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Mandate of the Special Rapporteur on the human rights of migrants

Contribution to the report on externalisation

In carrying out his mandate, the Special Rapporteur on the human rights of migrants has decided to dedicate his forthcoming report to the 80th session of the General Assembly to the externalization of migration and the impact on the human rights of migrants. In recent years, externalisation has become a defining feature of migration, asylum, and border policies, particularly among high-income destination countries. This umbrella term refers to measures designed to prevent migration, carry out administrative processes beyond national borders, and facilitate return through the involvement of third countries. The concept of "externalisation" can thus be broadly understood as “the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory.” Such practices may expose individuals to situations in which their human rights are not protected.

Questions

1. Examples of externalisation measures

European Union (EU) asylum and migration law and policies provide several examples of migration externalisation measures - formal and informal - adopted by the EU and its Member States to shift migration control beyond their territorial borders. These include sea interdictions, third-country processing, offshore detention centres, safe third country designations, and readmission arrangements. These practices are underpinned by a mix of formal treaties and informal instruments such as Memoranda of Understanding, declarations, and technical arrangements, often with limited transparency or parliamentary oversight.

The most emblematic example is the 2023 bilateral Protocol between Italy and Albania, which establishes offshore processing and extraterritorial detention facilities on Albanian territory but under Italian jurisdiction. This agreement allows Italy to intercept individuals at sea and transfer them to Albanian soil without ever bringing them into Italian territory, thereby seeking to avoid triggering EU asylum obligations. The legal basis for this arrangement is a formal intergovernmental agreement ratified by the Italian parliament in February 2024. However, the agreement was first signed without legislative involvement and was only subject to ratification after concerns were raised about democratic oversight and institutional transparency. Under the terms of the protocol, Italian authorities maintain jurisdiction over the detention centres and the asylum procedure conducted therein, while Albanian authorities are limited to security functions outside the perimeter of the facilities. This constitutes a paradigmatic case of third-country processing and extraterritorial detention in the European context.

The implementation of this measure is legally and logistically complex. Italian courts have already raised serious concerns. For instance, the Tribunal of Rome ruled that the detention foreseen by the protocol violates EU asylum law, particularly regarding

procedural guarantees and the illegality of automatic detention. Moreover, the Court of Justice of the European Union, in a preliminary ruling, underscored that "safe third country" designations must apply uniformly across a country's territory and not selectively to specific facilities, further undermining the legal coherence of the Italy-Albania scheme. In practice, although the centres in Albania opened in October 2024, the project faces considerable legal and operational challenges, including doubts about its compatibility with the EU Charter of Fundamental Rights and the 1951 Geneva Convention. Thus, while politically feasible in the short term, the arrangement's medium- to long-term viability is in doubt due to legal challenges and its likely incompatibility with supranational norms.

Another significant case of externalisation involves the EU's use of informal arrangements, such as the 2023 Memorandum of Understanding signed between the EU and Tunisia. This MoU is a soft law instrument, devoid of binding legal status and negotiated directly by the European Commission without formal involvement of the European Parliament. Despite its non-binding character, the agreement aims to significantly bolster Tunisia's capacity to prevent departures, conduct interceptions, and readmit third-country nationals - thereby externalising key elements of border control. This cooperation is incentivised through development aid, financial transfers, and the promise of enhanced political and economic cooperation under the "Team Europe" initiative. The operationalisation of these measures relies on executive discretion, particularly by the European Commission and Member State governments, rather than on democratically accountable legislative bodies.

Similar informal cooperation is also established between Frontex and various border authorities in third countries. After the 2016 and 2019 Frontex reforms, the agency is also mandated to cooperate with third countries, including conducting joint border control operations in their territories. This cooperation is developed under a Status Agreement signed between the European Commission and the third country concerned.

In addition, the reform of the EU Visa Code through Article 25 a institutionalises a readmission-related form of externalisation by linking the issuance of Schengen visas to a third country's cooperation with EU return and readmission demands. While this mechanism has a formal legal basis in secondary EU legislation, its implementation relies on evaluations by the Commission on the level of cooperation of a third country with Member States on the readmission of irregular migrants.[1] As such, the measure serves as a form of negative conditionality, pressuring third countries to accept returned migrants in exchange for visa facilitation - a form of externalisation embedded in administrative processes rather than overt bilateral treaties.

Finally, the broader evolution of the concept of "safe third countries" (STC) in the context of the EU's Pact on Migration and Asylum also exemplifies externalisation. The new Asylum Procedure Regulation (Reg. 2024/1348) lowers the threshold for designating a country as safe, removing the requirement that it entirely applies the 1951 Geneva Convention. This creates the legal basis for transferring asylum seekers to countries like Turkey or Lebanon, which either limit geographically or have not ratified the Convention. While the STC concept has formal legal grounding in EU law, its practical application risks disregarding substantive examination of asylum claims in the EU, which is at odds with the EU and its member states' human rights obligations. Recent reforms to EU asylum law, notably Regulation (EU) 2024/1348, have significantly broadened the

[1] Art. 25 a, Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), OJ L 188, 12.7.2019.

criteria for designating a country as a STC. A country can now be considered safe if it has a readmission agreement with the EU, even without guaranteeing full compliance with the 1951 Refugee Convention.

In addition, under Art. 59 (7) of Regulation (EU) 2024/1348, a country will be considered safe once it has signed a readmission agreement with the EU. Moreover, as per the most recent European Commission proposal on the concept of safe third country,[2] the (former EU law) requirement for a meaningful connection between the asylum seeker and the STC has been weakened; instead, mere transit or the existence of an agreement may suffice. This creates legal inconsistency, as some Member States require such a connection constitutionally, while others do not. Additionally, the Commission proposed to eliminate appeals' suspensive effect in order to prevent procedural delays and abuse. This, if the proposal were to be translated into EU legislation, would imply that individuals receiving inadmissibility decisions based on STC rules may no longer have an automatic right to remain during appeal, increasing the risk of being deported to unsafe countries in violation of European human rights standards.

G. Raimondo, Protocole Italie-Albanie : Une externalisation « à l'italienne » Jusletter 2024 (available upon request).
G. Raimondo, L'externalisation et le Pacte sur la migration et l'asile. Une analyse de la dimension externe de la récente législation européenne en matière d'asile. Jusletter 2024 (available upon request).

2. Transparency and monitoring

Transparency and monitoring of externalisation measures remain extremely limited. While some legal bases - such as the Italy-Albania protocol - are eventually made public following ratification, others, like the EU-Tunisia Memorandum of Understanding, are informal and not systematically published. This implies that not only are those agreements not subject to democratic scrutiny by parliaments and general public opinion, but that they are also difficult, if not impossible, to be judicially challenged, as their soft law nature involves that they are not supposed to produce legal effect towards third parties. In addition, access to implementing measures and technical cooperation documents through freedom of information laws is often restricted by exemptions related to public security (see CJEU, Sea Watch, 2023). Monitoring mechanisms, when present, for example during Frontex border control operations in third countries, are vague and lack independent oversight. Human rights impact assessments are not systematically conducted prior to concluding these agreements, and if carried out, their findings are rarely made public. Complaint mechanisms for individuals affected by externalisation are either absent or inaccessible, particularly in extraterritorial contexts where jurisdictional ambiguities further impede access to justice.

G. Raimondo, Protocole Italie-Albanie : Une externalisation « à l'italienne » Jusletter 2024 (available upon request).
G. Raimondo, L'externalisation et le Pacte sur la migration et l'asile. Une analyse de la dimension externe de la récente législation européenne en matière d'asile. Jusletter 2024 (available upon request).
G. Raimondo, The European Integrated Border Management. Frontex, Human Rights, and International Responsibility (Hart 2024), 42-44; 62-64; 92-94.

[2] Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2024/1348 as regards the application of the 'safe third country' concept, 20.05.2025, COM(2025) 259 final.

3. Cooperating States

Cooperating states benefit from externalisation arrangements primarily through financial aid, infrastructure investments, and enhanced political relations with the EU or its Member States. In exchange for cooperation, they receive development assistance, migration-related funding, visa exemption or visa waivers in the Schengen area as well as geopolitical recognition.

4. Non-State actors

Externalisation practices carried out by the European Union—a supranational actor—frequently depend on the collaboration of EU Member States, third countries, and various non-state actors. These non-state actors may include private corporations (e.g., HawkEye 360) or other entities such as Israeli Aerospace Industries (IAI) or Elbit Systems Ltd., whose technological expertise is leveraged to facilitate externalisation efforts. By expanding surveillance capacities through advanced technology, the EU—particularly through its border agency Frontex and naval missions such as the now-terminated Operation Sophia or the ongoing Operation IRINI—effectively shifts maritime borders into third countries. This strategy aims to prevent the departure of third-country nationals en route to the EU as a technique to avoid the triggering of human rights responsibilities.

However, this complex web of cooperation involving both public and private actors spans multiple legal regimes, including public and private law, across international, regional, and domestic law. It obscures chains of command in operational conduct (e.g., operations at sea), complicates the attribution of conduct, and ultimately hinders the determinations of legal responsibility under international human rights law, EU law, and domestic legal systems when such practices result in human rights violations.

J. De Coninck, Relational Human Rights Responsibility, (University of Pennsylvania Journal of International Law 2024).

J. De Coninck, The EU's Human Rights Responsibility Gap (Hart 2024).

5. Responsibility and jurisdiction

The EU's externalisation approach to Integrated Border Management involves a complex array of multi-actor collaborations - such as Frontex status agreements with third countries that grant broad immunities to Frontex personnel, or military operations at sea that operate without judicial oversight. These arrangements create substantial legal responsibility gaps, effectively precluding determinations of legal responsibility for human rights harms attributable to the European Union as well as its Member States. The fragmentation of legal regimes - where different courts apply divergent attribution rules, to the different implicated actors but for the same harmful conduct they have contributed to—enables complicit actors to evade responsibility across their respective regimes, leaving individuals with no meaningful legal recourse.

In addition, the absence of clearly crystallized, justiciable and enforceable legal obligations (e.g., negative, positive, procedural and substantive) for non-state actors such as the European Union (in all of its iterations including Frontex) as well commercial

entities governed by domestic law abroad, additionally complicate any findings of responsibility when multi-actor conduct gives rise to human rights violations. In turn, this prompts states to outsource border management to a greater degree, as the current regime fosters impunity under international human rights law.

J. De Coninck, The EU's Human Rights Responsibility Gap (Hart 2024).

J. De Coninck, Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication? (German Law Journal 2023).