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Human rights impact of the “external dimension” of European Union asylum and migration policy: out of sight, out of rights?

Report¹

Committee on Migration, Refugees and Displaced Persons

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Summary

The objectives of the delegation of migration procedures to countries outside the European Union's borders are, among others, to ease the migratory pressure on member States at the EU's borders and to reduce migrants' need to undertake potentially fatal land and sea journeys. Onward resettlement throughout Europe should then facilitate a more regular influx into the continent. However, the shifting of responsibilities and the enlistment of third countries to reinforce EU border controls entails serious human rights risks. It increases the risk of migrants being “stranded” in transit countries through readmission and greater use of punitive and restrictive measures such as *refoulement*, arbitrary detention and ill-treatment. It is also a way for many European Union member States to distance themselves from the politically divisive issue of assisting and integrating refugees.

This report urges member States to work together to ensure that the growing focus on deterrence policies does not detract from European States' duty to respect and defend human rights globally, and to refrain from externalising migration control to countries in which legislation, policies and practice do not meet the standards of the European Convention on Human Rights and the United Nations Convention relating to the Status of Refugees.

1. Reference to committee: [Doc. 14307](#), Reference 4298 of 30 June 2017.



Contents	Page
A. Draft resolution	3
B. Draft recommendation	7
C. Explanatory memorandum, by Ms Tineke Strik, rapporteur	8
1. Introduction	8
2. The European Union framework for asylum and migration	9
2.1. Extension of European Union norms	9
2.2. Lower human rights standards in countries outside European Union jurisdiction	10
3. Which rights are threatened by the externalisation of migration management?	10
3.1. Border controls – saving lives but putting human dignity and freedom of movement at risk	11
3.2. From pillar to post: readmission agreements could leave migrants stranded	11
3.3. The internal-external dimension: the “safe third country” concept	13
3.4. Non-refoulement obligations should include effective remedies	14
3.5. The use of development assistance for migration management	15
4. Implementation of externalisation policies – the cases of Turkey and Libya	16
4.1. Turkey – a model for future externalisation action?	16
4.2. Libya – as yet uncertain results of EU resource mobilisation	18
5. Conclusions	20

A. Draft resolution²

1. The Parliamentary Assembly has followed closely the European Union's policies providing for the implementation of asylum and migration control and border management beyond its external borders since the beginning of the current crisis in 2011.
2. The Assembly's position on the externalisation of asylum procedures has adapted to the evolving situation. [Resolution 2147 \(2017\)](#) on the need to reform European migration policies called on European Union member States and institutions to "explore possibilities for better identifying people in need of international protection and organising external processing of asylum applications by means of safer procedures established outside Europe in safe third countries, provided that the human rights of the asylum seekers are safeguarded". In [Resolution 2000 \(2014\)](#) on the large-scale arrival of mixed migratory flows on Italian shores, the Assembly expressed support for the setting up of camps to process asylum requests in North Africa. In [Resolution 2109 \(2016\) on the situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016](#), it voiced its concern that "the EU–Turkey Agreement raises several serious human rights issues relating to both its substance and its implementation now and in the future".
3. The declared objectives of the delegation of migration procedures to countries outside the European Union's borders are to ease the migratory pressure on member States at the European Union's borders, thus facilitating migrants' onward resettlement throughout Europe and a more regular influx, to reduce migrants' need to undertake potentially fatal land and sea journeys, and to promote co-operation with Europe's neighbours in migration management. In the most recent [Resolution 2215 \(2018\) "The situation in Libya: prospects and role of the Council of Europe"](#), the Assembly notes that the European Union's Triton and Sophia air and sea operations resulted in a reduction of nearly 32% of arrivals on the Italian coasts between November 2016 and November 2017, that these operations have saved over 200 000 lives since 2014 and that the European Union provides much of the funding for the activities of the United Nations High Commissioner for Refugees and the International Organisation for Migration in aid of refugees and migrants.
4. However, the shifting of responsibilities and the enlistment of third countries to reinforce European Union border controls entails serious human rights risks; it increases the risk of migrants being "stranded" in transit countries through readmission, as well as the increased use of punitive and restrictive measures such as *refoulement*, arbitrary detention and ill-treatment. It is also a way for many European Union member States to distance themselves from the politically divisive issue of assisting and integrating refugees. Keeping migrants at a greater distance may also in fact provide a means of avoiding situations of *refoulement* within Europe. In the above-mentioned [Resolution 2215 \(2018\)](#), the Assembly called on the Council of Europe member States to comply with their obligations under Article 3 of the European Convention on Human Rights (ETS No. 5), which requires them to refrain from sending migrants back to countries where they are exposed to the risk of torture and inhuman or degrading treatment or punishment, and not to co-operate on migration control with third countries if this is likely to result in violations of Article 3.
5. Despite what might be termed as the success of the European Union's externalisation policies in contributing to a reduction in the number of migrants entering Europe, it has become clear that the involvement of third countries in migration management has compromised the rights of asylum seekers on many occasions. The member States should do more to ensure that these rights are defended and maintained, especially where this degradation is a direct consequence of measures decided in Europe. Europe is both morally and politically accountable.
6. The Assembly considers that migrants who have been, or will be, the subjects of asylum processing organised by the European Union outside its borders may find themselves in a "legal limbo" with regard to the guarantee of the fundamental rights stemming both from the United Nations 1951 Convention relating to the Status of Refugees and the European Convention on Human Rights. That is because the countries concerned may not have equivalent human rights standards or legal instances to uphold them, whereas asylum seekers face difficulties in holding the European Union or individual States responsible for possible human rights violations.
7. This difficulty in upholding rights is all the more serious as the people in question are more exposed to their denial: in extreme situations there is proof that migrants have been subjected to *refoulement*, torture and inhuman and degrading treatment and even slavery, as revealed in Libya; in others, they are consistently subjected to discrimination, arbitrary detention and lack of social protection and economic opportunities.

2. Draft resolution adopted unanimously by the committee on 4 June 2018.

8. Externalisation policies have been introduced without due regard to the need to ensure that their implementation does not jeopardise human rights. In addition, there is a growing tendency to make development assistance conditional on countries' taking on migration procedures. For countries which by definition lack sufficient capacity to respond to the needs of their own populations, this amounts to creating more tensions and difficulties.

9. The Parliamentary Assembly therefore urges member States to:

9.1. work together to ensure that the growing focus on deterrence policies does not detract from European States' primary duty to respect and defend human rights globally and does not reduce resources devoted to development co-operation, which aims for the long-term reduction of poverty;

9.2. refrain from externalising migration control to countries in which legislation, policies and practice do not meet the standards of the European Convention on Human Rights and the Convention relating to the Status of Refugees, and where State agencies cannot effectively ensure the protection of these rights. To achieve this, human rights impact assessments on national and regional levels should be carried out by States before entering into such co-operation;

9.3. introduce conditions in all agreements and arrangements concerning asylum management providing for human rights protection of migrants and asylum seekers, including:

9.3.1. standards for asylum seekers and refugees equivalent to the Convention relating to the Status of Refugees and its 1967 Protocol;

9.3.2. respect for the standards of the European Convention on Human Rights, including the obligation of non-*refoulement* and an individual and meaningful assessment of asylum claims, the right to an effective remedy, freedom of movement (including the right to leave a country), human dignity and non-discrimination, as well as information and legal assistance;

9.3.3. safe and hygienic reception conditions and efficient and appropriate asylum application procedures which avoid arbitrary detention and allow possibilities for family reunion;

9.3.4. ensure that external co-operation on migration control and return policies is contingent on a system of independent monitoring which will ensure compliance with international human rights law and suspension of co-operation in the case of repeated human rights violations.

10. In line with its [Resolution 2109 \(2016\)](#) and its Resolution ... (2018) on the humanitarian situation of refugees in the countries neighbouring Syria, the Assembly praises the efforts of the Government of Turkey to host (as at June 2018) 3.6 million Syrian refugees and large numbers of refugees and asylum seekers of other nationalities, and asks it to:

10.1. ensure that the EU–Turkey Agreement is implemented in full respect of the human rights of all migrants, including irregular migrants and refugees;

10.2. guarantee that asylum seekers have access to an effective asylum procedure respecting the non-*refoulement* principle and to proper reception provisions;

10.3. in order for Syrian refugees to be able to build a sustainable future, ensure their right to family reunification as well as all the rights provided by the Convention relating to the Status of Refugees, including effective access to education and in particular the means of earning a livelihood through effective access to the labour market, without losing the benefit of protection measures or possibilities of resettlement;

10.4. give access to Turkey to Syrian refugees fleeing their country, and ensure that border control activities do not prevent them from claiming their right to protection;

10.5. ensure that migrants, asylum seekers and refugees always have access to an effective remedy against deportation decisions, including suspensive effect and a full and *ex nunc* review, and that these fundamental rights are not affected by any measures taken under the state of emergency;

10.6. give full information to asylum seekers on their asylum and protection status possibilities and provide direct access to legal assistance at all stages of asylum procedures, including appeal against decisions, as well as psychological support.

11. The Assembly asks the Government of Italy to:
 - 11.1. make any co-operation with the Libyan Coastguard dependent on respect for refugees' and migrants' fundamental rights, particularly by refraining from exposing them to situations in which they risk being subjected to severe ill-treatment, in accordance with its [Resolution 2174 \(2017\)](#) on human rights implications of the European response to transit migration across the Mediterranean;
 - 11.2. in accordance with its [Resolution 2215 \(2018\)](#) "The situation in Libya: prospects and role of the Council of Europe", delay the setting up of a new Maritime Rescue Co-ordination Centre in Libya until capacity building has ensured improved governance structures, to ensure adequate international human rights law training for the Libyan Coastguard and to maintain and improve co-operation with non-governmental organisations (NGOs) carrying out search and rescue operations in the Mediterranean;
 - 11.3. investigate fully the allegations of experts and international NGOs, such as Amnesty International, of returns to Libya of migrants picked up at sea in the Italian Search and Rescue Zone, and of collusion between the Libyan coastguard and the people smugglers in the Mediterranean.
12. The Assembly further asks the European Union member States and institutions, in addition to putting in place all the safeguards to the externalisation of migration control described above, to:
 - 12.1. make progress with the European Union's ratification of the European Convention on Human Rights in order to remove the legal void to allow appeals against the European Unions external policies;
 - 12.2. step up the sharing of responsibilities, in the first instance by fulfilling their pledges to resettle 50 000 refugees (of whom only 4 252 had been transferred in May 2018), giving preference to the most vulnerable refugees;
 - 12.3. in the context of the EU–Turkey Agreement, improve the flexibility of European Union programme implementation in order to provide more rapid and appropriate responses and fulfil the European Union's obligations entered into under the agreement;
 - 12.4. substantially improve, broaden and sustain support to host countries and communities, particularly those affected by large movements of refugees, in order to provide protection, assistance and sustainable solutions for refugees. Such support should not depend on co-operation on return or border control. The European Union should give its full support to the draft Global Compact on Refugees;
 - 12.5. ensure that the European Union carries out thorough human rights impact assessments, in particular as regards compliance with the principle of non-*refoulement*, both in advance of agreements likely to have an impact on human rights and after such agreement have been put into operation. Assessments should include direct and indirect effects as well as intended and unintended effects on human rights;
 - 12.6. recognise responsibility and enhance accountability for human rights violations in third countries if they result from formal or informal agreements on migration control between the European Union or its member States and those countries, and ensure that migrants affected by this co-operation have access to effective means of legal redress from European Union institutions and member States;
 - 12.7. refrain from making funding for co-operation programmes to developing countries dependent on their acceptance of delegated migration control which should be the responsibility of European Union member States;
 - 12.8. carry out stricter supervision of how funding for migration control is spent and ensure that a large proportion of expenditure is devoted to migrants' well-being and human rights during all procedures;
 - 12.9. ensure greater transparency in reporting on the expenditure of funding from the European Union and establish more assessment and accountability mechanisms for the investments made in the context of the external dimension of European Union migration policies;
 - 12.10. ensure that all co-operation arrangements with third countries on migration, whether formal or informal, including agreements of a political nature, are treated in a manner consistent with the principles and values set out in the international treaties and in the Charter of Fundamental Rights of the European Union;

12.11. in the context of the EU–Turkey Agreement, ensure that asylum seekers in Turkey have access to effective asylum procedures, that refugees can effectively enjoy all the rights under the Convention relating to the Status of Refugees, including access to the labour market, and that Syrian refugees are able to leave their country if necessary;

12.12. carry out a thorough human rights assessment of the EU–Turkey Agreement on a regular basis, in compliance with the European Union Ombudsman’s January 2017 decision in the joint inquiry into complaints Nos. 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU–Turkey Agreement “since the implementation of the Agreement reasonably and necessarily has an impact a) on the human rights of migrants (direct or indirect) and b) on the ability of the European Union and the Member States involved to fulfil their human rights obligations”. In order to carry out its responsibility, the European Union should ensure the possibility of legal redress for people affected by the agreement;

12.13. guarantee that the standards related to the safe third country concept in the forthcoming asylum procedures regulation are in line with international human rights law, by requiring that third countries fulfil all obligations under the European Convention on Human Rights and the Convention relating to the Status of Refugees, both in legislation and in practice, and that refugees have a meaningful connection with the third country concerned.

B. Draft recommendation³

1. The Parliamentary Assembly refers to its Resolution ... (2018) "Human rights impact of the 'external dimension' of European Union asylum and migration policy: out of sight, out of rights?".
2. The Assembly recalls that the aims of the delegation of migration control and procedures to countries outside the European Union's border are to ease the migratory pressure on member States at the borders, facilitate resettlement to Europe and regulate migratory flows, while reducing migrants' need to undertake long and dangerous land and sea journeys.
3. In the light of these aims, it emphasises that European countries must not only invest substantially in reception, protection and integration of refugees in the region but also show more willingness to host, resettle and integrate migrants themselves.
4. The Assembly insists that externalisation of border control and asylum procedures agreed by the European Union or by individual member States with third countries should be accompanied systematically by assessments of the impact of such agreements on the human rights of migrants and guarantees of the protection of migrants' human rights under international law, with access to legal redress in cases of violation.
5. In the light of the above, the Assembly calls on the Committee of Ministers to:
 - 5.1. instruct the relevant Council of Europe intergovernmental sector to draft guidelines for external co-operation on migration with third countries, in order to ensure that the implementation of this co-operation is in compliance with the standards of the European Convention on Human Rights (ETS No. 5) and other legal instruments of the Council of Europe, as well as the United Nations 1951 Convention relating to the Status of Refugees;
 - 5.2. support member States in defining the extent of their responsibility for possible human rights violations in third countries as an indirect or direct result of external co-operation on migration;
 - 5.3. ensure follow-up to the Copenhagen Declaration on the reform of the European Convention on Human Rights system adopted by the Council of Europe member States on 13 April 2018, in particular by actively promoting ratification by the European Union of the European Convention on Human Rights.

3. Draft recommendation adopted unanimously by the committee on 4 June 2018.

C. Explanatory memorandum, by Ms Tineke Strik, rapporteur

1. Introduction

1. For nearly two decades, the European Union (EU) has elaborated legislation and policies aimed at creating a Common European Asylum System. The stated objective is to achieve “high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply”.⁴ Based on the Charter of Fundamental Rights of the European Union,⁵ the European Convention on Human Rights (ETS No. 5, “the Convention”)⁶ and the United Nations 1951 Convention relating to the Status of Refugees (“Geneva Convention”) and its 1967 Protocol,⁷ the EU has thus developed higher standards through EU legislation.

2. Parallel to the development of internal standards, the EU has developed an external dimension of EU migration law, with the main objective of combating irregular migration. With that aim, the European Union is co-operating with many countries of origin and transit in Africa, south-east Europe and the Middle East as well as with Afghanistan and Asia. Such co-operation was initially primarily based on bilateral agreements, but has shifted to an increased use of the external competence of the EU under Article 216 of the Treaty on the Functioning of the European Union (TFEU) to conclude international agreements, in order to increase leverage to achieve co-operation from those third countries.⁸

3. On the basis of the Global Approach to Migration and Mobility,⁹ different forms of co-operation have been agreed upon with third countries, such as Mobility Partnerships, Common Agendas on Migration and Mobility, readmission agreements and, more recently, tailor-made global compacts. Co-operation includes agreements on strengthening border controls and readmission of undocumented migrants in exchange for trade benefits, financial support, development aid, visa facilitation and resettlement of refugees. Under its Migration Partnership Framework of 2016,¹⁰ however, the EU has shifted its emphasis from positive incentives (“more for more”) to sanctioning non-co-operation through less funds, trade or development aid (“less for less”).

4. One of the most prominent financing instruments to support the implementation of the Partnership Framework on Migration is the Emergency Trust Fund for Africa (EUTF).¹¹ Although the EUTF is framed as an emergency instrument, most of its resources consist of Official Development Assistance (ODA), which is intended to fund long-term development programmes.

5. The Parliamentary Assembly has adapted its position on the externalisation of asylum procedures according to developments and issues arising. It supported the suggestion made by the Italian Minister of the Interior that camps be set up to process asylum requests in North Africa in [Resolution 2000 \(2014\)](#) on the large-scale arrival of mixed migratory flows on Italian shores, but raised concerns in [Resolution 2109 \(2016\)](#) on the situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016, “that the EU–Turkey Agreement¹² raises several serious human rights issues relating to both its substance and its implementation now and in the future” and that “detention of asylum seekers in the ‘hotspots’ on the Aegean islands may be incompatible with the requirements of the European Convention on Human Rights (ETS No. 5), due notably to procedural failures undermining the legal grounds for detention and inadequate detention conditions”.¹³

4. https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

5. www.europarl.europa.eu/charter/pdf/text_en.pdf.

6. www.echr.coe.int/Documents/Convention_ENG.pdf.

7. www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf.

8. Article 78.2.g TFEU allows the EU to conclude partnerships and co-operate with third countries in order to regulate irregular migration; on the basis of Article 79.3 TFEU the Union has the exclusive competence to conclude readmission agreements with countries of origin. Since the Treaty of Lisbon the agreements are adopted at the EU level on the basis of Article 216 TFEU, with ratification by the European Parliament.

9. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0743&from=EN>.

10. https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf.

11. <https://ec.europa.eu/trustfundforafrica/>.

12. For the present report I have again used the term “EU–Turkey Agreement” rather than “Statement”, as did the EU Ombudsman, who notes that there is no consistent use of either one or the other in EU documentation.

13. See also [Doc 14028](#), report prepared in the context of a debate under urgent procedure for which I was rapporteur and which was adopted on 20 June 2016.

6. These statements may appear contradictory in substance, but the Assembly's positions have always been based on the assumption that solutions have to be found to improve migration management and alleviate the pressure at Europe's borders. Part of these solutions may be found outside Europe's borders, thus reducing the numbers of migrants risking their lives travelling to Europe, but any external or extraterritorial solutions are only possible if adequate safeguards are in place to guarantee migrants' rights to adequate asylum procedures and other human rights and that they are not solely driven by the aim of evacuating European member States' shared responsibilities to resettle refugees.

7. The human rights situation is also taken into account, therefore, by the Assembly in countries where the EU proposes the creation of hotspots outside its borders for dealing with applications for asylum. This latter aspect is, however, the subject of the report being prepared in parallel by my colleague Mr Domagoj Hajduković on the legal and practical requirements for extra-territorial processing of asylum claims.¹⁴ The potentialities of these types of asylum procedures will be developed in this report. My report, as stated in its title, focuses on the concrete evidence of shortcomings in situations where the processing is to a greater or lesser extent "handed over" to the authorities of countries outside the EU, rather than being managed by member States in a third country.

8. This report was enhanced by exchanges of views in the Committee on Migration, Refugees and Displaced Persons held in January and April 2018 with the office of the Office of the High Representative of the European Union for Foreign Affairs and Security Policy of the European Commission, the Head of the International Organization for Migration (IOM) Mission in Libya and with the Director for Europe of Amnesty International. I also carried out a fact-finding mission to Turkey on 31 May and 1 June 2018, which enabled me to gain first-hand and up-to-date information on the implementation of the EU–Turkey deal two years after its signature, on which I reported at the time. I would like to thank the Turkish Parliamentary delegation for its co-operation, which enabled me to hold meetings with all the relevant ministries as well as visiting the Kırklareli readmission centre. During the visit I met with the IOM, UNHCR, as well as Amnesty International and refugee rights NGOs and lawyers.

2. The European Union framework for asylum and migration

9. The current legal standards of the EU setting out the fundamental right to asylum are the Asylum Procedures Directive 2013/32/EU,¹⁵ the Reception Conditions Directive 2013/33/EU,¹⁶ the Qualification Directive 2011/95/EU¹⁷ (which are currently in the process of being revised), as well as the EU Charter on Fundamental Rights. The application of those instruments should in any case be compliant with the European Convention on Human Rights and the Geneva Convention.

2.1. Extension of European Union norms

10. Many of the 19 member States of the Council of Europe which are not members of the EU are engaged in an application process for membership, or co-operate closely with the EU in other frameworks. This means that many of these countries are implementing EU legislation and policies to a greater or lesser extent. Some countries, without being candidates for accession, contribute to the funding of EU programmes, such as Norway.¹⁸ Norway has also recently demonstrated high levels of human rights protection for refugees, for instance in a Supreme Court ruling of 28 March 2018 which stated that a "significant and stable change" in the country of origin was needed to justify cessation of refugee status.¹⁹

11. Some Council of Europe member States outside the European Union, including the Russian Federation and Turkey, are major countries of transit for migrants. Turkey, currently hosting 3.4 million registered Syrian refugees,²⁰ was allocated by mid-October 2017 2.9 billion euros under the EU Facility for Refugees in Turkey.²¹ The non-member States of the EU within the Council of Europe are bound by the European Convention on Human Rights and thus also by the prohibition of *refoulement* under its Article 3. Furthermore,

14. See Doc. 14314, Motion for a resolution, 2 May 2017.

15. <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032>.

16. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>.

17. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

18. <https://www.norway.no/en/missions/eu/areas-of-cooperation/financial-contribution/>.

19. On 23 March 2018, the Supreme Court of Norway ruled in case 2017/1659 concerning an appeal brought by the Norwegian Government/the Immigration Appeals Board (UNE) against the decision by the Borgarting Court of Appeal, which had found that the UNE had erred in its decision of cessation of the refugee status of an Afghan woman and her daughter. In its judgment, the Supreme Court confirmed the decision of the Court of Appeal.

20. Asylum Information Database (AIDA), [country report on Turkey](#), December 2017 update.

the Geneva Convention is applicable as well, albeit in Turkey still with a geographical limitation, meaning that only refugees from countries of the Council of Europe are eligible for recognition as such under this convention.

2.2. Lower human rights standards in countries outside European Union jurisdiction

12. In the framework of the external dimension of EU migration policy, the EU has developed specific multi-annual funds with non-EU States, in particular with countries in northern Africa, the Middle East and Turkey. As with other EU programmes, their implementation requires transparency, monitoring and evaluation, accountability mechanisms, as well as preliminary and ongoing assessments of their impact on fundamental rights.

13. Standards on asylum in most partner countries are below the level of the EU asylum *acquis*. This implies that refugees prevented from travelling to EU territory because of the EU's external co-operation are not able to invoke the same rights as they would have been able to in the EU. To what extent and in which cases does that make the EU responsible for possible human rights violations in the partner countries? An important issue to be addressed is whether the delegation of asylum management by the EU implies that human rights obligations are also delegated to these countries. If so, what standards should apply in partner countries? In my view, those third countries should at least comply with the standards of the European Convention on Human Rights and the Geneva Convention in their legislation, policies and practice. Only with these standards in place, can member States consider entering into co-operation on migration without running the risk of violating basic human rights of migrants and refugees.

14. As a consequence of externalisation, immigration control tasks are performed more and more by the transit countries instead of by the member States themselves. Although this co-operation has developed into comprehensive partnerships with a large number of transit countries, only very little is known about its actual consequences.²² What is known, is that what may initially have been intended as "transit" migration has in practice become more extended, even as far as semi-permanent immigration, as migrants are prevented from travelling onward to the EU, or are being returned from there.²³

15. These transit countries may have been persuaded to readmit migrants or prevent them from travelling further, but we do not know the extent to which the governments concerned take responsibility for those transit migrants. What is clear is that these countries conclude readmission agreements with other transit countries further away, which indicates that there is a will to expel transit migrants, implying the risk of indirect *refoulement*.²⁴

3. Which rights are threatened by the externalisation of migration management?

16. The externalisation of immigration policies by the EU thus brings with it essential human rights issues, especially regarding the right to leave a country, access to asylum and to the rights under the Geneva Convention, the prohibition of *refoulement* and of deprivation of liberty, the right to dignity and access to basic needs, as well as the right to an effective remedy in the transit countries. In controlling their borders, member States are bound by the human rights of migrants protected under international and EU law. This also implies that any external co-operation with potential human rights impacts requires clear criteria on the standards to which those third countries should adhere, but also clear answers to questions related to the responsibility of member States and the EU for respect of human rights.

21. https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf. The Turkish authorities claim, however, that only a fraction of this budget has been deployed.

22. P. Garcia Andrade, I. Martin and S. Mananashvili, EU cooperation with third countries in the field of migration. Study for the LIBE Committee of the European Parliament, October 2015. Readmission agreements on third country nationals have been concluded with Albania, Bosnia and Herzegovina, Montenegro, the Russian Federation, Serbia, "the former Yugoslav Republic of Macedonia", Turkey and Pakistan. Mobility Partnerships have been concluded with Armenia, Azerbaijan, Cape Verde, Georgia, the Republic of Moldova, Morocco, Tunisia and Ukraine. Common Agendas on Migration and Mobility have been signed with Ethiopia and Nigeria.

23. See, for example, Cherti and Grant, *The Myth of Transit: Sub-Saharan Migration in Morocco*, Institute for Public Policy Research, 2013.

24. N. Coleman, *European Readmission Policy. Third Country Interests and Refugee Rights*, 2009, Leiden: Martinus Nijhoff Publishers.

17. The question of responsibility of the EU relates primarily to migrants who are prevented from accessing EU territory or have been returned to transit countries. What does this external co-operation mean for their access to an asylum procedure, their right to human dignity and effective remedy and for their rights under the Geneva Convention in these countries? And if their human rights are violated in the third country, what legal remedies does (or should) a migrant have towards the EU or EU member States?

3.1. Border controls – saving lives but putting human dignity and freedom of movement at risk

18. Since the sudden increase in arrivals of refugees into the EU in 2015, the prevention of and combat against irregular migration to the EU is one of the few areas where member States are able to find common ground, which may have contributed to the increasing concentration on ways of stopping refugees and irregular migrants crossing the EU's external borders. The EU has been devoting an increasing part of its budget for migration policies on controlling its frontiers, for instance building up the capacity and geographical remit of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

19. Frontex launched a new joint operation on 1 February 2018, replacing operation Triton in place since 2014. The agency announced that the new operation would continue to include search and rescue, while at the same time focusing more on law enforcement over an operational area spanning the Central Mediterranean Sea and incoming flows from Algeria, Tunisia, Libya, Egypt, Turkey and Albania. The operation will also assist Italy in tracking down criminal activities such as drug smuggling across the Adriatic, and continue its presence in the hotspots in Italy to assist the national authorities in registering migrants. Frontex vessels will continue search and rescue operations under the co-ordination of the responsible Maritime Rescue Co-ordination Centres.

20. One of the problems with the EU objective to improve the human rights situation in partner countries is that those programmes are not conducted with such a systematic and formal structure and that they aim for long-term improvements, whilst co-operation on border controls seems to have a more structural basis, with an immediate effect. Furthermore, the co-operation on border control receives significantly more funding than co-operation for the improvement of human rights.²⁵

21. The main problem here is that a level of protection is not a prerequisite for co-operation on border control or readmission and there is no suspension mechanism for situations in which a transit country does not afford adequate protection. This raises the question of which aspects of the co-operation are prioritised, if human rights and border control come into conflict.²⁶

22. The human rights risks involved in the external dimension are not theoretical. Amnesty International, for instance, has evidenced that “the demands being placed on third countries to prevent irregular departures to Europe put refugees, asylum-seekers and migrants in those countries at risk of prolonged and arbitrary detention, *refoulement*, and ill-treatment”.²⁷ Many anti-smuggling measures merely lead to shifts in smuggling routes which thus become longer, more dangerous and more expensive.²⁸

3.2. From pillar to post: readmission agreements could leave migrants stranded

23. In the New York Declaration on Refugees and Migrants of September 2016, the EU Member States promised to contribute to “a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States”.²⁹

25. See “Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants”, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, June 2015 (A/HRC/29/36). See also the special report of the European Court of Auditors, No. 9/2016 “EU external migration spending in Southern Mediterranean and Eastern Neighbourhood countries until 2014”, published on 17 March 2016.

26. The Euro-Mediterranean Human Rights Network expressed its “fears that actions to combat irregular migration immigration will be prioritised and implemented at the expense of other themes included in the Mobility Partnership and, more worryingly, at the expense of the rights of migrants and refugees”; see EMHRN, 2014.

27. Letter from Amnesty International to the Foreign Affairs Council of 20 October 2014, “Human rights of migrants and refugees at the core of EU relations with neighbouring countries”.

28. See, for instance, F. Molenaar, et al., “A line in the Sand. Roadmap for sustainable migration management in Agadez”, Netherlands Institute of International Relations Clingendael, October 2017.

24. The most problematic aspect of this type of co-operation is that with transit countries. Formal or non-formal agreements on readmission by a transit country go beyond the narrow meaning of repatriation as set out in Article 63.3.b of the Treaty of Amsterdam, which refers to the obligation of a State to readmit its own citizens. There is no legal obligation for a transit country to readmit a third country national from another State. But EU Member States have increasingly shifted their focus to transit countries, especially to those sharing their borders with EU territory. The EU thus envisages creating a “buffer zone” around its territory by agreeing that neighbouring countries will readmit transit migrants who have passed through their territory on their way to the European Union. This could have a knock-on effect, by which the transit countries concerned will restrict incoming and outgoing migration both from their own neighbouring countries and to the European Union.

25. Readmission agreements reduce the chances for migrants to invoke human rights in the EU, but do not include any guarantee that the transit country offers effective protection to asylum seekers. The EU member States invest gradually more in the asylum systems of their neighbouring countries, but the EU, as the party “asking for assistance”, is reluctant to negotiate with third countries on human rights in the context of readmission agreements. The agreements also make migration into a transit country from another non-EU neighbouring country less likely, through increased visa restrictions and/or border control. This may lead to migrants being stranded in an even more remote transit country with less protection guarantees than the partner country itself. This chain effect can also severely hinder any mobility opportunities, especially for migrants from less wealthy countries, and therefore also obstruct regional migration programmes such as those carried out in the framework of the Economic Community of West African States (ECOWAS).³⁰ These effects may hinder the objectives of the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees, which are still under negotiation.

26. A final disadvantage of readmission agreements is that they oblige a transit country to readmit undocumented migrants from the EU but do not make any provision for access to basic needs such as the right to housing, health care, primary education, work and social welfare. The potential chain of transit is a threat to the principle of human dignity as enshrined in international law, in particular if the migrant is unable to return to his home country. Bearing in mind the risk of a (legal) limbo situation for the returnee in a transit country, the European Commission urged member States to always give priority to returning undocumented migrants to their country of origin,³¹ but the extent to which the member States comply with this principle is unclear. They at least did not follow up the Commission’s advice to be reticent to include third country nationals in readmission agreements, as the need for more incentives would complicate the negotiations substantially.³² Thus, negotiations with important transit countries such as Morocco have resulted in a deadlock due to the EU’s wish to incorporate clauses on the readmission of third country nationals.

27. The usual type of agreement on migration currently concluded by the EU is more comprehensive, involving different types of obligations and measures on different policy areas. The need for a comprehensive approach led to the adoption of the Global Approach to Migration and Mobility (GAMM) meant to safeguard a coherent internal and external migration policy.³³ The European Agenda on Migration (EAM) formulated in the light of Europe’s migration crisis in 2015 confirms the strengthening of the outward, external emphasis of the EU’s migration policy. The European Commission increasingly focused on the lack of co-operation on the part of partner countries and made proposals to foster their willingness to co-operate.

28. The New Partnership Framework published in June 2016 aims to adopt tailor-made “compacts” with priority partner countries, in which all instruments, tools and leverage are put together, “to better manage migration in full respect of our humanitarian and human rights obligations”.³⁴ Here, the principle of conditionality has been put at the centre of the policy, implying that economic support of third countries

29. New York Declaration for Refugees and Migrants, General Assembly, draft resolution referred to the high-level plenary meeting on addressing large movements of refugees and migrants by the General Assembly at its 17th session, 13 September 2016, A/71/150.

30. F. Molenaar, op. cit.

31. Communication of the European Commission on the evaluation of EU Readmission Agreements, COM(2011)76, 23 February 2011, Recommendation No. 8: “... In those cases [of readmission of third country nationals, TS] the EU should also explicitly state that, as a matter of principle, it will always first try to readmit a person to his/her country of origin. The EU should also focus more its readmission strategy towards important countries of origin.”

32. Ibid. Recommendation No. 8: “The current approach should be revised. As a rule, future negotiating directives should not cover third country nationals, hence there would not be a need for important incentives. Only in cases where the country concerned, due to its geographical position relative to the EU (direct neighbours, some Mediterranean countries) and where exists a big potential risk of irregular migration transiting its territory to the EU, the TCN clause should be included and only when appropriate incentives are offered. ...”

33. See COM(2005)621 and COM (2011)743.

depends on their performances on readmission and border control. The European Commission recommended that not only positive but also negative incentives be applied, by using all EU policy areas with the exception of humanitarian aid. With these tailor-made solutions, the informal nature of co-operation has increased, with the result that human rights are not always explicitly addressed and that transparency and democratic control is lacking. These omissions are clear obstacles to the legitimacy of the decisions and the establishment of accountability of the EU and its member States.

3.3. The internal-external dimension: the “safe third country” concept

29. An important threat to the sharing of responsibilities reaffirmed in the New York Declaration is the redefinition and mandatory application of the safe third country concept, which member States appeared to agree upon during the negotiations on the draft Regulation on Asylum Procedures, but which is now hindered by differences in national interpretation and the mixed competences (national and EU) the current system entails.

30. In cases where return takes place in the context of this safe third country concept, asylum claims are not examined by an EU member State and are thus dependent on the effectiveness of the asylum system in the third country. The EU–Turkey Declaration is based on the presumption of Turkey being a safe third country for refugees, and in a number of cases the Greek judges have applied this concept to asylum claims of refugees entering from Turkey. Many EU member States aspire to adopt the same approach with regard to North African countries. These countries, however, are not even bound by the European Convention on Human Rights, nor do they offer satisfactory asylum and reception systems. Readmission agreements do not currently include any guarantee that the transit country has an effective protection regime in place for asylum seekers.

31. The proposal for a regulation on Asylum Procedures, released in July 2016, clearly reflects one of the objectives of concluding migration deals with third countries: the transfer of responsibility for refugees.³⁵ The main changes in the proposed safe third country concept are that member States are obliged to apply the safe third country concept, but are allowed to designate third countries as safe in addition to the common EU list of safe third countries, unless the European Commission objects to it.³⁶ Furthermore, the Commission proposed to water down the criteria for a safe third country. According to the proposal, ratification of the Geneva Convention is not an obligation for third countries, and guaranteeing the “core rights” of the convention by third countries should be sufficient. Criteria for the personal connection between the refugee and the transit country are left to the member States.

32. These changes have increased the risk that refugees are handed over to a country where they will not enjoy the full rights of the Geneva Convention and will not be granted a durable solution, as they lack the possibility to build a new future together with their family members. As already foreseen in the London resolution, the concept should be applied before determining the responsible Member States in the framework of the Dublin Regulation.³⁷ This would also have the effect that family members who have travelled irregularly and are stranded in another member State are to be sent back outside the EU territory where they have to apply for family reunification. This would render family reunification more complicated and lengthy and make the provisions on family unity in the Dublin Regulation in many cases meaningless.

33. On 22 and 23 June 2017, the European Council explicitly made the connection between its ambition to conclude migration deals with third countries and the safe third country concept. While instructing the negotiating ministers of Justice and Home Affairs, it agreed that “in order to enhance co-operation with third countries and prevent new crises, the ‘safe third country’ concept should be aligned with the effective requirements arising from the Geneva Convention and EU primary law, while respecting the competences of the EU and the Member States under the Treaties. In this context, the European Council calls for work on an EU list of safe third countries to be taken forward ... The European Council invites the Council to continue negotiations on this basis and amend the legislative proposals as necessary, with the active help of the Commission”.³⁸ The call for amendment rather than adoption of the proposal suggests that the member States were far from an agreement. The expressed aim of the safe third country concept, to further co-operation with third countries, seems to imply a broadening rather than a restriction of its scope.

34. Communication of the Commission on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016)385, 7 June 2016.

35. COM(2016)467, Articles 45-50.

36. *Ibid.*, Article 50.3.

37. See preamble 35 of the Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016)85.

3.4. Non-refoulement obligations should include effective remedies

34. So far, appeals against *refoulement* have only been possible against specific countries, as the European Union itself could only be brought before the European Court of Human Rights if it finally decided to ratify the Convention as was negotiated between the two organisations for several years. At the same time, in February 2017 the European Court of Justice declared its lack of jurisdiction to judge in the actions brought against the EU–Turkey Agreement by two Pakistani nationals and one Afghan national, deciding that the agreement was reached by heads of State and government and not the institution itself.³⁹

35. Several allegations of violation of the principle of *non-refoulement* by member States under Article 4 of Protocol No. 4 to the European Convention on Human Rights (ETS No. 46) have been processed by the European Court of Human Rights, the most important so far being the 2012 case of *Hirsi Jamaa v. Italy*, found to have pushed refugees back to Libya. The judgment states that: “Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.” So even if there is no legal jurisdiction, the Court also recognises responsibility in case of *de facto* jurisdiction through effective control. Another decision on violation of Protocol No. 4 was pronounced against Italy and Greece in 2014 in the case of *Sharifi and Others*.⁴⁰

36. Spain has also been convicted of breaching the prohibition of collective expulsion under Article 4 of Protocol No. 4 and Article 13 of the Convention by its border control at the fences of Melilla.⁴¹ These cases concern the pushback policy of Spain to Morocco. A group of Sub-Saharan migrants managed to climb the three fences, but were immediately apprehended by the Spanish civil guard and handed over to the Moroccan authorities, without checking their identities or enabling them to explain their circumstances. The Spanish authorities argued that the events occurred outside their jurisdiction: as the migrants had not passed the border crossing point in Melilla, they had not entered Spanish territory. The European Court of Human Rights, however, recalled its jurisdiction as established in the *Hirsi* judgment, and made it clear that member States cannot escape their responsibility while construing their jurisdiction in a certain way. Member States are hence not allowed to move their borders inwards in order to prevent asylum seekers from making an asylum claim.⁴² After the case was referred to the Grand Chamber, the Council of Europe Commissioner for Human Rights submitted his written observations, in which he confirmed the violence against the migrants and the absence of any individual examination or right to an effective remedy.⁴³

37. Spain avoids reception of asylum seekers at these borders through bilateral co-operation with Morocco, which actively prevents sub-Saharan migrants from approaching the fences at Melilla and Ceuta. This co-operation is based on benefits offered by Spain, including substantial financial support. The fact that the bilateral agreements are not accompanied by guarantees of the treatment and rights of refugees on Moroccan territory could lead to situations where asylum seekers and refugees are not able to invoke their rights under the European Convention on Human Rights or the Geneva Convention. This is not an isolated case: more countries have entered into co-operation on their borders which result in less protection for asylum seekers and refugees, for instance the co-operation of Poland with Ukraine, Hungary with Serbia and Bulgaria and Greece with Turkey.

38. The *Hirsi* judgment made it clear that member States exercising effective control over migrants must ensure that their acts do not lead to *refoulement* under the European Convention on Human Rights. The tendency of member States to delegate their action to third countries raises the question of their responsibility in the case of a causal link between their bilateral co-operation and a breach of the Convention, even if they

38. Conclusion No. 23 of the European Council meeting of 22-23 June, EUCO 8/17, 23 June 2017.

39. CJEU, 28 February 2017, case T-192/16, *NF* ; CJEU 28 February, case T-193/16, *NG* ; CJEU 28 February 2017, case T-257/16, *NM*.

40. See European Court of Human Rights, [factsheet on the collective expulsion of aliens](#), regularly updated.

41. European Court of Human Rights, *N.D and N.T v. Spain*, Applications Nos. 8675/15 and 8697/153, judgment of 3 October 2017.

42. See C. Gortázar Rotaèche and N. Ferré Trad, “A cold shower for Spain-hot returns from Melilla to Morocco: *N.D. and N.T. v Spain*, ECtHR, 3 October 2017”, <http://eumigrationlawblog.eu/a-cold-shower-for-spain-hot-returns-from-melilla-to-morocco-n-d-and-n-t-v-spain-ecthr-3-october-2017/>; A. Pijnenburg, “Is *N.D. and N.T. v. Spain* the new *Hirsi*?”, 17 October 2017, <https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/>.

43. Third party intervention by the Council of Europe Commissioner for Human Rights, 22 March 2018, COMDH(2018)11, <https://rm.coe.int/third-party-intervention-n-d-and-n-t-v-spain-by-nils-muiznieks-council/1680796bfc>.

have not exercised direct physical control. Not to assume responsibility would imply that member States can easily escape their obligations under the Convention by simply letting third parties “do the job”. Such an outcome would clearly undermine the effectiveness of the Convention.

39. Another threat to the effective protection of rights under the Convention is the shift from legally defined procedures with formal commitments to the use of informal tools which enable practical co-operation in migration control. Although these informal arrangements are often not intended to create legal obligations under international law, they do have serious implications for the distribution of responsibility between States and migrants’ right to protection. The rights of asylum seekers are inherently dependent upon the possibility to have possible human rights violations assessed by a court, but without any formal agreements in place, it becomes very difficult to establish at the outset whether a State or organisation was engaged in extraterritorial jurisdiction and whether it actually agreed with a third State to delegate certain functions or acts.

40. A new case filed by the Global Legal Action Network (GLAN) and the Association for Juridical Studies on Immigration (ASGI) with the European Court of Human Rights at the beginning of May 2018 has yet to be registered, but will be interesting to follow and illustrates the direct consequences of EU externalisation policies. It concerns 17 survivors of a fatal incident in which a boat carrying migrants found itself in distress off the coast of Libya: the applicants include the surviving parents of two children who died in the incident. The submission makes use of evidence compiled by Forensic Oceanography, part of the Forensic Architecture agency based at Goldsmiths, University of London, which produced a detailed reconstruction of the incident and the policies that contributed to it.⁴⁴

3.5. The use of development assistance for migration management

41. Making development assistance for countries in need conditional upon the transfer of responsibilities for asylum and migration management poses multiple problems. The situation of the countries in question could deteriorate through lack of sufficient capacity to manage the migrants arriving as part of an agreement, which pressurises governance structures and creates tension among national populations who perceive assistance as being disproportionately allocated to migrants rather than to them. The human rights of the migrants concerned may also deteriorate through the lower standards afforded to them in the “external” context, and they risk being put “out of sight and out of rights” on the other side of EU borders. Finally, the EU itself could be found guilty of mismanagement and of violating rights, of which many are its own creation, if it retains responsibility for the situation of these migrants.

42. Since the Trust Fund for Africa is established under the European Development Fund, its contributions must comply with the conditions set out in Regulation 2015/323 on the financial regulation applicable to the 11th European Development Fund and the Cotonou Agreements. Tensions with the ownership and co-management principles of the Cotonou Agreement and the principle of mutual accountability for budget support as stipulated in Regulation 2015/323 raise serious issues as to whether some of the funded activities comply with these conditions and with the Treaty’s legal basis on development co-operation. Furthermore, questions can be raised about whether some of the proposed activities are consistent with the primary objective of EU development co-operation, namely the reduction and, in the long term, the eradication of poverty (Article 208.1 TFEU).

43. It is unclear whether substantive obligations arise from the agreements concluded under the Trust Fund. According to the Cotonou Agreement, programmes and projects financed by the multi-annual financial framework of co-operation are as a rule subject to financing agreements drawn up by the Commission and the ACP State. But for many projects no financing agreements have been concluded, which undermines the mutual accountability principle entailed in the Cotonou Agreement.

44. It is also currently unclear what “emergency” the Fund seeks to address, and what consequences its emergency status has for long-term development programmes. Since governance procedures for the Fund deviate from the ordinary decision-making processes, they should be seen as truly emergency-led instruments whose added value and consequences should be very well justified.

44. See Global Legal Action Network (GLAN) article of 8 May 2018: “Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse”

4. Implementation of externalisation policies – the cases of Turkey and Libya

45. Migrants mostly come to the EU across the Mediterranean Sea, with the largest numbers of applicants for asylum coming from Eritrea, Sudan and Somalia. Migrants, who transit across Turkey mainly come from Syria, Afghanistan and Iraq.⁴⁵ Many of the transit countries have a deficit in human rights standards.

46. The EU proposal for the Asylum Procedures Regulation, released in July 2016 and still under negotiation as part of the Common European Asylum System (CEAS) reform package, clearly reflects one of the objectives of concluding migration deals with third countries: the transfer of responsibility for refugees.⁴⁶ The EU especially seeks to harmonise, but also to weaken, the criteria for qualifying a transit country as a safe third country. Adoption of this regulation will further pave the way to the adoption of the EU–Turkey model to other countries. Political leaders have clearly shown an interest in concluding similar agreements with Tunisia, but also other countries of interest, such as Egypt, have their attention.

4.1. Turkey – a model for future externalisation action?

47. In its [Resolution 2109 \(2016\)](#) on the situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016, the Assembly found that returns of asylum seekers of any nationality to Turkey as a “safe third country” was contrary to EU and/or international law, and that returns of Syrian asylum seekers to Turkey as a “first country of asylum” could be contrary to EU and/or international law. The Assembly referred to the many obstacles for asylum seekers to have access to the procedure due to the rules a lack of capacity and appropriate reception conditions, the limited access for Syrian refugees to housing, primary education, the labour market and a livelihood, and the allegations of deportation, unlawful detention and bad detention conditions.

48. With the conclusion of the EU–Turkey Agreement, the debate on the requirements for applying the safe third country concept became ever more relevant, as Turkey retains its geographical limitation to the Geneva Convention and doubts remain as to whether the temporary protection status given to Syrians and the treatment of non-Syrians meet the standards of the Geneva Convention.

49. During the implementation of the Agreement, organisations continually reported about the precarious position of readmitted refugees and asylum seekers in Turkey. With a view to immediate deportation, non-Syrian migrants readmitted by Turkey from Greece are sent to Turkish removal centres where they have very limited or no access to lawyers, the UNHCR, NGOs, or to the asylum procedure. The deal thus makes refugees and migrants end up in a vacuum: although their access to asylum was very limited in Greece, the Turkish authorities claim that they already had an opportunity to request asylum there. According to the Turkish Government, Syrian refugees have access to temporary protection after readmission from Greece. Researchers however have reported that they are (first) transferred to *de facto* closed camps where they are locked in cells and have very limited communication opportunities and access to the outside world.

50. The expressed concerns not only relate to the readmitted refugees. Syrian refugees receiving temporary protection in Turkey live in extreme poverty, due to the combination of limited access to social welfare systems and to the labour market, where a quota system for Syrian refugees is applied and employers requesting a working permit face long and expensive procedures. The total number of official work permits being issued to Syrian refugees are not more than 15 000 to 30 000. Many of the refugees are exposed to exploitation on the informal labour market, including a substantial number of Syrian children.

51. The state of emergency that applies since the coup attempt of summer 2016 also has repercussions for refugees and asylum seekers, as it has significantly reduced their safeguards against *refoulement*. The Turkish Executive Decree 676/2016 has abolished the automatic suspensive effect of an appeal against removal orders for individuals considered to constitute a “threat to public order, security and health” or regarded as somehow associated with “terrorist organisations”. Although the reason for such labelling is not substantiated, administrative authorities and courts do not question its validity. In such cases, removal orders can be issued even when the person concerned is a recognised refugee or a registered asylum seeker. The only instance able to stop the deportation is the Constitutional Court.

45. www.europarl.europa.eu/RegData/etudes/ATAG/2017/595918/EPRS_ATA%282017%29595918_EN.pdf

46. COM(2016)467, Articles 45-50.

52. The positive results of the EU–Turkey Agreement are that funding has supported access to services for refugees in Turkey. Considerably more children are able to attend school and health services have been improved and more supporting programmes are offered to the most vulnerable refugees. Furthermore, as at 30 May 2018, 13 862 Syrian refugees had been resettled from Turkey and the capacities of Turkey’s Ministry for Migration had been significantly strengthened.

53. However, the level of poverty of Syrian refugees, exploitation on the labour market and housing market, as well as the high level of child labour remain concerning. The economic breakdown is likely to even worsen their situation and create tensions in a country already struggling with socio-economic strains and political tensions. Also gaps in protection remain, both for Syrian refugees and for non-Syrian asylum seekers. This is partly related to the sheer number of people hosted in Turkey. The highest numbers of migrants arriving in the country were from Afghanistan: 175 000 arrived in 2017, and for only the first five months of 2018 the figures already stood at over 100 000. Some 14 000 Afghans had been returned to Afghanistan in the framework of the readmission agreement with the country, 1 626 of whom had arrived from the Aegean islands. The IOM was co-operating in these operations, and efforts were being made to absorb the backlog, for example a second processing centre had just opened in Ankara.

54. The EU–Turkey Agreement not only had consequences in Turkey. The Statement made refugees dependent on the deficient asylum and reception system on the Greek Aegean islands. The former Commissioner for Human Rights, Nils Muižnieks, has voiced the opinion that the EU–Turkey deal was made redundant by the reinforcement of border controls. According to the Commissioner, migrants and refugees would no longer seek to cross into Greece from Turkey even if the migrant deal ceased to exist, as migrants were aware of all the difficulties they faced in reaching mainland Europe. So despite the fact that Turkey is doing more than its fair share in hosting 3.6 million Syrians, the EU is adding to this number through its failure to take on its full responsibility.

55. My visit to Turkey on 31 May and 1 June 2018 allowed me to experience this situation first-hand, and to better comprehend the context in which the EU–Turkey Agreement is being implemented. I was indeed impressed in many ways by Turkey’s efforts to create structures to host so many refugees, in a context of relative internal upheaval since the attempted coup, and of emerging and serious economic difficulty. But the visit also confirmed the concerns expressed in previous reports.

56. The Turkish authorities I spoke with were concerned and frustrated that the Pathway for Syrians programme for resettling 72 000 migrants was not functioning. The Ministry for Foreign Affairs regretted the delays in awaited EU action as part of the agreement. Discussions on visa liberalisation had just resumed after a two-year break. During my visit, several representatives of the authorities stressed the need for EU programmes to be more flexible in their implementation, as sometimes the speed of response was not sufficient and the programmes not fully adapted to the circumstances. The parliamentarians I met in Ankara said that only €750 000 million of the pledged assistance had been paid out so far.

57. My exchanges with the Ministry for EU Affairs reflected the same frustration, despite the general statement that the agreement had allowed the Adriatic route to be shut down and more regular and safe migration to be ensured. With the “1 for 1” scheme and the bilateral Greece-Turkey readmissions agreement, sea crossings had been reduced, although irregular migration continued. Turkey’s coastguard was assuming most of the burden of border control. The hope was that the second phase of implementation of the agreement would allow initial shortcomings to be corrected and good practices to be propagated.

58. The IOM had a relatively optimistic outlook on the situation and on the effects of the EU–Turkey Agreement, explaining that their role involved advice and support for Turkey as well as direct implementation of programmes. Integrated Border Management was becoming more efficient, and support had been given to the Directorate General of Migration Management (DGMM) as well as to the Ministries of Justice, of Labour and of Family Affairs. Administrative and institutional capacities had been built up, as had regional and international co-operation. Regional returns centres, formerly operated by police services, were now managed by the DGMM and reception conditions were much improved.

59. My visit to the Removal Centre was useful and informative. The living conditions in the Kırklareli centre were very good, the building large, spacious and clean and the staff informative, and visibly on friendly terms with the migrants staying there. On a daily basis, migrants had access to activities and fresh air. My exchanges with migrants of diverse origin (Afghan, Eritrean, Iraqi, Sierra Leonean) at the readmission centre in Kırklareli revealed a general lack of knowledge among migrants about the possibilities for asylum application or appeal against decisions, or indeed in some cases an ignorance of the reasons for their detention. Leaflets in different languages are distributed with information about the possibility to ask for asylum. If a migrant doesn’t have any means to pay for legal aid, he is referred to the bar association.

However, migrants in the removal centre and several NGOs informed us that the expressed will to ask for asylum does not always lead to action by the authorities and that legal aid is not always granted. So although the asylum procedure looks appropriate on paper, the rules do not always correspond to the practical situation. That leaves non-Syrian protection seekers often in an insecure and precarious situation.

60. Asylum procedures for non-Syrians still appear to be the most problematic. These asylum seekers are sent to “satellite cities” around the country, where they have to stay during the asylum procedure. However, there are long waiting periods and migrants suffer from poverty and lack of employment. If an asylum seeker leaves the satellite city, the asylum claim will not be examined.

61. An exchange of views with Ms Gauri van Gulik, Director for Europe of Amnesty International, at the Assembly’s April 2018 part-session confirmed that the situation was still of the utmost concern, with an increase in the practice of “forced voluntary returns” previously observed in Greece, and the multiplication of “removal centres”. My impression in Turkey was that there is an atmosphere of mistrust between the authorities and the NGOs, which may impede the capacity of the latter to assist migrants both legally and socially. Lawyers still manage to provide assistance, with support in particular from the Turkish Union of Bar Associations, which organised training and worked on the quality of legal aid and funding. But the field suffers from a shortage of qualified legal practitioners; this also applies to immigration officers.

62. The EU–Turkey Agreement has also led to obstacles for the entry of new refugees into Turkey. Soon after the Agreement was concluded, the Turkish authorities closed the land border with Syria. The 911-kilometre wall along Turkey’s borders with Syria was seen by the authorities as a necessity. According to the DGMM, the “border gate” was still open to vulnerable Syrians fleeing their country. Other stakeholders however pointed out that only refugees in a life-threatening situation are admitted to the Turkish territory since the closing of the land border. Practically, this makes it very difficult or even impossible for Syrian refugees to receive the protection to which they are entitled in the context of Article 3 of the European Convention on Human Rights and the Geneva Convention.

63. So-called “safe zones” were currently being tested to allow Syrians to return to areas close to the Turkish border, in the proximity of Gaziantep for instance: 150 000 people had returned to Jerablus, which appeared to be a viable solution, although how the people concerned manage to live with little or no means of subsistence is not clear. According to the Turkish authorities, these returns were voluntary – other interlocutors stated that there were many forced returns, not least by coercion to sign a “voluntary” return document, often drafted in Turkish which migrants do not understand. These documents were proposed on arrival. As these zones are established on Syrian territory, it is questionable if this safety is durable and if it really enables refugees to build a new future, given the unstable and dangerous situation in Syria.

64. Although the resistance within the Greek asylum system has reduced in favour of the EU position, the EU–Turkey Statement has not been effective in numbers of readmission. According to the European Commission, on 30 May 2018, 2 224 migrants had been returned from Greece to Turkey since 18 March 2016. On 7 June, the Turkish Government suspended the bilateral readmission agreement between Turkey and Greece following Greece’s release of four military servicemen that Ankara wants extradited in order to prosecute them for taking part in the 2016 coup attempt. This analysis shows that if the safe third country concept is merely applied because of political wishful thinking, asylum seekers and refugees face difficulties in invoking their rights under the EU Asylum *acquis*.

65. At the time of presenting this report, serious doubts persist as to the possibility of assuring migrants sufficient protection outside EU borders under this type of agreement. The application in Turkey is already problematic due to the large number of refugees and migrants it hosts. But still, the Turkey context is so unique that the EU–Turkey Agreement cannot be exported as a model for externalisation, even if future implementation involves stronger guarantees of protection of migrants’ rights. One of the reasons is that Turkey is bound by the European Convention on Human Rights, which does not apply to many other partner countries. Furthermore, the accession process obliges Turkey to adapt its asylum system to EU standards. There is an Asylum Law and a system to process claims, although it is in its infancy. Applying similar deals with other countries, in absence of these circumstances, appears impossible or, at the very least, will be at the cost of human rights.

4.2. Libya – as yet uncertain results of EU resource mobilisation

66. The EU is providing assistance in Libya’s political transition towards a stable, functioning country and is supporting United Nations-led mediation efforts. The importance of inclusiveness of the political process and Libyan ownership is emphasised in the EU’s communications on the subject. Through the IOM and the UNHCR, the EU is providing humanitarian assistance to respond to migration challenges and is supporting

Libyan authorities through its Common Security and Defence Policy (CSDP) missions and operations, EUNAVFOR MED Operation Sophia and EUBAM Libya. The EU is also working closely with the UN Support Mission in Libya (UNSMIL). Funding currently stands at 120 million euros to support projects in governance, health, youth and education, migration and protection, as well as security. Action is also undertaken under the Emergency Trust Fund for Africa, which includes giving “voluntary access to humanitarian return and reintegration”.⁴⁷

67. The European Commission press release of 16 May already mentioned refers to EU support in IOM action which has assisted over 6 185 people in voluntarily returning home from Libya so far in 2018, and to the work of a joint African Union-EU-UN taskforce working with the Libyan authorities to stop the systematic detention of migrants, which has enabled the release from detention of over 1 000 refugees this year. The EU Trust Fund for Africa’s 147 programmes had received a total amount of €2.59 billion so far for initiatives including voluntary returns from Libya. But the European Commission itself declared that the funding gap of around €1.2 billion risked crippling efforts if not “addressed together by the EU and member States”.

68. Despite these programmes and the untiring work of humanitarian organisations on the ground, the situation of migrants in Libya remains extremely worrying, as can only be expected in the case of a country emerging from a prolonged period of brutal dictatorship and corruption. The humanitarian situation in Libya is a subject for grave concern, as attested by the recent United Nations, IOM and Amnesty International reports,⁴⁸ coupled with doubts as to whether the perception of financial gain through foreign investment does not in fact increase criminal activity within the territory and at the southern borders. In this case it is extremely worrying that the responsibility for the lives of migrants is being put by the EU into the hands of representatives of authorities which do not yet have the capacity, competence or real means or even intention to provide them with assistance and protection, as well as proper access to asylum procedures.

69. In February 2018, the UNHCR reported that since November 2017 it had evacuated over 1 000 highly vulnerable refugees from Libya and was seeking durable solutions for them in third countries. Flights departed from Tripoli for Niamey in Niger carrying 128 refugees, and 150 refugees from Tripoli to Rome, bringing to 1 084 the total number of refugees evacuated in the first three months of the UNHCR’s operation. The UNHCR’s special Envoy for the Central Mediterranean, Vincent Cochetel, reported on UNHCR plans to evacuate thousands more refugees, with the co-operation of partners and the crucial support of the Government of Niger, where 770 refugees had so far been evacuated, including single mothers, families and unaccompanied and separated children. In total, 312 refugees had been evacuated directly to Italy.

70. During the preparation of this report, evacuations came to a standstill as EU member States had not respected their pledges to resettle the refugees (recognised as such at a UNHCR camp in Niger), as is evident from the pitifully small numbers of resettlements. As a result, the detention centres in Libya filled up again. A new press release on 10 May 2018 stated that evacuations had been resumed to Niamey for 132 people, citing a total of 1 474 evacuees as well as 477 resettlements directly from Libya to third countries.⁴⁹

71. In this context of concern and of lack of reliable information, in October 2017, the Chairperson of the Migration Committee wrote to the Chairperson of the Italian Delegation to the Parliamentary Assembly, Mr Michele Nicoletti, commending Italy’s humanitarian action in favour of migrants, but expressing concern about the implications of the adoption of a Code of Conduct for NGOs involved in search and rescue operations in the Mediterranean. The Chairperson of the committee highlighted the refusal to sign the Code by a majority of NGOs, including Doctors Without Borders, because of the ban on access to Libyan territorial waters and the requirement to give access on board rescue ships to armed police officers, amongst others. This letter voiced similar concerns to those voiced by the former Commissioner for Human Rights, Niels Muižnieks, in a letter to the Italian Minister of the Interior dated 28 September 2017.

72. The replies to the letters emphasised the resulting reduction in the risks of accidents and drowning, and the establishment of humanitarian corridors for Syrian refugees. This progress had been achieved by increased co-operation with Libya (as well as with Niger), including through capacity-building programmes, in particular training in combating human trafficking, indicated as the “first cause of the failure to respect human rights for thousands of people fleeing war or destitution”.⁵⁰ The Italian Minister stated that no Italian ships or any vessels co-operating with the Italian coastguards had taken rescued migrants back to Libya. Although this

47. See [Factsheet on the relations between Libya and the European Union](#), 22 January 2018.

48. See, for instance, a report published on 11 December 2017 by Amnesty International, “[Libya’s dark web of collusion: Abuses against Europe-bound refugees and migrants](#)”.

49. According to latest figures supplied by the UNHCR, 1 609 individuals had been evacuated as at 18 May 2018, 1 287 to Niger, 312 to Italy and 10 to Romania.

50. Reply by the Chairperson of the Italian Delegation to PACE, January 2018.

may be true, if the Libyan Coast Guard is paid by Italy to take those migrants back to Libya, the Italian authorities also have an indirect responsibility for what happens to those migrants at sea and back on Libyan territory.

73. NGOs are increasingly concerned about the new role attributed to the Libyan Coast Guard, which has resulted in increasing push-backs and distressing circumstances during operations, for both the people rescued and the NGO rescue teams. The grave violations of human rights repeatedly reported against migrants in Libya appear to show that people rescued cannot be returned and disembarked therein in compliance with international human rights law, refugee law and maritime law. NGOs see the obligation to hand over migrants to Libyan coastguards as a daily violation of human rights.

74. According to them, the Libyan coast guard has intercepted and pulled back migrants, in some instances causing deaths. NGOs state that, in several incidents, EU military ships were present in the vicinity but did not launch rescue operations, and the NGO Sea-Watch claims that EU ships have assisted the Libyan coastguard in carrying out some interceptions. Following these claims and for the purposes of this report, I wrote to the Libyan coastguard, Frontex, Eunavfor Med and Inmarsat to request detailed accounts of the incidents. The replies were not conclusive and I intend to pursue the matter in the context of follow-up to the report.

5. Conclusions

75. Externalising migration management to non-EU member States is seen as a necessity in order to ease the pressure on front-line EU countries, and as a solution to avoid migrants risking their lives on long and dangerous journeys towards Europe. But it remains a dangerous enterprise, as there is no guarantee that the rights of migrants will be respected, and in some cases that even basic human rights and dignity will be upheld. Indeed, evidence suggests that these rights are too often compromised. In order for external co-operation on migration to work, respect for human rights must be guaranteed through impact assessments prior to entering into co-operation, safeguards embedded in agreements as well as clear provisions on responsibilities and effective remedies for migrants affected by this co-operation.

76. The “emergency” nature of the EU’s Emergency Trust Fund for Africa and the broad objective of “tackling the root causes of migration” make it difficult to assess what EU policy objectives projects funded under the EUTF aim to achieve and how these objectives fit into the legislation covering EU development assistance. Furthermore, the non-binding and political nature of the approved action in the framework of the Fund makes the EU’s specific obligations and responsibilities unclear.

77. The cost of capacity building in countries which need substantial political, legal, economic and social assistance in attaining sufficient capacity to manage migration should be carefully measured against the potential cost of improving and reinforcing capacities in Europe for reception and integration.

78. Externalisation of migration control and border management cannot be carried out at the cost of the rights of migrants and refugees, including their right to leave countries like Libya in search of a better future. Levels of human rights protection need to be defined and adequate monitoring mechanisms designed, including provision for suspending co-operation if necessary. Resettlement obligations of EU member States also require enforcement in order to contribute to a fairer sharing of responsibility. In addition, resources spent on reinforcing border security and capacity building outside European member States should in no way detract from development co-operation with these and other countries in need of assistance. The detailed recommendations related to these issues are set out in the draft resolution.

79. In my exchanges, it was made clear that the Turkish authorities did not agree with the concept of “externalisation” of migration management by the EU in the case of Turkey, stating that the EU–Turkey Agreement of 18 March 2016 was based on mutual consensus and understanding. The authorities point to the humanitarian aims of the agreement – preventing the loss of lives at sea, crushing migrant smuggling rings and replacing illegal migration with regular migration.

80. The European Union’s policy, which is likely to be adopted by its third-country partners, does not seem to be well thought through as regards its consequences for the long term and at the global level. It may have regional consequences for free movement arrangements (such as ECOWAS) and flexible practices of border crossings for temporary protection and thus undermine the EU’s objective to enhance regional co-operation and mobility. The accumulation of the EU’s internal and external migration policy as analysed in this report will inevitably lead to an increasing responsibility for third countries and may thus affect their willingness to solve protection needs in a regional co-operation framework. This impact runs counter to the aim of the future

Global Compact on Refugees to strengthen international co-operation in order to ease pressures on the host countries involved, create a more equitable sharing of responsibility and foster sustainable solutions for refugees.