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"Smash the Gangs" or Save the People? Human Rights, Brexit Britain and the EU's Power to Influence UK Asylum Policy

Author: Rosa Tibbetts

Supervisor: Florence Benoit-Rohmer

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Abstract

In 2016, the UK's historic withdrawal from the European Union (EU) took place amongst a wider European context defined by the narrative of "crisis". Against this backdrop, the UK has pursued an increasingly securitised and criminalised approach to asylum, characterised by its response to irregular migration across the Channel. From EU Member state to third country, post-Brexit the EU-UK relationship has been confined to the realms of a hard-negotiated trade agreement, the EU-UK Trade and Cooperation Agreement (TCA).

This thesis investigates the existing legal landscape of the human rights relationship between the EU and the UK, defined in the TCA by a singular human rights clause. In doing so, it considers the extent to which the human rights clause can serve as a tool of EU influence over UK small boat Channel crossings. This question is situated at the complex intersection of international trade law, EU external policy and domestic asylum agendas, with few prior models of scholarship to draw from.

Drawing upon an interdisciplinary methodology, the research combines doctrinal legal and policy analysis to bridge the gap between the letter of the law and the law in practice. Legal analysis is used to examine the relevant legal frameworks that govern the human rights obligations of the UK and the EU. This is complemented by policy analysis informed by international relations theory to understand how the EU and UK's legal human rights obligations are enacted in practice.

The thesis finds that while the current legislative trajectory of the UK's asylum policies presents a systematic departure from international human rights obligations, the human rights clause of the TCA has limited power of influence. Presented as a legally binding obligation, the human rights clause is a symbolic gesture, with little possibility of utilisation. Expanding upon this, the thesis contends that the EU's own actions undermine its power as a normative actor in the international community.

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Chapter 1: The Nexus of Brexit, Human Rights and the Channel

no one puts their children in a boat
unless the water is safer than the land.[1]

The politicisation and securitisation of migration and asylum is an intensifying global phenomena. In the United Kingdom of Great Britain and Northern Ireland (UK), one clarifying moment of this phenomenon is Brexit. For the first time since the creation of what is now known as the European Union (EU), a Member State voted to leave the Union.[2] The withdrawal of the UK from the EU was sold to the British public as a triumph of British exceptionalism, sovereignty and control. As once a world leader in global diplomacy, trade negotiations and security partnerships, this uniquely British moment had particular significance for the wider international community as Brexit exemplified the growing movement towards the rejection of globalisation in favour of isolationism, protectionism and exclusionary nationalism.[3] Post-Brexit, the UK continues to contend with the long-term consequences of the decision to leave the EU.

One of the most profound consequences of Brexit is its effect on the UK's human rights framework. The UK's retreat from legally enforceable human rights is most acutely felt by those already on the margins of political membership: refugees and people seeking protection[4], whose claims to protection depend on the very frameworks now being dismantled by successive UK governments.[5] Although refugees and people seeking asylum represent a small proportion of the UK's population, they are given a disproportionate amount of legal and political attention due to their inherent position of vulnerability. The absence of safe and legal routes for asylum to the UK compels people to risk and often

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[1] Warsan Shire, 'Home Poem' (*PoemHunter, 2016*) <www.poemhunter.com/poem/home-433/> accessed 19 June 2025.
[2] Jenny Watson, *The 2016 EU Referendum: Report on the 23 June 2016 Referendum on the UK's Membership of the European Union* (Electoral Commission September 2016).
[3] Mary Gilmartin, Patricia Burke Wood and Cian O'Callaghan, *Borders, Mobility and Belonging in the Era of Brexit and Trump* (Policy Press 2018) 3, 4.
[4] I use the term "people seeking protection" throughout the thesis to (non-exhaustively) refer to people including asylum-seekers, displaced people and irregular migrants as a rejection of the exclusionary politics of asylum. Refugee connotes a specific legal status, as discussed in Chapter 2.
[5] Carla Gomes, 'Building a Fortress: the UK and the Dismantling of the Right to Asylum' (*DPolitik,* 06 June 2025) <dpolitik.com/en/blog/2025/06/06/building-a-fortress-the-uk-and-the-dismantling-of-the-right-to-asylum/> accessed 17 June 2025.

sacrifice their lives to claim asylum in the territory of the UK.[6] People who cross the Channel in small boats confront the paradox identified by Arendt: they are denied essential fundamental human rights, precisely at the point where the state most violently withholds them.[7]

Against this securitised humanitarian backdrop, the post-Brexit EU-UK relationship is now governed by the EU-UK Trade and Cooperation Agreement (TCA), concluded at the end of December 2020.[8] While the TCA's primary function is the post-Brexit regulation of trade between the EU and the UK, the TCA contains a human rights clause, which allows for action to be taken by either Party in cases of human rights violations.[9] In light of the UK's increasingly restrictive and punitive asylum policies targeting people who arrive by small boat crossing the Channel, an examination of the new legal landscape that defines the EU-UK relationship is essential. The inclusion of normative commitments through a human rights clause raises questions about the capacity of international trade instruments to function as mechanisms of rights protection and accountability for the UK that is no longer bound by the supranational legal order of the EU. In the post-Brexit era, the TCA may offer one of the few remaining normative footholds from which accountability might be provided.

1.1 Research Question and Agenda

The EU presents itself as a normative power grounded in the indivisible values of human rights and fundamental freedoms, democracy, the rule of law and respect for human dignity, equality and solidarity. These founding principles guide not only the EU's internal legal order, but also in its external action as the EU is required to uphold and promote these values when taking action on the international scene. Human rights clauses in third country trade agreements are a key tool for the EU to execute this duty. In the case of the TCA, such a

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[6] Statistics on deaths in the Channel can be found here: Peter William Walsh and Mihnea V Cuibus, 'Briefing: People Crossing the English Channel in Small Boats' (University of Oxford, The Migration Observatory, 16 June 2025) <migrationobservatory.ox.ac.uk/resources/briefings/people-crossing-the-english-channel-in-small-boats/> accessed 07 July 2025.

[7] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace 1985) 267.

[8] Trade and Cooperation Agreement Between the United Kingdom of Great Britain and Northern Ireland, of the One Part, and the European Union and the European Atomic Energy Community, of the Other Part (TCA) [2021] OJ L 149/10.

[9] Ibid art 763(1).

clause provides the normative obligations and framework for the continuance of ongoing political and economic cooperation between the parties.

At the same time, the UK's post-Brexit asylum and migration policies, particularly designed to target people who arrived to the UK via small boat, raise urgent concerns under international refugee and human rights law. The UK has enacted increasingly restrictive policy measures that have be criticised as severely undermining the principles of non-refoulement, the right to seek asylum and the protection of vulnerable groups.

This thesis therefore asks what is the extent to which the human rights clause can serve as a tool of EU influence over UK policies on small boat Channel crossings?

The scope is mostly limited to the legal and political frameworks post-Brexit**,** with emphasis on the period from the ratification of the TCA in 2021 through mid-2025. Primary sources include the text of the TCA, UK and EU treaty obligations, domestic legislation such as the Illegal Migration Act 2023, and relevant international human rights instruments, including the Geneva Convention relating to the Status of Refugees (Refugee Convention) 1951[10] and the European Convention on Human Rights (ECHR).[11]

While this thesis draws on political and policy sources to contextualise the legal analysis, it does not offer a comprehensive empirical study or statistical evaluation of migration patterns. Nor does it assess the full range of EU-UK cooperation under the TCA beyond the human rights clause. Instead, the analysis is both doctrinal and contextual, considering political rhetoric, enforcement practices, and institutional constraints.

The thesis is structured as follows:

- Chapter 1 introduces the research question and outlines the methodological approach.

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[10] Geneva Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (Refugee Convention) 189 UNTS 137 and Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
[11] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (opened for signature 4 November 1950, entered into force 3 September 1953) ETS 5.

- Chapter 2 analyses the UK's domestic asylum and migration legislative developments in response to small boat Channel crossings and their compliance with domestic and international human rights obligations

- Chapter 3 examines the legal structure of the TCA, with particular attention to the human rights clause and its origins in EU external relations policy.

- Chapter 4 assesses cases studies of the human rights clauses of other EU trade agreements in order to inform to what extent the human rights clause can act as a tool of EU influence, considering informal mechanisms of influence and the threshold required to trigger EU action under a human rights clause.

- Chapter 5 offers concluding reflections on the limits and possibilities of human rights conditionality in the post-Brexit EU-UK order.

1.2 Methodology

This thesis adopts an interdisciplinary methodology, combining doctrinal legal analysis with contextual policy evaluation. This dual approach is necessary to fully explore how the human rights clause within the TCA may influence the United Kingdom's response to irregular Channel crossings by small boats. The complexity of this subject lies in its intersection between legal obligations, state sovereignty, and politically contested policy arenas.

1.2.1 Doctrinal Legal Method

The primary method of research for this thesis relies on doctrinal analysis, often referred to as black letter law.[12] This method entails a close examination of legal sources, such as treaties, statutes, and case law, to identify and determine their content, scope, applicable rules and legal implications.[13] Doctrinal analysis will focus particularly the human rights clause of the TCA and related provisions on suspension and termination. Jurisprudential analysis will extend to case law of European Court of Human Rights (ECtHR) and occasionally the Court

[12] Michael Salter and Julie Mason, *Writing Law Dissertations* (Pearson 2007).
[13] Anthony Bradney et al, *How to Study Law* (7th edn, Sweet & Maxwell 2010) 3, 4.

of Justice of the EU (CJEU) case law on human rights in external action, with comparative references to similar clauses in other EU trade agreements. This methodological approach is well-suited for evaluating the content, structure, and enforceability of human rights clauses in EU trade agreements to assess the potential EU influence of the TCA's human rights clause over UK policies on small boat Channel crossings.

1.2.2 Contextual Policy Oriented Analysis

Doctrinal analysis is complemented in the thesis by a contextual policy-oriented method, which situates legal texts within broader political, institutional and societal contexts. This approach acknowledges that law does not operate in a vacuum, especially in politically charged domains such as asylum, migration and border governance. The policy analysis dimension addresses how legal obligations are implemented or resisted in practice and how political priorities shape the scope and limits of legal enforcement. This method is particularly suitable for evaluating whether the EU's tool of human rights clauses translates into measurable influence over UK policy choices, especially in contexts where formal enforcement mechanisms are weak or politically constrained.

1.2.3 Limitations and Ethical Considerations

This research is primarily qualitative and interpretive, relying on documentary sources. As such, it may be limited by the lack of precedent or action under the human rights provisions of the TCA, especially considering its recent introduction. It may also be limited by the potential political opacity in UK government justifications for migration policies and restricted access to confidential negotiations or internal EU documents.

While constrained by the limited availability of judicial interpretations specific to the TCA's human rights provisions, the thesis nonetheless provides a valuable doctrinal and policy appraisal of how the TCA's human rights clause operates in action. Its findings are intended to offer indicative rather than definitive conclusions, grounded in the normative and legal frameworks currently available.

This research precludes human subjects or personal data, and thus raises no formal ethical concerns; however, sensitivity to the human rights context and the experiences of affected individuals underpins the interpretive analysis.

1.3 Literature Review

This thesis draws upon a diverse range of legal, institutional, and critical sources, including academic literature, official government and EU documents, case law, and reports from non-governmental organisations (NGOs). This reflects the multidisciplinary approach taken to answering the research question of the thesis.

Primary legal materials include the full legal text of TCA, relevant provisions of EU treaties such as the Treaty of the EU (TEU)[14] and the Charter of Fundamental Rights of the EU (CFREU)[15], and UK Acts of Parliament. These instruments form the core legal basis for assessing the obligations, interpretative frameworks and influence potential of the human rights clause of the TCA. Further legal materials include international conventions and treaties to which the UK is a party, including the Refugee Convention, the ECHR and core United Nations (UN) treaties. These instruments are essential for assessing the UK's post-Brexit compliance with its legal human rights obligations under international law. They provide interpretative guidance on the universal human rights standards which serve as benchmarks when evaluating the UK's policies which target irregular small boat Channel crossings.

Supplementary secondary sources, such as Parliamentary debates, official government statements and communications from EU institutions provide insight into the political intentions and justificatory narratives behind contested UK and EU policy decisions. These materials help uncover how migration and asylum policies are presented to domestic audiences, how legal obligations are interpreted or resisted by political actors, and how human rights norms are positioned within broader strategies of border control and sovereignty. In the context of this thesis, they are particularly useful for tracing the rhetorical shifts and legislative justifications surrounding the UK's approach to small boat crossings, as

[14] Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/01.
[15] Charter of Fundamental Rights of the European Union (CFREU) [2012] OJ C 326/391

well as for understanding how the EU frames its expectations regarding human rights compliance within the structure of the TCA.

The thesis engages with civil society and NGO reports from organisations such as Amnesty International, Human Rights Watch and Free Movement, alongside media coverage and investigative journalism. NGOs offer essential perspectives on the lived experiences of people trying to cross the Channel and the humanitarian consequences of policies aimed at preventing small boats from crossing the Channel. Additional media coverage provides insights into how people seeking protection are portrayed in Europe, which affects the policy decisions of the UK and EU Member States.

The research question of this thesis is situated at the complex intersection of international trade law, EU external policy and domestic asylum agendas, with few prior pieces of comprehensive scholarship to draw from. However, as separate schools of inquiry there is a wealth of literature that the thesis draws upon, connecting these disparate areas.

While the existing literature on the TCA offers analysis of its institutional architecture, it has predominantly focused on the TCA's economic provisions, particularly its implications for trade, labour rights and regulatory alignment post-Brexit.[16] There is limited engagement with the TCA's human rights clause, and even less on its potential function in practice or capacity to influence state behaviour in politically sensitive areas like asylum and border control.[17] This gap is significant given the absence of supranational adjudication mechanisms and discretionary nature of the TCA's human rights clause enforcement mechanisms.

Separately, a well-developed body of scholarship has examined the EU's use of human rights conditionality in trade agreements with third countries.[18] This literature is often critical of the effectiveness of such clauses, raising concerns about inconsistent application and weak enforcement, although proposals for strengthening conditionality mechanisms have been

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[16] Federico Fabbrini, 'Review and Reform Options for Deepening EU–UK Cooperation in a Renewing Europe' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume V: The Trade and Cooperation Agreement* (OUP 2024) 235; Federico Ortino, 'Protecting Workers' Rights Using the EU–UK Trade and Cooperation Agreement' (Trade Union Congress 2022) <www.tuc.org.uk/research-analysis/reports/protecting-workers-rights-using-eu-uk-trade-and-cooperation-agreement> accessed 25 April 2025; Sara Moran, *UK–EU Series: Trade & Cooperation Agreement: Human Rights* (Senedd Research 2022).
[17] Steve Peers, 'So Close, Yet So Far: The EU/UK Trade and Cooperation Agreement' (2022) 59(1) CMLR 49.
[18] Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005); Markus Krajewski, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies' (CIDSE 2017).

suggested.[19] Some scholars argue that human rights clauses have lost political traction in EU external action, with individualised sanctions increasingly preferred as a policy tool by the EU.[20]

While theories of compliance and norm diffusion have been utilised in analysis of EU external governance,[21] the UK's unique transition from an EU Member State to a third country presents new grounds for the normative power of the EU. Scholars such as Karen Smith and Ian Manners have conceptualised the EU as a "normative power", committed to the promotion of human rights, democracy, and the rule of law in external relations.[22] However, the EU's ability to export values to post-Brexit UK, a former EU member with a longstanding tradition of democracy and a developed economy has not yet been systematically analysed.

A growing body of literature critically examines the UK's post-Brexit asylum framework, with particular attention given to the Illegal Migration Act 2023 and the increasing securitisation of the UK's asylum policies.[23] These studies often conceptualise borders as sites of structural violence and analyse the shift towards deterrence and externalisation through legal, discursive and media lenses.[24] While these studies offer valuable insights into the domestic framing and impact of the UK's asylum policies, they overlook the newly defined legal relationship between the EU and the UK as a potential normative or institutional constraint on such developments.

In light of these scholarly gaps, this thesis seeks to explore the gap between international instruments and domestic policy outcomes. This thesis addresses these lacunae by combining

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[19] Peter Van Elsuwege and Joyce De Coninck, 'The Effectiveness of Human Rights Clauses in EU Trade Agreements: Challenges and Opportunities' (Ghent European Law Institute 2022).

[20] Lorand Bartels, *Assessment of the Implementation of the Human Rights Clauses in International and Sectoral Agreements* (PE 702.586, Directorate-General for External Policies of the Union 2023) 29.

[21] Sandra Lavenx and Frank Schimmelfennig, 'EU Democracy Promotion in the Neighbourhood: From Leverage to Goverance' (2011) 18(4) Democratisation 885.

[22] Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) Journal of Common Market Studies 235; Karen E Smith, 'The Conditional Offer of Membership as an Instrument as EU Foreign Policy: Reshaping Europe in the EU's Image' (2000) 1(2) Marmara Journal of European Studies 33.

[23] Jennifer Morgan and Lizzy Willmington, 'The Duty to Remove Asylum Seekers under the Illegal Migration Act 2023: Is the Government's Plan to 'Stop the Boats' Now Doomed to Failure?' (2023) 52(4) Common Law World Review 103.

[24] Joseph Maggs, 'The "Channel Crossings" and the Borders of Britain' (2020) 61(3) Race & Class 78; Sophie Bennett et al, '"It's Time We Invested in Stronger Borders": Media Representations of Refugees Crossing the English Channel by Boat' (2022) 19(4) Critical Discourse Studies 348.

doctrinal analysis with a contextual, policy-oriented approach to examine to what extent the TCA's human rights clause can act as a tool for the EU to influence the UK's response to small boats crossing the Channel.

Chapter 2: "Crisis"

This chapter begins with the framing of "crisis", exposing the European roots of the Channel crossings phenomenon. It then critically examines the UK's legal and policy response to Channel crossings from 2018 to 2025. It aims to assess whether these measures comply with the UK's human rights and refugee law obligations, and to provide the necessary legal and political context for later analysis of the TCA's human rights clause and its potential role in influencing the policy agenda.

2.1 "Crisis" in Europe: From the Mediterranean to the Channel

Understanding the UK's response to Channel crossings requires an examination of the existing EU asylum system, particularly in light of the UK's geographical isolation and withdrawal from EU asylum frameworks. To ground the analysis, it begins with the so-called "migration crisis" of 2015. This year marked a turning point in European asylum politics. The dominant political and media framing of irregular migration into Europe was that of a sudden, exceptional "crisis".[25] This narrative obscured the long-standing nature of migration routes into Europe as well as the deeper structural drivers of movement through Europe rooted in colonialism, environmental destruction and armed conflict.[26] As Giorgio Agamben noted, "crisis" had become a permanent condition to modern governance, invoked to justify exceptional responses to routine phenomena.[27]

In 2015 alone, over 3,550 people died trying to gain access to Europe, alone many of whom travelling from Libya to Italy or from Türkiye to Greek islands such as Lesvos in small boats unfit for the Mediterranean crossing. [28] Despite the continuity of these routes since the 1990s, the political and media portrayal of arrivals from countries such as Syria, Afghanistan and

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[25] Farah Atoui, 'The Calais Crisis: Real Refugees Welcome, Migrations "Do Not Come"' in Krista Lynes, Tyler Morgenstern and Ian Alan Paul, *Moving Images: Mediating Migration as Crisis* (Transcript Verlag 2020).
[26] Nicolas de Genova et al, '"Europe / Crisis: New Keywords of "the Crisis" in and of "Europe"' (2016) 1 Near Futures Online <nearfuturesonline.org/europecrisis-new-keywords-of-crisis-in-and-of-europe-part-3/> accessed 13 June 2025.
[27] Giorgio Agamben, 'The Endless Crisis as an Instrument of Power: In Conversation with Giorgio Agamben' (*Verso Blog,* 04 June 2013) < www.versobooks.com/en-gb/blogs/news/1318-the-endless-crisis-as-an-instrument-of-power-in-conversation-with-giorgio-agamben> accessed 13 June 2025.
[28] William Spindler, '2015: The Year of Europe's Refugee Crisis' (*UNHCR*, 08 December 2015) <www.unhcr.org/news/stories/2015-year-europes-refugee-crisis> accessed 01 July 2025.

Iraq cast them as threats to European security rather than persons in need of protection.[29] Securitisation of asylum thus intensified, particularly in states on the border of the EU, such as Greece and Italy who received the majority of the people arriving by boat from the Mediterranean.[30] These systemic pressures were recognised in the ECtHR's earlier judgment in *MSS v Belgium and Greece* which confirmed that prior to 2015, Greece already faced systemic failings in its asylum system.[31] The inadequacy of the Greek reception conditions which meant returns to Greece under the EU Dublin system constituted a violation of Article 3 ECHR, the prohibition of torture, inhuman and degrading treatment.[32]

The EU Dublin system was created by the Dublin III Regulation, which entered into force in July 2013.[33] This established the criteria and mechanisms for determining which EU Member State is responsible for examining an asylum application lodged by a third-country national.[34] Its stated aims included ensuring rapid access to asylum procedures and the examination of asylum application by one EU state, discouraging multiple applications in different EU states.[35] The identification of the Member State responsible for determining an asylum application is done through a hierarchy of criteria. The responsibility criteria include family unity, possession of visas, irregular entry and visa-free entry.[36] However, the most frequently applied criteria is irregular entry, which allows (Dublin) Member States to send requests to other Member States to take back asylum applications where the person first entered the EU.[37]

As irregular entry is the most commonly applied criteria, the Dublin system created a disproportionate distribution system, with first-arrival states such as Italy and Greece hosting

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[29]Cristina Saenz Perez, 'The Securitisation of Asylum: A Review of UK Asylum Laws Post-Brexit' (2023) 35 IJRL 304.
[30] Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitisation of Human Rights: the 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm' (2017) 56(1) Journal of Common Market Studies 119.
[31] *MSS v Belgium and Greece* App No 30696/09 (ECHR 21 January 2011).
[32] Ibid.
[33] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin) [2013] OJ L 180/31.
[34] Ibid.
[35] Migration and Home Affairs, 'Country Responsible for Asylum Application (Dublin Regulation)' (European Commission) <home-affairs.ec.europa.eu/policies/migration-and-asylum/asylum-eu/country-responsible-asylum-application-dublin-regulation_en> accessed 13 June 2025.
[36] Ibid.
[37] Anja Radjenovic, *Reform of the Dublin System* (PE 586.639, European Parliamentary Research Service 2019).

more people seeking protection than other European states. During the European migration "crisis", the unequal distribution led to systemic shortcomings in EU Member reception conditions as the Dublin system continued to distribute people to countries ill-prepared to host them, including reception camps that were found by the ECtHR to violate Article 3 and 13 ECHR due to poor reception conditions and the lack of effective remedies.[38]

Dublin's rigid application of the responsibility criteria failed to take into account applicants' personal ties or diaspora communities in other Member States.[39] Despite the Dublin rules of state responsibility, most people seeking to apply for asylum do not want to apply in the country of first arrival.[40] As a result, secondary movement, where people travel beyond the country of first arrival to lodge asylum claims elsewhere, remains common. Many people seeking protection move to reunite with family, access support networks or improve their prospects for legal recognition and employment.[41] Yet, under Dublin rules, secondary movement triggers return procedures, reinforcing a cycle of displacement and procedural delay. The disjuncture between legal responsibility and personal agency illustrates the limits of the Dublin system as an effective mechanism of responsibility-sharing.

Despite its widely acknowledged structural flaws, the Dublin system remains embedded within the 2024 New EU Pact on Migration and Asylum.[42] Following the UK's departure from the EU and the consequent cessation of its participation in the Dublin III Regulation, the UK government has sought to establish alternative mechanisms to manage the increasing number of small boat crossings across the Channel. As part of a renewed bilateral approach, Prime Minister Keir Starmer and President Emmanuel Macron agreed to implement a symbolic 'one-in, one-out' arrangement.[43] Under this system modelled on the 2016 EU–Türkiye Statement, people whose asylum claims have been rejected in the UK would be

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[38] *HA and Others v Greece* App No 19951/16 (ECHR 28 February 2019).
[39] Alberto-Horst Neidhardt, 'Post-Brexit EU–UK Cooperation on Migration and Asylum: How to Live Apart, Together' (European Policy Centre 2022).
[40] Blanca Garcés-Mascareñas, 'Why Dublin "Doesn't Work"' (2015) 135 Notes Internacionals CIDOB.
[41] Fiorenza Picozza, 'Dublin on the Move' (2017) 3(1) Movements: Journal for Critical Migration and Border Regime Studies 70.
[42] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L 2024/1351.
[43] Cécile Ducourtieux, 'London Hopes for a Shift in French Immigration Policy in the Channel' (*Le Monde*, 09 July 2025) <www.lemonde.fr/en/international/article/2025/07/09/london-hopes-for-a-shift-in-french-immigration-policy-in-the-english-channel_6743178_4.html> accessed 09 July 2025.

returned to France, in exchange for a limited number of transfers to the UK of individuals with family ties.[44]

Although designed to function primarily as a deterrent, signalling that irregular arrival offers no realistic pathway to settlement in the UK, this arrangement raises serious concerns. The assumption that France constitutes a universally 'safe' country overlooks well-documented instances of systemic mistreatment and violence against people seeking protection, particularly in northern coastal regions.[45] The bilateral nature of this response has drawn criticism from southern EU Member States, including Spain and Italy, who view such arrangements as undermining the collective responsibility underpinning the Dublin framework. By circumventing broader EU mechanisms, these diplomatic measures risk further fragmenting European cooperation on the burden-sharing of asylum and burden-sharing.[46]

2.2 "Crisis" at the Border: The Violent Arm of Externalisation

Since the opening of the Channel Tunnel in 1994, displaced people have been living in the Calais area hoping to cross the Channel to the UK.[47] Informal camps like the "Jungle" have become enduring symbols of Europe's structural displacement and migration governance failures. symptomatic of broader systemic displacement within Europe and synonymous with the "European migrant crisis". These camps are not permanent settlements, but rather sites of exclusion, shaped by restrictive immigration policies on both sides of the Channel.[48] Again, the label of "crisis" obscures the deeper systemic violence underpinning global economic inequality, postcolonial displacement, and geopolitical destabilisation that perpetuates the conditions that force people to move.[49]

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[44] Ibid.
[45] Julia Dumont, 'France: Police Violence Against Migrants 'Has Become the Norm' (*MigrantInfo,* 26 November 2020) <www.infomigrants.net/en/post/28777/france-police-violence-against-migrants-has-become-the-norm> accessed 27 June 2025.
[46] Tarek Salame, 'Italy & Spain Warn France-UK Migration Pact Threatens EU Unity' (*EuroWeekly*, 27 June 2025) <euroweeklynews.com/2025/06/27/italy-spain-warn-france-uk-migration-pact-threatens-eu-unity> accessed 27 June 2025.
[47] Calais Migrant Solidarity, 'Trapped on the Border' in Pierpaolo Mudu and Sutapa Chattopadhyay (eds) *Migration, Squatting and Radical Autonomy* (Routledge 2016).
[48] Ibid 54; Matilda Della Torre (ed) *Conversations from Calais* (Welbeck Balance 2023).
[49] Genova (n 26).

In response to the growing concentration of displaced people in Calais, the UK and France signed the Treaty of Le Touquet (Le Touquet) in 2003.[50] Le Touquet introduced juxtaposed immigration border controls, ensuring immigration checks would take place in the country of departure rather than upon arrival.[51] This effectively "offshored and outsourced" Britain's border to northern France, allowing the UK to prevent irregular entry before individuals reached British territory.[52] The closure and dismantling of the Sangatte refugee centre in 2002, condemned for attracting displaced people further exemplified the UK's strategy of deterrence through displacement.[53] The British border externalisation strategy resulted in the French law enforcement operating as a proxy for UK migration control, as the "armed wing of British migration policy".[54] Le Touquet has faced sustained criticism from French politicians, legal academics and human rights organisations for entrenching border violence and delegating responsibility without ensuring corresponding support mechanisms.[55]

Despite intensified securitisation through Le Touquet and the subsequent bilateral agreements displaced people continue to reside in and around Calais.[56] Destination choices are rarely driven by knowledge of asylum policies.[57] Yet for many, the UK remains a symbolic and practical goal due to family, diaspora community, colonial or linguistic ties to the UK.[58] However, the externalised nature of the UK border means that northern France, particularly Calais due to its proximity to the Channel Tunnel, functions as a node of transport and border control. Yet camps around Calais are marked by precarity, systematic police violence and

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[50] Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea Ports of both Countries on the Channel and North Sea (adopted 4 February 2003, entered into force 1 February 2004) UKTS 18.
[51] Calais Migrant Solidarity (n 47).
[52] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) 2.
[53] Didier Fassin, 'Compassion and Repression: The Moral Economy of Immigration Policies in France' (2005) 20(3) Cultural Anthropology 362, 365.
[54] Op-Ed, 'The Government Must Shed Light on Practices Being Used at the France-UK Border' (*Le Monde,* 06 September 2024) <www.lemonde.fr/en/opinion/article/2024/09/06/migrants-the-government-must-shed-light-on-practices-being-used-at-the-france-uk-border_6725114_23.html> accessed 01 July 2025.
[55] Ibid.
[56] Dan Hicks and Sarah Mallet, *Lande: The Calais 'Jungle' and Beyond* (Bristol University Press 2019) 5.
[57] Anke Fiedler, 'From Being Aware to Going There: On the Awareness and Decision-Making of (Prospective) Migrants' (2020) 23 Mass Communication and Society 356.
[58] Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) Journal of Historical Sociology 423.

dire living conditions.[59] Though no official statistics are kept by French authorities, at least 15 people died in these camps in 2014, even before attempting the Channel crossing.[60] Under the Dublin system, the rejection of an asylum application in France is a rejection by the whole of the EU.[61] While it is difficult to definitively establish that EU Member State asylum processes are unreliable, there is a wealth of evidence that asylum procedures in many EU Member States, such as France are unfair, and often lead to the rejection of strong claims.[62]

In *Khan v France*, the ECtHR found that France had violated Article 3 ECHR by failing to provide adequate protection to an unaccompanied minor living in the Calais camp.[63] The ECtHR considered that the conditions of the camps were sufficiently degrading enough to constitute inhuman treatment, particularly for children or vulnerable people, referring to the ECtHR's *Rahimi* judgement to emphasise the extreme vulnerability of unaccompanied asylum-seeking children.[64] The main Calais camp, the 'Jungle' was officially destroyed in 2016 under the guise of humanitarian action.[65] Subsequent destruction of informal living encampments continue under the French policy of 'Zero Point of Fixation', occurring up to three times a week in Calais.[66] The actions of the French police have been criticised as aligning with the UK's broader policy of a 'hostile environment' seeking to make living conditions of irregular migrants intolerable and unliveable as a means of deterrence.[67]

The Channel has emerged as both as symbolic and material , where the failures of EU and UK asylum policies intersect. With safe and legal routes to protection restricted and scare and EU-UK cooperation on asylum returns effectively dismantled post-Brexit, the Channel has emerged not merely as a geographical obstacle but as a political and legal frontier. As a consequence, the maritime border has become a focal point for displacement, deterrence and

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[59] Matthew Taylor and Gyu Granjean, 'At Least 15 Migrants Died in 'Shameful' Calais Conditions in 2014' (*The Guardian,* 23 December 2014) <www.theguardian.com/uk-news/2014/dec/23/15-migrants-trying-enter-uk-die-shameful-calais-conditions> accessed 01 July 2025.
[60] Ibid.
[61] Dublin (n 33).
[62] See for example *IM v France* App No 9152/09 (ECHR 2 May 2012).
[63] *Khan v France* App No 12267/16 (ECHR 28 February 2019); *Rahimi v Greece* App No 8687/08 (ECHR 02 July 2011).
[64] Ibid.
[65] Anoosh Chakelian, 'Demolishing Purgatory: What Happens to the Refugees When Calais's "Jungle" is Destroyed?' (*New Statesman*, 15 March 2016) <www.newstatesman.com/world/2016/03/demolishing-purgatory-what-happens-refugees-when-calais-s-jungle-destroyed> accessed 24 June 2025.
[66] Lily MacTaggart, Katie Hall and Kate O'Neill, *We Want to Be Safe* (Project Play 2025) 30.
[67] Hicks and Mallet (n 56) 7.

securitisation. The UK government has responded with increasingly punitive measures that sideline its commitments to refugee protection and its obligations under international law. The small boats that leave northern France to cross the Channel reflect the failures of domestic asylum governance and the wider collapse of European solidarity on migration.

2.3 "Crisis" in the Channel: The Spectacle of Channel Crossings

This section examines the construction of the so-called "Channel crisis" and the ways in which this framing has enabled the UK government to introduce increasingly punitive and extraterritorial measures that conflict with its international human rights obligations.

Since 2018, the rise of small boat crossings the English Channel has been portrayed by UK political and media narratives as a security "crisis". When introducing the Illegal Migration Bill to the House of Commons, Suella Braverman the UK Home Secretary claimed that the

> "small boats problem is part of a larger global migration crisis. In the coming years, developed countries will face unprecedented pressure from ever greater numbers of people leaving the developing world for places such as the United Kingdom. Unless we act today, the problem will be worse tomorrow, and the problem is already unsustainable".[68]

The performance of a crisis spectacle is central to the mainstreaming of far-right ideas, such as the abandonment of human rights frameworks.[69] Although at least 147 people have died in the Channel between 2018 and April 2025,[70] the dominant focus in public discourse has been on control and deterrence rather than humanitarian protection.[71] As in the case of the border "European Migrant crisis", the notion of crisis operates less as a descriptor of empirical reality than a politically constructed spectacle, shaped by media amplification, securitised language and legal exceptionality.[72] This discursive framing is central to legitimising the

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[68] HC Deb, 07 March 2023, vol 729, col 151.
[69] Jan Dobbernack, 'The Spectacular Politics of the United Kingdom's "Small Boats Crisis" (2025) 19(1) International Political Sociology 1, 13
[70] Walsh and Cuibus (n 6).
[71] See for example, the rhetoric used by Prime Minister Keir Starmer: Sam Francis, 'We Must Stop Smuggling Gangs Before They Act - Starmer' (*BBC,* 04 November 2024) <www.bbc.co.uk/news/articles/cwy1n2nwnyjo> accessed 25 June 2025.
[72] Nicholas De Genova, 'Spectacles of Migrant 'Illegality': the Scene of Exclusion, the Obscene of Inclusion' (2013) 36(7) Ethnic and Racial Studies 1180.

UK's increasingly punitive deterrence-based approach to people crossing the Channel in small boats.

Small boats are overwhelmingly filled with people seeking protection. In 2024, 99% of all those crossing the Channel either applied for asylum themselves or were named as dependants of an asylum claimant.[73] These claims also reveal a higher-than-average rates of successful asylum application when compared to overall UK asylum recognition rates.[74] Nevertheless, the accompanying political discourse across the political spectrum has been disproportionate and racialised. Government officials such as former Home Secretaries Sajid Javid and Priti Patel have characterised such crossings as unlawful acts facilitated by organised crime and abetted by French inaction.[75] Slogans such as "Smash the Gangs" further introduce discourses of victimisation of people seeking protection by "smugglers" to allow the state to take a paternalistic approach, extending the protection of the state to some whilst simultaneously creating the conditions that ensure "smugglers" are needed.[76] Within this narrative, the figure of the "migrant" is frequently positioned as a threat to state security, in contrast to the more "deserving" refugee constructed in legal terms.[77] The result is a racialised moral dichotomy that permits repressive border governance in the name of public security.[78]

This dynamic reflects what Krzyżanowski terms the "crisis imaginary"[79]: a form of discourse that enables governments to present migration as a "crisis" that requires extraordinary intervention. The securitisation of asylum and migration challenges the normative foundations of the human rights regime by reinforcing the statist logic of sovereign border control. Irregular migration is often the subject of symbolic policy-making: using unfeasible policies to signal action and shift the baseline of what are considered acceptable measures.[80]

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[73] Walsh and Cuibus (n 6).
[74] Ibid.
[75] Maggs (n 24).
[76] Nicholas de Genova, 'The Border Spectacle of Migrant 'Victimisation' (*openDemocracy*, 20 May 2015) <www.opendemocracy.net/en/beyond-trafficking-and-slavery/border-spectacle-of-migrant-victimisation/> accessed 25 June 2025.
[77] Bennett (n 24) 349.
[78] Ibid.
[79] Michał Kryżanowski, 'Discursive Shifts and the Normalisation of Racism: Imaginaries of Immigration, Moral Panics and the Discourse of Contemporary Right-Wing Populism' 30(4) Social Semiotics 503.
[80] Mike Slaven and Christina Boswell, 'Why Symbolise Control? Irregular Migration to the UK and Symbolic Policy-Making in the 1960s' (2018) 45(9) Journal of Ethnic and Migration Studies 1477.

Within this "crisis" framework, legal norms can be suspended, eroded, or reinterpreted under the pretext of exceptional necessity, echoing Agamben's state of exception.[81] In this way, people crossing the Channel are not simply displaced persons; they are reimagined as potential intruders against whom the full weight of state power must be deployed.

The framing of these movements as a "crisis" has also facilitated a series of legal and operational shifts at the UK's external borders. In order to gain control of the "crisis", between 2014 and 2023, the UK government invested over £232 million (€269 million) in security infrastructure in northern France, funding surveillance equipment, fencing and permanent UK policing in Calais.[82] Since the "crisis" narrative ceases to abate, it has pledged an additional £476 million (€541 million) for the period 2023 to 2026.[83] Bilateral agreements, including Le Touquet as supplemented by the Sandhurst Treaty (2018) and the 2019 joint action plan, strengthened the French responsibilities for border enforcement, expanding French obligations to prevent irregular departures and established mechanisms such as the UK–France Coordination and Information Centre.[84] These agreements have led to more French intervention on the beaches of northern France, increasing the overloading of boats, risking lives in the Channel.[85]

In sum, the framing of Channel crossings as a "crisis" has been operationalised as a discursive and policy tool to obscure the legal rights and humanitarian needs of those seeking asylum and also legitimise the UK government's policies introduced in a time of "crisis". These developments raise critical questions about the compatibility of such measures with the UK's binding obligations under international and European human rights law.

2.4 "Crisis" in Asylum: A Securitised Response

This section examines the most prominent legal and policy measures enacted by successive UK government between 2018 and 2025 that have aimed at deterring or preventing small

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[81] Giorgio Agamben, *State of Exception* (Kevin Attell tr, University of Chicago Press 2005).
[82] Melanie Gower, 'Unauthorised Migration: Timeline and Overview of UK-French Co-operation' (House of Commons Library 2025) <commonslibrary.parliament.uk/research-briefings/cbp-9681/> accessed 06 July 2025, 7.
[83] Ibid 6.
[84] Neidhardt (n 39).
[85] HC Deb, 06 December 2024, col 311.

boat crossings across the Channel. They will be assessed in light of the UK's human rights and refugee law obligations.

Building on the "threat" that people arriving by small boat present to the security of the UK, consecutive UK governments introduced increasingly restrictive policies ostensibly aimed at preventing Channel crossings. Since Brexit, political discourses around immigration and border control have intensified, resulting in the enactment of the Nationality and Borders Act 2022 and the Illegal Migration Act 2023, the latter explicitly branded under the government's "Stop the Boats" campaign.[86] In justifying this approach, then Prime Minister Boris Johnson asserted:

> "We will send you back ... If you come illegally, you are an illegal immigrant."[87]

These punitive legislative measures reflect border control through deterrence and securitisation, closely aligned with the constructed narrative of a "Channel crisis". Far from representing neutral administrative controls, these measures should be conceptualised as part of a broader political project of sovereignty, securitisation and externalisation of asylum.

Several flagship measures introduced by previous governments have been prevented from taking effect, due to the legal challenges concerning their compatibility with domestic and international law, including the proposed Channel pushbacks plan and the Rwanda Plan. The failure of these measures to become law does not negate the effect that they have on the environment surrounding small boat Channel crossings, as they continue to function symbolically to shape public perception and produce the image of decisive state action against "illegality". Legal fictions, even when unenforceable, serve as performative border practices that render people seeking protection hyper-visible while simultaneously displacing accountability for systemic failures in asylum government. In June 2025 Prime Minister Keir Starmer described the situation in the Channel as "deteriorating", acknowledging the failure of a previous governments to reduce Channel crossing arrivals and utilising the continued

[86] Morgan and Willmington (n 23).
[87] Ben Quinn, 'Johnson Warns Against Channel Crossings After Dozens Intercepted' (*The Guardian*, 23 August 2019) <www.theguardian.com/uk-news/2019/aug/23/channel-crossings-uk-and-france-to-meet-after-dozens-intercepted> accessed 17 June 2025.

failure to justify more extreme measures to target "criminal gangs".[88] Despite successive measures aimed at reducing Channel crossings in small boats, both the number of Channel crossings and associated deaths have continued to rise, raising serious questions about the effectiveness of the UK's deterrence-based approach.

2.4.1 Pushback Policy

In November 2021, 27 people among them pregnant women and children, died when their dinghy capsized in the Channel.[89] In the wake of this tragedy, then Home Secretary Priti Patel proposed a controversial policy that would empower the British Border Force to physically intercept and redirect small boats attempting to cross the Channel back into French waters.[90] The UK Border Force was seen performing "pushback drills" in the Channel, using jet skis to turn around crowded dinghies.[91] This pushback policy sparked widespread alarm in civil society and legal challenges.[92]

The Home Office's pushback policy was challenged by the Public and Commercial Services Union, alongside NGOs including Care4Calais, Channel Rescue and Freedom From Torture for the specific disclosure of redacted sections of the pushback policy operating procedures.[93] In the High Court's supplementary judgment, the policy revealed that the nature of the policy would limit the ability of officers to assess or identify if anyone on board was seeking asylum or human rights protection in the UK before being identified prior to be redirected to France.[94] Under Article 33 Refugee Convention there is an prohibition of refoulement,

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[88] Jim Pickard, Ian Johnston and David Sheppard, 'Keir Starmer Says Small Boats Crisis in English Channel is 'Deteriorating'' (*Financial Times,* 17 June 2025) <www.ft.com/content/f2949840-db69-437c-98fb-c7c341166506> accessed 23 June 2025.

[89] Jamie Grierson, 'Channel Drownings: What Happened and Who is to Blame?' (*The Irish Times,* 25 November 2021) <www.irishtimes.com/news/world/europe/channel-drownings-what-happened-and-who-is-to-blame-1.4738915> accessed 24 June 2025.

[90] Dominic Glover, 'UK 'Push-Back' Policy Under Focus Following English Channel Disaster' (*Courthouse News Service*, 04 December 2021) <www.courthousenews.com/uk-push-back-policy-under-focus-following-english-channel-disaster/> accessed 24 June 2025.

[91] 'Channel: UK Practices Pushbacks as France, NGOs and the UN Deem "Turn-Around" Tactics Unsafe and Unlawful' (*ECRE,* 17 September 2021) <ecre.org/channel-uk-practices-pushbacks-as-france-ngos-and-the-un-deem-turn-around-tactics-unsafe-and-unlawful/> accessed 24 June 2025.

[92] Seen by the legal challenge in *Public and Commercial Services Union & Others v Secretary of State for the Home Department* [2022] EWHC 902 (Admin).

[93] *Public and Commercial Services Union (PCSU) & Others v Secretary of State for the Home Department* [2022] EWHC 902 (Admin).

[94] Ibid para 14.

meaning that states cannot expel or return a refugee to a territory where their "life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion".[95] While the UK is a Contracting State of the Refugee Convention, this principle has also been given effect in domestic law through Section 2 Asylum and Immigration Appeals Act 1993. Whenever an individual may be understood to be seeking refugee status, decision-makers are required to conduct an individual assessment as to whether return to a third country is lawful.[96]

Furthermore, Article 3 ECHR includes the prohibition of refoulement as the ECtHR has held that this article imports an obligation not to remove persons to other states where there are substantial grounds for believing that they would be at real risk of torture, inhuman or degrading.[97] The prohibition of refoulement has been extended to extraterritorial maritime contexts, requiring the individualised assessment of protection needs even when people seeking protection are intercepted by state agents outside the territory of the state.[98] The disclosed procedural documents stated that the proposed tactics must not be deployed if there were reasonable grounds to suspect that such action could result in treatment contrary to Article 3 ECHR.[99] However, the lack of procedural safeguards within the policy would make it a practical impossibility for officers to conduct such assessments in real time, raising the risk of violations of fundamental human rights.

Beyond the need for individualised assessments of protection needs required by domestic, ECHR and international law, pushbacks conducted by the British authorities without examination of their asylum claims may amount to collective expulsion. Collective expulsion is prohibited by Article 4 of Protocol 4 (A4P4) ECHR. It is understood as "any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group."[100] While the notion of expulsion is principally territorial, the ECtHR found A4P4 ECHR applies when a State exercises its jurisdiction outside of its territory,

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[95] Refugee Convention (n 11) art 33.
[96] Asylum and Immigration Appeals Act 1993, s 2.
[97] *Soering v United Kingdom* App No 14038/88 (ECHR 07 July 1989) para 91.
[98] *Hirsi Jamaa and Others v Italy* (*Hirsi Jamaa)* App No 27765/09 (ECHR 23 February 2012).
[99] *PSCU* (n 93).
[100] *Khlaifia and Others v Italy* App No 16483/12 (ECHR 15 December 2016) para 237.

ensuring that migratory patterns in maritime contexts falls within its ambit.[101] Therefore, the conduct of the British Border Force in the Channel would constitute an exercise of jurisdiction which engages the responsibility of the State. If pushbacks to France were conducted on small boats and carried out without any form of individualised assessment, despite not reaching the territory of the UK, the UK would be in violation of A4P4 ECHR.

Taken in conjunction with Article 3 and A4P4, Article 13 ECHR may also be engaged by the UK's proposed pushback policy. The ECtHR has consistently held that individuals subject to expulsion must be afforded an effective remedy before a competent judge or national authority to challenge that expulsion.[102] In situations where expulsion may result in irreversible consequences, such as breach of the principle of non-refoulement under Article 3 ECHR, the domestic remedy must carry automatic suspensive effect to be effective within the meaning of Article 13 ECHR.[103] In the absence of an effective remedy or where no meaningful opportunity exists to appeal or prevent removal before it occurs, a violation of Article 13 ECHR occurs.[104] The UK's proposed pushback failed establish procedural safeguards or mechanisms to ensure individual assessment and challenge and would therefore be likely to violate Article 13 ECHR in conjunction with Article 3 and A4P4 ECHR.

This policy was not used in practice. However, its influence can be seen in the recently announced new powers of French authorities to intervene with small boats in shallow waters.[105] This measure is likely to be contrary to Article 98(1) of the UN Convention on the Law of the Sea (UNCLOS) which imposes a duty on all states, including the UK and France to ensure that vessels flying their flags render assistance to persons in distress at sea, without regard to nationality or legal status.[106] Intervention in shallow waters creates more danger due to panic caused and overcrowding. This new policy shows how failed policies that are rejected in part due to their human rights violations creates an environment more likely to

[101] *Hirsi Jamaa* (n 98).
[102] *Čonka v Belgium* App No 51564/99 (ECHR 05 February 2002).
[103] Ibid para 65.
[104] *Moustahi v France* App No 9347/14 (ECHR 25 June 2020) 163.
[105] Joshua Nevett and Iain Watson, 'UK and France in Talks Over Migrant Returns Deal' (*BBC,* 16 April 2025) <ttwww.bbc.co.uk/news/articles/c99pg1men8po> accessed 24 June 2025.
[106] UN Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 98(1).

normalise increasingly coercive border enforcement measures, shifting the boundaries of what is considered acceptable in UK asylum policies.

2.4.2 Nationality and Borders Act 2022

The Nationality and Borders Act (NBA) 2022 represents a significant shift in the UK's asylum framework. Introducing the Nationality and Borders Bill at its second reading in the House of Commons, the Home Secretary Priti Patel led with

> "[…] enough of dinghies arriving illegally on our shores, directed by organised crime gangs; enough of people drowning on these dangerous, illegal and unnecessary journeys; enough of people being trafficked and sold into modern slavery; enough of economic migrants pretending to be genuine refugees; enough of adults pretending to be children to claim asylum; enough of people trying to gain entry illegally ahead of those who play by the rules; enough of foreign criminals, including murderers and rapists, who abuse our laws and then game the system so that we cannot remove them."[107]

Her speech highlights the political environment to which the Bill was introduced, one characterised by a securitised and adversarial narrative that frames irregular migration as a threat to national sovereignty, public safety, and the integrity of the asylum system. This rhetoric set the stage for a legislative agenda grounded in deterrence and criminalisation, rather than protection and compliance with the UK's international human rights and refugee law obligations. The NBA 2022 was described by United Nations High Commissioner for Refugees (UNHCR) as "fundamentally at odds" with the Refugee Convention, and contrary to the UK's historic role as a "refugee champion" within the international community.[108] At the centre of the NBA 2022 is the introduction of a two-tier asylum system, which discriminates between refugees based on their mode and route of arrival. This analysis shall focus on the effects of that distinction and the introduction of the offence of "illegal" arrival

[107] HC Deb, 19 July 2021, vol 699, col 705.
[108] UNCHR, *Updated Observations on the Nationality and Borders Bill* (January 2022) www.unhcr.org/uk/media/unhcr-updated-observations-nationality-and-borders-bill-amended accessed 24 June 2025.

due to their exemplary nature of the legislative agenda seeking to dismantle the right to asylum and deter small boat Channel crossings.

Primarily, the NBA 2022 disrupted the basis of the UK's entire asylum system. Under Section 12(1) NBA 2022, Group 1 refugees are defined as those who have come directly from a country where their life or freedom was threatened and who present themselves to UK authorities "without delay." Anyone not meeting this criteria, such as those arriving from small boat across the Channel, is classed as a Group 2 refugee regardless of the legitimacy of their protection claim.[109] Group 2 refugees are penalised by law through the NBA 2022 as they may only be granted temporary protection status, face restricted access to public funds, and have limited rights to family reunification.[110] Due to the UK's geographical location and the restrictive visa regime in place, the scenario set out in Section 12(1)(a) NBA 2022 is highly unlikely, diminishing the right to asylum by imposing arbitrary conditions that few, if any, refugees can realistically meet.

The stratification of the definition of refugee is incompatible with the Refugee Convention, which contains a singular definition of a refugee. Article 1A(2) Refugee Convention defines a refugee based on their need of international protection, because of feared persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion. Therefore, the Refugee Convention does not permit for refugee status to be determined by the route of travel, choice of country of asylum or the timing of their asylum claim.[111] The UK's asylum system, by distinguishing between people based on how and when they arrived in the UK, rather than on the merits of their need for protection violates the core of the international refugee system. It further undermines the principles of non-discrimination, equal treatment and non-penalisation of irregular entry enshrined in international refugee law.[112]

Moreover, this stratified asylum system creates the power to discriminate between Group 1 and Group 2 refugees. Section 12(5)(d) and 12(6) NBA 2022 empowers the Secretary of State to enact immigration rules that discriminate between Group 1 and Group 2 refugees and

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[109] Nationality and Borders Act (NBA) 2022, s 12(1)(b).
[110] Ibid ss 12(5) and 12(6).
[111] UNCHR (n 108) para 12.
[112] See Home Office, *Restoring Control over the Immigration System* (CP 1326, May 2025); Refugee Convention (n 11) arts 3 and 31, chapter (ch) IV.

their family members in areas such as the length of leave to remain granted, the requirements for qualifying for settlement and whether immediate family members are allowed to enter or remain in the UK. The Secretary of State's powers are limited by Section 2 Asylum and Immigration Act 1993, which requires them to act in accordance with the Refugee Convention. However, this limitation is precluded by the official Explanatory Notes of the Nationality and Borders Act 2022 set out the intention to remove the possibility of settlement from Group 2 refugees for at least 10 years.[113] This would restrict the possibility of integration and naturalisation for Group 2 refugees, rather than facilitating it as required under Article 34 Refugee Convention.

Other rights affected by the power to discriminate between refugees granted by NBA 2022 include Article 8 ECHR, the right to respect for private and family life. The Explanatory Notes set out the intention of the government to 'restrict' the rights of family members of Group 2 refugees to enter or remain in the UK.[114] This is contrary to the positive obligations of the state to reunify families, and the principle that refugee family reunification procedure should be "more favourable than that foreseen for other aliens" as recognised by the ECtHR.[115]

Further compounding these concerns is Section 40 NBA 2022 which amends the Immigration Act 1971 to criminalise irregular entry into the UK. It creates the offence of 'illegal' entry for people who arrive without prior authorisation, including people who subsequently claim asylum.[116] This provision directly conflicts with Article 31(1) Refugee Convention, which imposes a prohibition of penalisation for irregular entry. The UNHCR has expressed serious concern that UK law fails to provide a defence based on Article 31(1) Refugee Convention for refugees charged with immigration offences beyond a narrow range of immigration offences related to the use of false documentation or deception.[117] Coupled with the introduction of expansive new offences for irregular arrival and the increased criminal penalties for 'illegal' entry and presence, it is highly likely that people seeking protection in the UK will face criminal penalties for seeking asylum in the UK. The effective

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[113] Explanatory Notes of the Nationality and Borders Bill HL Bill 82, para 20.
[114] Ibid.
[115] *Rodrigues Da Silva and Hoogkamer v the Netherlands* App No 50435/99 (ECHR 31 January 2006) para 39; *Tanda-Muzinga v France* App No 2260/10 (ECHR 10 July 2014) para 75.
[116] NBA (n 109) s 40.
[117] UNHCR (n 108) para 247.

criminalisation of asylum undermines the principle that refugees should not be punished for their manner of entry. This provision conflicts with the UK's obligations under the Refugee Convention.

To conclude this subsection, these measures exemplify the UK government's legislative strategy to deter small boat Channel crossings. In a broader context, they form part of a systemic effort to erode access to asylum by criminalising irregular entry and diminishing rights afforded to people seeking protection and refugees. The creation of a two-tier system under the NBA 2022, combined with the introduction of the offence of "illegal" arrival, signals a paradigm shift: from a protection-oriented asylum framework to one rooted in deterrence and securitisation. This policy framework operates through a dichotomy: while officials claim to target criminal "smugglers," the legal and administrative changes simultaneously ensure that individuals in need of protection are left with no safe or legal means of accessing the UK. This contradiction undermines the principle of refugee protection at the heart of the Refugee Convention and violates the non-penalisation clause under Article 31(1) Refugee Convention. It also displaces the burden of state failure to provide safe pathways onto those seeking safety.

By criminalising irregular arrival and limiting access to asylum procedures and family reunification, the UK effectively erodes the possibility of international protection on its territory. As such, these measures do not merely constitute a domestic policy shift; they may also amount to a breach of the UK's binding international obligations.

2.4.3 The Rwanda Plan

The NBA 2022 also laid the legal foundations for one of the UK government's most controversial and widely condemned policies: the UK-Rwanda Migration and Economic Development Partnership, signed on 13 April 2022.[118] This agreement proposed the forcible

[118] NBA (n 109) sch 4; Home Office, 'Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement' (GOV.UK 2022) <www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r> accessed 24 June 2025; upgraded to a formal treaty in 2023.

transfer of people including “asylum seekers” who arrived to the UK via irregular routes and people who had had their asylum claim rejected to Rwanda, where they could seek asylum instead.[119] Regardless of the outcome of the asylum process in Rwanda, they would not be allowed to return to the UK.[120] From its inception, the policy faced significant opposition. Rwanda’s record on human rights, including concerns over access to a fair asylum procedure and protection from prosecution was central criticisms from legal experts, NGOS and international bodies.[121] The Rwanda Plan epitomised the European trend towards extraterritorial asylum, criticised by the Council of Europe as displacing state responsibility and human rights obligations in favour of territorial exclusion.[122] Framed by the government as a deterrent to small boat Channel crossings, the scheme represented a radical externalisation of UK asylum responsibilities.

In *R (AAA and others) v Secretary of State for the Home Department*, the Supreme Court held that Rwanda could not be considered a safe third country.[123] The ruling emphasised the real risk that people transferred to Rwanda would be subject to onward refoulement due to inadequacies in Rwanda’s asylum system in breach of Article 3 ECHR. The judgment confirmed that removals to Rwanda would violate the principle of non-refoulement, enshrined in domestic law, the UK’s obligations under the ECHR and Refugee Convention.

In unconstitutional defiance of this judgment, the government enacted the Safety of Rwanda (Asylum and Immigration) Act (Safety of Rwanda Act) 2024. This Act requires decision-makers, including courts and tribunals to treat Rwanda as a safe country in spite the Supreme Court’s judgment and in the absence of any new evidence.[124] The Safety of Rwanda Act 2024 further curtails most routes of legal challenge for removal decisions and prohibits the courts from considering ECtHR jurisprudence on Rwanda’s safety.[125] Taken together, these provisions restrict the application of the fundamental principle of non-refoulement,

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[119] Melanie Gower, Patrick Butchard and CJ Mckinney, *UK-Rwanda Migration and Economic Development Partnership* (CBP 9568, 29 May 2024).
[120] Ibid 6.
[121] Bail for Immigration Detainees, ‘BID and 150+ Organisations Oppose Plans to Send People Seeking Asylum to Rwanda’ (*BiD,* 14 April 2022) < www.biduk.org/articles/bid-and-150-organisations-oppose-plans-to-send-people-seeking-asylum-to-rwanda-> accessed 24 June 2025.
[122] Tineke Strik, *Human Rights Impact of the “External Dimension” of European Union Asylum and Migration Policy: Out of Sight, Out of Rights?* (Document 14307, Parliamentary Assembly Council of Europe 2018).
[123] *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42.
[124] Safety of Rwanda (Asylum and Immigration) Act (Safety of Rwanda Act) 2024, s 2.
[125] Ibid ss 3 and 4.

preventing courts from assessing whether a person faces a real risk of persecution following removal to Rwanda or onward transfer.

Although the current Labour government has since abandoned the Rwanda policy, its legislative legacy is emblematic of the UK government's broader trajectory: privileging performative deterrence over human rights obligations and refugee protection. Framed through the populist slogan of "Stop the Boats", now rebranded by the current government as "Smash the Gangs" these initiatives reflect a political environment where human rights obligations are subordinated to symbolic demonstrations of control.[126] The Rwanda illustrates how the UK's asylum policy created to target people who arrive by small boat, has increasingly diverged from its obligations under international and regional human rights frameworks, raising serious concerns about systemic non-compliance.

2.4.5 Illegal Migration Act 2023

The Illegal Migration Act became law on 20 July 2023 as an integral part of then Prime Minister Rishi Sunak's flagship pledge to "Stop the Boats".[127] The Illegal Migration Act (IMA) 2023 was pronounced inconsistent with the UK's obligations under international law and serious attack on the UK's system of human rights protection.[128] Aiming to deter irregular arrivals, particularly those arriving by small boats, the IMA built upon the UK asylum framework created by the NBA 2022, effectively extinguishing the right to seek asylum on UK territory for individuals arriving through irregular means.[129] While IMA 2023 consistently refers to "illegal" migration, this terminology is misleading and inaccurate under international refugee law, which explicitly recognises that people seeking protection may enter a country irregularly and still qualify for protection.[130]

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[126] Michael Collyer and Uttara Shahani, 'Offshoring Refugees: Colonial Echoes of the UK-Rwanda Migration and Economic Development Partnership' (2023) 12(8) Social Sciences 451.
[127] Rishi Sunak, 'PM Speech on Building a Better Future' (Prime Minister's Office 04 January 2023) <www.gov.uk/government/speeches/pm-speech-on-making-2023-the-first-year-of-a-new-and-better-future-4-january-2023> accessed 23 June 2025.
[128] UNHCR, *UNHCR Recommendations on the Implementation of the Illegal Migration Act 2023* (October 2023) <www.unhcr.org/uk/publications/unhcr-recommendations-implementation-illegal-migration-act-2023> accessed 23 June 2025; Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill (Part 1)* (HC 1279, HL 263, 2022–23)
[129] Illegal Migration Act (IMA) 2023, s 1.
[130] Refugee Convention (n 11) art 31.

The IMA 2023 gives the Secretary of State the power to commence the following sections, conditional to the operational reliance on bilateral removal agreements to “safe” third countries, as such, they are not yet in force.[131] At its core, the IMA imposes statutory duty on the Home Secretary to detain and remove individuals who had arrived to the UK irregularly, to either their home country or a designated third country, such as Rwanda at the earliest opportunity.[132] This duty is coupled with broad powers to detain such individuals for an undefined period, at the discretion of the Secretary of State, regardless of the presence of protection claims or pending legal challenges.[133] The regime of automatic indefinite detention and removal, without individualised protection assessments or an (effective) appeal process envisaged by the IMA 2023 raise serious concerns under Articles 3 and 13 ECHR. The procedural design of the IMA, particularly the limited access to judicial review and exclusion of core protections under the Human Rights Act 1998 in certain circumstances, may place the UK in breach of these fundamental obligations. These concerns have been echoed by the UNHCR, which has warned that the IMA 2023 may amount to a *de facto* denial of asylum and places the UK in breach of its obligations under international refugee and human rights law.[134]

Additionally, the IMA 2023 presents a significant rollback on protections for potential and confirmed victims of modern slavery and human trafficking, disqualifying them from being granted protection under the Modern Slavery Act 2015 if they arrive in the UK irregularly.[135] This development substantially undermines the UK’s obligation to identify and protect victims of human trafficking.[136] The Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) expressed deep concern over the United Kingdom’s Illegal Migration Bill and its lack of compliance with core elements of the Council of Europe Convention on Action against Trafficking in Human Beings.[137]

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[131] IMA (n 129) s 68.
[132] Ibid ss 2(a) and 6(1)
[133] IMA (n 129) ss 5, 11(2) and 12.
[134] UNHCR (n 128).
[135] IMA (n 129) s 16. See further restrictions in ss 17 to 25.
[136] Council of Europe Convention on Action against Trafficking in Human Beings (opened for signature 16 May 2005, entered into force with respect of the UK 01 April 2009) Council of Europe Treaty Series No 197, art 10.
[137] ‘“UK’s Illegal Migration Bill Should be Reviewed to Ensure it Complies with the Anti-Trafficking Convention”, Says Council of Europe Expert Group on Trafficking’ (*Council of Europe,* March 2023) <www.coe.int/en/web/anti-human-trafficking/-/uk-s-illegal-migration-bill-should-be-reviewed-to-ensure-it-

Sections of the IMA 2023 that are in force include Sections 30 to 27. These provisions impose a statutory bar on individuals who entered the UK irregularly after 7 March 2023 preventing them from obtaining refugee status, indefinite leave to remain, or British citizenship. Consequently, people who arrive via unauthorised routes, such as by small boat, even if they meet the criteria for international protection, are automatically excluded from the UK's protection framework. This directly conflicts with fundamental principles of the Refugee Convention, including non-discrimination and non-penalisation.[138] The enactment of these provisions continues the shift in the UK's legal architecture in replacing rights-based refugee protection with punitive, categorical exclusions designed to deter irregular entry.

The IMA 2023 is a key part of the UK's legislative trajectory that seeks to deter small boat crossings through increasingly punitive and exclusionary measures. By extinguishing the right to seek asylum for those arriving irregularly, weakening protections for trafficking victims, and enabling potentially arbitrary detention and removal, the IMA marks a fundamental departure from the UK's obligations under the Refugee Convention and the ECHR. These developments are not isolated policies but part of a systemic dismantling of rights-based protection in favour of deterrence through legal exclusion. In this context, the human rights clause in the EU–UK Trade and Cooperation Agreement may offer a limited yet important avenue for normative influence.

2.4.5 Border Security, Asylum and Immigration Bill 2025

Introduced in January 2025, the Border Security, Asylum and Immigration Bill 2025 seeks to repeal the Safety of Rwanda (Asylum and Immigration) Act 2024 and some sections of the Illegal Migration Act 2023. It is the first immigration bill of the recently elected Labour government, thereby providing a strong indication of government's immigration priorities. It has been presented as an essential measure seeking to "make real change" and deter criminal gangs that facilitate Channel crossings.[139] The Bill adopts a humanitarian framing, simultaneously purporting to protect people seeking protection from criminal smuggling

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complies-with-the-anti-trafficking-convention-says-council-of-europe-expert-group-on-trafficking> accessed 23 June 2025.

[138] Refugee Convention (n 11) arts 3 and 31.

[139] HL Deb, 02 June 2025, vol 846, col 523.

networks, while creating new criminal offences in relation to people undertaking Channel crossings and expansive data-sharing powers that extend the criminalisation of those arriving via irregular routes. Echoing the logic of the “Stop the Boats” campaign, the new slogan “Smash the Gangs” continuing to conflate people seeking protection with organised crime and national security threats, reinforcing a securitised border discourse.[140]

Part One of the Bill concerns “border security”. The statutory creation of a Border Security Commander grants them responsibilities for reducing the arrival or entry of people, whose arrival or entry is regarded as contrary to UK law.[141] Clauses 13 to 17 create new criminal offences related to the preparatory acts to commit an immigration offence, such as supplying or handling items to be used in connection with Channel crossings. Intended to deter and prevent those who seek to obtain a financial or material gain from people-smuggling, these offences do not contain sufficient safeguards to prevent the prosecution of people seeking asylum.[142] While not as extreme as the previous legislative measures, this part of the Bill continues to increase the powers of the Border Force in ways that make people more dependent on dangerous journeys.[143] Achilli argues that the mainstream media constantly point a finger at the perceived brutality of smugglers but “fail to account for the brutality caused by states’ effort to enforce border controls.”[144] The Bill prioritises deterrence, punishment and enforcement rather than respect for human rights.

An informative provision of the Border Security, Asylum and Immigration Bill 2025 introduces a new criminal offence of endangering another during sea crossing to the UK.[145] Intended to act as a deterrent, endangering is defined as doing an act that causes or creates a risk of death, or serious physical or psychological injury, to another person and can only be committed by somebody who commits the existing offence of knowingly entering the UK without permission.[146] This will allow for the prosecution of parents for endangering the lives

[140] Gholam Khiabany and Milly Wiliamson, ‘From ‘Stop the Boats’ to ‘Smash the Gangs’: Migration and Securitisation in Contemporary Capitalism’ (2025) Race & Class.
[141] Border Security, Asylum and Immigration Bill 2025, ch 1.
[142] UNCHR, *UNHCR Updated Observations on The Border Security, Asylum and Immigration Bill, As Amended* (May 2025) <www.unhcr.org/uk/border-security-asylum-and-immigration-bill> accessed 25 June 2025.
[143] ‘Briefing: Refugee and Migrant Rights’ (Amnesty International UK February 2025).
[144] Luigi Achilli, ‘The ‘Good’ Smuggler: The Ethics and Morals of Human Smuggling among Syrians’ (2018) 676(1) The ANNALS of the American Academy of Political and Social Science 77.
[145] Border Security Bil (n 141) clause (cl) 18.
[146] UNHCR (n 142).

of their children if they take their children on boats across the Channel.[147] The proposed offence is drafted with the intention of criminalising acts taken by people seeking protection who undertake dangerous journeys, and without a clearly defined scope risks criminalising acts carried out by passengers on small, unsafe boats in the Channel.[148] When actions like crossing the Channel in a small boat are inseparable from the mode of arrival, criminalising actions taken by people seeking protection during irregular arrival risks undermining their fundamental right to seek asylum.

Taken as a whole, this range of legislative measures illustrate a sustained asylum agenda oriented around deterrence, externalisation, and procedural exclusion across successive governments. This developing policy architecture no longer treats people seeking protection as rights-holders under international law but instead frames them as security threats, criminals, or burdens to be excluded. Even where framed as protective measures, these legislative initiatives risk conflating smuggling and asylum-seeking, thereby criminalising refugees and undermining their fundamental rights. The UK's asylum policy has evolved into a system that is structurally misaligned with its obligations under the ECHR, Refugee Convention and broader international human rights law. These developments provide the context in which to assess to what extent the EU-UK TCA's human rights clause can influence the legislative trajectory of policies targeting small boat Channel crossings.

[147] Rajeev Syal, 'Planned UK People-Smuggling Laws Risk 'Criminalising Asylum Seekers, Charities Say' (*The Guardian,* 30 January 2025) <www.theguardian.com/uk-news/2025/jan/30/asylum-seekers-who-refuse-rescue-in-channel-may-face-five-year-jail-terms> accessed 25 June 2025.
[148] UNHCR (n 142) para 11.

Chapter 3: Human Rights Clauses and the TCA

Human rights clauses have become key normative tools in the European Union's external trade policy. Since 1995, the EU has had a formal policy of inclusion of these clauses in its international trade agreements with third countries.[149] Brexit necessitated the creation of a fresh EU-UK framework, without which, would default to World Trade Organisation rules; an outcome both parties deemed undesirable.[150] This chapter traces the evolution of human rights clauses in EU trade agreements, examining whether it has been influential. It further analyses the form and function of the human rights clause within the TCA, assessing to what extent it could be an influential tool for the EU.

3.1 Human Rights Clauses in the EU

Initially introduced as political safeguards rather than tools of influence, human rights clauses have evolved into formal legal instruments through the integration of "essential elements" and "non-execution" clauses in EU trade agreements with third countries. The Lomé IV Convention (1989) between the European Community and the African, Caribbean and Pacific Group of States (ACP) is widely considered to have introduced the first human rights clause, with the agreement affirming a "deep attachment to human dignity and human rights", albeit without specific guarantees or an enforcement mechanism.[151] These human rights clauses were introduced into EU trade agreements to prevent the EU from being seen to be funding human rights violations through economic engagement with third countries, rather than a tool of influence. Over time, the human rights clause policy has been used to implement the EU's constitutional commitment to the promotion and protection of human rights in its external action in the international community.[152]

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[149] Lorand Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements* (German Institute for Human Rights and Misereor 2014) 12, 13, 14.

[150] Ilze Jozepa, 'No-Deal Brexit and WTO: Article 24 Explained' ('No-Deal Brexit and WTO: Article 24 Explained' (House of Commons Library 04 February 2019) <commonslibrary.parliament.uk/no-deal-brexit-and-wto-article-24-explained> accessed 28 June 2025.

[151] Anne-Carlijn Prickartz and Isabel Staudinger, 'Policy vs Practice: The Use, Implementation and Enforcement of Human Rights Clauses in the European Union's International Trade Agreements' (2019) Europe and the World: A Law Review, 8.

[152] TEU (n 14) art 21.

The Treaty of Lisbon solidified the legal foundations of the human rights clause in EU trade agreements with third countries. Drawing from the EU's constitutional framework, Article 3(5) and Article 21 TEU collectively mandate that the EU's external action be guided by the promotion and protection of human rights, democracy and the rule of law. Article 21 TEU provides the legal foundation for the inclusion of non-trade objectives in the EU's external trade relations. Moreover, Article 3(5) TEU enjoins the EU to uphold its values globally and safeguard its citizens, while Article 21(2)(b) TEU charges the EU with reinforcing democracy and human rights in its external action. These provisions impose negative obligations; the EU must not contribute to violations of the principles of human rights, democracy and the rule of law in third countries, such as the UK. This is aimed at preventing EU complicity in human rights violations. They also create affirmative obligations to actively support human rights advancement beyond the EU: the EU must endeavour to improve compliance with those principles, such as human rights, in third countries. The integration of human rights values into EU external action through human rights clauses reflects the EU's role as a "normative power" that seeks to export its foundational values through contractual relationships.[153] Due to these developments, human rights clauses included in EU trade agreements now technically operate both as political declarations and as instruments of norm diffusion.

Despite the absence of a precise definition of human rights in these agreements, Article 31 Vienna Convention on the Law of Treaties (VCLT) can provide interpretational guidance in light of applicable international law. It states that a treaty must be interpreted in light of the other provisions in the treaty as well as *inter alia* other relevant rules of international law applicable in relations between the parties.[154] Therefore, human rights clauses have been understood to include the obligation to respect human rights norms which have become part of international customary law, such as the principle of non-refoulement.[155] This is in addition to the rights included in the named conventions of the trade agreement such as the Universal Declaration of Human Rights (UDHR) and the ECHR.

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[153] Manners (n 22).
[154] Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31.
[155] UNHCR, *The Principle of Non-Refoulement as a Norm of Customary Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 Bvr 1954/93* (UNHCR January 1994).

By making respect for human rights an explicit and essential element of trade agreements and linking them to enforcement measures including suspension or termination of the agreement, human rights clauses have been able to provide a clearer and more predictable legal basis for action in the event of serious violations of human rights. They have taken a more robust form than in earlier agreements such as the Lomé Convention as these human rights clauses now generally allow either party to adopt "appropriate measures" in response to serious violations of human rights or democratic principles. Yet, these measures are subject to significant political discretion; the human rights clause is an option, not an imperative. Therefore, human rights clauses mostly function as soft law instruments, with symbolic and diplomatic importance.[156]

Consequently, due to the political discretion given to parties, and the idea that triggering human rights clause should only be 'the nuclear option", the enforcement mechanisms of human rights clauses in EU trade agreements are rarely activated.[157] Suspension of trade agreements have only occurred in extreme scenarios such as coup d'états or violent suppression of protests and only ever under the Cotonou Agreement with ACP countries.[158] The selective application of human rights clauses, with asymmetrical enforcement patterns have been criticised particularly when dealing with strategic partners.[159] This shall be discussed in more detail in Chapter 4.

The EU is generally reluctant to use the formal suspension procedures set out in trade agreements with third countries, preferring to adopt restrictive measures within the Common Foreign and Security Policy (CFSP).[160] This trend of individual sanctions rather than action through human rights clauses has been further supported by the adoption of the 'European Magnitsky Act'.[161] Sanctions allow for targeted sanctions against suspected individual human rights violators without necessarily invoking formal suspension clauses in trade

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[156] Krajewski (n 18) 12.
[157] Ibid 13, 14.
[158] Elsuwege and Coninck (n 19).
[159] Samantha Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32(83) Utrecht Journal of International and European Law 4145.
[160] Marc Maresceau, 'Unilateral Termination and Suspension of Bilateral Agreements Concluded by the EC' in Mielle Bulterman et al (eds), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer 2009).
[161] Bartels (n 20) 19.

agreements.[162] This trend suggests that while the existence of the human rights clause in the TCA provides a formal legal basis for accountability, the EU's enforcement practice may dilute its deterrent effect. As a result, its ability to influence UK migration or border enforcement policies, like those affecting people who travel by boat to the UK, depends more on political will and bilateral diplomatic dynamics than on the clause itself.

Theoretical perspectives help explain the function of human rights clauses in EU trade agreements. Legal pluralism provides an interpretative framework for understanding the interaction between different legal regimes including EU law, international human rights law, and national law. Human rights clauses reflect the pluralist environment across which they function by operating across multiple normative orders.[163] Sitting at the intersection of overlapping legal regimes, human rights clauses enable norm transfer through trade.

Meanwhile compliance theory offers an explanation for why states may adhere to human rights clauses even in the absence of strict enforcement mechanisms. Normative commitments are often driven by reputational incentives and peer expectations rather than strictly legal enforcement.[164] In the post-Brexit EU-UK relationship, with the TCA’s emphasis on the shared values of human rights, democracy and the rule of law, these theories help elucidate how the EU may influence UK behaviour through normative pressure rather than formal sanctions.

Yet, this section reveals a persistent tension between the ambitious normative framing of human rights clauses and their practical application. While human rights clauses in EU trade agreements provide a formal legal basis for promoting human rights in the context of trade, their real-world effectiveness and influence depends heavily on the political will of the parties, the institutional design of the trade agreement, and broader strategic considerations.

3.2 The TCA: Shaped by Negotiations, Politics and Time

The TCA, concluded on 30 December 2020 and provisionally applied from 01 January 2021, established the post-Brexit foundations and framework for EU-UK relations. Negotiated amid

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[162] Ibid.
[163] Piet Eeckhout, *EU External Relations Law* (2nd edn Oxford University Press 2011) ch 10.
[164] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 25.

intense political tension and pressing time constraints, the resulting TCA was shaped by two divergent imperatives: the UK's significant political emphasis on re-establishing sovereignty and legislative autonomy, including control of the British borders, and the EU's intent to uphold a consistent normative foreign policy with a third country, incorporating its external human rights commitments.[165]

Rather than viewing membership of the EU as an exercise of UK sovereign will, the predominant British viewpoint in negotiations was that leaving the EU would result in regaining sovereignty and control, with a focus on the UK's ability to control its own borders.[166] In the wider process of the UK's withdrawal, the EU's priorities were stability in Northern Ireland and Ireland, maintaining the Single Market and retaining a relationship with the UK.[167]

This context, driven by political disintegration rather than mutual economic integration, profoundly shaped the TCA's institutional architecture and normative content. Launched in February 2020, the negotiations of the TCA unfolded under a pressurised timeline, shaped by the conditions of Withdrawal Agreement, and further complicated by the practical and political disruptions caused by the COVID-19 pandemic.[168] The starting point of the TCA negotiations was the UK's formal withdrawal from the European Union on 31 January 2020, which initiated the transition period under the Withdrawal Agreement.[169] Negotiators Michel Barnier (EU) and David Frost (UK) faced a hard deadline of 31 December 2020 as the UK opted not to extend the transition period, prioritising the need to assert control of the British borders, economy and legislature in the midst of the crisis caused by the Covid-19 pandemic.[170] This reflected the UK government's decision to prioritise ideological political

[165] Christophe Hillion, 'Brexit Means Br(EEA)xit: The UK Withdrawal from the EU and its Implications for the EEA' (2018) 55 Common Market Law Review 135; Paul Craig, 'Brexit a Drama, The End Game - Part II: Trade, Sovereignty and Control' (2021) 46 (April) European Law Review 129.
[166] Craig (n 165) 132.
[167] Jannike Wachowiak and Fabian Zuleeg, 'Brexit and the Trade and Cooperation Agreement: Implications for Internal and External EU Differentiation' (2022) 57(1) The International Spectator 142, 146.
[168] Committee on the Future Relationship with the European Union, *The Future UK-EU Relationship: The Trade and Cooperation Agreement* (2020, HC1094).
[169] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7, art 126.
[170] Ibid art 132; Sebastian Payne and Jim Brunsden, 'UK Will Refuse Any EU Offer to Extend Brexit Transition" (*Financial Times*, 16 April 2020) <www.ft.com/content/3c006614-767f-4447-8136-97987045517f> accessed 10 June 2025.

considerations over concerns about the future of the EU-UK relationship.[171] As a result, the agreement reached between the EU and UK sides on 24 December 2021 was minimalist and left much for further detailed talks over a drawn-out schedule, with an initial review due in 2026.[172]

3.3 Intergovernmental Structure of the TCA

The governance structure of the TCA reflects the political compromises that underpinned its negotiation. It exposes a deliberate policy choice: to allow for normative signalling and strategic leverage without enabling legal enforcement through courts. It favours intergovernmental governance rather than supranational judicial oversight, thus removing the potential of legal challenges from the EU over human rights violations.

The TCA establishes the Trade and Cooperation Agreement Partnership Council (Partnership Council) to oversee the UK and EU implementation, application and interpretation of the TCA.[173] The Partnership Council is co-chaired by a member of the European Commission and a ministerial level representative of the UK government, it is designed to function as an intergovernmental agent for each party.[174] By relying on the Partnership Council for the enforcement of the TCA, this has significant implications for the influence of human rights clauses. The TCA reinforces a model where EU-UK disputes are resolved through consultation and settlement arrangements, not the courts. This illustrates a shift towards soft law mechanisms, ensuring that any enforcement of human rights obligations depends entirely on the political will of the UK and EU, acting through the Partnership Council. It further supports normative signalling and rhetorical commitments to human rights over binding legal obligations, limiting the potential to influence UK policy.

In practical terms, particularly in the context of the UK's asylum policies concerning small boat crossings, this arrangement diminishes the EU's ability to influence human rights compliance. The absence of binding legal procedures in this domain means that enforcement

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[171] Wachowiak and Zuleeg (n 167) 145.
[172] Helen Drake, 'Brexit and France' in John Fossum and Christopher Lord (eds) *Handbook on the European Union and Brexit* (Edward Elgar 2023) 288.
[173] TCA (n 8) art 7(2).
[174] Oliver Garner, 'Part Three of the EU-UK TCA - From a 'Disrupted' Area of Freedom, Security and Justice to 'New Old' Intergovernmentalism in Justice and Home Affairs?' in Federico Fabbrini (ed) *The Law & Politics of Brexit. Volume III: The Framework of New EU-UK Relationships* (OUP 2021)24.

of the TCA's human rights provisions remains a matter of intergovernmental diplomatic processes.

3.4 Red Lines: CJEU and ECHR

The design of the TCA results in a deliberately shallow framework for rights protection, shaped by the UK's insistence on avoiding any obligations that could expose it to supranational judicial oversight.[175] A central "red line" for the UK during negotiations was the exclusion of the CJEU and the broader body of EU law from any future governance arrangements.[176] After 47 years of engagement with EU law, the removal of this body of law left the UK with its common law rights, limited to primarily civil and political rights without constitutional protection, and the ECHR.[177] Consequently, although the TCA forms part of EU external relations law, it is not subject to the jurisdiction of the CJEU.[178] The CFREU was excluded from British domestic law through the European Union (Withdrawal) Act 2018 which explicitly provides that the Charter does not form part of "retained EU law" in the UK.

Moreover, the TCA negotiations on the ECHR reflected the intensifying British hostility towards Strasbourg institutions following the ECtHR's intervention in relation to the UK's Rwanda Plan.[179] While the UK currently remains a party to the ECHR, the UK resisted the inclusion of any binding reference to the ECHR within the TCA.[180] In 2022 the Conservative government went so far as to propose the repeal the Human Rights Act 1998 and replace it with a UK Bill of Rights. The proposed legislation sought to curtail the influence of the ECtHR on domestic courts, narrow the scope of positive obligations, and limit the extraterritorial application of rights.[181] As with the failed asylum policies, although the Bill of

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[175] Peers (n 17).
[176] Philip Moser, 'The TCA: New Law, Not EU Law' (*EU-UK Relations Law*, 29 December 2020) <eurelationslaw.com/blog/the-tca-new-law-not-eu-law> accessed 30 June 2025.
[177] Russell Solomon, 'Rights and the Post-Brexit Agenda: Rights Protection and Institutional Inadequacy in the United Kingdom' (2021) 13(1) Australian and New Zealand Journal of European Studies 1, 6.
[178] TCA (n 8) art 728(3).
[179] Dominic Casciani, 'European Court President Warns Over Rwanda Rulings' (*BBC*, 25 January 2024) <www.bbc.co.uk/news/uk-politics-68093940> accessed 30 June 2025.
[180] Issam Hallak, *EU–UK Trade and Cooperation Agreement: An Analytical Overview* (PE 679.071, European Parliamentary Research Service 2021).
[181] Bill of Rights 2022, cl 24; Ministry of Justice, *Bill of Rights: European Convention on Human Rights Reform* (CP 588, 2022).

Rights was eventually withdrawn in 2023, its underlying rationale has shifted the baseline of acceptable policies, proving influential in UK policy-making.

Therefore, the ECHR is only explicitly referred to in Part Three of the TCA, concerning law enforcement and judicial cooperation between the EU and the UK. The TCA provides that this part would be automatically terminated if either the United Kingdom or an EU Member State denounces the ECHR or Protocols 1, 6 or 13.[182] This explicit requirement of continued adherence to the ECHR fundamentally replaces the principle of mutual trust that underpinned judicial cooperation during the UK's EU membership,[183] reflecting a shift from reliance on shared legal frameworks to conditional trust grounded in formal human rights commitments. As a result, while the TCA rhetorically commits both parties to human rights, democracy and the rule of law, its capacity to ensure compliance with its human rights commitments through legal channels remains limited. Since the adoption of the TCA, reflecting positive developments in the EU-UK relationship, the ECHR has been informally recognised as an "essential element" of the Agreement, noting that the continued applicability and respect for the ECHR were foundational to the conclusion of the TCA.[184]

The British exclusionary approach to judicial oversight during the negotiations has had implications for the potential of EU influence with regards to UK asylum policies. The TCA's framework limits the European Union's legal leverage over the United Kingdom's asylum and migration practices, such as policies targeting Channel crossings. Article 696(2) TCA expressly excludes disputes concerning the human rights clause, including democracy, the rule of law, and human rights from the agreement's binding dispute settlement mechanism. This precludes the EU from initiating arbitration in response to UK policies concerning people that undertake crossing the Channel irregularly.

To a lesser extent, the limited justiciability of the human rights provisions in the TCA constrains the potential for the EU to exert influence over UK asylum policies. Article 5 TCA explicitly provides that the agreement does not create rights or obligations for individuals.

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[182] TCA (n 8) art 692(2).
[183] Vallamo Jutila, 'Who's Trusting Who? Observation of Fundamental Rights in Judicial Cooperation After Brexit' (2021) 1 Helsink Law Review 34.
[184] UK Government, 'Minutes of the Third Meeting of The Trade and Cooperation Agreement Partnership Council' (GOV.UK 16 May 2024) <www.gov.uk/government/publications/minutes-of-the-third-meeting-of-the-trade-and-cooperation-agreement-partnership-council-16-may-2024> accessed 30 June 2025, para 6.

This position is consistent with established CJEU jurisprudence, which confirms that human rights clauses in international agreements concluded by the EU are generally not intended to be directly invoked by individuals before domestic courts or the CJEU.[185] As such, individuals affected by the UK's asylum policies, including those arriving via small boats cannot rely on the TCA to challenge potential human rights violations in court. This lack of direct enforceability weakens the potential for legal pressure on the UK. If individuals were able to trigger legal accountability through the TCA, any resulting judgments could serve as a basis for EU institutions to apply reputational or political pressure on the UK. In the absence of such legal standing, the effectiveness of the TCA's human rights clauses relies on the EU's political will to enforce them, shifting the possibility of influence to political and diplomatic mechanisms.

3.5 Human Rights Clause of the TCA

Human rights are embedded within the TCA, through Article 763 and Article 771, Part Six of the TCA. These are articles that require the parties to respect human rights and democratic principles and, in the event that one party fails to respect these norms, permit the party to adopt 'appropriate measures', which can include the suspension or termination of the agreement. These provisions establish a normative foundation for the agreement, linking respect for human rights, democracy, and the rule of law to the broader bilateral relationship. Article 763(1) TCA affirms that:

> "The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties."

The wording "shall continue to uphold" implies that both Parties are obliged not to act in ways that undermine these shared values. Effectively, it prohibits conduct that would amount to backsliding or violations, for instance, policies or practices contrary to human rights norms.

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[185] Case T-292/09 *Muhamed Mugraby v Council and Commission* ECLI:EU:T:2011:418.

One such norm would be the right to asylum, set out in Article 14 of the Universal Declaration of Human Rights (UDHR).[186] which the UK government has dismantled through its asylum policies aimed to deter people from crossing the Channel in small boats. However, the reference to "shared values" and the reaffirmation of respect for the UDHR and other international human rights treaties within Article 763(1) TCA signals a clear normative alignment between the Parties. This phrasing serves to anchor the agreement in a framework of mutual political and ethical commitments, rather than creating direct or enforceable legal obligations. It situates human rights, democracy, and the rule of law as the foundational ethos of the UK-EU relationship, in line with the EU's broader external action objectives under Articles 3(5) and 21 TEU. International treaties recognised by the UK and the EU include the Refugee Convention, which as discussed in the last chapter, the UK has ignored when creating policies to deter people crossing the Channel in small boats. Therefore, in theory this provision could be invoked in response to the UK's increasingly restrictive asylum policies, such as those targeting individuals crossing the Channel. However, the legal force of this clause is primarily declaratory and political. The UDHR is a non-binding General Assembly resolution and, although parts of it may have attained customary status, it does not create direct legal obligations.[187]

Article 771 then defines this respect for human rights as an "essential element" of the TCA, rendering it a foundational condition for the continued operation of the agreement. As with other EU trade agreements the TCA does not provide a comprehensive definition of "human rights". In such cases, Article 31(3)(c) VCLT directs that treaties be interpreted in light of "any relevant rules of international law applicable in the relations between the parties." Article 763(1) TCA refers to both Parties respect for the UDHR and includes binding treaty obligations and norms of customary international law. Accordingly, the scope of the TCA's human rights clause can be interpreted to include universally recognised and codified standards, such as those found in the ECHR and the Refugee Convention. Additionally, the principle of non-refoulement has been recognised as international customary law, and so should be included within the TCA's scope of the human rights.[188] However, the abstract referral to (non-binding) international rights standards does not create targeted obligations for

[186] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), art 14.
[187] Ian Brownlie, *Principles of Public International Law* (8th edn, OUP 2012).
[188] UNHCR (n 155).

the parties of the TCA, thus highlighting how the human rights clause may prove difficult to be an influential tool for EU.[189]

3.6 TCA's Human Rights Clause Standard

While human rights clauses are formally incorporated into EU trade agreements as binding provisions, their legal effect and enforceability vary significantly depending on treaty design, political context, and the parties involved. The standard model includes an essential elements clause, affirming that respect for human rights and democratic principles forms a foundational part of the agreement, and a non-execution or appropriate measures clause that allows for unilateral suspension in the event of a serious breach.[190] The TCA reflects this standard model of human rights conditionality, with some context-specific modifications.

The consequence of defining human rights as an essential element of the TCA is that is it then subject to a special procedure, outlined in Title III of Part Six. If one Party is considered to commit a serious breach of these principles, the other Party may adopt "appropriate measures" following prior consultation.[191] Unrelated to the human rights clause, there is the option to terminate the entire treaty with twelve months' notice without having to have any grounds or a consultation requirement.[192]

Although Article 771 TCA elevates the "shared values" of human rights, democracy and the rule of law to the level of an "essential element" of the agreement, Article 772 TCA outlines the conditions under which either Party may suspend or terminate the agreement due to a breach of the essential elements clause. It provides that if one Party considers there to be a "serious and substantial failure" by the other to fulfil obligations described as an essential element in Article 771 TCA such as respect for democracy, the rule of law, and human rights, it may suspend or terminate the agreement or any supplementing agreement, in whole or in part.

[189] Coninck and Elsuwege (n 19) 45.
[190] Bartels (n 18).
[191] TCA (n 8) art 772.
[192] TCA (n 8) art 779.

Article 772(4) TCA qualifies this standard further, stating that the failure must be "of an exceptional nature and of sufficient gravity to threaten peace and security or [have] international repercussions." This high threshold is a markedly narrow conception of a human rights breach, which may exclude UK policies on Channel crossings, despite violating human rights and international legal obligations (as discussed in Chapter 2). These terms are not further defined within the TCA, nor are there objective criteria for assessing whether this threshold has been met. The ambiguity embedded in terms such as "serious and substantial" or "international repercussions" grants significant discretion to the Parties, underscoring the clause's political character. While the clause embeds normative language, its legal effects depend heavily on the political will of the Parties.

The standard set out in Article 772(4) TCA has been described as prohibitively high,[193] and as such, while Article 772 TCA provides a formal legal pathway for responding to egregious violations of human rights, its high threshold and lack of enforceable standards render it a symbolic safeguard within the TCA's governance framework. Formally, these provisions are legally binding on the EU and the UK. Theoretically, the human rights clause mechanism allow the parties to take proportionate, non-arbitrary appropriate measures under the agreement, consistent with the principle of *pacta sunt servanda* (treaties are to be obeyed) and subject to review under international law, including the VCLT, which governs the suspension and termination of treaties.[194] However, in practice, the threshold for such mechanisms renders it inoperable. This illustrates a wider trend, as the invocation of EU human rights clauses have been rare, limited to extreme political disruptions, despite the European Parliament's recent call the systemic inclusion of enforceable human rights clauses in all agreements between the EU and third countries.[195]

3.7 Mechanisms Available to the EU

Articles 763 and 771 TCA set out respect for human rights, democratic principles, and the rule of law as essential elements of the agreement, underpinning continued cooperation

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[193] Bartels (n 20).
[194] VCLT (n 154) arts 60, 61 and 62.
[195] European Parliament Resolution of 17 February 2022 on Human Rights and Democracy in the World and the European Union's Policy on the Matter - Annual Report 2021 [2022] OJ C 342/191, para 101.

between the parties. If the EU considered the UK policies regarding Channel crossings to amount to a serious and substantial failure to fulfil the obligation to respect human rights, the TCA sets out actions the EU could take. These actions are limited to suspension or termination of the TCA, subject to consultations.

The extent to which the EU could invoke or credibly threaten to invoke the human rights conditionality mechanisms within the TCA is predicated on meeting the threshold of a "serious and substantial failure" to fulfil the obligation to respect human rights, particularly where such failure threatens peace and security or has international repercussions. As Chapter 2 demonstrates, the UK's response to small boat Channel crossings, through its legal architecture and policy trajectory, amounts to a systemic restriction of rights protected under the ECHR and the Refugee Convention. When considered cumulatively, these measures arguably constitute a pattern of rights violations rather than isolated breaches and may therefore rise to the requisite threshold for EU concern. The UK government itself has framed these crossings as a threat to national peace and security, constructing a "crisis" narrative to justify the derogation from established human rights norms. This securitised framing, although intended to legitimise domestic policy, may in fact strengthen the case for EU scrutiny under the TCA's human rights clause by acknowledging the cross-border impact and geopolitical significance of the issue.

Before deciding to terminate or suspend the TCA, the EU would request that the Partnership Council should meet to seek a "timely and mutually agreeable solution".[196] This allows the representatives of the Partnership Council 30 days to find a mutually agreeable solution. What constitutes a "mutually agreeable solution" is not defined within the agreement and is inherently context-dependent. In the case of Channel crossings, any such solution would need to reconcile the UK's sovereign approach to migration control with the EU's normative emphasis on human rights, including respect for the jurisprudence of the ECtHR.

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[196] TCA (n 8) art 772(2).

3.8 What Could a Mutually Agreeable Solution Look like?

As the concept of a "mutually agreeable solution" is not defined in the TCA, this thesis considers the potential for a human rights-based approach to addressing the phenomenon of small boat Channel crossings, despite the political obstacles that make such an outcome unlikely.
First, the UK's operational cooperation with EU Member States, particularly France, has centred on deterrence and securitisation. Joint patrols, intelligence sharing, and surveillance funding have failed to reduce the number of crossings. These arrangements demonstrate that technical collaboration alone does not amount to a mutually agreeable solution, particularly where it neglects the underlying human rights concerns. Reports of police violence and degrading treatment of displaced persons in and around Calais illustrate that the current model undermines, rather than supports, the right to seek asylum. A shift towards humanitarian cooperation, such as renewed commitments to search-and-rescue operations and the creation of voluntary-access reception centres in Calais, could mitigate harm and reduce fatalities in and around the Channel.

Second, a human rights-compliant response would require the UK to amend core elements of the Nationality and Borders Act 2022 and the Illegal Migration Act 2023. These laws have been widely criticised for violating the Refugee Convention and the ECHR, especially through their imposition of a two-tier asylum system and the effective denial of territorial asylum. Repealing provisions that penalise refugees based on their mode of arrival would restore alignment with the UK's international obligations.

Third, such an approach would also necessitate the establishment of minimum procedural safeguards within the UK's asylum system. These could include guaranteed access to legal advice, non-discriminatory entry to asylum procedures, and robust individualised assessments to uphold the principle of non-refoulement. Although this would fall short of CJEU oversight, such commitments could be subject to monitoring through a bilateral mechanism, such as an EU–UK human rights observatory or a reporting framework within the TCA's Partnership Council.

Fourth, expanding safe and legal routes to protection, including humanitarian visas or resettlement pathways, would provide credible alternatives to irregular journeys. This would align the UK's asylum policy with EU priorities while preserving its control over admissions.

In return, the EU could commit to upholding full participation under the TCA, refraining from suspension of cooperation under the TCA, and de-escalating political tensions. However, given the securitised framing of Channel crossings in UK domestic politics and the EU's own inconsistencies in asylum governance, a durable, rights-based solution remains politically remote. Additional reasons why the EU would not choose to use the human rights clause are discussed in Chapter 4.

3.9 Post-Brexit Sovereignty and Compliance

This section uses compliance theory as a framework for examining how the United Kingdom may be influenced by the human rights clause in the TCA, despite both the discussed limited potential for its use and the prevailing domestic narrative of legal sovereignty post-Brexit. The UK's withdrawal from the EU was marked by a political emphasis on sovereign restoration, as a constitutional reset with an emphasis on reclaiming control over borders, laws, and judicial oversight. Nevertheless, Articles 763 and 771 TCA embed human rights and democratic principles as essential elements of the agreement, suggesting a residual normative framework even in a post-EU membership context.

Compliance theory provides a structured way to evaluate the conditions under which the UK may adhere to or resist norms contained in the TCA's human rights clause.[197] It distinguishes between coercive compliance (driven by sanctions), instrumental compliance (motivated by reputational or economic incentives), and normative compliance (reflecting internalised commitments to legal values).[198] From a managerial perspective of compliance theory, states generally do not violate treaty obligations on purpose. As optimistically noted by Louis Henkin, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[199] This perspective emphasises that non-

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[197] Chayes and Chayes (n 164) ch 1.
[198] Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2601.
[199] Louis Henkin, *How Nations Behave* (Colombia University Press 1979) 47.

compliance is more often the result of ambiguity, capacity constraints, or unforeseen circumstances rather than strategic bad faith. Treaties, under this model, are not rigidly coercive instruments but products of negotiated accommodation, reflecting an attempt to reconcile diverse national interests through legal form.[200] However, the TCA was negotiated under significant political and temporal pressure, with asymmetrical bargaining positions.[201] In this context, it is plausible that the UK accepted a relatively weak and ambiguously worded human rights clause as a pragmatic concession, calculating that the clause's historical lack of enforcement in other EU external agreements, and the high threshold for triggering sanctions, would limit any practical constraint. As such, the human rights clause could be seen less as a normative commitment than as a diplomatic artefact of political expediency.

Compliance theory highlights that the motivations driving a state to agree to treaty provisions during negotiations may not align with the incentives it faces when it comes to implementing those commitments in practice.[202] States, particularly those that made concessions during bargaining, may later seek to evade obligations that prove politically costly or legally inconvenient. This is illustrated by the UK's series of legislative measures post-Brexit, that restrict asylum access, criminalise irregular entry, and restrict judicial scrutiny, in response to small boat Channel crossings. A human rights-based approach to small boat Channel crossings, consistent with the human rights values articulated in Article 763 TCA is not on the policy agenda of the UK government.

Nonetheless, even under conditions of weak enforceability, compliance theory suggests that states do not negotiate international agreements expecting to breach them in routine circumstances.[203] Rather, the UK has rationalised non-compliance with human rights norms and the human rights clause of the TCA through the invocation of exceptional "crisis" whether legal, political, or moral that purportedly justify derogation. The UK's portrayal of small-boat Channel crossings as a national emergency and existential threat has enabled the Government to frame human rights violating measures as necessary, rather than

[200] Chayes and Chayes (n 164).
[201] Wachowiak and Zuleeg (n 167).
[202] George W Downs, David M Rocke and Peter N Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50(3) International Organisation 379.
[203] Henkin (n 199).

discretionary.[204] This crisis construction serves not only as domestic political justification but also as a potential shield against external legal critique.

Another important element in understanding compliance lies in the strategic use of ambiguity. Broad and indeterminate treaty language, such as references to "respect for human rights" without specification, provides states with interpretive flexibility.[205] This latitude enables states, such as the UK to argue that controversial measures fall within the scope of compliance, especially when cloaked in humanitarian aims, such as reducing exploitation through people smuggling. Ambiguity coupled with a high threshold for action reduces the risk of triggering a response from the EU. It functions as both a legal shield and a diplomatic buffer, enabling states to navigate tensions without open defection.

Finally, the TCA established a more distant relationship between the EU and the UK, as third country rather than a EU Member State. Norm diffusion theory, rooted in international relations and socio-legal scholarship, explains how legal norms such as human rights commitments embedded in trade agreements can influence state behaviour beyond formal enforcement mechanisms.[206] This framework is particularly relevant given that the human rights clauses in EU third country trade agreements rely more heavily on normative pressure and institutional dialogue than on direct sanctions.[207] However, the architecture of the TCA limits the influence of this theory, as very little space is left for dialogue outside of the formal mechanisms. This reflects the reality and nature of the economic and political disintegration caused by Brexit.

The distant relationship (partially formed by hostile negotiations) raises doubts regarding the TCA's effectiveness, sustainability and legitimacy in respecting normative commitments.[208] The UK's growing divergence from EU norms, particularly in rights protection, underscores

[204] Steph Spyro, 'Fresh Crisis for Keir Starmer as Minister Makes Bombshell Migration Statement' (*MSN*, 2 July 2025) <www.msn.com/en-gb/travel/news/fresh-crisis-for-keir-starmer-as-minister-makes-bombshell-migration-statement/ar-AA1HOMQv> accessed 2 July 2025.
[205] Chayes and Chayes (n 164).
[206] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) International Organisation 887.
[207] 'EU Trade Agreements and the Duty to Respect Human Rights Abroad' (Centre for the Law of EU External Relations 2020) 8, 9.
[208] Wachowiak and Zuleeg (n 167) 155.

the fragility of the human rights clause and its limited practical impact in the absence of robust institutional oversight.

Chapter 4: Human Rights Clauses and Other EU Agreements

This chapter considers case studies of EU trade agreements, analysing the contents and form of the human rights clause in order to inform the potential for EU influence with the human rights clause of the TCA. It assesses possibilities for influence outside of formal enforcement mechanisms, such as human rights dialogue. Due to the stark choice of suspension or termination within the human rights clause of the TCA, an examination of the threshold of third country human rights violations needed to trigger EU action is also conducted.

4.1 EU-Vietnam

Since 2002, the European Union and Vietnam have engaged in formal human rights dialogues.[209] Despite this longstanding engagement in discursive human rights, the human rights situation in Vietnam has deteriorated, particularly following the ratification of the EU-Vietnam Free Trade Agreement (EUVFTA).[210] Numerous credible reports point to ongoing violations of the rights to freedom of expression, association, assembly, movement, and religion or belief.[211] The United States Department of State 2023 Country Report also identified credible allegations of arbitrary or unlawful killings, arbitrary arrests, and the use of torture and other cruel, inhuman, or degrading treatment by the Vietnamese authorities.[212] These widespread human rights concerns underscore the importance of examining how the EU-Vietnam Partnership and Cooperation Agreement (PCA) and subsequent EUVFTA were

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[209] David Hutt, 'Are EU-Vietnam Human Rights Talks A Lost Cause?' (*DW*, 07 November 2024) <www.dw.com/en/are-eu-vietnam-human-rights-talks-a-lost-cause/a-69631970>

[210] 'Joint NGO Letter on EU-Vietnam Free Trade Agreement' (*Human Rights Watch,* 04 November 2019) <www.hrw.org/news/2019/11/04/joint-ngo-letter-eu-vietnam-free-trade-agreement> accessed 01 July 2025.

[211] Ibid.

[212] Bureau of Democracy, Human Rights, and Labour, 'Country Reports on Human Rights Practices: Vietnam' (US Department of State April 2022) www.state.gov/reports/2022-country-reports-on-human-rights-practices/vietnam/ accessed 01 July 2025.

structured and justified, particularly in light of their stated human rights obligations and the inclusion of human rights conditionality mechanisms.

In 2016, the European Ombudsman concluded that the European Commission's refusal to carry out *a priori* human rights impact assessment of the envisaged EU-Vietnam FTA amounted to maladministration, particularly given the known human rights risks in Vietnam.[213] Since then, the European Parliament has adopted multiple resolutions expressing deep concern over the Vietnamese government's continued violations of international human rights norms. [214]

The normative basis for EU-Vietnam relations was formally codified in the Framework Agreement on Comprehensive Partnership and Cooperation between the EU and Vietnam (PCA), which entered into force in 2016.[215] Article 1(1) of the PCA establishes a foundational essential elements clause:

> "The Parties confirm their commitment to […] the respect for democratic principles and human rights, as laid down in the UN General Assembly Universal Declaration of Human Rights and other relevant international human rights instruments to which the Parties are Contracting Parties, which underpin the internal and international policies of both Parties and which constitute an essential element of this Agreement."[216]

This formulation captures a broad conception of human rights obligations. By referring to instruments to which the parties are "Contracting Parties", the clause encompasses not only ratified treaties but also those which the parties have signalled a legal intention to be bound by, even if not yet in force.[217] The PCA also includes a positive obligation to comply with the

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[213] O'Reilly, *Draft Recommendation in the Inquiry into Complaint 1409/2014/JN against the European Commission* (Case 1409/2014/MHZ, European Ombudsman 26 March 2015).
[214] See: European Parliament resolution of 9 June 2016 on Vietnam [2016] OJ C 86/122; European Parliament resolution of 14 December 2017 on freedom of expression in Vietnam, notably the case of Nguyen Van Hoa [2017] OJ C 369/73; European Parliament resolution of 15 November 2018 on Vietnam, notably the situation of political prisoners (2018/2925(RSP).
[215] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (PCA) [2016] OJ L 329/8.
[216] Ibid art 1(1).
[217] VCLT (n 154) art 2(1)(f).

norms included in the Agreement, requiring Parties to take general or specific measures to fulfil their obligations.[218]
Should either party breach these obligations, the PCA allows for the adoption of "appropriate measures".[219] Unlike the TCA, which limits such measures to breaches that "threaten international peace or security", the PCA permits measures for any failure to fulfil its obligations. In cases of a "material breach" of the essential elements' obligations of the Agreement, the PCA allows for consultations within the Joint Committee for up to 30 days to seek an acceptable solution.[220] The TCA's iteration contains a significantly higher standard than that which applies to the adoption of appropriate measures under agreements with other countries, such as Vietnam. The PCA does not, however, provide for suspension as a remedy; this is left to linked agreements, such as the EVFTA, which contain separate non-fulfilment clauses.

The EUVFTA, which entered into force on 1 August 2020, imports the PCA's human rights conditionality by reference, thereby binding trade relations to compliance with the essential elements clause. [221] In the lead-up to its ratification, Vietnam ratified core International Labour Organization (ILO) conventions as a gesture towards meeting its international obligations and introduced a Labour Code (2019) aimed at enhancing labour rights.[222]

Nonetheless, following the EVFTA's entry into force, there has been a marked escalation in state repression. According to joint reports by FIDH and the Vietnam Committee on Human Rights (VCHR), there has been a sharp increase in the suppression of human rights defenders and independent civil society actors. In their words:

> "Since the last EU-Vietnam human rights dialogue, which was held in February 2020, an alarming escalation of arrests, unfair trials, harsh prison sentences, and

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[218] PCA (n 215) art 57(1).
[219] Ibid art 57(2).
[220] PCA (n 215) Annex: Joint Declaration on Article 57 EU-Vietnam PCA.
[221] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam [2020] OJ L 186/3, preamble, art 17, ch 13.

[222] Nguyen Manh. Hung and Nguyen Mai Ahn, 'Protecting Human Rights Through Trade: Lessons From the EU-Vietnam Free Trade Agreement' (2025) 15(2) TalTech Journal of European Studies 88.

> physical violence against human rights defenders, bloggers, environmental rights leaders, and members of civil society has continued unabated."[223]

These abuses have unfolded despite the EU's legal obligation under Article 21(3) TEU not only to avoid worsening human rights conditions abroad but to actively seek their improvement.[224] Despite the binding commitment to human rights, the inclusion of a human rights clause in the PCA (and subsequently EUVFTA) has failed to curb the increasingly authoritarian action of the Vietnamese government.

Amidst escalating violations, the EU has maintained its commitment to structured engagement with Vietnam through institutionalised human rights dialogues.[225] EU officials have reiterated that, notwithstanding criticisms regarding the efficacy of these dialogues, continued engagement remains preferable to disengagement.[226] The PCA and EVFTA provide a legal framework enabling the EU to pursue "appropriate measures" in response to breaches of the essential elements clause, though to date these provisions have not been engaged with in a meaningful manner. Civil society organisations, including Human Rights Watch and FIDH, have urged the EU to operationalise the conditionality mechanisms embedded in its agreements and to condition trade cooperation on measurable human rights benchmarks.[227]

The case of EU-Vietnam highlights that dialogue will not prevent human rights abuses from taking place. While the EU has expressed "deep concern" in international fora and continues to urge Vietnam to release political prisoners and ensure civil society participation, unless the EU is prepared to make the benefits of its trade agreements conditional on verified human rights progress, its human rights clause engagement strategy risks being perceived as symbolic rather than substantive.

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[223] 'Briefing Paper: Vietnam: Crackdown on Civil Society Intensifies*'* (FIDH and VCHR 2022).
[224] TEU (n 14) art 21(3).
[225] For example, Peter Stano and Xavier Cifre Quatresols, 'EU-Viet Nam: Annual Human Rights Dialogue Takes Place in Brussels' (*EEAS Press Team,* 04 July 2024) <www.eeas.europa.eu/eeas/eu-viet-nam-annual-human-rights-dialogue-takes-place-brussels_en> accessed 01 July 2025.
[226] Ibid.
[227] 'Human Rights Watch Submission to the European Union Ahead of the EU-Vietnam Human Rights Dialogue' (Human Rights Watch 2025) <www.hrw.org/news/2025/06/20/human-rights-watch-submission-to-the-european-union-ahead-of-the-eu-vietnam-human> accessed 01 July 2025.

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4.2 EU-ACP

In assessing the potential influence of the human rights clause in the TCA on the UK's Channel crossings policies, it is instructive to examine the most frequently invoked precedent: the human rights clause under the Cotonou Agreement.[228] This agreement, concluded between the EU and 79 ACP countries in 2000, provides the most significant body of practice concerning the activation of 'appropriate measures' in response to human rights violations.[229] Though the Cotonou Agreement expired in 2023 and has been succeeded by the OACPS- EU Partnership Agreement (also known as the Samoa Agreement), the human rights clause it contained remains unchanged, underscoring its continuing relevance in EU external relations.

The Cotonou Agreement stipulates that:

> "Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement".[230]

This characterises human rights as a foundational condition of the agreement, capable of triggering responses in cases of a breach. It also states that these areas will be an important subject for the political dialogue between the parties, which will conduct regular assessment of the changes made and continuity of the progress achieved.[231]

The enforcement mechanisms within the Cotonou Agreement are notably more structured that the TCA. Article 8 mandates regular comprehensive political dialogues between the EU and ACP countries in order to strengthen cooperation between the parties and prevent situations arising where further action under the Agreement may be needed.[232] However, if all possible options for political dialogue under Article 8 have been exhausted, Article 96

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[228] Bartels (n 18) 6.
[229] Ibid.
[230] Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States of the Other Part (Cotonou Agreement) [2010] OJ L 287/04, art 9(2).
[231] Ibid art 9(4).
[232] Cotonou Agreement (n 230) art 8.

outlines the process of consultation and appropriate measures regarding failure to fulfil obligations stemming from the respect for human rights, democratic principles, and the rule of law, as required by Article 9(2).[233] Consultations are aimed at finding a solution acceptable to both parties and can last up to 120 days. If these consultations do not lead to an acceptable solution, appropriate measures can be taken with the view of them being revoked as soon as the reasons for taking them have ceased.[234] Cases of "special urgency" are considered to be exceptional cases of serious violations of one of the essential elements that require an immediate reaction from the other party and are not subject to the requirement of consultations.[235] Appropriate measures are considered to be proportionate measures taken in accordance with international law, which cause the lease disruption to the application of the Cotonou Agreement.[236] Termination of the Agreement is not included as an enforcement option, unlike like TCA and suspension is mentioned on as a measure of last resort.[237] As illustrated, the human rights clause and mechanism is a lot more developed and defined than the one included in the TCA.

Between 2000 and 2014, the EU triggered the Article 96 consultations 16 times for situations occurring in the ACP states.[238] In each instance, a deterioration of human rights was accompanied by broader political instability, such as the instigation of a *coup d'état*, flawed elections and post-electoral violence or the collapse of rule of law institutions.[239] Crucially, in this assessment no action was taken by the EU solely on the basis of human rights violations, highlighting the political selectively embedded in the enforcement practices of human rights clauses in EU trade agreement.

This practice was reaffirmed in the post-2014 period, whereby only one instance occurred where the Cotonou Agreement human rights clause was triggered, concerning Burundi.[240] Following widespread deterioration and repression in 2015 and 2016, the EU suspended

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[233] Ibid art 96.
[234] Cotonou Agreement (n 230) art 96(2)(a).
[235] Ibid art 96(2)(b).
[236] Cotonou Agreement (n 230) art 96(2)(c).
[237] Ibid.
[238] Bartels (n 18).
[239] Prickartz and Staudinger (n 151) 13.
[240] Council Decision (EU) 2016/394 of 14 March 2016 concerning the conclusion of consultations with the Republic of Burundi under Article 96 of the [Cotonou Agreement] [2016] OJ L 73/90.

direct financial support to the Burundian government.[241] This was following UN investigations which found that gross human rights violations, primarily committed by agents of the state, had and continued to take place.[242] The human rights violations were found to be systematic, patterned and committed with pervasive impunity, with arbitrary deprivations of life, enforced disappearances, torture, arbitrary detention on a massive scale and non-existent freedom of expression, association and assembly.[243] While action was taken by the EU through the formal human rights clause mechanism, the termination of appropriate measures took place in 2022, and was criticised as premature by 43 Members of the European Parliament in a letter to the High Commissioner.[244] The reinstation of financial aid took place despite the grave political and human rights situation in Burundi, with arbitrary arrests and extrajudicial killings continuing apace.[245]

Despite the comparatively high use of the Cotonou Agreement human rights clause mechanisms, the EU's selective enforcement has attracted criticism. Human rights violations that include women, minorities or children have not alone reached the standard that the EU deems severe enough to trigger appropriate measures.[246] The pattern of dependence on wider political instability, undermines the EU's apparent commitment to the universality and indivisibility of human rights, a principle it consistently articulates in its external action rhetoric, as set out in Article 21 TEU.[247] The failure to respond to violations beyond those involving political instability raises questions about the credibility and coherence of its normative agenda. Moreover, following the EU's practice, human rights violations are not a standalone criterium for triggering the human rights clause in its trade agreements with third countries. The uneven invocation of the human rights clause raises questions about the EU's credibility of a normative actor, particularly when this practice is benchmarked against its

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[241] Ibid.
[242] UN Human Rights Council, 'Report of the United Nations Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council Resolution S-24/1' (20 September 2016) A/HRC/33/37.
[243] Ibid.
[244] Council Decision (EU) 2022/177 of 08 February 2022 repealing, on behalf of the Union, Decision (EU) 2016/394 [2022] OJ L 29/6; Council Decision (EU) 2022/178 of 08 February 2022 repealing, on behalf of the Representatives of the Governments of the Member States, meeting within the Council, Decision (EU) 2016/394 [2022] OJ L 29/8; Bartels (n 18) 17.
[245] Burundi: Events of 2023' (Human Rights Watch: World Report 2024) <www.hrw.org/world-report/2024/country-chapters/burundi> accessed 01 July 2025.
[246] Prickartz and Staudinger (n 151).
[247] TEU (n 14) art 21(3).

founding values of " human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."[248]

Therefore, the threshold established for EU to take action under a human rights clause is extremely high and thus preclude the UK's asylum policies on small boat Channel crossings. This finding does not deny that human rights are violated by the policies but highlights the inadequacy and inoperability of the EU's human rights clause to ensure respect for human rights.

4.3 EU-Israel

A valuable comparative case to include is Israel, as it highlights the political discretion that effect the enforcement of human rights clauses and the extent to which they can be used to influence policy.

The legal basis for the EU's trade relations with Israel is the EU-Israel Association Agreement (EUIAA), which entered into force in June 2000.[249] The EU-Israel Action Plan, adopted in 2005 and repeatedly extended, implemented the EUIAA.[250] The Action Plan expired in January 2025, and has not yet been renewed due to a lack of EU investigation in alleged human rights abuses.[251] Article 2 of the EUIAA states:

> "Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement"

As with the Cotonou Agreement, the EUIAA also creates the mechanism for political dialogue, however, in the case of the EUIAA, Article 4 emphasises cooperation for peace,

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[248] TEU (n 14) art 2.
[249] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part (EUIAA) [2000] OJ L 147/3.
[250] Carmen-Cristina Cîrlig, *Review of the EU-Israel Association Agreement* (PE 772.892, European Parliamentary Research Service, 12 June 2025).
[251] JNS Staff, 'The Netherlands Moves to Veto Extension of Israel-EU Cooperation Agreement' (*JNS,* 07 May 2025) <www.jns.org/the-netherlands-moves-to-veto-extension-of-israel-eu-cooperation-agreement/> accessed 01 July 2025.

security and democracy.[252] As with the other EU trade agreement discussed thus far, the consequence of making human rights an essential element enables either party to take appropriate measures, which include the suspension of the agreement.[253] However, the human rights clause of the EUIAA does not contain any explicit provisions about the grounds required for its activation, leaving the Parties with a wide margin for interpretation and a lower threshold than the TCA.[254]

In May 2025 the EU launched a formal review of Israel's compliance with Article 2 EUIAA.[255] This step was prompted by growing concerns among EU Member States, led by the Netherlands, about Israel's blockade of humanitarian aid into Gaza and the newly proposed system of aid distributed which has been criticised as incompatible with the international humanitarian principles of neutrality, impartiality and independence.[256] The review of Israel's compliance with Article 2 EUIAA is significant; it marks the first time the EU has formally activated or begun a process that could lead to suspension under the EUIAA framework. Despite longstanding human rights concerns regarding Israel's actions in Palestine, the EU has previously avoided invoking the human rights clause of the EUIAA, making the 2025 review a significant political and legal precedent.

According to Amnesty International's 2024 report, Israel's conduct during its military operations in Gaza may amount to serious violations of international humanitarian law and potentially to genocide; a crime against humanity.[257] The report identifies a pattern of indiscriminate and disproportionate attacks resulting in mass civilian casualties and widespread destruction of civilian infrastructure. Among the most egregious allegations are deliberate attacks on densely populated areas, the use of heavy explosive weapons in civilian settings, and repeated strikes on humanitarian and medical facilities.[258] The Amnesty report also documents Israel's continued obstruction of humanitarian aid, including food, medical supplies and fuel to Palestinians. This may constitute collective punishment, a violation of

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[252] EUIAA (n 249) arts 3 and 4.
[253] Ibid art 79.
[254] EUIAA (n 249).
[255] Cîrlig (n 250).
[256] JNS (n 251).
[257] 'Israel/OPT: 'You Feel Like You Are Subhuman': Israel's Genocide Against Palestinians in Gaza' (Amnesty International 2024).
[258] Ibid.

Article 33 Fourth Geneva Convention.[259] These acts may meet the threshold for crimes against humanity as defined under Article 7 Rome Statute of the International Criminal Court, particularly the concepts of "extermination", "persecution against any identifiable group" and "other inhumane acts intentionally causing great suffering" committed as part of a widespread or systematic attack against a civilian population.[260] Amnesty International further contends that these actions were not isolated by formed part of consistent pattern of conduct characterised by impunity and disregard for civilian life, echoing findings previously raised by a UN-mandated commission.[261]

The seriousness of these allegations underscores the necessity for the EU to review Israel's compliance with Art 2 EUIAA. However, the review is only linked to Israel's obstruction of humanitarian assistance.[262] If the review concludes that Israel has breached Article 2 EUIAA, the most likely outcome is that the Commission makes a proposal to the Council to open consultations with Israel to seek an acceptable solution to the issue, in accordance with Article 79 of the EUIAA.[263] If a solution is not found, the EU can take appropriate measures through a Council decision, reflecting the presence for measures that would least disturb the functioning of the agreement. In cases of "special urgency" appropriate measures may be adopted without prior consultation, which includes the option of suspension of the Agreement.[264]

Suspension of international treaties is governed by Article 218(9) of the Treaty on the Functioning of the EU.[265] If the Council receives a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, it shall adopt a decision suspending the application of an agreement.[266] For the suspension of bilateral

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[259] Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 33.
[260] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 01 July 2002) 2187 UNTS 90, art 7.
[261] UN Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel' (18 June - 12 July 2024) UN Doc A/HRC/56/26.
[262] Anitta Hipper and Anouar el Anouni, 'Foreign Affairs Council: Press Remarks by High Representative Kaja Kalla After the Meeting' (*EEAS Press Team,* 20 May 2025) <www.eeas.europa.eu/eeas/foreign-affairs-council-press-remarks-high-representative-kaja-kallas-after-meeting-2_en> accessed 01 July 2025.
[263] Cîrlig (n 250).
[264] EUIAA (n 249) art 75.
[265] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47, art 218(9).
[266] Ibid.

cooperation in specific areas, such as trade, research funding programmes or youth programmes such as Erasmus+, the Council has a threshold of a qualified majority.[267] These steps would serve both as a symbolic and substantive assertion of the EU's stated human rights commitments, but also expose the Union to significant internal and external political pressures. However, Article 218(9) TFEU requires the Council to act unanimously for association agreements,[268] which makes the complete suspension of the EUIAA challenging, due to the EU Member States mixed opinions on Israel's actions.

The EU has never suspended or terminated an agreement on the grounds of the essential elements clause being breached.[269] The EU's review of Israel's action on humanitarian aid into Gaza, while potentially historic, illustrates the criticised inconsistency in applying its human rights conditionality. As previously noted, the EU has only so far invoked the human rights clause of its third country trade agreements under the Cotonou Agreement. Article 96 Cotonou Agreement has only been applied when human rights violations occur *in conjunction with* violent government overthrows and irregular elections. The hesitation of the EU to act against partner countries like Israel, despite robust evidence of human rights abuses undermines the EU's credibility as a normative power and the effectiveness and potential influence of human rights clauses.

4.4 Barriers to Influence

While the human rights clause in the TCA provides a formal basis for EU influence, a range of legal, political, and structural barriers significantly constrain the EU's ability or willingness to activate this mechanism in response to the UK's Channel crossing policies.

4.4.1 Political and Economic

Despite the formal embedding of human rights as an essential element of the TCA, the EU is politically and economically disincentivised from invoking the clause to influence the UK's policies on Channel crossings. This reluctance stems in large part from the UK's status as a

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[267] Cîrlig (n 250).
[268] TFEU (n 265) art 218(9).
[269] Cîrlig (n 250) 2.

major strategic and economic partner. After the United States of America and China, the UK is the EU's third-largest trading partner globally, accounting for approximately 10% of the EU's total trade in goods in 2023.[270] Disruption to this relationship would carry significant economic consequences for both sides, particularly given the concentrated supply chain integration in sectors such as automotive, pharmaceuticals, and aerospace.[271] The TCA was designed to rebuild an economic relationship post-Brexit by maintaining tariff- and quota-free trade, conditional on mutual respect for core values, including human rights. However, invoking Article 772 TCA to suspend or terminate aspects of the TCA due to the UK's Channel crossings policies risks jeopardising the broader economic and political cooperation the TCA was created to facilitate.

The EU has historically exercised political restraint in activating human rights clauses against economically powerful or geopolitically strategic partners, as seen with the approach taken with Israel. Unlike actions taken under the Cotonou Agreement against economically smaller developing countries for democratic backsliding and human rights violations, no comparable measure has ever been adopted against a Western European country.[272] Even in spite the extremely serious human rights violations committed by Russia since 2014, the EU-Russia Partnership and Cooperation Agreement (EURPCA) has not been suspended or terminated.[273] This is reportedly because terminating the EURPCA would require diplomatic engagement with Russia in a period where the EU is diplomatically isolating Russia, as formally terminating the EURPCA would have required interaction that ran counter to the EU's political strategy of disengagement.[274] The EU has ended all cooperation with Russia and put in place CFSP sanctions, so suspension or termination would only have symbolic meaning.

However, this shows that the EU's policy of enforcement of human rights clauses is secondary to broader foreign policy objectives. The EU's approach reflects a multifaceted strategy: human rights clauses are included in third country trade agreements to signal normative compliance with the EU's own human rights obligations in its external action, but

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[270] 'Trade and Economic Security: United Kingdom' (*European Commission*) <policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-kingdom_en> accessed 03 July 2025.
[271] Ibid.
[272] Cîrlig (n 250).
[273] Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L 327/3.
[274] Bartels (n 18) 20.

substantive enforcement of the clause is selectively by the EU pursued when the political and economic stakes are low. In high-stakes or adversarial contexts, the EU prefers to rely on alternative instruments such as CFSP sanctions. Individual sanctions have been criticised as tokenistic, enabling the appearance of action while evading substantial measures.[275] Sanctions imposed on individuals *accused* of corruption or human rights abused have also been challenged in the CJEU for not upholding rights such as fair hearing, effective judicial review, and property protection that have been enshrined in the CFREU.[276] This inconsistency undermines the credibility and effectiveness of human rights clauses, revealing them as tools of diplomacy rather than legal mechanisms of accountability.

Therefore, the precedent suggests that the EU's use of human rights clauses is selectively shaped by realpolitik rather than legal consistency. The discretion of the TCA's human rights clause allows for the EU to exercise pragmatic caution in the post-Brexit landscape, consistent with the EU's desire to maintain political stability in the European neighbour, including peace in Northern Ireland. Suspending or terminating parts of the TCA in response to the UK's human rights violations, would reopen political wounds caused by Brexit, which adds to the EU's hesitancy to escalate disputes with the UK.

Furthermore, the UK's Channel policies are politically framed as central to domestic sovereignty and border control: principles that underpinned Brexit itself. For the EU to challenge these polices would be construed as external interference in sovereign affairs in the UK, reinforcing Eurosceptic narratives and potentially undermining political actors within the UK who favour EU alignment. This would make EU intervention not only diplomatically sensitive but counterproductive to the EU's aims. Thus, while the TCA permits human rights-based measures, the political and economic stakes of triggering such mechanisms significantly dilute the influence of the human rights clause in practice, especially in areas as politically charged as Channel crossings.

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[275] Philip Alston, 'The Criminalisation of Human Rights' (*Open Global Rights* 06 March 2024) <www.openglobalrights.org/criminalization-human-rights/> accessed 02 June 2025.
[276] Case C-402/05 P *Kadi v Council and Commission* ECR I-6351.
Case C-584/10 P, C-593/10 P and C-595/10 P Commission and Others v Kadi ECLI:EU:C:2013:518.

4.4.2 Institutional Limitations

It is not only the political and economic limitations that constrain the EU's potential influence on the UK. The architecture of the TCA, shaped as it was by the fraught EU-UK negotiations, lacks a structured human rights or political dialogue mechanism. Unlike many of the EU's trade agreements with third countries, such as the expired Cotonou Agreement or the EU-Vietnam PCA, the TCA does not provide for any dedicated fora where human rights can be regularly raised, discussed and addressed outside of crisis scenarios. In other EU trade agreements, human rights dialogues can serve as institutionalised space for the EU to express concerns over human rights violations in a manner that is consistent and non-escalatory, a gentle exertion of normative pressure.[277] This is a departure from the EU's standard human rights clause model and reflects the British political sensitivities surrounding sovereignty and judicial oversight in the UK's post-Brexit position.

Additionally, the TCA lacks intermediate or graduated enforcement tools tailored to human rights breaches. Apart from the 30-day Partnership Council consultation, the only measure explicitly linked to a violation of the essential elements clause is the right to suspend or terminate the TCA in whole or in part. This is a dramatic all-or-nothing structure which contrasts with other EU trade agreements which often provide more options for action under the ambit of appropriate measures. Appropriate measures are generally required to be proportionate, in accordance with international law and cause the least disruption to the agreement as possible. [278]This allows the possibility of the EU to respond with more flexibility to human rights violations without having to sever the bilateral relationship. The TCA's omission of such as mechanism makes the human rights clause exceptionally difficult to operationalise in practice: the EU must either tolerate systemic violations or risk jeopardising economic and political cooperation by resorting to the option of suspension.

4.4.3 EU Inconsistency: France's Violent Border

The EU's ability to influence the UK with regards to its policies on Channel crossings is significantly weakened by actions of the own Member States. In the context of Channel crossings, the conduct of the French authorities has been met with condemnation from NGOs

[277] Bartels (n 149) 14.
[278] Bartels (n 20).

and civil society.[279] Increased securitisation of the UK-France border has increased the risk of serious injuries and death: the most frequent deadly incidents involving small boat crossings occur during embarkation in France due to police violence.[280] The French police have also been recorded stabbing and slashing inflatable boats in shallow water as people boarded them, compounding the chances of overcrowding and panic during crossing attempts.[281] The UK recently announced that they were responsible for changing French rules, permitting intervention in French water to prevent boat crossings.[282] The police regularly use tear gas against people hoping to cross the Channel, including families and very young children, in an attempt to disperse them from the border.[283] These violent tactics persist as a practice, and are partially funded by the UK government.[284]

Despite these alarming human rights violations instigated by French authorities, the EU has remained largely silent. Highlighting the misconduct of an EU Member State would risk undermining the EU's internal cohesion and exposing the inconsistency between the EU's human rights rhetoric and reality. In reality, Article 3 ECHR jurisprudence, mirrored by Article 4 CFREU has long established that treatment does not need to be physical torture to constitute a violation.[285] A state's action or inaction which places an individual in a situation where they are at real risk of suffering treatment contrary to Article 3 ECHR can amount to inhuman or degrading treatment.[286] When the French police actively damage inflatable boats already in the water, this endangers the (relative) safety of those people and demonstrably places people in life-threatening situations. This state-led exposure to poor conditions, such as the cold ocean water, especially coupled with the degrading policy of 'Zero Point of

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[279] Julia Pascual and Thomas Statius, 'French Police Use Aggressive Techniques to Stop Migrants from Crossing English Channel' (*Le Monde,* 23 March 2024) <www.lemonde.fr/en/france/article/2024/03/23/french-police-use-aggressive-techniques-to-stop-migrants-from-crossing-english-channel_6648196_7.html> accessed 27 June 2025.
[280] ''The Deadly Consequence of the New Deal to 'Stop the Boats''' (Alarmphone 2024) <alarmphone.org/en/2024/01/28/the-deadly-consequences-of-the-new-deal-to-stop-the-boats/> accessed 27 June 2025.
[281] MacTaggart (n 65) 41.
[282] Holly Bancroft, 'We Have Persuaded France to Change Rules to Stop Migrants Reaching Britain, Cooper Says' (*The Independent*, 29 April 2025) <www.independent.co.uk/news/uk/politics/small-boat-migrants-yvette-cooper-today-b2741349.html> accessed 27 June 2025.
[283] Ibid 39.
[284] Ibid.
[285] *MSS* (n 31).
[286] Ibid.

Fixation' may amount to a violation of Article 3 ECHR. Thus, police action in France may be violating human rights to stop people from trying to cross the Channel.

Furthermore, every State requires ships flying their flag to provide assistance to any person found at sea.[287] The French action of damaging vessels that have already been set afloat, particularly small boats, such as inflatable dinghies, violates this duty. Rather than engaging in search and rescue missions, these actions create state-created risk, violating France's international human rights obligations. EU Member States including France, are bound by the CFREU. The CJEU has ruled that human rights obligations apply extraterritorially in certain maritime contexts, including European Border and Coast Guard Agency (Frontex) operations. In C-355/10 *Parliament v Council,* the CJEU annulled provisions of a Council Decision that set out additional rules to the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex.[288] The CJEU held that the maritime surveillance regime failed to guarantee adequate safeguards for intercepted individuals and reaffirmed that EU operations at sea must guarantee fundamental rights, such as the right to asylum.[289] France, as an EU Member State, is required to respect Charter rights during search and rescue activities involving coordination with UK authorities.

In this context, France should be held responsibility for its action on the UK-French border that deliberately creates a risk of harm to people who attempt to cross the Channel. The UK's financing and joint coordination of the French border operations adds further layer of complicity, but the primary legal responsibility rests with the French authorities whose actions endanger life and dignity. These practices reflect a broader erosion of the duty to protect asylum seekers at Europe's borders and calls into question the coherence of the EU's external human rights policies, when itself has Member States who do not fulfil their human rights obligations.

4.4.4 EU Inconsistency: Greece's Systematic Pushbacks

The recent ECtHR judgment of *ARE v Greece* recognised that there are systemic human rights violations, committed by an EU Member State conducted at the external borders of the

[287] UNCLOS (n 106) art 98(1).
[288] Case C-355/10 *European Parliament v Council* ECLI:EU:C:2012:516, para 84.
[289] Ibid paras 49 and 77.

EU.[290] As with France's actions, this judgment undermines the EU's normative credibility to invoke human rights clauses in trade agreements such as the TCA.

The case concerned a Turkish national who fled Türkiye, and irregularly entered Greece via a dinghy to cross the Evros river. While in Greece, she was detained, denied access to asylum procedures and forcibly returned to Türkiye by small boat, in a practice known as a pushback. The ECtHR found that Greece had committed multiple violations of the ECHR under Articles 3, 5 and 13.[291] Most importantly, the ECtHR held that there were strong indications of a systematic practice of foreign nationals conducted by Greek authorities at the Greece-Türkiye border, supported by reports from the UN, Council of Europe and national institutions, such as the Greek National Commission for Human Rights.[292]

These findings of the ECtHR significantly undermine the EU's ability to use the human rights clause of the TCA in respect to the UK government's Channel crossing policies. Systematic pushbacks, informal detention and the denial of access to asylum procedures by an EU Member States amounts to judicially recognised institutionalised human rights violations and violence at the EU's external border. If the EU fails to hold Member States like Greece accountable, it risks accusations of double standards if it were to apply pressure to the UK for its border policies. This further weakens the extent to which the EU can use human rights conditionality in the TCA for Channel crossings policies.

4.4.5 EU Inconsistency: Plans of Externalisation

The European Union and its Member States have increasingly turned to externalised asylum procedures,[293] such as the creation of offshore asylum processing centres shifting the responsibility for asylum seekers to third countries, often with weaker legal safeguards, in return for EU funding.[294] The shifting of a state's border is used to prevent people seeking

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[290] *ARE v Greece* App No 15783/21 (ECHR 07 January 2025).
[291] Ibid.
[292] *ARE* (n 290) para 227.
[293] Offshore processing centres are not the only externalisation policy, yet it is the most blatant example of states attempting to shift accountability for people seeking asylum. Other externalisation policies include carrier sanctions, maritime interdiction operations and pushbacks.
[294] Salvatore Fabio Nicolosi, 'Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law' (2024) 71 Netherlands International Law Review 1.

asylum from reaching the territory of states to apply for.[295] However, the transfer of people seeking asylum to third countries does not exonerate the EU and its Member States from the infringements of human rights that may take place on the territory of third countries.[296] The growing trend of EU asylum externalisation raises serious concerns about compliance with human rights obligations and significantly undermines the EU's credibility and leverage if it was to invoke the human rights clause of the TCA.

A prominent example of an EU Member State attempting to externalise its asylum processing is the bilateral protocol signed between Italy and Albania, finalised in 2024.[297] Up to 36,000 people per year (theoretically excluding vulnerable people such as pregnant people and minors) who are deemed to come from safe countries will be taken to and have their asylum claims processed in Albania, under the *de jure* and *de facto* jurisdiction of Italy.[298]

The legal challenges to this Protocol thus far have been significant. Italy has faced substantial questions regarding the Protocol's compliance with the EU asylum *acquis* and fundamental rights guarantees, especially the right to access asylum procedures and the obligations of non-refoulement.[299] It is clear that the Italian-Albanian Protocol has the potential to significantly impact the human rights of people seeking asylum. People will be systemically detained in Albania, leading to the possibility of arbitrary detention, incompatible with secondary EU law on asylum procedures and Articles 5 and 47 CFREU, the right to liberty and an effective remedy and fair trial. Concerning the detention conditions, the detention centres will be managed by a private company already facing accusations and investigations of mismanagement of detention centres for migrants and connections to the Italian mafia.[300]

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[295] Ibid; Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester University Press 2020).
[296] Juan Santos Vara and Laura Pascual Matellám, 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries' in Wybe Douma et al (eds) *The Evolving Nature of EU External Relations Law* (TMC Asser Press 2021).
[297] Protocol Between the Government of the Italian Republic and the Council of Ministers of the Albanian Republic (06 November 2023).
[298] 'What is the Italy-Albania Asylum Deal?' (*IRC*, 15 October 2024) <www.rescue.org/article/what-italy-albania-asylum-deal> accessed 27 June 2025.
[299] Amnesty International Public Statement, 'The Italy-Albania Agreement on Migration: Pushing Boundaries, Threatening Rights' (Amnesty International 2024).
[300] Kristina Millona, 'The Italy-Albania Agreement and the New Frontiers of Border Externalisation' (translation by Nicoletta Alessio, *Melting Pot Europa* 16 May 2024) <www.meltingpot.org/en/2024/05/the-italy-albania-agreement-and-the-new-frontiers-of-border-externalization/#easy-footnote-bottom-5-501341> accessed 28 June 2025.

Due to the external nature of the processing centre, the agreement further fails to import fundamental procedural guarantees enshrined in European law. The European Commission declined the possibility of the extraterritorial application of EU law in 2018, which raises difficulties as to the application of fundamental rights guarantees on Albanian (non-EU) territory.[301] This includes the right to an effective remedy, as guaranteed under Article 47 CFREU and Article 13 ECHR. The removal of people applying for asylum from within the EU, for example, an Italian boat performing search and rescue,[302] to outside of the EU's territory, denies asylum applicants the right to remain in the Member State until a decision has been made on their application. The offshore nature of the Albanian asylum processing centres may undermine the right to an effective remedy if people are unable access to the courts that have jurisdiction over their claims (theoretically Italian), if they lack access to independent legal representation, interpreters or the ability to challenge decisions within a meaningful timeframe.[303] The spatial separation from Italian territory functionally denies and deprives asylum applicants of the ability to enforce their procedural rights in an Italian court. This is compounded by the fact that the nature of offshore detention environments restrict transparency, media access and civil society monitoring, all of which are essential to ensuring procedural fairness.

Despite the legal uncertainties, legal challenges and extraordinary costs, the Italian-Albanian model of offshore asylum processing has been endorsed by the European Commission as a potential model with further EU applications. The President of the European Commission, Ursula von der Leyen said that the EU could build upon models like the Italy-Albania Protocol.[304] Other EU countries such as the Netherlands are now considering the offshoring of people seeking protection.[305] The endorsement of the Italy-Albania Protocol by the EU executive body indicates a broader institutional shift towards legitimising third-country processing within EU asylum policy, effectively encouraging the outsourcing of protection

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[301] Council of the EU, 'The Legal and Practical Feasibility of Disembarkation Options' (Follow-Up to the Informal Working Meeting of 24 June 2018 2018) <commission.europa.eu/publications/commission-contribution-european-council-economic-and-monetary-union-migration-eu-budget-future_en> accessed 28 June 2025.
[302] As in *Hirsi Jamaa* (n 98).
[303] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast) [2013] L 180/60, art 9.
[304] Laura Gozzi, 'Migrant Deportations to Increase, Says EU Chief', (*BBC,* 17 October 2024) <www.bbc.co.uk/news/articles/cx2mzvj4051o> accessed 27 June 2025.
[305] Ibid.

obligations to non-EU states. While framed as a response to irregular migration pressures, this approach erodes the principle of territorial asylum and dilutes the legal accountability for treatment of asylum seekers.

The EU's legitimisation of third-country externalisation models, as exemplified by the Italy-Albania Protocol, complicates its ability to exert influence under the TCA's human rights clause. The UK may justifiably question the consistency and credibility of EU human rights conditionality where the Union itself endorses offshoring policies that potentially breach core human rights standards, including those under the ECHR and CFREU. This undermines the persuasiveness of any EU critique of the UK's own Channel crossing policies by creating a perceived double standard. If the EU tolerates or facilitates the circumvention of territorial asylum rights and procedural safeguards by its Member States, its invocation of the TCA's human rights clause against UK practices may appear selective or politically motivated rather than principled. Consequently, the coherence and enforcement potential of the human rights clause as a mechanism of influence in the TCA becomes weakened, diminishing its ability to substantively influence UK asylum policy choices.

Chapter 5: Conclusion

5.1 Summary of Chapter Findings

This thesis has undertaken a detailed examination of the human rights clause contained in the TCA, focusing on its legal framework, interpretative potential and to what extent the possibility of practical influence on the UK's asylum and migration policies that target Channel crossings in small boats exists.

Chapter 2 set the scene of migration crisis, and provided an analysis of the legislative and policy measures that have been taken in response to people that cross the Channel in small boats. While more extreme legislation, such as the Safety of Rwanda (Asylum and Immigration) Act 2024, seeks to be repealed by the upcoming Border Security, Asylum and Immigration Bill, the legislative trajectory of criminalising the right to seek asylum is deeply at odds with the UK's human rights obligations, and will only lead to more deaths in the Channel.

Chapter 3 clarified the scope and structure of the TCA's human rights clause. While it affirms the commitment of both parties to respect the principles of democracy, the rule of law and human rights, the TCA's architecture avoids any judicial oversight due to the zealous approach of the UK negotiations. Instead, its enforcement is contingent on broader political and diplomatic processes, operating through mechanisms such as suspension or termination of the Agreement in part or whole. The TCA's human rights clause situates human rights breaches as a potential ground for these mechanisms but allows for political discretion rather than binding enforcement mechanisms.

Chapter 4 broadened the analysis by examining other EU third country trade agreements and their use of the human rights clause. The PCA established regular human rights dialogues, and the EU remains engaged despite increasing repression by the Vietnamese government. Analysis of the Cotonou Agreement clearly established what will trigger EU action under the human rights clause. Substantially, a failure to fulfil an essential element requires rising political instability coupled with either electoral violence and/or sustained and widespread human rights violations. The EU is more likely to take action when the other party is less economically developed or politically sensitive, as highlighted with the exploration of action taken under the EU-Israel trade agreement in response to Israel's genocide of Palestinians in

Gaza. It further compared the EU's own member state asylum policies, looking specifically at France, Greece and Italy that demonstrate that the EU is willing to tolerate the violation of human rights in the name of strong borders. The similarities between the European states action and the UK's Channel policies hugely weakens the extent to which the EU could influence the UK under the human rights clause of the TCA.

5.2 Policy Recommendations

In light of these findings, this thesis advances several interrelated policy recommendations aimed at enhancing the credibility and operational capacity of the TCA's human rights clause.

1. For the TCA's human rights clause to become operable, the standard must be lowered, and a list of procedural triggers should be decided upon. The standard of human rights violation required in the TCA is extremely high, prevents the human rights clause from being able to be used in response to state human rights violations short of a coup d'état. If a human rights clause is not immediately triggered by the commencement of a genocide what will?

2. In conjunction with this, if the TCA's human rights clause is to be a meaningful way of respecting a promoting human rights, an institutional space for human rights dialogue between the EU and the UK should be created.

3. Rather than be presented with the nuclear option, the human rights clause should contain appropriate measures other than suspension or termination. As the EU-UK relationship improves post-Brexit, the introduction of a joint monitoring body with competence to review allegations of systemic human rights breaches is recommended. This would create a platform for civil society input and promote accountability beyond purely diplomatic fora.

4. This thesis also recommends the removal of the two-tier asylum system in the UK. Irregular entry should not be penalised. To meaningfully stop small boat Channel crossings, immediate opening of safe routes to asylum not only in the UK but in Europe. People will continue to die trying to reach safety unless this happens.

5.3 Answer to the Research Question

The central research question guiding this thesis was to what extent could the human rights clause in the TCA influence UK policy on Channel crossings. The evidence presented leads to a measured conclusion: while the clause constitutes a symbolic affirmation of shared values, it lacks the structural and procedural force necessary to shape UK migration policy.

The TCA clause operates as a political safeguard rather than a binding legal instrument. Its invocation depends on diplomatic calculus rather than objective legal thresholds. In practice, the EU has demonstrated resounding reluctance to utilise this mechanism, even in response to policies that arguably contravene core human rights guarantees, such as genocide. The situational inconsistency in the EU's approach diminishes to what extent the EU could use the human rights clause of the TCA as a normative check on UK behaviour, particularly with the EU's endorsement and toleration of similar externalisation strategies among its own Member States.

Therefore, while the clause may fulfil EU human rights obligations, it is unable to influence political discourse or serve as a platform for EU critique. It does not presently operate as an effective constraint or regulatory tool capable of materially influencing the UK's Channel crossing policies. The asymmetry between legal norms and political will is too great, and the enforcement architecture too soft, for the clause to deliver substantive rights-based outcomes.

5.4 Concluding Reflections

The TCA's human rights clause reflects a growing trend of the inclusion of non-trade values as conditions of market access and cooperation in international trade agreements. Yet, the limited enforceability and discretionary application of EU human rights clauses reveal the inherent challenges of embedding substantive normative obligations within instruments primarily designed to regulate trade. The credibility of such clauses depends on their consistent and principled application, something the EU has yet to achieve in its relations both with third countries and internally among its Member States. The TCA's human rights clause remains an insufficient tool of influence for the EU. It is a mirror of shared commitments, but also of shared failures. To become meaningful, it must be backed by

political resolve, institutional mechanisms, and normative consistency. Only then can it begin to be used to uphold human rights commitments.

The EU, for its part, must reconcile its identity as a human rights actor with its emerging pragmatism in asylum governance. Despite legal and operational challenges, the Italy-Albania Protocol reveals that externalisation is no longer an exception but is potentially becoming a mainstream feature of the EU's migration architecture. This shift risks normalising a model of protection that is territorially distanced, without procedural or substantive human rights guarantees.

The UK, in seeking to reduce the number of people attempting to cross the Channel, has adopted increasingly extraterritorial and deterrent-based measures. The extreme nature of attempted legislative policies have shifted the normalised an asylum system without an effective right to seek asylum. As a result, the France-UK border kills people. They are preventable, unnecessary deaths. While such policies may resonate domestically, they violate fundamental human rights.

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