BRIEFING

European Parliament

Extraterritorial processing of asylum claims

SUMMARY

In the past decade, continuous migration and asylum pressure on European Union Member States has made the external dimension of the EU's approach to migration management all the more important. The need to address challenges relating to external border management has reoriented EU migration policy towards extended and stricter border controls, combined with the externalisation of migration management through cooperation with third countries. In this context, the external processing of asylum claims has also been put forward as a possibility. External processing entails applications for international protection being processed beyond the EU's external borders, in third countries. An individual processed externally whose claim was successful would then, in theory, be resettled to an EU Member State.

Asylum is governed by international, EU and national laws. Both EU and national asylum legislation must be aligned with the international legal framework. Although EU law does not provide for the processing of asylum applications outside the EU, the idea of 'transit' or 'processing' centres in third countries has been recurrent over the years. Examples of externalisation procedures can be found around the world. Some non-EU countries, such as Australia and the United States, have practical experience of the extra-territorial processing of asylum claims.

Back in 1986, Denmark tabled a draft resolution in the United Nations (UN) General Assembly to create UN centres where asylum claims could be processed, in order to coordinate the resettlement of refugees among all states. Later, in 2001 and 2002, when the EU experienced the first peak of migrant arrivals in the EU, this was followed by a series of proposals involving the external processing of asylum requests. Extraterritorial processing was first put forward by the United Kingdom in 2003, while Germany proposed the establishment of asylum centres in North Africa in 2005. Another upsurge of arrivals was experienced from 2014 to 2016; this led – among other things – to the signature of the EU-Turkey Statement.

The series of proposals made over the years with a view to externalising migration policies, have raised concerns, not least in relation to the human rights implications, asylum procedures and EU and international law.

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Background

The notion of external migration management in the EU can be traced back to the 1980s, when it was introduced in the form of cooperation agreements with countries of transit and origin in Africa. More specifically, the idea of establishing European processing centres was examined during intergovernmental consultations on migration, asylum and refugees following a Dutch initiative. The concept of 'reception in the region' was also supported by the Danish government during the Danish Presidency of the Council of the European Union in 2001. In 2003, the United Kingdom was among the first EU Member States to put forward a proposal on extraterritorial processing of asylum claims. Soon after that, Germany also tabled a proposal in 2005 to establish asylum centres in North Africa. Later on in 2016, the Hungarian Prime Minister called for the EU to set up a 'giant refugee city' in Libya in order to process the asylum claims there. In a different approach, the French President, Emmanuel Macron, made another proposal to curb irregular immigration to Europe from Africa by means of external processing. Austria has also been suggesting an externalisation agenda since its non-paper of 2016, with camps in the Balkans for rejected asylum-seekers being one element.

External or **extraterritorial processing** involves applications for international protection being processed beyond the EU's external borders in third countries and encompasses a wide variety of practices whereby a protection claim is examined, at least to some extent, before arrival, in third countries.

Extraterritorial asylum refers to asylum granted in embassies, delegations, or consulates, or on warships or merchant vessels in foreign territory and then granted within the territory of the state from which protection is sought. An individual who has had their asylum claim processed outside EU borders would theoretically then be a candidate for resettlement to an EU Member State.

Extraterritorial processing can take different forms and be used for different purposes. It can be limited to a pre-screening exercise based on protection safeguards, but it can also take the form of granting temporary forms of protection to particular groups. The main proponents of extra-territorial processing of asylum claim it would 'save lives', as such a procedure would drastically reduce the need for asylum-seekers to embark on dangerous journeys in order to reach Europe. At the same time, it would stop the flow of money to migrant smuggling networks. Moreover, extraterritorial processing arrangements are of additional interest for certain Member States involved in maritime interception operations, where asylum-seekers and migrants are prevented from reaching their destinations.

Since the 2015 migration crisis, the EU has been looking at various forms of external cooperation that could potentially push migration management outside the EU's external borders. In this way, the notion of the 'external processing' of asylum claims, and the possibility of the EU establishing processing centres in North Africa or elsewhere to manage asylum-seekers and migrants traveling to Europe, has entered the migration debate. Furthermore, while existing EU policy on asylum may envisage certain pathways for those seeking protection, including humanitarian visas or resettlement, recent discussions have raised a range of other ideas: extraterritorial processing, or the assessment of claims for asylum in non-EU countries under arrangements operated or supported by the EU as a whole. At the same time, the EU's new pact on migration and asylum, published in September 2020, also suggested a series of measures aiming to enhance operational cooperation and collaboration in order to advance the 'externalisation of migration'.

Examples of externalisation procedures can be found worldwide. Australia, for instance, has externalisation agreements with a series of countries, including Cambodia, Nauru and Papua New Guinea. The EU and its Member States have also launched relevant initiatives, such as the EU-Türkiye Statement, while other initiatives are ongoing/currently under examination in negotiations between the EU and several African countries.

Italy, Germany and Austria, as well as the UK, have recently come forward with their own plans to send asylum seekers to third countries. Italy has announced a protocol through which it will process asylum applications made by people rescued in the Mediterranean in Albania. Germany is also

considering processing asylum claims outside its territory, while the UK and Austria have announced plans to collaborate on the issue.

Asylum policy in the EU

Extraterritorial processing arrangements are subject to international legal standards, in particular international refugee and human rights law. However, additional standards may need to be taken into consideration under relevant regional human rights and refugee law or national law. Asylum is regulated at international, EU and national levels. Both EU and national asylum legislation must align with the international refugee law framework set by the 1951 Geneva Convention and its Protocol, which have been incorporated into EU law under Article 78(1) of the Treaty on the Functioning of the European Union (TFEU). The core element of the Geneva Convention is the **principle of *non-refoulement*** enshrined in Article 33, which stipulates that 'no Contracting State shall expel or return (*refouler*) 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 opinion'.

Persons not qualifying for refugee status under the Geneva Convention may, nevertheless, be granted **subsidiary protection** under EU law, if they can show that substantial grounds exist for believing that they would face a real risk of suffering serious harm if returned to their country of origin. Another way that EU Member States can resolve some situations, especially when individuals are in urgent need of care, or when prolonged asylum procedures are getting in the way of family reunification, is to issue **humanitarian visas**. These would essentially be national long-term visas, although it is not always clear from the available research which type of visa was issued by a given Member State.

At EU level, asylum policy has been evolving since 1999, with the Amsterdam Treaty facilitating the shift from autonomous national policies to some common minimum standards. In 2009, under the Stockholm Programme Member States agreed on principles for a common migration and asylum policy, which the Lisbon Treaty embedded in a legal framework (Article 78 TFEU) based on solidarity. Post-Lisbon, asylum, as part of justice and home affairs, is a **shared competence** between the EU and its Member States. Although there is no EU-wide asylum status, the Lisbon Treaty did introduce a legal basis for a common asylum policy to make it possible to eliminate differences in the treatment of asylum-seekers across the EU (Article 78(2)a TFEU).

The common European asylum system (CEAS) was completed in 2013 and comprises five key acts: the Qualification Directive clarifying the grounds on which international protection is granted to asylum-seekers; the Asylum Procedures Directive establishing common procedures for granting and withdrawing international protection; the Reception Conditions Directive ensuring common standards in Member States for asylum-seekers' access to healthcare, education, employment, etc.; the Dublin III Regulation establishing the criteria for determining which Member State is responsible for examining an application for international protection; and the Eurodac Regulation facilitating the implementation of the Dublin Regulation through a fingerprint database in which Member States register the fingerprints of asylum-seekers and irregular migrants to identify their point of entry or their first application.

At national level, Member States have transposed EU asylum law into their legislation. They are responsible for receiving asylum applicants at least according to the standards set out in the CEAS, processing their applications within the required timeframe and ensuring the refugee status and corresponding rights to those whose asylum application was successful. EU law does not foresee the option of processing asylum applications outside of the EU. Nevertheless, the idea of 'transit centres' or 'processing centres' in third countries have been over the years proposed several times, notably by Denmark, the Netherlands, UK and Germany, differing only with regard to their proposed location and functions. However, in practice, to date there has not yet been any extra-territorial processing of asylum claims by the EU or any of its Member States. Both the European Court of

Human Rights as well as the Court of Justice of the EU have in their case law advocated against the option of extraterritorial processing of asylum decisions.

A derogation allows **Denmark** to **opt out of the CEAS**, but Denmark is nevertheless bound by international law, such as the UN Refugee Convention, which the country was the first to sign in 1951. In 1986, Denmark tabled a draft resolution in the UN General Assembly proposing to create UN centres where asylum claims would be processed in order to coordinate the resettlement of refugees among all states. In September 2020, the Danish government appointed a new special envoy on migration, for the primary purpose of opening reception centres outside the EU's borders, and to prevent 'as many spontaneous asylum-seekers as possible'. In April 2021, Denmark announced its plans to start revoking the residency permits of some Syrian refugees, as it deemed Damascus and its neighbouring regions to be safe to return to. In addition, those refusing to return might face being sent to deportation centres. The Danish government argued that it had made clear all along to Syrian refugees that they were only being offered temporary protection. In June 2021, the Danish Aliens Act was amended. More specifically, Denmark's parliament passed Bill L 226, a legislative amendment that would allow the **transfer of asylum-seekers to a third country outside the EU for the purposes of both asylum processing and protection of refugees**. Although many proposals to externalise asylum processes or refugee protection have been made over the years, this Danish legislation is unique as it provides for the **establishment of a legal mechanism** for the transfer of asylum-seekers outside Europe.

Relevant case law

On 7 March 2017, the Court of Justice of the European Union (CJEU) gave a preliminary ruling in the case *X and X* v *Belgium*. Against the recommendations of the Advocate General, the CJEU left **responsibility for granting humanitarian visas with the Member States**. It argued that, although the request for a visa was formally submitted on the basis of Article 25 Visa Code, the situation at stake fell outside the scope of the Visa Code because it was in fact a national long-term visa under Belgian law. The applicants had submitted their request with the intention to apply for asylum as soon as possible upon their arrival in Belgium and to stay there as refugees, while the Visa Code only covers short-term visas. The CJEU ruled that visas obtained with an intent to apply for asylum fall within the scope of national law, and outside that of EU law, in the absence of EU legislation.

This decision has been criticised on different grounds, including the territorial scope of the European Convention on Human Rights (ECHR). Commentators argue that the refusal of the visa took place at the Belgian embassy in Lebanon, while jurisdiction is primarily territorial, meaning that the ECHR applies inside the territory of the Member States. The state's human rights obligations under the ECHR do not stop at its borders. Referring to cases such as *Hirsi Jamaa and others* v *Italy*, *Al Skeini and others* v *the U.K.* and *Al Jedda* v *the U.K.*, commentators further argue that given the extent of states' extraterritorial obligations, 'it is no longer required that a state has control over a territory and the power to secure all Convention rights in order for it to exercise jurisdiction'. **The Court replaced the need for territorial jurisdiction with the possibility of 'state agent authority' or 'functional jurisdiction'**. If a state agent is in a position to safeguard Convention rights, then the state has jurisdiction. Moreover, supporting the principle of *non-refoulement*, the European Court of Human Rights (ECtHR) in *Hirsi* v *Italy*, found that, in the case that an EU Member State exercises jurisdiction over a person potentially in need of protection – even if that person is situated in international waters, border zones, or in another state's territory – then that person cannot be returned to persecution, torture, inhuman or degrading treatment, nor can they be expelled to countries that would direct them onwards to those risks.

On 22 June 2023, the CJEU delivered a preliminary ruling in the case C-823/21 *Commission* v *Hungary*, which in essence **prohibits a compulsory extra-territorial system**. The Court stated that 'forcing third-country nationals or stateless persons residing in Hungary or presenting themselves at the borders of that Member State to move to the embassy of that Member State in Belgrade or

Kyiv in order to be able, subsequently, to return to Hungary to lodge an application for international protection constitutes a manifestly disproportionate interference with the right of those persons to make an application for protection'. In particular, the Court ruled on the law adopted by Hungary, in the wake of the COVID-19 pandemic, requiring certain third-country nationals or stateless persons, already in Hungary or arriving at its borders, to follow a prior procedure in order to lodge an asylum application. This regulation, challenged by the Commission in July 2021, requires asylum-seekers to be directed to the Hungarian embassy in Belgrade or Kyiv to lodge a declaration of intent to apply for protection in person. Following examination of that declaration, the Hungarian authorities could then decide to grant a travel document for those persons, allowing them to enter the Member State to make such an application. Based on the above, the Commission considered that by adopting these provisions, Hungary was failing to fulfil its obligations under the Asylum Procedures Directive.

On 5 May 2020, the Grand Chamber of the ECtHR delivered its long-awaited decision in *MN and Others v Belgium*, a case testing whether a Syrian family's humanitarian visa application at the Belgian embassy in Beirut triggered the state's human rights law obligations. In a majority decision, the Court held that the process of applying for a visa in person did not bring the applicants within the ECHR's jurisdiction, declaring the case inadmissible. The decision has already seen reactions, including reflections on refugees' exclusion from the international legal order, the strategic value of the case, and implications for legal pathways to protection, the exercise of public powers and conduct of diplomatic agents.

On 13 February 2020, the Grand Chamber of the ECtHR indirectly referred to the availability of **legal pathways to protection** in its decision in *N.D. and N.T. v Spain*, which concerned two Mali and Côte d'Ivoire nationals, who attempted to enter the Spanish enclave of Melilla from Morocco by climbing the fence as part of a large group of migrants. They reached Spanish territory but were subject to 'hot return' to Moroccan officials by the Spanish *Guardia Civil*. The Grand Chamber held no violation of Article 4 of Protocol No 4 (prohibition of collective expulsion), finding that **the applicants had placed themselves in danger**, used a large group to enter illegally and did not use legal pathways available to them, including via a nearby Spanish consulate. While the Court in *ND and NT v Spain* insists that such legal pathways be genuine and effective (paragraphs 209 to 210), *MN and Others* confirms that legal pathways such as humanitarian visas are not in fact governed by the ECHR.

Increased cooperation with third countries

Connected to the extraterritorial processing of asylum applications is the support the EU offers third countries to stem the flow of irregular migration to Europe. This can be **increased funding, capacity building or specific commitments**. A prominent instance was the statement agreed between the European Council and Türkiye on 18 March 2016, notable for shifting significant responsibility for managing European migration management to Türkiye. It was also one of the first instances of the EU taking a stance on migration as a bloc. However, the statement has been controversial ever since, in terms of its questionable legality and compliance with the EU Charter of Fundamental Rights. In 2016, three asylum-seekers challenged the statement's legality before the CJEU, which presented its orders on 28 February 2017. The General Court announced that it 'lacks jurisdiction to hear and determine the actions pursuant to Article 263 TFEU, and, accordingly, dismisses them'. The CJEU explained that 'even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, something which has been denied by the European Council, the Council of the European Union and the European Commission in the present cases, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the EU and the Turkish Prime Minister. In an action brought under Article 263 TFEU, however, the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States'.

Türkiye

The EU-Türkiye Statement remains the **principal framework for cooperation on migration along the eastern Mediterranean route**. According to the statement, all new irregular migrants and asylum-seekers arriving on the Greek islands from Türkiye and whose applications for asylum have been declared inadmissible should be returned to Türkiye. The statement followed a series of meetings dedicated to deepening Türkiye-EU relations, with the EU-Türkiye joint action plan activated on 29 November 2015. In addition, on 15 December 2015, the Commission proposed a voluntary humanitarian admission scheme for Syrian refugees in Türkiye. In order to break the business model of the smugglers' networks and offer migrants alternatives, the EU and Türkiye agreed to work together to end irregular migration from Türkiye to the EU. Türkiye further agreed to accept the **rapid return** of all migrants not in need of international protection crossing from Türkiye into Greece, and to take back all irregular migrants intercepted in Turkish waters.

In its evaluation of the 2015 Report on Türkiye, the European Parliament took special interest in EU-Türkiye cooperation on migration. It welcomed the statement, but recalled that outsourcing was not a credible long-term solution and called on EU Member States for more solidarity in welcoming refugees. The same concerns were expressed in the European Commission's 2022 report on Türkiye, where the Commission itself questioned the safety of this country for asylum-seekers. While being a signatory of the 1951 Refugee Convention and the 1967 Protocol, Türkiye applies a geographical limitation when it comes to the Convention – it only applies the Convention definition of 'refugee' to those who have become refugees owing to events in Europe. The status of refugees in Türkiye remains highly problematic, therefore, as most people looking for protection come from non-European countries. Furthermore, Türkiye has not ratified other core human rights treaties, and through a Presidential Decree of 20 March 2021 withdrew from the Istanbul Convention on preventing and combating violence against women and domestic violence. Human Rights Watch has been critical of the country's direction.

Between 2016 and 2020 only about 2 000 people were returned from the five eastern Aegean Greek islands covered by the EU-Türkiye Statement. It is also observed that the drop in overall arrivals in the EU, which the Commission has called 'a game changer', did not result only from the EU-Türkiye agreement, but was the consequence of countries in the Western Balkans closing access to migrants by barring the land route into Europe. The EU agreed to provide **€6 billion** in humanitarian assistance, education, health care, municipal infrastructure, and socioeconomic support for Syrian refugees in Türkiye between 2016 and 2019. Although the EU says the full amount has been allocated and more than €4 billion disbursed, the Turkish government has taken issue with the pace and manner of the payments, which have gone to refugee-serving organisations rather than government accounts. Erdoğan's government has claimed that key elements of the deal were not met. In 2020, the EU committed to an additional €485 million to see some programmes continue throughout 2021. The promise of **one-to-one resettlements** also appears to have been less effective than expected. It is reported that from March 2016 to March 2021, the number of Syrian refugees resettled in the EU from Türkiye was 28 000, far below the objective of 72 000 agreed in the deal.

Libya, Morocco and Tunisia

The statement signed with Türkiye set the tone for future European migration diplomacy outside the EU, for instance it served to reignite **deals between Morocco and Spain**, which had cooperated on migration issues in the past. Since 2016, multiple **bilateral migration** 'deals' have been implemented to externalise aspects of European migration management, including the 2017 Italy-Libya Memorandum of Understanding. In 2008 Italy signed a 'friendship agreement' with Muammar Gaddafi's regime to reduce irregular migrant arrivals, and in 2012 signed a declaration in Tripoli with Libya's post-revolution National Transitional Council. The 2017 memorandum proved different because in this case the Italian government and the EU provided the **Libyan** coast guard with boats, equipment, and training to patrol Libya's waters and deter smugglers in the

Mediterranean. In 2017 alone, 15 358 people were intercepted by the Libyan coast guard and taken back to detention centres in Libya.

Spain convinced the EU to provide €140 million for measures such as speedboats and staff to enforce Morocco's migration controls, and offered an additional €30 million of its own. Subsequently, fewer than half as many people arrived in Spain irregularly by sea in 2019 compared with 2018.

In June 2023, the European Commission proposed a €900 million economic **aid package for Tunisia** as well as another €150 million in immediate budget assistance in support of implementation of the Memorandum of Understanding (MoU) on a strategic and comprehensive partnership between the EU and Tunisia, which was signed in July 2023. The MoU includes provisions on combating irregular migration and EU financial support for improving Tunisia's management of its borders. The EU will provide €105 million for training and technical support for Tunisian border management, for combating anti-smuggling operations, and for reinforcing control of borders. On 22 September 2023, the Commission announced €60 million in budget support for Tunisia and an operational assistance package on migration worth around €67 million. In return, Tunisia would need to ensure full cooperation on migration and readmission of rejected Tunisian and sub-Saharan asylum-seekers. However, on 3 October, Tunisian President, Kais Saied, rejected **the above-mentioned financial support**. Like the EU-Türkiye statement, these deals have been **criticised by human rights groups**, which consider them ways to circumvent international humanitarian obligations, and contend that these types of arrangements make the EU complicit in the abuse of migrants in other countries.

Albania

In November 2023, Italy signed a Protocol with Albania, which will remain in force for 5 years and will be automatically renewable for a further 5 years, under which Italy will pay for the construction of two centres in Albania to receive migrants rescued by the Italian navy and who wish to apply for asylum in Italy. This is the first time that an EU country has entrusted its asylum procedures to a country that is not yet part of the EU. According to the protocol, the centres would be under Italian legal jurisdiction, constructed at Italy's expense. They are expected to open by spring 2024. According to Italy's Prime Minister, Georgia Meloni, the two structures for the entry and temporary reception of migrants rescued at sea will enable asylum applications to be processed and any repatriations to be carried out quickly, but the agreement 'does not concern children, pregnant women and other vulnerable individuals'.

The European Commissioner for Home Affairs, Ylva Johansson, has said that the agreement is legal according to the Commission's initial analysis. In particular, according to the preliminary assessment, the agreement between Italy and Albania for the management of migratory flows does not violate EU law, mainly because it is outside the scope of EU law. However, the individual situation of migrants must be taken into consideration, in accordance with Italian legislation and under the aegis of the Italian authorities. The signing of the protocol has sparked criticism – regarding human rights issues and risks over inadequate oversight and complaints over a lack of political consensus and a parliamentary vote – from MEPs, stakeholders, NGOs and the Italian opposition, but also from Albanian experts and residents in the area set to host the centres. The Albanian government has published the protocol, so that it can be discussed in parliament. However, Albania's Constitutional Court has blocked, at least temporarily, the vote of the Albanian Parliament to ratify protocol. The Court held a public hearing on 18 January 2024 to determine whether the agreement violates Albania's constitution.

Stakeholder concerns

The externalisation of migration management, depending on its form, is highly problematic. Attempts to arrange for external processing have come up against a variety of **institutional, legal**

and political obstacles that have not as yet allowed this method to become a central migration control instrument. For such a scheme to be lawful, it must be in line with international and domestic human rights law, which includes individual assessments of each transfer; fair and effective procedures in the asylum processing country; ongoing protection in that country; and respect for the principle of *non-refoulement*. At the same time, the EU has been criticised for prioritising border controls over migrants' human rights and for externalising border controls in cooperation with third countries, but also for not having assessed the human rights standards in third countries nor the way local governments may be handling immigration issues at a national level prior to the establishment of partnerships.

Before envisaging external processing of asylum claims, the EU needs to **cooperate more with international organisations**, such as the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM). A series of **human rights concerns** arise given that **respect for EU human rights law** cannot be ensured outside the borders of the EU. In this way migration management aid may build the capacity of states to monitor borders and prevent irregular migration, but it could potentially lead to **possible human rights abuses being ignored and to increased surveillance for migrants and citizens alike**. It is difficult to ensure the relevant **guarantees regarding asylum and reception conditions** when the applicant is situated outside the EU. However, when Frontex cooperates with the authorities of third countries (Article 73 Frontex Regulation) it must comply with Union law, both for norms and standards of the Union *acquis* and for the protection of fundamental rights, including where cooperation with third countries takes place on the territory of those third countries. In 2005, to address the ongoing refugee challenges, UNHCR came forward with Convention Plus, a number of special agreements in a spirit of international cooperation, for instance on resettlement and development cooperation. Moreover, in 2010, **UNHCR** published a policy paper on legal standards and policy considerations with respect to extraterritorial processing. This sets out UNHCR's views on extraterritorial processing of claims for international protection made by persons who are intercepted at sea, and offers an overview of the applicable standards under international human rights and refugee law. Furthermore, in UNHCR's view **the principle of *non-refoulement*** is a rule of customary international law. This means that the prohibition of *refoulement* is also applicable when a state has *de jure* or *de facto* jurisdiction extraterritorially.

Key stakeholders, including the EU Fundamental Rights Agency (FRA) and UNHCR, have meanwhile underlined the importance of **facilitating the creation of legal pathways to asylum**, to identify those in need of protection before they reach Europe's borders. Furthermore, stakeholders have stressed that the **asylum and migration pact represents the expansion of moves to externalise responsibility and increase secrecy around EU migration and asylum policies.** In addition to the above, Amnesty International considers that several types of external migration policies, and in particular the externalisation of border control and asylum-processing, pose significant **human rights risks**. In May 2021, UNHCR published a note on the 'externalization' of international protection summarising the legal standards applicable and UNHCR's positions regarding policies and practices that seek to 'externalise' international protection obligations. Finally, in March 2023, 16 organisations signed a statement opposing the externalisation of EU migration policies.

Following the signing of the MoU between the EU and Tunisia, international organisations expressed reservations. The Council of Europe Commissioner for Human Rights, Dunja Mijatović, underlined the MoU's failure to refer to human rights safeguards for migrants, and invited the members of the Council of Europe to 'press for immediate clarification of the human rights safeguards that will be put in place and to insist that the migration-related aspects of the agreement are not further implemented until adequate safeguards have been established'. The **European Ombudsman** has also expressed concerns regarding the signature of the MoU. More specifically, the Ombudsman asked the Commission: whether a human rights impact assessment had been carried out before signing the MoU; whether the Commission intended to carry out a periodic review of the human rights impact of actions undertaken during its implementation, and if criteria

for suspending funding had been established in the event that human rights were not upheld in the context of the MoU.

Finally, the Council of Europe Commissioner for Human Rights has stressed that implementation of the protocol between Italy and Albania on disembarkation and the processing of asylum applications raises a series of human rights questions in respect of refugees, asylum-seekers and migrants. It has also emphasised the importance of ensuring that asylum can be claimed and assessed on Member States' own territories.

EU position

European Commission

Between 2007 and 2008, the European Commission further developed the 'global approach to migration (GAM)' launched by the European Council. This resulted in a framework for EU cooperation with third countries on migration and asylum. In 2011, the EU opened dialogues on migration, mobility and security with Tunisia and Morocco, leading to the revision of the GAM and a 'global approach to migration and mobility' (GAMM). In February 2015, the Commission published a European Political Strategy Centre (EPSC) strategic note, exploring the feasibility of off-shore asylum processing, possibly through EU-run facilities in North Africa and key transit countries.

Later in 2015, the European Commission published a communication on an 'agenda on migration'. It advocated for a holistic approach to migration, including the establishment of a pilot multi-purpose centre in Niger by the end of 2015. The centre opened in November 2015 on the basis of a contract with the International Organization for Migration, under the Instrument contributing to Stability and Peace. The establishment of this centre implies the extraterritorial assessment of asylum and other protection claims, an idea that can be traced back to 2003 at least. The services provided included: direct assistance, medical and psychological support, referral of asylum-seekers to the UNHCR, information about risks and alternatives to irregular migration, transport towards countries of origin, assisted voluntary return and reintegration in cooperation with local communities in Senegal, Gambia, Mali and Nigeria.

In a June 2018 note, the Commission examined the following scenarios: (i) a regional arrangement for disembarkation in EU Member States for migrants rescued in the territorial sea of a Member State; (ii) a regional arrangement for disembarkation in third countries for migrants rescued in the territorial sea of a third country or by vessels in international waters; and (iii) external processing of asylum applications and/or return procedures in a third country. Under the third scenario, migrants who had already arrived on EU territory (whether they had made an application for international protection or not) would systematically be sent to centres situated outside the EU without any assessment of their situation.

Moreover, in a letter sent to EU Member States ahead of the European Council meeting in Brussels on 26 October 2023, the President of the Commission, Ursula von der Leyen, stressed that the external aspects of migration were crucial in implementing EU migration policy, particularly through the **establishment of comprehensive partnerships**. Following, the memorandum of understanding with Tunisia, the 'deal' with Libya, and the partnerships with Senegal and Mauritania, the aim now is to establish a partnership with Egypt too.

European Parliament

Over the years, the European Parliament has called for the creation of legal pathways to Europe, while discussing the external aspects of migration and the possibility to externalise certain migration policies. On 29 April 2015, the European Parliament adopted a resolution calling on the Member States to make full use of existing possibilities for **issuing humanitarian visas at their embassies and consular offices** and to make greater contributions to existing **resettlement** programmes. In 2018, following a request by the chair of the LIBE committee, the Legal Service of

the European Parliament carried out a review of the European Council conclusions of 28 June 2018, in particular in light of the three scenarios set out by the Commission.

In a more recent resolution of May 2021 on the protection of human rights and the EU's external migration policy, the European Parliament reiterated the obligation of **Member States to uphold human rights in their external and extraterritorial actions, agreements and cooperation in the areas of migration, borders and asylum**. It further stressed the importance of ensuring **non-discrimination and procedural guarantees**, such as the right to effective remedy, the right to family reunification, and the need to avoid separating children from their parents or legal guardians. On 25 October 2023, the Subcommittee on Human Rights (DROI), in association with the Committee on Civil Liberties, Justice and Home Affairs (LIBE), held a hearing on tackling the root causes of migration, the externalisation of the EU's migration policy, and the treatment of refugees and migrants in partner countries in North Africa.

European Council

Back in November 2004, European Council conclusions called on the Commission to carry out a **feasibility study on joint processing of asylum applications outside EU territory**. The German Interior Minister, Otto Schily, supported the idea in the Council in December 2004. In 2005, the European Council underlined the 'increasing importance of migration issues' and 'mounting public concern' about migration in certain Member States. Thus, it launched a 'global approach to migration' (GAM). Later, in June 2008, the European Council also contributed to the discussion on externalising asylum with the introduction of the idea of regional disembarkation platforms for people saved at sea by search and rescue operations. In 2023, the Swedish Presidency also called for a 'Team-Europe spirit', and stronger cooperation with third countries to develop 'mutually beneficial partnerships' and to fill the talent partnerships with content.

European leaders also discussed migration on 29 June 2023, with particular focus on the external dimension of migration and the possibility of increasing the number of partnerships with third countries, such as the one proposed by von der Leyen in **Tunisia** on 11 June. According to a Spanish Presidency discussion paper, the Justice and Home Affairs (JHA) Council on 28 September 2023 supported the Spanish Presidency's approach of applying a more preventive model in the practical response to irregular migration, while enhancing the proactive approach. The paper also stressed the need to use the tools at hand to ensure the operationalisation and implementation of EU actions and priorities.

The EU is funding and participating in intergovernmental regional dialogues on migration, and has established EU migration dialogues with countries of origin and transit. In addition, action plans have been drawn up for 10 priority countries of origin and transit. On 19 October, the topic of the externalisation of migration control was back on the agenda of the JHA Council. Another paper, prepared by the Spanish Presidency later in October, called for a series of actions, including maximising synergies with EU external action. At the European Council meeting on 26-27 October 2023, EU leaders held a strategic discussion on migration and discussed the above-mentioned letter from the President of the European Commission. Finally, the incoming Belgian Presidency also wishes to expand migration-related partnerships with countries in Africa.

Examples outside the EU

The case of Australia

Since 1992, Australia has had a policy of mandatory detention for asylum-seekers who arrive in Australia without valid visas. It is the only country in the world to enforce immigration detention for all unlawful non-citizen arrivals. For most of the past two decades, Australia has been using offshore processing, which the Australian government refers to as 'regional processing', to process refugee claims. The policy of offshore processing was first established in 2001, when Australia started

sending unlawful non-citizens to Nauru, and to Manus Island in Papua New Guinea (PNG). The policy was discontinued in 2008 but reintroduced in 2012 following an increase in the number of people trying to reach the country by boat, and a political impasse in Parliament as to how to address the situation.

In July 2013, the Australian government further toughened its stance, stating that no person arriving by boat without a valid visa could ever be resettled in Australia, even if they were recognised as refugees. Australia has concluded a number of agreements to resettle 'unlawful non-citizens' outside the country. For instance, on 19 July 2013, Australia signed a Regional Settlement Arrangement with Papua New Guinea, providing for people entering unlawfully to be transferred to this country for processing and resettlement. On 3 August 2013, a new Memorandum of Understanding with Nauru was signed containing similar provisions. Consequently, since 13 August 2012, in line with Australian law, people arriving in Australia by boat, without a valid visa, have been sent for an unlimited period to offshore processing sites in Nauru, or Manus Island in Papua New Guinea. Since Australia restarted the policy of offshore processing in August 2012, 4 194 people have been taken to a regional processing country.

In 2014, Australia ceased new transfers and reoriented its border protection policies to maritime interception and returning people coming illegally by sea to their countries of departure (the policy is operationalised through the military-led Operation Sovereign Borders – OSB). Subsequently, in 31 December 2021, the Australian government ended Australia's regional processing association with Papua New Guinea, with support for individuals remaining in PNG transitioning to full and independent management by the PNG government. Meanwhile, in late June 2023, the last refugee was moved from the offshore processing centre on Nauru, even though in early February 2023, Nauru was re-authorised as a regional processing country for an additional 10 years. Australia also signed an AU$422 million contract with a private United States prison company to oversee the facilities in Nauru until at least 2025.

Australia's policy of offshore transfer has been criticised from multiple points of view. The criticism emerged with **concerns about the safety and security of asylum-seekers, prolonged uncertainty for those being processed, living conditions and the significant financial cost**. The policy was challenged before the High Court of Australia, which ruled it legal. Then, in 2020, in line with its procedural requirements after receiving allegations regarding Australia's asylum policy, the International Criminal Court (ICC) examined the situation in the offshore processing camps and concluded that 'conditions of detention appear to have constituted cruel, inhuman, or degrading treatment, and appears to have been in violation of fundamental rules of international law'. Nevertheless, the ICC stated that 'it does not appear that Australia's interdiction and transfer of migrants and asylum-seekers arriving by boat to third countries meets the required statutory criteria to constitute crimes against humanity', as the migrants or asylum-seekers were not lawfully present in the area from which they were deported.

The case of the United Kingdom

The United Kingdom (UK) has one of the harshest asylum policies in Europe, as it entails no right to work for at least a year, the widespread use of detention and below subsistence level assistance. In March 2003, the UK government put forward the idea as a pro-refugee but anti-asylum-seeking strategy, which involved **processing resettlement claims in regional protection areas**. In 2022, Nationality and Borders Act gave the Home Secretary the discretionary power to remove illegal migrants. A subsequent update to the migration and asylum policy, namely the Illegal Migration Act 2023, enacted in July 2023, binds the Home Secretary with a legal duty to remove illegal migrants to their home country if it is a safe country of origin or to one of 57 'safe third countries' listed in the bill. The prospect of relocation to the 'safe third country' is one of the ways in which the UK government is seeking to deter people from making irregular journeys to the UK. The bill is an important part of a broader set of changes to the asylum system, under the overarching 'new plan for immigration' policy agenda.

However, the **Migration and Economic Development Partnership with Rwanda**, signed in April 2022, is the only removal agreement the UK has in place with a third country. Notably, the partnership's memorandum of understanding (MoU) provides for a 5-year 'asylum partnership arrangement', introducing a scheme to move people with asylum applications deemed inadmissible by the UK to Rwanda to have their asylum claims processed there. The UK deems most asylum applications as inadmissible if the applicant has passed through a 'safe third country' before making an onward journey to the UK. Following a case-by-case risk assessment, those removed to Rwanda and whose claims were successful would not be eligible to return to the UK but could settle in Rwanda as refugees. Those with unsuccessful claims could be removed from Rwanda to a country in which they have a right to reside. In return, the UK has provided GB£120 million in development funding to Rwanda and has committed to pay for the processing and integration costs for each relocated person.

As of December 2023, nobody has been removed under the UK-Rwanda asylum partnership as it has faced legal challenges. The first planned flight on 14 June 2022 was halted following a controversial European Court of Human Rights injunction. In December 2022, the UK High Court upheld the overall lawfulness of the policy. In January 2023, the High Court granted permission for a partial appeal of the ruling. Subsequently, in June 2023, the UK Court of Appeal overturned the finding that Rwanda represents a 'safe third country' due to a risk of *refoulement* to unsafe countries of origin and the inadequate asylum processing posing a risk of inhuman and degrading treatment in Rwanda. As a result, the UK Count of Appeal ruled that the Rwanda policy in its current form was unlawful. Following the ruling, the UK government appealed to the UK Supreme Court. On 15 November 2023, **the Supreme Court** handed down its appeal judgment in the Rwanda policy case, in which it **held unanimously that the government's Rwanda scheme is unlawful**.

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