement of 22 September 2009, paragraph 107-117;*Gebremedhin [Gaberamadhien] v. France*, 25389/05, judgement of 26 April 2007, paragraphs 53-67; *Chahal v. the United Kingdom* [GC], 1996, paragraphs 147-154; *Shamayev and Others v. Georgia and Russia*, 36378/02, judgement of 12 April 2005, paragraph 460.

35. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, paragraph 3; International agreements for the transfer of refugees and asylum-seekers, 7 August 2025, paragraph 7.

36. Under EU law currently in force, a country can only qualify as a safe third country if, inter alia, persons recognised as refugees receive protection in accordance with the Geneva Convention, meaning that other rights set out in that instrument must also be accorded beyond the mere prohibition of refoulement (Article 38(1)(e) of Directive 2013/32/EU (recast Asylum Procedures Directive)). From mid-2026, new rules will apply under Regulation 2024/1348 (Asylum Procedures Regulation), which focus on a safe third country providing "effective protection" (Article 57), but this still requires a range of guarantees to be provided beyond protection against refoulement, such as access to means of subsistence sufficient to maintain an adequate standard of living, access to healthcare and essential treatment of illness and access to education (all under the conditions generally provided for in that country).

37. European Court of Human Rights, *M.S.S. v. Belgium and Greece [GC]*, 2011.

38. Ibid., paragraphs 286-293.

39. See Commissioner for Human Rights, Serious human rights concerns about the United Kingdom's Rwanda Bill, 23 April 2024. See also, Committee for the Prevention of Torture, Report to the United Kingdom Government on the ad hoc visit to United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 29 June 2023.

40. See UK Supreme Court, Judgment [2023] UKSC 42, 15 November 2023, paragraphs 104-105.

41. On this and other relevant issues, see Corte Suprema di Cassazione (Italian Court of Cassation), Ufficio del Massimario e del Ruolo, Relazione su novità normativa: Decreto-legge 28 marzo 2025, n.37, 18 June 2025, and sources listed therein.

42. See, for example, ASGI, La Commissione europea monitora il protocollo Italia-Albania, ma l'interferenza con il diritto UE è già evidente, policy paper, March 2025; and Extraterritorial detention and the return of irregular migrants from Albania: doubts about compatibility with EU law, Legal analysis, July 2025, section 3.

43. Corte Suprema di Cassazione (Italian Court of Cassation), Ufficio del Massimario e del Ruolo, Relazione su novità normativa: Decreto-legge 28 marzo 2025, n.37, 18 June 2025, sections 3.1 and 3.3.2.

44. Letter to the European Commission of the Ministers of Interior and/or Migration of 14 member states, 15 May 2024.
45. See, for example, Polish Ministry of the Interior and Administration, Polish Presidency in the Council of the European Union - Informal Justice and Home Affairs Council meeting, 30 January 2025.
46. See, for example, Benjamin Fox, Migrant deportation 'hubs' and 'innovative' solutions on EU's agenda, say ministers, EUObserver, 10 October 2024. See also: Ministerial summit on migration: Working together on reducing illegal migration effectively, Joint declaration, Zugspitze, Germany, 18 July 2025.
47. European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC, 11 March 2025.
48. Ibid., Articles 4(3)(g) and 17.
49. Between late 2024 and early 2025, multiple judicial decisions by domestic courts, including referrals to the Court of Justice of the EU, resulted in hindering the possibility for the Italian government to use the detention centres in Albania as originally intended, i.e. for the detention of people intercepted at sea and undergoing border procedures. Following this, through decree-law 37/2025, Italian authorities amended legislation regarding the detention centres located in Albania, adding the possibility to use them to detain people who have entered Italian territory and are subjected to an expulsion order. Decree-law 28 March 2025, n. 37, *Disposizioni urgenti per il contrasto dell'immigrazione irregolare*, converted into law and modified with Law 23 May 2025, n.75.
50. The broadening in the potential use of the pre-removal detention centre located in Albania was realised through the adoption of decree-law 28 March 2025, n. 37, subsequently converted, with modifications, into Law 23 May 2025, n. 75.
51. NOS, Kabinet wil uitgeprocedeerde Afrikaanse asielzoekers naar Uganda sturen, 16 October 2024; The Guardian, Netherlands mulls sending rejected African asylum seekers to Uganda, 17 October 2024.
52. See, for example, Financial Times, Starmer says UK in talks with 'return hubs' to take failed asylum seekers, 15 May 2025.
53. UNHCR, The need for effective returns systems and the potential role of return hubs, March 2025, page 3.
54. See Council of Europe, Department for the execution of judgements of the European Court of Human Rights, Implementing ECHR judgments: New factsheet on migration and asylum, November 2021. Also see, among others, European Court of Human Rights, *M.A. and Others v. Lithuania*, 59793/17, judgement of 11 December 2018; *Ilias and Ahmed v. Hungary*, 2019; and *M.S.S. v. Belgium and Greece*, 2011.
55. See, for example, Court of Justice of the European Union, *European Commission v. Hungary*, 2021; and *M.A. v Valstybės sienos apsaugos tarnyba*, 2022.
56. See, for example, European Implementation Network, Justice Delayed and Justice Denied: Report on the Non-Implementation of European Judgments and the Rule of Law, 2024.
57. Commissioner for Human Rights, Pushed beyond the limits: Four areas for urgent action to end human rights violations at Europe's borders, chapter 1, April 2022. See also, Committee for the Prevention of Torture, 32nd General Report of the CPT, December 2022; Parliamentary Assembly of the Council of Europe, Pushback policies

and practice in Council of Europe member states, Resolution 229(2019); Parliamentary Assembly of the Council of Europe, Pushbacks on land and sea: illegal measures or migration management, Resolution 2462(2022).

58. Commissioner for Human Rights, Finland should reject the draft law on instrumentalisation of migration, protect access to asylum and prevent summary expulsions, 17 June 2024; and Poland: Proposed amendments to asylum law should be rejected to ensure human rights observance at the border with Belarus, 11 March 2025.
59. See, for example, European Commission, Communication on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders, 11 December 2024.
60. See Corte Suprema di Cassazione (Italian Court of Cassation), Ufficio del Massimario e del Ruolo, Relazione su novità normativa: Decreto-legge 28 marzo 2025, n.37, 18 June 2025, section 5.
61. See European Court of Human Rights, *N.D. and N.T v. Spain* [GC], 8675/15 and 8697/15, judgement of 13 February 2020, paragraph 185; *Khlaifia and Others v. Italy* [GC], 16483/12, judgement of 15 December 2016, paragraph 243; and *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, 23 February 2012, paragraph 174.
62. The Albanian Constitutional Court ruled on the matter, stating that "double jurisdiction" applies, and therefore holding that Albania retains a certain level of responsibility for ensuring the respect of human rights obligations on its territory. See, Gjykata Kushtetuese e Republikës së Shqipërisë (Constitutional Court of the Republic of Albania), Press release, 29 January 2024.
63. FRA, Planned return hubs in third countries, 6 February 2025, chapter 1.
64. See International Law Commission, Draft Articles on the Expulsion of Aliens, 2014, Article 22(1).
65. Directive 2008/115/EC of the European Parliament and of the Council, Article 3(3). Return may also take place to another third country to which the person voluntarily decides to return, but as this depends on the discretion of the individual, this is not relevant to the current discussion of involuntary transfers to externalised procedures.
66. This is the case even when the return procedure is not carried out under the jurisdiction of the member state that initiated the transfer and if ECHR or EU law safeguards do not apply. See, in particular, International Law Commission, Draft Articles on the Expulsion of Aliens, 2014.
67. See: ASGI, Extraterritorial detention and the return of irregular migrants from Albania: doubts about compatibility with EU law, Legal analysis, July 2025, section 5.
68. European Commission, Migration: Commission proposes new European approach to returns, 11 March 2025.
69. See, for example, German Federal Ministry of Interior, "Asylverfahren in Drittstaaten": Sachstandsbericht der Bundesregierung, 20 June 2024.
70. See for example, Commissioner for Human Rights, Report on visit to Denmark from 30 May to 2 June 2023, 25 October 2023, chapter 1.
71. See for example, European Committee of Social Rights, *Conference of European Churches (CEC) v. the Netherlands*, complaint No. 90/2013, decision on the merits, 1 July 2014, paragraphs 62-76.
72. For example, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the Returns Directive), in its Article 14, sets out certain safeguards to be implemented by member states during return

procedures, including when return is postponed, which include emergency health care and essential treatment of illness and the taking into account of the special needs of vulnerable persons. See FRA, Fundamental rights of migrants in an irregular situation who are not removed, 7 April 2017.

73. See, for example, German Federal Ministry of Interior, "Asylverfahren in Drittstaaten": Sachstandsbericht der Bundesregierung, 20 June 2024, highlighting the lack of clarity on how externalised procedures could avoid "detention-like camps".

74. See, European Court of Human Rights, *Patrick Muzamba Oyaw v. Belgium*, 23707/15, decision of 28 February 2017, paragraph 36; and *J.R. and Others v. Greece*, 22696/16, 19 April 2016, paragraphs 108-111. See also, Council of Europe Steering Committee for Human Rights (CDDH), Alternatives to Immigration Detention: Fostering Effective Results, June 2019, chapter 1.

75. See, among others, ASGI, Extraterritorial detention and the return of irregular migrants from Albania: doubts about compatibility with EU law, Legal analysis, July 2025, section 1, suggesting that, since extraterritorial detention involves more severe material conditions compared to detention on the relevant state's territory, while not increasing the likelihood of return, its imposition conflicts with EU law provisions requiring that coercive measures are imposed only when proportionate and strictly functional to the objective of returning the irregularly staying person.

76. UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012.

77. See, for example, European Court of Human Rights, *S.Z. v. Greece*, 66702/13, judgement of 21 June 2018; and *H.T. v. Germany and Greece*, 13337/19, judgement of 15 October 2024.

78. See Corte Suprema di Cassazione (Italian Court of Cassation), Ufficio del Massimario e del Ruolo, Relazione su novità normativa: Decreto-legge 28 marzo 2025, n.37, 18 June 2025, sections 3.1 and 3.3.2. In the specific case of the Italy-Albania scheme, such differences may also arise when people detained in Albania are accused of having committed a crime while in detention centres in Albania, since accused people would remain detained in the centre in Albania while awaiting trial, rather than in a prison in Italy, where legal guarantees are higher. See Legge 9 giugno 2025, n. 80, Conversione in legge del decreto-legge 11 aprile 2025, n. 48, recante disposizioni urgenti in materia di sicurezza pubblica, di tutela del personale in servizio, nonchè di vittime dell'usura e di ordinamento penitenziario. See also Commissioner for Human Rights, Letter to the President of the Italian Senate, 16 December 2024, and Coalizione Italiana per le Libertà e i Diritti civili (CILD), Sedare e punire: il nuovo DDL Sicurezza reprime la protesta nei CPR, 5 June 2024.

79. See, for example, Committee for the Prevention of Torture, Factsheet 'Immigration detention', CPT/Inf(2017)3, March 2017.

80. Committee for the Prevention of Torture, 32nd General Report of the CPT, 2022.

81. See, for example, Eleonora Celoria, Italy, Albania and the EU: Externalisation and the reconfiguration of extraterritorial borders, 8 July 2024.

82. ASGI, Extraterritorial detention and the return of irregular migrants from Albania: doubts about compatibility with EU law, Legal analysis, July 2025, section 2.

83. See Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania for the Strengthening of Cooperation on Migration, 6 November 2023.

84. See European Court of Human Rights, *Hirsi Jamaa v. Italy*, 2012, paragraphs 70-82. See also *Medvedyev and Others v. France* [GC], 3394/03, judgement of 29 March 2010; and

Banković and Others v. Belgium and Others [GC], 52207/99, decision of 12 December 2001.

85. European Court of Human Rights, *Medvedyev and Others v. France,* 2010, paragraph 81; *Hirsi Jamaa and Others v. Italy,* 2012, paragraph 178; and *S.S. and Others v. Italy,* 21660/18, decision of 20 May 2025, paragraph 111.

86. Commissioner for Human Rights, Lives Saved. Rights Protected. Bridging the protection gap for refugees and migrants in the Mediterranean, June 2019.

87. See, for example, Amnesty International, Italy: New investigation reveals damning details about preventable drownings, 2 June 2023.

88. See, for example, SOS Humanity, SOS Humanity criticises disembarkation of survivors in Albania, 14 October 2024.

89. International Maritime Organization, Res. MSC. 167(78), Guidelines on the treatment of persons rescued at sea, adopted on 20 May 2004, paragraph 6.8.

90. International Convention on Maritime Search and Rescue, 1979, Article 3.1.9, and International Convention for the Safety of Life at Sea, 1974, Regulation 33, paragraph 1.1.

91. Amnesty International, The Italy-Albania Agreement on Migration: Pushing Boundaries, Threatening Rights, 19 January 2024, paragraph 4.1.

92. See European Court of Human Rights, *Čonka v. Belgium*, 51564/99, judgement of 5 February 2002, paragraph 79; and *Hirsi Jamaa and Others v. Italy*, 2012, paragraph 200.

93. Under the Italy-Albania Protocol's initial implementation, only men who could be submitted to 'border procedures' would be transferred to Albania. The nationalities selected for transfer were therefore those of countries designated as 'safe', in particular through a legislative measure adopted by the Italian parliament. Since then, and following a request for an interpretative ruling submitted by an Italian court, the CJEU has clarified that designation of such safe countries of origin is possible through member states' legislation, but that this is subject to several preconditions. In particular, the legislative act must be able to be subjected to judicial review as regards compliance with the material criteria laid down by EU law and the sources of information on which that designation is based must be accessible to the applicant and to the national court or tribunal. Furthermore, the designation of a safe country of origin may not include countries that do not offer adequate protection to their entire populations. See joined cases of *Alace*, case C-758/24, and *Canpelli*, case C-759/24, judgment [GC] of 1 August 2025. On the impermissibility of using territorial exceptions, also see *CV*, case C-406/22, judgment [GC] of 4 October 2024. However, note that Regulation 2024/1348 (the Asylum Procedures Regulation), adopted as part of the EU Pact and entering into force in June 2026, explicitly (re)introduces the possibility to designate both safe countries of origin and safe third countries while making exceptions for specific parts of their territories or clearly identifiable categories of persons (see Articles 59(2) and 61(2) of the Regulation).

94. See IMO, UNHCR, ICS, Rescue at Sea: A guide to principles and practice as applied to refugees and migrants, January 2015, page 14.

95. International Convention on Maritime Search and Rescue (SAR), 1979, paragraph 6.19; International Convention for the Safety of Life at Sea (SOLAS), 1974, paragraph 6.20.

96. European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, 2012, paragraphs 185 and 202.

97. Azadeh Dastyari and Daniel Ghezelbash, *Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures*, 29 February 2020.

98. European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, 2012, paragraphs 183-186.

99. See International Law Commission, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006.

100. See European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, judgement of 12 October 2006, paragraph 55; *Muskhadzhiyeva and Others v. Belgium*, 41442/07, judgement of 19 January 2010, paragraph 56; *Popov v. France*, 39472/07 and 39474/07, judgement of 19 January 2012, paragraph 91; *Tarakhel v. Switzerland*, 29217/12, judgement of 4 November 2014, paragraph 99; *Abdullahi Elmi and Aweys Abubakar v. Malta*, 25794/13 and 28151/13, judgement of 22 November 2016, paragraph 103; *R.C. and V.C. v. France*, 76491/14, judgement of 12 July 2016, paragraph 35; *R.M. and Others v. France*, 33201/11, judgement of 12 July 2016, paragraph 71; *S.F. and Others v. Bulgaria*, 8138/16, judgement of 7 December 2017, paragraph 79; *G.B. and Others v. Turkey*, 4633/15, judgement of 17 October 2019, paragraph 101; *Khan v. France*, 12267/16, judgement of 28 February 2019, paragraph 74; and *Darboe and Camara v. Italy*, 5797/17, judgement of 21 July 2022, paragraph 173.

101. See, for example, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006.

102. United Nations Convention on the Rights of the Child (CRC), Article 3(1).

103. European Court of Human Rights, *Rahimi v. Greece*, 8687/08, judgement of 5 April 2011, paragraphs 109-110; *Popov v. France*, 2012, paragraph 119; *A.B. and Others v. France*, 11593/12, judgement of 12 July 2016, paragraph 124; *R.M. and Others v. France*, 2016, paragraphs 86-88; *R.K. and Others v. France,* 68264/14, judgement of 12 July 2016, paragraphs 85-87; *H.A and Others v. Greece*, 19951/16, judgement of 28 February 2019, paragraphs 206-207; *Bilalova and Others v. Poland*, 23685/14, judgement of 26 March 2020, paragraphs 80-82; *M.D. and A.D. v. France*, 57035/18, judgement of 22 July 2021, paragraph 89; *M.H. and Others v. Croatia*, 15670/18 and 43115/18, judgement of 18 November 2021, paragraph 249; *R.R. and Others v. Hungary,* 19400/11, judgement of 4 December 2012, paragraphs 90-92; and *Nikoghosyan and Others v. Poland*, 14743/17, judgement of 3 March 2022, paragraph 88.

104. OHCHR, Joint General Comment Number 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their families and number 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, paragraph 5, 16 November 2017.

105. UNHCR, Position regarding the detention of refugee and migrant children in the migration context, January 2017. Also see the position of the Parliamentary Assembly of the Council of Europe, which "expresses its uncompromising opposition to the detention of children", Ensuring human rights-compliant asylum procedures, Resolution 2555(2024), paragraph 13.1.

106. UNHCR, The need for effective return systems and the potential role of return hubs, March 2025, page 3.

107. FRA, Planned return hubs in third countries: EU fundamental rights law issues, position paper, 6 February 2025, paragraph 46, further referring to FRA, Returning unaccompanied children: fundamental rights considerations, 6 September 2019.

108. The European Commission, Proposal for a Regulation of the European Parliament and of the Council, establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC, 11 March 2025.

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153. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, Article 74. See also Florin Coman-Kund, The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond, Verfassungsblog, 6 February 2020.
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European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, COM/2021/829 final, 21 December 2021; and Communication from the Commission to the European Parliament and the Council, Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, COM/2016/0747 final, 22 November 2016.

158. The Fundamental Rights Officer and Deputy Officer lead a team of about 70 staff, providing continuous monitoring of activities, including in third countries, and investigating complaints and reports alleging violations of human rights. They report directly to the Management Board, which is however barred from giving them instructions. They can issue recommendations to the Management Board and the Executive Director, and these must respond within 15 or 30 days, depending on the urgency of the matter.
159. See, for example, Mariana Gkliati and Jane Kilpatrick, Exporting borders: Frontex and the expansion of Fortress Europe in West Africa, Statewatch/Transnational Institute, July 2025.
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161. Meijers Committee, Comment on Frontex's Status Agreements with Senegal and Mauritania, CM2307, 7 June 2023, page 4.
162. Ibid., including sources referenced therein.
163. See Frontex Consultative Forum, Recommendation on the assessment of fundamental rights implications of Multipurpose Aerial Surveillance in Frontex activities, in: Frontex Consultative Forum, Tenth Annual Report (2022), Annex III.
164. Mariana Gkliati, Shaping the Joint Liability Landscape? The Broader Consequences of WS v Frontex for EU Law, European Papers, Volume 9, Number 1, 2024, pages 69-86.
165. See Commissioner for Human Rights, Greece should prevent pushbacks and ensure accountability for human rights violations at the borders, 6 May 2025.
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173. See, for example, European Commission, Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia, 16 July 2023.

174. See, for example, European Council, EU-Turkey statement, 18 March 2016.

175. See, for example, European Commission, The Joint Valletta Action Plan, adopted at the Valletta Summit on 11-12 November 2015. See also European Council conclusions, 22 October 2021, paragraph 15.

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177. See, for example, European Commission, EU-Mauritania Joint Declaration, 8 March 2024.

178. See European Council, European Council conclusions, 24-25 June, 2021.

179. European Ombudsman, Decision on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding (OI/2/2024/MHZ), 12 April 2024. See also Andrea Ott, Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges,2020, pages 569–601.

180. Eva Kassoti and Narin Idriz (eds.), The Informalisation of the EU's External Action in the Field of Migration and Asylum, 2022.

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183. European Ombudsman, Decision on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding, OI/2/2024/MHZ, 21 October 2024.

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185. Juan Santos Vara, The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?; in: European Papers, Volume 8, Number 2, 2023, page 999.

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190. Regulation (EU) 2021/947 of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe. See European Ombudsman, Decision on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding, OI/2/2024/MHZ, 21 October 2024, paragraph 27. See also Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget; and Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

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- awareness-raising activities.

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