Externalization of migration governance: new trends and specific aspects
Submission to the UN Special Rapporteur on the Human Rights of Migrants

January 2026

This briefing is submitted in response to the call for input by the UN Special Rapporteur on the Human Rights of Migrants. It is based on ECRE's analysis of developments at the EU level which seek to create the legal framework to externalise migration governance and more specifically, responsibility for assessing protection needs, providing protection and returns.

ECRE is a pan-European alliance of 125 not-for-profit organisations in 40 European countries, focusing on defending and promoting the rights of displaced people in Europe and in Europe's external policies. ECRE's membership continues to grow consistently year-by-year, reflecting the desire of European civil society to work together on refugee protection.

Externalisation measures related to asylum:

Concluded in 2024, the Pact on Migration and Asylum ("the Pact") is a complex package of ten legislative acts that reform the EU's Common European Asylum System (CEAS). It will become effective in June 2026. The Asylum Procedures Regulation (APR) in particular includes changes to the use of the safe country concepts in EU asylum law. These concepts include the *safe country of origin* concept, whereby applicants from countries that are deemed safe have their applications processed rapidly and/or in a border procedure; the *first country of asylum* concept applied when an applicant has received international protection in a third country; and the *safe third country* concept, which is used to facilitate the transfer of an applicant to a third country designated as safe for them where they can receive protection.

ECRE puts forward in this contribution how these concepts as they have recently been developed under the Pact are effective obstacles to the full and effective protection of the human rights of migrants in need of international protection arriving at the borders of the European Union.

As a consequence, it is ECRE understanding that UN Human Rights Treaty Bodies who consider individual complaints or communications should prepare for an increase in the number of submissions and be ready to contribute to an assessment of the compliance of recently adopted EU legislation with international standards.

The *safe country of origin* and *safe third country* concepts are constructions of EU law rather than being derived from international law. Products of administrative practice of asylum authorities developed over the years, they aim at shifting protection responsibilities to neighbouring countries or to any country asylum applicants may have transited on their way to the state they request protection from. As such, both concepts and their current implementation not only pave the way for shifting Europe's responsibility for migrants and refugees towards third countries, they also further undermine solidarity with other regions in the world which host the majority of the world's refugees. While they are used in relation to different groups of applicants, all three concepts are deployed in EU asylum law as a means of limiting the number of people who receive international protection in the EU.

Watering down the notion of "effective protection"

Countries are to be considered safe if they offer "effective protection" which is defined in Article 57 of the Asylum Procedures Regulation (APR) and relates to both first country of asylum and safe third country concepts. This new concept of 'effective protection' replaces protection as defined by the Refugee Convention, setting a lower threshold for a country to be determined to be safe. As codified in EU law this concept is more restricted than the standard use of the term "effective protection" by

UNHCR, whereby the term means Geneva Convention-level protection which can be accessed in practice.

There are two ways for the standard of effective protection to be met. While Article 57(1) explains that countries which have ratified and respect the Geneva Convention shall be considered as ensuring effective protection, Article 57(2) explains that there is an alternative to Convention-level protection.

Accordingly, countries also provide effective protection when five criteria are met. These criteria are in place when the people concerned:

- are allowed to remain on the territory of the third country in question;
- have access to means of subsistence sufficient to maintain an adequate standard of living with regard to the overall situation of that hosting third country;
- have access to healthcare and essential treatment for illnesses under the conditions generally provided for in that third country;
- have access to education under the conditions generally provided for in that third country; and
- effective protection remains available until a durable solution can be found.

By introducing a second way in which the standard of effective protection can be met, the APR undermines the centrality of the Refugee Convention. At Article 57(2), five criteria are sufficient to constitute effective protection, and fall short of the level of protection set out in the Convention. ECRE strongly argues that the reference to respect for the Refugee Convention in Article 57 should be interpreted as meaning that the people are able to request and obtain refugee status under the Convention in the country concerned.

The concept of first country of asylum:

As per Article 59 APR, a country can be considered as a first country of asylum if the applicant held effective protection as per Article 57 and if three other criteria also apply:

- the applicant's life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- the applicant faces no real risk of serious harm as defined in Article 15 of the Qualification Regulation;
- the applicant is protected against refoulement in accordance with the Geneva Convention and against removal in violation of the right to protection from torture and cruel, inhuman or degrading treatment or punishment as laid down in international law.

While EU law previously required that for the first country of asylum to apply, the applicant had to be "recognised as a refugee", the APR states now that the applicant should have "held effective protection" in the country. Again, ECRE argues that this should be interpreted as having held refugee status with all the safeguards it implies.

The concept of safe third country (STC)

The definition of safe third country has four cumulative criteria, starting with the three listed above that apply for first country of asylum, and concluding with a reference to the Article 57 definition on effective protection, which in this case does not have to have been enjoyed – rather the applicant should have the possibility to request and receive it. This is a significant lowering of standards compared to the current rule, where it was necessary that the applicant could request and obtain refugee status in accordance with the Geneva Convention.

There are two more ways in which the threshold that needs to be reached for a country to be deemed 'safe' has been weakened in the Pact.

Firstly, a new element in Article 59(2) renders it possible for a country to be designated as safe "with exceptions for specific parts of its territory or clearly identifiable categories of persons". This measure is intended to widen the use of the concept. Previously, a country would not have been designated as safe if that were not the case for certain areas or where certain categories of people – for example minority communities – were at risk. The new provision opens the door for categorising countries as

safe despite the lack of safety in some areas or for some people. This implies, for example, that conflict in one part of the country or repression or even potentially persecution of one particular group should not preclude the country from being designated as safe. The designation of a country as safe will be carried out at the Member State level.

Secondly, a new paragraph in Article 59(7) allows the states to bypass all of the above requirements in cases where an agreement has been made between the EU and a third country, as follows: "[…] Where the EU and a third country have jointly come to an agreement pursuant to Article 218 TFEU that migrants admitted under this agreement will be protected in accordance with the relevant international standards and in full respect of the principle of non-refoulement, the conditions of this Article regarding safe third country status may be presumed fulfilled without prejudice to paragraphs 5 and 6".

The reference to Article 218, meaning that only formal international agreements concluded following the process set out in the Treaty on the Functioning of the EU will qualify (the process includes consultation of the Parliament) is significant. While recent experience, including the EU's and individual states' dealings with Rwanda, Turkyie and Tunisia, demonstrates that third countries offered benefits by Europe may be willing to make claims – or indeed efforts – to be safe for asylum applicants, refugees or other people, objective evidence throws doubt on such claims. At the same time, these agreements deliberately take the form of informal agreements rather than formal international agreements, thus they would not fall under Article 59(7).

The concept of safe country of origin (SCO)

Article 61 of the APR stipulates that a country can be deemed as a safe country of origin if "on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is no persecution as defined in Article 9 of [the Qualification Regulation] and no real risk of serious harm as defined in Article 15 of [the Qualification Regulation].

Similarly to the STC concept, a country can be designated as a SCO with exceptions for specific parts of its territory or clearly identifiable categories of persons.
In terms of process, it is the EC that proposes the designation of a country as SCO for the common EU list, taking into consideration information provided by the EU Asylum Agency. The EC's proposal is then adopted by the Council. Member States will retain the possibility to draw up national SCO lists.

Further reforms that undermine standards and safeguards

In April 2025, the EC presented new proposals to reform the APR, focusing on the safe country of origin concept and the safe third country concept even before the changes agreed as part of the Pact have come into effect.

The 2025 reform introduces three main changes to the usage of *the SCO concept*. First, it establishes that the EU common list of safe countries of origin envisaged by the APR should be created and come into effect as soon as the Pact instruments apply in 2026. Second, it adds the provision that EU candidate countries are to be classified as safe countries of origin at EU level unless very specific circumstances apply. Third, it provides that seven other countries which appear in an annex to the proposal are to be designated as safe at EU level. These countries are Bangladesh, Colombia, Egypt, India, Kosovo, Morocco and Tunisia.

The reform also is further expanding the use of *the STC concept* by removing the mandatory connection required between the applicant and the country concerned. Instead, it proposes to introduce three conditions, any of which may be used to apply the concept:

i) there is a connection between the applicant and the third country concerned, on the basis of which it would be reasonable for him or her to go to that country;
ii) the applicant has transited through the third country concerned;
iii) there is an agreement or an arrangement with the third country concerned requiring the examination of the merits of the requests for effective protection made by applicants subject to that agreement or arrangement.

In addition, the 2025 reform proposals includes the weakening of appeal rights in cases where the STC concept is applied, meaning that an applicant who receives a rejection as inadmissible following application of the safe third country concept will no longer have the right to remain during an appeal. The automatic suspensive effect of the lodging of the appeal is removed. Instead, the applicant will have to apply separately to be allowed to remain but this will have to take place at the same time as they lodge the appeal, with a five-day deadline for making the request. The deportation is then suspended pending the court's decision on whether to allow the person to remain until the legal process is concluded.

The standard of protection afforded by third countries which are considered as safe as set by the Pact is already below that of the Refugee Convention. This already generates significant risks for applicants and undermines international law. Hence ECRE warns against the further erosion of standards constituted by the removal of connection criterion. In ECRE's view, removal of the automatic suspensive effect of an appeal against an inadmissibility decision on the grounds of the safe third country concept would significantly increase the risk of refoulement. The non—refoulement principle is not only embedded in the Refugee Convention (art. 33) and in several regional and international law instruments, it has also acquired a ius cogens status (see Executive Committee Conclusion No. 25 para. (b); UN docs. A/AC.96/694 para 21.; A/AC.96/660 para. 17; A/AC.96/643 para. 15; A/AC.96/609/Rev.1 para. 5). Removing the automatic suspensive effect of an appeal against an inadmissibility decision on the grounds of the safe third country concept would also erode the right to an effective remedy to a level that is no longer effective and which is below what is required by EU primary and secondary law and the jurisprudence of the European Courts.

State of play regarding the negotiations

EU Member States and the European Parliament have reached political agreements on the STC concept and on the SCO concept on 18 December 2025. The agreement largely follows the measures proposed by the EC and outlined above. The changed rules will come into effect in June 2026.

General remarks:

In ECRE's view, if EU law is to allow Member States to deflect their responsibility for examining the merits of individual applications, it should only allow this where it is established that the protection received in the third country is the same as required under EU law. The capacity of the third country to provide effective protection in practice in light of the effort it is already undertaking in hosting large refugee populations must necessarily be part of any assessment of whether the first country of asylum concept or the safe third country concept can be applied with respect to the applicant. Finally, in ECRE's view, applying the first country of asylum concept is not appropriate for countries where UNHCR undertakes refugee status determination because the state does not have the capacity to do so or cannot provide protection as defined above. As UNHCR recognition in such countries does not constitute recognition of a right of residence for the individual – nor can it guarantee protection from refoulement – no effective protection can be assumed to exist. This approach is supported by the case law of the ECtHR. In the case of Abdolkani and Karimnia v. Turkey concerning the planned deportation by Turkey of two Iranian nationals, former members of the Peoples Mujahidin Organisation in Iran (PMOI), to Iraq, the ECtHR found that their deportation to Iraq would violate Article 3 ECHR, notwithstanding the fact that they both had been recognised as refugees by UNHCR in Iraq. Women fleeing domestic violence, honour-based violence, forced marriage, female genital mutilation (FGM), human trafficking, or other forms of gender-based persecution risk being directed into inappropriate asylum procedures that lack gender sensitivity. This may lead to their return to third countries where they face a serious risk of persecution, torture, inhuman or degrading treatment, or other human rights abuses.

For further reading:

ECRE Policy Paper (2025): Creating more 'safe' countries and frontloading the Pact available here.
ECRE Comments (2024) on the Asylum Procedures Regulation available here.

Externalisation measures related to return:

In March 2025, the European Commission (EC) presented a proposal for a Regulation establishing a common system for the return of third country nationals staying illegally in the Union (the Return Regulation) repealing Directive 2008/115/EC (the Return Directive). The Return Regulation is supposed to establish a Common European System for Returns with "swifter, simpler and more effective return procedures across the EU."

A significant expansion of countries to which third-country nationals (TCNs) can be transferred against their will is suggested (Article 4). This goes far beyond the country of origin or habitual residence, to encompass transit countries, countries which the person has the right to enter, countries deemed safe for the person on the basis of the Asylum Procedures Regulation, and countries with which there is an agreement or arrangement – even where non-binding.

The proposal also covers return to a third country with which there is an agreement or arrangement (Article 17) and provides the legal basis for the development of "return hubs" – centres in third countries to which people with a return decision will be deported (with the exception of unaccompanied children and families with children (Article 17(4)).

ECRE has grave concerns about the expansion of countries people can be deported to and of using non-binding agreements or arrangements as the basis for return procedures. The "return hub" concept outsources the very EU's fundamental rights responsibilities to third countries with no clear safeguards for the individual concerned, i.e. potentially no decision in writing establishing the return hub as a destination, or appeal before a judicial authority. There is no information on how the EU will judge whether international human rights standards are respected in the third country; which independent body or mechanism will monitor this; and any powers in case of violations of rights. The monitoring body or mechanism foreseen in the Return Regulation proposal also only monitors the application of the agreement, not its impact on individual rights.

There are also specific risks to those in vulnerable situations, including women and girls, including the risk of violation of Article 4 (prohibition of torture and inhuman or degrading treatment) and Article 21 (non-discrimination) of the European Charter of Fundamental Rights, the non-refoulement principle under the 1951 Refugee Convention, and Article 5 of the Istanbul Convention, which obliges states to prevent, investigate, and prosecute acts of violence against women.

State of play regarding the negotiations:

The EC's proposal is currently being negotiated by the co-legislators. The Council has adopted its position on the Return Regulation on 8 December 2025. It removes the limited references to obligations and responsibilities of Member States and suggests that monitoring should only be necessary in cases there is onward return from the third country concerned. The relevant provisions related to externalisation of return responsibilities are also those that Member States want to enter into force almost immediately following agreement with the EP on the final text of the Return Regulation. The European Parliament is still deliberating its position at the time of writing this submission.

Further Reading:

ECRE Policy Note (2025). Towards a Point of No Return for Fundamental Rights? Available here
ECRE Comments (2025) on the proposed Return Regulation available here.
Joint civil society statement (2025) on the Council's position on the Return Regulation available here.

Externalisation measures related to development assistance and trade

The EU is increasingly using development assistance to put pressure on third countries to cooperate on its migration objectives. In the current EU budget this is done via what the EU calls a "flexible incitative approach" where third countries are able to receive funding additional to their initial allocation for specific projects related to migration management and return. Examples of projects that have been supported in the past in this framework can be found here.

As part of the negotiations for the EU's next multi-annual budget which will start in 2028, the EC has proposed to go beyond this positive conditionality to also include the possibility for the EU to withhold funding to third countries if they do not cooperate, particularly on return (see Article 12 of the proposed Global Europe Regulation). If agreed, this proposal siginficantly undermines the four development effectiveness principles (ownership of development priorities by developing countries; focus on results; inclusive partnerships and transparency and mutual accountability) agreed in 2011 and overseen by the Global Partnership for Effective Development Cooperation (GPEDC) of which the EU is a member.

The EU has already included this approach of punishing non-cooperation in its trade scheme with developing countries. Under the General System of Preferences (GSP), the EU removes import duties from countries coming into the EU market for a group of developing countries. In a recent reform of the GSP, the Council and the European Parliament agreed in December 2025 that GSP preferences can be withdrawn in case a developing country does not cooperate with the EU on readmission. This change will come into effect in January 2027.

Further Reading:

ECRE Policy Note (2021): Thightening the Screw: Use of EU external policies and funding for asylum and migration available here.
ECRE Policy Note (2020): Migration Control Conditionality: A Flawed Model available here.

Recommendations:

ECRE is respectfully inviting the Special Rapporteur to consider reiterating the Recommendations (a) to (u) made in the report on **Externalization of migration governance and its effect on the human rights of migrants** (A/80/302) taking into account the recent legislative changes and developments at EU level, including the ongoing implementation of the EU Pact on Asylum and Migration.

ECRE puts forward the following recommendations to EU Member States:

- Refrain from using the weakened standards for safe third country concept as Member States retain the right to examine the application on the merits and on carrying out an individual assessment.
- Refrain from concluding any agreements that transfer responsibility for assessing and/or providing protection to a third country, particularly in cases where the level of protection that is available does not meet the standards set by the Refugee Convention.
- Ensure that any cooperation on migration takes place as part of a formal agreement which is subject to parliamentary and judicial scrutiny.
- Apply the fundamental and human rights standards as set out by the Fundamental Rights Agency and the Commissioner for Human Rights of the Council of Europe when considering agreements with third countries .
- Refrain from introducing negative conditionality into the Global Europe Regulation as it undermines the principles for effective development assistance, including partnership and accountability.

As States parties to the Charter of Fundamental Rights of the European Union and in order to strengthen the promotion, protection and implementation of the human rights of migrants in need of international protection in Europe, EU Member States should:

- Consistent with Article 19.1 Treaty of the EU, establish a procedure allowing an individual applicant to preventatively apply for judicial protection, where a plausible allegation is made that the application of a legislative act of the Union would lead to a violation of fundamental rights by EU Member States.
- Adopt a declaration recognising that the EU Member States adopting measures in the framework of an action decided by the Council or the EU under the Common Foreign and Security Policy (CFSP), remain fully accountable for any impacts on fundamental rights that may result from such action.

(See The Implementation of the Charter of Fundamental Rights in the EU institutional framework, available here, Recommendations 6.1 and 6.2).

The following recommendation is made to UN agencies:

- UN-agencies should not participate in any EU or EU Member State externalization activity that could violate human rights.