

# Externalisation within the migration policy of the European Union<sup>1</sup>

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<sup>1</sup> This article is primarily based on the author's XXXVI. National Conference for Student Research (OTDK) paper, which was honoured with II. place on the Conference. The aim for this article is to present the paper to the English-speaking experts. The author is committed to the facilitation of translation in order to break down the language barriers concerning science distribution. Therefore, the text was translated with assistance from the European Commission's eTranslation service.

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## ABSTRACT

The externalisation of the migration policy within the European Union is a new approach of blocking migrants from the possibility of activating the safeguards of the European human rights. Despite having several case studies and mal-practices of the externalisation globally (e.g. the practice of the USA or Australia), the EU is uncovering its own approach – with its own flaws. This article offers to present the existing externalisation agreements between the EU and its partner countries, shows improper procedures and gives recommendations in order to be more humane towards persons arriving to Europe. The methodology of the paper is to analyse the text of the partnerships, then analyse their execution. Problematic practices and procedures are highlighted. In the recommendations part, the author attempts to give solutions to these issues.

Keywords: migration, EU Migration and Asylum Pact, human rights, political agreements

### I. INTRODUCTION

The Dublin III Regulation,<sup>2</sup> in force during the 2015 migration crisis, has been intensely criticised for its shortcomings in the execution of the EU's migration and asylum policy. During the most important test of the regulation—the migration wave in 2015—it received serious critique.<sup>3</sup> To address these critiques, a legislative reform initiative was launched in 2016 and is now part of the New Pact on Migration and Asylum (hereinafter: New Pact).<sup>4</sup>

The New Pact was adopted by the EU legislators on 14 May 2024.<sup>5</sup> The Pact—be-

<sup>2</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). [2013] OJ L180/31.

<sup>3</sup> 'Asylum and migration in the EU: facts and figures' (*European Parliament*, 30 June 2017) <<https://www.europarl.europa.eu/topics/en/article/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures>> accessed 23 October 2025. *Nota bene*: Regarding the shortcomings, a number of reasons can be listed: the lack of definition of competences between Member State authorities. Unjust distribution of burdens between Member States and the lack of cooperation between them. No personal interviews with persons arriving at the borders. Minors were not provided with an interest representative. In the case of family reunification, the obligation to provide evidence by means of a document. (Source: European Commission (DG Migration and Home Affairs), 'Evaluation of the Implementation of the Dublin III Regulation – Final Report' (Brussels, 18 March 2016) <[https://home-affairs.ec.europa.eu/system/files/2020-09/evaluation\\_of\\_the\\_implementation\\_of\\_the\\_dublin\\_iii\\_regulation\\_-\\_executive\\_summary\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/evaluation_of_the_implementation_of_the_dublin_iii_regulation_-_executive_summary_en.pdf)> accessed 23 October 2025.

<sup>4</sup> 'Migration and asylum pact' (*European Council*) <<https://www.consilium.europa.eu/en/policies/eu-migration-asylum-reform-pact/>> accessed 23 October 2025.

<sup>5</sup> 'Timeline - Migration and asylum pact.' (*European Council*) <<https://www.consilium.europa.eu/en/policies/eu-migration-asylum-reform-pact/timeline-migration-and-asylum-pact/?>> ac-

ing a package of legislative acts<sup>6</sup>—represents a comprehensive reform of the EU’s migration and asylum acquis, including regulations to address possible future scenarios such as migration crises. E.g. the much-criticised Dublin III Regulation being repealed by the Asylum and Migration Management Regulation.<sup>7</sup> The Pact’s ambitious aim is to ensure a fair and swift procedure for those arriving in Europe, while building the confidence of the European public by instituting an effective common migration and asylum policy.<sup>8</sup>

The New Pact aims to *establish* international partnerships and *deepen* existing agreements.<sup>9</sup> Targeted assistance, an effective return policy, the fight against migrant smuggling and the development of sustainable legal pathways to the EU are the primary European intentions in new partnerships.<sup>10</sup> However, this new approach is a new concern for academic and non-governmental organisations. This paper presents the externalisation of migration and asylum, as well as the European agreements established within this framework.

The importance of the topic is underlined by the novelty of the EU’s externalisation measures, in particular its human rights concerns. Externalisation as a possible way of dealing with migration crises is becoming more and more common in practice. In the statement of Gillian Triggs, Assistant High Commissioner for Protection, at the 71st session of the Executive Committee of the High Commissioner’s Programme, Ms. Triggs noted this short sentence on migration-related problems: “out of sight and out of mind”.<sup>11</sup> In her speech,

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cessed 23 October 2025.

<sup>6</sup> Ten legislative acts are included in the Pact: screening regulation; the updated Eurodac database regulation; asylum procedure regulation; return border procedure regulation; asylum and migration management regulation; crisis regulation; qualification regulation; reception conditions directive; resettlement regulation. Source: ‘The Council adopts the EU’s pact on migration and asylum’ (*European Council*, 14 May 2024) <<https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/>> accessed 23 October 2025.

<sup>7</sup> Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013. [2023] OJ L 2024/1351.

<sup>8</sup> ‘Pact on Migration and Asylum’ (*European Commission*, 21 May 2024) <[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/migration-and-asylum/pact-migration-and-asylum\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/migration-and-asylum/pact-migration-and-asylum_en)> accessed 23 October 2025.

<sup>9</sup> ‘New Pact on Migration and Asylum: Questions and Answers’ (*European Commission*, 23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_1707](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707)> accessed 23 October 2025.

<sup>10</sup> Commission, ‘New Pact on Migration and Asylum’ (Communication) COM (2020) 609 final. *Nota bene*: The document sets out a number of other objectives that the Pact wants to change, such as firm and fair management of the external borders, fair and efficient asylum rules and simpler asylum and return procedures.

<sup>11</sup> ‘Statement by Ms. Gillian Triggs, Assistant High Commissioner for Protection, to the 71th session of the Executive Committee of the High Commissioner’s Programme’ (UNHCR, 7

however, the Assistant High Commissioner praised the New Pact drawn up by the European Commission, saying that the legislative package seeks to promote a fairer distribution of responsibility among Member States and rejects push-backs at borders, in line with the recommendations made by the United Nations High Commissioner for Refugees (hereinafter: UNHCR). By contrast, Triggs sees externalisation as an uncertain, dangerous, responsibility-shifting practice with potentially damaging consequences.

Regarding the approach of the present paper, it relies predominantly on the primary EU law sources<sup>12</sup> and in particular an analysis of international partnerships between the EU and third countries. . As regards research methodology, the critical method was most heavily relied on. An important element of the paper is to highlight the questionable provisions of the analysed agreements, to present human rights concerns and to draw the appropriate conclusions. Given the novelty of the topic, the key element of the study is to make *de lege ferenda* proposals on the solution of presumed human rights concerns within the externalisation of migration and asylum in Europe.

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October 2020) <<https://www.unhcr.org/us/publications/statement-ms-gillian-triggs-assistant-high-commissioner-protection-71th-session>> accessed 23 October 2025.

<sup>12</sup> The EU treaties used in the thesis: Consolidated version of the Treaty on European Union [2012] OJ C 326/1. (hereinafter referred to as: TEU), Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1. (hereinafter referred to as: TFEU) and the Charter of Fundamental Rights of the European Union [2012] OJ C 326/1.

## II. LEGAL BACKGROUND

The New Pact on Migration and Asylum emphasises the international role of the European Union, as migration and asylum are best managed through universal cooperation.<sup>13</sup> In this context, it is of paramount importance to develop new types of cooperation with countries of origin<sup>14</sup> and/or transit<sup>15</sup> as part of the EU's migration and asylum policy.<sup>16</sup>

### 1. Treaties

Art. 67(1) TFEU empowers the European Union to establish a common policy on asylum and migration, taking into account the fair treatment of third-country nationals.<sup>17</sup> The Geneva Convention Relating to the Status of Refugees of 28 July 1951 and its Protocol of 31 January 1967<sup>18</sup> (hereinafter: (Geneva) Convention) have major relevance, as the Geneva Convention defines the term 'refugee'.<sup>19</sup> The Convention also sets out a number of general obligations for the practice of host countries, including, *e.g.* the prohibition of discrimination against refugees on the basis of race, religion or country of origin,<sup>20</sup> freedom of movement<sup>21</sup> and the prohibition of expulsion or *refoulement*,<sup>22</sup> among other rights for refugees.

<sup>13</sup> García Paula Andrade, 'EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?' (*EU Migration Law Blog*, 8 December 2020.) <<https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/>> accessed 24 October 2025.

<sup>14</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9, art. 2 (n) 'country of origin' means the country or countries of nationality or, for stateless persons, of former habitual residence.

<sup>15</sup> The country through which migration flows (regular or irregular) move; this means the country (or countries), different from the country of origin, which a migrant passes through in order to enter a country of destination. 'Glossary: country of transit' (*European Commission, Migration and Home Affairs*) <[https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/country-transit\\_en?prefLang=hu](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/country-transit_en?prefLang=hu)> accessed 24 October 2025.)

<sup>16</sup> Andrade (n 14).

<sup>17</sup> For the purposes of this paragraph, stateless persons shall be considered as third-country nationals.

<sup>18</sup> Legislative Decree No 15 of 1989 promulgating the Convention Relating to the Status of Refugees of 28 July 1951 and the Protocol Relating to the Status of Refugees of 31 January 1967.

<sup>19</sup> *ibid*, art. 1.

<sup>20</sup> *ibid*, art. 3.

<sup>21</sup> *ibid*, art. 26.

<sup>22</sup> *ibid*, art. 33(1). "No Contracting State shall expel or return ("refoul") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political

In subsequent chapters, it is relevant—in particular because of the examination of human rights concerns—that Art. 78(1) TFEU states the EU’s obligation to develop a common policy on asylum, which must be consistent with the 1951 Geneva Convention and the 1967 Protocol. The TFEU underlines the respect of the principle of non-refoulement,<sup>23</sup> however Member States possess the right to expel third-country nationals *illegally* present in the European Union.<sup>24</sup> In addition, Art. 78(2)(g) TFEU empowers the European Parliament and the Council—acting in accordance with the ordinary legislative procedure—to conclude agreements with third countries for the purpose of managing the influx of asylum seekers or persons seeking subsidiary or temporary protection.

Art. 18 of the Charter of Fundamental Rights of the European Union (hereinafter: Charter) provides the right to asylum. In accordance with the Geneva Convention, the Charter lays down the obligation to ensure the right to asylum, the prohibition of collective expulsion, and the respect for the principle of non-refoulement. In the case of illegal migration, the EU’s Charter of Fundamental Rights does not preclude the expulsion of persons who are unworthy of protection.

The Universal Declaration of Human Rights, which has become a customary law in the European Union also enshrines the right to seek asylum and the right to asylum as customary international law,<sup>25</sup> as well as the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).<sup>26</sup>

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opinion.”

<sup>23</sup> TFEU, art. 79.

<sup>24</sup> 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 [2008] OJ L348/98, para. 8. It must be noted that a further condition is that the expulsion Member State operates a fair and efficient asylum system. (*ibid.*) Nota bene: art. 79(2)(c) of TFEU also contains, in the same way as the directive, the competence of the Member States to deport and repatriate illegally staying persons.

<sup>25</sup> 1948 Universal Declaration of Human Rights, art. 14. As an international legal entity, the Declaration binds the European Union but does not have binding force in European law.

<sup>26</sup> Act XXXI of 1993 on the promulgation of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, and the eight additional protocols thereto. Nota bene: The European Court of Human Rights (ECtHR) concluded in *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012) p. 57, para. 9, that the transfer of migrants to Libya constituted collective expulsion, as they were returned without examining the individual situation of each person. The prohibition of collective expulsion was established by the ECtHR on the basis of Art. 4 of Protocol No 4 to the ECHR. It is worth mentioning the relevant case-law of the ECtHR, since it forms part of the general principles of the EU legal order, even though, under art. 6(2) TEU, accession has not yet taken place. (For more on the topic, see: Victor Davio and Elise Muir, ‘Dialogue on the Way the CJEU Uses ECHR Case Law’ (2023) 8 European Papers 317.

## 2. *Categorisation of Externalisation*

Externalisation policies—in broad sense—are procedures by which a state transfers its functions outside to its territory.<sup>27</sup> Externalisation as a set of extraterritorial procedures is an umbrella term.<sup>28</sup> The externalisation of migration essentially summarises the different practices of the countries of destination, in which third countries are entrusted with the control of migration processes.<sup>29</sup> It is important to point out that there is no uniform definition of externalisation—neither in international law or in European law—<sup>30</sup> therefore the paper relies primarily on the literature.

The *Refugee Law Initiative* was a research project by several experts, the results of which—especially in connection with the classification of the practice of externalisation—cannot be overlooked.<sup>31</sup> Based on the research, it is worth distinguishing two major categories: the externalisation of border protection<sup>32</sup> and the externalisation of the asylum system.<sup>33</sup> In order to avoid repetition, the author uses *outsourcing* occasionally, instead of externalisation.<sup>34</sup> The study does not include *periphering*—which was used in the Dublin III Regulation<sup>35</sup>—as a separate scientific dissertation on that topic could be prepared.<sup>36</sup>

In relation to border protection, two concepts should be distinguished: pushback; immediate return of arrivals without a decision on their asylum application<sup>37</sup> and pullback; blocking off persons on the territory of third countries from travelling further, on the basis of agreements with destination countries.<sup>38</sup> Pushback procedures have practically no positive side,<sup>39</sup> literature claims to have

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<sup>27</sup> David Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' (2022) 34 International Journal of Refugee Law 120.

<sup>28</sup> Nikolas Feith Tan, 'Conceptualising Externalisation: Still Fit for Purpose?' (2021) 68 Forced Migration Review 8.

<sup>29</sup> *ibid*, 8.

<sup>30</sup> *ibid*, 9.

<sup>31</sup> Cantor and others (n 28).

<sup>32</sup> *ibid*, 132-141.

<sup>33</sup> *ibid*, 141-152.

<sup>34</sup> Other literature, such as Ermioni Xanthopoulou, 'Mapping EU Externalisation Devices through a Critical Eye' (2024) 26 European Journal of Migration and Law, follows the same principles.

<sup>35</sup> Regulation (EU) No 604/2013.

<sup>36</sup> The criteria for determining the Member State responsible are laid down in art. 7 to 15 of Regulation (EU) No 604/2013. Nota bene: Xanthopoulou (n 35) 116-118, describes the Dublin system.

<sup>37</sup> Cantor and others (n 28) 132.

<sup>38</sup> *ibid*, 135.

<sup>39</sup> Against Hungary, a judgment was handed down by the ECtHR.- In the case at hand which Pa-

only negative effects.<sup>40</sup> The concept of pullback includes similar practices with implementation by third countries.<sup>41</sup> Outsourcing border control is not a *prima facie* illegal act and it is always possible to verify whether the measures raise human rights abuses or not.<sup>42</sup>

Outsourcing the asylum system (*i.e.* the second type of externalisation) has two major sub-groups. One way of outsourcing is where the authorities of the country of destination act on the territory of the third country—therefore have jurisdiction with the authorisation of the third country—or the third country itself carries out the administrative procedure—possibly in cooperation with the country of destination—.<sup>43</sup> Since there is no positive right to be granted asylum in a *chosen* country, the processing of asylum applications in a third country is not prohibited.<sup>44</sup> It is also worth referring briefly to practices by authorities that make it difficult to cross borders, such as transit zones, port closures, fences or wall building,<sup>45</sup> or, *e.g.* the new screening regulation adopted by the New Pact.<sup>46</sup>

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kistanis were expelled from the territory of the country without the state considering their asylum applications. *Shahzad v. Hungary* App no 12625/17(ECtHR, 8 July 2021). Nagy Boldizsár, ‘Magyarország bírái előtt. Menekültügyek az Emberi Jogok Európai Bíróságán, az Európai Unió Bíróságán és más fórumokon’ (2019) 60 Állam- és Jogtudomány 120. Hungary, as other states in the Visegrad Group have taken a more restrictive approach to migration and asylum during the migration and asylum crisis and in the years leading up to the New Pact. See Ágoston Mohay, ‘Migration and asylum law of the V4 in the European Union context: between harmonisation and reluctance’ (2021) 17 Politics in Central Europe (s1) 761.

<sup>40</sup> Cantor and others (n 28) 133. *Nota bene*: The term pushback includes so-called hot returns, which *inter alia* contravenes the principle of non-refoulement. See: 1982 United Nations Convention on the Law of the Sea, 31363 UNTS 1833; Xanthopoulou (n 35) 123.

<sup>41</sup> Morocco can serve as an example of pullback practice. On the basis of an agreement with Spain, Morocco stops people crossing its territory, leaving for Spain via the mainland crossing of Ceuta or the water crossing of Melilla. Emma Smith, ‘What’s behind the death at Morocco’s land border with the EU?’ (*The New Humanitarian*, 8 September 2022) <<https://www.thenewhumanitarian.org/analysis/2022/09/08/Migrant-crisis-Morocco-Spain-border>> accessed 24 October 2025.

<sup>42</sup> Cantor and others (n 28) 135.

<sup>43</sup> Cantor and others (n 28) 141. *Nota bene*: An agreement has been concluded between Italy and Albania on the outsourcing of asylum procedures. Under the agreement, centres for asylum procedures will be set up in Albania, where asylum applications will be processed on the basis of Italian (and European law). If the claims are accepted, Italy will provide shelter. Steffen Angenendt and others, ‘The Externalisation of European Refugee Protection, A Legal, Practical and Political Assessment of Current Proposals’ (2024) 13 Stiftung Wissenschaft und Politik 3.

<sup>44</sup> Cantor and others (n 28) 144.

<sup>45</sup> Xanthopoulou (n 35) 110.

<sup>46</sup> Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (2024) OJ L2024/1356. *Nota bene*: It refers to the appropriate procedure (asylum procedure or return) for third-country nationals who have illegally crossed an external border, art. 1.

### 3. Migrant or Refugee?

In the context of the European Union's externalisation efforts,<sup>47</sup> *Human Rights Watch* (hereinafter: HRW) draws attention to a number of potential breaches.<sup>48</sup> HRW emphasizes the contradiction that represents the perceived and real purpose of externalisation. The perceived goal is to protect migrants from the adversities of travel,<sup>49</sup> but HRW claims the real goal is to curb migration flow.<sup>50</sup>

A cornerstone of the relationship between the 1951 Geneva Convention and European law is the definition of refugee.<sup>51</sup> A refugee is defined in Art. 1 of the Convention as a person "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...". The Qualification Directive<sup>52</sup> defines a refugee with the same content and under the same conditions. Refugee status is granted when a Member State recognises a person as a refugee.<sup>53</sup>

The term migrant is an umbrella term not defined in European (nor international) law, it refers to a person who is temporarily or permanently absent from his or her habitual residence beyond (or even within) a national border.<sup>54</sup> Migrants can be divided into two groups according to the inclusivist and residualist definitions.<sup>55</sup>

<sup>47</sup> The Lisbon Treaty introduced a revised common migration policy, which has become an important tool for foreign policy and migration management. It is the reason why we can talk about a pan-European migration and externalisation policy. TFEU, arts. 77-80.

<sup>48</sup> Bill Frelick, Ian M. Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (*Human Rights Watch*, 6 December 2016) <<https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants>> accessed 24 October 2025.

<sup>49</sup> For the sake of giving a complete view and the topic, it must be added that the journeys are far from safe. Through the Mediterranean Sea, it was extremely dangerous to enter Italy, and many lives were lost at sea. Giulia Carbonaro, 'Four shipwrecks in five days: Why migrants tragedy keep happening in the Med' (*Euronews*, 9 August 2023) <<https://www.euronews.com/2023/08/09/four-shipwrecks-in-five-days-why-migrants-tragedy-keep-happening-in-the-med>> accessed 24 October 2025.

<sup>50</sup> *ibid.*

<sup>51</sup> 'Guaranteeing the right to asylum' (*European Parliament*) <<https://www.europarl.europa.eu/about-parliament/en-democracy-and-human-rights/fundamental-rights-in-the-eu/guaranteeing-the-right-to-asylum>> accessed 24 October 2025.

<sup>52</sup> Directive 2011/95/EU, art. 2(d).

<sup>53</sup> *ibid.* art. 2(e).

<sup>54</sup> 'Key Migration Terms' (*International Organization for Migration*) <<https://www.iom.int/key-migration-terms>> accessed 24 October 2025.

<sup>55</sup> The characteristics of the two views were developed on the basis of the following source:

The author's view is that the residualist view is closer to the prevailing perception in the European Union.<sup>56</sup> For residualists, a migrant can be a person who is not fleeing war or persecution, therefore legally is *not a refugee*. The 2015 migration crisis in Europe have raised the question as whether all applicants for asylum are in need of assistance or not.

On the basis of the residualist view, a distinction must also be drawn between the group of persons referred to as *illegal migrants*—which is often used in the media—on account of the unlawful breach of the requirements for entry, stay or residence in the Member States of the European Union,<sup>57</sup> and *irregular migration*. The latter means, in accordance with Art. 13 of the Schengen Borders Code the illegal crossing of land, sea or air borders of the Schengen Member States<sup>58</sup> and unauthorised stay in the Member States, which entails expulsion.<sup>59</sup> Illegal migration is often confused with irregular migration, the latter term referring to the irregularities in the *movement*. One of the main problems with irregular migration is the smuggling of migrants and the trafficking in human beings, combating this is a priority of the EU.<sup>60</sup>

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<sup>56</sup> What is the meaning of 'migrants'? (*Meaning of Migration*) <<https://meaningofmigrants.org/>> accessed 24 October 2025.

<sup>57</sup> Nota bene: The inclusivist view is that the refugee is also a migrant.

<sup>58</sup> 'Countering irregular migration: better EU border management' (*European Parliament*, 30 June 2017) <<https://www.europarl.europa.eu/topics/en/article/20170627STO78419/countering-irregular-migration-better-eu-border-management>> accessed 24 October 2025.

<sup>59</sup> The Schengen *acquis* comprising of two legal documents, the 1985 Schengen Agreement (Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.) and the Schengen Convention (Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.) has created an area free of internal borders called the Schengen area, where third-country nationals, together with nationals of the Member States, can circulate without border controls. Nota bene: Temporary border controls have also been reintroduced within the internal border-free zone, see more: 'Temporary Reintroduction of Border Control' (*European Commission*) <[https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en)> accessed 24 October 2025. The Schengen Borders Code was part of the reform of the Pact on Migration and Asylum, the new regulation is Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (2024) OJ L2024/1717.

<sup>60</sup> Directive 2008/115/EC, art. 3(2)-(3).

<sup>61</sup> 'Timeline - EU migration and asylum policy' (*European Council*) <<https://www.consilium.europa.eu/en/policies/eu-migration-policy/migration-timeline/>> accessed 24 October 2025. Nota bene: A typical method for illegally crossing state borders is the use of false or falsified documents and the possibility of hiding in means of transport, which can potentially be life-threatening. 'Gyakorlati Lépések az Irreguláris Migráció Csökkentésére' (*European Council Migration and Home Affairs*) <[https://home-affairs.ec.europa.eu/system/files/2020-09/12\\_hungary\\_national\\_report\\_practical\\_measures\\_for\\_reducing\\_irregular\\_migration\\_final\\_dec2012\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/12_hungary_national_report_practical_measures_for_reducing_irregular_migration_final_dec2012_en.pdf)>

To conclude, migrants arriving irregularly may also be in need of international protection, as for those fleeing a real threat could also travel this way.

### III. EXISTING EXTERNALISATION AGREEMENTS

In 2011, the European Commission issued a communication on the general approach to regional and sub-regional cooperation.<sup>61</sup> The scope of the cooperation was the Southern Mediterranean region (Morocco, Algeria, Tunisia, Libya and Egypt),<sup>62</sup> the Eastern region (Ukraine, Belarus, Moldova, Georgia, Armenia and Azerbaijan),<sup>63</sup> Africa (the partnership of 53 African states)<sup>64</sup> and the Western Balkans, Eastern Europe, Russia, Central Asia, the South Caucasus and Turkey played a strategically important role in the so-called Prague process.<sup>65</sup>

In addition to Mobility Partnerships—which were designed to facilitate labour mobility, readmission agreements and visa facilitation—and joint roadmaps—joint recommendations, targets and commitments<sup>66</sup>—which were previously either transnational or sub-regional in scope, the New Pact on Migration and Asylum explicitly aims to develop international partnerships with origin and transit countries of migration, listed in the previous paragraph.<sup>67</sup> Five key areas of cooperation are highlighted in the New Pact: supporting host countries, harnessing local economic potential, fighting migrant smuggling, improving the return process and developing legal migration pathways.<sup>68</sup> The author's view is that the externalisation of migration is embedded in this framework, because the cooperation with third countries can take the burden off the authorities of the Member States of the European Union, since, if the problem is tackled locally, illegal migration to the EU can be reduced.

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accessed 24 October 2025. 27. The European Commission has prepared an action plan to tackle migrant smuggling for 2021-2025, see more: Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A renewed EU action plan against migrant smuggling (2021-2025)' COM (2021) 591 final.

<sup>61</sup> Commission, 'Communication From the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions The Global Approach to Migration and Mobility' COM (2011) 0743 final.

<sup>62</sup> *ibid*, footnotes 10.

<sup>63</sup> *ibid*, footnotes 11.

<sup>64</sup> *ibid*, footnotes 12.

<sup>65</sup> *ibid*, part 3. Geographical priorities.

<sup>66</sup> *ibid*, part 4. Implementation mechanisms.

<sup>67</sup> Andrade (n 14).

<sup>68</sup> 'Pact on Migration and Asylum' (*European Commission*, 21 May 2024) <[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/migration-and-asylum/pact-migration-and-asylum/acting-together-deepen-international-partnerships\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/migration-and-asylum/pact-migration-and-asylum/acting-together-deepen-international-partnerships_en)> accessed 24 October 2025.

There are two important routes for migration to Europe: through the Turkish Eastern Mediterranean route and through African transit countries in the Mediterranean.<sup>69</sup> The European Union expects its partners to implement migration management objectives in exchange to gain the EU's economic support.<sup>70</sup> The Blue Card system,<sup>71</sup> seasonal work opportunities or visa facilitation, where third countries are actively involved in the fight against illegal migration are such incentives of support.<sup>72</sup>

### *1. Pre-New Pact Agreements*

Before the New Pact on Migration and Asylum, an international partnership on migration and asylum was established between the European Union and Turkey.<sup>73</sup> With Turkey's assistance, the Eastern Mediterranean migration route<sup>74</sup> received almost 98% fewer arrivals in Europe in 2020, making the fight against migrant smuggling effective and saving lives by avoiding numerous maritime disasters.<sup>75</sup>

#### 1.1. EU-Turkey Statement

According to the 2016 EU-Turkey Statement, migrants arriving in the first Schengen country, Greece via Turkey—which is a transit country— who are not eligible for international protection, will be immediately returned to Turkey, with

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<sup>69</sup> While Africa is prone to be seen as a continent of economic migrants leaving for the European Union (e.g. due to Algerian or Malian weavers in France), many are forced to flee Africa. See Alain Antil and others, 'Migrations : logiques africaines' (2016) *Politique Étrangère* 12.

<sup>70</sup> In the context of international partnerships with African countries, the need to negotiate individually with African states is a challenge, as there is no comprehensive political dialogue in the African Union, due to its institutional constraints. See Victoire d'Humières, 'La coopération Union européenne/Afrique: l'externalisation des politiques migratoires européennes' 472 *Question d'Europe* 1, 4.

<sup>71</sup> Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC. (2021) OJ L 382/1. Nota bene: The Directive lays down the conditions of entry and residence and the rights of third-country nationals and their family members for more than three months in the territory of the Member States for the purpose of highly qualified employment.

<sup>72</sup> d'Humières (n 71) 6.

<sup>73</sup> 'EU-Turkey statement of 18 March 2016' (*European Council*, 18 March 2016) <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 24 October 2025. Nota bene: Regarding the declaration between the European Union and Turkey, it is important to mention that it is not an international treaty, but a political agreement.

<sup>74</sup> The route of the vast majority of irregular arrivals. 'Migration flows: Eastern, Central and Western routes' (*European Council*) <<https://www.consilium.europa.eu/en/infographics/migration-flows-to-europe/>> accessed 24 October 2025.

<sup>75</sup> 'Migration flows on the Eastern Mediterranean route' (*European Council*) <<https://www.consilium.europa.eu/en/policies/eastern-mediterranean-route/>> accessed 24 October 2025.

the European Union bearing the costs of the return.<sup>76</sup> As a Member State of the European Union, Greece conducts the asylum procedure and if the application is inadmissible, the EU sends the person back.<sup>77</sup> The EU supports legal migration by prioritising those persons' claim who have not entered its territory irregularly.<sup>78</sup> In return for every expelled illegal immigrant, the EU undertook to resettle the same number of Syrian refugees from Turkey.<sup>79</sup> The declaration takes the burden off from the authorities of the Member States, albeit not entirely. In return, the EU provides funds to Turkey for the benefit of individuals under temporary protection, *e.g.* health, education, infrastructure and food projects in support of the situation of refugees.<sup>80</sup>

On the basis of the Statement, its main priorities are to provide targeted assistance to refugees, to curb irregular migration and to return migrants who are not eligible for international protection to Turkey. In terms of human rights violations, it should be pointed out, however, that the European Border and Coast Guard Agency (Frontex) in the Aegean Sea has faced pushbacks<sup>81</sup> due to weaknesses in its internal control, but there have also been cases where Turkey has been reluctant to take back migrants who have been refused asylum.<sup>82</sup> The parties also agreed to accelerate the visa liberalisation process.<sup>83</sup>

In the final provision of the Statement, the European Union and Turkey enter into cooperation to provide targeted assistance to the humanitarian situation in Syria, in particular to the geographical areas on the Turkish-Syrian border, to alleviate the concerns of the local population and refugees.<sup>84</sup> A civil war broke out in Syria in 2011, leading to large numbers of people leaving their country,

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<sup>76</sup> EU-Turkey statement of 18 March 2016, para. 1.

<sup>77</sup> *ibid.* "This [return] will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion.".

<sup>78</sup> *ibid.* para. 2.

<sup>79</sup> *ibid.* para. 3.

<sup>80</sup> *ibid.* para. 6. The effectiveness of the projects is presented in the above quoted 'Migration flows on the Eastern Mediterranean route'.

<sup>81</sup> 'Human Rights Watch Submission to the Special Rapporteur's Report on Pushback Practices and Their Impact on the Human Rights of Migrants' (*Human Rights Watch*, 1 February 2021) <<https://www.hrw.org/news/2021/02/01/human-rights-watch-submission-special-rapporteurs-report-pushback-practices-and>> accessed 24 October 2025.

<sup>82</sup> 'Greece pushing to return 1,450 asylum seekers to Turkey' (*Info Migrants*, 14 January 2021) <<https://www.infomigrants.net/en/post/29650/greece-pushing-to-return-1450-asylum-seekers-to-turkey>> accessed 24 October 2025.

<sup>83</sup> All EU Member States will lift visa requirements for Turkish citizens if Turkey takes the necessary steps. (EU-Turkey statement of 18 March 2016, para. 5.) For more information on the visa liberalisation process in Turkey, see: 'The Visa Liberalization Dialogue' (*Republic of Turkey, Ministry of Foreign Affairs*) <[https://www.ab.gov.tr/the-visa-liberation-dialogue\\_51819\\_en.html](https://www.ab.gov.tr/the-visa-liberation-dialogue_51819_en.html)> accessed 24 October 2025.

<sup>84</sup> EU-Turkey statement of 18 March 2016, para. 9.

many of them on the Turkish Eastern Mediterranean route to Europe.<sup>85</sup> On the basis of the joint Statement, the EU will provide financial support for the reconstruction in the aftermath of the devastation of the Syrian civil war, in the hope of reducing migration towards the EU. However, for the sake of completeness, it should be noted that there have also been instances of Turkey returning arrivals—migrants and refugees—to war-torn Syria, where their fundamental human rights and their lives and freedom were at risk.<sup>86</sup>

## 1.2. Communication on an Effective Externalisation Policy<sup>87</sup>

At the time of the Turkish political agreement, the European Union set out a new direction for migration management, establishing new partnership frameworks with third countries.<sup>88</sup> In its 2016 Communication, the Commission sets out the desire to eradicate irregular migration on the one hand and forced displacement on the other, in coherence with public international law and fundamental rights and applying consistent, medium- and long-term policies.<sup>89</sup> With regard to aid to Syria, the European Union supports projects worth more than 7 billion € to restart lives closest to the country of origin of the refugees (*cf.* EU-Turkey agreement).<sup>90</sup> In 2016, the European Union launched high-level dialogues on migration cooperation with 16 priority cooperating countries.<sup>91</sup> Agree-

<sup>85</sup> Marko Valenta and others, 'Syrian Refugee Migration, Transitions in Migrant Statuses and Future Scenarios of Syrian Mobility' 39 (2020) *Refugee Survey Quarterly* 153.

<sup>86</sup> Bill Frelick, Ian M. Kysel and Jennifer Podkul, (n 49).

<sup>87</sup> Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration' COM (2016) 0385 final.

<sup>88</sup> *ibid.* *Nota bene:* Unsuccessful externalisation efforts could also be pointed out, such as the agreement between Italy and Libya. Libya is not a member of the 1951 Geneva Convention. 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' (UNHCR) <<https://www.unhcr.org/sites/default/files/legacy-pdf/3b73b0d63.pdf>> accessed 24 October 2025. However, Italy has encouraged Libya to withhold and take back migrants (although the human rights violations committed in Libya were known). See more on the horrors of the situation in Libya. 'Libya: Nightmarish Detention for Migrants, Asylum Seekers' (*Human Rights Watch*, 21 January 2019) <<https://www.hrw.org/news/2019/01/21/libya-nightmarish-detention-migrants-asylum-seekers>> accessed 24 October 2025. Cf. *Hirsi Jamaa and Others v. Italy*.

<sup>89</sup> COM/2016/0385 final, part 4.

<sup>90</sup> *ibid.* part 1. *Nota bene:* The 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Lives in Dignity: from Aid-dependence to Self-reliance Forced Displacement and Development COM(2016) 234 final' reviews the EU's long-term strategic approach to regional and territorial development, humanitarian aid, regional cooperation and various catching-up projects (e.g. education, development, health).

<sup>91</sup> COM/2016/0385 final, part 2. The countries are: Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Côte d'Ivoire, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan.

ments have already been reached from some dialogues (not necessarily with priority countries).<sup>92</sup>

## 2. Post-New Pact Agreements

The communication on the New Pact on Migration and Asylum aims at creating new types of partnerships other than readmission agreements,<sup>93</sup> which will be able to provide more effective legal protection for refugees and will be mutually beneficial for the partner country and the European Union.<sup>94</sup> In this context, it is necessary to highlight the objective of the Pact, which was also raised in the context of the sub-chapter *EU-Turkey Statement*, to increase the effectiveness of the readmission mechanism.<sup>95</sup> These agreements are examined below, in particular regard to the achievement of the objectives of the Pact.

### 2.1. EU-Tunisia Memorandum

The EU's joint migration agreement with Tunisia (abbreviated as *MOU*) was concluded in Tunis in 2023 at a meeting between Tunisian President Kais Saied, European Commission President Ursula von der Leyen, Italian Prime Minister Giorgia Meloni and Dutch Prime Minister Mark Rutte.<sup>96</sup> Ursula von der Leyen, Giorgia Meloni and Mark Rutte took a pragmatic approach facing the accusations of autocratic ambition and racism against the Tunisian President ("the end justifies the means").<sup>97</sup> Like the EU-Turkey Statement, this agreement has not been translated into a binding legal instrument. The Memorandum divides the main areas of the agreement into five pillars: "macroeconomic stability", "economy and trade", "green energy transition", "people-to-people contacts"

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<sup>92</sup> There are cases where the EU invests in certain projects or provides financial support to finance the priorities of certain countries, without a complete cooperation agreement. Such support has been established, for example, between the EU and Lebanon. 'Decision No 1/2016 of the EU-Lebanon Association Council agreeing on EU-Lebanon Partnership Priorities' (*European Council*) <<https://www.consilium.europa.eu/media/24224/st03001en16docx.pdf>> accessed 24 October 2025.)

<sup>93</sup> 'Readmission agreements between the EU and certain non-EU countries' (*EUR-Lex*) <<https://eur-lex.europa.eu/EN/legal-content/summary/readmission-agreements-between-the-eu-and-certain-non-eu-countries.html>> accessed 24 October 2025.

<sup>94</sup> COM(2020) 609 final, 6.4.

<sup>95</sup> There is no explicit rule that transit countries are obliged to readmit non-nationals, so the effective implementation of readmission agreements lies in the exchange of targeted EU support. *ibid*, 6.5.

<sup>96</sup> Jorge Liboreiro and Vincenzo Genovese, 'The contentious EU-Tunisia deal is finally here. But what exactly is in it?' (*Euronews*, 17 July 2023) <<https://www.euronews.com/my-europe/2023/07/17/the-contentious-eu-tunisia-deal-is-finally-here-but-what-exactly-is-in-it>> accessed 24 October 2025.

<sup>97</sup> *ibid*.

and “migration and mobility”.<sup>98</sup>

The last pillar of the Memorandum concerns migration and mobility measures. The MOU highlights the need to address migration at the root cause and to take a holistic approach.<sup>99</sup> Tunisia stresses that, in order to curb irregular migration, it surveilles its own borders and combats migration, which is in the mutual interest of the EU and Tunisia, by establishing legal migration routes.<sup>100</sup> To combat migrant smuggling, the European Commission is working on a framework to ensure that illegal migrants in Tunisia can be returned to their country of origin once they have been identified.<sup>101</sup> The EU provides mainly financial support, and additional training and equipment to ensure border protection.<sup>102</sup> In accordance with international law, the Parties agree to return Tunisian nationals illegally present in the EU to Tunisia and to return persons who have arrived illegally via Tunisia to their country of origin.<sup>103</sup> Tunisia in the latter instance serves as a country of transit for migrants. Facilitating legal mobility through visa preferences<sup>104</sup> and talent programs is also included in the migration and mobility pillar, which favors Tunisian talents.<sup>105</sup>

As regards the Memorandum, it is worth presenting the European Ombudsman’s inquiry.<sup>106</sup> In particular, the criticism of President Saied and its possible im-

<sup>98</sup> Mémorandum d’entente sur un partenariat stratégique et global entre: l’Union européenne, représentée par la Commission européenne, ci-après individuellement dénommée l’«UE», et la République tunisienne, ci-après dénommée individuellement «la Tunisie», ci-après dénommés conjointement les «parties». Within the framework of macroeconomic stability, the EU provides economic aid to Tunisia in order to achieve sustainable economic growth in the country and social and economic reforms. (1.) Priority will be given to the economy and trade in priority areas such as sustainable agriculture (including, *e.g.* access to clean drinking water or sustainable irrigated agriculture), the circular economy, the digital transition, aviation and investment. (1-3.) The Memorandum strengthens cooperation between partners on the transition to sustainable energy. (3-5.) In the area of people-to-people contacts, Tunisian nationals benefit from visa preferences (in particular, the Memorandum provides for the harmonisation of short-stay visas between Member States). (5.)

<sup>99</sup> *ibid.* 5.

<sup>100</sup> *ibid.* 6.

<sup>101</sup> For more information on the Commission’s Global Alliance against Migrant Smuggling and the EU Framework, see: ‘Commission launches a Global Alliance to Counter Migrant Smuggling and proposes a strengthened EU legal framework’ (*European Commission*, 28 November 2023) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6081](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6081)> accessed 25 October 2025.

<sup>102</sup> Mémorandum d’entente, 6.

<sup>103</sup> *ibid.*

<sup>104</sup> The Memorandum sets out the need to reduce delays in issuing visas, their costs and administrative burdens.

<sup>105</sup> *ibid.* 7.

<sup>106</sup> Strategic initiative SI/5/2023/MHZ on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding.

pact on the management of migration in Tunisia must be emphasized here.<sup>107</sup> In a letter to Commission President Ursula von der Leyen, Emily O'Reilly, the then European Ombudsman, asked three questions about the Memorandum: firstly; whether the Commission carried out a human rights impact assessment prior to the conclusion of the agreement, secondly; whether the Commission plans to carry out a regular and systematic human rights impact assessment of the measures implemented, and thirdly; under Regulation 2021/947<sup>108</sup>—according to which the EU does not support measures that result in human rights violations—how does the Commission ensure that the actions set out in the Memorandum are compatible with human rights standards, and whether the Commission suspends the disbursement of funds in case of incompatibility.<sup>109</sup> The Commission replied as follows:<sup>110</sup> to the first question, the Commission's position is that there is no need to carry out a human rights impact assessment in relation to the Memorandum, which, although sets out common objectives, *is not a binding source of law*.<sup>111</sup> To the second question, however, the Commission has identified certain means of verification—such as verification visits—but in the absence of an impact assessment, it is certain in the view of the author that these verifications do not carry out an in-depth and systematic assessment of the risk of human rights violations.<sup>112</sup> To the third question, the Commission highlighted the preparedness and regular monitoring of the implementing partners, as well as the provision 11.6(a) of the general terms and conditions of the contribution agreements,

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Nota bene: The European Council on Refugees and Exiles (ECRE) has compiled an extensive list of criticisms on the agreement: 'EU External Partners: EU's Dodgy Deal with Tunisia Sparks Outcry Amid Continued Crack-down Against Sub-Saharan Migrants by the Regime' (ECRE, 26 July 2023) <<https://ecre.org/eu-external-partners-eus-dodgy-deal-with-tunisia-sparks-outcry-amid-continued-crack-down-against-sub-saharan-migrants-by-the-regime/>> accessed 25 October 2025.

<sup>107</sup> For more on Saied's statements against sub-Saharan migrants, see: 'Tunisia's president accused of stirring racism with 'reckless' rhetoric' (Financial Times, 25 February 2023) <<https://www.ft.com/content/c4ecf01d-c01a-4b06-a574-896bc0822850#:~:text=Kais%20Saied,%20the%20authoritarian%20Tunisian%20leader,%20said%20earlier%20this%20week>> accessed 25 October 2025.

<sup>108</sup> Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 (Text with EEA relevance) (2021) OJ L209/1, art. 29.

<sup>109</sup> The questions are set out on page 2 of SI/5/2023/MHZ.

<sup>110</sup> Reply of the European Commission to the questions from the European Ombudsman – Strategic initiative SI/5/2023/MHZ on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding.

<sup>111</sup> *ibid*, 2-3.

<sup>112</sup> *ibid*, 3-4.

which allows suspension in case of human rights violations.<sup>113</sup>

With the lack of impact assessment and legal force, the a new form of international partnership has emerged following the EU-Turkey agreement, which has not made significant progress on guarantees for the protection of human rights. The MOU is not infamous thanks to the effectiveness of human rights protection, but the atrocities committed against black Africans—hundreds from sub-Saharan countries were deported to the desert without food and water by the Tunisian authorities<sup>114</sup>—and the Tunisian authorities' refusal to carry out checks.<sup>115</sup> It can be generally stated that the EU seems to consider its own borders' protection to be more important, even at the expense of human rights. In this context it should be highlighted that the European Union has helped Tunisia to prepare a draft law on asylum, which has not been adopted so far.<sup>116</sup> However, the law and jurisprudence of the country are not always coherent, for example regarding respect for the principle of non-refoulement.<sup>117</sup>

## 2.2. Agreements concluded in 2024

In 2024), the tendency to conclude agreements with third countries seems to be accelerating, as the European Union concluded agreements with Mauritania<sup>118</sup> and Egypt.<sup>119</sup> The agreements have similar content to the EU-Turkey and

<sup>113</sup> ibid, 4-5. Nota bene: The cited document is: ANNEX II - General Conditions for Contribution Agreements.

<sup>114</sup> 'Tunisia: Crisis as Black Africans Expelled to Libya Border' (*Human Rights Watch*, 6 July 2023) <<https://www.hrw.org/news/2023/07/06/tunisia-crisis-black-africans-expelled-libya-border>> accessed 25 October 2025.

<sup>115</sup> Gregorio Sorgi, 'Tunisia denies entry to EU lawmakers on official visit' (*Politico*, 14 September 2023) <<https://www.politico.eu/article/tunisia-denies-entry-to-eu-lawmakers-delegation/>> accessed 25 October 2025.

<sup>116</sup> Fatma Raach and Hiba Sha'ath, 'Tunisia-EU Cooperation in Migration Management: From Mobility Partnership to Containment' in Carrera Sergio Nunez and others (eds), *Global Asylum Governance and the European Union's Role Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Springer 2025).

<sup>117</sup> ibid, 225; 'Algerian refugee deported from Tunisia now imprisoned in Algeria' (*Amnesty International*, 3 September 2021) <<https://www.amnesty.org/en/latest/news/2021/09/algerian-refugee-deported-from-tunisia-now-imprisoned-in-algeria/>> accessed 25 October 2025. Nota bene: The cited Nunez and others volume of studies on page 241 highlights, in relation to the EU-Turkey Statement, the implementation of the agreements and the inconsistency of the terms of the agreement when it comes to the enforcement of human rights, in particular at the expense of them. Orçun Ulusoy and others, 'Cooperation for Containment: An Analysis of the EU-Türkiye Arrangements in the Field of Migration' in Carrera Sergio Nunez and others (eds), *Global Asylum Governance and the European Union's Role Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Springer 2025).

<sup>118</sup> Déclaration conjointe établissant un partenariat sur les migrations entre la République islamique de Mauritanie et l'Union Européenne.

<sup>119</sup> Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Re-

EU-Tunisia partnerships, examined above. Their aim is to support the education of talented young people and their access to employment in the EU,<sup>120</sup> complemented by economic assistance—and the promotion of investment in the agreement with Egypt<sup>121</sup>—in order to achieve the European Union's migration goals.

In the context of migration and mobility, both partnerships emphasise the fight against irregular migration and the importance of the fight against human smuggling.<sup>122</sup> It should be noted that the EU-Mauritania agreement is a partnership on migration, however the agreement with Egypt gives the impression of a broader strategic cooperation, including migration. In the context of operational cooperation between authorities on migration, both Mauritanian and Egyptian personnel agree to deepen cooperation.<sup>123</sup> In the future, Frontex will also support Mauritania with equipment and training to help protect its borders.<sup>124</sup> It must be pointed out that the agreements in the current sub-chapter are not international treaties.

### *3. The Deterrent Nature of the Externalisation System*

Since the establishment of migration regimes, different migration and asylum procedures have been used to differentiate between people who can or cannot enter the state, based on established criteria.<sup>125</sup> The role of international human rights should be to protect equal rights for everyone around the world, but practice is different.<sup>126</sup> Human rights are de facto territorial to this day.<sup>127</sup> Many countries around the world, including the European Union, are pushing migration management away from its territory through externalisation policies.<sup>128</sup> The legitimacy of the policies are disputed,<sup>129</sup> as many methods are in a grey area due to the powers conferred on other countries.<sup>130</sup> The externalisation policy

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public Of Egypt and the European Union' (European Commission, 17 March 2024) <[https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17\\_en](https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en)> accessed 25 October 2025.

<sup>120</sup> EU-Mauritania Statement, para. 1.1.-1.3; EU-Egypt Statement.

<sup>121</sup> EU-Egypt Statement.

<sup>122</sup> EU-Mauritania Statement, para. 4.1; EU-Egypt Statement.

<sup>123</sup> EU-Mauritania Statement, para. 4.2.-4.3; EU-Egypt Statement.

<sup>124</sup> EU-Mauritania Statement, para. 5.1.

<sup>125</sup> David Scott Fitzgerald, 'Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence' (2019) 46 Journal of Ethnic and Migration Studies 4.

<sup>126</sup> See e. g. 'World Report 2024' (Human Rights Watch) <<https://www.hrw.org/world-report/2024>> accessed 25 October 2025.

<sup>127</sup> Fitzgerald (n 126) 5.

<sup>128</sup> ibid.

<sup>129</sup> ibid.

<sup>130</sup> Xanthopoulou (n 35) 112.

of the European Union does not take the form of international treaties, but of joint declarations or memoranda. Taking into account the literature,<sup>131</sup> the author believes it is not a coincidence that the European Union does not conclude its agreements with third countries in the form of international treaties. *Cantor et al.*, referring to the judgment of the ECtHR in *Othman (Abu Qatada) v. UK*, point out that, as far as the protection of human rights is concerned, *bona fide* diplomatic guarantees are not sufficient without formal and substantive rules.<sup>132</sup> By defining *common* objectives with third countries in the EU's political declarations, it actually circumvents Art. 218 TFEU,<sup>133</sup> so that the CJEU cannot examine the conformity of the partner countries as safe third countries<sup>134</sup> and first countries of asylum<sup>135</sup> under Directive 2013/32/EU. In relation to Turkey, it was even mentioned that it did not respect the prohibition of refoulement, thus not fulfilling the conditions of a safe third country, nor could it accomplish the conditions of a first country of asylum.<sup>136</sup> The same has been proven with regard to the MOU.<sup>137</sup>

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<sup>131</sup> *Cantor and others* (n 28) 144. Proposals on the human rights implications of the practices used, it is stated that international treaties should replace the form of political declarations in order to allow for the examination of international responsibility.

<sup>132</sup> *Cantor and others* (n 28) 144; *Othman (Abu Qatada) v UK* App. no 8139/09 (ECtHR, 17 January 2012).

<sup>133</sup> There was an example of a challenge against the EU-Turkey Statement, but the General Court did not act on the case due to lack of jurisdiction. Case T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128 and Case T-193/16 *NG v European Council* [2017] ECLI:EU:T:2017:129.

<sup>134</sup> President Ursula von der Leyen raised the possibility of transfer from the European Union to safe third countries. 'EU conservatives embrace UK-style asylum plan' (*Financial Times*, 7 March 2024) <<https://www.ft.com/content/ef07e57e-c9d5-4a3d-b68f-4d6911e47b45>> accessed 25 October 2025. In the event of a positive assessment following an asylum procedure, the applicant could be protected by the safe third country. The criteria for countries are set out in art. 38 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (2013) OJ L180/60. On the basis of the criteria, these are countries where the threat of persecution or serious harm is absent, where the principle of non-refoulement is respected and where access to the asylum procedure is ensured and protection in accordance with the Geneva Convention is guaranteed.

<sup>135</sup> The first country of asylum principle is also regulated by Directive 2013/32/EU in Art. 35. These countries recognise the applicant as a refugee or the applicant enjoys adequate protection in this country, including non-refoulement.

<sup>136</sup> For additional information on the problems with the EU-Turkey Statement, see: Gloria Fernández Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) 1 European Papers 1097.

<sup>137</sup> For additional information on the problems with the EU-Tunisia Memorandum, see: 'Joint Statement: Tunisia is Not a Place of Safety for People Rescued at Sea' (*Human Rights Watch*, 4 October 2024) <<https://www.hrw.org/news/2024/10/04/joint-statement-tunisia-not-place-safety-people-rescued-sea>> accessed 25 October 2025.

Fitzgerald's quoted study outlines a defence system, which is intended to symbolise the protection of medieval fortresses by comparing contemporary externalisation practices to the structures of the fortification system.<sup>138</sup> The purpose of externalisation policies is to control and select individuals outside the territory of the country of destination from those who may enter, to those who may not enter.<sup>139</sup> These include, *inter alia*, the practice<sup>140</sup> of transit countries—or land-based buffer states—which, after having been found to be unworthy of an appropriate screening procedure, to limit the passage of a person to the country of destination through the country of transit.<sup>141</sup> As territorial borders are same as borders of jurisdictions, outsourcing border control means that elements of the European system of law—as the person does not enter the territory—are not activated.<sup>142</sup>

The French non-entrée summarises externalisation policies aimed at excluding refugees from jurisdiction.<sup>143</sup> In the light of the non-entrée, the European Union undertakes minimum commitment—primarily financial, secondly technical, thirdly by providing training to its partners—in principle to the humane management of migration and asylum, but seems to relieve itself and circumvent its international responsibility.<sup>144</sup> The EU shows a tendency to put its interests and those of its Member States against the interests of migrants, *e.g.* by referring to the protection of the “European way of life”<sup>145</sup> or by declaring a state of emergency.<sup>146</sup>

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<sup>138</sup> Fitzgerald (n 126) 9.

<sup>139</sup> *ibid*, 9.

<sup>140</sup> It must be added that the study highlights in the classic Barbacan strategy that the arrivals had to wait in the temporary transit zones established in Serbia before they could enter the territory of Hungary. (*ibid*, 15.)

<sup>141</sup> *ibid*, 11-12.

<sup>142</sup> *ibid*, 16. Nota bene: it is highlighted in the study that these policies are not fully effective as long as smugglers are able to bring in migrants. (17.)

<sup>143</sup> James C. Hathaway and Thomas Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2014) 14-016 University of Michigan Law & Economic Research Paper 6. Nota bene: The new generation of non-entrée policies, based on pages 20-28 of the study, are political cooperation, mainly economic and investment cooperation in exchange for deterrence of arrivals, provision of financial incentives, equipment and training, joint or shared implementation with officials of the country of destination in the partner country, including European officials at the Greek-Turkish border, and implementation by the country of destination or international agencies such as Frontex on the territory of the partner country.

<sup>144</sup> *ibid*, 7.

<sup>145</sup> ‘Promoting our European way of life’ (European Commission) <[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life_en)> accessed 25 October 2025.

<sup>146</sup> Xanthopoulou (n 35)115.

As regards the jurisdiction, it should be pointed out that there are rights which do not have exclusive territorial effect, such as Art. 33 of the Geneva Convention, the prohibition of refoulement.<sup>147</sup> In this regard, the international responsibility of the EU should be examined in two cases.<sup>148</sup> Firstly, the European Union may assume international responsibility if it assists third countries in committing an internationally illegal act in full knowledge of the circumstances, or if it provides material assistance to a third country knowing that the assistance constitutes a violation of human rights.<sup>149</sup> The liability of the European Union may also be examined in cases of personal liability where, in the context of inter-agency cooperation, European officials determine for the authorities of a third country the manner in which tasks are to be performed (management and control)<sup>150</sup> in such a way that the EU officials may be held responsible for an infringement resulting from the exercise of the other country's official authority.<sup>151</sup> The author believes the first instance may be more pertinent for the EU in that case, it is not necessary to establish the jurisdictional criteria, but only the support provided and the EU's awareness of human rights violations.<sup>152</sup>

<sup>147</sup> Hathaway and Gammeltoft-Hansen (n 144) 30, cites in footnote 95: James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 160-171., where Hathaway enshrines the fundamental rights of migration and asylum, which are: non-discrimination (art. 3), movable and immovable property (art. 13), access to courts (art. 16(1)), rationing (art. 20), public education (art. 22), fiscal charges (art. 29) and the right to naturalisation (art. 34).

<sup>148</sup> Juan Santos Vara and Paula García Andrade and Tamás Molnár, 'The Externalisation of EU Migration Policies in Light of EU Constitutional Principles and Values: Reconciling the Irreconcilable? An Introduction to the Special Section' (2023) 8 European Papers 901, 904. The authors questioned, whether it is in fact a Member State's responsibility, since it is the Member States themselves that are implementing EU law on an extraterritorial basis.

<sup>149</sup> Cantor and others (n 28) 131. Nota bene: the extension of liability based on territorial jurisdiction alone is less likely to give rise to international liability as third countries implement non-entrée practices. It should be noted, however, that the concept of jurisdiction is developing before international and European (here, in particular, the ECtHR) jurisprudence. (Hathaway and Gammeltoft-Hansen (n 144) 32-34; *Al-Skeini and Others v. United Kingdom* App no 55721/07 (ECtHR, 7 July 2011). This paper does not deal with bilateral agreements in detail, but it is necessary to refer to the Italy-Albania and the United Kingdom-Rwanda agreements, in which the former countries conduct the asylum procedure within the territory of the latter. (For more information on the two agreements, see, e.g. Salvatore Fabio Nicolosi, 'Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law' (2024) 71 Netherlands International Law Review 1, 7-9.

<sup>150</sup> Hathaway and Gammeltoft-Hansen, (n 144) 41. Nota bene: The European Union has agreements with some Western Balkan countries (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia) to carry out joint border protection tasks with Frontex officers. Xanthopoulou (n 35) 133-134.

<sup>151</sup> *Al-Skeini and Others v. United Kingdom* case, para. 135. Nota bene: the liability of EU officials may also exist where an illegal act is carried out by an authority of a third country under the direction and control of the official or where EU officials have effective control of that authority in this respect. (Hathaway and Gammeltoft-Hansen (n 144) 43-44. cites: James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 126-32, 146-161, 422-34.

<sup>152</sup> Hathaway and Gammeltoft-Hansen, (n 144) 53-61 address the 'Draft articles on Responsi-

#### IV. RECOMMENDATIONS

Although the European Union is committed to uphold human rights, the externalisation agreements concluded contain a risk of violations.<sup>153</sup> In addition to the examination of international responsibility, it is important to note that migrants do not have access at all—or only with extreme difficulty—to resort to forums examining the responsibility of states<sup>154</sup>—so it is not possible to resolve what happens with persons on the basis of the establishment of international responsibility—. There is reason to believe that the European Union may have a responsibility,<sup>155</sup> but the author believes, instead the question to answer is how to protect human rights in the extraterritorial dimension of migration and asylum.

The European Union understands that the right to apply for asylum must be guaranteed, but if another *safe third country* is able to provide adequate protection, the EU does not have to carry out the procedure itself.<sup>156</sup> Under the safe third country concept, asylum applications may be rejected without a substantive examination and applicants may be transferred to a *safe* third country by the authorities.<sup>157</sup> The safe third country—as well as the first country of asylum—in

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bility of States for Internationally Wrongful Acts, with commentaries 2001.’ art. 16., which is called “Aid or assistance in the commission of an internationally wrongful act”. Importantly, the Venice Commission of the Council of Europe found art. 16 applicable to European states in its opinion on a human rights violation case, as they contributed to human rights violations. (Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoner. European Commission for Democracy through Law (Venice Commission), Opinion no. 363 / 2005, 17 March 2006. para. 45.) Nota bene: The commentary on the draft specifies that financial support may be sufficient to establish liability. In such a case, it is necessary to examine, on the one hand, the knowledge of the State granting the aid in relation to the commission of the unlawful conduct and, on the other hand, the intention to facilitate it (Commentary on art. 16, para. 9).

<sup>153</sup> The following article finds human rights violations in all international partnerships concluded by the European Union: ‘EU External Partners: EU accused of funding forced deportations from Türkiye — European Commission President calls for development of ‘return hubs’ — Egypt and Tunisia reportedly reluctant to co-operate with EU on migration deals; Libya showing more ‘commitment’ — NGOs denounce Tunisia as ‘not a safe place’ for disembarking rescued people and call for end of EU-Tunisia migration co-operation — More than 300,000 people flee into Syria from Lebanon’ (ECRE, 17 October 2024) <<https://ecre.org/eu-external-partners-eu-accused-of-funding-forced-deportations-from-turkiye-%e2%80%95-european-commission-president-calls-for-development-of-return-hubs-%e2%80%95-egypt-and-tunisia-r/>> accessed 25 October 2025.

<sup>154</sup> Nicolosi (n 150) 14.

<sup>155</sup> Cf. Draft State Responsibility adopted by the Committee on International Law, art. 16; Venice Commission Opinion 363/2005.

<sup>156</sup> Iris Goldner Lang and Boldizsár Nagy, ‘External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement’ (2021) 17 European Constitutional Law Review 442, 447.

<sup>157</sup> Berfin Nur Osso, ‘Unpacking the Safe Third Country Concept in the European Union: B/orders, Legal Spaces, and Asylum in the Shadow of Externalization’ (2023) 35 International

Regulation 2013/32/EU does not directly refer to the obligation to enforce European asylum rules and the Geneva Convention.<sup>158</sup> This is a shortage called into question by the literature, which makes the author think that at least the provision—according to which a country can be classified as safe by the EU Member States simply because of the fact of transit—should be removed from the Regulation.<sup>159</sup> It must be added that the concept of *safe country of origin*<sup>160</sup>, which, like the two previous concepts, *prevents* the need to initiate an asylum procedure, has already been examined by the CJEU.<sup>161</sup> A revision of the other concepts would be necessary as well, in particular with regard to the legal *gap* on the basis of which Hungary rejected the applications of persons transiting through Serbia, referring to previous ‘transit’.<sup>162</sup>

The European Union should conclude its partnerships exclusively subject to safeguards to the compliance with human rights obligations. The HRW study sets out six conditions to ensure human rights in EU partner countries.<sup>163</sup> In my view, the European Union should review its existing agreements under these conditions and—these conditions should govern the conclusion of any eventual new agreement. In particular, as suggested in the HRW study, any practice of sending asylum seekers to a place where there is a serious risk of violation of their human rights should be prohibited.<sup>164</sup> To ensure this, the author proposes a review on the basis of Art. 218(11) TFEU and Art. 263 TFEU, as the most effective way of guaranteeing legal protection would be for the Court of Justice of the European Union to examine the content of the agreements, in the light of the Union’s binding fundamental rights and other obligations under its primary law.

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Journal of Refugee Law, Volume 272, 273.

<sup>158</sup> Goldner Lang and Nagy (n 157) 462.

<sup>159</sup> *ibid*, 463.

<sup>160</sup> “A country is considered as a safe country of origin where, 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 generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.” (Annex I to Directive 2013/32/EU).

<sup>161</sup> Case C-406/22 *CV v Ministerstvo vnitra České republiky* [2024] ECLI:EU:C:2024:841.

<sup>162</sup> Goldner Lang and Nagy (n 157) footnote 86.

<sup>163</sup> Bill Frelick, Ian M. Kysel and Jennifer Podkul, (n 49). Part IV: Recommendations for Promoting Government Migration Policies Protective of Human Rights To The European Union. The six conditions are: the same status as the 1951 Geneva Convention in the national legal system; a ban on sending migrants to a country in armed conflict; access of refugees (as well as beneficiaries of temporary protection) to the labour market; health and education; abstention from detention of asylum seekers—in particular children—; and respect for the prohibition of refoulement.

<sup>164</sup> *ibid*. Part IV: Recommendations for Promoting Government Migration Policies Protective of Human Rights To The European Union.

The European Union should strive to improve accountability. The fact that partnerships are concluded informally—being mere political agreements—does not allow the CJEU to assess compatibility with the Treaties, nor does it ensure democratic scrutiny between the institutions.<sup>165</sup> The European Parliament—which historically is an important institution protecting human rights<sup>166</sup>—did not take part in the conclusion of the agreements. In contrast, *e.g.* the readmission agreements concluded by the EU with Parliament’s approval.<sup>167</sup> In a formal resolution in 2021, the European Parliament indicated that the European Union should equally respect human rights in its extraterritorial action, in particular in its agreements, in accordance with international law.<sup>168</sup> The Commission should systematically and publicly assess the impact on human rights when implementing its new partnerships on migration.<sup>169</sup> The most appropriate way to do this is, in the author’s view, to establish legally binding international treaties, thus giving the CJEU the opportunity to examine their conformity with the Treaties on the basis of its powers under the TFEU.<sup>170</sup>

The author believes that to prevent violations, it is of particular importance to carry out the ignored<sup>171</sup> human rights impact assessment for all partnerships.<sup>172</sup> In addition to the impact assessment, the author considers important (in line with the EP resolution quoted) to develop uniform, regular and systematic monitoring, evaluation and accountability mechanisms to monitor possible infringements.<sup>173</sup> The EP proposed to involve the European Union Agency for Fundamental Rights—composed of independent experts—to assess the risks of cooperations and warned the Commission to draw up periodic reports on the

<sup>165</sup> TFEU, art. 78(2)(g) confers on the European Parliament and the Council the power to conclude formal partnerships.

<sup>166</sup> E.g. it is worth listening to the plenary debate in Strasbourg on 4 October 2023: ‘Need for a speedy adoption of the asylum and migration package (debate)’ (*European Parliament*, 4 October 2023) <[https://www.europarl.europa.eu/doceo/document/CRE-9-2023-10-04-ITM-003\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-9-2023-10-04-ITM-003_EN.html)> accessed 25 October 2025.

<sup>167</sup> Tineke Strik and Ruben Robbesom, ‘Compliance or Complicity? An Analysis of the EU-Tunisia Deal in the Context of the Externalisation of Migration Control’ (2024) 71 *Netherlands International Law Review* 199, 203.

<sup>168</sup> European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy (2020/2116(INI)), para. 1-4.

<sup>169</sup> *ibid*, para. 4-5.

<sup>170</sup> It must be added that Strik and Robbesom highlight the possibility of declaring partnership agreements (the authors are specifically examining the EU-Tunisia Memorandum) to be illegal if they were concluded by impeding the EP’s legislative powers, such as readmission in the agreements or visas. Strik and Robbesom (n 168) 213-214.

<sup>171</sup> Cf. Ombudsman’s inquiry SI/5/2023/MHZ.

<sup>172</sup> The purpose of impact assessments is to identify and describe the problem to be addressed and to monitor and evaluate the expected results. (European Commission, ‘Better Regulation Guidelines’ Brussels, SWD (2021) 305 final. 3.4. Impact assessment.)

<sup>173</sup> 2020/2116(INI), para. 7.

implementation of the agreements.<sup>174</sup> The author believes that these provisions would better serve the promotion of human rights.

## V. CONCLUSION

The rights of asylum seekers are currently out of the spotlight in the implementation of externalisation policies. There is an emerging practice in European legal systems where legitimate violence can even be used against wrongdoers in the event of their culpable behaviour.<sup>175</sup> It should be noted, however, that the European Union's actions to protect its own citizens, economy and defence against border violations are not without foundation. Spain—like all EU country—provides access to its territory, as it accepts refugees in real need of assistance once they have applied for asylum. However, the European Union does not have to tolerate people smugglers profiting from irregular routes. Therefore, the agreements are, in the author's view, a step in the right direction with the externalisation of migration and asylum, however it must not come at the expense of the realisation of human rights.<sup>176</sup> I therefore propose a strict but consistent and transparent migration policy with international partners who accept and comply with the Geneva Convention. Furthermore, the conclusion of partnerships should take place exclusively in the form of international treaties, thus effectively enforcing institutional guarantees (scrutiny by the European Parliament and possible judicial review by the Court of Justice of the European Union) and human rights guarantees (e.g. impact assessment, periodic reports).

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<sup>174</sup> *ibid*, para. 10-11.

<sup>175</sup> Xanthopoulou (n 35) 126. cites: Case of *N.D. and N.T. v. Spain* App no 8675/15 and 8697/15 (ECtHR, 13 February 2020). Nota bene: the ECtHR legitimized pushbacks due to the culpable behaviour of offenders in the case. (Case of N.D. and N.T. v. Spain, para. 200.) Para. 24 of the case shows that the defendants made an attempt to cross the border illegally and were expelled from Spain. Nota bene: Regulation (EU) 2024/1356 introduces new rules for persons crossing borders without authorisation by introducing 'screening'.

<sup>176</sup> This is confirmed by Case of *M.K. and Others v. Poland* App no 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020), in which the ECtHR held that an asylum seeker cannot be transferred to a third country without it being certain that the third country will conduct the asylum procedure in compliance with the principle of non-refoulement (para. 172-173.). Goldner Lang and Nagy sees this as a factor influencing expulsion on the basis of the difference in behaviour between asylum seekers, in parallel with N.D. and N.T. Goldner Lang and Nagy (n 157) 458.