



THE HUMAN RIGHTS RISKS OF EXTERNAL MIGRATION POLICIES



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Cover photo: Australian border force ships, viewed from the deck of the asylum-seekers' boat, May 2015
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EXTERNAL MIGRATION POLICIES

States have a legitimate interest in controlling migration into their territories, and in cooperating with each other to do so. In recent years, some countries have put an increasing emphasis on certain “external migration policies” – i.e. a broad spectrum of actions implemented outside of the territory of the state that people are trying to enter, usually through enhanced cooperation with other countries. These policies may consist of formal, stand-alone legal agreements, or they may comprise a variety of informal arrangements or actions contained within broader cooperation agreements, diplomatic dialogues, projects, compacts or programmes established between states which include – but go beyond – migration issues.

Amnesty International considers that external migration policies include:

- EXTERNALIZATION OF BORDER CONTROL – Enlisting other countries to engage in punitive or preventive policies aiming at stopping irregular border crossings by refugees, asylum-seekers and migrants.
- EXTERNALIZATION OF ASYLUM-PROCESSING – Shifting to other countries the responsibility for providing protection to those seeking asylum.
- READMISSION AGREEMENTS – Arrangements that facilitate the forcible return (to their countries of origin) of people with no right to remain – for example irregular migrants or people whose asylum claims were unsuccessful.
- INTERNATIONAL ASSISTANCE – Positive incentives that attempt to address the perceived causes of migration and displacement by improving living conditions and access to rights and protection in countries of origin and transit, including through the deployment of development aid, trade measures and foreign direct investment.
- SAFE AND REGULAR PATHWAYS OF ENTRY – Policies enabling regular access to destination countries for people in need of protection (for example: resettlement, family reunification, protected entry, community sponsorships, etc.) – as well as for migrants (for example: labour migration schemes, student visas, etc).

From the perspective of international law, external migration policies – which often simply entail cooperation between states on migration issues – are not unlawful *per se*. However, Amnesty International considers that several types of external migration policies, and particularly the externalization of border control and asylum-processing, pose significant human rights risks.

PURPOSE OF THIS DOCUMENT

This briefing paper sets out the main human rights risks linked to external migration policies. It is intended as a guide for activists and policy-makers working on the issue, and includes some examples drawn from Amnesty International’s research in different countries. The briefing does not provide any detailed case studies of the actual human rights *impacts* of external migration policies. At the end of the document, readers are referred to Amnesty International reports which contain detailed information on specific cases.



A NOTE ON TERMINOLOGY:

In this document, “destination state” refers to the place people are trying to reach – often a wealthy country (e.g. Australia, United States, Germany). A “source state” is the country of origin (e.g. Eritrea, Honduras, Syria). “Transit state” (e.g. Kenya, Mexico, Turkey) refers to the country through which people travel *en route* to their intended destination. Of course, one state could be all three – Libya for example, is simultaneously: a place that many West African migrants have tried to reach in order to find work; a country through which asylum-seekers travel *en route* to Europe; and a place from which Libyans have fled to seek refuge in other countries. And some countries – for instance the Pacific island state of Nauru – cannot be classified according to these categories. However, these terms are helpful to understand what externalization means in practice.

EXTERNALIZATION

Within the wider realm of external migration policies, some entail a shifting of the responsibility for providing international protection to refugees and asylum-seekers to other countries, or the enlistment of source or transit countries to tighten control over their borders, often through the imposition of conditions on aid. Amnesty International refers to these policies, which share the objective of preventing or punishing irregular border crossings by refugees, asylum-seekers and migrants, as “externalization.”

In the context of externalization policies, examples of destination state actions include:

- “Push-backs” by land or sea: these operations involve automatically pushing back people who are attempting to cross a border (or soon after they cross a border), towards the country from which they came. They are unlawful because they take place without procedural safeguards and without respecting the right of individuals to challenge their expulsion or apply for asylum.
- Cooperation, capacity-building and funding for specific border control measures or activities in other countries such as: the construction of border fences or walls; the provision of technology, equipment and training for the people (border guards, coast guard, security forces, police, etc) who control a country’s borders; and the construction or refurbishment of detention facilities for migrants, asylum-seekers and refugees.
- Providing bilateral funding in the form of development aid which supports or is made conditional upon the receiving state taking preventive or punitive action, such as tightening control over their borders or tackling smuggling.

In the context of externalization policies, source or transit state actions or commitments include:

- Preventing irregular entries into its territory (“push-backs”) by land or sea (see above).
- Preventing departures from its territory (“pull-backs”) by land or sea: similar to push-backs, but instead of preventing people from arriving, these operations automatically prevent people from leaving. They are unlawful because they take place without procedural safeguards and without respecting the right of individuals to leave any country, including their own.
- Readmitting people who had transited through that country, but who are not citizens.
- Processing the asylum claims of people trying to reach a destination country and/or providing asylum to people who had been trying to reach a destination country – in other words, fulfilling the international protection obligations of the *destination state*.

Externalization measures exist around the world:

- Some have been initiated by the European Union (EU) and its Member States, including the agreement concluded in March 2016 with Turkey (the “EU-Turkey Deal”).¹ EU institutions and Member States are also currently developing a number of arrangements, including externalization policies, with several African countries.
- Australia has concluded formal externalization agreements with Cambodia, Nauru and Papua New Guinea (PNG). Under those deals anyone attempting to reach Australia by sea in order to claim asylum is forcibly transferred to Nauru or Manus Island in PNG and never permitted to enter Australia. Cambodia has agreed to accept those individuals who are, following their forced transfer to Nauru or PNG, found to be refugees.
- The United States has also taken action to put in place externalized border controls. For instance, the US provides funding and technical support to the Mexican government aimed at restricting the irregular arrival of people through Mexico’s southern border, and to the Honduran authorities in order to prevent people crossing from Honduras into Guatemala.²

¹ Amnesty International, *A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal*, 14 February 2017, EUR 25/5664/2017, <https://www.amnesty.org/en/documents/eur25/5664/2017/en/>.

² See for example: Bill Frelick, Iain M. Kysel and Jennifer Podkul, “The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants,” *Journal on Migration and Human Security*, 4:4 (2016), p. 201-203.

WHY IS AMNESTY INTERNATIONAL CONCERNED ABOUT EXTERNAL MIGRATION POLICIES?

In and of itself, devising and implementing external migration policies does not necessarily violate human rights. States are entitled to regulate the entry and residence of foreign nationals, and to partner with other states in their efforts to do so. But as in all state actions, external migration policies must be in line with the state's international human rights obligations.

When assessing external migration policies for their potential human rights risks, it is important to consider two factors.

The first is the goal of the policies. Governments often claim that their border control efforts are aimed at saving lives by reducing the incidence of irregular border crossings, or at curbing the criminal networks involved in smuggling and trafficking. Taken at face value, these are legitimate goals, as irregular crossings lead to the deaths of thousands of people every year and expose migrants, asylum-seekers and refugees to a risk of abuse by criminal gangs. Indeed, Amnesty International would welcome external migration policies that genuinely aimed at creating safe and orderly ways for people to move across national borders, and which tried to ensure an equitable sharing of responsibility for the global refugee crisis. But this is not the case. In most instances, the primary goal of external migration policies is to reduce the number of people arriving to a destination country.

The second is the means by which the goals are achieved. Amnesty International welcomes approaches that employ positive incentives, such as the creation of safe and legal routes to move across borders, as well as international cooperation aiming at improving living conditions in poorly-resourced refugee camps in developing countries and establishing viable asylum-systems there. By contrast, negative incentives – in other words punitive or preventive measures – raise the possibility of human rights risks. This possibility is heightened when measures designed to tighten border control and tackle smuggling are encouraged politically (including by leveraging financial aid, trade and other tools) and facilitated technically (through training and provision of equipment) in countries with problematic human rights records.

Currently, the prevailing approach to external migration policies has a narrow objective of reducing irregular border crossings and proposes to achieve this goal mainly through negative incentives. This approach is bound to exacerbate the current unfair distribution of responsibility for protecting refugees between developed and developing countries, and – as no alternatives are provided to dangerous irregular crossings – will force people fleeing conflict, persecution and poverty to put their lives into the hands of unscrupulous smugglers or traffickers.

Amnesty International considers that any policy seriously aiming at addressing irregular arrivals of refugees and migrants must respond to the key problems at the roots of displacement: human rights violations and destitution in countries of origin; lack of adequate protection and opportunities in countries of transit or first refuge; and the near impossibility for refugees, asylum-seekers and migrants to reach destination countries in a safe, orderly and regular way.

The following discussion illustrates how some external migration policies may result in *refoulement*, arbitrary detention, ill-treatment and other serious human rights violations.

WHAT ARE THE HUMAN RIGHTS RISKS?

When it comes to human rights norms, external migration policies fall within a spectrum, ranging from unproblematic, to risky, to inherently abusive. For any countries developing such policies, it is imperative that the human rights risks are fully considered, the most common of which are examined below.

RIGHT TO SEEK AND ENJOY ASYLUM

Everyone has the right to seek and enjoy asylum from persecution in other countries.

Universal Declaration of Human Rights, Article 14

One feature of the right to seek asylum is that a person has to be outside their country of origin and have access to the territory of another state in order to exercise that right. In other words, externalization measures aimed at restricting the ability of people seeking asylum to leave or enter a state will restrict their ability to access international protection.

Australia's externalization deals violate the right to seek and enjoy asylum. Individuals who reach Australian territory by sea, and who seek asylum, are forcibly taken to another country and permanently barred from entry into Australia. The "options" for these people are to remain in PNG or Nauru, move to another country (Cambodia), or return to their country of origin. In none of these places can refugees enjoy their right to asylum from persecution.

In the case of the EU and its Member States' arrangements with countries on the EU's land or sea borders, many of these measures deny people's right to seek and enjoy asylum, because they prevent people from arriving in Europe. Where the countries they are prevented from leaving do not offer an asylum system, then these people's right to seek and enjoy asylum is undermined. For example, the EU-Turkey Deal traps people in a country that cannot offer them adequate protection. And EU efforts to prevent arrivals to Europe from Libya are trapping asylum-seekers and migrants in a place where they are at risk of serious human rights violations such as indefinite and arbitrary detention, as well as torture and other ill-treatment.³

In the case of both the EU and Australia, the data shows that in recent years the majority of people who attempted to reach these territories irregularly by sea were indeed refugees. For example, in 2015 some 800,000 people made the dangerous crossing from Turkey to Greece; they were overwhelmingly refugees fleeing conflict or persecution in Afghanistan, Eritrea, Iraq, Somalia and Syria.⁴ While the proportion of refugees among overall arrivals in Europe has decreased significantly in 2016 and 2017, including as a result of the EU-Turkey Deal and restrictions on the Western Balkans route, still a vast number of people arriving in Europe, mostly through the central Mediterranean route, seek asylum and are eventually recognized as deserving protection. Similarly, between 2001 and 2008, under Australia's first offshore detention regime in PNG and Nauru, 70% of the people detained were eventually found to be refugees.⁵

Cooperation between the EU and countries that do not border the EU – for instance Afghanistan, or states in West or East Africa – may also undermine the right to seek and enjoy asylum, when such efforts prevent people who are in need of international protection from reaching a country where they can enjoy asylum from persecution. For example, in 2014, the EU set up the EU-Horn of Africa Migration Route Initiative (known as the "Khartoum Process") to address irregular migration within and from the region. The initiative mentions refugee protection but does not include any explicit guarantees to protect the rights of refugees and asylum-seekers.⁶

PRINCIPLE OF *NON-REFOULEMENT*

No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3

Refoulement is the forcible transfer of an individual to a place where they would be at real risk of serious human rights violations. The principle of *non-refoulement* prohibits such transfers. International refugee law forbids states from sending refugees and asylum-seekers to a country where they face serious human rights violations – including persecution because of their status and/or actions, or torture and other cruel, inhuman, or degrading treatment or punishment. This principle also applies to people who are not refugees, as international human rights law does not allow anyone, including migrants, to be transferred to a risk of torture.

There are a number of ways in which externalization measures can result in *refoulement*.

In the case of Australia, its deals with PNG and Nauru violate the principle of *non-refoulement*, both directly and indirectly.⁷ In a direct sense, *non-refoulement* obligations require the Australian authorities to conduct a

³ Amnesty International, *The Human Cost of European Hypocrisy on Libya*, 15 March 2017, <https://www.amnesty.org/en/latest/news/2017/03/the-human-cost-of-european-hypocrisy-on-libya/>; Amnesty International, "Italy: Refugees and Migrants in the Central Mediterranean, Cutting the Lifelines," 22 May 2017, https://www.amnesty.org/en/documents/eur30/6319/2017/en/?utm_source=twitter&utm_medium=article&utm_term=&utm_campaign=social; Amnesty International, *EU Risks Fuelling Horrific Abuse of Refugees and Migrants in Libya*, 14 June 2016, <https://www.amnesty.org/en/latest/news/2016/06/eu-risks-fuelling-horrific-abuse-of-refugees-and-migrants-in-libya/>.

⁴ Amnesty International, *Tackling the Global Refugee Crisis: From Shirking to Sharing Responsibility*, 18 October 2016, POL 40/4905/2016, <https://www.amnesty.org/en/documents/pol40/4905/2016/en/>.

⁵ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, November 2014, https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf, p. 10.

⁶ Amnesty International, *Human Rights Impacts and Risks Associated with the Khartoum Process: Submission to the UK All-Party Parliamentary Group for Sudan and South Sudan*, AFR 54/5337/2016, 30 November 2016, <https://www.amnesty.org/en/documents/afr54/5337/2016/en/>.

⁷ This entire paragraph is based on Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru*, 17 October 2016, ASA 12/4934/2016, <https://www.amnesty.org/en/documents/asa12/4934/2016/en/>; Amnesty International, *This is Breaking People:*

fair, case-by-case assessment every time they transfer someone to Nauru or Manus Island, to determine whether or not the person would be at risk of serious human rights violations there, or at risk of being sent onwards to another country where they would face such a risk. However, the Australian authorities do not carry out these assessments. In the case of Nauru, research by Amnesty International found that persistent verbal and physical assaults on refugees and asylum-seekers on Nauru bear the hallmarks of persecution. Moreover, *non-refoulement* applies not only to the initial decision to transfer people to Nauru from an Australian territory, but to each subsequent decisions to return people to Nauru after they have been sent to Australia or PNG for medical treatment. In each case, Australia is violating the principle of *non-refoulement*. The other way in which Australia's offshore processing results in *refoulement* is indirect; the conditions on Nauru and Papua New Guinea are so deeply inadequate that anyone who "accepts" to return to their country of origin cannot be understood to have given their free and full consent – these returns should be considered forced.

The EU's externalization initiatives also give rise to *refoulement* concerns. In some cases, including the cooperation between Spain and Morocco, they have led to push-backs carried out in breach of the principle of *non-refoulement*. In others, cooperation arrangements have led to pull-backs from transit countries, in an apparent attempt by EU member states to avoid their *non-refoulement* obligations. This can be seen in a February 2017 memorandum of cooperation between Italy and Libya on migration control issues,⁸ followed by the provision of vessels to the Libyan coast guard.⁹ Also in February, European leaders declared their intention to further strengthen their collaboration with Libya, after having begun the training of Libyan coast guard officers in 2016.¹⁰ Notwithstanding this type of cooperation's stated goals of saving lives at sea and disrupting the smuggling business, its real intention appears to be supporting the interception and disembarkation in Libya of refugees and migrants crossing the central Mediterranean, regardless of the real risk of harm these people are exposed to once they are arbitrarily detained in centres notorious for systematic ill-treatment.

In others cases, arrangements with EU Member States may cause or encourage *refoulement* by non-EU countries whose cooperation on border control is being sought. Indeed, as part of some of these arrangements, non-EU countries are strongly encouraged and supported to prevent people from leaving to Europe (e.g. from Libya) or through places that could lead to Europe (e.g. people trying to pass through Niger to Libya).¹¹

Similarly, the EU and its Member States may themselves be violating the principle of *non-refoulement* through the recent "Joint Way Forward" with Afghanistan, signed in October 2016,¹² and which has already resulted in hundreds of deportations from Europe. Afghanistan is not currently a country to which people can be safely returned.¹³

In other instances, the EU and its Member States have struck deals with states whose asylum systems are deeply inadequate, meaning that people are at risk of onwards *refoulement* to another country. For example, in late 2015 and early 2016, as the EU exerted political pressure on Turkey to halt irregular crossings to Europe, thousands of asylum-seekers and refugees in Turkey were sent back to a risk of serious human rights violations in Afghanistan, Iraq and Syria, in clear violation of the prohibition of *refoulement*.¹⁴ In Sudan, under the Khartoum Process, European governments have pressured the Sudanese government to gain tighter control over who enters and leaves the country. In this context, Sudan's Rapid Support Forces (RSF) and other agencies have been tasked with some elements of border control, including stopping people

Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea, 11 December 2013, ASA 12/002/2013, <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>.

⁸ *Italy-Libya Agreement: The Memorandum Text*, <http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf>

⁹ Ministero dell'Interno, "Minniti in Libia: Fronte Comune Contro il Traffico di Migranti," 16 May 2017, <http://www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-migranti>

¹⁰ European Council, "Council Conclusions on Libya," 6 February 2017, <http://data.consilium.europa.eu/doc/document/ST-5321-2017-INIT/en/pdf>.

¹¹ See for example: "Comunicato Congiunto dei Ministri dell'Interno di Italia, Ciad, Libia, Niger," 21 May 2017, <http://www.interno.gov.it/it/sala-stampa/comunicati-stampa/comunicato-congiunto-dei-ministri-dellinterno-italia-ciad-libia-niger>.

¹² Amnesty International, Press Release: *EU Forces Afghanistan to Drink "Poisoned Cup" in Exchange for Aid*, 5 October 2016, <http://www.amnesty.eu/en/news/press-releases/all/eu-forces-afghanistan-to-drink-poisoned-cup-in-exchange-for-aid-0999/#.WKqujW-LTIU>.

¹³ See for example: Afghan Analysts Network, *Voluntary and Forced Returns to Afghanistan in 2016/17: Trends, Statistics and Experiences*, 19 May 2017, <https://www.afghanistan-analysts.org/voluntary-and-forced-returns-to-afghanistan-in-201617-trends-statistics-and-experiences/>; UNAMA, "Reports on the Protection of Civilians in Armed Conflict," <https://unama.unmissions.org/protection-of-civilians-reports>.

¹⁴ Amnesty International, *Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*, EUR 44/3022/2015, 16 December 2015, <https://www.amnesty.org/en/documents/eur44/3022/2015/en/>; Amnesty International, *Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal*, 23 March 2016, <https://www.amnesty.org/en/latest/news/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/>; Amnesty International, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal*, 1 April 2016, <https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>.

believed to be irregular migrants from moving through Sudan towards Libya.¹⁵ As there is no clear information about what happens to people who are stopped by the RSF, and given the RSF's appalling human rights record, there is a real risk of *refoulement*, as well as other serious violations of human rights.

RIGHT TO LIBERTY

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law.

International Covenant on Civil and Political Rights, Article 9

Everyone shall be free to leave any country, including his own.

International Covenant on Civil and Political Rights, Article 12

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who [...] enter or are present in their territory without authorization [...].

International Convention Relating to the Status of Refugees, Article 31

As the main purpose of externalization is to prevent people from moving across borders – or to punish them for doing so – these often involve some form of deprivation of liberty. Although international law permits states to impose limits on the right to liberty, these limitations must be justified. For instance, only when immigration detention is reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time, can it be justified.¹⁶

Australia has provided no adequate justification for its indefinite, automatic detention of people on Nauru and Manus Island. Given the circumstances of Australia's offshore processing system, it is unlikely that any justification for the forcible detention of people on Nauru or PNG could exist.

In the case of several externalization deals done by the EU and its Member States, in which the emphasis is on partner countries taking measures to stop people from attempting to reach the EU, the risks arise from the tactics and policies used by the other state. For example, the conditions in official and unofficial places of detention in Libya, in which migrants, asylum-seekers and refugees are subjected to unlawful detention and grave abuse, are well-known to EU governments. Yet the EU and its Member States continue to train Libyan border and coast guard and enhance their capacity to prevent people from leaving the country, and are even planning to support the running of "reception centres" in Libya, whereas such centres are in fact detention centres.¹⁷ Through such measures, Italy and the EU are knowingly risking complicity in the human rights violations that returnees suffer in the detention centres where they are taken upon disembarkation – including arbitrary detention.¹⁸

Risks around unlawful deprivation of liberty as a consequence of externalization measures (or a pre-existing problem which externalization measures exacerbate) are relevant to all those who are attempting to move through or out of a country, but additionally, in the case of detained asylum-seekers and refugees, their detention can also constitute a punishment for irregular entry or stay, contrary to the obligations of states party to the Refugee Convention.

RIGHT TO A REMEDY

Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy [...].

International Covenant on Civil and Political Rights, Article 2

¹⁵ Amnesty International, *Human Rights Impacts and Risks Associated with the Khartoum Process: Submission to the UK All-Party Parliamentary Group for Sudan and South Sudan*, AFR 54/5337/2016, 30 November 2016, <https://www.amnesty.org/en/documents/afr54/5337/2016/en/>.

¹⁶ UN Human Rights Committee, *General Comment no. 35, Article 9 (Liberty and Security of Person)*, 16 December 2014, UN Doc. CCPR/C/GC/35, <http://www.refworld.org/docid/553e0f984.html>, para. 18.

¹⁷ "Comunicato Congiunto dei Ministri dell'Interno di Italia, Ciad, Libia, Niger," 21 May 2017, <http://www.interno.gov.it/it/sala-stampa/comunicati-stampa/comunicato-congiunto-dei-ministri-dellinterno-italia-ciad-libia-niger>.

¹⁸ Amnesty International, "Italy: Refugees and Migrants in the Central Mediterranean, Cutting the Lifelines," 22 May 2017, https://www.amnesty.org/en/documents/eur30/6319/2017/en/?utm_source=twitter&utm_medium=article&utm_term=&utm_campaign=social.

Limited or non-existent accountability for human rights violations is another major risk associated with external migration policies in general, and externalization measures in particular. This stems from two principal sources.

First, by virtue of their transnational nature, these types of policies and practices raise complex questions about which state is responsible for any subsequent human rights violations. Theoretically, states that have jointly undertaken an internationally wrongful act can each be held responsible, and a destination state could potentially incur responsibility for another state's unlawful act when the destination state: gives aid or assistance, exercises direction or control, or coerces the other state to commit the act.¹⁹ For example, some refugee and legal experts have observed: "we believe a state which takes steps such as providing maritime patrol vessels or border control equipment, which seconds border officials, or which shares relevant intelligence or directly funds migration control efforts that assist another country to breach its *non-refoulement* or other protection obligations is taking action that can fairly be characterized as within the ambit of aiding or assisting."²⁰ In any case, even if the conceptual challenges to the state's responsibility for a human rights violation are overcome, the practical question of in which jurisdiction someone could exercise their right to a remedy is often insurmountable.

A second challenge is that the arrangements through which externalization is put into effect – even when these are formal agreements – are often characterized by a lack of transparency at all stages: in the process leading to their negotiation, in their substance, and in their implementation. Sometimes the precise legal status of the arrangements is unclear,²¹ or the obligations of each state's authorities are not made public, or there is a deliberate policy of concealment.

Australia's offshore processing system is a glaring example of a lack of transparency.²² The abuses on Nauru have been facilitated by the Government of Australia's deliberate policy of secrecy. Australian law gives the authorities the power to prosecute and imprison staff who work at the refugee processing centres if they speak out about conditions in immigration detention. This has had a chilling effect on disclosures about human rights abuses. Exacerbating the Australian government's policies is the fact that the Nauruan Government has made it extremely difficult to access its territory, including by increasing the price of a visa from \$200 to \$8,000. In 2014 and 2015, Amnesty International unsuccessfully requested access to Nauru six times. A researcher who travelled to Nauru in July 2016, and who was not asked about their organizational affiliation when they completed entry formalities, was publicly called a "spy" and "secret agent" by a prominent Nauruan politician.

FREEDOM FROM TORTURE AND OTHER ILL-TREATMENT

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

International Covenant on Civil and Political Rights, Article 7

While less common – at least for the moment – externalization measures also pose a risk of subjecting migrants, asylum-seekers and refugees to torture and other ill-treatment.²³ Australia's offshore processing system on Nauru violates the prohibition on torture and other ill-treatment. Amnesty International has

¹⁹ Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling*, Cambridge University Press, 2014, p. 349-352.

²⁰ James C. Hathaway and Thomas Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence," *Law & Economics Working Papers* (Paper 106), 2014, p. 56.

²¹ For instance, the EU appears to be striking "deals" in ways that bypass the required channels (approval by the European Parliament). The resultant ambiguity in their legal status makes these "agreements" very difficult – and perhaps impossible – to challenge. For example the EU-Turkey Deal is officially only a "statement," and it might not even be an "EU" statement. On 28 February 2017, after a group of asylum-seekers brought a challenge to the deal at the Court of Justice of the European Union, the Court declined jurisdiction on the following basis: "The Court therefore considers that neither the European Council nor any other institution of the EU decided to conclude an agreement with the Turkish Government on the subject of the migration crisis. In the absence of any act of an institution of the EU, the legality of which it could review under Article 263 TFEU, the Court declares that it lacks jurisdiction to hear and determine the actions brought by the three asylum seekers." See <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf>.

²² This entire paragraph is based on Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru*, 17 October 2016, ASA 12/4934/2016, <https://www.amnesty.org/en/documents/asa12/4934/2016/en/>.

²³ This entire paragraph is based on Amnesty International, *Island of Despair: Australia's "Processing" of Refugees on Nauru*, 17 October 2016, ASA 12/4934/2016, <https://www.amnesty.org/en/documents/asa12/4934/2016/en/>; Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea*, 11 December 2013, ASA 12/002/2013, <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>.

concluded that the combination of refugees' severe physical and mental anguish, the intentional nature of the harm, and the fact that the goal of offshore processing is to intimidate or coerce refugees and asylum-seekers to achieve a specific outcome (namely, to discourage people from trying to reach Australia by boat), means that Australia's offshore processing regime fits the definition of torture under international law. Likewise, Amnesty International's research on Manus Island in Papua New Guinea found that the conditions under which people were being held amounted, in some cases, to ill-treatment.

By cooperating with Libya and Sudan on migration matters, whilst failing to assess the risks of doing so with countries with such appalling human rights records, the EU risks complicity in the torture and ill-treatment of migrants, asylum-seekers and refugees, as discussed above. Ill-treatment and excessive use of force have been widely documented in detention centres in Libya, and have also been committed by the Libyan coast guard during interception operations.²⁴ And although the EU has stated that the aid that it gives to Sudan for "Better Migration Management" projects under the Khartoum Process does not go to the Rapid Support Forces, there is no real monitoring system to track these resources and ensure they are not used to commit human rights violations.

WHAT ARE THE ALTERNATIVES?

At a minimum, any destination state considering external migration policies – whether these are formal, stand-alone agreements, or informal arrangements or actions contained within other measures – should:

- Ensure that the human rights of migrants, asylum-seekers and refugees are central to the development and implementation of external migration policies.
- Not engage in cooperation on border control matters with countries where there are systematic human rights violations. In particular, states should refrain from engaging in any form of cooperation that might prevent refugees and migrants from leaving a country where they do not have access to effective protection and are exposed to a real risk of human rights violations.
- Exercise due diligence: prior to implementing relevant measures, states must take steps to identify and address risks to human rights.
- Develop transparent monitoring and accountability mechanisms, which allow for public scrutiny of external migration policies, including through public reporting of human rights impacts.
- Refrain from outsourcing to other countries their responsibility to provide international protection to individuals in need, including through the introduction and application of "safe country" provisions.
- Guarantee that funding for border control matters is additional to any existing development aid, and that development aid funding is not made conditional upon transit or source states' cooperation on migration control.

Furthermore, destination states should privilege means of achieving their migration goals that consist of positive incentives, as opposed to preventive or punitive measures. Some of the most urgently needed actions are:

- A significant increase in funding for refugee protection and meaningful financial support to countries hosting large numbers of refugees.
- A substantial increase in resettlement places for the world's most vulnerable refugees, as identified by UNHCR.
- The significant expansion of other safe and legal routes for asylum-seekers to reach destination countries, such as humanitarian visas, family reunification, student visas, and community sponsorship arrangements.
- A review of the mechanisms through which would-be migrants can apply for regular entry and the development of systems that are as accessible and transparent as possible, and which open up real mobility opportunities, such as within under-resourced areas of the labour market, and across skill levels.

²⁴ Amnesty International, "Italy: Refugees and Migrants in the Central Mediterranean, Cutting the Lifelines," 22 May 2017, https://www.amnesty.org/en/documents/eur30/6319/2017/en/?utm_source=twitter&utm_medium=article&utm_term=&utm_campaign=social.

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THE HUMAN RIGHTS RISKS OF EXTERNAL MIGRATION POLICIES

This briefing paper sets out the main human rights risks linked to external migration policies, which are a broad spectrum of actions implemented outside of the territory of the state that people are trying to enter, usually through enhanced cooperation with other countries. From the perspective of international law, external migration policies are not necessarily unlawful. However, Amnesty International considers that several types of external migration policies, and particularly the externalization of border control and asylum-processing, pose significant human rights risks. This document is intended as a guide for activists and policy-makers working on the issue, and includes some examples drawn from Amnesty International's research in different countries.