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# HUMAN RIGHTS CHALLENGES TO EUROPEAN MIGRATION POLICY (REMAP)

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## About this Publication

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# Introduction: Nature and Purpose of this Study

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This study is co-authored by three researchers based at Justus Liebig University Gießen (JLU), Germany. Jürgen Bast is Professor of Public Law and European Law at this university. Frederik von Harbou and Janna Wessels were Postdoctoral Researchers when the project started in 2018; in the interim, they have become Professor of Law at the University of Applied Sciences Jena (EAH) and Assistant Professor of Migration Law at Free University Amsterdam (VU) respectively. From the beginning we have been supported by Saskia Ebert, who started as an undergraduate student assistant and received her law degree in July 2020. The study was generously funded by Stiftung Mercator. We are grateful for the professional support over the last three years, the Foundation’s appreciation of independent research, and its flexibility when the pandemic affected the original timetable of the project. We also gratefully acknowledge the support from a panel of experts composed of academics and practitioners, who shared their experience in a series of workshops and gave most valuable input to earlier versions of the study (for all full list of experts, see the Annex).

The REMAP study is placed at the crossroad of academic and political discourse. The project aims at re-mapping the legal framework of Human Rights law applicable to European migration policy and examines the implications of this framework in practice. REMAP is an ongoing process. The first edition of the study focuses on access to asylum, deprivation of liberty, procedural rights, the right to non-discrimination, and on the infrastructure necessary to render the Human Rights of migrants effective. Our findings on the protection of social and family ties of migrants and of their economic and social rights will be presented at a later point in time in the context of a revised second edition. In the ‘missing’ chapters particular attention will be paid to the situation of irregular migrants. In the meantime, we are happy to receive any comments on the chapters presented here.

In the remainder of this introduction, we shall reflect on the context of the study, define core concepts and doctrinal premises, and explain its methods and structure.

## 0.1 Why re-mapping the role of Human Rights in European migration policy?

When discussing the aim of this project within our academic communities, virtually nobody doubted that such a study is a timely endeavor that could deliver meaningful outcomes, although many found it overly ambitious given the wealth of material. Twenty years ago, the reaction probably would have been different. A European migration policy was practically non-existent at the time, and it was far from obvious that Human Rights law had much to say about the governance of migration. This indicates that fundamental changes in the basic legal structures of an entire policy field, and the related legal discourse, have occurred within a fairly short period of time.

Today, the European Union (EU) has established itself as a powerful actor in migration policy, although it still struggles to meet public expectations of delivering ‘solutions’. In any case, the EU’s role in migration policy has vastly expanded in terms of its substantive and territorial scope, including extraterritorially. Both forms of expansion have intensified the reach of the EU’s regulatory power over, and the impact on, migrants’ individual rights. Looking at EU policy in this field, hardly anyone today would contemplate the EU’s role in migration governance as a sort of regional Human Rights organization, as Alston and Weiler did back in 1999.<sup>1</sup> Rather, much of the policy is guided by concerns that potentially conflict with individual rights of migrants. The EU has yet to adjust to its new role as a potential threat to the Human Rights of migrants.

An equally important shift has taken place in Human Rights discourse. The rights and interests of migrants are not a ‘classic’ topic of Human Rights. For a long time the discourse was implicitly based on the fictitious model of an immobile society with borders controlled by sovereign states, regardless of the fact that Human Rights have always been meant to apply to non-nationals residing within their territories as well. Only with the onset of globalization in the 1980s, as the static attribution of territory, public authority and rights started to loosen,<sup>2</sup> space was created for a Human Rights framing of migration processes.<sup>3</sup> Today, Human Rights guarantees are frequently invoked in migration-related issues. Such claims are also increasingly being recognized by courts as forming a part of the applicable law.<sup>4</sup> The case-law of the European Court of Human Rights (ECtHR) has been critical to this development, although the future direction of its jurisprudence is subject to debate. Individual and collective actors of civil society also play an important role in ‘universalising Human Rights through processes driven by non-State actors’.<sup>5</sup> This new paradigm is reflected in the wealth of legal scholarship dedicated

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<sup>1</sup> Ph. Alston and J.H.H. Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights* (1999).

<sup>2</sup> S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2008), at 143 et seq.

<sup>3</sup> A. Farahat, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (2014), at 104 et seq.

<sup>4</sup> See, e.g., R. Rubio-Marín (ed.), *Human Rights and Immigration* (2014).

<sup>5</sup> B. Leisering, *Menschenrechte an den europäischen Außengrenzen: Das Ringen um Schutzstandards für Flüchtlinge* (2016), at 195; trans. by the authors.



to the Human Rights of migrants.<sup>6</sup> In particular the ECtHR's case-law has received widespread attention,<sup>7</sup> with an outstanding study by Dembour.<sup>8</sup> In international refugee law, a Human Rights-based approach has largely replaced an older, intergovernmental paradigm of humanitarianism.<sup>9</sup> The shift to a Human Rights paradigm is also reflected in research on the prohibition of refoulement.<sup>10</sup>

These two complementary processes sit at the heart of this study: the increasing density of obligations under Human Rights law that are recognized as relevant to migration, and the new role of the EU as a powerful player in migration policy. This has resulted in an increasing number of instances where EU migration policies potentially conflict with Human Rights. The purpose of the present study is to identify these instances, outline the applicable legal standards, and provide recommendations to ease the tension.

## 0.2 What is our understanding of 'Human Rights'?

In the context of this study, we consistently distinguish between Human Rights and fundamental rights (i.e., legal norms of EU law or national constitutional law), irrespective of the closely interwoven nature of these legal layers. According to our understanding, Human Rights are legal norms that have their basis in public international law. The EU and its Member States are legally bound by these norms: As a subject of international law, the EU is obliged to respect, protect, and promote Human Rights to the extent that they are part of the unwritten body of customary international law.<sup>11</sup> For the EU Member States, these and other obligations primarily follow from the Human Rights treaties to which they are a party. In addition, both for the EU and for its Member States, the commitment to Human Rights is constitutionally entrenched as a foundational value (cf. Art. 2 TEU).

The study makes a contribution to the *legal* discourse: it identifies legal imperatives on the basis of the law as it stands, and against this yardstick it judges laws and practices adopted by

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<sup>6</sup> For example, Cholewinski, 'Human Rights of Migrants: The Dawn of a New Era?', 24 *Georgetown Immigration Law Journal* (2010) 585; M.-B. Dembour and T. Kelly, *Are Human Rights for Migrants?* (2011); A.R. Gil, *Imigração e Direitos Humanos* (2017); E. Guild, S. Grant and K. Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (2017).

<sup>7</sup> See, e.g., C. Costello, *The Human Rights of Migrants and Refugees in European Law* (2016); Spijkerboer, 'Analysing European Case-Law on Migration', in L. Azoulay and K. de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (2014) 188; Viljanen and Heiskanen, 'The European Court of Human Rights: A Guardian of Minimum Standards in the Context of Immigration', 34 *Netherlands Quarterly of Human Rights* (2016) 174.

<sup>8</sup> M.-B. Dembour, *When Humans Become Migrants* (2015).

<sup>9</sup> See, seminally, J. Hathaway, *The Law of Refugee Status* (1<sup>st</sup> ed. 1991); *id.*, *The Rights of Refugees under International Law* (2005); as to the pitfalls, see J. Wessels, *The Concealment Controversy: Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (forthcoming).

<sup>10</sup> J. McAdam, *Complementary Protection in Refugee Law* (2007); K. Wouters, *International Legal Standards for the Protection from Refoulement* (2009); E. Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2016).

<sup>11</sup> Uerpmann-Wittzack, 'The Constitutional Role of International Law' in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2009) 131, at 135 et seq.

public authorities as lawful or unlawful. At the same time, we are aware that any appeal to Human Rights always simultaneously invokes the special moral persuasiveness inherent in Human Rights as the ‘universal language of justice’.<sup>12</sup> Indeed, for the authors – this must be openly stated at this point – endorsing a Human Rights-based migration policy is both a moral imperative and a guideline for political action. However, we claim to move within the rules of legal discourse with this study. Our statements claim to be professionally objective, in that they are based on recognized methods of interpretation of positive law. We acknowledge the relative indeterminacy of the law, which is particularly pronounced for Human Rights norms given the open formulation of many of its provisions. The inherent logic of the law includes the contestability of legal claims. However, it provides all participants in the discourse with the kind of arguments on the basis of which contestation can occur, if they do not want to leave the frame of reference of the legal discourse. In this sense, we look forward to an open discussion with all critics of the study.

However, we emphasize that the study does not pursue a ‘maximalist’ agenda in the sense of seeking to exhaust the limits of what can be argued legally.<sup>13</sup> Nor do we want to declare the optimal realization of Human Rights to be the only legitimate orientation for politics. There are two reasons for this. First, we were surprised to see to what extent even a ‘conservative’ interpretation of the applicable law has already revealed considerable potential for conflict with current practices. There is no reason to weaken the persuasive force of these findings by offering excessively ‘progressive’ proposals for interpretation. Second, we recognize that migration policy has the legitimate task of reconciling public interests in shaping migration processes with the interests of migrants protected by Human Rights. We therefore in no way negate political discretion in making European migration policy, which must be exercised in democratically legitimized processes by politically responsible decision-makers.

At the same time, however, we reject a ‘minimalist’ understanding of Human Rights according to which Human Rights merely provide a justiciable external framework for policy, and otherwise contain no – or only a few – substantially relevant statements regarding the contents of migration policy.<sup>14</sup> This view is based on an overly strict separation of law and politics and, as a consequence, the tasks of (constitutional) courts and politically responsible bodies. Such a minimalist understanding of Human Rights underestimates the extent to which they depend on legislative concretization. The *legal* significance of Human Rights is not limited to serving as a yardstick for a court judgment. The program of duties derived from Human Rights goes far beyond the simple omission of infringing acts; rather, they are dependent on the active

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<sup>12</sup> M. Ignatieff, *Human Rights as Politics and Idolatry* (2001); Cassel, ‘The Globalization of Human Rights: Consciousness, Law and Reality’, 2(1) *Northwestern Journal of International Human Rights* (2004), Article 6.

<sup>13</sup> For a nuanced defense of Human Rights maximalism, see Brehms, ‘Human Rights: Minimum and Maximum Perspectives’, 9 *Human Rights Law Review* (2009) 349.

<sup>14</sup> See, e.g., Thym, ‘EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook’, 50 *Common Market Law Review (CMLRev.)* (2013) 709; Groß, ‘Menschenrechtliche Grenzen der Migrationssteuerung’, in J. Markow and F. von Harbou (eds), *Philosophie des Migrationsrechts* (2020) 133.

exercise of legislative powers and, thus, open up spaces for Human-Rights-led policy-making, for which we make proposals in this study (on this ‘objective dimension’ of Human Rights, see again below).

In sum, our study is based on an understanding of Human Rights as legal norms of international law that are rich in content but have to be construed by means of interpretation that are methodologically sound – a ‘positivist Human Rights maximalism’, as it were.

### **0.3 What do we mean by ‘European Migration Policy’?**

In this study we use the term ‘migration policy’ in its broadest sense. We consider various forms of migration and categories of migrants, including but not limited to asylum seekers and refugees. The latter concept includes all forms of international protection – that is, it covers refugees in a wider sense, including persons relying on ‘subsidiary’ protection grounds. Throughout the study we give considerable attention to migrants who find themselves in circumstances that render them particularly vulnerable, although we use the concept of ‘vulnerability’ with due caution as it tends to establish arbitrary distinctions that may even lead to false assumptions of non-vulnerability of ‘ordinary’ migrants (or humans at large). We specifically focus on classes of migrants with a precarious legal status, such as irregular migrants and asylum seekers, and to a certain extent also on persons facing intersectional disadvantages, such as migrant women, children and people of color, although we do not systematically deal with issues of intersectionality.

A more detailed explanation is required regarding the notion of ‘European’ in the title of the study. Ever since the EU legislature started to use its new competences, conferred on it by the Treaty of Amsterdam and subsequently expanded by the Treaties of Nice and Lisbon, a highly complex and constantly changing system of multi-level governance has emerged in the field of migration. The relevant powers of legislation, rule-making and enforcement are shared between the EU and its Member States, to a degree that varies over time and according to the respective subfields. This study mainly focuses on the responsibility of the EU for the conduct of Human Rights-based policies in this increasingly Europeanized field.

Accordingly, we look into acts or omissions that, according to our legal evaluation, actually violate Human Rights obligations, or instances in which current policies and practices run the risk of doing so. We do not only focus on acts or omissions attributable to the EU but also on the EU Member States acting ‘within the scope of EU law’ – that is, in situations covered by existing EU legislation – and partly also beyond, as we shall explain in the following discussion. Our core assumption is that the EU is primarily accountable for European migration policy being in conformity with Human Rights. This assumption builds on a somewhat complex legal argument of EU constitutional law. Specific variations of the argument will be provided in the various chapters, but the general argument runs as follows.

Obviously, the EU is legally responsible for its own action – that is, any measures taken by, or otherwise attributable to, any of its own institutions, bodies, offices, and agencies (cf. Art. 51(1) EU-CFR). Moreover, it is beyond dispute that the EU is responsible where EU law requires the Member States to take certain action and where that law determines the contents of those actions – that is, where state authorities act as a mere ‘agents’ of the EU. However, we argue that the EU is also accountable where the existing legislative framework, as laid down in EU acts, does not prevent the Member States from taking decisions that violate Human Rights, or seemingly even invites them to do so. We call such situations ‘underinclusive legislation’ since the EU has failed to enact a comprehensive legal framework that is sufficiently specific (first instance) or sufficiently broad (second instance) to address cases in which Human Rights violations by States frequently occur in a field principally covered by EU law.

In the first instance, the matter is covered by EU legislation and Member State action therefore constitutes ‘implementation’ for the purposes of Art. 51(1) EU-CFR. Still, the relevant pieces of legislation often include discretionary or optional clauses, or simply lack sufficient detail, which may in effect lead to Human Rights violations on the part of the implementing Member States that are seemingly in accordance with the letter of the law. However, such practices simultaneously violate EU law given that, according to the EU Court of Justice (CJEU), EU legislation must always be construed in conformity with EU fundamental rights, which in substance mirror Human Rights (on the relevant sources and their interplay, see below).<sup>15</sup> This rule of interpretation established by the CJEU effectively shields underinclusive EU legislation from being regarded as unlawful *per se*, provided that it is sufficiently undetermined to enable a lawful interpretation by incorporating EU fundamental rights. Still, this study argues that the EU is accountable for addressing situations where, on a regular basis, the silence of the EU legislature coincides with results that are actually inconsistent with EU fundamental rights and Human Rights. In cases of systematic violations, this amounts to a legal obligation to amend the existing legislative framework.

In the second instance, Member State action in the field of migration policy does not (yet) fall within the scope of EU law although the EU is vested with the necessary legislative powers to regulate the issue. Accordingly, EU fundamental rights are not applicable, and the EU is not empowered to take supervisory measures to ensure compliance with EU law. One may argue that this is the normal state of affairs in a federal polity in which migration is a matter of shared competence governed by the principle of subsidiarity (cf. Art. 5(3) TEU, Art. 2(2) and 4(2)(j) TFEU). However, the EU’s incremental or fragmentary exercise of its legislative powers may lead to an incoherent situation in terms of Human Rights, leaving ‘gaps’ that are filled by Member States with problematic practices. We have identified such tensions in cases where the EU

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<sup>15</sup> See, e.g., CJEU, Case C-540/03, *Parliament v. Council* (EU:C:2006:429), at para. 61 et seq. and 104–105 (re family reunification); Case C-305/05, *Ordre des barreaux francophones et germanophones* (EU:C:2007:383), at para. 28.

has regulated certain aspects of migration policy in quite some detail, while other, closely related aspects are not covered. This not only constitutes a strong case in favor of EU action in terms of the principle of subsidiarity, but arguably also suggests a duty to take action in accordance with the values of Art. 2 TEU and the related objectives of Art. 3(1) and (2) TEU and Art. 67(1), 78(1) and/or 79(1) TFEU.

In sum, we hold that the EU is under a legal obligation, derived from EU constitutional law, to use its legislative powers in the field of migration to prevent systematic Human Rights violations on the part of the Member States wherever the EU has (fully or partly) occupied the field by its previous legislative action. In these situations, underinclusive legislation must be specified or broadened, as the case may be.

#### **0.4 What do we mean by the ‘challenges’ identified in each chapter?**

This study is organized according to the interests of migrants protected by Human Rights guarantees (the relevant *Schutzgut*, in German). Having established the extent to which the EU is accountable for ensuring this protection, each chapter starts with our conclusions on what the main ‘challenges’ to these protected interests are. In these sections, we identify the relevant policy trends as they emerged from our analysis of the respective fields of migration governance.

The temporal scope of the ‘trends’ varies. Some of them crystalized only in recent years, sometimes involving a dramatic escalation. Others reflect unresolved issues of a more structural nature. We therefore title these sections ‘Structural challenges and current trends’, to cover both types of challenges. We aim at identifying major trends in European migration policy that may pose – increasing and/or structural – conflicts with Human Rights.

For this purpose we have consulted various empirical and comparative studies, along with legal scholarship reporting on cases and legislative developments. In addition, we relied heavily on the experience assembled in the panel of experts who supported the authors. In our presentation we provide evidence and examples where appropriate for illustrative purposes, but with no intention of singling out individual Member States.

Selecting certain topics as a subject of further investigation while leaving others aside necessarily involves a subjective element of choice. Our selection represents what we consider the most pressing issues in terms of the Human Rights of migrants, with the aim of directing public and scholarly attention toward them. Some of them are highly topical (such as access to asylum), while other issues are less visible and have yet to be discussed extensively (such as non-discrimination among migrants). In any event, a worrying picture emerges in which Human Rights challenges are not limited to singular events or States but, rather, concern European migration policy as a whole.

## 0.5 What are the sources of the ‘legal evaluation’ provided in each chapter?

In the second section of each chapter, we outline the relevant sources of Human Rights based in Public International Law and identify the provisions of EU constitutional law, in particular the EU Charter of Fundamental Rights, which mirror them in the EU legal order. These provide the basis of a more detailed legal analysis of the specific issues raised by the trends and patterns identified in the first section.

The outline of sources lists the relevant guarantees of universal international law that Chetail calls the ‘fundamental principles of International Migration Law’<sup>16</sup> derived from customary international law and reflected in the trinity of documents that constitute the ‘International Bill of Rights’ – the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Reference is also made to other universal Human Rights treaties to which all EU Member States are a party, such as the Convention against Torture (CAT) and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD). According to our understanding, the Geneva Refugee Convention (GRC) of 1951/1967 also constitutes such a Human Rights treaty. Next to these sources of universal international law we identify the relevant guarantees of regional Human Rights law, with special regard to the European Convention of Human Rights (ECHR). Other international treaties are referred to with somewhat more caution due to the more limited number of ratifications – these include relevant ILO conventions, the UN Migrant Workers Convention, and the revised European Social Charter.

The ECHR has by far the strongest legal force within the EU legal order, since all relevant rights laid down in the ECHR are expressly mirrored in the EU Charter. According to Art. 52(3) EU-CFR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. The same holds true for the unwritten general principles of Union law, which provide an additional source of fundamental rights. According to Art. 6(3) TEU, and in line with the settled case-law of the CJEU, the provisions of the ECHR are the most important source of inspiration in clarifying the meaning and scope of EU fundamental rights. Consequently, the EU is legally obliged to fully observe the Human Rights guaranteed in the ECHR, although the EU has so far failed to become a party to this Convention. Similar arguments can be made in respect of Human Rights guarantees derived from other treaties to which all, or almost all, Member States are parties. They are relevant sources of inspiration in construing the meaning of the ‘mirror provisions’ in the EU Charter of Fundamental Rights (EU-CFR), particularly where they provide a broader scope of protection than the ECHR (in particular in respect of social and economic rights) or where they provide a higher level of protection (in particular derived from the ICCPR). The same assumption of substantive homogeneity of Human Rights and EU

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<sup>16</sup> V. Chetail, *International Migration Law* (2019), at 76 et seq.

Fundamental Rights applies, unless it is rebutted by a detailed analysis of the relevant provisions.

In discussing the meaning of the provisions of the ECHR, the case-law of the European Court of Human Rights in Strasbourg plays a paramount role that is also recognized by the EU Court of Justice in Luxembourg. Technically, the judgments of the ECtHR are only binding upon the parties of the respective dispute (Art. 46(1) ECHR). However, the case-law developed by the ECtHR is generally accepted as precedent with *erga omnes* effect for all Convention States, thus providing mandatory guidance on the interpretation of the ECHR. It is, therefore, appropriate to consider the ECtHR as a constitutional court in the legal architecture of Europe whose leading role in matters of Human Rights is accepted both by the CJEU and most constitutional or supreme courts in Europe when dealing with the provisions of their domestic bill of rights.

Accepting this leading role also for the purposes of this study, we heavily rely on case-law of the ECtHR in our own legal evaluation. In the rare instances in which we take the scholarly liberty to deviate from the established jurisprudence of the Strasbourg Court and side with minority voices within the Court, we will mark this expressly. Apart from that, the crucial importance of the ECHR does not rule out that other sources of international law and/or EU law provide higher levels of protection that must be met by EU policy.

Another source of interpretation that we consult to give meaning to a relevant provision of Human Rights is the interpretative practice of treaty bodies established to monitor compliance with a particular Human Rights treaty, most prominently the Human Rights Committee (HRC) serving the ICCPR. Such interpretative practice can be derived from their findings in quasi-judicial complaint procedures and from so-called General Comments, despite the fact that they are non-binding under international law.<sup>17</sup> Moreover, we refer to other documents of 'soft law' when they express an existing or emerging consensus of the international community of States. One important example is the Global Compact for Migration (GCM) adopted by a large majority of members in the UN General Assembly. While a legal obligation cannot be derived from this type of act in its own right, it does constitute a legitimate argument when discussing the provisions of binding international law, in line with the rules of interpretation laid down in the Vienna Convention on the Law of Treaties.<sup>18</sup>

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<sup>17</sup> Çali, Costello and Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies', 21 *German Law Journal (GLJ)* (2020), Special Issue: Border Justice: Migration and Accountability for Human Rights Violations, 355.

<sup>18</sup> Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law', 25 *Leiden Journal of International Law (LJIL)* (2012) 335.

## 0.6 What is the nature of the ‘recommendations’ provided in each chapter?

Based on the findings of what we consider the law in view of the trends and patterns challenging the Human Rights of migrants, we offer specific recommendations at the end of each chapter.

The content of these recommendations automatically follows from those findings where the EU, either in its laws or through action taken by its executive bodies, violates Human Rights. Given the fact that EU fundamental rights mirror Human Rights as a minimum standard owed to citizens and non-citizens alike, such action is almost automatically unlawful under EU law. Hence, for this type of findings the recommendation is straightforward: the EU must stop violating Human Rights immediately and ensure restitution and/or compensation to those whose rights have been infringed.

A more complex situation arises where our findings indicate that positive action on the part of the EU is required. The situation of underinclusive legislation discussed above is a prime example. Other examples include the failure of the EU to adequately address structural challenges that create a risk of repeating Human Rights violations that occurred in the past.

The doctrine of Human Rights is well equipped to deal with situations that require action of the obliged legal person (States or other subjects of international law). In the context of the ECHR, the ECtHR has consistently recognized that Convention rights entail so-called positive obligations – the duty of parties to take the measures within their power in order to ensure respect for the rights guaranteed by the Convention. In universal Human Rights law, legal scholarship and UN treaty bodies have developed the notion that Human Rights are characterized by the threefold duty to ‘respect, protect and fulfill’, of which the latter two require taking action. In German constitutional jurisprudence this is called the ‘objective dimension’ of rights, according to which a constitutionally protected right entails ‘duties to protect’ (*Schutzpflichten*) and may require ‘statutory fleshing-out’ (*gesetzliche Ausgestaltung*), i.e. implementing legislation to give effect to a particular right.

However, meeting a positive obligation usually involves a higher degree of discretion on the part of the competent authority, and this authority is often a legislative body rather than part of the executive or judicial branches of government. Accordingly, courts that have the power to adjudicate on matters of Human Rights are more reluctant to determine a failure to act, or to issue a specific order to take action, because such determinations and orders may tilt the constitutional balance between the branches of government. Arguably, such deference is even more justified in the European multi-level system of government, in which legislative powers are shared between the Member States’ and the EU’s legislatures.

In our study we point to such positive obligations nevertheless, even when they are not justiciable. According to our understanding, Human Rights are not only ‘guardrails’ that set strict



outer limits to policy choices, but are also ‘directive principles’ that legally guide policy-making.<sup>19</sup> Metaphorically, one may distinguish between a justiciable ‘core’ of Human Rights and a non-justiciable ‘corona’ of principles. Accordingly, we include in our study a set of recommendations that are based upon, and derived from, our legal findings but that involve policy choices on the part of the addressee. We acknowledge that the objective dimension of Human Rights constitutes a space in which policy and law overlap, in particular when it comes to recommendations on the legislative action the EU should take. We do not hold that our recommendations are the *only* lawful response to remedy a legally problematic situation, but we argue that it is not merely a matter of politics but also a matter of law – that is, that there is a legal obligation to take remedial action.

Some of our recommendations may sound politically naïve, given that the current political climate tends to lower Human Rights standards for migrants rather than raising them. One may even argue, as some members of our panel of experts did, that certain recommendations are dangerous, as they may trigger a political dynamic in which the legislative framework becomes more restrictive than before. Still, at a time when Human Rights of migrants are increasingly in peril, we find it even more important to contribute to a discourse on a European migration policy faithfully implementing the EU’s foundational commitment to Human Rights. We are imagining ourselves being the trusted legal advisors of a ‘bona fide’ policy-maker who would like to know what a European migration policy based on Human Rights must and should entail.

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<sup>19</sup> See Kälin, ‘Menschenrechtsverträge als Gewährleistungen einer objektiven Ordnung’, 33 *Berichte der Deutschen Gesellschaft für Völkerrecht: Aktuelle Probleme des Menschenrechtsschutzes* (1994) 9, at 38.



# Chapter 1 – Ensuring Access to Asylum

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Asylum policy is the subfield of European migration policy that most strongly demands that Human Rights serve as guardrails and guiding principles.<sup>20</sup> Refugee law and Human Rights law are intrinsically linked: Refugees are persons who ask for international protection against the threat of serious Human Rights violations in their home country, and due to the forced nature of their mobility they are typically a particularly vulnerable class of migrants.<sup>21</sup>

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<sup>20</sup> For an overview, see C. Costello, *The Human Rights of Migrants and Refugees in European Law* (2016); V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017).

<sup>21</sup> See ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Grand Chamber Judgment of 21 January 2011, at para. 233 and 251, on the *inherent* vulnerability of asylum-seekers. The narrower understanding of vulnerability in Art. 21 Reception Conditions Directive 2013/33 (mentioning as examples sub-classes of asylum seekers such as minors, disabled and elderly people, and pregnant women) may obscure the fact that asylum seekers are per se structurally susceptible to rights violations.

There are three fundamental questions any asylum system must answer regarding the protection of refugees: who deserves protection (Who is a ‘refugee’ in the eyes of that system?), the required content of the protection (What is the ‘asylum status’ offered to refugees?), and the issue of entering the protection system and having an asylum claim processed (How do refugees gain ‘access to asylum’?).

In the European context, the EU has taken the primary political responsibility for answering all three questions. The EU Treaties have assigned the EU the task of establishing a Common European Asylum System (CEAS) in order to implement the fundamental right to asylum in accordance with Human Rights law, in particular the Geneva Convention of 1951/1967 (Art. 18 EU-CFR). According to this constitutional commitment, the Union shall develop a common policy with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement (Art. 78(1) TFEU). The EU has all legislative powers necessary to formulate a comprehensive asylum policy (Art. 78(2) TFEU).

In the two decades since the entry into force of the Amsterdam Treaty, the EU legislature has consistently addressed the aforementioned first and second questions. Broadly speaking, the EU has adopted a Human Rights-based approach to defining the European concept of refugee, and it has defined the minimum standard for the asylum status of those eligible for international protection in the EU (on the remaining issues in this regard, see Chapter 4).<sup>22</sup> However, the EU struggles in tackling the third question. In this chapter, we therefore focus on the issue of gaining access to asylum – notwithstanding the fact that other aspects also deserve critical evaluation from a Human Rights perspective.<sup>23</sup>

## 1.1 Structural challenges and current trends

The EU’s approach to granting asylum on EU territory seems to contradict its liberal approach to eligibility and status, to the extent that it almost appears paradoxical. The EU not only fails to effectively offer legal and safe passages to asylum but has actively implemented policies that aim at preventing access to asylum. The CEAS defines the EU as a single jurisdictional space in order to collectively fulfil the international obligations of its Members, yet the EU adopts policies that aim at circumventing these obligations by way of non-exercise of asylum jurisdiction.

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<sup>22</sup> However, severe deficits in the implementation of these standards persist in individual Member States, leading among other things to disparities between EU Member States as to the application of the refugee definition, sometimes described as ‘asylum lottery’ (cf. Chapter 6); see Asylum Information Database/ European Council on Refugees and Exiles, *Asylum Statistics 2018: Changing Arrivals, Same Concerns*, 25 January 2019, available at <https://www.asylumineurope.org/news/25-01-2019/asylum-statistics-2018-changing-arrivals-same-concerns>.

<sup>23</sup> Some of the latter will be addressed in subsequent chapters, most notably the issues of detention (Chapter 2), poor procedural safeguards (Chapter 3), inequalities regarding the right to family reunification (Chapter 4) and the undermining of institutionalized support for refugees (Chapter 7).

We observe a consistent pattern of policies, both at the level of the EU and among its Member States, that prevent potential asylum seekers from gaining access to refugee status determination procedures in EU Member States and, hence, from seeking and enjoying asylum in the EU as promised in Art. 18 EU-CFR. While visa requirements coupled with carrier sanctions have served for decades to exclude most would-be asylum seekers from legally traveling to European States in the first place,<sup>24</sup> new forms of containment of migrants have emerged or increased in recent years. According to our analysis, these policies take three forms: avoiding, contesting and transferring jurisdiction.

### **Trend 1: Avoiding jurisdiction through cooperative externalization of mobility control**

We observe increased efforts among the EU and its Member States to avoid international jurisdiction to assess an asylum claim through the externalization of mobility control via enhanced cooperation with third countries.

Such policies of cooperative externalization may aim either at preventing migrants from leaving the country of origin or a transit country in the first place ('non-departure policies') or at 'pulling back' migrants before arrival on EU territory ('non-arrival-policies'). The common rationale of these policies is that jurisdiction in international law is triggered either by physical presence of a person on State territory or, in certain instances, by extraterritorial exercise of public authority of the State concerned (for details, see section 1.2 below). Both triggers are avoided when the authority is exercised by other States.

While the cooperation with Turkey, as laid down in the EU–Turkey 'statement' in March 2016,<sup>25</sup> contains elements of the 'protection elsewhere' approach (see below), it also operates on the level of non-departure policy. It does so explicitly as well as implicitly: beyond the declared commitment of the Turkish government to prevent the opening of new routes for irregular migration,<sup>26</sup> the general subtext of the statement is directed at deterring attempts by 'irregular' migrants departing from Turkey to access EU territory.

While the cooperation with Turkey is meant to limit the access of irregular migrants to Greece, the European cooperation with Libyan authorities is supposed to do the same with regard to Italy – that is, to achieve the closure of the 'central Mediterranean route'.<sup>27</sup> Bilateral cooperation between Italy and post-Gaddafi Libyan authorities on questions of border control started

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<sup>24</sup> See, e.g., Neumayer, 'Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalized World', 31 *Transactions of the Institute of British Geographers* (2006) 72.

<sup>25</sup> European Council, 'EU-Turkey Statement', Press release, 18 March 2016, available at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

<sup>26</sup> *Ibid.*, at para. 3.

<sup>27</sup> Cf. the extensive report by Forensic Oceanography (C. Heller and L. Pezzani), *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean* (2018), available at <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>; Moreno-Lax, Ghezelbash and Klein, 'Between Life, Security and Rights: Framing the Interdiction of

as early as in 2012.<sup>28</sup> A Memorandum of Understanding between Libya and Italy of 2017<sup>29</sup> refers to and reactivates a number of formal and informal agreements on mobility control, inter alia the 2008 Treaty of Friendship, Partnership and Cooperation<sup>30</sup> concluded with Libya before the civil war, during the reign of Gaddafi. The Treaty of Friendship, a formal international agreement, contains provisions on the cooperation regarding both the enhanced control of Libyan maritime and land borders.<sup>31</sup> The 2017 memorandum, which was tacitly renewed in February 2020, forms the basis of the since-intensified cooperation between Italy and Libya on strengthening maritime and land border controls as well as for the financing of such measures.<sup>32</sup> Also in 2017, the European Council in its Malta Declaration promised EU support for the ‘training, equipment and support’ of the Libyan coastguard.<sup>33</sup> Following these developments, the Libyan government declared a Search and Rescue (SAR) zone to the International

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“Boat Migrants” in the Central Mediterranean and Australia’, 32 *Leiden Journal of International Law (LJIL)* (2019) 715.

<sup>28</sup> For a reference to the ‘Tripoli Declaration of 21 January 2012’ see ‘Memorandum d’intesa sulla cooperazione nel campo dello sviluppo, del contrasto all’immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana’, 2 February 2017, available at <http://itra.esteri.it/vwPdf/wfrmRenderPdf.aspx?ID=50975>, as well as E. Paoletti, *Migration Agreements between Italy and North Africa: Domestic Imperatives versus International Norms*, 20 December 2012, available at <https://www.mei.edu/publications/migration-agreements-between-italy-and-north-africa-domestic-imperatives-versus>. For another early example, see Italian Ministry of Defence, ‘Italy – Libya: cooperation agreements’, Press statement, 29 November 2013, available at [http://www.difesa.it/EN/Primo\\_Piano/Pagine/20131129\\_Italy-Libyacooperationagreements.aspx](http://www.difesa.it/EN/Primo_Piano/Pagine/20131129_Italy-Libyacooperationagreements.aspx).

<sup>29</sup> Memorandum d’intesa, 2 February 2017, available at <http://itra.esteri.it/vwPdf/wfrmRenderPdf.aspx?ID=50975>; for an English translation, see ‘Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic’, available at [http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf).

<sup>30</sup> Cf. the unofficial translation by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) of the ‘Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People’s Libyan Arab Jamahiriya and the Republic of Italy’, 30 August 2008, available at [https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009\\_EN.pdf](https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf). Per Art. 19(2) of the Treaty: ‘As regards illegal migration, the Parties shall establish a control system for Libya’s land borders to be entrusted to Italian companies with the necessary technical competences. The Italian government shall assume fifty percent of the costs thereof, and the Parties shall ask the European Union to bear the remaining fifty percent, taking into account the understanding that had been concluded at the time between the Great Jamahiriya and the European Commission.’

<sup>31</sup> According to Art. 19(2) of the Treaty the control of the Libyan land borders is supposed to be ‘entrusted to Italian companies’ while ‘the Italian government shall assume fifty percent of the costs thereof, and the Parties shall ask the European Union to bear the remaining fifty percent’. Art. 19(1) of the Treaty refers inter alia to ‘protocols of cooperation signed in Tripoli on 29/12/2007’. This agreement on bilateral maritime cooperation allowed Italian boats to patrol in Libyan territorial waters and provided for the creation of joint maritime patrols by the Italian police and Libyan coast guard in order to apprehend and push back migrants leaving the Libyan shores, cf. S. Klepp, *Italy and its Libyan Cooperation Program: Pioneer of the European Union’s Refugee Policy?*, 1 August 2010, available at <https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy>.

<sup>32</sup> Art. 1(c) and Art. 2(1), Art. 4 of the Memorandum.

<sup>33</sup> European Council, ‘Malta Declaration’, Press release, 3 February 2017, available at <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>, at para. 6.

Maritime Organization in 2017,<sup>34</sup> but it has not yet established the rescue coordination facilities required by international maritime law.

Through the EU Emergency Trust Fund for Africa,<sup>35</sup> the European Commission adopted the program ‘Support to Integrated border and migration management in Libya’ in order to ‘strengthen the capacity of relevant Libyan authorities in the areas of border and migration management’.<sup>36</sup> Both Italy and the EU are engaged in the funding, delivery, and maintenance of coast guard equipment – such as vessels – and the training of Libyan coast guard personnel.<sup>37</sup> The Italian Maritime Rescue Coordination Centre (MRCC) in Rome cooperates with the Libyan coast guard in asking them to pick up rescues.<sup>38</sup>

The logistical and operational support of the Libyan coast guard by Italy and the EU raise questions regarding their international responsibility for Human Rights violations. Numerous reports bear testimony to the devastating Human Rights situation of (retained or returned) migrants in Libya, including their systematic subjection to arbitrary detention and torture.<sup>39</sup> Additionally, an application to the ECtHR was filed in May 2018 concerning a specific fatal incident in late 2017 in which partly EU-trained Libyan coast guards on a vessel donated to Libya by Italy tried to ‘pull back’ migrants trying to reach Italy by boat.<sup>40</sup>

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<sup>34</sup> European Parliament, Parliamentary questions, available at [http://www.europarl.europa.eu/doceo/document/E-8-2018-000547\\_EN.html](http://www.europarl.europa.eu/doceo/document/E-8-2018-000547_EN.html), answer given by Mr. Avramopoulos on behalf of the Commission, 26 April 2018, available at [http://www.europarl.europa.eu/doceo/document/E-8-2018-000547-ASW\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/E-8-2018-000547-ASW_EN.pdf).

<sup>35</sup> For a broader assessment of the EU Trust Fund, see Oxfam International, *The EU Trust Fund for Africa. Trapped between aid policy and migration politics*, Briefing Paper (2020), available at <https://reliefweb.int/sites/reliefweb.int/files/resources/bp-eu-trust-fund-africa-migration-politics-300120-en.pdf>. The possible violation of EU financial regulations by the use of the Trust Fund is subject to a pending legal complaint filed with the European Court of Auditors in April 2020, see GLAN/ASCI/ARGI, ‘Legal Complaint against EU Financial Complicity in Illegal Push-Backs to Libya’, Press statement, 27 April 2022, available at <https://www.glanlaw.org/eu-complicity-in-libyan-abuses>.

<sup>36</sup> The budget of the programme in the first phase (from December 2017 to December 2018) was EUR 46.3 million and in the second phase (since December 2018) EUR 45 million, see European Commission, Action Document for EU Trust Fund to be used for the decisions of the Operational Committee (2018), available at <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf>. Until September 2019, the total sum allocated by the EU to Libya for migration control under the EU Emergency Trust Fund for Africa and the bilateral assistance amounted to around EUR 367.7 million, cf. EEAS, Factsheet EU–Libya Relations, 25 September 2019, available at [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/19163/EU-Libya%20relations](https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations).

<sup>37</sup> More than 238 Libyan coast guards were trained by the end of 2018, with training conducted by European Union Naval Force Mediterranean Operation Sophia; see European Commission, Action Document for EU Trust Fund to be used for the decisions of the Operational Committee (2018), available at <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf>.

<sup>38</sup> Pijnenburg, ‘From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?’, 20 *European Journal of Migration and Law (EJML)* (2018) 396, at 405.

<sup>39</sup> See, e.g., Human Rights Watch, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya* (2019), available at [https://www.hrw.org/sites/default/files/report\\_pdf/eu0119\\_web2.pdf](https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf); United Nations Security Council, United Nations Support Mission in Libya, Report of the Secretary-General, UN Doc. S/2020/41, 15 January 2020.

<sup>40</sup> ECtHR, *S.S. and others v. Italy*, Appl. no. 21660/18, Judgment of 16 June 2019; cf. European Council on Refugees and Exiles (ECRE), *Case against Italy before the European Court of Human Rights will raise issue of*

Both types of cooperation established between the EU and its Member States with Turkey and with Libya are regarded as models for future relations with other third countries bordering the Mediterranean Sea in order to further implement non-departure and non-arrival policies. In June 2016, the Commission referred to the EU–Turkey statement when presenting ideas for a new ‘partnership framework’ for the cooperation with third countries on mobility control.<sup>41</sup> The Commission’s plans to conclude ‘regional disembarkation arrangements’ with all North African Mediterranean countries, and to refer asylum seekers to procedures on the African continent, are also based on this.<sup>42</sup> However, the plans on the part of the EU are opposed by many African countries of origin and transit, so that the early implementation of further ‘disembarkation arrangements’ – or even the establishment of the ‘regional disembarkation platforms’ in North Africa originally called for by the European Council<sup>43</sup> – appears uncertain. At a summit in November 2015, representatives of European and African States agreed on an action plan (the ‘Valletta Principles’) based on the previous cooperation formats on migration issues (the so-called Rabat and Khartoum Processes and the Joint EU–Africa Strategy) and providing for, among other things, a more intensive fight against irregular migration, and greater cooperation in the readmission of irregular migrants and in border protection (including the training of border guards).<sup>44</sup> The EU’s push to conclude further ‘arrangements’ with North African countries is an example of the wider trend toward an informalization of the EU’s external migration policy and the proliferation of soft-law cooperation on migration issues, apparently intended by the EU.<sup>45</sup>

Parallel to the EU’s efforts to conclude political agreements with third countries on border security and the return of migrants, the mandate and equipment of the European Border and Coast Guard Agency Frontex is also reflected in its power to conclude administrative cooperation agreements: the 2019 Frontex Regulation (Regulation 1869/2019) further authorizes Frontex to cooperate with third countries that are not directly neighboring EU Member States. Among other things, Frontex will have the power to conclude status agreements with these

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*cooperation with Libyan Coast Guard*, 18th May 2018, available at <https://www.ecre.org/case-against-italy-before-the-european-court-of-human-rights-will-raise-issue-of-cooperation-with-libyan-coast-guard/>.

<sup>41</sup> European Commission, ‘Towards a new Partnership Framework with third countries under the European Agenda on Migration’, Press release, 7 June 2016, available at [http://europa.eu/rapid/press-release\\_MEMO-16-2118\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-2118_en.htm); European Council, Conclusions, 28 June 2016, at para. 2, available at <https://www.consilium.europa.eu/media/21645/28-euco-conclusions.pdf>.

<sup>42</sup> European Commission, ‘Managing migration: Commission expands on disembarkation and controlled centre concepts’, Press release, 24 July 2018, available at [http://europa.eu/rapid/press-release\\_IP-18-4629\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4629_en.htm).

<sup>43</sup> European Council, ‘Conclusions on: migration, security and defence, jobs, growth and competitiveness, innovation and digital, and on other issues’, Press release, 28 June 2018, at para. 5, available at <https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/>.

<sup>44</sup> Valletta Summit on Migration, Action Plan, 11–12 November 2015, available at [https://www.consilium.europa.eu/media/21839/action\\_plan\\_en.pdf](https://www.consilium.europa.eu/media/21839/action_plan_en.pdf).

<sup>45</sup> Such cooperation arrangements have been concluded in recent years with, for example, Afghanistan, Niger, and Sudan; for an overview, see Molinari, ‘The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns’, 44 *European Law Review* (2019) 824.



third countries for Frontex operations on their territories and the deployment of border management and repatriation teams there.<sup>46</sup> In addition, the European Border Surveillance System (Eurosur) was integrated into the Frontex framework.<sup>47</sup> Eurosur is a mechanism for information exchange and cooperation between different Member State authorities involved in border surveillance as well as with Frontex. Its purpose is most notably to detect and prevent irregular immigration, a term that is applied also to forced migration of individuals entitled to international protection. Both developments may be regarded as aspects of non-departure as well as non-arrival policies. Increased operational and informational cooperation with countries of origin and transit aims either at finding and stopping migrant boats before entering European territorial waters, or at discouraging migrants from leaving in the first place by establishing comprehensive border regimes, including in countries remote from Europe.

## **Trend 2: Contesting jurisdiction by failing to comply with Human Rights obligations**

We observe that actors of European migration policy actually contest the applicability of Human Rights norms, in particular the principle of non-refoulement, when confronted with claims to refuge on their territory or at their part of the EU's external border. This reflects a growing trend among EU Member States of disregarding their Human Rights obligations (and corresponding obligations under EU law) toward migrants who demand access to asylum. We read this as political attempts at challenging, and possibly reversing, Human Rights jurisprudence on asylum jurisdiction.

Such practices of resistance include push-back measures toward migrants at or near the border ('hot returns') and the closure of ports to the disembarkation of migrants saved at sea ('non-disembarkation policy'). Those are carried out despite the settled case-law of the ECtHR post-*Hirsi* and provisions of the CEAS requiring Member States to ensure the possibility of applying for asylum at the border (Art. 3(1) and 43 Asylum Procedures Directive).<sup>48</sup>

Since 2015, a number of incidents of push-back measures have been reported at land borders in Eastern Europe, particularly concerning migrants trying to enter Hungarian territory.<sup>49</sup> In July 2018, the Commission referred Hungary to the CJEU for the non-compliance of its asylum and return policy with EU law; according to the Commission, among other things 'Hungary fails to provide effective access to asylum procedures as irregular migrants are escorted back across the border, even if they wish to apply for asylum.'<sup>50</sup> In a similar vein, the ECtHR held in 2017

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<sup>46</sup> See Art. 73 Frontex Regulation, in comparison to Art. 54 of the repealed Regulation 1624/2016.

<sup>47</sup> Art. 18–23 Frontex Regulation.

<sup>48</sup> Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Asylum Procedures Directive).

<sup>49</sup> Hungarian Helsinki Committee, *Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States* (2017), available at <https://www.refworld.org/docid/5888b5234.html>.

<sup>50</sup> European Commission, 'Migration and Asylum: Commission takes further steps in infringement procedures against Hungary', Press release, 19 July 2018, available at

in a Chamber judgment<sup>51</sup> (repealed by a 2020 Grand Chamber judgment)<sup>52</sup> that the Spanish practice of ‘hot returns’ to control the border of the Spanish exclave of Melilla violated the prohibition of collective expulsions (see Chapter 3 for details on this case).

In recent years a number of European countries bordering the Mediterranean, most notably Italy and Malta, have also resorted to non-disembarkation policies, most notably, the closure of their ports to the disembarkation of migrants saved at sea, mainly by NGO-chartered rescue ships.<sup>53</sup> While already threatening to do so in 2017<sup>54</sup>, Italy in 2018 and 2019 repeatedly closed its ports to NGOs and other vessels conducting SAR operations, such as the *Aquarius*, the *Life-line*, the *Sea-Watch*, the *Sea Eye*, and the *Diciotti*. This policy led to a ‘disembarkation crisis’,<sup>55</sup> leaving rescued migrants on those ships ‘stranded at sea for weeks’<sup>56</sup> and in limbo regarding their access to asylum in the EU. EU Member States reacted with a ‘ship by ship’ approach to their disembarkation and relocation.<sup>57</sup> This ad hoc approach – a de facto exception of the ‘first country of entry’ principle of the Dublin system – points to a structural lack of a safe, fair, and predictable allocation and relocation mechanism for such cases.<sup>58</sup> A Joint Declaration of Intent by Italy, Malta, France, and Germany signed at an informal summit in September 2019 in Malta was intended to alleviate the situation by promising a limited solidarity mechanism for persons disembarked following SAR operations conducted in the high seas, and falling under the responsibility of the Italian and Maltese governments, but lacks a firm legal basis and sufficient consent across EU Member States necessary to provide for a stable mechanism.<sup>59</sup>

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[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_4522](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4522); the action was brought on 21 December 2018: Case C-808/18, *Commission v. Hungary*, OJ C 155 of 6 May 2019, 18.

<sup>51</sup> ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Chamber Judgment of 3 October 2017 (repealed).

<sup>52</sup> ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020.

<sup>53</sup> In March and April 2020, Italy and Malta closed their ports to SAR vessels, pointing to the strain imposed by the Covid-19 pandemic; see on the development and possible further conflicts with international law, A. Farahat and N. Markard, *The European Policy of Outsourcing Responsibility* (2020), available at [https://eu.boell.org/sites/default/files/2020-05/HBS-POS%20study-A4\\_25-05-20-2.pdf](https://eu.boell.org/sites/default/files/2020-05/HBS-POS%20study-A4_25-05-20-2.pdf).

<sup>54</sup> European Parliament: Parliamentary questions, Immigration emergency in Italy: closure of Italian ports to prevent clandestine migrants from disembarking, 28 July 2017, available at [https://www.europarl.europa.eu/doceo/document/E-8-2017-005108\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/E-8-2017-005108_EN.pdf).

<sup>55</sup> European Council on Refugees and Exiles (ECRE), ‘*Relying on Relocation*’: *ECRE’s Proposal for a predictable and fair relocation arrangement following disembarkation* (2019), at 3, available at <https://www.ecre.org/wp-content/uploads/2019/01/Policy-Papers-06.pdf>.

<sup>56</sup> UNHCR, Italy Fact Sheet (2019), at 2, available at <https://data2.unhcr.org/en/documents/download/68161>.

<sup>57</sup> ECRE, ‘*Relying on Relocation*’: *Proposal for a predictable and fair relocation arrangement following disembarkation* (2019), at 3 et seq., available at <https://www.ecre.org/wp-content/uploads/2019/01/Policy-Papers-06.pdf>.

<sup>58</sup> *Ibid.*, at 4 et seq.; UNHCR, Italy Fact Sheet (2019), at 2, available at <https://data2.unhcr.org/en/documents/download/68161>.

<sup>59</sup> Joint declaration of intent on a controlled emergency procedure – voluntary commitments by member states for a predictable temporary solidarity mechanism, 23 September 2019, available at <http://www.statewatch.org/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>; see S. Carrera and R. Cortinovis, *The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism? CEPS Policy Insights No. 14* (2019), available at [https://www.ceps.eu/wp-content/uploads/2019/10/PI2019\\_14\\_SCRC\\_Malta-Declaration-1.pdf](https://www.ceps.eu/wp-content/uploads/2019/10/PI2019_14_SCRC_Malta-Declaration-1.pdf).

### Trend 3: Transferring jurisdiction by referring migrants to other States

We observe increased efforts to implement schemes that refer migrants to (presumed) protection in countries other than their place of actual residence. Such measures of shifting jurisdiction delegate responsibilities within Europe, or even beyond to non-European countries, although access to adequate asylum procedures and/or effective protection is not ensured.

While in these cases jurisdiction is neither silently avoided nor normatively contested in principle, such arrangements provide either the EU as a whole or particular EU Member States with an exemption from being in charge of processing the asylum applications of certain migrants. Thus, EU Member States try to deny jurisdiction by referring migrants either to third countries ('protection elsewhere' in a supposedly safe third country) or to other European States within the Dublin system (that is, within the ambit of Regulation 604/2013, the so-called Dublin III Regulation).<sup>60</sup>

As mentioned above, referring migrants trying to reach EU territory to 'protection elsewhere', in this case Turkey, is a key element of the EU–Turkey statement, concluded in March 2016.<sup>61</sup> It raises the question of whether the required level of protection for refugees is met by Turkey. This concern is linked to the fact that Turkey maintains a geographical limitation to the 1951 Refugee Convention, such that it only applies to events in Europe. Furthermore, there are reports that Turkish authorities forcibly returned Syrian refugees after coercing them to sign 'voluntary return' forms.<sup>62</sup> Nonetheless, the EU–Turkey statement is partly regarded as a model for EU migration policy. For instance, in the revision process of the Asylum Procedures Directive, it was proposed to lower the standards for a 'safe third country', by requiring only that parts of that country meet the requirements for protection.<sup>63</sup> This raises unresolved questions around the EU's responsibility for ensuring requisite standards in third countries.

But even for those who have reached European soil, access to an adequate asylum procedure may be thwarted by the Dublin system determining the Member State responsible for examining an application for asylum. While the asylum procedure and reception of refugees in a given Member State in charge according to the Dublin system may be malfunctioning and unacceptable,<sup>64</sup> an asylum application in another Member State would be inadmissible in most

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<sup>60</sup> Regulation 604/2013 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 (Dublin III Regulation).

<sup>61</sup> European Council, 'EU–Turkey Statement', Press release, 18 March 2016, available at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

<sup>62</sup> Human Rights Watch, *Turkey Forcibly Returning Syrians to Danger*, 26 July 2019, available at <https://www.hrw.org/news/2019/07/26/turkey-forcibly-returning-syrians-danger>.

<sup>63</sup> Council of the EU, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (First reading), 6238/18, 19 February 2018, Art. 45(1a), available at <http://www.statewatch.org/news/2018/mar/eu-council-asylum-procedures-asylum-6238-18.pdf>.

<sup>64</sup> Examples of severe and systemic deficiencies in the asylum systems of different EU Member States are manifold and a long-standing issue; see ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Grand Chamber Judgment of 21 January 2011; on the more recent situation in Greece, see Commissioner for

cases, preventing de facto effective access to asylum. At the same time relocation is also malfunctioning, as demonstrated by the failure of the 2015 refugee relocation scheme,<sup>65</sup> which was meant to remedy some of the deficiencies of the Dublin system.<sup>66</sup>

Furthermore, as the Dublin system is being amended it is not clear whether the relevant actors envisage a distribution mechanism that actually guarantees the rights of migrants to access a functioning asylum system. Some highly problematic provisions have so far been proposed in the recasting process, aimed at a new Regulation replacing the current Dublin III Regulation.<sup>67</sup> For example, in its 2016 draft the European Commission proposed to restrict the scope of the discretionary clause for the assumptions of responsibility by Member States,<sup>68</sup> thus possibly reducing Member State flexibility to comply with Human Rights norms, particularly in cases of emergency. At the same time, the draft aims at imposing extended duties on the Member State where an asylum application is first lodged to mandatorily apply the 'safe third country' rule when examining admissibility prior to the actual Dublin procedure.<sup>69</sup> In a similar vein, it was proposed to shorten or eliminate time limits for transfers from one Member State to another,<sup>70</sup> which would lead to longer periods 'in limbo' for individual migrants. Although the Commission withdrew many of these suggestions in its 2020 proposal for a Regulation on Asylum and Migration Management,<sup>71</sup> these ideas may re-emerge at any time during the legislative process and, if realized, create serious problems in terms of access to protection.

## 1.2 Legal evaluation

### 1.2.1 General legal framework regarding access to asylum

The most important principle affected regarding the question of access to asylum is the prohibition of expelling or returning a person to a State in which his or her fundamental Human Rights are threatened (principle of non-refoulement). This principle not only protects persons

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Human Rights of the Council of Europe, Report following her visit to Greece from 25 to 29 June 2018, 6 November 2018, available at <https://rm.coe.int/report-on-the-visit-to-greece-from-25-to-29-june-2018-by-dunja-mijatov/16808ea5bd>; on Hungary, see UN Special Rapporteur on the human rights of migrants, End of visit statement, 17 July 2019, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24830&LangID=E>.

<sup>65</sup> Council Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

<sup>66</sup> E. Guild, C. Costello and V. Moreno-Lax, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece* (2017), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL\\_STU\(2017\)583132\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf).

<sup>67</sup> Cf. F. Maiani, *The Reform of the Dublin III Regulation* (2016), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL\\_STU\(2016\)571360\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf).

<sup>68</sup> European Commission, Proposal for a recast Dublin Regulation, COM(2016) 270 final, 4 May 2016, Art. 19.

<sup>69</sup> *Ibid.*, Art. 3(3).

<sup>70</sup> *Ibid.*, Art. 30.

<sup>71</sup> European Commission, Proposal for a Regulation on Asylum and Migration Management, COM(2020) 610 final, 23 September 2020, Art. 25, Art. 8(5), Art. 35, available at [https://ec.europa.eu/info/sites/info/files/proposal-regulation-asylum-migration\\_en-1.pdf](https://ec.europa.eu/info/sites/info/files/proposal-regulation-asylum-migration_en-1.pdf).

from being transferred to a State that itself threatens the individual, but also to a State that would not protect the person against onward transfer in violation of the principle of non-refoulement (so-called chain refoulement).

In Human Rights law, the refoulement prohibition is most importantly provided for in Art. 33(1) of the 1951 Refugee Convention and Art. 3 CAT. The Universal Declaration of Human Rights, in Art. 14, enshrines only the right ‘to seek’ asylum. The principle of non-refoulement can also be inferred from the right to life and the prohibition of torture, cruel, inhuman, or degrading treatment, as guaranteed by Art. 6 and 7 ICCPR as well as – very relevantly – Art. 3 ECHR. Procedural safeguards, such as the prohibition of collective expulsion (Art. 4 Protocol No. 4 ECHR), also play an important role in ensuring effective access to asylum; they are discussed in detail in Chapter 3 of this study. Standing out among the various other Human Rights affected by policies preventing access to asylum is the right to leave any country, including one’s own, as protected by Art. 13(2) UDHR, Art. 12(2) ICCPR, and Art. 2(2) of Protocol No. 4 ECHR.

As to the EU Charter of Fundamental Rights, while Art. 4 EU-CFR mirrors (with the very same wording) Art. 3 ECHR,<sup>72</sup> Art. 19(2) EU-CFR mirrors the case-law of the ECtHR on Art. 3 ECHR<sup>73</sup> as well as the non-refoulement principle from international Human Rights law by explicitly prohibiting any removal, expulsion, or extradition if there is a serious risk of inhuman or degrading treatment or punishment of the person concerned. Art. 18 EU-CFR furthermore guarantees the right to asylum, referring in particular to the 1951 Refugee Convention.

The Global Compact on Refugees (GCR) recognizes the principle of non-refoulement as the ‘cardinal principle’ of the international refugee protection regime (GCR, para. 5). The Global Compact for Migration (GCM) contains commitments to the protection of migrants’ right to life (GCM, para. 24, point a) as well as upholding the ‘prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm’ (GCM, para. 37) – that is, a commitment, among other things, to the principle of non-refoulement.

The cooperation between the EU or its Member States on the one side and third countries on the other directed at non-departure or non-arrival of migrants thus raises numerous Human Rights concerns. Apart from possible violations of the principle of non-refoulement, especially through the risk of chain refoulement, such practices may also affect the Human Right to leave any country including one’s own, especially where effective protection is not available in the country concerned.<sup>74</sup> Furthermore, the treatment of migrants pulled back or hindered from departure in the third country (the country of transit, e.g., Libya) may itself amount to Human

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<sup>72</sup> On Art. 4 EU-CFR, see Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, 17.

<sup>73</sup> On Art. 19(1) EU-CFR, see *ibid.*

<sup>74</sup> For details, see Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’, 27 *European Journal of International Law (EJIL)* (2016) 591; V. Moreno-Lax, *Accessing Asylum in Europe* (2017), chapter 9.

Rights violations, including by subjecting migrants to torture or inhuman or degrading treatment.

### 1.2.2 Specific issue: Attributing responsibility for acts of third countries

The cooperation of the EU or its Member States with third countries raises difficult questions of attribution of responsibility, which also depend on the kind and degree of support from European actors for third countries (e.g., deployment of vessels, training of coast guards, sharing of information regarding the location of migrant boats etc.).<sup>75</sup> This is because ultimate and effective operational control in such cases usually rests with the third country engaged in pull-back measures (e.g., the control of Libya over the boats of its coast guard), such that ‘jurisdiction’ of a European country as required for the applicability of the ECHR according to Art. 1 ECHR will often be questionable.<sup>76</sup> In addition, the multiplicity of actors in this area may lead to a diffusion of responsibilities – and it is exactly for this reason that the EU Member States employ these strategies.<sup>77</sup>

The accountability of States and International Organizations in cooperative scenarios is governed by the principles of responsibility in international law. These principles are restated in the 2001 Articles on State Responsibility (ASR) and the 2011 Articles on the Responsibility of International Organizations (ARIO). Both were drafted by the International Law Commission (ILC) and for the most part reflect customary international law.

According to these principles, direct responsibility for the acts of another State is only incurred in very limited circumstances. According to Art. 6 ASR, ‘the conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the government authority of the State at whose disposal it is placed.’ It is hard to imagine situations of migration control measures in which third countries fully place their agents at the disposal of an EU Member State. However, the concept of joint responsibility (Art. 47(1) ASR),<sup>78</sup> which allows attributing a single internationally wrongful act to a plurality of States, confirms that responsibility is not diminished or reduced by the fact that one or more other States are responsible for the same act. According to the principle of independent responsibility, each State continues to be separately responsible for conduct attributable to it.<sup>79</sup>

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<sup>75</sup> On the following considerations, see M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (2018); R. Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (2016).

<sup>76</sup> However, under specific circumstances ‘contactless control’ may also amount to ‘effective control’ in the sense of Art. 1 ECHR; see Moreno-Lax and Giuffré, ‘The Rise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Migratory Flows’, in S. Juss (ed.), *Research Handbook on International Refugee Law* (2019) 81.

<sup>77</sup> Moreno-Lax and Lemberg-Pedersen, ‘Border-induced Displacement: The Ethical and Legal Implications of Distance creation through Externalization’, *56 Questions of International Law* (2019) 5, at 19 et seq.

<sup>78</sup> Or Art. 48(1) ARIO, respectively.

<sup>79</sup> International Law Commission, Commentary on Art. 47 ASR, at para. 1 and 3, *Yearbook of the International Law Commission* (2001), vol. II, Part Two.

However, this still leaves the possibility of indirect (derivative) responsibility of the EU or its Member States for Human Rights violations committed by third countries. Notably, liability could be established by the facilitation of the commission of Human Rights violations (e.g., by supplying equipment to the Libyan coast guards, enabling them to pull back migrants to Libya). While this type of support will not constitute direction or control (Art. 17 ASR), it may constitute an act of ‘aid or assistance’ according to Art. 16 ASR, which reads:

*A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.*

There is a controversy regarding the criterion of ‘knowledge’ in Art. 16 ASR, with some scholars requiring actual intent to facilitate the commission of a Human Rights violation.<sup>80</sup> However, as with other violations of international law, motivation – notoriously hard to prove, especially where State actions are concerned – is not necessary; what matters is the effect of the action, the knowledge of its causation, and the possibility of acting differently.<sup>81</sup> Therefore, a due diligence standard must be applied. This is also in line with a more recent General Comment of the Human Rights Committee on the right to life (Art. 6 ICCPR), according to which the obligation of States Parties to respect and ensure the Human Right to life extends to ‘reasonably foreseeable threats’.<sup>82</sup> Applying this standard, it would be hard to deny the fulfillment of the knowledge criterion at least in respect of certain forms of cooperation regarding migration control with third countries, such as Libya, that have a well-documented record of Human Rights violations in the treatment of migrants pulled back when trying to reach Europe (see above, section 1.1, on trend 1).<sup>83</sup>

However, it is not yet fully established how the general principles on State responsibility and responsibility of International Organizations – as laid down in ASR as well as ARIO – relate to the special regime of the ECHR. Does the jurisdiction clause in Art. 1 ECHR create a *lex specialis* that limits state responsibility to cases where jurisdiction exists, or is it not meant to limit other responsibility rules? The ECtHR has explicitly invoked the ASR in the past<sup>84</sup> when discussing

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<sup>80</sup> See, e.g., H.P. Aust, *Complicity and the Law of State Responsibility* (2011), at 235 et seq.; Nolte and Aust, ‘Equivocal Helpers: Complicit States, Mixed Messages and International Law’, 58 *International & Comparative Law Quarterly (ICLQ)* (2009) 1.

<sup>81</sup> See, for a similar standard, M. Fink, *Frontex and Human Rights. Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law* (2018); R. Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU* (2016), at 80 et seq.

<sup>82</sup> HRC, General Comment No. 36 on Article 6 ICCPR on the Right to Life, CCPR/C/GC/36, at para. 7; see also Moreno-Lax and Lemberg-Pedersen, ‘Border-induced Displacement: The Ethical and Legal Implications of Distance creation through Externalization’, 56 *Questions of International Law* (2019) 5, at 19.

<sup>83</sup> In the case of Libya, this result may follow even if one interprets Art. 16 ASR as requiring intent, given that this criterion is assumed to be met when ‘internationally wrongful acts are manifestly being committed’, H.P. Aust, *Complicity and the Law of State Responsibility* (2011), at 245.

<sup>84</sup> Namely Art. 6 ASR, see ECtHR, *Jaloud v. the Netherlands*, Appl. no. 47708/08, Grand Chamber Judgment of 20 November 2014, at para. 151; on the implications of this decision, see Rooney, ‘The Relationship between

the establishment of jurisdiction under Art. 1 ECHR. Here, the question of attribution – as regulated by ASR and ARIO respectively – was discussed as a preliminary question for establishing jurisdiction when multiple actors are involved in a possible Human Rights violation. In line with this case-law, one may also invoke Art. 16 ASR for the interpretation of Art. 1 ECHR and thus extend the notion of jurisdiction as ‘effective control’ to cases of complicity.<sup>85</sup>

Following another line of argument, it is also possible to refer directly to Art. 16 ASR as applicable independently of Art. 1 ECHR. In a recent decision, the ECtHR again pointed out the embedding of the ECHR into the general framework of international law:

*Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law.*<sup>86</sup>

Art. 1 ECHR should not be interpreted so as to limit international responsibility for Human Rights violations. Such an interpretation would open up a pathway for the extensive circumvention of Convention rights by the employment of third countries. Consequently, the ECHR is also applicable when a State Party to the Convention is responsible for complicity to Human Rights violations under Art. 16 ASR.

### 1.2.3 Specific issue: ‘Push-backs’ on the High Seas and at land borders

Push-back practices constitute direct violations of the principle of non-refoulement. They have already been outlawed by the ECtHR in its *Hirsi* decision in 2012 for cases on the high seas.<sup>87</sup> In that decision, the Court also declared push-backs at sea a violation of the prohibition of collective expulsions as laid down in Art. 4 Protocol No. 4 ECHR (for details, see Chapter 3).

The same rationale applies to cases concerning such measures at land borders. This was also confirmed by the ECtHR’s Grand Chamber decision in the case of *N.D. and N.T.*<sup>88</sup> In this decision, however, the Court established a new criterion for the assessment of violations of the prohibition of collective expulsions: now, States may refuse entry to aliens and may even push back persons who have already entered the State’s territory without individual removal decisions if the State provides ‘genuine and effective access to means of legal entry’. In its assessment, the Court considers whether there were ‘cogent reasons’, based on ‘objective facts for which the ... State was responsible’, for a person concerned not to make use of these means of legal entry.<sup>89</sup> However, the Court established this criterion for the interpretation of Art. 4

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Jurisdiction and Attribution after *Jaloud v. Netherlands*, 62 *Netherlands International Law Review (NILR)* (2015) 407.

<sup>85</sup> M. den Heijer, *Europe and Extraterritorial Asylum* (2012); Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’, 27 *European Journal of International Law (EJIL)* (2016) 615.

<sup>86</sup> ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020, at para. 172.

<sup>87</sup> ECtHR, *Hirsi Jamaa et al. v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012.

<sup>88</sup> ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020.

<sup>89</sup> *Ibid.*, at para. 201.



Protocol No. 4 ECHR ‘without prejudice to the application of Articles 2 and 3’ of the Convention.<sup>90</sup> Given the absolute nature of these provisions, among them the principle of non-refoulement, the aforementioned standards established by the ECtHR in *N.D. and N.T* do not apply to persons in need of protection.

Thus, as far as access to asylum is concerned, the standard set out in the *Hirsi* decision remains unchanged both at sea and on land. This means that push-backs violate Art. 3 ECHR insofar as they expose persons to risks of inhuman or degrading treatment.

EU legislation mirrors this result, as Art. 4 of the Schengen Borders Code<sup>91</sup> commits EU Member States, when conducting any measure to control the external borders of the Union, to fully comply with the EU-CFR, relevant international law (including the 1951 Refugee Convention), and ‘obligations related to access to international protection, in particular the principle of non-refoulement’. Art. 3 point (b) of the Schengen Borders Code further confirms that the Regulation applies ‘without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement’. As Art. 4 of the Schengen Borders Code also affirms that ‘decisions under this Regulation shall be taken on an individual basis’, it leaves no doubts about the illegality of push-backs without any individual assessment of possible grounds for international protection.

#### **1.2.4 Specific issue: Entry of vessels into the territorial waters and disembarkation at EU ports**

Disembarkation in the EU is another highly controversial issue, particularly given the fact that the international law of the sea – most importantly, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) – itself does not explicitly oblige any specific State to permit disembarkation. While the law of the sea obliges States Parties to cooperate in order to promote a swift disembarkation, this obligation toward other States Parties is impossible to address by an individual claimant. However, even UNCLOS (in Art. 2(3)) affirms that the Convention must not be interpreted in isolation but in line with other rules of international law. The application of the law of the sea thus does not preclude the application of international refugee and Human Rights law. The law of the sea, therefore, must be interpreted, most notably, in conjunction with the principle of non-refoulement (Art. 3 ECHR)<sup>92</sup> as well as positive duties attached to the right to life (Art. 2 ECHR).<sup>93</sup> These may well leave a coastal state with no other option but to allow for disembarkation on its own soil.

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<sup>90</sup> *Ibid.*

<sup>91</sup> Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>92</sup> See Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’, 23 *International Journal of Refugee Law* (2011) 174.

<sup>93</sup> Komp, ‘The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?’, in V. Moreno-Lax and E. Papastavridis (eds), *Boat Refugees’ and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (2016) 222.

The same may follow from the duty to render assistance to persons in distress at sea,<sup>94</sup> an obligation both under customary international law and under a number of provisions in international treaties, such as Art. 98(1) UNCLOS, Annex 2.1.10 of the 1979 International Search and Rescue Convention (SAR Convention),<sup>95</sup> and Regulation V/33 of the 1974 International Convention for the Safety of Life at Sea (SOLAS).<sup>96</sup> Rescues must be delivered to a ‘place of safety’.<sup>97</sup> This has been characterized by the Maritime Safety Committee (MSC) of the International Maritime Organization (IMO) as a ‘place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.’ Governments have the duty to ‘co-operate with each other with regard to providing suitable places of safety for survivors after considering relevant factors and risks’. Where asylum seekers and refugees recovered at sea are affected, the governments must consider the ‘need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened’.<sup>98</sup> More specifically, the Rescue Co-ordination Centre (RCC) of the state responsible for a particular SAR zone in which an incident takes place (and possibly also other RCCs confronted with a distress situation) is obliged to initiate not only the rescue operation but also the process of identifying a place of safety and delivering the person to that place.<sup>99</sup>

A recent study taking into account numerous reports on the current Human Rights situation in Northern African Mediterranean countries reached to the conclusion that none of these countries generally qualify as ‘places of safety’ in the sense of the aforementioned provisions.<sup>100</sup> While this result seems obvious for Libya (see above on Libya’s record of Human Rights violations), an analysis of the situation in Algeria, Egypt, Morocco and Tunisia – albeit less devastating – likewise showed an overall lack of functioning asylum systems as well as numerous severe Human Rights violations, such as incidences of chain refoulement, detention of migrants in inhuman and degrading conditions, and the use of torture. This was especially the case for LGBTI migrants, who face persecution in all Northern African countries. At the same

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<sup>94</sup> For the following, see also A. Farahat and N. Markard, *Places of Safety in the Mediterranean: The EU’s Policy of Outsourcing Responsibility* (2020), at 14–18, available at <https://eu.boell.org/en/2020/02/18/places-safety-mediterranean-eus-policy-outsourcing-responsibility>.

<sup>95</sup> International Convention on Maritime Search and Rescue (SAR), 1979, 1405 UNTS 97, modified by Res. MSC Res. 155(78), 20 May 2004 (SAR Convention 2004). The Convention was ratified by all Mediterranean countries in Europe as well as all other Mediterranean states except for Egypt and Israel. The 2004 amendments were not ratified by Malta.

<sup>96</sup> International Convention for the Safety of Life at Sea (SOLAS), 1974, 1184 UNTS 278. The 1974 Convention was ratified by all Mediterranean States except for Bosnia and Herzegovina; the 2004 amendments (hereafter referred to as SOLAS (2004)) were not ratified by Malta.

<sup>97</sup> SOLAS (2004) regulation V/33, para. 1.1; SAR Convention (2004), Annex 3.1.9.

<sup>98</sup> MSC.Res. 167(78), 20 May 2004, (MSC 78/26/Add.2, Annex 34, para. 6.12., 6.16 and 6.17). These Guidelines were passed by the IMO Member States with the exception of Malta and were later affirmed by the UN General Assembly, GA Res. 16/222, 16 March 2007, UN doc. A/RES/61/222, para. 70.

<sup>99</sup> SAR Convention (2004), Annex 3.1.9 and 4.8.5.

<sup>100</sup> A. Farahat and N. Markard, *Places of Safety in the Mediterranean: The EU’s Policy of Outsourcing Responsibility* (2020), available at <https://eu.boell.org/en/2020/02/18/places-safety-mediterranean-eus-policy-outsourcing-responsibility>.

time, it seems impossible to provide a reliable screening procedure onboard rescuing ships to determine refugee status and comprehensively assess the risk of torture or a particular vulnerability.<sup>101</sup> This is why EU Member States, in order to comply with their duty to render assistance to persons in distress at sea, may also have to allow for disembarkation on the soil of an EU Member State.

However, despite these substantive positions in the law of the sea as well as Human Rights law, persons affected by non-disembarkation policies are in a particularly weak position to enforce these rights given the lack of explicit procedural safeguards and remedies for individuals.

Based on the EU's general commitment to the protection and promotion of Human Rights (Art. 2 TEU), to the right of life (Art. 2 EU-CFR), the right to asylum (Art. 18 EU-CFR), and the principle of non-refoulement (Art. 19(2) EU-CFR), the EU is accountable for possible violations of substantive rights. It should, therefore, propose a set of rules according to which Member States must allow migrants to disembark, certainly combined with a mechanism of transfer (for example, by quota), based on the principle of solidarity among Member States.<sup>102</sup> In this respect, the 2019 Malta Declaration on SAR and relocation (see above 1.1, Trend 2) is not an adequate substitution for a stable mechanism with a firm legal basis and general applicability in all (coastal) EU Member States.

Clear-cut and legally binding rules on disembarkation already exist for a limited number of situations, namely, where Frontex-coordinated missions are concerned. Here, the 2014 Maritime Surveillance or External Sea Borders Regulation (Regulation 656/2014) provides for two options: disembarkation may take place in the country from whence the migrants came and, that failing (e.g., if this would violate the principle of non-refoulement or other Human Rights duties),<sup>103</sup> disembarkation shall take place in the Member State hosting the Frontex operation.<sup>104</sup> This provision could serve as a model for a codification that allows disembarkation in coastal Member States in general.

### 1.2.5 Specific issue: Limits to 'protection elsewhere'

Based on the concept of 'protection elsewhere', refugees are frequently referred or transferred to third countries that are said to provide sufficient protection. The general idea of 'protection elsewhere' as excluding from refugee status – mostly applied as a rule of (in)admissibility of protection claims<sup>105</sup> – has no firm and explicit basis in international law. It is built on

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<sup>101</sup> *Ibid.*, at 18–31.

<sup>102</sup> European Commission, COM(2020) 610 final, 23 September 2020. The Commission proposes a solidarity mechanism for cases of disembarkation but builds largely on the goodwill of Member States once the particular situation arises instead of sufficiently anticipating conflict between Member States by providing for clear-cut rules for actual burden sharing; see Art. 45–49.

<sup>103</sup> See Art. 4 Regulation 656/2014 establishing rules for the surveillance of the external sea borders.

<sup>104</sup> Art. 10 Regulation 656/2014.

<sup>105</sup> See, e.g., Art. 33(2) Asylum Procedures Directive.

the silence on this matter of the 1951 Refugee Convention, which neither expressly permits nor prohibits such policies. The concept remains contested to this day.<sup>106</sup> Among other things, it may be fundamentally at odds with the principles of international solidarity, burden- and responsibility-sharing among UN Member States, and some of the ‘guiding principle’ of the 2018 Global Compact on Refugees (GCR, para. 5). However, based on the argument that the 1951 Refugee Convention does not grant a direct right to asylum and that asylum seekers may not be entitled to ‘choose’ their specific country of refuge, the general principle of ‘protection elsewhere’ is mostly accepted – for example, by the United Nations High Commissioner for Refugees (UNHCR)<sup>107</sup> and by the authors of the 2007 Michigan Guidelines, a highly relevant scholarly opinion.<sup>108</sup> However, constraints are imposed on its application – that is, there are criteria for the permissibility of a referral or transfer of asylum seekers to a particular third country.<sup>109</sup>

In the context of the EU, the principle of ‘protection elsewhere’ is applied by referring or transferring refugees to third countries that are identified either as the ‘country of first asylum’ (Art. 35 Asylum Procedures Directive 2013/32/EU), implying that the person concerned has already found protection in that country, or as a ‘safe third country’ (Art. 38 and 39 Asylum Procedures Directive), where it is presumed that the person concerned *could have* found protection.

A number of normative problems arise regarding both the interpretation of the current versions and the possible reform of these provisions, most notably the ‘safe third country’ rule.

While Art. 38(1)(c) Asylum Procedures Directive requires that a Member State may only apply the ‘safe third country’ rule if the third country respects the principle of non-refoulement ‘in accordance with the Geneva Convention’, it is unclear whether this requires actual ratification of the Geneva Convention by the receiving state or only an equivalent protection standard. This question is relevant for the case of Turkey, whose geographical limitation of the Geneva Convention to refugees from Europe excludes those from Syria, for example. An expansion of the safe third country concepts seems also to be intended by the European Commission’s 2016 and 2020 proposal to replace the wording in Art. 38(1)(c) Asylum Procedures Directive by a provision that only refers to the ‘substantive standards of the Geneva Convention’ or ‘sufficient

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<sup>106</sup> Moreno-Lax, ‘The Legality of the ‘Safe Third Country’ Notion Contested: Insights from the Law of Treaties’, in G.S. Goodwin-Gill and P. Weckel (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects* (2015) 663.

<sup>107</sup> UNHCR, Position on Readmission Agreements, ‘Protection Elsewhere’ and Asylum Policy (1994), at 465, available at <https://www.refworld.org/docid/3ae6b31cb8.html>.

<sup>108</sup> University of Michigan Law School, *The Michigan Guidelines on Protection Elsewhere* (2007), at 211, available at <https://www.refworld.org/docid/4ae9acd0d.html>.

<sup>109</sup> On the general legitimacy of the concept, see also Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’, 28 *Michigan Journal of International Law* (2007) 223, at 230.

protection’ provided that further criteria are met.<sup>110</sup> Such a widening of the concept would be at odds with Art. 78(1) TFEU, which continues to require the EU’s asylum policy to be ‘in accordance’ with the Geneva Convention. Furthermore, the EU’s substantive commitments to the protection and promotion of Human Rights in general (Art. 2 TEU), as well as to the right to asylum (Art. 18 EU-CFR) and the principle of non-refoulement (Art. 19(2) EU-CFR) in particular, require a narrow interpretation of the current provision of Art. 38(1)(c) Asylum Procedures Directive and set limits for legislative amendments.

In the current process of reforming the CEAS, it was additionally proposed to make the application of the (nowadays optional) ‘safe third country’ rule mandatory for all EU Member States<sup>111</sup> as well as to lower the standard for referrals to ‘safe third countries’ by assuming a necessary ‘connection’<sup>112</sup> between any asylum seeker and a third country solely on the basis that the country was transited by, and is geographically close to the country of origin of, the asylum seeker.<sup>113</sup> Again, these proposals seem to contradict the EU’s endorsement of a positive contribution to the protection of Human Rights and are at odds with the principle of burden- and responsibility-sharing as expressions of international solidarity (GCR, para. 5).

Another important issue regarding the application of the ‘safe third country’ rule concerns the actual empirical determination of the Human Rights situation (or ‘safety’) in a given third country and the burden of proof in this regard. The 2007 Michigan Guidelines require, for permitting the referral of an asylum seeker to ‘protection elsewhere’ a ‘good faith empirical assessment’ by the sending state that refugees will enjoy Refugee Convention rights in the receiving state.<sup>114</sup> Similarly, UNHCR maintains that

*the country to which an asylum application has been submitted is primarily responsible for considering it. Accordingly, if that country wants to transfer that responsibility to a third country, in addition to securing the agreement of that country to receive and consider the asylum application, it must establish that such third country is “safe” with respect to that particular asylum-seeker. The burden of proof does not lie with the asylum-seeker (to establish that the third country is unsafe), but rather with the country which wishes to remove the asylum-seeker from its territory (to establish that the third country is safe).*<sup>115</sup>

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<sup>110</sup> European Commission, Proposal for an Asylum Procedures Regulation, COM(2016) 467 final, 13 July 2016, Art. 45(1)(e). The Commission’s amended proposal of 23 September 2020, COM(2020) 611 final, leaves the relevant parts unchanged.

<sup>111</sup> *Ibid.*

<sup>112</sup> On the concept, see Lübke, ‘Das Verbindungsprinzip im fragmentierten europäischen Asylraum’, 50 *Europarecht (EuR)* (2015) 329.

<sup>113</sup> European Commission, Proposal for an Asylum Procedures Regulation, COM(2016) 467 final, 13 July 2016, Art. 45(3)(a). The amended proposal of 23 September 2020, COM(2020) 611 final, leaves the relevant parts unchanged.

<sup>114</sup> University of Michigan Law School, *The Michigan Guidelines on Protection Elsewhere* (2007), at 211, available at <https://www.refworld.org/docid/4ae9acd0d.html>.

<sup>115</sup> UNHCR, *Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status* (2001), at para. 36, available at <https://www.refworld.org/docid/3c0e3f374.html>; for a similar standard, see Foster, ‘Protection Elsewhere:

The burden of proof in this respect lies with the country where the asylum application was filed, as it retains the responsibility for any action in violation of its obligation from international law, most notably the principle of non-refoulement. This may also follow from the practical consideration that the refugee affected cannot be required to provide comprehensive information about the Human Rights situation in the third country.<sup>116</sup>

In the context of the EU, Art. 38 Asylum Procedures Directive states that Member States may only apply the third country rule where the competent authorities are ‘satisfied’ that a person seeking protection will be treated in accordance with the principles named in Art. 38 in the third country concerned. According to EASO (the European Asylum Support Office), Member States therefore must ‘substantiate any finding that the country concerned is sufficiently safe to remove the applicant’ if they wish to apply the safe country concept.<sup>117</sup> This requires the ‘determination of more than the mere absence of persecution or serious harm’<sup>118</sup> and obliges Member States to show that the safeguards provided for in Art. 38 Asylum Procedures Directive would be met in the third country concerned – a requirement practically impossible to accomplish aboard a ship on a SAR mission, for instance. This sets a high standard for any EU and Member State policy that must be observed both in future EU legislation on the matter and in any conclusion or application of informal cooperation arrangements with third countries on migration control.

### 1.2.6 Specific issue: Allocating asylum jurisdiction within the EU (Dublin system)

Other normative problems arise as to the internal European dimension of referring asylum seekers to other countries in the framework of the Dublin system. Depending on the circumstances of the applicant concerned, as well as of the conditions of the asylum system in the specific EU Member State to which a person is supposed to be referred, the ECtHR has in the past found that Dublin referrals may violate Art. 3 ECHR, both on its own and in conjunction with Art. 13 ECHR (right to an effective remedy) as well as Art. 4 of Protocol No. 4 ECHR (prohibition of collective expulsion).<sup>119</sup>

The rights from the ECHR are mirrored and partly expanded by the safeguards enshrined in the EU-CFR. The current Dublin III Regulation (Regulation 604/2013) explicitly refers to the EU-CFR when it states that the Regulation ‘seeks to ensure full observance of the right to asylum guaranteed by Art. 18 of the Charter as well as the rights recognised under Articles 1 [dignity],

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The Legal Implications of Requiring Refugees to Seek Protection in Another State’, 28 *Michigan Journal of International Law* (2007) 223, at 281.

<sup>116</sup> *Ibid.*

<sup>117</sup> EASO, Evidence and credibility assessment in the context of the Common European Asylum System (2018), at 164.

<sup>118</sup> *Ibid.*, at 167.

<sup>119</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no., 30696/09, Judgment of 21 January 2011; *Sharifi and others v. Italy and Greece*, Appl. no. 16643/09, Judgment of 21 October 2014; *Tarakhel v. Switzerland*, Appl. no. 29217/12, Grand Chamber Judgment of 4 November 2014.

4 [prohibition of torture, inhuman or degrading treatment or punishment], 7 [respect for private and family life], 24 [rights of the child] and 47 thereof [right to an effective remedy and to a fair trial].<sup>120</sup> While the CJEU has hitherto left open the question of whether Art. 18 EU-CFR amounts to a free-standing right to asylum,<sup>121</sup> it is clear that the Dublin Regulation has to be construed in light of this constitutional guarantee. Moreover, the Court confirmed that in order to ensure compliance with the fundamental rights of asylum seekers, EU Member States, when applying the Dublin Regulation, may not transfer asylum seekers to other Member States ‘where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Art. 4 of the Charter’.<sup>122</sup>

The Dublin system must fully respect the aforementioned Human Rights and fundamental rights. A recast Dublin Regulation must be particularly sensitive to the protection of family union as part of the respect for private and family life enshrined in Art. 8 ECHR and Art. 7 EU-CFR, and to the rights of – particularly unaccompanied – minors, in order to fully take into account the rights of the child as provided for in the Convention on the Rights of the Child (CRC) and Art. 24 EU-CFR. Proposals such as the 2016 Commission proposal to shorten or eliminate time limits for transfers from one Member State to another<sup>123</sup> may not only lead to violations of cross-cutting procedural rights such as the right to an effective remedy (Art. 13 ECHR, Art. 47 EU-CFR) but also to the guarantee of access to a fair asylum procedure that is implied in Art. 18 EU-CFR. Accordingly, access to a functioning asylum procedure must be provided by a new Dublin system.<sup>124</sup>

In order to guarantee these rights, including under exceptional circumstances, and to avoid leaving persons in limbo as ‘refugees in orbit’, the new Dublin Regulations must also provide for sufficiently flexible rules for one Member State to be able to step in for another if needed by applying escape clauses such as, for example, the discretionary or ‘humanitarian’ clauses in the current Dublin system (Art. 17 Dublin III Regulation). Depriving the future Dublin system of such flexibility would inevitably lead to situations where EU Member States would have to choose between compliance with EU law and their obligations under the ECHR. A recast Dublin Regulation that does not systematically avoid such conflict would be unlawful.<sup>125</sup>

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<sup>120</sup> Dublin III Regulation, recital 39.

<sup>121</sup> CJEU, Case C-528/11, *Zuheyra Frayeh Halaf* (EU:C:2013:342).

<sup>122</sup> CJEU, Joined Cases C-411/10 and C-493/10, *N.S. and M.E.* (EU:C:2011:865), at para. 94.

<sup>123</sup> European Commission, Proposal for a recast Dublin Regulation, COM(2016) 270 final, 4 May 2016, at 16.

<sup>124</sup> Cf. E. Guild, C. Costello and V. Moreno-Lax, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece* (2017), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL\\_STU\(2017\)583132\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf), 43, at 51.

<sup>125</sup> M. Pelzer, *Die Rechtsstellung von Asylbewerbern im Asylzuständigkeitsystem der EU* (2020), at 148 et seq. and 243 et seq.

### 1.2.7 Specific issue: International obligations to provide for safe and legal access to asylum?

Due to the lack of safe and regular options for access to protection in Europe, the vast majority of asylum seekers nowadays reach Europe as irregular migrants.<sup>126</sup> This has provoked calls for opening or extending safe and regular pathways such as quota-based governmental admission, resettlement programs, ad hoc humanitarian admission programs, or admission on the basis of private or community sponsorship.<sup>127</sup> At the same time the ECtHR, in the 2020 decision in *N.D. and N.T. v. Spain*, held that certain coercive measures of migration control (in that case, actual push-backs without individual assessment; see above, section 1.2.3, and Chapter 3) may only be employed by States that at the same time provide ‘genuine and effective access to means of legal entry’.<sup>128</sup> Arguably, this line of reasoning implies a broadly framed positive obligation of States, derived from Human Rights, to facilitate legal pathways of accessing the asylum system. This calls for legislation in the EU to provide for such forms of regular access to protection, which notably must also be ‘effective’.<sup>129</sup>

One of the safe and regular pathways to protection frequently discussed is humanitarian visas – that is, permits to enter the territory of a state in order to ask for asylum. What makes this stand out among other pathways is it is based on a well-established legal instrument (visas) and existing governmental institutions (embassies and consulates). Moreover, this instrument allows for the external assessment of individual protection claims, taking into account both urgent need and existing (e.g., family or economic) ties. If founded on a legal basis applicable in all EU Member States, rather than on unilateral ad hoc measures, this pathway could also provide for an accessible, fair, and reliable mechanism for the individual and contribute to burden sharing among the EU Member States. The question of humanitarian visas also specifically calls for the EU legislature because – unlike in resettlement programs – UNHCR is typically not involved here. Such legislation could build upon rich experiences from Member States,

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<sup>126</sup> V. Moreno-Lax, *The Added Value of EU Legislation on Humanitarian Visas: Legal Aspects* (2018), at 34 et seq., available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621823/EPRS\\_STU%282018%29621823\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621823/EPRS_STU%282018%29621823_EN.pdf).

<sup>127</sup> For an overview, see M.-C. Floblets and L. Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (2020), and L. Ansems de Vries, J.P. Gauci and H. Redwood, *Legal Pathways to Protection* (2018), available at [https://www.biicl.org/documents/24\\_2042\\_legal\\_pathways\\_policy\\_brief\\_final\\_complete\\_27feb2018.pdf](https://www.biicl.org/documents/24_2042_legal_pathways_policy_brief_final_complete_27feb2018.pdf).

<sup>128</sup> ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020, at para. 201.

<sup>129</sup> However, the reluctance of EU Member States in this respect is considerable. For example, in a hearing regarding a case currently pending before the ECtHR, representatives of Belgium and France, among other Member States, reaffirmed their rejection of any interpretation of the ECHR that would require Member States to issue humanitarian visa; see the public hearing in the case *M.N. and others v. Belgium*, Appl. no. 3599/18, webcast available at [https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=359918\\_24042019&language=en](https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=359918_24042019&language=en); Süddeutsche Zeitung, ‘Europäische Staaten warnen vor humanitären Visa’, 24. April 2019, available at <https://www.sueddeutsche.de/politik/europa-asyl-visa-menschenrechte-1.4419695>.



given that 16 of them have, or have had, schemes for issuing humanitarian visas.<sup>130</sup>

In fact, in 2018 the European Parliament issued an initiative report calling on the Commission to table a legislative proposal establishing a ‘European Humanitarian Visa’ that gives access to the territory of the Member State issuing the visa for the purpose of submitting an application for international protection.<sup>131</sup> This call to provide a regular pathway to access international protection in the EU is most notably based on the duty of the EU to take positive action to guarantee the principle of non-refoulement (as enshrined in Art. 4 and Art. 19(2) EU-CFR, consolidating the substance of Art. 3 ECHR as interpreted by the ECtHR<sup>132</sup>), but other human and fundamental rights may also require the EU to become active as a legislator in the field.

It has been argued, for example, that in light of the EU-CFR, a duty to issue visas to ensure safe access to the European asylum already follows from the interpretation of EU law as it stands, in particular the EU Visa Code (Regulation 810/2009). For example, in the case of a Syrian family who had applied for visas at the Belgian embassy in Lebanon in order to seek asylum in Belgium, Paolo Mengozzi, Advocate General at the CJEU, argued that in cases where its rejection would expose a person to a serious risk of inhuman or degrading treatment, a legal right to a visa flows from the EU-CFR, which applies in the ambit of the EU Visa Code.<sup>133</sup> In that specific case, the Advocate General held that the denial of visas may violate the applicants’ rights as protected by Art. 1 (right to dignity), Art. 2 (right to life), Art. 3 (right to the integrity of the person), Art. 4 (prohibition of torture and inhuman and degrading treatment) and Art. 24(2) EU-CFR (the child’s best interest). The CJEU, in its 2017 decision, did not follow the Advocate General’s Opinion. However, it did not rule on the substance of the case but rather rejected the view that the Visa Code, and hence the EU-CFR, applied to the particular case.<sup>134</sup> Given the ongoing structural risk of human and fundamental rights violation referred to by Advocate General Mengozzi, in cases of denial of visa applications the EU remains accountable for not having provided a firm legal basis for humanitarian visas across EU Member States.

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<sup>130</sup> U. Iben Jensen, *Humanitarian Visas: Option or obligation?* (2014), at 48 et seq., available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL\\_STU\(2014\)509986\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf).

<sup>131</sup> European Parliament, Resolution 2018/2271(INL) of 11 December 2018 with recommendations to the Commission on Humanitarian Visas, available at [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0494\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0494_EN.pdf); European Parliament, ‘Humanitarian visas’, European Added Value Assessment accompanying the European Parliament’s legislative own-initiative report (Rapporteur: Juan Fernando López Aguilar), Study, October 2018, available at <https://publications.europa.eu/en/publication-detail/-/publication/a3b57ef6-d66d-11e8-9424-01aa75ed71a1/language-en/format-PDF>.

<sup>132</sup> V. Moreno-Lax, *The Added Value of EU Legislation on Humanitarian Visas: Legal Aspects* (2018), at 69 et seq., available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621823/EPRS\\_STU%282018%29621823\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621823/EPRS_STU%282018%29621823_EN.pdf).

<sup>133</sup> Opinion of Advocate General Mengozzi in Case C-638/16 PPU, *X & X v. Belgium* (EU:C:2017:93).

<sup>134</sup> The Court held that the Visa Code was not applicable to such visa applications as in the case decided upon filed with the purpose to seek international protection after arrival in the EU: CJEU, Case C-638/16-PPU, *X & X v. Belgium* (EU:C:2017:173). In a similar vein, the ECtHR in 2020 decided that according to Art. 1 ECHR and given the lack of ‘jurisdiction’ in such cases, the ECHR does not apply to State Parties’ diplomatic and consular missions, ECtHR, *M.N. and others v. Belgium*, Appl. no. 3599/18, Grand Chamber Decision of 5 May 2020, at para. 112 et seq.

## 1.3 Recommendations

### **Recommendation 1: Strictly condition cooperation with third countries on Human Rights compliance**

The EU and its Member States must immediately cease to support, directly or indirectly, any measures of migration control by third countries that constitute breaches of international law. Accordingly, cooperation in this regard with States known for their systematic violations of Human Rights must be suspended.

In deciding on the establishment of any other ‘migration partnerships’ with third countries, Human Rights provisions should always be strictly observed as firm legal guardrails and should also be carefully considered as policy guidelines. Following such assessments, cooperation with third countries may appear to be inappropriate in the first place.

Any form of cooperation by the EU or its Member States with third countries in the field of migration control should only be considered when the third country is able and willing to effectively protect Human Rights and is politically sufficiently stable at the time of concluding any agreement. Furthermore, to guarantee a certain level of protection over time, an effective mechanism to monitor respect for Human Rights in such third countries would need to be established. Such a mechanism must provide for an objective and independent evaluation. It would have to consist of a politically responsible management body (under the direction of the Commission or Frontex) as well as an independent body of experts for risk assessment of Human Rights violations (e.g., delegated by the EU Fundamental Rights Agency (FRA) in cooperation with UNHCR as well as experts from NGOs). The latter would need to have full access to empirical data in the third country (e.g., prison conditions) allowing for a continuous and precise evaluation of conformity with Human Rights standards in that country.

Any future arrangements on migration cooperation between the EU or its Member States and third countries should, therefore, contain provisions on the establishment of such a mechanism and should be conditional upon the continuous respect for Human Rights in that country. The cooperation should automatically end if the management body, following the risk assessment of the independent expert body, comes to the conclusion that the third country does not sufficiently observe Human Rights provisions, namely, in cases of severe or systematic violations of Human Rights. The standard to be observed should be the one required by the ECHR and the EU-CFR.

### **Recommendation 2: End push-backs and closure of ports**

Member States must refrain from any push-back measures as such practices violate the ECHR. This should be fostered by new EU legislation specifying the conditions for the respect of Human Rights, such as the principle of non-refoulement, during border control measures conducted by Member States. While such conditions are enumerated in detail for all measures

involving the coordination of Frontex (most notably in the Frontex and the External Sea Borders Regulations), the same is not true for measures conducted by Member States independently – the vast majority of all (sea) border control measures.<sup>135</sup> While these must also respect the principle of non-refoulement and other human and fundamental rights when undertaking controls of the EU external borders (with or without Frontex involvement), the respective provisions in the Schengen Borders Code are rather general and make no provision for search and rescue incidents in the course of border control operations. Such legislation should also specify the Human Rights obligations that apply when EU agencies or Member States call on third country authorities for pull-back measures.

In a similar vein, while Member States should refrain from the closure of their ports to the disembarkation of migrants rescued at sea by NGO vessels conducting SAR operations, such non-disembarkation policies also point to the structural lack of a safe, fair, and predictable allocation and relocation mechanism following disembarkation.<sup>136</sup> Such an allocation mechanism should be an integral part of any reform of the Dublin System.

### **Recommendation 3: Establish a high standard for the assumption of safe third countries**

Any attempt at lowering standards with regard to the concept of a ‘safe third country’, such as the current proposal for a Regulation replacing the Asylum Procedures Directive, should be thoroughly reconsidered. In particular, the new concept of partial territorial protection must be formulated in such a way as to exclude the dangers of referring migrants to overall unstable third countries and of their confinement in parts of that third country. Furthermore, any proposals for revising the connection clause in Art. 38 of the Asylum Procedure Directive must take into account the right to respect for the applicant’s family and social ties.

### **Recommendation 4: Keep the Dublin system flexible to effectively ensure access to asylum**

Any reform of the current Dublin system must duly take into account the Human Rights of asylum seekers, most notably the right to access a functioning asylum procedure and reception system, while strengthening the respect for family and social ties.

A recast of the Dublin Regulation must not reverse the achievements in terms of Human Rights and EU fundamental rights brought about through case-law – most notably, the protection against transfers to Member States where there is a threat of Human Rights violations and the guarantee of effective legal remedies, including with suspensive effect. A new Regulation must

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<sup>135</sup> Den Heijer, ‘Frontex and the shifting approaches to boat migration in the European Union’, in R. Zaiotti (ed.), *Externalizing Migration Management* (2016) 53, at 67.

<sup>136</sup> ECRE, ‘*Relying on Relocation*’: *ECRE’s Proposal for a predictable and fair relocation arrangement following disembarkation* (2019), at 4 et seq., available at <https://www.ecre.org/wp-content/uploads/2019/01/Policy-Papers-06.pdf>; UNHCR, Italy Fact Sheet (2019), at 2, available at <https://data2.unhcr.org/en/documents/download/68161>.

also strictly guarantee that the responsibility to process an asylum application falls back upon a Member State in the case of deficits of the asylum system in the responsible Member State. In a similar vein, in order to guarantee sufficient flexibility of Member States to comply with Human Rights norms, particularly under exceptional circumstances, a new Dublin Regulation must continue to provide for an open-ended discretionary clause for the assumption of responsibility by Member States.

Overall, a new Regulation should reduce rather than expand coercive elements and provide for ways to take due account of the individual interests and agency of asylum seekers.

### **Recommendation 5: Establish safe and legal pathways to asylum in the EU**

In order to comply with its claim to protect and promote Human Rights, the EU must not only refrain from certain measures but also become proactive in providing safe and legal pathways to refuge in the EU.

There are a number of avenues to reach this goal. For example, quota-based governmental admission may guarantee such pathways for those in urgent need of protection. Massively expanding resettlement programs or ad hoc humanitarian admission programs – for example, in cooperation with UNHCR – could be one solution. This could also be combined with facilitating individual admission based on personal links to the receiving state by family reunification and private sponsorship.

However, external assessment of individual protection claims with a realistic chance of obtaining a humanitarian visa is, in our view, the preferable option for providing an accessible, fair, and reliable mechanism of access based on considerations of both urgent need and existing ties. Such a mechanism would also build as much as possible upon an already established structure (of embassies) to examine such claims. Conditions for issuing such visas should be laid down in a Regulation, following the initiative report by the European Parliament for a legislative proposal for a European Humanitarian Visa.

# Chapter 2 – Ensuring Liberty and Freedom of Movement

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The authority to admit and expel non-nationals is generally regarded as a key element of state sovereignty. To enforce such decisions, States often resort to administrative detention. EU Member States were initially reluctant to lose control over the legal exercise of physical force toward migrants. However, immigration detention is not only instrumental in enforcing a given policy aim but also a tool of migration policy in its own right, used for a variety of purposes.<sup>137</sup> Accordingly, regulating immigration detention is a necessary corollary of the EU’s task of developing a common immigration policy according to Art. 79 TFEU.

Since the second phase of legislation in the field of migration policy, the EU has exercised its respective powers and developed a broad – albeit patchy – regulatory framework in relation to administrative detention of migrants. Immigration detention is treated as an adjunct to the reception of asylum seekers (Reception Conditions Directive),<sup>138</sup> including the EU-wide mechanism for allocating asylum jurisdiction (Dublin Regulation),<sup>139</sup> and to the legislative act regu-

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<sup>137</sup> Leerken and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’, 50 *British Journal of Criminology* (2010) 830.

<sup>138</sup> Directive 2013/33/EU, recitals 15–20 and Art. 8–11.

<sup>139</sup> Regulation 604/2013, recital 20 and Art. 28.

lating the procedure on terminating illegal residence, including deportations (Return Directive).<sup>140</sup> Other related instruments touch on the issue of detention indirectly, such as the Schengen Borders Code<sup>141</sup> or, briefly, the Asylum Procedures Directive.<sup>142</sup> As a result, EU law has established a regulatory framework on detention that covers all relevant situations and, hence, has assumed for itself primary responsibility for Human Rights compliance in this field of European migration policy.

## 2.1 Structural challenges and current trends

In public discourse, migration has increasingly been assimilated to security. Migrants, especially those who are undocumented, are presented as a danger to society. Detention policies have become emblematic in an attempt to show control and respond to the threat of terrorism as well as to mounting political pressures regarding border security.<sup>143</sup> There is also an increasing trend of States using detention as a deterrence policy with a view to managing the numbers of certain groups of ‘undesirable’ migrants, by seeking to push those in their territory to leave and to deter future arrivals.<sup>144</sup> Thus, detention is portrayed as a legitimate response to protecting national interests and serves to further a variety of broader strategies of migration management. It is implemented toward migrants, including refugees and asylum seekers, at all stages of their migration process: upon seeking entry to a territory or pending deportation, removal or return from a territory,<sup>145</sup> but also during asylum procedures (e.g., the special form of Dublin detention pending transfer to another EU Member State).<sup>146</sup>

Detention, defined here as ‘deprivation of liberty or confinement to a particular place’<sup>147</sup>, can take place in a variety of locations – from specialized administrative facilities to prisons, airport

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<sup>140</sup> Directive 2008/115/EC, recitals 16–17 and Art. 15–17.

<sup>141</sup> Regulation 2016/399, Art. 14, Annex V and VI: Border guards must prevent the entry of persons without a right to enter ‘in accordance with national, Union and international law’.

<sup>142</sup> Directive 2013/32/EU, Art. 26: a person shall not be detained for the sole reason that he or she is an applicant; speedy judicial review must be ensured; cross-reference to Reception Conditions Directive for grounds, conditions and guarantees.

<sup>143</sup> Sampson and Mitchell, ‘Global trends in immigration detention and alternatives to detention: practical, political and symbolic rationales’, 1 *Journal on Migration and Human Security (JMHS)* (2013) 97; see also Leerken and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’, 50 *British Journal of Criminology* (2010) 830, at 842–844; Ph. de Bruycker et al., *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation* (2015), at 19.

<sup>144</sup> See, e.g. for Denmark, J. Suarez-Krabbe, J. Arce and A. Lindberg, *Stop Killing Us Slowly: A Research Report on the Motivation Enhancement Measures and Criminalization of Rejected Asylum Seekers in Denmark* (2018), available at [http://refugees.dk/media/1757/stop-killing-us\\_uk.pdf](http://refugees.dk/media/1757/stop-killing-us_uk.pdf).

<sup>145</sup> A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’* (2011), available at <https://www.unhcr.org/4dc949c49.pdf>.

<sup>146</sup> Dublin detention is a special form of detention which should only serve the purpose of facilitating a transfer to the responsible Dublin State and falls within neither the categories of restrictions of liberty for asylum seekers nor detention in the context of return; see Art. 28(2) Dublin III Regulation.

<sup>147</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), at 9, available at <https://www.refworld.org/docid/503489533b8.html>.

transit zones, or remand facilities.<sup>148</sup> States justify detention measures with practical considerations – such as having the migrant at the disposal of the authorities for identity checks or public health screenings at arrival – as well as enforcement-related motivations such as securing public order or forced return of irregular migrants, or political objectives such deterring further arrivals or protecting host societies.<sup>149</sup>

The three key pieces of legislation at EU level that pertain to detention are subject to ongoing reform efforts,<sup>150</sup> which tend toward a tightening of the regime. Whereas in the context of the second phase of CEAS, the European Commission still displayed a fundamental rights approach to migration detention (albeit one met with skepticism by some Member States),<sup>151</sup> more recently the Commission has adopted a more restrictive and repressive approach that moves further away from an administrative law rationale and integrates the punitive logic of criminal law, captured by the term ‘crimmigration’.<sup>152</sup>

We observe three key trends in which this plays out: (1) an increased use of immigration detention for a wider range of reasons, (2) a proliferation of area-based restrictions and other measures limiting migrants’ freedom of movement short of detention, and (3) problematic conditions in immigration detention facilities. These trends naturally increase the tension between the expanding scope of EU migration policy and its commitment to Human Rights.

### **Trend 1: More frequent and systematic use of detention for a wider range of reasons**

We observe that Member States are more frequently and systematically resorting to immigration detention based on a wider range of grounds. This trend is buttressed by EU legislation and policy.

First, we observe an expansion of the reasons for detention. Although the relevant Directives establish lists of permissible detention grounds,<sup>153</sup> and recourse to detention is to some extent subject to political economies,<sup>154</sup> there is ample evidence indicating that the use of immigra-

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<sup>148</sup> Ph. de Bruycker et al., *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation* (2015), at 15.

<sup>149</sup> G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (2010), at 247; S. Vohra, ‘Detention of irregular migrants and asylum seekers’, in R. Cholewinski, R. Perruchoud and E. McDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (2007) 49.

<sup>150</sup> European Commission, Proposal for a recast Reception Conditions Directive, COM(2016) 465 final, 13 July 2016; European Commission, Proposal for a recast Return Directive, COM(2018) 634 final, 12 September 2018; European Commission, Proposal for a recast Dublin Regulation, COM(2016) 270 final, 4 May 2016.

<sup>151</sup> See Tsourdi, ‘Asylum Detention in EU Law: Falling between Two Stools?’ 35 *Refugee Survey Quarterly* (2016) 7, at 11.

<sup>152</sup> Costello, ‘Immigration Detention: The Grounds Beneath Our Feet’, 68 *Current Legal Problems* (2015) 143; citing Legomsky, ‘The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms’, 64 *Washington & Lee Law Review* (2007) 469.

<sup>153</sup> Art. 8(3) Reception Conditions Directive; Art. 15(1) Return Directive.

<sup>154</sup> Prior to 2015, in some Member States the number of migrants in detention went down sharply after the high costs and low effectiveness became clear (NL) or the judicial control became stricter (Germany). See I. Majcher et al., *Immigration Detention in the European Union: In the Shadow of the Crisis* (2020), at 1–4.

tion detention is on the rise quantitatively, both for those seeking asylum<sup>155</sup> and in the context of returns.<sup>156</sup> For example, Denmark explicitly used detention as a deterrence measure when reopening old military camps and prisons to house rejected asylum seekers with a view to making life so ‘intolerable’ for them that they would leave Denmark ‘voluntarily’.<sup>157</sup> Immigration detention affects not only asylum seekers or rejected asylum seekers but also migrants of any kind of status. A particularly egregious example is the Windrush scandal in the United Kingdom, then still an EU Member State. In the course of the so-called ‘hostile environment policy’, which involved administrative and legislative measures to make staying in the UK as difficult as possible for people so as to induce them to leave ‘voluntarily leave’, dozens of people, many of whom had been born British subjects, were wrongly detained and deported.<sup>158</sup>

At EU level, reform efforts reinforce restrictive state practice, in particular with a view to a more expansive use of detention. Specifically, regarding pre-deportation detention, the European Commission’s 2018 proposal for a recast Return Directive would make the list of grounds for detention explicitly non-exhaustive. In addition, it would add a new, broadly framed ground for detaining irregular migrants, namely, the option to detain individuals posing a threat to public order or national security. It also proposes a non-exhaustive list of ‘objective’ criteria for determining the risk of absconding, which is one of the existing grounds for detention, as well as a new requirement of setting a maximum detention period of at least three months, with a view to giving States sufficient time to organize deportations.<sup>159</sup>

Second, we observe a wider and more arbitrary use of detention for asylum seekers upon entry specifically. This trend is reflected in EU as well as Member State policy. Examples of this development are national legislative reforms in countries such as Hungary and Poland to the effect that asylum procedures are conducted almost exclusively at the border, involving deten-

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<sup>155</sup> E.g., in Greece, immigration detention remains systematic and arbitrary, and some forms of detention lack a legal basis altogether, see Greek Refugee Council, *Administrative detention in Greece: Field observations (2018)* (2019), available at [https://www.gcr.gr/media/k2/attachments/GCR\\_Ekthesi\\_Dioikitik\\_Kratisi\\_2019.pdf](https://www.gcr.gr/media/k2/attachments/GCR_Ekthesi_Dioikitik_Kratisi_2019.pdf).

<sup>156</sup> For example, Germany is planning to expand its use of detention with the introduction of a new ‘Orderly Return Act’ (Geordnete-Rückkehr-Gesetz); for critique, see Pro Asyl, *Stellungnahme zum Entwurf eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht (BT-Drucksache 19/10047) zur Sachverständigenanhörung des Ausschusses für Inneres und Heimat des Deutschen Bundestages am 03.06.2019*, 29 May 2019, available at [https://www.proasyl.de/wp-content/uploads/PRO-ASYL\\_Stellungnahme-zum-Geordnete-R%C3%BCckkehr-Gesetz\\_Sachverst%C3%A4ndigenanh%C3%B6rung.pdf](https://www.proasyl.de/wp-content/uploads/PRO-ASYL_Stellungnahme-zum-Geordnete-R%C3%BCckkehr-Gesetz_Sachverst%C3%A4ndigenanh%C3%B6rung.pdf).

<sup>157</sup> J. Suarez-Krabbe, J. Arce and A. Lindberg, *Stop Killing Us Slowly: A Research Report on the Motivation Enhancement Measures and Criminalization of Rejected Asylum Seekers in Denmark* (2018), available at [http://refugees.dk/media/1757/stop-killing-us\\_uk.pdf](http://refugees.dk/media/1757/stop-killing-us_uk.pdf).

<sup>158</sup> W. Williams, *Windrush Lessons Learned Review, Independent review, Ordered by the House of Commons*, 19 March 2020, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/876336/6.5577\\_HO\\_Windrush\\_Lessons\\_Learned\\_Review\\_LoResFinal.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf).

<sup>159</sup> European Commission, ‘Fact Sheet: State of the Union 2018: Stronger EU rules on return: Questions and Answers’, 12 September 2018, available at [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_18\\_5713](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_5713).



tion on a regular basis. The EU's policies echo the restrictive turn, as both the 'hotspot' approach<sup>160</sup> and the follow-up proposal of 'controlled centres'<sup>161</sup> build on the detention of asylum seekers.<sup>162</sup> The increased use of so-called border procedures, which almost automatically entail liberty-restricting measures, is one of the major trends in European asylum policy.<sup>163</sup>

EU legislation paves the way for expanded use of detention for asylum seekers. For example, in the Reception Conditions Directive the permitted derogations from the required level of reception conditions seem to open up to the option that housing is provided in detention.<sup>164</sup> These provisions create a legal ambiguity that appears to allow Member States to lawfully detain asylum seekers at the external borders.<sup>165</sup> The proposal for a new Reception Conditions Directive does not address the expanding use of detention.<sup>166</sup> Instead, the proposal emphasizes the risk of absconding as a ground for detention. Under the current legislation, an asylum seeker not respecting a reporting obligation can already be considered as absconding.<sup>167</sup> 'Absconding' remains a fuzzy ground for detention. It could be interpreted sufficiently broadly to

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<sup>160</sup> European Commission, A European Agenda On Migration, COM(2015) 240 final, 13 May 2015; European Commission, Explanatory note on the 'hotspot' approach, 15 July 2015, available at <https://www.statewatch.org/media/documents/news/2015/jul/eu-com-hotspots.pdf>; European Commission, Fact sheet: The Hot spot approach to managing exceptional migration flows, 14. Oktober 2015, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf); S. Silverman, *The EU's Hotspot Approach: Questionable Motivations and Unreachable Goals* (2018), available at <https://www.e-ir.info/2018/04/17/the-eus-hotspot-approach-questionable-motivations-and-unreachable-goals/>; Markard and Heuser, "'Hotspots' an den EU-Außergrenzen: Menschen- und europarechtswidrige Internierungslager", *Zeitschrift für Ausländerrecht (ZAR)* 165.

<sup>161</sup> European Council, European Council meeting (28 June 2018): Conclusions, EUCO 9/18, at 6; European Commission, Fact Sheet: Migration: 'Controlled Centres' in EU Member States: Follow-up to the European Council Conclusions of 28 June 2018, available at [https://ec.europa.eu/commission/sites/beta-political/files/controlled\\_centres\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/controlled_centres_en.pdf); European Commission, Non-paper on 'controlled centres' in the EU: interim framework, 24 July 2018, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724\\_non-paper-controlled-centres-eu-member-states\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-controlled-centres-eu-member-states_en.pdf); see F. Maiani, *'Regional Disembarkation Platforms' and 'Controlled Centres': Lifting The Drawbridge, Reaching out Across The Mediterranean, or Going Nowhere?* (2018), available at <https://eumigrationlawblog.eu/regional-disembarkation-platforms-and-controlled-centres-lifting-the-drawbridge-reaching-out-across-the-mediterranean-or-going-nowhere/>.

<sup>162</sup> Campesi, 'Normalising The Hotspot Approach? An Analysis of the Commission's Most Recent Proposals', in S. Carrera, D. Curtin and A. Geddes (eds), *20 Year Anniversary Of The Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice* (2020) 93.

<sup>163</sup> See, e.g., European Commission, Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612 final, 23 September 2020; and European Commission, Amended proposal for an Asylum Procedures Regulation, COM(2020) 611 final, 23 September 2020.

<sup>164</sup> Art. 18(1)(a) of the Directive allows housing in kind to be provided, among others, in 'premises used for the purpose of housing applicants during the examination of an application made at the border or in transit zones' or 'other premises adapted for housing applicants'; other provisions of the Directive refer to derogations from certain conditions in cases where 'the applicant is detained at a border post or in a transit zone' (see, e.g., Art. 10(5) and 11(6) Reception Conditions Directive).

<sup>165</sup> M. Mouzourakis and K. Pollet, *Boundaries of Liberty: Asylum and de facto Detention in Europe* (2018), at 15, available at <https://www.asylumineurope.org/sites/default/files/shadow-reports/boundariesliberty.pdf>.

<sup>166</sup> European Commission, Proposal for a recast Reception Conditions Directive, COM(2016) 465 final, 13 July 2016.

<sup>167</sup> The CJEU established this in the *Jawo* case (C-163/17) in the context of the Dublin procedure: CJEU, Case C-163/17, *Abubacarr Jawo* (EU:C:2019:218).

render the vast majority of irregular migrants and asylum seekers susceptible to detention.<sup>168</sup> For example, if payment of a smuggler is seen as an objective indicator of a risk of absconding, this would in principle allow for the detention of almost all asylum seekers and irregular migrants. However, due to a lack of capacity in detention facilities not all individuals meeting such broad criteria could actually be put in detention. Therefore, there is a risk of arbitrariness, as it cannot be predicted whether a person will be detained or not. Such a wide degree of discretion in the context of the deprivation of liberty is highly problematic.

## **Trend 2: Increasing use of area-based restrictions not amounting to detention**

In addition to the wider use of detention, the second trend we observe relates to the fact that States increasingly make use of area-based restrictions – that is, liberty-restricting measures that fall short of detention narrowly defined.

These measures involve a range of policies and practices reflecting different degrees of coerciveness.<sup>169</sup> They include designated residence (often coupled with conditionality for the provision of material reception conditions), as well as registration requirements, deposit of documents, bond/bail or surety/guarantor, reporting requirements, case management/supervised release, electronic monitoring, and home curfew/house arrest.<sup>170</sup> We observe that Member States have increasingly put in place such liberty-restricting measures, either as alternative pathways to detention or in addition to detention.<sup>171</sup> This is warranted by the Reception Conditions Directive as it generally allows Member States to subject asylum seekers to geographical and residence restrictions, even without there being a ground for detention.<sup>172</sup> Such practices expand the scope and intensity of coercive measures vis-à-vis migrants.

The failure to respect such restrictive measures may lead to detention. In this case, they function as a pathway to detention (this aspect thus relates back to the developments described above). In this way, recourse to liberty restrictions as a general means of migration control actually facilitates detention. As a consequence, the legal constraints applicable to immigration detention are turned on their head – rather than being a measure of last resort, permissible on strictly circumscribed grounds, detention seems increasingly legitimized as a punitive

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<sup>168</sup> See on asylum seekers: Costello and Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers', 35 *Refugee Survey Quarterly* (2016) 47, at 65–70.

<sup>169</sup> C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva* (2013), at 10–11, available at <https://www.refworld.org/docid/51a6fec84.html>.

<sup>170</sup> UNCHR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), at 40, available at <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>; C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva* (2013), at 6, available at <https://www.refworld.org/docid/51a6fec84.html>.

<sup>171</sup> Asylum Information Database, *The detention of asylum seekers in Europe Constructed on shaky ground?* (2017), available at <http://www.refworld.org/docid/595a23ef4.html>.

<sup>172</sup> Art. 7 Reception Condition Directive.

measure per se, justified by the individual's failure to comply with an alternative.<sup>173</sup> Austria, for example, has introduced legislative reforms to codify systematic residence restrictions and a corollary power to detain those who fail to observe them;<sup>174</sup> in France, the '*assignments a residence*' (house arrest with reporting obligations) easily lead to findings of absconding, which in turn warrants detention.<sup>175</sup>

This trend is reflected at EU level. In its 2016 proposal for a recast Reception Conditions Directive, the EU Commission broadens the scope for Member States to impose residence restrictions on asylum seekers and even proposes *requiring* them to do so.<sup>176</sup> The rationale is explicitly stated in the accompanying Commission document:

*[I]n order to tackle secondary movements and absconding of applicants, an additional detention ground has been added. In case an applicant has been assigned a specific place of residence but has not complied with this obligation, and where there is a continued risk that the applicant may abscond, the applicant may be detained in order to ensure the fulfilment of the obligation to reside in a specific place.*<sup>177</sup>

The new ground for detention foreseen in Art. 8(3)(c) of the proposal constructs a legal obligation to comply with residence restrictions.<sup>178</sup> This would enable Member States to bypass the requirement of satisfying the existing grounds for detention under the Reception Conditions Directive and the obligation to consider an alternative beforehand.<sup>179</sup>

Moreover, area-based restrictions are used to manage the migration process more broadly – for example, to prevent 'ghettoization' or to avoid overburdening individual municipalities. Such policies and practices involve measures aimed at restricting migrants' freedom of movement, but do not necessarily amount to detention. Rather, they are widening the network of available restrictions of migrants' liberty of movement, in addition to detention.

Various EU Member States<sup>180</sup> have such policies in place or are planning to implement them,

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<sup>173</sup> Asylum Information Database, *The detention of asylum seekers in Europe Constructed on shaky ground?* (2017), at 11, available at <http://www.refworld.org/docid/595a23ef4.html>.

<sup>174</sup> Asylum Information Database, *Austria: Movement restrictions and detention ahead of EU reform* (2017), available at <https://www.asylumineurope.org/news/26-05-2017/austria-movement-restrictions-and-detention-ahead-eu-reform>.

<sup>175</sup> La Cimade, *La Machine Infernale de l'Asile Européen: Dissuader et exclure: analyse des impacts d'une procédure sur les droits des personnes exilées en France* (2019), available at [https://www.lacimade.org/wp-content/uploads/2019/04/La\\_Cimade\\_Rapport\\_Dublin\\_2019.pdf](https://www.lacimade.org/wp-content/uploads/2019/04/La_Cimade_Rapport_Dublin_2019.pdf).

<sup>176</sup> Proposal for a recast Reception Conditions Directive, COM(2016) 465 final, 13 July 2016, Art. 7: The Commission proposes to include that Member States 'shall' decide on the residence of asylum seekers, instead of the current language on the basis of which Member States 'may' decide on that. The objective is to reduce reception-related incentives for secondary movements within the EU.

<sup>177</sup> *Ibid.*, at 14.

<sup>178</sup> *Ibid.*, Art. 8(3)(c) reads: 'in order to ensure compliance with legal obligations imposed on the applicant through an individual decision in accordance with Art. 7(2) in cases where the applicant has not complied with such obligations and there is a risk of absconding of the applicant.'

<sup>179</sup> European Council on Refugees and Exiles (ECRE), *Comments on the Commission proposal to recast the Reception Conditions Directive* (2016), at 12, available at <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf>.

<sup>180</sup> For example, Greece, Italy, Denmark as well as at the border between Hungary and Serbia.

both upon arrival (detention in camps on islands, on ships, in camps with restricted opening hours, in airports) and in the context of enforcing returns (camps in remote areas, on islands, in police stations and airports, etc.). Sometimes migrants are legally free to leave the assigned places but will lose essential benefits – such as access to status determination procedures or social assistance – if they actually do so. Examples of ‘soft’ restrictions of liberty include the ‘AnKER Centres’ in place in some German regional states,<sup>181</sup> which de facto require asylum seekers to stay in a reception facility. Such ‘semi-carceral spaces’<sup>182</sup> provide limited space to move but are different from the clearly delineated practice of detention. Accordingly, these measures are not subject to the same legal requirements; often, there is not even a clear legal basis for imposing them.<sup>183</sup>

### Trend 3: Persistent pattern of problematic conditions of detention

Whereas the first two trends related to the question of whether to detain, the third challenge relates to the question of *how* migrants are detained. We observe a persistent pattern of problematic conditions of detention in many Member States, both for migrants generally and for vulnerable groups specifically. It is important to recall in this context that immigration detention is a form of administrative detention – that is, migrants are detained for administrative purposes rather than because they committed a crime. Detention conditions should reflect this fact.

First, State practice displays a persistent pattern of detention conditions that are often extremely poor. Particularly egregious examples are the failure to provide food for detained asylum seekers in Hungary<sup>184</sup> or appalling conditions in Spanish immigration detention facilities.<sup>185</sup> In the UK there is no legal time limit on immigration detention, meaning that migrants

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<sup>181</sup> ECRE, *The AnKER centres: Implications for asylum procedures, reception and return* (2019), available at [https://www.asylumineurope.org/sites/default/files/anker\\_centres\\_report.pdf](https://www.asylumineurope.org/sites/default/files/anker_centres_report.pdf); see also a large study of reception centres in Germany prior to the recent reforms: Die Landesflüchtlingsräte und Pro Asyl (eds), *AusgeLagert: Zur Unterbringung von Flüchtlingen in Deutschland* (2011), available at <https://www.proasyl.de/wp-content/uploads/2012/02/AusgeLAGERt.pdf>.

<sup>182</sup> Term borrowed from E. Guild, C. Costello, M. Garlick and V. Moreno-Lax, *Enhancing the Common European Asylum System and Alternatives to Dublin* (2015), at 34–35.

<sup>183</sup> L. Slingenberg, ‘Evaluating “Life Steeped in Power”: Non-Domination, the Rule of Law and Spatial Restrictions for Irregular Migrants’, *Hague Journal on the Rule of Law* (2020), <https://doi.org/10.1007/s40803-020-00147-x>.

<sup>184</sup> Hungarian Helsinki Committee, *Hungary Continues to Starve Detainees in the Transit Zones Information update by the Hungarian Helsinki Committee (HHC)*, 23 April 2019, available at [https://www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf?utm\\_source=ECRE+Newsletters&utm\\_campaign=ad4260b76c-EMAIL\\_CAMPAIGN\\_2019\\_04\\_26\\_08\\_50&utm\\_medium=email&utm\\_term=0\\_3ec9497afd-ad4260b76c-420543949](https://www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf?utm_source=ECRE+Newsletters&utm_campaign=ad4260b76c-EMAIL_CAMPAIGN_2019_04_26_08_50&utm_medium=email&utm_term=0_3ec9497afd-ad4260b76c-420543949).

<sup>185</sup> La Vanguardia, *101 internos del CIE de Aluche denuncian la vulneración de sus derechos*, 2 May 2019, available at [https://www.lavanguardia.com/vida/20190502/461997644926/101-internos-del-cie-de-aluche-denuncian-la-vulneracion-de-sus-derechos.html?utm\\_source=ECRE+Newsletters&utm\\_campaign=ff2f249c45-EMAIL\\_CAMPAIGN\\_2019\\_05\\_10\\_12\\_46&utm\\_medium=email&utm\\_term=0\\_3ec9497afd-ff2f249c45-420543949](https://www.lavanguardia.com/vida/20190502/461997644926/101-internos-del-cie-de-aluche-denuncian-la-vulneracion-de-sus-derechos.html?utm_source=ECRE+Newsletters&utm_campaign=ff2f249c45-EMAIL_CAMPAIGN_2019_05_10_12_46&utm_medium=email&utm_term=0_3ec9497afd-ff2f249c45-420543949).

can be detained indefinitely.<sup>186</sup> Further problematic aspects are the absence of contact with the outside world, the impossibility of continuing to manage one's own affairs, loss of any employment, separation from family, and loss of power to decide one's diet, among others.<sup>187</sup> Many EU countries blurred the separation of administrative and criminal detention, such as Germany in 2019 with its Orderly Return Act.<sup>188</sup>

Second, we observe that detention conditions are often particularly critical for migrants in situations of vulnerability, including children. Some Member States (e.g., Portugal<sup>189</sup> and Poland<sup>190</sup>) continue to detain children without the necessary protections in place. This, too, is apparently permitted by the relevant EU legislation. While the Reception Conditions Directive includes a special provision on the detention of vulnerable persons, it does not prescribe a screening procedure in order to identify them, and it permits the detention of children, albeit 'as a measure of last resort' and 'in exceptional circumstances' only (the latter in the case of unaccompanied minors).<sup>191</sup> In contrast, the provisions in the Return Directive relating to the special needs of vulnerable migrants are minimal, being limited to requiring that 'particular attention shall be paid to the situation of vulnerable persons', and that 'emergency health care and essential treatment of illness shall be provided.'<sup>192</sup>

## 2.2 Legal evaluation

### 2.2.1 General framework: The rights to liberty, to freedom of movement, and to adequate treatment

The aim of this section is to develop the standards relevant to determine under which circumstances restrictions on the spatial movement of migrants constitute a Human Rights violation.

We have identified four interrelated layers of Human Rights standards as being particularly relevant in this regard. Human Rights law protects not only against detention unless duly justified (first layer) but also against other forms of arbitrary limitation of movement (second layer). In all situations in which migrants' liberty and freedom of movement is restricted, Human Rights law prohibits inhuman or degrading treatment (third layer), and it precludes other, less severe interferences with private life if they do not meet the requirements of the principle

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<sup>186</sup> I. Majcher, M. Flynn and M. Grange, *Immigration Detention in the European Union: In the Shadow of the Crisis* (2020), at 189–190; Wilsher, 'Whither Presumption of Liberty? Constitutional Law and Immigration Detention', in M. Flynn and M. C. Flynn (eds), *Challenging Immigration Detention: Academics, Activists, and Policy-makers* (2017) 66.

<sup>187</sup> M.-B. Dembour, *When Humans Become Migrants* (2015), at 395–396.

<sup>188</sup> *Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht* ('Orderly Return Act'), 15 August 2019, BGBl I 1294.

<sup>189</sup> See, e.g., Asylum Information Database, *Country Report: Portugal* (2017), at 17, available at <https://www.asylumineurope.org/reports/country/portugal>.

<sup>190</sup> ECtHR, *Bilalova and others v. Poland*, Appl. no. 23685/14, Judgment of 26 March 2020.

<sup>191</sup> Art. 11(2) and (3) Reception Conditions Directive, respectively.

<sup>192</sup> Art. 16 Return Directive.

of proportionality (fourth layer). In other words, Human Rights law determines both the question of *whether* a person's spatial movement may be restricted (first and second layer) and of *how* such restrictions may be carried out (third and fourth layer).

(1) The right to liberty and security is one of the oldest and most fundamental Human Rights. The guarantee of *habeas corpus* applies to all human beings, regardless of immigration or other status.<sup>193</sup> The right is expressed in two provisions of the Universal Declaration of Human Rights of 1948: 'Everyone has the right to life, liberty and security of person' (Art. 3 UDHR) and 'No one shall be subjected to arbitrary arrest, detention or exile' (Art. 9 UDHR). The prohibition of arbitrary detention is a well-established rule of customary international law and is codified in a broad range of treaties.<sup>194</sup>

At the universal level, it has been included in Art. 9 of the ICCPR.<sup>195</sup> The jurisprudence of the Human Rights Committee (HRC, the treaty body entrusted with the supervision of ICCPR) has clarified that in order to comply with the requirements of lawfulness and non-arbitrariness, the principles of reasonableness, necessity, and proportionality apply.<sup>196</sup> While the detention of migrants is not prohibited per se, it must pursue a narrow and specific aim and be necessary and proportionate to reach this aim, taking into account the individual circumstances of the case at hand. Illegal entry by migrants does not in itself justify their detention; additional factors particular to the individual are required, such as the likelihood of absconding or a risk of acts against national security.<sup>197</sup> Following the same line of reasoning, the UN Working Group on Arbitrary Detention reiterates the principles of reasonableness, necessity, and proportionality in the light of the circumstances specific to the individual case.<sup>198</sup> The UN Working Group recalls that the 'standards restated in the present deliberation apply to all States in all situations, and factors such as the influx of large numbers of immigrants regardless of their status ... cannot be used to justify departure from these standards'.<sup>199</sup>

Provisions similar to Art. 9 ICCPR can be found in other universal Human Rights treaties, such as Art. 16 of the Migrant Workers Convention (ICRMW) and Art. 37 of the Convention on the Rights of the Child (CRC).<sup>200</sup> The 'presumption of liberty' for migrants is also reflected in regional Human Rights law, including in Art. 6 of the African Charter on Human and People's Rights (ACHPR, 'Banjul Charter') and in Art. 7 of the American Convention on Human Rights

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<sup>193</sup> As reaffirmed, for example, in HRC, General Comment No. 15: The Position of Aliens under the Covenant, HRI/GEN/1/Rev.1, at para. 1 and 7.

<sup>194</sup> V. Chetail, *International Migration Law* (2019), at 133.

<sup>195</sup> Art. 9(1) ICCPR: 'Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established in law.'

<sup>196</sup> HRC, *Van Alphen v. the Netherlands*, Communication No. 305/1988, CCPR/C/39/D/305/1988, at para. 5.8; *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, at para. 9.2.

<sup>197</sup> See, e.g., HRC, *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, at para. 9.4; *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3–9.4.

<sup>198</sup> HRC, Deliberation No. 5 on Deprivation of Liberty of Migrants, A/HRC/39/45, at para. 14, 19–20 and 22–24.

<sup>199</sup> *Ibid.*, at para. 48.

<sup>200</sup> E.g., Art. 16 ICRMW; Art. 37 CRC.

(ACHR). The Inter-American Commission on Human Rights explicitly rejects a ‘presumption of detention’ for migrants<sup>201</sup> and acknowledges that the constraints on immigration detention must be even stricter than those governing pre-trial or other forms of preventive criminal detention.<sup>202</sup> This international consensus is confirmed in Objective 13 of the Global Compact for Migration: ‘Use immigration detention only as a measure of last resort and work towards alternatives’ (para. 29).<sup>203</sup>

To complete the picture of relevant guarantees in universal Human Rights law, reference is made to the 1951 Convention Relating to the Status of Refugees (Geneva Refugee Convention, GRC). Art. 31 GRC exempts refugees from penalties for illegal entry. This provides an additional source of protection against detention of asylum seekers upon entry. According to legal scholarship, depriving asylum seekers or refugees of their liberty for the mere reason of having entered or stayed illegally would amount to a penalty under Art. 31(1) GRC.<sup>204</sup> In addition, Art. 31(2) GRC entails a necessity requirement regarding refugees unlawfully in the country, but only if they come directly from a territory where their life was in danger. In its 2012 Revised Guidelines on Detention of Asylum Seekers, UNHCR confirmed the principle that asylum seekers should not be detained for the sole reason of seeking asylum and that detention is only permissible in exceptional circumstances, when it is reasonable, necessary, and proportionate in order to attain a limited range of objectives.<sup>205</sup>

In the European legal space, Art. 5 ECHR incorporates the right to liberty and security of the person. Rather than a generic prohibition of arbitrariness, however, it provides an exhaustive list of six situations of when detention may lawfully occur. In the context of immigration detention, the relevant provision is point (f) of Art. 5(1) ECHR, which reads: ‘the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a

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<sup>201</sup> In the *Maríel Cubans* case, the Inter-American Commission on Human Rights criticized US practice leading to ‘a presumption of detention rather than a presumption of liberty’, which the Court regarded as ‘fundamentally antithetical’ to Art. I (liberty), XXV (protection against arbitrary arrest and detention) ADHR. See Gomez, ‘The Inter-American System: Report No. 51/01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), Report No. 51/01, 4 April 2001 Inter-American Commission on Human Rights’, 2 *Human Rights Law Review* (2002) 117; for an elaborate examination of the presumption of liberty in the Inter-American system, see M.-B. Dembour, *When Humans Become Migrants* (2015), at 369–401.

<sup>202</sup> Costello, ‘Immigration Detention: The Grounds Beneath Our Feet’, 68 *Current Legal Problems* (2015) 143, at 171.

<sup>203</sup> See also GCM, Objective 21, para. 37 (‘Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration’).

<sup>204</sup> Noll, ‘Article 31 (Refugees lawfully in the country of refuge/Réfugiés en situation irrégulière dans le pays d’accueil)’, in A. Zimmermann (ed.), *Commentary on the 1951 Convention relating to the Status of Refugees* (2011) 1243, at para. 96; see also Goodwin-Gil, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalisation, Detention and Protection’, in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) 185, at 195–196; A. Grahl-Madsen, *The Status of Refugees in International Law* (1972), at 209; A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’* (2011), at 11, available at <https://www.unhcr.org/4dc949c49.pdf>.

<sup>205</sup> UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), available at <https://www.refworld.org/docid/503489533b8.html>.

person against whom action is being taken with a view to deportation or extradition’.

The original intent, in 1950, to draft an exhaustive list of detention grounds was to provide for more specific regulation than the generic clauses of the UDHR, but the ensuing case-law on Art. 5(1)(f) has some difficulties in keeping track with developments in universal Human Rights law. The ECtHR only reluctantly applies the principles of necessity and proportionality to cases of immigration detention. While the ECtHR has recognized in non-migration contexts that ‘it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances’,<sup>206</sup> the Court has accepted the practice of detention for bureaucratic convenience in the migration context.<sup>207</sup> In its *Saadi* judgment, the Grand Chamber explicitly held that necessity is not a requirement under Art. 5(1)(f) ECHR for the lawfulness of immigration detention upon entry.<sup>208</sup>

This line of reasoning was widely challenged in legal scholarship.<sup>209</sup> It also has outspoken critics within the Court<sup>210</sup> and the Council of Europe more widely. The Parliamentary Assembly of the Council of Europe has expressly criticized the *Saadi* judgment,<sup>211</sup> and the European Commissioner for Human Rights and the European Committee for the Prevention of Torture have expressed their opposition to the use of immigration detention as a first response and deterrent to migrants reaching Europe irregularly.<sup>212</sup> In its more recent case-law, albeit not decisively, the Strasbourg Court has been cautiously resiling from its previous position and increasingly incorporates elements of a full proportionality test (including the element of necessity).<sup>213</sup>

To sum up the Human Rights standard regarding immigration detention, the prohibition of arbitrary detention is an absolute norm of customary international law. In the language of the

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<sup>206</sup> ECtHR, *Witold Litwa v. Poland*, Appl. no. 26629/95, Judgment of 4 April 2000, at para. 78.

<sup>207</sup> ECtHR, *Chahal v. UK*, Appl. no. 22414/93, Judgment of 15 November 1996 (regarding pre-removal detention), and *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008 (regarding detention upon entry).

<sup>208</sup> ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, at para. 72–74.

<sup>209</sup> G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (2010); Moreno-Lax, ‘Beyond Saadi v UK: Why the “Unnecessary” Detention of Asylum Seekers is Inadmissible under EU Law’ (2011) 5(2) *Human Rights and International Legal Discourse* 166; Costello, ‘Human Rights & the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law’, 19 *Indiana Journal of Global Legal Studies* (2012) 257; see also D. Wilsher, *Immigration Detention: Law, History, Politics* (2014).

<sup>210</sup> In the *Saadi* case, by reference to international law documents, judges Rozakis, Tulkens, Kovler, Hajiyev, Spielman and Hiverlä formulated a joint partly dissenting opinion that ended on the oft-cited words ‘Is it a crime to be foreigner? We do not think so’, ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, dissent.

<sup>211</sup> A. C. Mendonça, *The Detention of Asylum Seekers and Irregular Migrants in Europe*, 11 January 2010, available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12435&lang=en>, at 14 and 20.

<sup>212</sup> Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom on 5–8 February and 31 March–2 April 2008, as cited in London Detainee Support Group, *Detained Lives: The Real Cost of Indefinite Immigration Detention* (2009), at 11, available at <https://detentionaction.org.uk/wp-content/uploads/2018/12/Detained-Lives-report1.pdf>.

<sup>213</sup> ECtHR, *Suso Musa v. Malta*, Appl. no. 42337/12, Judgment of 23 July 2013 and ECtHR, *Yoh-Ekale Mwanje v. Belgium*, Appl. no. 10486/10, Judgment of 20 December 2011, at 124, are examples where the Court applies a proportionality test.



Working Group on Arbitrary Detention, '[a]rbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers'.<sup>214</sup> In order not to be considered arbitrary, detention measures must adhere to the principles of reasonableness, necessity, and proportionality (i.e., in the doctrinal language of EU law, all elements of the principle of proportionality must be tested). Accordingly, the lower standard provided in the ECHR is superseded by the higher level of protection in universal Human Rights law.

In EU law, the latter standard is mirrored in Art. 6 EU-CFR, which replicates the plain wording of Art. 3 UDHR and Art. 9(1) ICCPR, without further qualifications or special provisions on immigration detention. Regardless of the general rule of interpretation established in the first sentence of Art. 52(3) EU-CFR, according to which the provisions of the EU Charter are presumed to have the same meaning as the corresponding provisions of the ECHR, we hold that the second sentence of Art. 52(3) EU-CFR applies. According to this clause, the above-mentioned rule of interpretation shall not prevent Union law providing more extensive protection. We argue that in respect of the prohibition of arbitrary detention, the relevant EU fundamental right in substance is consistent with the jurisprudence of the HRC rather than with the *Saadi* case-law of the ECtHR. In any case, the EU is legally bound to follow the rules of customary international law that are an integral part of the EU legal order and are binding upon the institutions of the Union, including its legislative bodies.

(2) Human Rights law also prohibits arbitrary limitations on the freedom of movement in the form of 'area-based restrictions'<sup>215</sup> even if they do not constitute detention. In its initial form, the relevant right can be found in Art. 13 UDHR, which provides that '[e]veryone has the right to freedom of movement and residence within the borders of each state'. The main difference in relation to the concept of detention is the wider geographical scope of the bordered space ('territory') to which the guarantee of mobility relates.

However, subsequent instruments incorporating this right have conditioned it on lawful stay of the protected person. Art. 12(1) ICCPR limits freedom of movement and choice of residence to those 'lawfully within the territory of a State'. A similar qualification is laid down in Art. 26 GRC, which requires a State to 'accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances'. At the level of the Council of Europe, freedom of movement was added to the ECHR only in 1963 through Protocol No. 4, which entered in

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<sup>214</sup> HRC, Deliberation No. 5 on Deprivation of Liberty of Migrants, A/HRC/39/45, at para. 8; and see HRC, General Comment No. 35: Article 9 Liberty and Security of Person, CCPR/C/GC/35, at para. 66: 'The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by Art. 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.'

<sup>215</sup> Todt, 'Area-based Restrictions to Maintain Public Order: the Distinction Between Freedom-restricting and Liberty-depriving Public Order Powers in the European Legal Sphere', 4 *European Human Rights Law Review* (2017) 376.

force in 1968. Likewise, Art. 2 of that Protocol grants freedom of movement to ‘everyone lawfully within the territory of a State’.

In contrast to the prohibition of arbitrary detention, the right to intra-territorial mobility is not an absolute right. Once a person is lawfully within a State, restrictions on his or her right guaranteed by Art. 12(1) ICCPR, as well as any treatment different from that accorded to nationals, must be justified under the rules provided for by Art. 12(3) ICCPR. This provision restricts permissible limitations to those ‘provided by law’ and necessary to protect national security, public order, health or morals, or the rights and freedoms of others; such limitations must also be consistent with the other rights recognized in the ICCPR.<sup>216</sup> Thus, restrictions applied in the individual case must have clear legal basis, serve one of the listed grounds, meet the test of necessity and the requirements of proportionality, and be governed by the need for consistency with the other rights recognized in the Covenant.<sup>217</sup> The ECHR has a comparable limitation clause in Art. 2(3) of Protocol No. 4 ECHR. In addition, Art. 2(4) Protocol No. 4 ECHR permits restrictions in certain areas as justified by ‘the public interest in a democratic society’. This wider scope of permissible restrictions is not warranted by the ICCPR.

In EU law, the legal status of the Human Right to intra-territorial mobility is not entirely clear. A distinction must be drawn here between the territory of each Member State, on the one hand, and Union territory as a whole (as defined in Art. 52(2) TEU and Art. 355 TFEU), on the other hand.<sup>218</sup> The right to freedom of movement within the borders of a Member State is not mentioned in the EU Charter of Fundamental Rights. However, given that all EU Member States are party to the ICCPR, the GRC and to Protocol No. 4 ECHR (except for Greece, which did not sign Protocol No. 4) we assume that the right to freedom of movement within the territory of each Member State is recognized as a general principle of EU law, subject to the qualifications and permissible restrictions laid down in these instruments. In respect of the freedom of movement within the territory of the EU as a whole, Art. 45(1) EU-CFR grants this right to all EU citizens. For third-country nationals, Art. 45(2) EU-CFR incorporates the proviso of legal residence, stating that ‘[f]reedom of movement may be granted ... to nationals of third countries legally resident in the territory of a Member State.’ This provision refers to the powers conferred on the Union by Art. 77, 78 and 79 TFEU. Consequently, the granting of this right depends on the institutions exercising that power.<sup>219</sup> A discussion of the extent to which a positive obligation exists to exercise this power is beyond the scope of this chapter (it may follow from the principle of non-discrimination; see Chapter 4).

Two main issues of construction arise from this overview. The first question is who is to be considered lawfully present on state territory. In principle, this matter is governed by national

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<sup>216</sup> HRC, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.

<sup>217</sup> *Ibid.*, at para. 2 and 16.

<sup>218</sup> On the legal concept of Union territory, see Bast, ‘Völker- und unionsrechtliche Anstöße zur Entterritorialisierung des Rechts’, 76 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (VVDStRL)* (2017) 277.

<sup>219</sup> See Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, OJ 2007 C 303, 17.

law, provided it is in compliance with international obligations.<sup>220</sup> On the other hand, this cannot imply unlimited discretion on the part of the States. Since ‘lawful stay’ is a concept laid down in an instrument of international law, it can have an autonomous meaning and is ultimately a matter for international interpretation.<sup>221</sup> According to legal scholarship, migrants whose right to stay is subject to determination or adjudication should be considered as lawfully on territory.<sup>222</sup> The same rationale applies to those migrants who are qualified as non-deportable, such as people with toleration status (*Duldung*) in Germany or Austria.<sup>223</sup> However, the right to freedom of movement does not apply to those who have entered or are present irregularly and do not have a pending request for regularization of their stay, or to those whose request has been rejected and who are not considered unreturnable.

The second issue relates to the delimitation of restrictions of movement – which are justifiable for a larger range of reasons – from deprivations of liberty that constitute detention. In that regard, the Strasbourg Court has stated that the difference between restrictions on freedom of movement and deprivation of liberty is one of degree rather than substance.<sup>224</sup> The label of the measure is irrelevant; determination requires a factual assessment of the concrete situation (type, duration, effects, and manner of implementation).<sup>225</sup> This line of reasoning is significant in the context of this study in two respects. First, it implies that a measure that is not explicitly labeled as detention may nonetheless be subject to the stricter test provided by Art. 9 ICCPR and Art. 5 ECHR. Second, the so-called alternatives to detention are not exempted from observing strict Human Rights standards. Arguably, the closer a liberty-restricting measure comes to being a detention measure, the stricter these standards must be. We return to this issue in more detail below when discussing border procedures in European asylum law.

(3) As to the conditions of detention or other forms of mobility restrictions, any deprivation of liberty must respect the detainee’s dignity and cannot be in conflict with the prohibition of torture or inhuman or degrading treatment. That prohibition is laid down in numerous universal instruments, such as Art. 5 UDHR, Art. 7 ICCPR and Art. 1 and 16 CAT, as well as regional instruments such as Art. 3 ECHR, Art. 5 ACHR and Art. 5 ACHPR. The prohibition of torture and inhuman or degrading treatment or punishment is mirrored in Art. 4 EU-CFR. It is considered

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<sup>220</sup> HRC, General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.

<sup>221</sup> L. Slingenberg, *The Reception of Asylum Seekers under International Law* (2014), at 110–111.

<sup>222</sup> Costello, ‘Immigration Detention: The Grounds Beneath Our Feet’, 68 *Current Legal Problems* (2015), at 147 and 174.

<sup>223</sup> See Report of the Special Rapporteur for the Human Rights of Migrants, Francois Crépeau, A/HRC/20/24, at para. 54; HRC, *Celepli v. Sweden*, CCPR/C/51/D/456/1991, at para. 9.2; for an extensive consideration on the meaning of lawful stay in the context of the Refugee Convention, see J. Hathaway, *The Rights of Refugees under International Law* (2005), at 173.

<sup>224</sup> See ECtHR, *Khlaifia and others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, at para. 64.

<sup>225</sup> ECtHR, *Z.A. and others v. Russia*, Appl. no. 61411/15, 61420/15, 61427/15 and 3028/16, Judgment of 21 November 2019, at para. 138; *Ilias and Ahmed v. Hungary*, Appl. no. 47287/15, Judgment of 21 November 2019, at para. 217–218; see Tsourdi, ‘Asylum Detention in EU Law: Falling between Two Stools?’ 35 *Refugee Survey Quarterly* (2016) 7, at 11.

to be an absolute guarantee. If detention conditions are found to amount to such treatment, detention will automatically be unlawful.

In its case-law regarding Art. 3 ECHR in the context of detention,<sup>226</sup> the ECtHR has developed a number of important and detailed positive obligations of States. In order to establish whether the required level of severity has been reached, the Court takes into account the cumulative effect of detention conditions, ranging from sufficient and adequate living space, including sanitary products and meals, to medical care and assistance.<sup>227</sup> However, even though the Court has found violations in numerous cases, it has so far failed to derive general principles regarding the required standards. This has enabled some more controversial judgments in which the Court has found that the situation fell short of a violation of Art. 3 ECHR.<sup>228</sup>

(4) While Art. 3 ECHR (and its counterparts in universal Human Rights law) constitutes an absolute standard for detention conditions, other provisions of Human Rights law provide further limitations on such measures. They serve to fill a gap in protection where the threshold of severity that constitutes inhuman treatment is not exceeded.

Art. 10(1) ICCPR enshrines a right to humane treatment in detention. It states in positive terms: ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ Case-law of the Human Rights Committee demonstrates that breaches of this article need not reach the threshold of inhuman treatment.<sup>229</sup> Art. 10(1) ICCPR does not have an explicit equivalent in other Human Rights instruments.

At the European regional level, the ECtHR combines the assessment of the lawfulness of detention with the adequacy of detention conditions, to a similar effect. The safeguard provided by Art. 5(1) ECHR is that the detention must be ‘in accordance with law’. As the Strasbourg Court has established, lawfulness involves a requirement of non-arbitrariness, which amounts to a compendium of factors, including those relating to the place and duration of detention: ‘the place and conditions of detention should be appropriate’, bearing in mind that asylum seekers are not convicted of a criminal offense; and ‘the length of the detention should not exceed that reasonably required for the purpose pursued’.<sup>230</sup> In other words, the Court clarified that there must be a link between the ground of permitted deprivation of liberty, on the

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<sup>226</sup> See, e.g., ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/06, Judgment of 21 January 2011, at para. 205–234; *S.Z. v. Greece*, Appl. no. 66702/13, Judgment of 21 June 2019, and *HA.A. v. Greece*, Appl. no. 58387/11, Judgment of 21 April 2016.

<sup>227</sup> L. Slingenbergh, *The Reception of Asylum Seekers under International Law* (2014), at 300–304 and 310.

<sup>228</sup> Such as, controversially, in ECtHR, *J.R. and others v. Greece*, Appl. no. 22696/16, Judgment of 25 January 2018. For a discussion concerning in particular Greece, see Vedsted-Hansen, ‘Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?’, in V. Chetail, Ph. de Bruycker, F. Maiani (eds) *Reforming the Common European Asylum System: the New European Refugee Law* (2016) 317.

<sup>229</sup> HRC, *Penarrieta, Pura de Toro and others v. Bolivia*, Communication No. 176/1984, CCPR/C/31/D/176/1984; *Francesco Madafferi et al. v. Australia*, Communication No. 1011/2001, CCPR/C/81/D/1011/2001: the HRC found that the separation of a family pending removal causing financial and psychological difficulties would violate Art. 10(1) ICCPR.

<sup>230</sup> ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, at para. 74. In addition, detention must be carried out in good faith and be closely connected to the purpose of preventing entry (or facilitating return).

one hand, and the place and conditions of detention, on the other hand.<sup>231</sup> It has repeatedly held that detaining children in closed centers designed for adults does not take account of their extreme vulnerability and that their detention is therefore disproportionate and unlawful under Art. 5(1)(f) ECHR.<sup>232</sup> Although the Court does not label it that way, this essentially constitutes a proportionality assessment, allowing the ECtHR to measure detention conditions not only in terms of Art. 3 ECHR (which precludes any balancing with the public interest pursued) but also in terms of a more flexible standard derived from Art. 5(1)(f) ECHR. If detention conditions were adequate, the detention measure would not be disproportionate and thence would be lawful.

Restrictions on movement may also interfere with other Human Rights, in particular the right to private and family life. The most developed jurisprudence in this regard stems from the ECtHR case-law on Art. 8 ECHR (mirrored in Art. 7 EU-CFR; for details, see Chapter 5). According to the settled case-law, private life includes a person's physical and mental integrity and encompasses the development, without outside interference, of the personality of each individual in their relations with other human beings.<sup>233</sup> Liberty of movement is an indispensable condition for the free development of a person.<sup>234</sup> In several cases the ECtHR has held that detention constituted a disproportionate interference with Art. 8 ECHR if no particular flight risk has been established.<sup>235</sup> Even where there was an indication that a family might abscond, authorities were found to have violated Art. 8 ECHR due to a failure to provide sufficient reasons to justify detention for a lengthy period.<sup>236</sup>

Likewise, Art. 8 ECHR comes into play in the context of area-based restrictions. The Strasbourg Court considers Art. 2 of Protocol No. 4 ECHR and Art. 8 ECHR to be closely linked and regularly considers them together.<sup>237</sup> This is of particular relevance for irregular migrants: although they are excluded from the scope of Art. 2 Protocol No. 4 ECHR due to their unlawful presence, the protection granted under Art. 8 ECHR also extends to them. In a case involving the freedom to

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<sup>231</sup> ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, at para. 118; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006, at para. 102; *Muskhadzhiyeva and others v. Belgium*, Appl. no. 41442/07, Judgment of 19 January 2010, at para. 73.

<sup>232</sup> ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, *Muskhadzhiyeva and others v. Belgium*, Appl. no. 41442/07, Judgment of 19 January 2010, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006.

<sup>233</sup> ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006, at para. 83, citing *Niemietz v. Germany*, Appl. no. 13710/88, Judgment of 16 December 1992, at para. 29; *Botta v. Italy*, Appl. no. 21439/93, Judgment of 24 February 1998, at para. 32; *Von Hannover v. Germany*, Appl. no. 59320/00, 24 June 2004, at para. 50.

<sup>234</sup> HCR, General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, at para. 1.

<sup>235</sup> ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, at para. 147–148, *A.B. and others v. France*, Appl. no. 11593/12, Judgment of 12 July 2016, at para. 155–156; *R.K. and others v. France*, Appl. no. 68264, Judgment of 12 July 2016, at para. 114 and para. 117.

<sup>236</sup> ECtHR, *Bistieva and others v. Poland*, Appl. No. 75157/14, Judgment of 10 April 2018, at para. 88.

<sup>237</sup> See, e.g., ECtHR, *Oliveira v. the Netherlands*, Appl. no. 33129/96, Judgment of 4 June 2002, at para. 67–69; *Garib v. the Netherlands*, Appl. no. 43494/09, Grand Chamber Judgment of 6 November 2017; at para. 140–141; see also, more extensively, in the preceding Chamber judgment of 23 February 2016: ECtHR, *Garib v. the Netherlands*, Appl. no. 43494/09, at para. 114–117.

leave any country, laid down in Art. 2(2) Protocol No. 4 ECHR, the Court clarified: ‘The fact that ‘freedom of movement’ is guaranteed as such under Article 2 of Protocol no. 4, which Turkey has signed but not ratified, is irrelevant given that one and the same fact may fall foul of more than one provision of the Convention and its Protocols’.<sup>238</sup> This reasoning can be extended to area-based restrictions not amounting to detention. In situations where Art. 2(1) of Protocol No. 4 does not apply, restrictions of movement may nonetheless violate other Convention rights, most notably the right to family and private life.<sup>239</sup> Accordingly, any type of area-based restriction for irregular migrants must be in accordance with Art. 8 ECHR.

The above standards to measure the conditions of detention or other forms of liberty-restricting measures imposed on migrants are mainly developed by judicial and quasi-judicial bodies based on broadly framed provisions in international treaties. They are necessarily of a casuistic nature, which makes it difficult for States (or the EU) to implement them in practice. In such situations, international soft law is of key importance to specifying the contents of Human Rights, without imposing obligations in its own right.

The first document to mention in this context is the developed set of standards contained in the Nelson Mandela Rules of 2016 adopted by the UN General Assembly in 2016, which concretizes the right to humane treatment in detention enshrined in Art. 10 ICCPR for the criminal law context.<sup>240</sup> The standards are a revised version of the Standard Minimum Rules for the Treatment of Prisoners, originally adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955. The Nelson Mandela Rules constitute the universally acknowledged minimum standard for the management of prison facilities and the treatment of prisoners. The equivalent standards in the Council of Europe are the European Prison Rules.<sup>241</sup> While it is clear that the quality of immigration detention cannot be lower than that of criminal detention, the established criminal detention standards are neither directly applicable to nor adequate for immigration detainees. Therefore, at the level of the Council of Europe an attempt at codifying specific European Rules on Administrative Detention is currently

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<sup>238</sup> The case involved restrictions of movement regarding a Turkish citizen by Turkey, preventing him from leaving Turkey to be with his family in Germany. Turkey had signed but not ratified Protocol No. 4; ECtHR, *Iletmis v. Turkey*, Appl. no. 29871/96, Judgment of 6 December 2005, at para. 50.

<sup>239</sup> In this regard, see ECtHR, *Battista v. Italy*, Appl. no. 43978/09, Judgment of 2 December 2014, at para. 51–52, where the applicant complained against compulsory residence order under both Art. 2(1) Protocol No. 4 ECHR and Art. 8 ECHR. The Court held that the claim raised under Art. 8 ECHR was ‘closely linked to the complaint under Article 2 of Protocol No. 4’ and therefore needed not be assessed separately.

<sup>240</sup> UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 8 January 2016, A/RES/70/175, available at <https://www.refworld.org/docid/5698a3a44.html>. For the original version see: [https://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf).

<sup>241</sup> Council of Europe: Committee of Ministers, Recommendation Rec(2006)2 on the European Prison Rules, 11 January 2006, available at <https://www.refworld.org/docid/43f3134810.html>.

in progress.<sup>242</sup> A first draft establishes rules of international law pertaining to administrative detention, including immigration detention, though its future normative status is unclear.<sup>243</sup>

### 2.2.2 Specific issue: Detention grounds

In view of the increasing use of immigration detention in Europe, a more detailed analysis of the permissible grounds for detention seems appropriate to evaluate whether the EU meets the minimum standards established by Human Rights law. Particular attention will be given to the jurisprudence developed by the HRC in respect of Art. 9 ICCPR, since this Covenant represents the level of protection incorporated in Art. 6 EU-CFR (see above, 2.2.1, subsection 1).

Current EU law regulates pre-removal detention and detention of asylum seekers in separate legal instruments. However, the CJEU has clarified that the notion of detention is the same across the Asylum Procedures Directive, the Reception Conditions Directive, and the Return Directive.<sup>244</sup> This is in line with international law, as the HRC does not distinguish either explicitly or in substance between pre-removal detention and detention upon entry. According to the HRC, any detention of migrants is only permissible if there are circumstances specific to the individual that make it necessary and proportionate to resort to this ultimate measure. While the HRC does not develop a closed list of accepted detention grounds, it emerges from its case-law that an individualized risk of absconding<sup>245</sup> or a risk of acts against national security<sup>246</sup> can justify detention measures, provided that less coercive means of achieving the same ends are not available.<sup>247</sup> Although the language of the HRC ('reasons such as') concedes that, in principle, other detention grounds are not excluded, the HRC has consistently held that detention cannot be 'based on a mandatory rule for a broad category' of situations, but would have to be 'specific to the individual' and meet the strict necessity test.<sup>248</sup> Mere administrative convenience, sanctioning unlawful behavior on the part of the migrant concerned, or general aims of migration policy, such as deterring or educating other migrants, would not meet these

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<sup>242</sup> Council of Europe, Website 'Administrative Detention of Migrants', available at <https://www.coe.int/en/web/cdcj/activities/administrative-detention-migrants>.

<sup>243</sup> Council of Europe: European Committee on Legal Co-Operation (CDCJ), Codifying instrument of European rules on the administrative detention of migrants, 18 May 2017, available at <https://rm.coe.int/european-rules-on-the-administrative-detention-of-migrants-draft-codif/1680714cc1>. See also the European Committee for the Prevention of Torture 'Fact Sheet' detailing standards for immigration detention: Council of Europe Committee for the Prevention of Torture, Immigration detention: Factsheet (2017), available at <https://www.refworld.org/docid/58ca84894.html>. For an assessment and critique of the draft, see International Detention Coalition and ICJ, *European rules for the administrative detention of migrants Written submission to the European Committee on Legal Co-Operation of the Council of Europe* (2017), available at <https://idcoalition.org/wp-content/uploads/2017/07/CouncilofEurope-ImmigrationDetentionRules-JointSubmission-ICJIDC-ENG-2017.pdf>.

<sup>244</sup> In the *Röszke* case, the CJEU clarified that the notion of detention is the same, CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and others* (ECLI:EU:C:2020:367), at para. 224.

<sup>245</sup> HRC, *Jalloh v. the Netherlands*, Communication No. 794/1998, CCPR/C/74/D/794/1998, at para. 8.2.

<sup>246</sup> HRC, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3–9.4.

<sup>247</sup> HRC, *C. v. Australia*, Communication No. 900/1999, CCPR/C/74/D/900/1999, at para. 8.2.

<sup>248</sup> HRC, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3.

standards. Accordingly, other grounds justifying detention have thus far not been accepted by the HRC.<sup>249</sup>

Applying these standards to EU legislation on immigration detention, the first thing to note is that EU legislation generally subjects immigration detention to the requirements of necessity and proportionality, in line with the general principles of EU law. However, the grounds justifying detention appear overly broad, so that they have the potential to undermine the strict standards required by Human Rights law. In the following discussion, we shall consider in detail the relevant legislation and the suggested proposal for its reform.

Detention with a view to deportation is specifically regulated in the Return Directive. The relevant provision in Art. 15(1) states:

*Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.*<sup>250</sup>

The wording of this provision allows for differing views as to whether the listed grounds for detention are exhaustive. A literal reading would suggest that the Directive allows for the detention of third-country nationals ‘only’ when they are subject to return procedures for the two reasons listed in points (a) and (b). However, prefaced by the non-exhaustive ‘in particular when’ the reference to these grounds seems to imply that they serve as mere illustrations.<sup>251</sup> In line with the latter reading, some EU Member States have laid down further grounds for detention in their domestic legislation.<sup>252</sup> Hence, the wording is sufficiently vague to allow for alternative readings.<sup>253</sup> The CJEU has indicated in a series of judgments that the list of grounds is limited to the two laid down in the provision.<sup>254</sup> In its 2020 judgment on the Hungarian

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<sup>249</sup> See the HRC’s own summary of its jurisprudence in General Comment No. 35: Liberty and Security of Person, CCPR/C/107/R.3, at para. 18. Note that in the early case of *A. v. Australia*, the HRC also accepted non-cooperation as a legitimate ground, but has never done so since and does not list non-cooperation as an example for accepted grounds in its General Comment No. 35.

<sup>250</sup> Art. 15(1) Return Directive, emphasis added.

<sup>251</sup> For an example of this reading, see FRA, *Detention of third-country nationals in return procedures* (2011), at 15 and 27.

<sup>252</sup> Such as investigation of the person’s identity (Belgium, Italy), acquisition of travel documents (Italy), unlawful entry (Denmark), or public health considerations (Spain), thus providing a significantly broader basis for detention; see European Parliament, *The Return Directive 2008/115/EC: European Implementation Assessment* (2020), at 90, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS\\_STU\(2020\)642840\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU(2020)642840_EN.pdf).

<sup>253</sup> The European Parliament in its Implementation Study is careful not to preclude that reading and somewhat reluctantly notes that ‘[b]y using the terms “in particular”, Article 15(1) of the Directive appears to enumerate the two grounds in a non-exhaustive manner,’ *ibid.*, at 90 (emphasis added).

<sup>254</sup> CJEU, Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi* (EU:C:2014:1320), at para. 61; Case C-61/11 PPU, *Hassen El Dridi, alias Soufi Karim* (EU:C:2011:268), at para. 39; Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)* (EU:C:2009:741), at para. 70.



transit zone Röske (the ‘Röske case’), the CJEU reiterated this reading and stated that Member States may only deprive an individual of their liberty on the basis of Art. 15(1) Return Directive if the deportation may be jeopardized by the behavior of the person concerned.<sup>255</sup>

In response to this ambiguity, the 2018 Commission proposal for a recast Return Directive aims to resolve the issue in favor of a non-exhaustive reading. The Commission not only proposes to strike out the word ‘only’ but also to expand the illustrative list of possible grounds, which would henceforth include ‘the third-country national poses a risk to public policy, public security or national security’.<sup>256</sup> While detention on the basis of risks of ‘acts against national security’ is warranted by HRC jurisprudence, it is highly doubtful that this also extends to any risk to public policy. Public policy is a broadly framed concept covering a wide range of public interests, whereas the HRC explicitly requires that the factors justifying detention must be specific to the individual.<sup>257</sup> Even more importantly, the removal of the limiting ‘only’ while maintaining the illustrative ‘in particular when’ would emphasize a reading of the provision that detention for the purpose of removal is permitted to pursue policy aims of any kind. Such a reading would certainly not be in line with HRC jurisprudence.<sup>258</sup>

As regards asylum seekers, the permissible grounds for detention are unequivocally laid down exhaustively in Art. 8(3) Reception Conditions Directive:

*An applicant may be detained only:*

*(a) in order to determine or verify his or her identity or nationality;*

*(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;*

*(c) in order to decide, in the context of a procedure, on the applicant’s right to enter the territory;*

*(d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;*

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<sup>255</sup> CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and others* (EU:C:2020:367), at 268–269.

<sup>256</sup> European Commission, Proposal for a recast Return Directive, COM(2018) 634 final, 12 September 2018, at 34.

<sup>257</sup> HRC, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3; HRC, General Comment No. 35: Liberty and Security of Person, CCPR/C/107/R.3, at para. 18.

<sup>258</sup> HRC, *A v. Australia*, CCPR/C/59/D/560/1993, at para. 9.4; this extends to illegal stay, see subsequent jurisprudence on deportation detention, for example: *Jalloh v. the Netherlands*, Communication No. 794/1998, CCPR/C/74/D/794/1998, at para. 8.2.; *Madafferi v. Australia*, Communication No. 1011/2001, CCPR/C/81/1011/2001, at para. 9.2.

*(e) when protection of national security or public order so requires;*

*(f) in accordance with Article 28 of 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.<sup>259</sup>*

Although formulated in an exhaustive manner, this list of grounds covers a wide range of situations that are subject to interpretation and raises a series of issues.

First, the two grounds that are generally accepted by the HRC – risk of absconding and acts against national security – are laid down in a convoluted manner. Rather than specifying the risk of absconding as a self-standing ground, as in the Return Directive, the provision in point (b) presents absconding merely as an example of situations in which determination of the actual need of protection supposedly requires detention. It is unclear which ‘elements’ that would be, especially in light of the fact that detention can in turn impede access to information that is required to evaluate an asylum claim. This appears to be contrary to the principle established by the HRC that determination of the asylum claim should not take place in detention.<sup>260</sup> Similarly, the wording of the provision in point (e) appears broader than is warranted by the HRC. Not only has public order been added to national security, but the provision also does not specify that those considerations must relate to risks posed by acts of the individual concerned. It thus gives way to the interpretation that broader public order considerations could warrant detention of asylum seekers, a reading that would not be in line with international law to the extent that it requires individualized reasons specific to the person concerned.<sup>261</sup>

Second, while detention to determine or verify identity or nationality (see point (a)) may be in line with Human Rights law, it is only acceptable for a brief initial stage.<sup>262</sup> It must, therefore, be interpreted in that light. In contrast, detention to determine the right to enter (see point (c)) is contrary to Human Rights law. This issue will be discussed in more detail in the following section on border procedures (2.2.3).

Third, the remaining two grounds listed in the Reception Conditions Directive give rise to other concerns. Point (d) regulates a situation that could be subsumed under non-cooperation. While Human Rights law does not in principle preclude non-cooperation as a ground for detention, it appears disproportionate in this context absent a risk of absconding. Point (f) makes cross-reference to Dublin procedures. Art. 28(2) Dublin Regulation establishes that the ground for detention under the Regulation is a risk of absconding. It is not clear why a separate ground

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<sup>259</sup> Art. 8(3) Reception Conditions Directive.

<sup>260</sup> HRC, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at 9.3.

<sup>261</sup> Moreover, as discussed above, acts against national security can be prosecuted under criminal law; their inclusion here reflects the ‘crimmigration’ trend that is so far warranted by the HRC.

<sup>262</sup> See the HRC jurisprudence, reported above, and also, e.g., UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), at 17, para. 24, available at <https://www.refworld.org/docid/503489533b8.html>.

is necessary for Dublin cases, as the same safeguards should apply, and the risk of absconding laid down in the Reception Conditions Directive should also cover Dublin cases. Thus, neither of these grounds should be interpreted so as to expand the possible grounds for detention but should, rather, be read in the light of the notion of absconding.

Since detention based on a broader notion of non-cooperation – extending beyond a risk of absconding – would often be considered disproportionate, the two most pertinent grounds are the risk of acts against national security and absconding. As regards the former, such risks would rarely be found. In contrast, a risk of absconding could potentially be found for a large range and number of migrants. A careful definition as well as a thorough proportionality analysis are therefore required in order not to undermine the requirement of an individual assessment.

The Reception Conditions Directive and the Asylum Procedures Directive do not define the notion at all, whereas the Return Directive and the Dublin Regulation currently merely state that risk of absconding means ‘the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures and may abscond’.<sup>263</sup> The ‘objective criteria’ are not defined in the Return Directive or the Dublin Regulation.<sup>264</sup> Hence, the understanding of the concept of the risk of absconding and the criteria laid down in domestic laws vary between Member States.<sup>265</sup> In its non-binding 2008 Recommendation on Returns, the European Commission calls upon Member States to provide for eight criteria for establishing a risk of absconding in their legislation.<sup>266</sup> The 2018 proposal for a recast Return Directive projects a new article with an even more expansive notion, proposing a non-exhaustive list of 16 criteria to establish a risk of absconding, four of which lead to a presumption of a risk of absconding.<sup>267</sup> Such broad and non-exhaustive lists – especially if they are only loosely connected with a person’s propensity to flee – are contrary to Human Rights law, because they undermine the individual assessment required by the proportionality principle.<sup>268</sup> The risk of absconding as a ground for detention must be interpreted narrowly and is not amenable to legislative presumptions. In the words

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<sup>263</sup> Art. 3(7) Return Directive; see also Art. 2(n) Dublin Regulation: ‘risk of absconding’ means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.

<sup>264</sup> In the *Jawo* case, in the context of the Dublin Regulation, the CJEU clarified that ‘absconding’ can be assumed when the individual does not remain at the accommodation allocated to them without informing the competent authorities of their absence, CJEU, Case C-163/17, *Abubacarr Jawo* (EU:C:2019:218), at para. 70.

<sup>265</sup> European Parliament, The Return Directive 2008/115/EC: European Implementation Assessment (2020), at 86–88.

<sup>266</sup> European Commission, Recommendation 2017/432 on making returns more effective when implementing the Directive 2008/115/EC, at para. 15–16.

<sup>267</sup> European Commission, Proposal for a recast Return Directive COM(2018) 634 final, 12 September 2018, Art. 6.

<sup>268</sup> European Parliament, The Return Directive 2008/115/EC: European Implementation Assessment (2020), at 89.

of the HRC, a determination must carefully ‘consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category’.<sup>269</sup> The legislative approach taken by the Commission is therefore not consonant with Human Rights law.

### 2.2.3 Specific issue: Border Procedures

The rise of so-called ‘border procedures’ to determine an asylum claim is a major trend in European migration policy. Next to concerns related to the principle of solidarity among the Member States, such procedures raise issues of Human Rights in view of the prohibition of arbitrary detention and other non-justified measures restricting liberty.

The EU border procedures regime is scattered across various legal instruments, which must be read together. Art. 8(3)(c) of the Reception Conditions Directive provides that detention is permissible ‘in order to *decide*, in the context of a procedure, on the *right to enter* the territory.’<sup>270</sup> A systematic reading of this somewhat opaque provision reveals that ‘procedure’ refers to ‘border procedures’ as defined in the Art. 43 of the Asylum Procedures Directive.<sup>271</sup> According to that provision, Member States may establish border procedures in order to determine the admissibility, and in some cases the substance, of an asylum claim.<sup>272</sup> Although Art. 43 Asylum Procedures Directive itself makes no mention of detention, various other provisions of this Directive, read in conjunction with the Reception Conditions Directive, indicate that the EU legislature acknowledged that these procedures entail deprivation of liberty in most cases.<sup>273</sup> For example, some provisions of the Reception Conditions Directive refer to derogations in cases where ‘the applicant is detained at a border post or in a transit zone’.<sup>274</sup> In the *Rösze* case, the CJEU explicitly endorsed this interpretation and stated that in light of Art. 8(3)(c) Reception Conditions Directive, Art. 43 Asylum Procedures Directive permits the detention of asylum seekers at the border for the purposes specified in that provision.<sup>275</sup>

The question arises as to whether detention of asylum seekers in the context of a border procedure is in line with Human Rights law. As outlined above (see section 2.2.1), Human Rights law does not preclude the detention of asylum seekers entering a State’s territory unlawfully, but does narrowly circumscribe such detention. Such detention is permissible only for a brief

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<sup>269</sup> HRC, *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3.

<sup>270</sup> Art. 8(3)(c) Reception Conditions Directive.

<sup>271</sup> See also European Commission, Proposal for a recast Reception Conditions Directive, COM(2016) 465 final, 13 July 2016, Art. 8(3)(d).

<sup>272</sup> Art. 43(1) Asylum Procedures Directive.

<sup>273</sup> G. Cornelisse, *The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights* (2016), available at <https://research.vu.nl/ws/portalfiles/portal/1522197/Cornelisse-GDP-paper.pdf>.

<sup>274</sup> E.g., Art. 10(5) and Art. 11(6) Reception Conditions Directive.

<sup>275</sup> CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and others* (EU:C:2020:367), at para. 237–239. This followed the finding that conditions at the transit zone did amount to detention, at para. 226–231; in contrast to the Grand Chamber of the European Court of Human Rights in *Ilias and Ahmed*, which controversially overruled a Chamber judgment to hold that asylum seekers were not detained in the transit zone: ECtHR, *Ilias and Ahmed v. Hungary*, Appl. no. 47287/15, Grand Chamber Judgment of 21 November 2019.

initial period in order to *document* their entry, *record* their claims, and determine their identity if it is in doubt.<sup>276</sup> However, to detain asylum seekers further while their claims are being processed would be arbitrary in the absence of particular reasons specific to the individual.<sup>277</sup> As established above (see section 2.2.2), only individualized reasons specific to the individual can justify detention, such as a risk of absconding or acts against national security. A pending determination on the right to enter is not a sufficient reason to justify detention beyond initial documentation and recording.

Due to the scattered nature of the regulation of border procedures, it is not entirely clear what constitutes the legal basis for the detention in this context. In the *Röszke* case, the CJEU referred to the ‘purposes’ laid down in Art. 43 Asylum Procedures Directive. These purposes are decisions on the admissibility of claims pursuant to Art. 33 Asylum Procedures Directive<sup>278</sup> or on the substance of an application for the situations listed in Art. 31(8) Asylum Procedures Directive.<sup>279</sup> Both the determination of admissibility pursuant to Art. 33(2) and the accelerated procedure foreseen by Art. 31(8) of the Asylum Procedures Directive require the assessment of core elements of the asylum claim. As established above, determination of the substance of claims is not a valid ground for detention of asylum seekers. Thus, detention in the context of border procedures cannot be based on the mere purposes stated in this Directive.

Alternatively, it may be argued that the basis for the detention of asylum seekers in the context of border procedures is not Art. 43 Asylum Procedures Directive, since that provision merely outlines the procedure. Rather, the relevant ground for detention of asylum seekers would be found in Art. 8(3)(c) Reception Conditions Directive. Art. 8(3)(c) states: ‘An applicant may be detained ... in order to decide, in the context of a [border] procedure, on the applicant’s right to enter the territory’.<sup>280</sup> However, this reading also conflicts with Human Rights law. The determination of an applicant’s claim is not a sufficient ground to justify detention absent specific and individual reasons. Art. 8 Reception Conditions Directive accounts for this to the extent that it subjects any decision to detain to necessity and proportionality in the individual

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<sup>276</sup> HRC, *Bakhtiyari v. Australia*, Communication No. 1069/2002, CCPR/C/79/D/1069/2002, at para. 9.2–9.3. In line with HRC jurisprudence, the 2017 Michigan Guidelines also accept detention ‘during the very earliest moments after arrival’ but only ‘so long as such detention is prescribed by law and is shown to be the least intrusive means available to achieve a specific and important lawful purpose, such as documenting the refugee’s arrival, recording the fact of a claim, or determining the refugee’s identity if it is in doubt’; see University of Michigan Law School, *The Michigan Guidelines on Refugee Freedom of Movement* (2017), at 15, available at <https://www.refworld.org/docid/592ee6614.html>; similarly: UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), at para. 24, available at <https://www.refworld.org/docid/503489533b8.html>.

<sup>277</sup> HRC, *Tarlue v. Canada*, Communication No. 1551/2007, CCPR/C/95/D/1551/2007, at para. 3.3 and 7.6; *Mansour Ahani v. Canada*, Communication No. 1051/2002, CCPR/C/80/D/1051/2002, at para. 10.2; and see UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), at 18, para. 28, available at <https://www.refworld.org/docid/503489533b8.html>.

<sup>278</sup> Art. 33(2) Asylum Procedures Directive.

<sup>279</sup> Art. 31(8) Asylum Procedures Directive.

<sup>280</sup> Art. 8(3)(c) Reception Conditions Directive.

case, as the CJEU acknowledged in the *Röszke* judgment.<sup>281</sup> Yet such individual assessment could only ever be the result of a proper procedure, which may or may not result in a lawful detention order. It follows that in the light of Human Rights law, point (c) of Art. 8(3) Reception Conditions Directive is devoid of meaning.

The question remains whether other grounds laid down in Art. 8 Reception Conditions might serve as a legal basis for detention in the context of border procedures. The most pertinent candidate is Art. 8(3)(a) Reception Conditions Directive, which establishes verification of identity as a detention ground. As long as detention based on this ground remains ‘brief’ and ‘initial’, this is warranted under Human Rights law. However, any detention that serves to assess the substance of the claim is unlawful.

In sum, immigration detention can only legally take place if there are individual reasons specific to the person concerned, such as a risk of absconding (which corresponds with Art. 8(3) points (b) and (f) of the Reception Conditions Directive) or of acts against national security (corresponding with Art. 8(3) point (e) Reception Conditions Directive). This must be established in the individual case, including in the context of border procedures. Hence, in order for border procedures to be in line with international law, they cannot summarily resort to detention. In other words, border procedures may be a legitimate element of the Common European Asylum System, but this policy choice does not justify quasi-automatic detention of entire classes of asylum seekers.

The remaining scope of application for border procedures is limited to area-based restrictions not amounting to detention.<sup>282</sup> Art. 43(3) Asylum Procedures Directive allows for ‘normal’ accommodation near the border or within a transit zone.<sup>283</sup> In parallel, Art. 18(1)(a) of the Reception Conditions Directive allows housing to be provided in kind, among others, in ‘premises used for the purpose of housing applicants during the examination of an application made at the border or in transit zones’. In the *Röszke* case, the CJEU clarified that these are different from detention centres as referred to in Art. 10 Reception Conditions Directive and must not lead to deprivations of liberty in the meaning of Art. 5 ECHR.<sup>284</sup> To the extent that such housing is connected with limitations on freedom of movement, they must be duly justified (see next section).

#### 2.2.4 Specific issue: Area-based restrictions

EU law permits restrictions on intra-territorial movement of migrants in various instances. Art. 7 of the Reception Conditions Directive lays down the conditions under which Member States may limit the freedom of movement of asylum seekers. Other provisions, such as

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<sup>281</sup> CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and others* (EU:C:2020:367), at para. 259 and 266.

<sup>282</sup> The CJEU made suggestions to that end in the *Röszke* case, see *ibid.*, at para. 222 and 247.

<sup>283</sup> *Ibid.*, at para. 247.

<sup>284</sup> *Ibid.*, at para. 254.

Art. 18(1)(a) Reception Conditions Directive<sup>285</sup> and Art. 43(3) Asylum Procedures Directive<sup>286</sup> also rely on the assumption that asylum seekers' movement is restricted to a certain area, in that case near the border or transit zone. Such area-based restrictions must be distinguished from so-called alternatives to detention (ATDs). While the principle of proportionality requires the prior consideration of alternatives to detention before a decision to detain a migrant is taken (as discussed above, section 2.2.2), area-based restrictions are not meant to serve as a less onerous measure in response to a situation that, as a rule, would justify issuing a detention order. Rather, they serve independent aims that, according to a specific legal basis, justify temporarily restricting the spatial movement of individuals to a certain area.

The central provision for this type of measure as regards asylum seekers is Art. 7 Reception Conditions Directive on 'Residence and Freedom of Movement'.<sup>287</sup> It reads, in the relevant parts:

- 1. Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.*
- 2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.*
- 3. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national law.*

A series of issues arise when analyzing these provisions in light of Human Rights. The measures foreseen in Art. 7 of the Reception Conditions Directive must pass the test of conformity with Art. 12 ICCPR and Art. 2 of Protocol No. 4 ECHR (and the corresponding fundamental right). Note that, according to Art. 9(1) of the Asylum Procedures Directive, asylum seekers are allowed to remain in the Member State pending a decision on their asylum claim, irrespective of a potentially illegal entry. They are, therefore, 'lawfully within the territory' for the purposes of Art. 12 ICCPR and Art. 2 of Protocol No. 4 ECHR.<sup>288</sup> Were asylum seekers conceived as not being covered by the scope of these guarantees, area-based restrictions on their mobility would have to be tested against Art. 8 ECHR (see above, section 2.2.1 and Chapter 6).

First, restrictive measures taken on the basis of Art. 7 of the Reception Conditions Directive – or rather, of national legislation transposing its provisions – may, depending on their degree, intensity, and cumulative impact, nonetheless amount to a deprivation of liberty within the

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<sup>285</sup> Art. 18(1)(a) Reception Conditions Directive.

<sup>286</sup> Art. 43(3) Asylum Procedures Directive.

<sup>287</sup> Art. 7 Reception Conditions Directive.

<sup>288</sup> Art. 9(1) Asylum Procedures Directive; on this point, see Costello, 'Immigration Detention: The Grounds Beneath Our Feet', 68 *Current Legal Problems* (2015) 143, at 147 and 174.

meaning of Art. 9 ICCPR and Art. 5 ECHR. Due to the lack of a sufficient detention ground, such a measure would be arbitrary and, therefore, illegal (see above, section 2.2.1). The question of whether restrictions actually amount to detention irrespective of their designation depends on the specific circumstances in each particular case<sup>289</sup> – for example, whether the building is physically locked is not decisive if the places and time spent away are subject to permissions, controls, and restrictions.<sup>290</sup> Likewise, being held on a small island under strict supervision and curfew, including the requirement to report to the police twice a day, and only being permitted to contact the outside world under supervision, would also amount to deprivation of liberty for the purposes of Art. 5 ECHR.<sup>291</sup> In contrast, night curfew coupled with reporting obligations on certain days and the requirement to inform the police when leaving the house was found to be a mere restriction of movement rather than deprivation of liberty.<sup>292</sup> In light of these criteria, it depends on the specific circumstances whether measures that Member States put in place to restrict the movement of asylum seekers based on Art. 7 Reception Conditions Directive – such as house arrest in France with reporting obligations, restriction of movement to an island in Greece, or accommodation in a remote village in Austria – amount to unlawful deprivation of liberty.

Second, Art. 12 ICCPR and Art. 2 of Protocol No. 4 ECHR require area-based restrictions to be ‘provided by law’ and ‘in accordance with law’, respectively. Art. 7(1) and (2) Reception Conditions Directive does not explicitly mention this requirement. Only the decision to make provision of material reception conditions subject to actual residence is constrained by a procedure ‘established by national law’ (Art. 7(3) of the Directive). However, the requirement of a legal basis in an act of general application can be deduced from general principles of EU law and, more specifically, from the legal regime developed by the CJEU for a proper transposition of directives in accordance with Art. 288(3) TFEU.<sup>293</sup> Notably, this legal regime does not provide for so-called reversed direct effect of directives: absent a sufficient legal basis in national law, the provisions of the Reception Conditions Directive cannot be held against an asylum seeker, that is, it cannot serve as an independent legal basis for a restrictive measure.

Third, Art. 7(2) Reception Conditions Directive provides that ‘Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.’ This wide scope for the grounds that may justify area-based restrictions raises questions in light of Art. 12(3) ICCPR and Art. 2(3) and (4) of Protocol No. 4 ECHR. According to Art. 12(3) ICCPR, restrictions on the right to freedom of movement must be necessary for

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<sup>289</sup> ECtHR, *Amuur v. France*, Appl. no. 19776/92, Judgment of 25 June 1996; the Court qualified holding persons in the transit zone of an international airport as detention, even though they were ‘legally free to leave’ toward third countries.

<sup>290</sup> ECtHR, *Stanev v. Bulgaria*, Appl. no. 36760/06, Judgment of 17 January 2012, at para. 124.

<sup>291</sup> ECtHR, *Guzzardi v. Italy*, Appl. no. 7367/76, Judgment of 6 November 1980.

<sup>292</sup> ECtHR, *Raimondo v. Italy*, Appl. no. 12954/87, Judgment of 22 February 1994.

<sup>293</sup> See Bast, ‘Legal Instruments and Judicial Protection’, in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2009) 345, at 355 et seq.



the protection of national security, public order, public health or morals, or the rights and freedoms of others. Art. 2(3) Protocol No. 4 ECHR is drafted in a similar way. However, the additional limitation foreseen in Art. 2(4) Protocol No. 4 ECHR, permitting area-based restrictions justified by ‘the public interest’, is not included in Art. 12(3) ICCPR.

This difference is particularly significant in the context of Art. 7(2) of the Reception Condition Directive. The broad notion of ‘public interest’ might well cover measures taken for mere bureaucratic convenience that would not qualify for the maintenance of *ordre public*. Arguably, the ‘swift processing and effective monitoring’ of asylum claims that is explicitly mentioned in Art. 7(2) is but one example, although a swift and fair asylum procedure is also in the interest of bona fide asylum seekers. However, measures that are only supported by public interests, and not by the grounds mentioned in Art. 12(3) ICCPR and Art. 2(3) Protocol No. 4 ECHR, would violate Human Rights law in two respects. First, the Member States are bound to respect their international obligations under the ICCPR in addition to their obligations under the ECHR. Second, the Strasbourg Court has established a narrow reading of the scope of Art. 2(4) Protocol No. 4 ECHR. According to its case-law, the fourth paragraph does not apply to measures directed at particular individuals or groups of individuals – which must be considered in light of the third paragraph, with its narrower scope – but only to measures of general applicability that are limited to discrete areas of a country.<sup>294</sup> Hence, Member States cannot refer to Art. 2(4) Protocol No. 4 ECHR when implementing Art. 7(2) of the Directive. In light of the above jurisprudence, freedom of movement of legally present migrants may only be limited by national security or public order considerations in a stricter sense, as laid down in Art. 12(3) ICCPR and Art. 2(3) Protocol No. 4 ECHR.

Accordingly, Art. 7(2) of the Reception Condition Directive seemingly permits Member State certain action that is actually unlawful under Human Rights law and EU fundamental rights. This is not merely another example of ‘underinclusive legislation’, which would be technically lawful according to the jurisprudence of the CJEU when its provisions are sufficiently flexible to incorporate EU fundamental rights (see above, introductory chapter). Rather, in cases such as Art. 7(2) of the Reception Condition Directive, in which the literal transposition of the provision of a Directive would constitute a violation of fundamental rights, this provision must itself be regarded as unlawful.

### 2.2.5 Specific issue: Detention conditions

(1) The outline of the legal framework has revealed a lack of normative standards on adequate conditions for administrative immigration detention (see above, section 2.2.1). This also holds true in EU legislation. The regulation of detention conditions for asylum seekers (Art. 10 Reception Conditions Directive) and for persons who are subject to return procedures (Art. 16

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<sup>294</sup> On this distinction in a non-migration case, see ECtHR, Appl. no. 43494/09, *Garib v. the Netherlands*, Judgment of 6 November 2017, at para. 110.

Return Directive) is rather sparse. Although the requirements laid down in the Reception Conditions Directive are somewhat more detailed than those in the Return Directive, neither provides detailed guidance on how a detention centre is to be designed and what facilities it should provide.<sup>295</sup> Both instruments limit the standards for conditions essentially to one article, and under both instruments many exceptions and derogations are possible.<sup>296</sup>

This is a clear case of underinclusive legislation at the EU level with regard to those standards that do exist in Human Rights law to prevent inhuman or degrading treatment in detention. The European Commission has noted this gap and reminded Member States in its 2017 Recommendation regarding a 'Return Handbook' that Member States must respect the absolute minimum that is required by Art. 4 EU-CFR, even when the Return Directive does not regulate certain material detention conditions.<sup>297</sup> The Commission makes reference to a series of relevant guidelines and standards. This illustrates that not even the absolute minimum is sufficiently regulated in EU legislation regarding immigration detention.

As outlined above, inadequate conditions in immigration detention can also lead to a breach of Art. 5(1)(f) ECHR or other provisions of Human Rights law, in particular Art. 8 ECHR. In this regard, detention conditions must reflect the administrative character of the measure. Detention is imposed in order to achieve the specific aim of a person not leaving, but otherwise detention conditions should not be of punitive character and be as close as possible to living normally such that other harms are curbed as much as possible. To reflect this, and while other specific legislation is lacking, the provisions on reception conditions of asylum seekers could provisionally serve as a general standard. To this end, the Reception Conditions Directive could be made applicable to all migrants in detention. This would at least ensure compliance with the basic principle of proportionality in most cases, regardless of the requirement also to assess this principle in the individual case.

In addition, there is a need for further concretization. The codification process of the European Rules for Administrative Detention is potentially promising in the regard. However, reports indicate that the process is stagnating just as, somewhat ironically, the EU is blocking the adoption of a Council of Europe resolution on the standards.<sup>298</sup> Moreover, the draft contains little detail on the design and operation of an immigration detention center and on how migrants

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<sup>295</sup> A. Achermann, J. Künzli and B. von Rütte, *European Immigration Detention Rules: Feasibility Study* (2013), at 20, available at <https://www.unine.ch/files/live/sites/ius-migration/files/Publikationslisten/EIDR%20Feasibility%20Study%20MC.pdf>.

<sup>296</sup> For example, Art. 16(1)(1) Return Directive, and Art. 10(1)(3) Reception Conditions Directive.

<sup>297</sup> European Commission, Recommendation 2017/2338 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, at para. 149.

<sup>298</sup> See Deutscher Bundestag, Bericht der Bundesregierung über die Tätigkeit des Europarats im Zeitraum vom 1. Januar bis 31. Dezember 2018, BT Drucksache 19/9444, 5. April 2019, at 16: '[CDCJ] has continued its work on a codification of existing legal standards in centers for the administrative detention of migrants. The work has been halted shortly before the finalization by interventions lodged by the EU Commission at a late stage. The Committee of Ministers of the Council of Europe is currently examining in what form the work can be taken up again in 2019 and finalized' (trans. by the authors).

are to be treated.<sup>299</sup> Rather, the parts of the Rules on the conditions and treatment in detention largely replicate the text of the European Prison Rules, without contextualization or adaptation.<sup>300</sup> Here, a more proactive role of the EU and its Member States would be required from the viewpoint of Human Rights.

(2) Detention of any kind represents a context of particular vulnerability to maltreatment that requires an effective monitoring mechanism. Art. 16(4) Return Directive provides for monitoring but permits visits in detention facilities subject to prior authorization. The Reception Conditions Directive does not specifically foresee a monitoring mechanism. According to Art. 10(3) and (4) Reception Conditions Directive, only UNHCR and NGOs have (in principle) unlimited access to detained asylum seekers. In order to ensure Human Rights compliance, a monitoring mechanism is needed not only for detention centers but also for reception centers and other places of area-based restriction, such as confinement on islands.<sup>301</sup> Such monitoring should be carried out by bodies that also inspect prisons – for example, by national prison monitoring bodies such as the national preventive mechanisms established under the Optional Protocol to CAT.<sup>302</sup>

(3) The Return Directive allows for the detention of children ‘as a measure of last resort and for the shortest appropriate period of time’ (Art. 17) as well as of persons in situations of vulnerability and with special needs (Art. 16(3) Return Directive). Similarly, the Reception Conditions Directive allows for the detention of both children and persons in situations of vulnerability. The 2017 Commission Recommendation on making returns more effective even states that Member States should not preclude the detention of minors in their legislation.<sup>303</sup>

This raises the issue as to what extent, and under what conditions, the placement in detention of particularly vulnerable migrants can be justified in international law. In Human Rights law as it stands, we were not able to identify a general prohibition of detaining certain classes of persons entirely. The UN Convention on the Rights of the Child establishes that detention of a

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<sup>299</sup> Council of Europe: European Committee on Legal Co-Operation (CDCJ), Codifying instrument of European rules on the administrative detention of migrants, 18 May 2017, available at <https://rm.coe.int/european-rules-on-the-administrative-detention-of-migrants-draft-codif/1680714cc1>.

<sup>300</sup> L. McGregor, *An Appraisal of the Council of Europe’s Draft European Rules on the Conditions of Administrative Detention of Migrants*, 19 July 2017, available at <https://www.ejiltalk.org/an-appraisal-of-the-council-of-europes-draft-european-rules-on-the-conditions-of-administrative-detention-of-migrants/>.

<sup>301</sup> E. Guild, M. Garlick and V. Moreno-Lax, *Study on Enhancing the Common European Asylum System and Alternatives to Dublin* (2015), available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU%282015%29519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf), at para. 30–38. See also the guide for monitoring immigration detention prepared by the Association for the Prevention of Torture (ATP), the International Detention Coalition (IDC) and UNHCR, *Monitoring Immigration Detention: Practical Manual* (2014), available at <https://idcoalition.org/wp-content/uploads/2015/06/Monitoring-Immigration-Detention-Practical-Manual.pdf>.

<sup>302</sup> Ph. de Bruycker et al., *Alternatives to Immigration and Asylum Detention: Time for Implementation* (2015), at 21.

<sup>303</sup> European Commission, Recommendation 2017/432 on making returns more effective when implementing the Directive 2008/115/EC, at para. 14.

minor should be a measure of last resort, but it does not explicitly prohibit the practice.<sup>304</sup> The same holds true under the UN Convention on the Rights of Persons with Disabilities; while this document has been specifically designed to address the protection of disabled persons, it does not prohibit resorting to detention.<sup>305</sup> Consequently, establishing a general prohibition to detain certain classes of particularly vulnerable persons would be the task of domestic legislatures, including the EU.

However, as repeatedly stated, detention must be necessary and proportionate in each case. The individual's specific vulnerability is an important element that needs to be duly considered. Taking into account the administrative purpose of a measure, through a correct reading of the principles of necessity and proportionality, a vulnerable person should be placed under a non-custodial measure from the outset of the procedure.<sup>306</sup> In this light, the Working Group on Arbitrary Detention argues that immigration detention of migrants in situations of vulnerability or at risk, such as unaccompanied children, families with minor children, pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture, and/or other serious violent crimes, 'must not take place'.<sup>307</sup> Similarly, for children specifically, the UN Special Rapporteur on the Human Rights of Migrants has argued that children should never be detained for immigration purposes, nor can detention ever be justified as being in a child's best interests,<sup>308</sup> a view that is shared by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child.<sup>309</sup> The ECtHR has also regularly found detention of children to be disproportionate in relevant cases that came before it.<sup>310</sup> In sum, although detention is not categorically prohibited, the requirements of necessity and proportionality renders immigration detention of people in situations of vulnerability, in particular children, almost always unlawful.

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<sup>304</sup> See Art. 37(c) CRC.

<sup>305</sup> See Art. 14 of the Convention on the Rights of Persons with Disabilities (relating to liberty and security).

<sup>306</sup> Pétin, 'Exploring the Role of Vulnerability in Immigration Detention', 35 *Refugee Survey Quarterly* (2016) 91, at 98.

<sup>307</sup> Working Group on Arbitrary Detention, Revised deliberation No. 5 on deprivation of liberty of migrants, 2018, A/HRC/39/45, at para. 41; see also Report of the Working Group on Arbitrary Detention, Mission to Malta 2009, A/HRC/13/30/Add.2, at para. 79(f), and Report of the Working Group on Arbitrary Detention, Mission to Malaysia 2011, A/HRC/16/47/Add.2, at para. 119.

<sup>308</sup> Report of the Special Rapporteur on the human rights of migrants: Focus Return (2018), at 10.

<sup>309</sup> See joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration; joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return; OHCHR, 'UN Child Rights Experts call for EU-wide ban on child immigration detention', Press release, 21 February 2018, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22681&LangID=E>.

<sup>310</sup> For an analysis, see Ciara M. Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children', 19 *Human Rights Law Review* (2019) 1, at 16–19.

Finally, in order to identify migrants in situations of vulnerability, and to prevent their potentially unlawful detention, a screening procedure is required. Some situations of particular vulnerability are more or less obvious, such as old age or physical disability, but others are not, such as mental disorders, or trauma resulting from torture or rape. Identification is a core element without which the provisions aimed at special treatment of persons in situations of vulnerability would lose any meaning.<sup>311</sup>

While Art. 11 of the Reception Conditions Directive includes a special provision on the detention of vulnerable persons, it does not specifically prescribe a screening procedure in order to identify them.<sup>312</sup> Art. 21 and 22 of this Directive require an assessment of special reception needs, and Art. 24(1) of the Asylum Procedures Directive requires an assessment of a need for special procedural guarantees. But the details and design of such mechanisms are not specified in either instrument. The sole prerequisite is the need for a vulnerability assessment.<sup>313</sup> It is unclear whether identification should be a separate step in the asylum procedure and what minimal requirements would suffice to fulfill this obligation. In contrast, the Return Directive makes no mention of any vulnerability assessment procedure at all. Art. 16 of the Return Directive is limited to requiring that ‘particular attention shall be paid to the situation of vulnerable persons’, and that ‘emergency health care and essential treatment of illness shall be provided’. There is thus no explicit legal requirement for a screening procedure in order to identify persons in situations of vulnerability among those who are subject to pre-removal detention based on the Return Directive.

## 2.3 Recommendations

### Recommendation 1: Enact horizontal provisions on detention grounds

We recommend that in order to prevent the disproportionate and expansive use of detention, the EU should regulate the grounds for detention of migrants in a horizontal provision that applies across all instruments. Taking the cue from the exhaustive list in the Reception Conditions Directive and the CJEU’s rulings regarding the Return Directive, the provision should exhaustively list the possible grounds for detention. Taking into account the relevant jurisprudence of the HRC, the permissible grounds for detention should be limited to a risk of absconding and a risk of acts against national security. We suggest the following wording:

*Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may keep in detention, for the shortest time possible, a third-country national who is the subject of migration procedures only when strictly necessary in order to prevent*

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<sup>311</sup> Jakuleviciene, ‘Vulnerable Persons as a New Sub-Group of Asylum Seekers?’ in V. Chetail, Ph. de Bruycker and F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (2016) 353, at 353–373.

<sup>312</sup> Art. 11 Reception Conditions Directive.

<sup>313</sup> Art. 22 and Recital 29 of Reception Conditions Directive, in conjunction with Art. 24 Asylum Procedures Directive.

*(a) absconding or (b) acts against national security. In each individual case, Member States must demonstrate that the detention is necessary in order to meet this aim.*

These two grounds should each be carefully circumscribed and exhaustively defined in EU law in order to ensure that expanding interpretation does not undermine the requirement of an individual assessment. This provision should apply to instances of the detention in the EU related to asylum and immigration matters, including but not limited to the Return Directive, the Reception Conditions Directive, and the Dublin Regulation. The necessary powers of the EU legislature follow from a combined use of the legal bases provided in Art. 78(2) and Art. 79(2) TFEU.

### **Recommendation 2: Prohibit ‘border procedures’ based on detention**

The EU should abstain from enabling the use of detention as part of border procedures to assess asylum claims. Upholding the current policy that relies on detention for border procedures would violate Human Rights law and, hence, Art. 6 EU-CFR. Accordingly, we recommend deleting Art. 8(3)(c) Asylum Procedures Directive. Accelerated asylum procedures at the external borders of the EU are not per se unlawful, but they must not be accompanied by quasi-automatic detention absent a specific reason to detain a particular individual.

Pending such amendment, EU Member States are obliged, by virtue of Art. 9 ICCPR and their corresponding obligations under EU law, to refrain from detaining asylum seekers upon entry beyond a brief initial stage to register and record their claim. In order to achieve the purposes laid down in Art. 43(1) Reception Conditions Directive, Member States may only resort to well-justified area-based restrictions, as referred to in Art. 43(3) Reception Conditions Directive.

Accordingly, the Commission should withdraw its proposal for an Asylum Procedures Regulation, as amended in 2020, since it proposes to expand the use of border procedures and maintains ambiguous wording as regards the question of whether this involves detention.<sup>314</sup> We rather recommend that in its reform efforts regarding border procedures, the EU should explicitly prohibit the use of detention.

### **Recommendation 3: Specify legal safeguards for area-based restrictions**

We recommend that Art. 7(2) Reception Conditions Directive be revised. First, it should explicitly require a legal basis in national law for any type of area-based restriction imposed on asylum seekers. Second, the permissible grounds for area-based restriction laid down in Art. 7(2) Reception Conditions Directive must be amended, as ‘public interest’ and ‘swift processing and effective monitoring’ of asylum applications are not sufficient to justify area-based restrictions. In order to align with EU fundamental rights, read in the light of Art. 12(3) ICCPR and Art. 2(3) Protocol No. 4 ECHR, the revised Reception Conditions Directive should provide

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<sup>314</sup> See Art. 41 and 41a of the Amended proposal for an Asylum Procedures Regulation, COM(2020) 611 final, 23 September 2019, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0611&from=EN>.

for area-based restrictions only on grounds of national security or for the maintenance of public order.

The same limitations and safeguards should apply to all types of area-based restrictions, including in the context of border procedures, as referred to in Art. 18(1)(a) Reception Conditions Directive and Art. 43(3) Asylum Procedures Directive.

#### **Recommendation 4: Ensure adequate conditions in immigration detention and reception centers**

We recommend that the EU proactively advance the process of further developing soft law on the conditions of immigration detention. To this end, it should constructively contribute to the process at the Council of Europe with the aim of implementing a Human Rights-based approach to defining the adequate conditions for administrative detention. The EU should define its own position on the draft European Immigration Detention Rules in the form of a decision, which would also be binding upon the negotiating stance of the Member States in all fields governed by EU law, including immigration detention.

In the meantime, we recommend that the general provisions on reception conditions laid down in the Reception Conditions Directive be made applicable to all migrants in detention.

In order to ensure compliance with these standards, we further recommend that the EU require Member States to implement a monitoring mechanism for places of administrative detention and reception centers, including the possibility of inspections without notice.

#### **Recommendation 5: Prohibit detention of persons in situations of particular vulnerability**

We recommend that the EU legislature explicitly prohibit the administrative detention of migrants in situations of particular vulnerability, including but not limited to children, in order to comply with the principle of proportionality by way of legislative balancing.

In order to be able to effectively implement this prohibition, this should be coupled with the requirement for Member States to implement an identification mechanism for situations of vulnerability prior to any order to detain, and at regular intervals during detention.





# Chapter 3 – Guaranteeing Procedural Standards

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Substantive rights need procedural safeguards in order to be effective. Such procedural standards encompass provisions ensuring that individuals are heard before decisions are taken that may adversely affect their legal position, that reasons are given for such decisions, and that the latter are subject to appeal through effective legal remedies. These safeguards recognize the affected person’s agency as a legal subject and, thus, his or her human dignity.

In an objective dimension, procedural rights are inherently related to the rule of law, guaranteeing the supremacy of law as well as the equal and predictable application of legal norms to individual cases. The EU has committed itself to the respect of the rule of law as one of its core values, on equal level with human dignity, freedom, democracy, equality, and respect for human rights (Art. 2 TEU). This foundational value of the EU is also reflected in the Union’s objectives guiding the creation of an Area of Freedom, Security and Justice, of which the EU’s migration policy is a part: respect for fundamental rights, fairness toward migrants from third countries, and the facilitation of access to justice are supposed to be its cornerstones (Art. 3(2) and 67 TFEU).

Ensuring due process of law is one of the most important expressions of any public authority's respect for the rule of law. In the EU legal order, these standards are recognized as fundamental rights. The EU Charter of Fundamental Rights provides for a right to good administration, including certain procedural rights (Art. 41 EU-CFR) as well as a right to an effective remedy and to a fair trial (Art. 47 EU-CFR). According to the EU Court of Justice, these provisions express general principles of EU law.<sup>315</sup>

Accordingly, EU institutions and bodies as well as Member States' authorities must meet the procedural guarantees stipulated in the Charter in all situations governed by EU law. The EU has, therefore, assumed full legal responsibility, and is politically accountable, for ensuring that these standards are observed in all administrative and judicial proceedings that fall within the substantive scope of EU migration law, irrespective of the fact that such processes are mostly conducted by Member States' bodies. As a consequence, all substantive Human Rights of migrants discussed in this study are accompanied by procedural guarantees derived from EU constitutional law. As we shall explain in more detail below, some of these constitutional guarantees mirror Human Rights that are specific to migrants and are recognized as procedural Human Rights per se.

Does the Union live up to these ambitious commitments toward migrants and, if not, how can it make sure it does?

### 3.1 Structural challenges and current trends

In the context of migration governance, the recognition of a comprehensive set of procedural rights and a strict respect for the rule of law have long been alien to most legal systems, including those of EU Member States. These systems have traditionally been marked by a notorious exceptionalism regarding immigration proceedings. Full protection by procedural guarantees (as well as by substantive rights) were reserved to citizens, allowing for largely unbound discretionary powers of state authorities vis-à-vis foreigners. This exceptionalism was even more marked toward non-residents, that is, when dealing with applications from persons staying abroad.

The belated and still partial assertion of procedural safeguards in immigration proceedings only started after the Second World War, spurred by three, largely simultaneous developments: the constitutionalization of domestic legal systems, with an increasing importance of the rule of law (or *Rechtsstaat* or *État de droit*) in general; the rise of international Human Rights law and its transformative effect on domestic legal systems; and – arguably the most important driver in this respect – the Europeanization of migration law.<sup>316</sup> Today, as a conse-

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<sup>315</sup> On the right to good administration, see CJEU, Case C-604/12, *H. N. v. Ireland* ECJ (EU:C:2014:302), at para. 49; C-230/18, *PI v. Landespolizeidirektion Tirol* (EU:C:2019:383), at para. 57; on the right to an effective remedy: C-556/17, *Alekszij Torubarov v. Bevándorlási és Menekültügyi Hivatal* (EU:C:2019:626), at para. 55.

<sup>316</sup> Bast, 'Of General Principles and Trojan Horses: Procedural Due Process in Immigration Proceedings Under EU

quence of this Europeanization, numerous EU legal acts provide for specific procedural safeguards and legal remedies in the context of migration law. They concern, inter alia, applications for Schengen visas,<sup>317</sup> the refusal of entries at border crossings,<sup>318</sup> the rejection of applications for residence permits for family reunification<sup>319</sup> as well as for long-term residence,<sup>320</sup> and of a number of residence permits related to labor migration (among others, applications to issue, amend or renew a single permit to reside and work in a Member State,<sup>321</sup> applications for EU Blue Cards,<sup>322</sup> and for residence permits for the purposes of research, studies, training, voluntary service, pupil exchange schemes, or educational projects and au pairing<sup>323</sup>). A specific set of procedural provisions apply once an asylum claim is presented – for example, the right to a personal interview.<sup>324</sup> Furthermore, pursuant to the Return Directive Member States must provide for effective remedies to challenge decisions related to return.<sup>325</sup>

The EU has thus already assumed responsibility to safeguard procedural rights regarding a large spectrum of migration statuses and situations, even if some of the explicit regulations in the respective acts may fall short of the level of protection required by EU fundamental rights and/or Human Rights. This raises the question of where the Union must close remaining gaps of protection by comprehensively providing for procedural rights of migrants. This question is all the more pressing as procedural rights have a particularly widespread impact, as they can come into play at all possible stages of immigration proceedings. Most notably, the following types of decisions may lead to the denial or loss of a particular immigration status:

- decisions on visa applications and on admission at the border (decisions on admission)
- decisions on the renewal or extension of residence permits
- decisions on the termination of residence, particularly expulsion and deportation.

Note that we are applying a wide notion of ‘decision’ for the purposes of this chapter. The

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Law’, 11 *German Law Journal (GLJ)* (2010) 1006; Rochel, ‘Working in Tandem: Proportionality and Procedural Guarantees in EU Immigration Law’, 20 *GLJ* (2019) 89.

<sup>317</sup> Art. 32(3) Regulation 810/2009 establishing a Community Code on Visas (Visa Code).

<sup>318</sup> Art. 14(3) Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>319</sup> Art. 5(4), Art. 18 Directive 2003/86/EC on the right to family reunification (Family Reunification Directive).

<sup>320</sup> Art. 7(2), Art. 10, Art. 20 Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (Long-Term Residents Directive).

<sup>321</sup> Art. 8 Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (Single Permit Directive).

<sup>322</sup> Art. 11(3) Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card Directive).

<sup>323</sup> Art. 34 Directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) (REST Directive).

<sup>324</sup> Art. 14, 46 Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Qualification Directive).

<sup>325</sup> Art. 13 Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive). For a recent application, see CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and others* (EU:C:2020:367), at para. 127 et seq.

failure of an authority to give a person access to a proper procedure amounts to a decision as well.

Today, procedural guarantees seem to be largely respected by Member States in respect of decisions on renewing or extending an existing residence permit. Similar standards are often violated or even negated, however, when it comes to decisions on the admission of migrants (visa applications or territorial admission at the borders) or on the termination of residence. Here, ‘immigration exceptionalism’ seems to persist as a historically shaped and bequeathed mindset. This chapter therefore focuses on the latter two issues.

While the main focus of this chapter is on decisions taken by Member States’ authorities, an area of growing tension concerns situations where the EU administration is directly involved as an actor. The last two decades have not only produced a general ‘agencification’ of EU governance but also a particular rise of EU agencies as key actors involved in ‘hybrid’ or ‘mixed’ administrative decision-making in the field of migration.

### **Trend 1: Denial of procedural standards for decisions on admission**

We observe a persistent pattern of denying procedural guarantees in proceedings that may lead to refusing the admission of migrants. This pattern is particularly marked when the place of decision-making is located outside the territory of the Member State, or in close proximity to the external border.

First, in what amounts to a long-term structural deficit, notoriously little attention is given to procedural standards in visa application procedures conducted at Member States’ consular or diplomatic missions. The Visa Code (Regulation 810/2009) contains some procedural guarantees, but it only applies to short-stay visas (so-called ‘Schengen visas’).<sup>326</sup> There are no equivalent horizontal provisions for long-stay visas (so-called ‘national visas’, although the ground of admission may be governed by EU law). Procedural guarantees for applications for residence permits defined in EU legislation (such as Art. 5(4) of the Family Reunification Directive<sup>327</sup> and Art. 11(3) of the Blue Card Directive<sup>328</sup>) are potentially thwarted by Member

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<sup>326</sup> Even regarding the application procedures for Schengen visas, Member States have in some instances tried to limit these guarantees by narrow interpretations of EU law – for example, by excluding access to court procedures in the case of the refusal of a visa application: Art. 5(4) of the Polish *Prawo o postępowaniu przed sądami administracyjnymi* (Law on proceedings before the administrative courts) of 30 August 2002.

<sup>327</sup> Cf. Art. 5(4) of the Family Reunification Directive: ‘The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged. In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended. Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State.’

<sup>328</sup> Art. 11(3) of the Blue Card Directive: ‘Any decision rejecting an application for an EU Blue Card, a decision not to renew or to withdraw an EU Blue Card, shall be notified in writing to the third-country national concerned and, where relevant, to his employer in accordance with the notification procedures under the relevant national law and shall be open to legal challenge in the Member State concerned, in accordance

State laws and practices excluding or limiting procedural rights. For example, a provision in the German Residence Act (*Aufenthaltsgesetz*) waives the requirement to specify the reasons for the decision and to inform applicants about available redress procedures and the time limit for bringing an action, when rejecting applications for national visas (Sec. 77(2) German Residence Act).<sup>329</sup>

Second, the trend of avoiding asylum jurisdiction (described in Chapter 1) usually encompasses the denial of any individual procedure – that is, such denials amount to decisions of collective non-admission to the territory at the land or sea border. The fact that such decisions do not necessarily qualify as ‘decisions’ according to the terms of procedural codes is precisely the point of concern. Several manifestations have already been mentioned above, such as the support for pull-back measures conducted by third countries or non-disembarkation-policies toward refugees saved at sea by the closure of ports to SAR vessels (see Chapter 1). In the same vein, individual procedural guarantees are violated by Member State practices of forcible – ‘hot’ – returns of migrants in immediate proximity to borders, such as the long-running Spanish practice of controlling the border of the Spanish exclaves of Ceuta and Melilla,<sup>330</sup> or the more recent practice of push-backs from Croatia to Serbia or Bosnia and Herzegovina.<sup>331</sup> Similarly, accelerated asylum procedures in transit zones (see Chapter 2) may also lead to an infringement of procedural rights.<sup>332</sup>

Yet even when border guards actually apply EU law to entry decisions at external border crossing, the applicable procedural guarantees often remain rather general and vague. While Art. 14(2) of the Schengen Borders Code (Regulation 2016/399) requires a ‘substantiated decision stating the precise reasons for the refusal’ for adverse entry decisions, ticking boxes in a standard form is generally supposed to fulfill the requirement. Moreover, the refusal is supposed to take immediate effect. In this regard, Art. 14(3) of the Schengen Borders Code does not set precise conditions for satisfying the guarantee of an effective remedy.

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with national law. The notification shall specify the reasons for the decision, the possible redress procedures available and the time limit for taking action.’

<sup>329</sup> Sec. 77(2) of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory: ‘Denial and restriction of a visa and passport substitute before the foreigner enters the federal territory shall not require any statement of grounds or information on available legal remedies; refusal at the border shall not require written form. Formal requirements for the denial of Schengen visas shall be determined by Regulation (EC) No 810/2009.’

<sup>330</sup> See, e.g., López-Sala, ‘Keeping up Appearances: Dubious Legality and Migration Control at the Peripheral Borders of Europe: The Cases of Ceuta and Melilla’, in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union* (2020) 25.

<sup>331</sup> European Council on Refugees and Exiles (ECRE), ‘Widespread Pushbacks and Violence Along Borders in the Balkans Continues’, Press release, 20 December 2019, available at <https://www.ecre.org/widespread-pushback-and-violence-along-borders-in-the-balkans-continues/>; ECRE, ‘Croatia: Further Evidence of Systemic Push-Backs at the Border with Bosnia’, Press release, 5 June 2020, available at <https://www.ecre.org/croatia-further-evidence-of-systemic-push-backs-at-the-border-with-bosnia/>.

<sup>332</sup> See, e.g., CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and others* (EU:C:2020:367).

## Trend 2: Deportation procedures without adequate procedural guarantees

We observe a persistent pattern of insufficient procedural guarantees in proceedings that may lead to the termination of residence.

The most critical issue in this regard is the procedures of forced returns. Such deportations or ‘removals’ (the term employed by EU legislation)<sup>333</sup> regularly involve coercive measures, including the use of physical force, by Member State officials. They may lead to irreversible harm on the side of the deported person when she or he fears individual persecution or general insecurity in the destination country. Deportations carry an inherent risk of leading to violations of substantive Human Rights. It is, therefore, essential to provide for comprehensive procedural safeguards in EU law as well as their strict implementation by Member States. Neither requirement, however, is currently fully satisfied.

First, the lack of sufficiently clear procedural guarantees concerns EU legislation on return decisions. According to the Return Directive, such return decisions must precede the actual deportation and should also usually provide for a certain period for voluntary departure.<sup>334</sup> The right to be heard before taking a return decision is not explicitly provided in the Return Directive; it was inferred by the CJEU from general principles of EU law.<sup>335</sup> The Commission’s proposal of 2018 for a recast Return Directive still does not contain any such clause.<sup>336</sup> Moreover, the Return Directive currently fails to provide for suspensive effect of appeals against return decisions concerning applicants for international protection.<sup>337</sup>

An even more pressing issue, however, is the actual execution of deportations. Despite being regulated in some detail by the Return Directive, Member States’ actual enforcement of returns frequently leads to violations of procedural standards such as safeguards for sufficient access to legal assistance, or even respect for the suspensive effects of appeals against deportation decisions. For example, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) mentions in a 2019 report that in 2017 and 2018 seven persons were unlawfully deported from Germany while legal proceedings that had suspensive effect were still pending before a court.<sup>338</sup>

Such cases are often not recognized by the public because of a lack of independent observation. Despite the fact that Art. 8(6) of the Return Directive requires Member States to install

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<sup>333</sup> See, e.g., Art. 8 Return Directive.

<sup>334</sup> Art. 6–7 Return Directive.

<sup>335</sup> CJEU, Case C-249/13, *Boudjlida* (EU:C:2014:2431), at para. 28 et seq.

<sup>336</sup> Proposal for a recast Return Directive, COM(2018) 634 final, 12 September 2018, at 79; European Parliament Research Service, *The proposed Return Directive (recast): Substitute Impact Assessment* (2019), at 79, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS\\_STU\(2019\)631727\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf).

<sup>337</sup> Leading to possible violations of Art. 18, 19, 47 EU-CFR, see CJEU, Case C-181/16, *Gnandi* (EU:C:2018:465), at para. 54.

<sup>338</sup> See for example: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the German Government on the visit to Germany*, 9 May 2019, at 8–9, available at <https://rm.coe.int/1680945a2d>.

an ‘effective forced-return monitoring system’, an FRA report revealed that in 2018 four Member States did not sufficiently do so, providing either no monitoring at all (Cyprus), a monitoring system belonging to the branch of government responsible for return (Slovakia and Sweden), or a system that only covers parts of the country (Germany).<sup>339</sup>

### **Trend 3: Blurring accountability by agencification of EU migration policy**

An increasing cause of concern is the lack of accountability of EU agencies involved in mixed proceedings implementing EU migration law.

With more than 40 agencies at present, the increasing involvement of EU agencies in European executive governance – its ‘agencification’ – has become a general trend of EU policy since the 1990s. The term describes a structural process of functional decentralization within the EU executive, shifting executive powers away from the EU Commission and usually implying a higher degree of Member States’ control via the agency’s governing bodies. This goes hand-in-hand with a process of federal centralization – increasing involvement of EU bodies in composite administrative procedures involving both Member State and EU authorities. EU agencies have their own legal personality and enjoy a certain degree of administrative and financial autonomy. Agencies assist in the implementation of EU law and policy, collect information, provide scientific advice, and help with the coordination of Member State authorities. In some instances, agencies can adopt legally binding acts if the founding legislative act so provides.

EU agencies are a well-known feature of EU composite administration, first developed in the field of governing the internal market. In migration policy, the involvement of agencies in ‘mixed’ or ‘hybrid’ procedures of decision-making is a more recent phenomenon. Since the establishment of Frontex in 2004 (renamed ‘European Border and Coast Guard Agency’ in 2016)<sup>340</sup>, EASO in 2010<sup>341</sup> and eu-LISA (EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice) in 2012,<sup>342</sup> agencies have played an increasing role in the implementation of EU migration policy.

Due to the nature and structural features of EU agencies, this development poses a number of obstacles to the full respect for procedural safeguards, particularly concerning access to justice. Legal and political accountability for the decision taken is notoriously blurred, most notably by the structural entanglement of different actors.

The main task of Frontex is to support EU Member States in controlling the external borders of the Union and the Schengen area (see also Chapter 1). It does so by the deployment of European Border Guard Teams and the coordination of maritime operations or operations at

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<sup>339</sup> FRA, Forced return monitoring systems: 2019 update (2019), available at <https://fra.europa.eu/en/publication/2019/forced-return-monitoring-systems-2019-update>.

<sup>340</sup> See Regulation 2019/1896 on the European Border and Coast Guard (Frontex Regulation).

<sup>341</sup> See Regulation 39/2010 establishing a European Asylum Support Office (EASO Regulation).

<sup>342</sup> See Regulation 1726/2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA).

external land borders. In ‘joint operations’ it coordinates the deployment of staff and equipment from one Member State in another EU Member State, or even in third countries. In such instances of operational cooperation between the agency and Member States, responsibility is often diffused – despite a moderately increased level of scrutiny since the 2018 renewal of Frontex’s founding Regulation.<sup>343</sup>

EASO was originally more focused on gathering and sharing information among EU Member States – for example, on ‘best practices in asylum matters’ or on countries of origin of persons applying for international protection.<sup>344</sup> In recent years, it has considerably expanded its operational powers.<sup>345</sup> It has become more operationally involved in the asylum procedure (for which Member States remain primarily competent), as in the case of interviews conducted by deployed experts. This has nourished uncertainty as to the procedural rights available to migrants in such cases.<sup>346</sup>

In the case of eu-LISA, the agency allows for data exchange among EU Member States by providing the IT systems Eurodac (European Dactyloscopy – a fingerprint database for the identification of asylum seekers), SIS (Schengen Information System, containing certain information and alerts on persons, such as when a person’s entry is to be refused) and VIS (Visa Information System, including information on applicants for visas to enter the Schengen area). Eu-LISA is also scheduled to set up a new large-scale IT system in 2022 for the automatic monitoring of the border crossing of third-country nationals, the Entry/Exit System (EES).<sup>347</sup> A variety of questions regarding such interoperable system remain unanswered – for example, how to effectively ensure the right to access one’s own data and have incorrect data rectified.<sup>348</sup>

Overall, the structure of such ‘mixed administration’ between agencies and Member State administrations, the entanglement of multiple actors in general, and the complex legal structure of the agencies lead to a lack of transparency and of information, making it difficult to determine who is actually responsible for potential rights violations.

To make matters worse, the conditions of admissibility for actions brought before the CJEU by

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<sup>343</sup> M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms* (2018), at 1, available at <https://space.sas.ac.uk/9187/>.

<sup>344</sup> See., e.g., Art. 3 and 4 EASO Regulation.

<sup>345</sup> On EASO, see Nicolosi and Fernandez-Rojo, ‘Out of Control? The Case of the European Asylum Support Office’, in M. Scholten and A. Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order* (2020) 177.

<sup>346</sup> Tsourdi, ‘Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office’, *European Papers* (2016) 997, at 1024, available at <http://www.europeanpapers.eu/en/e-journal/bottom-up-salvation-from-practical-cooperation-towards-joint-implementation>.

<sup>347</sup> Based on Regulation 2017/2226 establishing an Entry/Exit System (EES).

<sup>348</sup> FRA, *Fundamental Rights and the Interoperability of EU Information Systems: Borders and Security* (2017), at 33 et seq., available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-interoperability-eu-information-systems\\_en-1.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-interoperability-eu-information-systems_en-1.pdf); R. Bossong, *Intelligente Grenzen und interoperable Datenbanken für die innere Sicherheit der EU: Umsetzungsrisiken und rechtsstaatliche Anforderungen* (2018), at 28 et seq., available at [https://www.swp-berlin.org/fileadmin/contents/products/studien/2018S04\\_bsg.pdf](https://www.swp-berlin.org/fileadmin/contents/products/studien/2018S04_bsg.pdf).



individuals against measures taken by agencies are very restrictive (see Art. 263(4) TFEU). This is particularly true of the criteria for determining a reviewable act, the criteria for determining direct and individual concern caused by such acts, and the short time limit of two months for filing an action.<sup>349</sup>

## 3.2 Legal evaluation

### 3.2.1 General framework

In universal Human Rights law, procedural guarantees tend to be rather general and/or fragmentary compared to substantive rights. Procedural guarantees under customary international law form only a thin layer of International Migration Law. This relates to the prohibition of arbitrary detention, certain due process guarantees concerning the removal of migrants, and respect for human dignity in the enforcement of immigration control.<sup>350</sup> However, a growing awareness of the international community is reflected in the Global Compacts. The Global Compact for Migration restates that ‘respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance’ (GCM, para. 15) and establishes the non-binding objective to strengthen certainty and predictability in migration procedures (GCM, para. 28). In the Global Compact on Refugees, States have acknowledged the importance of the rule of law in general (GCR, para. 9) as well as of procedural safeguards for identifying international protection grounds, particularly for those with specific needs (GCR, para. 59–61).

In universal Human Rights treaties, the ICCPR contains a general right to recognition as a person before the law (Art. 16 ICCPR) as well as a right to a fair trial and certain rights of the accused in criminal procedures (Art. 14 and 15 ICCPR). Stand-alone guarantees regarding administrative proceedings are not explicitly mentioned. In respect of migrants, the ICCPR stipulates a prohibition of arbitrary expulsions, but only of foreigners who are ‘lawfully in the territory’ of the State (Art. 13 ICCPR). In a similar vein, the 1951 Refugee Convention contains procedural safeguards against expulsions for refugees ‘lawfully’ in the territory of a Contracting State (Art. 32 Refugee Convention). A rare exception is the UN Convention on the Rights of the Child, which requires States to provide children with a comprehensive right to be heard in all judicial and administrative proceedings (Art. 12 CRC).

The ECHR contains a number of important provisions entailing procedural rights. However, most of them correlate with limitations *ratione materiae* or *ratione personae*. The right to a fair trial (Art. 6(1) ECHR), pursuant to its wording, only applies to ‘civil rights and obligations’ and to ‘criminal charges’, and thus not to immigration court proceedings per se. Art. 13 ECHR

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<sup>349</sup> M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms* (2018), at 10 et seq., available at <https://sas-space.sas.ac.uk/9187/https://sas-space.sas.ac.uk/9187/>.

<sup>350</sup> V. Chetail, *International Migration Law* (2019), at 132 et seq.

provides for the right to an effective remedy against any violation of Convention rights. Yet, because it is not an autonomous right but an auxiliary one, it can only be claimed in connection with a substantive right derived from the Convention. In addition, implied procedural guarantees that exceed the standard of Art. 13 ECHR can be derived from the prohibition of non-refoulement laid down in Art. 3 ECHR (see Chapter 1).

European Human Rights law provides for certain procedural guarantees that are applicable to migrants regardless of whether they are seeking international protection. Procedural safeguards relating to expulsion of aliens are provided by the 1984 Protocol No. 7 to the ECHR, ratified by all EU Member States except for Germany and the Netherlands. According to Art. 1(1) Protocol No. 7 ECHR, any ‘alien lawfully resident’ in a Convention State may only be expelled when such a decision was reached ‘in accordance with law’ and on the condition that she or he was allowed to submit reasons against the expulsion, have the case reviewed, and to be represented for these purposes.<sup>351</sup>

In light of the increasing importance of ensuring actual access to procedures with respect to the territorial admission in Europe, a procedural safeguard that has been under the spotlight in the past years is the 1963 Protocol No. 4 to the ECHR, ratified by all EU Member States except for Greece. Art. 4 of Protocol No. 4 ECHR simply states: ‘Collective expulsion of aliens is prohibited.’ As this provision outlaws any form of collective expulsion without the qualification of lawful residency, it applies to all persons irrespective of their immigration status. While the corresponding guarantee in unwritten universal Human Rights law is mostly regarded as a substantive right accorded to a group of persons, the case-law of the ECtHR has developed implied procedural guarantees protecting individual migrants. Following the jurisprudence of the ECtHR, the provision requires a ‘reasonable and objective examination of the particular cases of each individual alien’.<sup>352</sup> Such a sufficiently individualized examination requires that each person ‘has a genuine and effective possibility of submitting arguments against his or her expulsion’ as well as an appropriate examination of those arguments by the state authorities involved.<sup>353</sup>

It is noteworthy that the ECtHR interprets the concept of expulsion not in a narrow but in a wider sense, encompassing different forms of removal, among other things in extraterritorial situations.<sup>354</sup> In its 2020 Grand Chamber judgment in the case *N.D. and N.T. v. Spain*, the ECtHR confirmed the view that the term ‘expulsion’ also covers non-admission of aliens at state borders,<sup>355</sup> notwithstanding its ultimate rejection of the application in the instant case on the

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<sup>351</sup> Exceptions are possible according to Art. 1(2) for reasons of public order or national security.

<sup>352</sup> See e.g. ECtHR, *Čonka v. Belgium*, Appl. no. 51564/99, Judgment of 5 February 2002, at para. 59.

<sup>353</sup> ECtHR, *Khlaifia and others v. Italy*, Appl. no. 16483/12, Judgment of 1 September 2015, at para. 238 and 248.

<sup>354</sup> ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012 ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020, at para. 166 et seq.

<sup>355</sup> ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020, at para. 173.

basis of the applicants' individual conduct and conditional upon a supposedly present 'genuine and effective access to means of legal entry'.<sup>356</sup>

It follows that, according to the ECHR – and, hence, in European migration policy at large – any decision by public officials on the territorial admission of migrants must be sufficiently individualized in order to comply with the prohibition of collective expulsion. In this sense, Art. 4 Protocol No. 4 ECHR constitutes a general due process clause in European migration law and, thus, an equivalent of the right to juridical personality in immigration proceedings.<sup>357</sup> The rights enumerated in Art. 1 Protocol No. 7 ECHR can serve as a point of reference for the determining this minimum standard. It encompasses the rights to submit reasons against a decision adversely affecting the migrant, to have one's case reviewed, and to be represented for these purposes. Save for the carve-out in *N.D. and N.T. v. Spain*, the precise scope of which is still subject to debate, the requirement of lawful residence stipulated in Art. 1(1) Protocol No. 7 ECHR has become immaterial in order to avoid collective expulsions. In effect, the standards laid down in Protocol No. 7 constitute the procedural yardstick for all decisions granting or refusing lawful immigration status.<sup>358</sup>

The EU should not have any difficulties in meeting the minimum procedural guarantees derived from international Human Rights law. The relevant provisions are mirrored, specified, and, in many respects, extended by the fundamental rights laid down in the EU-CFR.

Most notably, Art. 41 EU-CFR sets a high standard by providing for a right to good administration,<sup>359</sup> comprising, among other things, the right to be heard and the obligation of the administration to give reasons for its decisions. Technically, Art. 41 EU-CFR is merely directed at EU institutions and bodies.<sup>360</sup> However, the CJEU has acknowledged that the right to good administration constitutes a general principle of EU law,<sup>361</sup> hence it applies also to Member State authorities when acting within the scope of EU law. This is particularly true for the right to be heard as part of the so-called 'rights of defence', which have been developed in the CJEU's

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<sup>356</sup> *Ibid.*, at para. 201.

<sup>357</sup> For a comparison with the American Convention on Human Rights, see Campbell-Durufilé, 'The Right to Juridical Personality of Arbitrarily Detained and Unidentified Migrants After the Case of the Guyaubin Massacre', *Revue Québécoise de droit international* (2013) 429, at 439.

<sup>358</sup> Note that the ECHR also applies to visa procedures, following the case-law of the former European Commission of Human Rights which ruled that a State may be held responsible under the ECHR for acts of visa officials in its embassy: EComHR, *X v. Germany*, Appl. no. 1611/62, Decision of 25 September 1965, Yearbook 8 (1965) 158, at 163.

<sup>359</sup> It is not clear whether or not this right can also be considered as being part of the corpus of customary international law and/or a general principles of law within the meaning of Art. 38(1) of the ICJ Statute; see B. Fassbender, *Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure That Fair and Clear Procedures are Made Available to Individuals and Entities Targeted With Sanctions Under Chapter VII of the UN Charter*, available at [https://www.un.org/law/counsel/Fassbender\\_study.pdf](https://www.un.org/law/counsel/Fassbender_study.pdf). However, as far as the EU is concerned the relevance of deciding this controversy is diminished by the applicability of Art. 41 EU-CFR.

<sup>360</sup> CJEU, Joined Cases C-141/12 and C-372/12, *YS and others* (EU:C:2014:2081), at para. 67.

<sup>361</sup> CJEU, Case C-604/12, *H. N. v. Ireland* (EU:C:2014:302), at para. 49.

case-law as cornerstones of any administrative proceedings governed by EU law.<sup>362</sup> While these rights have originally been recognized in proceedings that may lead to an administrative sanction, they have since been extended also to adverse decisions taken upon the initiative of the potential beneficiaries.<sup>363</sup>

As far as the right to an effective remedy is concerned, Art. 47 EU-CFR provides for a comprehensive guarantee that exceeds the standard established by Art. 13 ECHR in various respects. In particular, the effective remedy must be ‘before a tribunal’ (as compared to remedy ‘before a national authority’, which may be a quasi-judicial body), and any rights granted by EU law entail this protection (rather than the enumerated Convention rights, as provided by Art. 13 ECHR).<sup>364</sup>

Given that EU constitutional law generally provides for a higher level of protection in terms of procedural rights, both at the administrative and the judicial stages of immigration proceedings, one may even argue that there is no point in identifying the extent to which respect for these rights is required by Human Rights law. However, as our analysis of current trends and persistent patterns demonstrates, the EU and its Member States are not immune to the legacy of ‘immigration exceptionalism’. Recalling that a basic layer of procedural guarantees owed to migrants is part of Human Rights law may be instrumental in overcoming this legacy, even in a polity that proudly claims to be ‘a Union based in the rule of law’.

### 3.2.2 Specific issue: Application of procedural standards on visa decisions

On the basis of our construction of Art. 4 Protocol No. 4 ECHR as a general due process clause, it follows that all decisions of state officials on the territorial admission of non-resident foreigners, irrespective of their status or the nature of their claim, must be adequately individualized and thus respect certain procedural safeguards (see above, 3.2.1). The prohibition of collective expulsion would thus in general also provide for procedural rights regarding visa decisions.

This conclusion may be challenged based on the ECtHR judgment in the *M.N. and others v. Belgium* case. According to the ECtHR, the Convention does not apply to visa applications at embassies and consulates abroad. This follows from Art. 1 ECHR, which limits the applicability of the Convention to persons within the ‘jurisdiction’ of a Contracting Party. The Court holds that such jurisdiction, understood as territorial or extraterritorial effective authority or control, is not exercised by Convention States vis-à-vis foreign nationals who apply for a visa at one of

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<sup>362</sup> CJEU, Case C-166/13, *Mukarubega* (EU:C:2014:2336), at para. 45.

<sup>363</sup> CJEU, Case C-277/11, *M.M.* (EU:C:2012:744), at para. 87.

<sup>364</sup> For recent case-law on the scope of Art. 47 EU-CFR, see CJEU, Case C-556/17, *Alekszj Torubarov v. Bevándorlási és Menekültügyi Hivatal* (EU:C:2019:626); Joined Cases C-133/19, C-136/19 and C-137/19, *B. M. M. and others* (EU:C:2020:577).

their diplomatic and consular missions.<sup>365</sup> While in the instant case the Court ruled out a potential violation of Art. 3 ECHR, the same rationale arguably applies to Art. 4 Protocol No. 4 ECHR.

However, we counter this argument by making two legal observations. First, the ECtHR's finding regarding the lack of jurisdiction in the *M.N.* case determines whether a Convention State (in this case, Belgium) has violated its treaty obligations under public international law. Given that the EU is not a party to this Convention anyway, this sheds no light on the issue as to whether the EU, and the EU Member States when implementing EU law, meet the relevant obligation *in terms of substance*. We would like to recall here the argument developed in the introductory chapter that a strong assumption of homogeneity between the substance of Human Rights and the legal obligations under EU law applies, regardless of any international obligation on the part of the EU.

Second, the criteria for establishing the scope of application of EU fundamental rights and the jurisdiction under the ECHR are not identical. Accordingly, the ECtHR rationale regarding the construction of Art. 1 ECHR does not necessarily apply to the EU Charter of Fundamental Rights.<sup>366</sup> According to Art. 51(1) EU-CFR, Charter provisions are addressed to the EU and its Member States 'when they are implementing Union law'. According to our knowledge, neither territorial nor other forms of effective control play a role in the relevant case-law of the CJEU. Rather, the jurisprudence of the CJEU is guided by the assumption that the scope of EU law (and hence, of the Charter) is determined by the scope of EU powers to the extent that the EU has actually exercised them. In other words, it is unthinkable that the EU has enacted any legislation the implementation of which is not limited by EU fundamental rights.

Accordingly, to the extent that the issuance or refusal of visas is covered by the EU Visa Regulation or any other piece of EU legislation, such action constitutes implementation of EU law in the sense of Art. 51(1) EU-CFR, irrespective of where the acting authority sits.<sup>367</sup> In the case of such visa applications, the safeguards of Art. 4 Protocol No. 4 and Art. 1(1) Protocol No. 7 ECHR are thus not only mirrored but also extended and rendered applicable by the EU-CFR, most notably the right to good administration (Art. 41 EU-CFR), comprising especially the right to be heard and the obligation of the administration to give reasons for its decisions. Only in those instances where EU law, as it stands, does not provide for relevant legislation, such as the issuance of 'humanitarian visa' pursuant to a contested ruling of the CJEU (see Chapter 1), does the rationale not apply.

For national visas (long-term visas) this means that decisions by Member States' consular or

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<sup>365</sup> ECtHR, *M.N. and others v. Belgium*, Appl. no. 3599/18, Grand Chamber Decision of 5 May 2020, at para. 112 et seq.

<sup>366</sup> V. Moreno-Lax, *Accessing Asylum in Europe* (2017), at 292–294, with reference to pertinent CJEU case-law.

<sup>367</sup> Moreno-Lax, 'Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part II)', *EU Migration Law Blog* (2017), available at <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/>.

diplomatic missions constitute implementation of EU law if they are the pre-entry stage of a decision on granting a residence right defined by an EU instrument, such as decisions on a long-term visa for family reunification or a Blue Card. Consequently, in such cases the procedural guarantees following from the right to good administration must be respected. In some instances, certain aspect of this right are already specified in the relevant legal acts, such as Art. 5(4) Family Reunification Directive.<sup>368</sup> National provisions limiting procedural rights in application procedures for long-term visas (such as Sec. 77(2) German Residence Act, mentioned above) are contrary to EU law and, hence, inapplicable whenever the matter falls within the substantive scope of EU law.<sup>369</sup>

Short-term (Schengen) visas are comprehensively determined by EU law. In this regard, it is questionable whether the duty to give reasons is sufficiently reflected in Art. 32(2) Visa Code. This provision merely requires Member State officials to tick boxes on a list in a standard form. The same provision also renders it difficult to legally challenge refusals of Schengen visa without having a substantiated explanation for the refusal at hand. This puts into question the *effect utile* of the right to an effective remedy (Art. 47 EU-CFR). While this specific issue is not yet decided by the CJEU, there is ample case-law stressing the functional link between the duty to give reasons and the right to an effective remedy.<sup>370</sup> The CJEU already ruled that – contrary to the practice of some Member States – Art. 32(3) of the Visa Code, read in the light of Art. 47 EU-CFR, requires Member States to provide for an appeal procedure against decisions refusing visas, including a right to judicial review.<sup>371</sup>

### 3.2.3 Specific issue: Decisions on territorial admission at land and sea borders

As far as push-back operations are concerned, these do directly and clearly violate the prohibition of collective expulsion (Art. 4 Protocol No. 4 ECHR, mirrored by Art. 19(1) EU-CFR), as entire groups of people are returned without adequate verification of the individual identities and circumstances of the group members. This follows from established case-law of the ECtHR on push-back operations on the high seas<sup>372</sup> and even inside the EU.<sup>373</sup> Push-backs often also constitute a breach of procedural guarantees implied in the principle of non-refoulement (Art. 3 ECHR, mirrored in this respect by Art. 19(2) EU-CFR) – as no individual assessment of

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<sup>368</sup> R. Hofmann (ed.), *Ausländerrecht* (2<sup>nd</sup> ed. 2016), commentary on Sec. 77 AufenthG, at para. 3.

<sup>369</sup> As to Sec. 77(2) German Residence Act (*Aufenthaltsgesetz*), an administrative circular acknowledges certain procedural rights in cases of family reunification (see Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz vom 26. Oktober 2009, Sec. 77(2), available at [http://www.verwaltungsvorschriften-internet.de/bsvwwvbund\\_26102009\\_MI31284060.htm](http://www.verwaltungsvorschriften-internet.de/bsvwwvbund_26102009_MI31284060.htm)). However, this administrative circular has limited legal effect and refers only to German constitutional law (Art. 6 German Basic Law), not to EU law.

<sup>370</sup> See, most notably, CJEU, Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, at para. 71–333; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, at para. 97–137.

<sup>371</sup> CJEU, Case C-403/16, *Soufiane El-Hassani* (EU:C:2017:960), at para. 42. Yet, many problems remain regarding the effectiveness of remedies against the refusal of Schengen visa, e.g. in cases of visa representation by another (Member) State, see CJEU, Case C-680/17, *Sumanan Vethanayagam, Sobitha Sumanan, Kamalaranee Vethanayagam* (EU:C:2019:627).

<sup>372</sup> ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012

<sup>373</sup> ECtHR, *Sharifi and others v. Italy and Greece*, Appl. no. 16643/09, Judgment of 21 October 2014.

the migrant's situation takes place regarding potential grounds for granting international protection – as well as Art. 13 ECHR (right to an effective remedy, mirrored by Art. 47 EU-CFR).<sup>374</sup>

As to the Spanish practices of 'hot returns' of migrants who crossed the fences separating the Spanish exclave of Melilla from Morocco, the ECtHR's Grand Chamber in 2020 revoked its 2017 Chamber decision in *N.D. and N.T. v. Spain*, finding no breach of the Convention in the particular cases.<sup>375</sup> The reasoning of the judgment is highly contextual, however, referring to the specific conduct of the applicants (climbing a fence together with a larger group of people) as well as supposedly available alternatives to access Spanish territory using legal pathways. It thus remains open to discussion whether these conditions will be met in similar cases with different personal conduct (e.g., clandestine border crossing) or at different border crossings (without effective legal alternatives at hand).

In any event, the aforementioned carve-out may only be considered regarding the application of Art. 4 Protocol No. 4 ECHR and not of Art. 3 ECHR. Whenever there is a risk of refoulement (e.g., when migrants are returned to Libya; see Chapter 1), the procedural dimension of Art. 3 ECHR always requires a thorough assessment of the individual circumstances, which follows from the absolute nature of the prohibition of torture and inhuman or degrading treatment enshrined in Art. 3 ECHR.

However, it is not only the operational practice of push-backs that seems problematic; so too do the legal provisions in EU legislation regarding the treatment of migrants at the border requesting access to the territory. Most notably, Art. 14(3) of the Schengen Borders Code, while specifying that complaints against entry decisions shall *not* have a suspensive effect, does not set precise conditions for satisfying the guarantee of effective remedy. In particular, Art. 14(3) of the Schengen Borders Code does not specify that the possibility for remedies to not have suspensive effect only applies once it has been established that none of the grounds for international protection apply and the refusal does not violate relevant international law such as the Geneva Convention or the Convention on the Rights of the Child<sup>376</sup> (cf. Art. 4 Schengen Borders Code). At the same time, the right to an effective remedy as laid down in Art. 47 EU-CFR requires in such cases the possibility of obtaining a judicial order establishing suspensive effect of a remedy in an interim injunction before a court.

### 3.2.4 Specific issue: Scope of procedural safeguards in Return Directive

The Return Directive provides for certain procedural safeguards that may be invoked in proceedings before national courts by those affected by return decisions (Art. 12–14 Return Directive). Among other things, a certain form is prescribed for such decisions; they must be

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<sup>374</sup> ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012.

<sup>375</sup> ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020.

<sup>376</sup> Committee on the Rights of the Child, *D.D. v. Spain*, CRC/C/80/D/4/2016, Decision of 1 February 2019.

issued in writing, give reasons, and provide information about legal remedies (Art. 12(1) Return Directive). However, the Return Directive does not contain an explicit right to be heard before any return decision is taken. Instead, the CJEU had to confirm that such a right to be heard 'is required even where the applicable legislation does not expressly provide for such a procedural requirement.'<sup>377</sup> This follows from the rights of the defence as a general principle of EU law.<sup>378</sup> The CJEU also made it clear that the right to be heard serves to enable the persons concerned to express their point of view on the legality of their stay and to provide information that might justify a return decision not being issued, most notably where such a decision may pose a threat to the rights of the person concerned enshrined in Art. 5 of the Return Directive (non-refoulement, best interests of the child, family life, and state of health).<sup>379</sup>

The current proposal for a recast Return Directive still does not contain any such (horizontal) provision on the right to be heard.<sup>380</sup> Although in the light of the CJEU case-law cited above the right to be heard must be respected under any circumstances, an explicit provision in the new Return Directive would significantly enhance legal clarity and access to legal safeguards.<sup>381</sup>

Instead, the Commission proposal for a recast Return Directive contains a considerable tightening of the provision on voluntary departure. The new Art. 9(4) would oblige Member States to automatically refrain from granting a voluntary period of departure, among other things, where there is a risk of absconding or a risk to public policy. This is contrary to the CJEU jurisprudence on the matter, which states that 'the right to be heard before the adoption of a return decision implies that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced.'<sup>382</sup> Art. 9(4) of the proposed new Return Directive is, therefore, in breach of the right to be heard as interpreted by the CJEU.<sup>383</sup>

Another procedural safeguard that plays a crucial role in the context of returns is the right to an effective remedy (Art. 13 ECHR, Art. 47 EU-CFR). Art. 13(1) of the Return Directive repeats this right 'to appeal against or seek review of decisions related to return ... before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.' What seems to be problematic about

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<sup>377</sup> CJEU, Case C-166/13, *Mukarubega* (EU:C:2014:2336), at para. 49.

<sup>378</sup> *Ibid.*, at para. 45.

<sup>379</sup> CJEU, Case C-249/13, *Boudjlida* (EU:C:2014:2431), at para. 47–51.

<sup>380</sup> European Commission, Proposal for a recast Return Directive, COM(2018) 634 final, 12 September 2018.

<sup>381</sup> European Parliament Research Service, The proposed Return Directive (recast): Substitute Impact Assessment (2019), at 79 et seq., available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS\\_STU\(2019\)631727\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf).

<sup>382</sup> CJEU, Case C-249/13, *Boudjlida* (EU:C:2014:2431), at para. 51.

<sup>383</sup> European Parliament Research Service, The proposed Return Directive (recast): Substitute Impact Assessment (2019), at 80, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS\\_STU\(2019\)631727\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf).



Art. 13 of the Return Directive, as it stands, is not only that it does not require judicial review (contrary to Art. 47 EU-CFR) but that it also lacks a provision guaranteeing automatic suspensive effect in the case of a potential violation of the principle of non-refoulement.

According to the case-law of the ECtHR on Art. 13 ECHR, effectiveness of the remedy requires that the person concerned should have access to a remedy with automatic suspensive effect when there are substantial grounds for fearing a real risk of treatment contrary to the right of life (Art. 2 ECHR) or the prohibition of torture (Art. 3 ECHR) in the case of a return.<sup>384</sup> In a similar vein, the CJEU decided that, despite the lack of an explicit provision in the Return Directive, the applicant for international protection must be guaranteed a remedy enabling automatic suspensory effect, based on the right to asylum (Art. 18 EU-CFR), the principle of non-refoulement (Art. 19(2) EU-CFR), and the right to an effective remedy (Art. 47 EU-CFR).<sup>385</sup>

The Commission's proposal for a new Return Directive clarifies in its Art. 16(1) that there is a right to 'judicial review' (as compared to administrative or other) to appeal return decisions. In Art. 16(3) and Art. 22(6), it would provide for an automatic suspensory effect of appeals in cases where there is a risk of breach of the principle of non-refoulement by the enforcement of return decisions. However, this shall not apply where 'no relevant new elements or findings have arisen or have been presented', as compared to the asylum procedure (Art. 16(3)(3) and Art. 22(6)(1) Proposal for a recast Return Directive). Depending on the interpretation in the Member States, this may lead to exclusion of the automatic suspension in cases where, for example, a serious health condition and absence of treatment in the country of origin was raised in the asylum procedure but was not sufficient to grant subsidiary protection.<sup>386</sup>

### 3.2.5 Specific issue: Monitoring of deportations by EU Member States

As to the execution of return decisions by actual deportations, Art. 8(4) of the Return Directive acknowledges that Member States may – as a last resort – use coercive measures to carry out the removal of a third-country national. However, such measures must be proportionate and shall be implemented in accordance with the fundamental rights of the person concerned.

At the same time, Art. 8(6) Return Directive states only that 'Member States shall provide for an effective forced-return monitoring system'. It does not prescribe in any detail what such a system should look like. It thus grants wide discretion to Member States.<sup>387</sup> However, the FRA

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<sup>384</sup> ECtHR, *De Souza Ribeiro v. France*, Appl. no. 22689/07, Judgment of 13 December 2012, at para. 82.

<sup>385</sup> CJEU, Case C-181/16, *Gnandi* (EU:C:2018:465), at para. 52–56.

<sup>386</sup> European Parliament Research Service, *The proposed Return Directive (recast): Substitute Impact Assessment* (2019), at 85, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS\\_STU\(2019\)631727\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf).

<sup>387</sup> Cf. European Commission, Recommendation 2017/2338 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks, at para. 42.

considers a system ‘effective’ in the sense of Art. 8(6) Return Directive only when the monitoring entity is separate from the authority in charge of returns, which was not the case in all EU Member States in 2018 (see above, Trend 2).<sup>388</sup>

In line with general recommendations of the UN Human Rights Council,<sup>389</sup> all EU Member States should establish independent forced-return monitoring mechanisms with a wide scope of monitoring activities. The EU would have to provide a binding and detailed list of minimum requirements that such institutions must fulfill in order to be ‘effective’.<sup>390</sup> However, the Art. 10(6) of the Commission’s proposal for a recast Return Directive<sup>391</sup> does not suggest any amendment in this respect. Consequently, the determination of the shape and details of the monitoring systems will continue to be left to the discretion of the Member States.

### 3.2.6 Specific issue: Accountability of EU agencies

Procedural safeguards also come into play regarding the scrutiny of actions by EU agencies. Here, international Human Rights are particularly relevant in their iterations as fundamental rights enshrined in the EU-CFR. As bodies of the EU, the provisions of the EU-CFR are directly applicable to all agencies (Art. 51 EU-CFR). Consequently, the right to good administration (Art. 41 EU-CFR) and to an effective remedy (Art. 47 EU-CFR) form the most important yardsticks for the evaluation of procedural guarantees in the context of possible rights violations by EU agencies toward migrants.

The shortcomings in the fulfillment of the requirements set up by Art. 41 and 47 EU-CFR can be illustrated by looking at the legal framework and practice of Frontex. Following amendments in the year 2011, the Frontex Regulation today contains a number of institutional and procedural safeguards for the protection of human and fundamental rights in the context of Frontex activities. A consultative forum on fundamental rights was established, comprising among others representatives of EASO, the FRA, and UNHCR (Art. 108 Frontex Regulation). Furthermore, the position of a fundamental rights officer, appointed by the management board (Art. 109 Frontex Regulation), was created. In 2016, following a 2013 own-initiative report of the European Ombudsman<sup>392</sup> supported by the European Parliament,<sup>393</sup> these instruments were supplemented by a complaints mechanism, providing the ability to file individual

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<sup>388</sup> FRA, Forced return monitoring systems: 2019 update (2019), available at <https://fra.europa.eu/en/publication/2019/forced-return-monitoring-systems-2019-update>.

<sup>389</sup> UN Human Rights Council: Report of the Special Rapporteur on the human rights of migrants, 4 May 2018, at para. 78–79, available at <https://undocs.org/A/HRC/38/41>.

<sup>390</sup> For a non-binding list, see European Commission, Recommendation 2017/2338 establishing a common ‘Return Handbook’ to be used by Member States’ competent authorities when carrying out return related tasks, at para. 42–43.

<sup>391</sup> European Commission, Proposal for a recast Return Directive, COM(2018) 634 final, 12 September 2018.

<sup>392</sup> European Ombudsman, Decision closing own-initiative inquiry OI/5/2012/BEH-MHZ, 12 November 2013, available at <https://www.ombudsman.europa.eu/en/decision/en/52477>.

<sup>393</sup> European Parliament, Resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 2017/C 399/01, available at [https://www.europarl.europa.eu/doceo/document/TA-8-2015-0422\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2015-0422_EN.html).

complaints against Frontex actions to the Frontex fundamental rights officer (Art. 111 Frontex Regulation).

Another possibility for addressing fundamental rights issues is to file a complaint to the European Ombudsman. The European Ombudsman examines complaints about maladministration by EU institutions and bodies and can also conduct inquiries on her/his own initiative (Art. 228 TFEU, Art. 43 EU-CFR). The European Code of Good Administration,<sup>394</sup> drafted by the European Ombudsman and adopted in 2001 as a resolution by the European Parliament, serves as a specification of the right to good administration enshrined in Art. 41 EU-CFR, and thus as a basis for the work of the Ombudsman. However, the European Ombudsman has no binding powers to compel compliance with her/his decisions. The Ombudsman has limited authority, reduced to offering recommendations, warnings, or advice to EU institutions and bodies. Correspondingly, the European Code of Good Administrative Behavior is not a legally binding instrument.<sup>395</sup> Furthermore, complainants must be either EU citizens or residents to have legal standing (Art. 43 EU-CFR). Thus, the administrative procedures installed by the Frontex Regulation and the complaints mechanism with the European Ombudsman can complement, but not replace, the possibility of judicial review as the core of the right to an effective remedy guaranteed by Art. 47 EU-CFR.<sup>396</sup>

The CJEU, according to Art. 263(1) TFEU reviews the legality of acts of bodies or agencies of the EU intended to produce legal effects vis-à-vis third parties. This review can also be initiated by a natural or legal person who is addressed by the act or to whom it is of direct and individual concern (Art. 263(4) TFEU). However, in the case of Frontex these requirements are nearly impossible to meet due to the structural features of Frontex operations. These are notoriously marked by an involvement of a plethora of multi-level authorities, often consisting of (local and deployed) officials from different (host and guest) Member States, Frontex staff, and actors from third countries (such as the Libyan coast guard). Given these complicated structures, it is legally and practically all but impossible for individuals to prove that the ultimate operational control in a particular situation rested with Frontex rather than with officials of third countries or of the host Member State, even though Frontex is widely regarded as playing a predominantly coordinating role. However, its acts are not final and supposedly do not have legal effects vis-à-vis individuals (see Chapter 1).<sup>397</sup>

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<sup>394</sup> European Ombudsman, *The European Code of Good Administrative Behaviour* (2015), available at <https://www.ombudsman.europa.eu/de/publication/en/3510>.

<sup>395</sup> N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (2018), at 33.

<sup>396</sup> J. Rijpma, *The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?* (2016), at 30, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL\\_STU\(2016\)556934\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf).

<sup>397</sup> M. Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law* (2018); M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms* (2018), available at <https://sas-space.sas.ac.uk/9187/>; M. Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen*,

A lack of information, on the side of the individual affected, about the details of Frontex operations often contributes to the difficulty of substantiating her or his claim. While the principle of transparency and the rights of individuals to access documents of EU bodies (Art. 15 TFEU, Art. 42 EU-CFR), as concretized by secondary EU law,<sup>398</sup> also apply to Frontex (Art. 114(1) Frontex Regulation), and while persons without residence in the EU also have the right to address the agency and receive an answer (Art. 114(4) Frontex Regulation), there is no obligation of result and the content of the answer is left to the discretion of Frontex.<sup>399</sup>

Taken together, these circumstances render the guarantee of Art. 47 EU-CFR in the case of Frontex operations ineffective in practice, and leave individual migrants affected by these operations without proper access to justice, understood as the possibility of obtaining independent and binding judicial review.

These problems could be mitigated by introducing an appeal procedure regarding the decisions of complaints against Frontex actions filed with the Frontex fundamental rights officer (Art. 111 Frontex Regulation). This remedy should provide for full judicial review of such cases by the CJEU. EU primary law already allows for this possibility, as acts setting up agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these agencies intended to produce legal effects in relation to them (Art. 263(5) TFEU). A good example of such a provision is Art. 94 of Regulation 1907/2006 (REACH Regulation),<sup>400</sup> which gives individuals the right to have decisions by the European Chemicals Agency reviewed by the CJEU.<sup>401</sup>

However, access to justice is also rendered difficult by the multiplicity and divergence of existing legal bases for the plethora of EU agencies. This plurality impedes transparency, accessibility, and predictability of procedural guarantees, not to mention requiring consistent interpretation of the relevant norms by the CJEU. However, in this respect the far more numerous decentralized (or ‘regulatory’) agencies (like Frontex, EASO, or eu-LISA) must be distinguished from executive agencies, the latter being created by the European Commission for a fixed period. As to executive agencies, Regulation 58/2003<sup>402</sup> lays down common provisions on liability

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(2014), at 337 et seq.; R. Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (2016).

<sup>398</sup> Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.

<sup>399</sup> M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms* (2018), at 7, available at <https://sas-space.sas.ac.uk/9187/>. Furthermore, challenging such decisions before a court may come with a high financial risk for persons who claim their fundamental rights, as was shown by a 2019 judgement of the General Court: CJEU, Case T-31/18, *Izuzquiza* (EU:T:2019:815).

<sup>400</sup> Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH Regulation).

<sup>401</sup> M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms* (2018), at 5–6, available at <https://sas-space.sas.ac.uk/9187/>.

<sup>402</sup> Regulation 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.

(Art. 21 Regulation 58/2003), the legality of acts (Art. 22 Regulation 58/2003), and access to documents and confidentiality (Art. 23 Regulation 58/2003). A similar horizontal regulation providing for common procedural guarantees for decentralized agencies could significantly increase the ability to hold EU agencies accountable and thus serve the *effet utile* of Art. 41 and 47 EU-CFR.

### 3.3 Recommendations

#### **Recommendation 1: Provide comprehensive procedural safeguards for visa applications**

Courts at all levels of European migration governance are called upon to safeguard the procedural rights of migrants in all immigration and asylum proceedings. Art. 41 EU-CFR sets high standards for safeguarding due process in EU migration law, which reflects and expands the Human Rights protected by Art. 4 of Protocol No. 4 and Art. 1 of Protocol No. 7 ECHR. According to Art. 41 EU-CFR and the corresponding guarantee recognized as a general principle of EU law, any processing of a visa application that is substantively governed by EU law must respect the right to be heard and the duty to submit reasons for a decision adversely affecting the applicant, and would have to provide for the possibility of review and representation before the competent authority.

As to EU legislation, the already existing sectoral provisions guaranteeing procedural rights in the case of refusal of a long-term visa should be supplemented by a horizontal provision applicable to all applications for granting a right to reside as far as the scope of EU law is affected, including applications for long-term (national) visas.

#### **Recommendation 2: Clarify and strengthen procedural guarantees at the borders**

Art. 14(3) of the Schengen Borders Code lacks legal clarity in respect of the guarantee of effective remedy. This provision should be reformulated accordingly. Due consideration is particularly to be given to the suspensive effect of legal remedies. In order to guarantee the Human Right to an individual assessment of one's case – including possible exceptional circumstances – it must always be possible to obtain a judicial order establishing suspensive effect of a remedy in an urgent preliminary ruling procedure.

#### **Recommendation 3: Guarantee sufficient procedural rights when terminating residence**

The recast Return Directive<sup>403</sup> should contain a clear and explicit reference to the right to be heard, especially as far as the rights enshrined in Art. 5 of the proposed new Directive ('Non-

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<sup>403</sup> European Commission, Proposal for a recast Return Directive, COM(2018) 634 final, 12 September 2018.

refoulement, best interests of the child, family life and state of health') are concerned, preferably in a horizontally applicable provision.<sup>404</sup> In a similar vein, Art. 9(4) of the Proposal should be amended, as a provision obliging Member States to automatically refrain from granting a voluntary period of departure (e.g., when there is a risk of absconding or to public policy) is in breach of the right to be heard according to the interpretation of the CJEU.

The current version of the Return Directive must be amended so as to include ECtHR and CJEU case-law on the automatic suspensive effect of appeals against return decisions posing a real risk of a violation of the non-refoulement-principle. The wording of the proposed amendments (Art. 16(3) and Art. 22(6) of the Commission proposal) may, however, render the changes not fully effective. Most notably, the Commission should ensure that the requirement of 'new elements or findings' as compared to the asylum procedure (cf. Art. 16(3)(3) and Art. 22(6)(1) Proposal for a recast Return Directive) will not lead to a very narrow interpretation of the applicability of automatic suspensive effect by Member States.

Unlike the Return Directive as it stands (Art. 8(6)) or the Commission proposal for a recast Directive on the same matter (Art. 10(6)), the EU should provide a binding and detailed list of minimum requirements for forced-return monitoring mechanisms. In order to render this institution effective, its shape and independence should not be left to the discretion of the Member States.

#### **Recommendation 4: Guarantee a right to an effective remedy against EU agencies**

In face of the trend toward an agencification of EU migration policy, the EU must ensure that the relevant actors in the field remain accountable and their actions are legally reviewable. In order to achieve this aim, the EU should adopt a horizontal regulation for all EU agencies, including a general minimum standard for safeguarding procedural rights.

Such a horizontal provision is important to increase transparency as a precondition to effective and adequate access to justice. Such a horizontal regulation should be reinforced by procedural safeguards for the specific contexts of Frontex, EASO, and eu-LISA.

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<sup>404</sup> European Parliament Research Service, *The proposed Return Directive (recast)* (2019), at 79, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS\\_STU\(2019\)631727\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf).

## Chapter 4 – Preventing Discrimination

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The inclusion of foreigners according to the principle of non-discrimination is a central goal of European integration. Ever since the Treaties of Rome were concluded in the 1950s, the European Communities/Union has called upon the founding States to ensure equal treatment of migrants – be they migrant workers, entrepreneurs, service providers, or consumers. This principle of ‘constitutional tolerance’, as Joseph Weiler famously theorized it,<sup>405</sup> was later elevated to the status of a fundamental right (Art. 21(2) EU-CFR). However, the personal scope of this constitutional guarantee has always been limited to nationals of other Member States, even though this is not evident from the wording of the relevant Treaty provisions (cf. Art. 18 TFEU).<sup>406</sup> Hence, equality of status within the EU is a right of Union citizens, rather than a Human Right.

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<sup>405</sup> Weiler, ‘In defence of the status quo: Europe’s constitutional *Sonderweg*’, in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (2003) 7.

<sup>406</sup> CJEU, Case C-122/96, *Saldanha and MTS* (EU:C:1997:458); Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* (EU:C:2009:344); on the genesis of the ambiguous wording, see S.A.W. Goedings, *Labor Migration in an Integrating Europe* (2005), at 309–343.

Nonetheless, we argue in this chapter that equality of status, both of and among migrants, has a Human Rights dimension that is underexplored and widely underestimated as a source of legal obligations the EU is bound to respect when developing its migration policy.

Equality and non-discrimination of migrants is a complex issue that could be discussed at various levels of inquiry.<sup>407</sup> Everyday experiences of migrants are often characterized by discrimination, both in their interaction with members of the host societies and with public officials. Migrants are frequently labeled and treated as ‘the other’, irrespective of their immigration status or nationality. There are clear indications that we are witnessing a new wave of xenophobia in Europe in the wake of populist movements and governments. More recently, this shared experience of migrants is being voiced more loudly in public debate, triggered by incidents of racist police action against black citizens in the USA.

The claim of migrants not to be subject to racist and xenophobic discrimination has a strong legal basis in Human Rights law. However, the present chapter has a different focus – namely, discrimination based on nationality and immigration status. The EU’s policy regarding discrimination based on racial or ethnic origin is conceptually outside the field of migration law. Art. 19 TFEU and the relevant EU anti-discrimination legislation aim at providing protection that is not specific to migrants, whereas migration law proper is largely exempt from the scope of the EU’s anti-discrimination policy.<sup>408</sup>

The present chapter connects these separate fields and addresses non-equal treatment within the realm of immigration and asylum law. It discusses the issue of whether EU migration law is a cause of inequality in itself and, if so, what the Human Rights standards constraining EU policies are.

## 4.1 Structural challenges and current trends

Questioning inequality in migration law seems almost a contradiction in terms. The difference in treatment of citizens and non-citizens of a State – that is, ‘discrimination’ based on nationality – is at the very heart of migration law.<sup>409</sup> The relevant legal regimes emerged in the nineteenth century in the wake of the modern nation state, both in domestic law<sup>410</sup> and in international law.<sup>411</sup> Non-nationals are the subjects of a special set of rules that excludes them from hard-won citizens’ rights and accords the former an inferior legal position in the host state.

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<sup>407</sup> See, e.g., B. Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (2017); MacCormack-George, ‘Equal Treatment of Third-Country Nationals in the European Union: Why Not?’, 21 *European Journal of Migration and Law (EJML)* (2019) 53.

<sup>408</sup> Cf. Art. 3(2) of the Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>409</sup> Thym, ‘Ungleichheit als Markenzeichen des Migrationsrechts’, 74 *Zeitschrift für öffentliches Recht* (2019) 905.

<sup>410</sup> D. Gosewinkel, *Einbürgern und Ausschließen: Die Nationalisierung der Staatsangehörigkeit vom Deutschen Bund bis zur Bundesrepublik Deutschland* (2001).

<sup>411</sup> R.B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984).



This largely holds true today, irrespective of the fact that the gradual expansion of the rule of law into the field of migration and the emergence of denizenship policies since the 1970s has reduced the degree of legal inequality between citizens and non-citizens.<sup>412</sup> On that basis, a second layer of rules was gradually developed by state legislatures. Modern migration law provides for difference in treatment *among* non-citizens – that is, ‘discrimination’ based on immigration status. Depending on the respective purpose of admission, migration law coins various immigration statuses, with distinctive combinations of residence rights, access to employment, and access to the welfare system.<sup>413</sup> Historically, this new field of ‘immigration law’ (*Aufenthaltsrecht*, in German) emerged in the early twentieth century with the rise of the interventionist welfare state.<sup>414</sup> In essence, immigration law is about defining a plurality of immigration statuses, thus deliberately creating inequality among classes of migrants and causing a stratification of their rights.<sup>415</sup>

When the EU entered the stage in the theater of migration law, it almost naturally followed this line, adopting legislation that defines legal statuses of various classes of third-country nationals. Depending on the regulatory approach, the impact on the existing plurality of immigration statuses at the level of the Member States varies. On the one hand, a certain trend toward horizontal (transnational) convergence of immigration statuses is inherent in the Europeanization of migration policy. The emergence of the EU as a new actor in immigration law heralds a pan-European harmonizing effect. On the other hand, the activity of yet another legislature in the field adds to its complexity when newly created immigration statuses accompany existing ones at the national level, rather than harmonizing or replacing them.<sup>416</sup> In this case, the EU actually contributes to new vertical (multi-level) divergence and, hence, increases inequality among migrants.

Given these structural conditions, the impact of the EU legislature on the equality of migrant status is strongly policy-dependent. In this respect, we observe the following trends, which in sum reveal a growing number of status distinctions created by the EU.

### **Trend 1: Increasing sectoral divergence within the Europeanized fields of legal migration**

There is a trend toward increasing sectoral divergence within the Europeanized fields of legal migration – that is, in immigration policy in the narrow sense as defined in Art. 79 TFEU. This is the result of the approach taken by the EU legislature to defining immigration statuses. The

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<sup>412</sup> Thym, ‘Vom “Fremdenrecht” über die “Denizenship” zur “Bürgerschaft”’, 57 *Der Staat* (2018) 77.

<sup>413</sup> Bast, ‘Zur Territorialität des Migrationsrechts’, in F. von Harbou and J. Markow (eds), *Philosophie des Migrationsrechts* (2020) 17.

<sup>414</sup> Lucassen, ‘The Great War and the Origins of Migration Control in Western Europe and the United States’, in A. Böcker et al. (eds), *Regulation of Migration* (1998) 45.

<sup>415</sup> L. Morris, *Managing Migration: Civic Stratification and Migrants’ Rights* (2002), at 19 et seq. and 103 et seq.

<sup>416</sup> Examples include the denizen status under the Long-Term Residents Directive (Directive 2003/109/EC), which sits next to permanent residence statuses according to national law; subsidiary protection status according to Qualification Directive (Directive 2011/95/EU) sits next to complementary national protection statuses.

EU's approach features a number of aspects, the combined effect of which is the risk of maintaining, or actually creating, distinctions among classes of migrants that lack a reasonable foundation.

First, the EU has enacted incomplete or 'shallow' harmonization by, inter alia, inserting optional clauses, laying down discretionary requirements, or choosing an approach of partial non-regulation. The prime example of this approach is the Family Reunification Directive (Directive 2003/86/EC; see Chapter 5). This legislative approach is often a result of political disagreement within the Council, where Member States have pursued the goal of limiting the impact of particular legislative acts on existing domestic laws. This weakens the horizontal convergence or even contributes to new divergence. This, in turn, involves the risk of maintaining arbitrary distinctions among holders of residence permits whose immigration statuses are partly defined by EU law.

Second, the EU has followed a piecemeal approach to defining new immigration statuses based in EU law. This increases the risk of inconsistent outcomes of legislative processes that are insufficiently coordinated. This trend is even more marked since the Commission adopted a sectoral approach in the field of labor migration, after the political failure to garner sufficient support in the Council for a horizontal approach to European labor migration policy.<sup>417</sup> The EU has failed to develop a meaningful body of law that lays down cross-sectoral standards and procedures applicable to all immigration statuses defined by EU law, or at least to broad classes thereof. The 'general body' (*Allgemeiner Teil*) of EU migration law is rather slim.<sup>418</sup>

Third, the EU's incremental legislative activity lacks a clear *Leitbild* – a model or overall concept – that could serve as a template for defining the immigration statuses of third-country nationals.<sup>419</sup> In the first period of legislation after the entry into force of the Amsterdam Treaty, the Tampere Program adopted by the European Council raised expectations that the status of Union citizens would serve as such a *Leitbild* for the future statuses of third-country nationals. The ensuing negotiations led to the adoption of the Long-Term Residents Directive (Directive 2003/109/EC), which in turn served as a point of reference for other legislation (e.g., the Blue Card Directive 2009/50/EC). However, ten years later the Tampere *Leitbild* of near-equality between Union citizens and third-country nationals had all but disappeared, as many observers critically observed.<sup>420</sup> In the absence of such a model, the EU does not have a yardstick to

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<sup>417</sup> B. Fridriksdottir, *What Happened to Equality?* (2017), chapter 3.

<sup>418</sup> According to H. Tewocht, *Drittstaatsangehörige im europäischen Migrationsrecht* (2017), at 411–412 and 449, it consists of the Family Reunification Directive, the Long-Term Residents Directive, the Return Directive, and the Single Permit Directive. Only the latter provides rights that apply to a range of immigration statuses.

<sup>419</sup> On the function of a *Leitbild* in immigration policy, see Gusy and Müller, 'Leitbilder im Migrationsrecht', *Zeitschrift für Ausländerrecht (ZAR)* (2013) 265.

<sup>420</sup> Halleskov Storgaard, 'The Long-Term Residents Directive: A Fulfilment Of The Tampere Objective Of Near-Equality?', in E. Guild and P. Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (2011) 299; A. Wiesbrock, *Legal Migration to the European Union* (2010).

distinguish unprincipled proliferation of statuses from sectoral differentiation related to the respective purposes of admission.

Because of this unprincipled approach, the EU's legislative activity in defining immigration statuses has maintained or created distinctions that seem to reflect little more than the ad hoc political compromises found in dealing with the latest dossier. This inconsistency causes a major challenge to EU migration policy. While a certain degree of inconsistent outcomes is inherent in any political decision-making that involves various actors and stretches over time, at some point the increasing sectoral divergence within the Europeanized fields of migration law encounters legal limits posed by Human Rights law.

## **Trend 2: Contradictory policy choices in respect of the asylum status in the EU**

We observe a high degree of inconsistency in respect of the asylum status of persons enjoying international protection in the EU – that is, of refugees in the broad sense of the term. On the one hand, this is a particular case in point of the EU's unprincipled approach to defining immigration statuses, since to some extent it results from incomplete, incremental, and unguided decision-making. On the other hand, it is also – and perhaps primarily – a result of contradictory policy choices. This policy inconsistency unfolds on two levels: among the persons enjoying asylum in the EU, and between them and other migrants legally residing in the EU.

First, the EU legislature decided to create a uniform protection status called 'international protection (in the EU)', thereby fusing the protection of refugees as defined in the Geneva Refugee Convention with other Human Rights-based grounds of protection ('subsidiary protection').<sup>421</sup> The status of Convention refugees according to international law served as the template for the immigration status defined by EU law for all grounds of international protection. The choice in favor of equality of status includes the prospect of long-term residence according to the Long-Term Residents Directive. However, in certain instances the EU legislature deviates from that template and assigns an inferior status to people eligible for protection on subsidiary grounds, such as the validity of the (renewable) residence permit and access to social assistance. The distinction between the two subgroups of migrants enjoying international protection is most pronounced in respect of the right to family reunification; persons enjoying subsidiary protection are excluded both from the privileged regime applicable to Convention refugees and from the standard regime applicable to migrants legally residing within the EU. The question thus arises as to whether this inequality of status is justified in light of Human Rights law (see below, section 4.2.4).

Second, the EU legislature has elected to establish a privileged status for persons enjoying international protection in the EU. This is in line with the basic rationale of refugee law, which regards refugees as persons whose decision to migrate (or not to return) is non-voluntary and who thus cannot avail themselves of the citizens' rights in their home country. Accordingly,

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<sup>421</sup> Bast, 'Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff', *Zeitschrift für Ausländerrecht (ZAR)* (2018) 41.

they deserve equal, or at least similar, treatment to the citizens of their host country as long as their need of protection persists. The EU (then still called the European Community) applied this rationale in 1958 when Regulation No. 3 on the coordination of social security systems granted refugees the same rights as nationals of the Member States. However, in certain respects the asylum status defined by EU law is less favorable than the immigration status of other, 'ordinary' migrants residing in the EU. This is particularly true in respect of mobility rights within the Union. Such rights are granted, albeit to a limited degree, to persons who are admitted as researchers, students, or highly-qualified non-EU nationals. In contrast, such rights to relocate voluntarily are notably absent for refugees and other persons enjoying asylum in the EU. Their 'secondary movement' is even seen as a threat to the asylum system and is actively discouraged (on this issue, see also Chapter 6). Here again, at some point the inequality of status created by the EU legislature may constitute a Human Rights violation.

## 4.2 Legal evaluation

### 4.2.1 General framework: Three objectionable grounds of distinction among migrants ('race', nationality, immigration status)

The section will develop the standards of determining which distinctions in immigration and asylum law constitute Human Rights violations. We have identified three grounds of distinction that are particularly relevant in this context: distinctions that constitute direct or indirect discrimination *on racial grounds*, distinctions based on the *nationality* of the migrants concerned, and distinctions that relate to their *immigration status*. In the following, we shall set out the respective sources as well as the elements of the legal test for whether such distinctions constitute a discrimination prohibited by Human Rights law.

(1) First, Human Rights law prohibits any distinctions that amount to racial discrimination, including indirect discrimination on racial grounds. 'Race' – that is, any attribution of presumably unalterable characteristics of human beings such as their skin color or ethnic origin – is a ground of distinction that Human Rights law most strongly condemns.<sup>422</sup> It is an 'objectionable' ground in the sense that such distinctions cannot be justified.<sup>423</sup>

Various sources of universal and regional Human Rights law unequivocally reject 'race' as a legitimate ground of distinctions. In EU law, the prohibition of racial discrimination is mirrored in Art. 21(1) EU-Charter and Art. 19 TFEU. The most general non-discrimination clause is Art. 2 UDHR, stating that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as, inter alia, 'race' or 'colour'. It is reproduced al-

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<sup>422</sup> On the historical context, see Van Boven, 'The Concept of Discrimination in the International Convention on the Elimination of all Forms of Racial Discrimination', in W. Kälin (ed.), *Das Verbot ethnisch-kultureller Diskriminierung: Verfassungs- und menschenrechtliche Aspekte* (1999) 9.

<sup>423</sup> Cf. ECtHR, *Biao v. Denmark*, Appl. no. 38590/10, Grand Chamber Judgment of 25 March 2014, at para. 94.

most verbatim in Art. 2(1) ICCPR and Art. 14 ECHR. Various other Human Rights sources confirm and specify the right to non-discrimination on racial grounds within their respective scope of application (see, e.g., Art. 2(2) ICESCR and Art. 2(1) ICRC). The right to non-discrimination on racial grounds is generally regarded as a norm of customary international law, even one of preemptory character (*ius cogens*).<sup>424</sup> This view is confirmed by numerous soft-law instruments, including the Global Compact for Migration (see, inter alia, Objectives 15 [para. 31] and 16 [para. 32]).

The most comprehensive prohibition of racial discrimination is laid down in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). In this Convention, the term ‘racial discrimination’ means ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms’ in any field of public life (Art. 1(1) ICERD). The Convention lays down various negative and positive obligations of States Parties to eliminate racial discrimination.

However, certain limitations as to the scope of ICERD apply. According to Art. 1(2) and (3) ICERD, this Convention does not apply to distinctions between citizens and non-citizens, and it does not affect provisions concerning nationality, citizenship, or naturalization, provided that such provisions do not discriminate against any particular nationality. It is noteworthy here that ‘immigration law’ is not excluded from the scope of ICERD. Moreover, the Committee on the Elimination of Racial Discrimination (CERD, the treaty body entrusted with the supervision of the Convention) has developed a consistent jurisprudence according to which non-equal treatment based on citizenship or immigration status may constitute hidden or indirect forms of racial discrimination.<sup>425</sup>

We recognize that this ‘intersectional’ approach of the CERD is not free from criticism, as evidenced by several opinions of judges of the International Court of Justice in the pending case *Qatar v. United Arab Emirates*.<sup>426</sup> However, it is generally acknowledged that Art. 1(1) ICERD prohibits not only direct discrimination but also measures that expose persons to indirect discrimination.<sup>427</sup> Developing the relevant legal test is not without its difficulties. The starting

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<sup>424</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion), General List No. 53 [1971], at para. 131; *Case Concerning the Barcelona Traction, Lights and Power Company Ltd. (Belgium v. Spain)* (Judgment), [1970] ICJ Reports 3 [32], at para. 33–34. For references to scholarly opinions, see V. Chetail, *International Migration Law* (2019), at 147, note 378.

<sup>425</sup> CERD, General Recommendation No. 30 on Discrimination Against Non-Citizens, HRI/GEN/1/Rev.7/Add.1 (2002), at para. 4.

<sup>426</sup> ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Provisional measures), Order of 14 June 2019.

<sup>427</sup> See CERD, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, CERD/C/GC/32, at para. 7. In EU law, cf. Art. 2(1) and (2) of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

point of any indirect discrimination is a norm or practice characterized by distinctions based on apparently neutral criteria. The decisive factor is whether a specific group is particularly affected by the relevant measure, irrespective of the intention to expose it to discriminatory treatment.<sup>428</sup> CERD, in particular, is critical of the assumption that, when claiming discriminatory treatment, it is necessary to demonstrate discriminatory intent.<sup>429</sup> The empirical examination of the prejudicial effects of such norms and practices is decisive in order to establish a discriminatory effect.<sup>430</sup> The proof of indirect discrimination can only ever be provided by considering the context and all given circumstances.<sup>431</sup>

Given the postcolonial conditions of global inequality, where ‘race’ and ‘class’ are closely linked, it could be argued that many of the socio-economic selection criteria (such as income or skill requirements) frequently used in current immigration law in the Global North are biased toward ‘race’ because they objectively affect the ethnic composition of the migrant population, to the disadvantage of certain groups defined by their ‘race’. Such a line of reasoning would fundamentally challenge the mode of operation of immigration law, since States (and the EU) would have to demonstrate that their seemingly neutral socio-economic selection criteria do not entail discriminatory effects as defined in ICERD. While this line of reasoning seems perfectly logical according to established jurisprudence, we accept that it would amount to a ‘progressive development’ of the law, for which we do not find sufficient support in existing authorities.

(2) The second ‘objectionable’ ground in distinguishing among migrants relates to nationality. These distinctions are not prohibited per se, unless they constitute a hidden racial discrimination (see above). However, distinctions based on the nationality of a migrant must be justified by ‘very weighty reasons’, according to the case-law of the ECtHR.

‘Nationality’ is a technical term of international law that refers to a legal bond, established by national law, between a natural person and his or her State (or States, in the case of multiple nationalities). Note that none of the non-discrimination clauses referred to above explicitly lists nationality as a prohibited ground. Pursuant to the dominant understanding, the term ‘national origin’ mentioned in Art. 2 UDHR, Art. 2 ICCPR and Art. 2 CESCPR pertains to particular groups within the citizenry of the relevant State, rather than foreign nationals.<sup>432</sup> In any event, nationality constitutes ‘other status’ according to the cited provisions (on this open-ended concept, see below).<sup>433</sup>

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<sup>428</sup> O. de Schutter, *International Human Rights Law* (3<sup>rd</sup> ed. 2019), at 722 et seq.; P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination* (2016), at 114.

<sup>429</sup> CERD, Concluding Observations on the fourth, fifth and sixth periodic reports of the USA, 8 May 2008, CERD/C/USA/CO/6, at para. 35.

<sup>430</sup> O. de Schutter, *International Human Rights Law* (3<sup>rd</sup> ed. 2019), at 723. Cf. ECtHR, *Biao v. Denmark*, Appl. no. 38590/10, Grand Chamber Judgment of 25 March 2014, para. 103.

<sup>431</sup> CERD, *L. R. et al. v. Slovakia*, Communication No. 31/2003, CERD/C/66/D/31/2003, at para. 10.4.

<sup>432</sup> V. Chetail, *International Migration Law* (2019), at 151.

<sup>433</sup> HRC, *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, CCPR/C/35/D/196/1985, at para. 9.4.

Seemingly an outlier in this regard is the EU Charter of Fundamental Rights. According to Art. 21(2) EU-CFR, any discrimination on grounds of nationality shall be prohibited within the scope of application of the EU Treaties. A historically informed construction of this provision (and of Art. 18(1) TFEU, its template) reveals that it merely establishes a prohibition of discrimination of nationals of other EU Member States, and not of third-country nationals. This traditional understanding has more recently been confirmed by the CJEU,<sup>434</sup> rejecting scholarly proposals to expand the meaning of the clause.<sup>435</sup> Distinctions based on the nationality of third-country nationals are therefore measured against the yardstick of Art. 21(1) EU-CFR, rather than Art. 21(2) EU-CFR. The wording of the former provision slightly differs from the cited non-discrimination clauses of Human Rights law, as it does not include a reference to ‘other status’. However, while it lists additional grounds not mentioned in these sources, the omission of the phrase ‘other status’ was not meant to reduce the substantive scope of the guarantees or establish an exhaustive lists of discrimination grounds (see the wording ‘such as’ introducing the listed grounds).<sup>436</sup>

The most developed jurisprudence relating to discrimination based on nationality stems from the ECtHR’s case-law on Art. 14 ECHR, which is also the main source of inspiration for Art. 21(1) EU-CFR. The relevant line of reasoning was founded in 1996 with the judgment *Gaygusuz v. Austria*, where the Court for the first time held that excluding certain classes of migrants from a particular social welfare benefit constitutes discrimination based on nationality and therefore violates Art. 14 ECHR.<sup>437</sup>

The legal test to determine a violation of Art. 14 ECHR consists of five elements.<sup>438</sup> First, the contested measure must affect the enjoyment of a right set forth in the ECHR or in one of its Protocols, and therefore falls within the ambit of the Convention. Second, the measure must be based on a discrimination ground covered by Art. 14 ECHR. Third, to establish prima facie discrimination against the person concerned, a relevant class of persons must be identified who are in analogous positions but not adversely affected by the tested measure (comparability test). Fourth, the standard of review by the Court must be determined – that is, the extent to which States enjoy a margin of appreciation in making distinctions relating to the subject-matter concerned. Fifth, provided that comparable groups are treated differently according to

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<sup>434</sup> CJEU, Case C-291/09, *Francesco Guarnieri & Cie* (EU:C:2011:217); Case C-42/11, *Lopes de Silva* (EU:C:2012:517); Case C-45/12, *Hadj Hamed* (EU:C:2013:390).

<sup>435</sup> See, e.g., Brouwer and De Vries, ‘Third-country nationals and discrimination on the ground of nationality: Article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach’, in M. Van den Brink, S. Burri and J. Goldschmidt (eds), *Equality and human rights: nothing but trouble?* (2015) 123.

<sup>436</sup> Opinion of AG Cruz Villalón, Joined Cases C-443/14 and 444/14, *Alo and Osso* (EU:C:2015:665), at para. 98.

<sup>437</sup> ECtHR, *Gaygusuz v. Austria*, Appl. no. 17371/90, Judgment of 16 September 1996.

<sup>438</sup> See Arnardóttir, ‘The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention of Human Rights’, 14 *Human Rights Law Review* (2014) 647; Gerards, ‘The Discrimination Grounds of Article 14 of the European Convention on Human Rights’, 13 *Human Rights Law Review* (2013) 99.

the first three elements, the defending State must provide an objective and reasonable justification supporting the difference in treatment. That element essentially entails a proportionality test. A difference in treatment is discriminatory if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. This proportionality test is to be conducted according to the standard of review determined in step four.

In respect of legal distinctions made in migration law, it follows from the *Gaygusuz* judgment that 'nationality' is a discrimination ground covered by Art. 14 ECHR, although the Court never finally clarified why this is the case (it may fall under the rubric of 'national origin' or 'other status'). In any case, the applicable standard of review is high, since the Court requires the State to provide 'very weighty reasons' to justify distinctions based exclusively on the ground of nationality. The *Gaygusuz* case and the ensuing case-law also demonstrates that difference in treatment may be considered 'based exclusively' on nationality if a State discriminates against certain classes of non-nationals while other foreign nationals enjoy equal treatment with the citizens of that State.<sup>439</sup> The comparability test conducted by the ECtHR usually enquires whether the claimant is in a like or analogous situation to a national of the responding State, irrespective of the treatment of other classes of migrants.<sup>440</sup> This doctrine is particularly noteworthy, since immigration legislatures almost always distinguish between different classes of non-nationals, whereas rules and regulations that apply to all non-nationals without distinction are very rare.<sup>441</sup>

(3) A third layer of protection against discrimination in migration law relates to difference in treatment based on immigration status per se. As is the case with nationality, distinctions based on immigration status are unlawful unless the differentiation is duly justified, that is, supported by a legitimate aim and proportionate to achieve that aim. However, States usually enjoy a larger degree of discretion in making these types of distinctions.

Again, the most developed jurisprudence is provided by the ECtHR in its case-law on Art. 14 ECHR. This layer of protection against discrimination was added in several rulings of the ECtHR in 2011 and 2012.<sup>442</sup> The Court held that distinctions based on immigration status, either exclusively or in combination with the nationality of the person concerned, can amount to unlawful discrimination.

In *Ponomaryovi v. Bulgaria* (2011), the ECtHR held that the irregular immigration status of the

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<sup>439</sup> See, e.g., ECtHR, *Okpisz v. Germany*, Appl. no. 59140/00, Judgment of 25 October 2005; *Niedzwiecki v. Germany*, Appl. no. 58453/00, Judgment of 25 October 2005.

<sup>440</sup> See, e.g., ECtHR, *Andrejeva v. Latvia*, Appl. no. 55707/00, Grand Chamber Judgment of 18 February 2009, at para. 87.

<sup>441</sup> For a critical discussion on the actual impact of *Gaygusuz*, see Dembour, 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda', 12 *Human Rights Law Review* (2012) 689.

<sup>442</sup> ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011; *Bah v. UK*, Appl. no. 56328/07, Judgment of 27 September 2011; *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012.



claimant did not provide sufficient grounds to exclude him from access to a social benefit in the educational field. The case shows obvious similarities to the landmark *Plyler* case decided by the US Supreme Court.<sup>443</sup> In respect of the relevant discrimination ground, the ECtHR pragmatically acknowledged that in the instant case the exclusion of Mr. Ponomaryovi was based on a ‘personal characteristic’, without making a clear distinction between ‘nationality’ and ‘immigration status’.<sup>444</sup>

In *Bah v. UK* (2011), the Court confirmed its view that the legal position defined in immigration law constitutes a ‘status’ for the purposes of Art. 14 ECHR, irrespective of the fact it does not amount to an immutable or innate characteristic.<sup>445</sup> In the instant case, the difference in treatment was based purely on a distinction established in national immigration law (the irregular status of the applicant’s son), which would have prevented Ms. Bah’s family from having access to housing assistance even if she were a British national.

In *Hode and Abdi v. UK* (2012), the ECtHR reviewed a difference in treatment between different groups of refugees in respect of the right to family reunification. Again, the test conducted by the ECtHR enquired as to whether the State had provided objective and reasonable justification supporting the distinctions made in its asylum legislation, which resulted in non-equal treatment among different classes of non-nationals.

In *Bah v. UK*, however, the Court distinguished that type of case from the jurisprudence established in *Gaygusuz*. To justify a difference in treatment based on immigration status, the State need not necessarily provide ‘very weighty reasons’. The Court explained that in order to determine the relevant standard of review, the ‘nature of the status’ is particularly relevant. Accordingly, in respect of immigration status the States enjoy a larger margin of appreciation; the Court will usually enquire only whether the difference is ‘manifestly without reasonable foundation’.<sup>446</sup> As we will discuss in more detail below, this lower standard of review does not apply in all circumstances, particularly where migrants in vulnerable situations are concerned.

Having outlined the general jurisprudence on evaluating distinctions in immigration and asylum law in light of Human Rights, we shall proceed to apply this yardstick to the relevant trends and patterns of EU migration policy.

#### 4.2.2 Specific issue: Privileged and non-privileged nationalities in EU migration law

(1) According to our assessment, the existing immigration *acquis* of EU law does not make use of distinctions that amount to racial discrimination as defined in ICERD. As explained above, according to current jurisprudence the high-income requirements laid down, for example, in

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<sup>443</sup> Cf. H. Motomura, *Immigration Outside the Law* (2014), at 105 et seq.

<sup>444</sup> ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011, at para. 50 and 63.

<sup>445</sup> ECtHR, *Bah v. UK*, Appl. no. 56328/07, Judgment of 27 September 2011, at para. 43–46.

<sup>446</sup> *Ibid.*, at para. 37.

the Blue Card Directive 2009/50/EC in order to obtain the favorable status defined in this Directive do not amount to indirect discrimination on grounds of ‘race’, irrespective of the objectively biased effects that such criteria probably entail.

As a singular incident of what amounts to indirect racial discrimination, we identify the inclusion of Union citizens in the scope of Regulation 2019/816 to establish a centralized system for the exchange of criminal record information on convicted third-country nationals and stateless persons (ECRIS-TCN).<sup>447</sup> According to Art. 2 of this Regulation, its provisions apply to citizens of the Union who also hold the nationality of a third country and who have been subject to convictions in the Member States, apart from minor exceptions. In effect, Union citizens with multiple nationalities are subject to a system that represents a typical instrument of ‘aliens police’ (*Fremdenpolizei*, in German) subordinating foreigners to a special layer of supervision.<sup>448</sup> While ‘dual nationality’ is a seemingly neutral criterion in terms of ‘race’, in practice the majority of dual nationals are non-European migrants or their descendants and hence marked by their ethnic origin.<sup>449</sup> Commentators have convincingly argued that this difference in treatment between groups of Union citizens constitutes an indirect racial discrimination.<sup>450</sup>

(2) The EU immigration *acquis* rarely uses ‘nationality’ as a factor in legal distinctions. The EU legislature follows the path of Member States with a developed system of immigration law in predominantly using *functional* criteria to define grounds of admission and the corresponding immigration statuses, regardless of the nationality of the persons concerned (see the introduction to this chapter). In some instances, however, the EU does draw distinctions between different nationalities in order to accord a privileged status exclusively to these nationals. This may raise issues of discrimination. We recall that ‘very weighty reasons’ must be provided to justify distinctions exclusively based on nationality.

The most fundamental distinction in EU law based on nationality is that between Union citizens and their family members, on the one hand, and third-country nationals, on the other hand.<sup>451</sup> Already in 1991 the ECtHR accepted the preferential treatment given to nationals of other Member States, on the ground that the Union (or, at the time, the European Communities) forms a ‘special legal order’.<sup>452</sup> This rationale has been confirmed in more recent case-

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<sup>447</sup> Regulation 2019/816 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN).

<sup>448</sup> On this older layer of immigration law, see J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011), at 75–78.

<sup>449</sup> See, e.g., CERD, *D.R. v. Australia*, Communication No. 42/2008, CERD/C/75/D/42/2008; Concluding observations on the eighteenth to twentieth periodic reports of Rwanda, 10 June 2016, CERD/C/RWA/CO/18–20.

<sup>450</sup> Meijers Committee, *Note on the definition of third-country nationals in the Commission’s ECRIS-TCN proposal* (CM1710), 2 October 2017; Meijers Committee, *Note on Proposal for a Regulation of the European Parliament and of the Council establishing a centralized system for the identification of Member States holding conviction information on third-country nationals and stateless persons* (CM1711), 18 October 2017.

<sup>451</sup> On the conceptual basis, see Thym, ‘The Evolution of Citizens’ Rights in Light of the European Union’s Constitutional Development’, in D. Thym (ed.), *Questioning EU Citizenship* (2017) 111.

<sup>452</sup> ECtHR, *Mustaqim v. Belgium*, Appl. no. 12313/86, at para. 49.

law.<sup>453</sup> However, it is important to note that the ECtHR does not understand the lawfulness of this distinction to be inherent in the concept of citizenship but, rather, requires reasonable grounds. In fact, in certain instances the ECtHR has found the drawing of a distinction between Union citizens and third-country nationals to be discriminatory for the purposes of Art. 14 ECHR.<sup>454</sup>

This rationale of a ‘special legal order’ is not readily applicable to the preferential treatment of nationals from particular third countries, which is granted in association agreements jointly concluded by the EU and its Members with those countries. While most external EU agreements do not include provisions that are immediately relevant for European immigration law, the EEA Agreement with Iceland, Lichtenstein, and Norway, and the bilateral agreements with Switzerland and with Turkey, do include far-reaching regulations concerning immigration law,<sup>455</sup> essentially granting the nationals of these association states free movement rights similar to those of EU citizens or, in the case of Turkish nationals residing in the EU, a denizen status that is even more favorable than the status defined in the Long-Term Residents Directive 2003/109/EC.<sup>456</sup> According to a traditional understanding, such distinctions are part of the unfettered discretion of States (and, by analogy, of the EU) to pursue their own migration policy. In light of modern Human Rights law they constitute difference in treatment that requires justification. However, it is likely that the foreign policy considerations that sit at the heart of such external EU agreements would still satisfy the need to provide ‘very weighty reasons’. The privileged status accorded to the nationals of the association states mirrors the privileged partnership between the respective subjects of international law and, hence, meets the requirement of objective and reasonable justification.

The critical case in respect of distinctions based exclusively on nationality is the Schengen visa regime laid down in the Visa List Regulation 2018/1806. Art. 3(1) in conjunction with Annex I to this Regulation establishes a list of States whose nationals must have a visa when crossing the external borders in order to stay in the Schengen area for up to 90 days, while nationals of States listed in Annex II are exempt from this requirement. Of course, one may take the view that the Schengen visa regime is beyond the scope of this study, since it concerns short-term travel rather than immigration. However, there are many legal and factual links between the two regimes that may bring about a situation whereby a short-term stay transforms into the first stage of an immigration process.<sup>457</sup>

The Visa List Regulation does not state the reasons for placing one particular State in Annex I

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<sup>453</sup> ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011, at para. 54.

<sup>454</sup> See, e.g., ECtHR, *Dhahbi v. Italy*, Appl. no. 17120/09, Judgment of 8 September 2014, at para. 50 et seq.

<sup>455</sup> Cf. D. Thym and M. Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (2015).

<sup>456</sup> Bast, ‘European Community and Union, Association Agreements’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law (MP-EPIL)*, online edition, last updated August 2010.

<sup>457</sup> See, in the context of German immigration law, J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011), at 233–234.

(the ‘black list’), and others in Annex II. Art. 1 of the Regulation refers to a ‘case-by-case assessment of a variety of criteria relating, inter alia, to illegal immigration, public policy and security, economic benefit ... and the Union’s external relations with the relevant third countries ...’. The actual composition of the lists seems to reflect a mixture of migration and foreign policy considerations.<sup>458</sup> In particular, the offer to conclude a bilateral Visa Facilitation Agreement has become a powerful tool in the EU’s external relations.<sup>459</sup>

A scholarly debate on the legality of these distinctions based on the nationality of the traveler in light of non-discrimination law has begun only recently, drawing inspiration from the legal debate in the USA concerning selective travel bans against predominantly Muslim countries.<sup>460</sup> In respect of Art. 14 ECHR, one may doubt whether the matter falls within the ambit of the Convention. In instances of family-related travel, however, Art. 8 ECHR could serve as a connecting factor. Even in cases in which the more lenient standard of the general equality clause in Art. 20 EU-CFR applies, rather than Art. 21(1) EU-CFR mirroring Art. 14 ECHR, objective justification of the non-equal treatment is required under EU law. In any case, the lack of transparency regarding the ‘case-by-case assessment’ of the open-ended criteria laid down in the Regulation seem to originate from a tradition in which such decisions could still be taken without having due regard to the Human Rights of the persons concerned. A particular cause of concern is the fact that the placement of the large majority of countries on the ‘black list’ dates from the intergovernmental Schengen era and has never been properly justified.<sup>461</sup>

### 4.2.3 Specific issue: Differential treatment in respect of social assistance

It follows from the above legal analysis (section 4.2.1) that the EU must provide sufficient reasons to justify a difference in treatment between immigration statuses that are defined by EU law. This pertains, inter alia, to difference in treatment in respect of family reunification, social welfare, health care, access to the labor market, and mobility within the Union.<sup>462</sup>

The initial observation in this context is that it is very difficult to assess whether differences among the various categories of migrants established by the EU legislature are based on objective and reasonable justification, given that the recitals in the preamble to the directives usually do not include any ‘equality reasoning’ explaining the legislative outcome in comparison to existing statuses. By way of example, we shall discuss in some detail the provisions related to social assistance. This is a crucial element of social welfare and is recognized in Art. 34(3) EU-CFR as a fundamental social right.

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<sup>458</sup> Martenczuk, ‘Visa Policy and EU External Relations’, in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (2008) 21.

<sup>459</sup> N. Coleman, *European Readmission Policy* (2009), at 184–201.

<sup>460</sup> M. den Heijer, ‘Visas and Non-discrimination’, 20 *European Journal of Migration and Law (EJML)* (2018) 470, with references to earlier contributions.

<sup>461</sup> *Ibid.*, at 487.

<sup>462</sup> For comparative analysis in the field of labor migration, see B. Fridriksdottir, *What Happened to Equality?* (2017).

(1) First, we provide a brief outline of the relevant legislation, covering a selected number of immigration statuses.

A limited guarantee of access to social assistance is provided for in the Long-Term Residents Directive (Directive 2003/109/EC). According to point (d) of Art. 11(1), long-term residents shall enjoy equal treatment with nationals as regards, *inter alia*, social assistance. However, pursuant to Art. 11(4) of this Directive, Member States may limit the equal treatment to ‘core benefits’. Recital 13 in the preamble to this Directive explains that this possibility of limiting the benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance, and long-term care.<sup>463</sup>

In contrast, in the Blue Card Directive (Directive 2009/50/EC) social assistance is not mentioned in the list of matters where EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card (Art. 14 Blue Card Directive). When the EU Blue Card holder applies for social assistance, this may even be regarded as a ground for withdrawal or non-renewal of the Blue Card (Art. 9 Blue Card Directive).

A very similar approach is taken in the so-called REST Directive (Directive 2016/801/EU) regarding researchers and certain other third-country nationals whose stay is mainly related to educational purposes. Researchers are entitled to equal treatment with nationals of the Member State to the extent that this is provided for in another Directive, the Single Permit Directive 2011/98/EU. The equality of treatment of researchers is subject to certain further exceptions provided for in the REST Directive. Even more restrictions are permitted regarding trainees, volunteers, *au pairs*, and students.

The cited Single Permit Directive applies to ‘third-country workers’ as defined in this Directive, who are legally residing and are allowed to work in an EU Member State, including persons whose status is defined in national law. These workers enjoy a right to equal treatment in matters listed in Art. 12 of the Single Permit Directive (the clause referenced in the REST Directive). However, social assistance is not mentioned in this list. It does cover the branches of social security as defined in the relevant EU Regulations on the coordination of social security systems, but these branches usually do not include social assistance.

A different approach is taken by the EU legislature regarding refugees. According to Art. 29(1) of the Qualification Directive (Directive 2011/95/EU), Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, the ‘necessary social assistance’ as provided to nationals of that Member State. However, pursuant to Art. 29(2) of this Directive, Member States may limit social assistance granted to beneficiaries of subsidiary protection to ‘core benefits’.

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<sup>463</sup> On the construction of this derogation, see CJEU, Case C-571/10, *Kamberaj* (EU:C:2012:233), at para. 83 et seq.

(2) The following legal evaluation is based on Art. 14 ECHR. Further applicable sources are Art. 2(2) ICESCR and Art. E of the revised European Social Charter. Note that in the Global Compact for Migration States have also committed themselves ‘to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services’ (Objective 14 [para. 31]).

It is readily apparent that access to social assistance falls within the ambit of the ECHR, given that the ECtHR regards such benefits as a pecuniary right for the purposes of Art. 1 of Protocol No. 1 ECHR.<sup>464</sup> As discussed above, immigration status constitutes a personal characteristic for the purposes of Art. 14 ECHR. The relevant group of persons who are in a similar situation are other third-country nationals whose status is governed by EU law. Absent specific circumstances, the more lenient standard of review applies – that is, the difference in treatment must not be ‘manifestly without reasonable foundation’.

The limited number of cases thus far decided by the ECtHR provides some guidance as to what arguments are sufficient to demonstrate a ‘reasonable foundation’. The Court seems to accept that ‘offering incentives to certain groups of immigrants’ may provide such foundation.<sup>465</sup> More specifically, the need ‘to stem or reverse the flow of illegal immigration’ is explicitly recognized as a legitimate policy aim.<sup>466</sup> With respect to social benefits, the Court has pointed out that short-term and illegal immigrants do not contribute to the funding of public services.<sup>467</sup> The ECtHR acknowledges that the use of categorizations to distinguish between different groups in need is inherent in any welfare system, which may also justify distinctions between different categories of non-nationals.<sup>468</sup> On the other hand, the fact that the beneficial treatment of certain migrants fulfills the State’s international obligations will not in itself justify the difference in treatment.<sup>469</sup> As to the proportionality of the differential treatment, the Court seems particularly concerned when migrants with a high level of de facto integration into the host society are excluded from certain benefits merely due to their status.<sup>470</sup>

To sum up the guidance from case-law, general considerations of migration policy (‘offering incentives’) may justify a difference in treatment with respect to the welfare system. In this context, States are entitled to use general categorizations. However, the difference in treatment must be reasonably related to the nature of the social benefit. Exclusions of migrants based on their temporary or irregular status serve a legitimate aim but may be disproportionate if they exclude migrants with lasting and strong ties with the host society.

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<sup>464</sup> ECtHR, *Gaygusuz v. Austria*, Appl. no. 17371/90, Judgment of 16 September 1996, at para. 41.

<sup>465</sup> ECtHR, *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012, at para. 53.

<sup>466</sup> ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011, at para. 60.

<sup>467</sup> *Ibid.*, at para. 54.

<sup>468</sup> ECtHR, *Bah v. UK*, Appl. no. 56328/07, Judgment of 27 September 2011, at para. 49–50.

<sup>469</sup> ECtHR, *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012, at para. 55.

<sup>470</sup> See ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011, at para. 61; *Dhahbi v. Italy*, Appl. no. 17120/09, Judgment of 8 September 2014, at para. 52; see also ECtHR, *Biao v. Denmark*, Appl. no. 38590/10, Grand Chamber Judgment of 25 March 2014, at para. 118.

(3) Applying these standards to the examples from the EU immigration *acquis*, it seems reasonable to grant more favorable treatment in terms of social assistance to long-term residents and persons enjoying international protection in the EU. While the former are characterized by their strong social ties with the host societies, the latter are forced migrants who, by definition, cannot rely on social assistance in their country of origin. Yet, the consistency of the detailed differences between the three groups concerned is less obvious. While the social assistance granted to long-term residents can be limited to ‘core benefits’, the same limitation does not apply to Convention refugees. However, in respect of the latter the social assistance from the host State must be ‘necessary’. Both limitations to the right to equal treatment apply to persons with subsidiary protection status. In effect, it is difficult to see what these differences actually entail and what reasons potentially justify them. We will return to the issue of the difference in treatment between these two groups of internationally protected persons in the next section.

In respect of the other immigration statuses reported above, the striking feature is the lack of distinction made by the EU legislature in terms of social assistance. Highly qualified workers with a prospect of permanent stay and who are actively contributing to the funding of the social systems, such as EU Blue Card holders and researchers, are placed on equal footing with temporary visitors such as participants in training programs and pupil exchange schemes. Neither the validity of the residence permit, nor the actual duration of stay, nor the potential presence of social and family ties are taken into account. The same lack of regard to the actual situation of the migrants concerned pertains to third-country workers holding a ‘single permit’ under the Directive 2011/98/EU. This all the more surprising as the EU Charter of Fundamental Rights recognizes that the right to social assistance is instrumental ‘to ensure a decent existence for all those who lack sufficient resources’ (Art. 34(3) EU-CFR), indicating that in various situations a Member State acts in violation of EU law (and corresponding Human Rights) when it refrains from granting the applicant the social assistance necessary to ensure a decent existence.

In sum, the scope of the right to equal treatment guaranteed in the Directives does not include all situations in which equal treatment in terms of social assistance would be required under Art. 14 ECHR. While such ‘underinclusive legislation’ may not per se violate EU law, since the Directives do not *oblige* the Member State to take decisions that would violate Art. 34(3) EU-CFR (see above, introductory chapter), such lack of consistency of EU legislation raises serious issues of compliance with the right to non-discrimination according to Art. 14 ECHR and Art. 21(1) EU-CFR.

#### **4.2.4 Specific issue: Differential treatment among beneficiaries of international protection**

A more detailed legal analysis is required in respect of the difference in treatment among beneficiaries of international protection as defined in the Qualification Directive 2011/95/EU, i.e.,

between Convention refugees and persons protected on subsidiary grounds. The leading authority is *Hode and Abdi v. UK*. At the time of writing, further potentially relevant cases are pending before the ECtHR.<sup>471</sup>

Two issues are of particular concern in light of Art. 14 ECHR. First, Member States may limit the social assistance to persons with subsidiary protection status to ‘core benefits’, whereas Convention refugees are entitled to equal treatment with nationals of the host State regarding ‘necessary social assistance’ (see above, 4.2.3). Second, in terms of the right to family reunification, Convention refugees benefit from a privileged regime laid down in the Family Reunification Directive 2003/86/EC (Art. 9–12), whereas EU law as it stands does not contain any regulations regarding family reunification of beneficiaries of subsidiary protection, since they are exempt from the scope of the Family Reunification Directive.<sup>472</sup> The background of this gap is that the first Qualification Directive 2004/83/EC was not yet adopted when the Family Reunification Directive was drafted.

Applying the settled doctrine regarding non-discrimination to these regulations, it is beyond dispute that they fall within the ambit of the ECHR<sup>473</sup> and that being entitled to subsidiary protection constitutes a ‘status’ for the purposes of Art. 14 ECHR. Obviously, there is a difference in the treatment of persons in analogous, or relevantly similar, situations, namely other persons enjoying international protection in the EU (Convention refugees).

As to the standard of review, in view of the fact that the present case concerns a status defined in immigration law, States (and by analogy, the EU) would enjoy a wider margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify differential treatment. However, we argue that very weighty reasons are required in cases involving persons in need of international protection since they are in a particularly vulnerable situation.<sup>474</sup> Among other things, the family life of these forced migrants cannot be maintained or established in the country of origin, nor can they rely on its systems of social welfare. In contrast, the ‘element of choice’ involved in obtaining an immigration status was a core argument put forward by the Court to determine that the justification required ‘will not be as

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<sup>471</sup> *M.T. and Others v. Sweden*, Appl. no. 22105/18; *S.S. v. Sweden*, Appl. no. 43654/18; *M.A. v. Denmark*, Appl. no. 6697/18.

<sup>472</sup> CJEU, Case C-380/17, *K. and B.* (EU:C:2018:877), at para. 33.

<sup>473</sup> On family reunification, see ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, Appl. no. 9214/80, 9473/81 and 9474/81, Judgment of 28 May 1985.

<sup>474</sup> On this rationale for deriving a high standard of review, see ECtHR, *Alajos Kiss v. Hungary*, Appl. no. 38832/06, 20 May 2010, at para. 42: ‘if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.’ Note that in *Hode and Abdi v. UK* (Appl. no. 22341/09, Judgment of 6 November 2012) the ECtHR did not elaborate on this point since the responding Government even failed to prove a ‘reasonable foundation’ (i.e., the more lenient standard) for the difference in treatment between groups of refugees (see at para. 52–54).



weighty as in the case of a distinction based, for example, on nationality'.<sup>475</sup> Such an 'element of choice' is notably absent where refugees or other forced migrants are concerned.<sup>476</sup>

Applying this standard of review, we now turn to the issue of whether the difference in treatment between the two classes of internationally protected persons has an objective and reasonable justification. The aims pursued by the EU legislature are somewhat difficult to identify, since the Qualification Directive reflects a compromise between contradictory policy approaches represented by different Member States in the Council. On the one hand, the EU legislature aimed at creating a uniform status for all beneficiaries of international protection and, therefore, chose to afford beneficiaries of subsidiary protection, as a general rule, the same rights and benefits enjoyed by beneficiaries of refugee status.<sup>477</sup> Accordingly, when implementing the Directive, a presumption of equality of status applies.<sup>478</sup> This conception constitutes a deliberate deviation from an orthodox approach to refugee protection, which tends to privilege refugees as defined in the Geneva Refugee Convention. This policy choice is even more marked since the reform of the Qualification Directive in 2011.<sup>479</sup> The central point of the new approach is that subsidiary protection is not characterized by a less urgent or otherwise reduced need for protection, which would potentially translate into an inferior asylum status.<sup>480</sup> Rather, subsidiary protection in the EU is based on other Human Rights-based grounds of protection and thus complements and adds to the protection of refugees enshrined in the Geneva Refugee Convention.<sup>481</sup> On the other hand, the traditional approach lingers on in certain provisions of the Qualification Directive and in the exemption from the scope of the Family Reunification Directive. According to this view, which is still prevalent within certain Member States, subsidiary protection is a secondary form of protection that goes beyond of what is required under international refugee law and is thus marked by a higher degree of discretion on the part of States and, consequently, by a less comprehensive set of rights for the beneficiaries. The regulations under review here, on family reunification and social assistance, are prime examples of the latter approach. The EU legislature has chosen to partially maintain this discretion, even at the cost of laying down contradictory policy choices.

However, in order for the resulting difference in treatment to be in line with Art. 14 ECHR (and

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<sup>475</sup> ECtHR, *Bah v. UK*, Appl. no. 56328/07, Judgment of 27 September 2011, at para. 47. The Court expressly noted that the applicant was not granted refugee status.

<sup>476</sup> This conclusion is supported by T. Gordzielik, *Sozialhilfe und menschenwürdige Existenzsicherung: Zwischen Migrationskontrolle und menschenwürdiger Existenzsicherung* (2020), at 114–115.

<sup>477</sup> CJEU, Joined Cases C-443/14 and C-444/14, *Alo and Osso* (EU:C:2016:127), at para. 32; Case C-720/17, *Bilali* (EU:C:2019:448), at para. 55.

<sup>478</sup> Cf. CJEU, Case C-662/17, *E.G. v. Slovenia* (EU:C:2018:847), at para. 42.

<sup>479</sup> For a detailed analysis, see Bauloz and Ruiz, 'Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?', in V. Chetail, Ph. de Bruycker and F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (2016) 240.

<sup>480</sup> Hasel and Salomon, 'Differenzierungen zwischen Flüchtlingen und subsidiär Schutzberechtigten. Zu einem einheitlichen Schutzstatus', in St. Salomon (ed.), *Der Status im europäischen Asylrecht* (2020) 113, at 147–152, discussing the relevant arguments in legal scholarship.

<sup>481</sup> Bast, 'Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff', *Zeitschrift für Ausländerrecht (ZAR)* (2018) 41.

Art. 21(1) EU-CFR), there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In other words, there must be objective reasons (in our view: very weighty reasons) demonstrating that the different status accorded to beneficiaries of subsidiary protection is reasonably related to the different grounds of protection that distinguish them from Convention refugees. We would like to recall that the different status under international law as such does not suffice to justify the difference in treatment (see above, section 4.2.3).<sup>482</sup>

A single argument stands out as having the potential to demonstrate such reasonable relationship: the claim that subsidiary protection is of a more temporary nature than the protection of Convention refugees. Indeed, were subsidiary protection status conceived as a provisional status, as opposed to a more permanent refugee status, it would be plausible that Member States should have a higher degree of discretion to limit access to social assistance or postpone family reunification, although an individual assessment of the applicant's situation would be required anyway. This point has been made, *inter alia*, by the Austrian Constitutional Court in its evaluation of the relevant provisions of Austrian law in light of Art. 14 ECtHR.<sup>483</sup>

However, this argument was met with convincing critique.<sup>484</sup> First, the assumption that a change of circumstances in the country of origin is more likely in cases of the real risk of serious harm that led to the granting of subsidiary protection (such as civil war or systematic torture) in comparison with cases of a well-founded fear of persecution that led to recognition as a refugee, has until now not been sufficiently supported empirically.<sup>485</sup> Second, there is no compelling normative argument that subsidiary protection status, according to the conception of the EU legislature, is characterized by distinct temporality. Such construction of the Qualification Directive seems unduly influenced by national statuses of complementary protection, *i.e.*, precisely the traditional approach not taken by the EU legislature. At first glance, the difference in respect of the validity of the first residence permit (three years for refugees, one year for beneficiaries of subsidiary protection, according to Art. 24 of the Qualification Directive) seems to provide evidence to the contrary. However, this argument apparently overlooks the fact that all persons enjoying international protection are entitled to have their residence permit renewed, as long as the need for protection persists. The relevant provisions on the ces-

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<sup>482</sup> See, again, ECtHR, *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012, at para. 55. The only difference that finds a strong explanation in international law is Art. 25 of the Qualification Directive on travel documents.

<sup>483</sup> Verfassungsgerichtshof, E 3297/2016 (Erkenntnis of 28 June 2017, *re minimum benefit system*), at para. 21–22; VfGH, E 4248–4251/2017–20 (Erkenntnis of 10 October 2018, *re family reunification*), at para. 47.

<sup>484</sup> Council of Europe: Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe* (2017), at 25–26 and 47; from legal scholarship, see, *e.g.*, Immervoll and Frühwirth, 'Statusdifferenzierungen in der Familienzusammenführung', in St. Salomon (ed.), *Der Status im europäischen Asylrecht* (2020) 161, at 183.

<sup>485</sup> See Hasel and Salomon, 'Differenzierungen zwischen Flüchtlingen und subsidiär Schutzberechtigten', in St. Salomon (ed.), *Der Status im europäischen Asylrecht* (2020) 113, at 153.

sation of the protection status are literally drafted in parallel (Art. 11 and 16 Qualification Directive). Moreover, both groups are entitled to the status of long-term residents according to exactly the same conditions (see Directive 2003/109/EC, as amended by Directive 2011/51/EU). Accordingly, the claim that the difference in treatment has a reasonable foundation in a more temporary nature of subsidiary protection must be rejected.

In sum, there is no objective justification for the difference in treatment between refugees and persons enjoying subsidiary protection, in respect of either social assistance or family reunification. Accordingly, these instances of non-equal treatment amount to a violation of Art. 14 ECHR.

The resultant legal question is: what level of European governance must provide for equal treatment – the EU legislature or the Member States? Usually, the answer to such a question is rather straightforward: the level of governance that has caused the Human Rights violation is responsible for remedying the situation. In the present instance, however, the responsibility is shared. The unlawful discrimination against persons enjoying subsidiary protection occurs in a situation of partial and underinclusive regulation by the EU legislature, on the one hand, and practices and regulations on the part of the Member States that are seemingly permitted (social assistance) or not covered (family reunification) by EU law, on the other hand. In other words, the problematic non-equal treatment is the result of the current distribution of legislative powers in the multi-level system of European migration governance.

This is a well-known problem of federal systems, which tend to produce, and constitutionally accept, non-equal treatment of comparable situations whenever the federal level has only partly exercised its shared legislative powers (or is not competent to legislate at all). In the context of EU law, this issue is familiar from internal market law that, at times, creates ‘reverse discrimination’ against national entities, which is not regarded as unlawful. Examples from the field of migration include family reunification where the sponsor is an EU national who has not exercised his or her freedom of movement.<sup>486</sup>

However, we argue that this doctrine of reverse discrimination does not apply to persons enjoying international protection in the EU. The crucial difference here is that both the EU and its Member States have legally committed themselves to observe the Human Rights standards defined by the ECHR. From the ‘outside’ perspective of the ECHR, the distribution of powers between the EU and its Members is not a valid argument to justify discrimination caused by disparate decisions between the two levels. Both are simultaneously obliged to provide for equal treatment of persons in analogous positions, each within their respective scope of powers. This view finds additional support in the ECtHR judgment in *Hode and Abdi v. UK*, where the Court explicitly rejected the argument that an international obligation to grant certain rights to one group of persons could justify denying these rights to another group.<sup>487</sup>

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<sup>486</sup> A. Walter, *Reverse Discrimination and Family Reunification* (2008).

<sup>487</sup> *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012, para. 55.

Applying this premise to the present case of persons enjoying international protection, we hold that the EU Member States are legally bound to immediately accord non-discriminatory treatment to persons protected on subsidiary grounds in respect of social assistance and family reunification, even if the EU legislature has so far failed to establish statutory obligations to this effect. This obligation follows from international law and, in the case of social assistance, from EU constitutional law.

In respect of the EU itself, it is more difficult to argue that a positive obligation to legislate to this effect exists, given that the EU is not a party to the ECHR and that the EU is constitutionally entitled to pursue an incremental approach to establishing the Common European Asylum System (Art. 78(1) TFEU).<sup>488</sup> For an interim period, this necessarily implies that certain elements of the system are only partly governed by EU law, including asylum status (Art. 78(2)(a) and (b) TFEU). However, the EU legislature must refrain from adding to the disparities that already stem from the absence of full harmonization of national legislation, and work toward a comprehensive system.<sup>489</sup> Accordingly, we hold that it is unlawful, from a constitutional point of view, to maintain a situation of underinclusive legislation in respect of the asylum status, a situation that in effect leads to a violation of the prohibition of discrimination based on immigration status.

### 4.3 Recommendations

#### Recommendation 1: Systematically ensure non-discrimination regarding social assistance

We recommend that the EU systematically review its asylum and immigration *acquis* to ensure that any distinctions between immigration statuses defined in EU law are based on objective and reasonable justification as required by Art. 14 ECHR, in order to ensure non-discrimination among these persons. The above legal analysis revealed that non-equal treatment in respect of social assistance is a critical case in point. For most categories of migrants, whose immigration status is (partly) defined by EU law, the EU legislature apparently permits Member States to deny access to social assistance entirely or to limit the assistance to ‘core benefits’. The lack of guidance provided by this ‘underinclusive legislation’ invites the Member State to apply arbitrary distinctions and issue unlawful decisions in individual cases. We therefore recommend that the EU enact, as a minimum guarantee, a right to equal treatment in respect of social assistance necessary to ensure a decent existence for all migrants present in the Union for more than 90 days.

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<sup>488</sup> See, *mutatis mutandis*, CJEU, Case C-193/94, *Sknavi* (EU:C:1996:70), at para. 27; Case C-233/94, *Germany v. Parliament and Council* (EU:C:1997:231), at para. 43.

<sup>489</sup> See, *mutatis mutandis*, CJEU, Case 41/84, *Pinna* (EU:C:1986:1), at para. 21.

In order to prepare for comprehensive reform, the European Commission should conduct a systematic review of the asylum and immigration *acquis* to identify non-justified sectoral differentiation created by the EU legislature, including distinctions exclusively based on nationality. Any distinction that fails to meet the test enshrined in Art. 14 ECHR must be eliminated. This pertains, *inter alia*, to difference in treatment in respect of family reunification, social welfare, health care, access to the labor market, and mobility within the Union. Such review should result, where appropriate, in initiatives to revise existing legislation, including most notably the Qualification Directive (see Recommendation 2).

We further recommend that the European Commission conduct a systematic review of Member States' laws and policies making use of optional clauses or derogations that allow for less favorable treatment of third-country nationals. The Commission should institute, where appropriate, infringement proceedings according to Art. 258 TFEU and/or propose amendments to EU legislation that currently provides for discretion on the part of the Member States that in practice leads to violations of Human Rights law.

### **Recommendation 2: Eliminate any discrimination among persons granted international protection**

We recommend that the EU exercise its legislative and supervisory powers to ensure that any discrimination among persons granted international protection in respect of their immigration status is eliminated, most notably regarding family reunification. Upholding the current situation of non-regulation of family reunification where the sponsor enjoys subsidiary protection status would violate Art. 21(1) EU-CFR.

As to the means of achieving that aim, the EU should accord a uniform asylum status defined in EU legislation. More specifically, all beneficiaries of international protection must be granted the same rights in respect of family reunification and access to social welfare, including social assistance. Such an approach would transpose existing legal obligations of Member States under Human Rights law onto parallel obligations under statutory EU law. Accordingly, we recommend deleting Art. 3(2)(c) and amending Art. 9 to 12 of the Family Reunification Directive and deleting Art. 29(2) of the Qualification Directive, in order to establish a uniform asylum status for all persons enjoying international protection in the EU.

Pending such amendments, EU Member States are obliged, by virtue of Art. 14 ECHR, to apply the same legal regime in respect of the right to family reunification to refugees and persons eligible for subsidiary protection. In effect, Member States participating in the Area of Freedom, Security and Justice must grant the rights laid down in Chapter V of the Family Reunification Directive (Art. 9–12) to beneficiaries of subsidiary protection as defined in the Qualification Directive.

In respect of the right to social assistance, EU Member States are obliged, by virtue of Art. 14 ECHR and Art. 20(1) EU-CFR, to apply the same legal regime to Convention refugees and per-

sons eligible for subsidiary protection. The possibility of limiting such assistance to core benefits pursuant to Art. 29(2) of the Qualification Directive is rendered inapplicable by EU fundamental rights. We recommend that the European Commission conduct a systematic review of the relevant laws and policies of those Member States relying on Art. 29(2) of the Qualification Directive and, where appropriate, institute infringement proceedings according to Art. 258 TFEU.

### **Recommendation 3: Follow a legislative approach guided by the ‘Leitbild’ of status equality**

As regards future legislation in migration law, we recommend that the EU follow a horizontal approach, in order to avoid creating new, potentially non-justified distinctions among immigration statuses. The EU should be guided by the *Leitbild* of status equality that serves as a template for the status of all third-country nationals residing in the EU.

Such an approach would not only foster consistency of legislative outcomes but also provide for conformity with the principle of non-discrimination. Defining such a *Leitbild* obviously involves political choices that are not determined by Human Rights law. The logical starting point for such determinations is the privileged status of migrants who are Union citizens. While Human Rights law does not necessarily require that the EU accord third-country nationals the same set of rights as Union citizens, the latter could nevertheless serve as a point of reference for the model immigration status of third-country nationals, in particular in respect of equal treatment in all fields governed by EU law and the freedom of movement within Union territory. Where legal and political discourse reveals that distinctions between EU citizens and non-citizens are supported by objective and reasonable justification, the status of a long-term resident as defined in the Long-Term Residents Directive could serve as secondary point of reference, providing the template for the ‘general status’ of third-country nationals residing in the EU.

Any deviation from this dual template should relate to the specific nature of the class of migrants at issue, in particular the purpose of admission to the EU, and of the specific right at hand. On a procedural level, the EU legislature should include explicit equality reasoning in the preamble to every new act, providing the reasons for which the immigration status of a particular class of migrants deviates from the templates.

## Chapter 5 – Preserving Social and Family Ties

The findings on the protection of social and family ties of migrants will be presented at a later point in time in the context of a revised second edition of this study.

## Chapter 6 – Guaranteeing Socio-Economic Rights

The findings on the protection of economic and social rights of migrants will be presented at a later point in time in the context of a revised second edition of this study.



# Chapter 7 – Fostering Human Rights Infrastructure

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Human Rights protections do not exist in a vacuum. The substantive and procedural guarantees of Human Rights law depend on certain infrastructure to render them effective. Such structures exist on a political and administrative level, a judicial level, and a civil-societal level. For the purposes of this chapter, and in line with the UN Declaration on Human Rights Defenders,<sup>490</sup> we identify as vital Human Rights infrastructure in the field of European migration policy certain supervisory bodies, the judiciary, and civil society actors (be they individuals or associations), each contributing by different means to the effective protection of migrants’ individual rights.

In the political and administrative sphere, supervisory bodies such as UNHCR, UN Special Rapporteurs, the Council of Europe’s Commissioner for Human Rights, National Human Rights Institutions (NHRI), ombudspersons (including the European Ombudsman), and the EU Agency for Fundamental Rights (FRA) play particularly important roles in protecting migrants’ Human Rights. Regarding the judiciary, independent, effective, and respected judges and courts form the heart of any Human Rights infrastructure. In the case of the EU this is true both at the

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<sup>490</sup> UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Resolution adopted on 9 December 1998, A/RES/53/144, available at <https://undocs.org/A/RES/53/144>.

Union and the Member State level. The ECtHR plays a pivotal role in the interpretation of international law, alongside the ‘quasi-judicial’ UN treaty bodies (such as the Human Rights Committee or the Committee Against Torture, among others). But apart from any public institutions, the implementation and protection of Human Rights also vitally depends on civil society actors, most notably lawyers, journalists, NGOs, and volunteers. These may be involved in different ways in protecting the interests of migrants – for example, by engaging in actual rescue operations at sea, in providing social and legal assistance to migrants, or in reporting on the Human Rights situation in countries of origin or transit and drawing public attention to Human Rights violations.

While these structures evolved to a certain extent independently from the EU, the EU has committed itself to preserving and fostering them. This follows from Art. 2 TEU as well as from the EU-CFR, which reaffirms in its preamble that the EU is based on the ‘indivisible, universal values of human dignity, freedom, equality and solidarity’. Furthermore, with the creation of the FRA the EU established an institution for, among other things, the implementation of ‘activities in the field of promotion of fundamental rights and capacity building’.<sup>491</sup>

## 7.1 Structural challenges and current trends

While the legitimacy of the historically grown, multi-layered infrastructure of Human Rights protection in Europe has long been widely accepted, and was by some even considered as self-evident, recent years have seen a number of developments that cast doubt upon this general acceptance. Various political actors, including governments, have recently made attempts to limit, or even abolish, essential elements of this Human Rights infrastructure. In our view, three developments stand out in this respect: the criminalization of civil society actors supporting migrants (Trend 1), the growing populist pressure on judges protecting the rights of migrants (Trend 2), and challenges to the role of the ECHR as guardian of migrants’ Human Rights (Trend 3).

### Trend 1: Criminalization of civil society actors supporting migrants

We observe a trend in several EU Member States toward restricting the activities of civil society actors promoting and striving for the protection and realization of Human Rights, including the

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<sup>491</sup> EU Agency for Fundamental Rights (FRA), FRA Strategy 2018–2022, at 4, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-fra-strategy-2018-2022\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-fra-strategy-2018-2022_en.pdf); see Art. 2 Regulation 168/2007 establishing a EU Agency for Fundamental Rights (FRA Regulation): ‘The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.’ Notably, in the years 2018–2022, such FRA activities are supposed to focus among other things on ‘migration, borders, asylum and integration of refugees and migrants.’ Cf. Art. 2(e) of the Council Decision 2017/2269 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018–2022.

rights of migrants. These Human Rights defenders – as individuals or organizations – have increasingly come under pressure from state authorities in many respects, including restricted access to public funding (and, in some instances, also to private funding), administrative and judicial harassment, abusive inspections (sometimes referred to as forms of ‘discriminatory legalism’<sup>492</sup>), missing protection against hate speech by other private actors, and many other examples.

This development has been accurately labeled by numerous observers and institutions such as the European Parliament, FRA or the Council of Europe’s Commissioner for Human Rights as a ‘shrinking space for civil society’<sup>493</sup> or ‘shrinking space for human rights organisations’.<sup>494</sup> The restrictions affect civil society actors in general and those supporting migrants in particular.<sup>495</sup> Attempts to intimidate humanitarian actors in this area aim to restrict the access of asylum seekers to protection or to facilitate the return of irregular migrants. These attempts take different forms and are not confined to Member States marked by semi-authoritarian tendencies.<sup>496</sup>

An outstanding example is the criminalization of activities by humanitarian actors to rescue migrants in distress at sea by EU Member State authorities. While this is not an entirely new phenomenon,<sup>497</sup> since the end of 2016, Italy, Greece, and Malta have increased their efforts to de-legitimize and criminalize Search and Rescue (SAR) operations in the Mediterranean Sea conducted by NGOs, most notably through measures such as the seizure of rescue ships,<sup>498</sup>

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<sup>492</sup> J.W. Müller, *What Is Populism?* (2016), at 28.

<sup>493</sup> European Parliament, *Shrinking space for civil society: the EU response*, Study (2017), available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578039/EXPO\\_STU\(2017\)578039\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578039/EXPO_STU(2017)578039_EN.pdf); FRA, *Challenges facing civil society organisations working on human rights in the EU*, Report (2017), at 18, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-challenges-facing-civil-society\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf).

<sup>494</sup> Council of Europe: Commissioner for Human Rights, *The Shrinking Space for Human Rights Organisations*, Statement (2017), available at <https://www.coe.int/mk/web/commissioner/-/the-shrinking-space-for-human-rights-organisations>.

<sup>495</sup> For an overview: S. Carrera, V. Mitsilegas, J. Allsopp and L. Vosyliūtė, *Policing humanitarianism: EU policies against human smuggling and their impact on civil society* (2019); Amnesty International, *Europe: Punishing compassion: Solidarity on trial in Fortress Europe*, 3 March 2020, available at <https://www.amnesty.org/download/Documents/EUR0118282020ENGLISH.PDF>.

<sup>496</sup> For example, in spring 2019, the German Ministry of Interior proposed in its first draft of a new legislation (*Geordnete-Rückkehr-Gesetz*) to introduce a provision that would have allowed punishing those who publish or disseminate deportation dates with up to three years imprisonment. Similarly, humanitarian organizations would have been criminalized if they informed irregular migrants about identification measures. The project was only dropped following massive protest from civil society and the Council of Europe’s Commissioner for Human Rights. See <https://rm.coe.int/letter-to-andrealindholz-%20%20chairwoman-of-the-committee-on-internal-affa/168094799d>.

<sup>497</sup> For an early example, see the 2004 *Cap Anamur* boat incident: Cuttitta, ‘Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean’, 23 *Geopolitics* (2018) 632.

<sup>498</sup> For further references, see S. Carrera et al., *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update* (2018), at 69 et seq. and 107, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL\\_STU\(2018\)608838\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf).

the imposition of a binding ‘code of conduct’ for SAR NGOs in August 2017 by the Italian government,<sup>499</sup> and the actual criminal prosecution of humanitarian actors for their rescue activities.<sup>500</sup> By 2019, most of the SAR vessels operated by NGOs or private actors since 2016 had been either seized or had ceased activity due to political pressure and legal prosecution of their crews.<sup>501</sup>

Other instances of the criminalization of migrants’ Human Rights defenders can be observed in semi-authoritarian EU Member States like Hungary. Notably, severe restrictions were imposed on Hungarian civil society organizations with the 2017 so-called ‘Stop Soros’ legislation – which, among other things, requires every NGO in Hungary to register as an ‘organisation receiving foreign funds’ once a certain threshold of donations is reached<sup>502</sup> – being subject of an infringement procedure before the CJEU.<sup>503</sup> More specifically directed against migrants’ Human Rights defenders, a 2018 modification of the Hungarian Criminal Code ensures that criminal sanctions can be imposed on NGOs and individuals providing legal or other types of aid to migrants arriving at Hungarian borders; a new provision of the Hungarian Criminal Code was introduced that criminalizes ‘facilitating illegal immigration’ by extending already existing prohibitions to a wide range of organizational activities related to migration.<sup>504</sup> According to an official press statement issued by the Hungarian government, this was to be regarded as a ‘strong action’ directed ‘against the organisers of migration’.<sup>505</sup> While a complaint against the new law was rejected by the Hungarian Constitutional Court in February 2019,<sup>506</sup> the European

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<sup>499</sup> *Ibid.*, at 68.

<sup>500</sup> *Ibid.*, at 69 et seq. and 107; see also: Global Legal Action Network, ‘Case filed against Greece in Strasbourg Court over Crackdown on Humanitarian Organisations’, Press statement, 18 April 2019, available at <https://www.glanlaw.org/single-post/2019/04/18/Case-filed-against-Greece-in-Strasbourg-Court-over-Crackdown-on-Humanitarian-Organisations>.

<sup>501</sup> For an overview, see FRA, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations: 2018 (2018), available at <https://fra.europa.eu/en/publication/2018/ngos-sar-activities>; FRA, 2019 update: NGO ships involved in search and rescue in the Mediterranean and criminal investigations (2019), available at <https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities>.

<sup>502</sup> An unofficial English translation of the ‘Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds’ by the Hungarian Helsinki Committee is available at <https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>.

<sup>503</sup> CJEU, Case C-78/18, *Commission v. Hungary* (transparency of associations) (EU:C:2020:476); see also the Opinion of Advocate General Campos Sánchez-Bordona (ELIC:EU:C:2020:1).

<sup>504</sup> Alongside the new Art. 353/A of Act C of 2012 of the Hungarian Criminal Code, a subheading ‘Facilitating illegal immigration’ was introduced.

<sup>505</sup> Hungarian Government, ‘Strong Action is Required Against the Organisers of Migration’, 24 May 2018, available at <http://www.kormany.hu/en/news/strong-action-is-required-against-the-organisers-of-migration>.

<sup>506</sup> Hungarian Constitutional Court, Decision 3/2019 on the Support of Illegal Immigration, 28 February 2019, available at [https://hunconcourt.hu/uploads/sites/3/2019/05/3\\_2019\\_en\\_final.pdf](https://hunconcourt.hu/uploads/sites/3/2019/05/3_2019_en_final.pdf). Cf. also: Kazai, ‘Stop Soros Law Left on the Books: The Return of the “Red Tail”’, *Verfassungsblog* (2019), available at <https://verfassungsblog.de/stop-soros-law-left-on-the-books-the-return-of-the-red-tail/>

Commission initiated an infringement procedure and in July 2019 decided to refer Hungary to the CJEU concerning this legislation also.<sup>507</sup>

## Trend 2: Populist pressure on judges protecting the rights of migrants

We also observe a trend in several Member States of growing public pressure on judges in charge of asylum and other migration law cases to take a restrictive approach and to deny applicants an adequate level of Human Rights protection. This development may be observed particularly in Member States marked by strong populist movements – either governing the Member States or as an influential faction of the opposition.

Populist pressure on the independence of the judiciary extends across a continuum and takes various forms, reaching from rather diffuse exertion of political influence to the defamation of critical judges through ‘smear campaigns’, and the selective and arbitrary application of legal provisions to actual institutional reforms. Some Member States have also formally limited judicial independence. Enhanced political control – for example, by tightened disciplinary regimes for judges – undermine the guarantee of impartial and effective adjudication and protection of rights, including the effective application of EU law, thus threatening the stability of existing Human Rights and rule of law infrastructures.

In recent years, systemic and repeated assaults on the independence of the judiciary in general, and among the branches in charge of asylum and migration cases in particular, have become a prominent issue in a number of EU Member States, such as Bulgaria, Hungary, Poland, and Romania. These assaults are often identified as an essential ingredient of what is frequently referred to as the ‘rule of law crisis’ in some EU Member States.<sup>508</sup>

Examples of this trend are numerous. For instance, since December 2015, Poland has passed a large number of legislative acts on judicial reform, leading the European Commission, as early as in January 2016, to activate the so-called rule of law framework for the very first time.<sup>509</sup> According to the Commission, the Polish reforms pose ‘systemic threats’ to the rule of law.<sup>510</sup> One example of the large number of problematic legislative acts on the matter<sup>511</sup> is

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<sup>507</sup> European Commission, ‘Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones’, Press release, 25 July 2019, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4260](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260).

<sup>508</sup> For an overview, see C. Cloas and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (2016).

<sup>509</sup> European Commission, ‘Rule of law in Poland: Commission starts dialogue’, Press release, 13 January 2016, available at [https://ec.europa.eu/commission/presscorner/detail/en/WM\\_16\\_2030](https://ec.europa.eu/commission/presscorner/detail/en/WM_16_2030).

<sup>510</sup> European Commission, ‘Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court’, Press release, 24 September 2018, available at [http://europa.eu/rapid/press-release\\_IP-18-5830\\_en.pdf](http://europa.eu/rapid/press-release_IP-18-5830_en.pdf).

<sup>511</sup> Other examples include:

- the 2017 Law on the National School of Judiciary, allowing among other things assistant judges – without being subject to Constitutional guarantees protecting judicial independence – to act as single judges in district courts (Law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organization and certain other laws, published in Polish Official Journal on 13 June 2017, in force since 20 June 2017);

Poland's 2018 Law on the Supreme Court,<sup>512</sup> lowering the retirement age and applying it to current Supreme Court judges, thus terminating the mandate of more than a third of serving judges, as well as establishing a new disciplinary regime for Supreme Court judges, among other things. The law was partly reversed later in 2018 following interim relief by the CJEU.<sup>513</sup>

Similar developments concern the independence of the judiciary and the rights of judges in Hungary. As early as 2011, a controversial law lowered the retirement age of Hungarian judges and other legal professionals, removing judges, prosecutors, and notaries from office – this law was later determined to be unlawful by the CJEU for infringing the Equal Treatment Directive.<sup>514</sup> Further concerns over violations of the rule of law led the European Parliament in September 2018 to propose the activation of a breach of value procedure (Art. 7 TEU procedure; see section 7.2.4 for details) against Hungary.<sup>515</sup> The Hungarian government argued that this step was an act of 'revenge' by 'pro-immigration politicians' reacting to Hungary's stance on migration.<sup>516</sup> Additionally, two laws<sup>517</sup> passed in December 2018 were intended to create a separate administrative court system in Hungary as of 1 January 2020, in charge of asylum cases but also of cases concerning elections or freedom of assembly, and placed under the supervision of the Minister of Justice. However, following heavy criticism, in mid-2019 the reform was suspended indefinitely.<sup>518</sup> At about the same time, the initiation of disciplinary proceedings in 2019 against a Hungarian judge for referring questions to the CJEU, supposed to

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- the 2017 Law on Ordinary Courts Organization, reducing the retirement age of ordinary judges while giving the Minister of Justice the power to decide on the prolongation of judicial mandates, among other things (Law amending the law on the Ordinary Courts Organization, published in the Polish Official Journal on 28 July 2017, in force since 12 August 2017);
  - the 2018 Law on the National Council on the Judiciary, providing for the premature termination of the mandate of all judges-members of that Polish institution and, by establishing a new regime for the appointment of its judges-members, guaranteeing strong political influence (Law amending the law on the National Council for the Judiciary and certain other laws of 8 December 2017, published in the Polish Official Journal 2018, item 3, entry into force in March 2018);
  - the 2018 Supreme Court Act, constituting the basis for the jurisdiction of a Disciplinary Chamber of the Supreme Court (Law of 8 December 2017, Official Journal 2018, item 5), meanwhile suspended by interim order of the CJEU, C-791/19, *Commission v. Poland* (ECLI:EU:C:2020:277);
  - the yet not ratified Polish judicial disciplinary panel law, among other things prohibiting any political activity of judges, obliging them to publicly disclose membership in associations and introducing new disciplinary offences and sanctions in respect of judges (Law adopted by the lower house of the Polish parliament (*Sejm*) on 20 December 2019).

<sup>512</sup> Law on the Supreme Court (*Ustawa o Sądzie Najwyższym*) of 8 December 2017, Polish Official Journal 2018, item 5, which entered into force on 3 April 2018.

<sup>513</sup> CJEU, Case C-619/18, *Commission v. Poland* (ECLI:EU:2018:852), in French.

<sup>514</sup> CJEU, Case C-286/12, *Commission v. Hungary* (ECLI:EU:C:2012:687).

<sup>515</sup> European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, available at [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html?redirect).

<sup>516</sup> R. Staudenmaier, 'EU Parliament votes to trigger Art. 7 sanctions procedure against Hungary', Deutsche Welle, broadcasted on 12 September 2018, available at <https://p.dw.com/p/34k9l>.

<sup>517</sup> Act on Public Administration Courts and Act on the Coming into Force of the Act on Public Administration Courts and Certain Transitional Regulations, both adopted by the National Assembly on 12 December 2018.

<sup>518</sup> Hungarian Government: Ministry of Justice, 'Government to postpone the coming into force of the Act on Public Administration Courts', Press release, 30 May 2019, available at

have a ‘chilling effect’ on other judges in terms of discouraging them from fully applying EU and Human Rights law,<sup>519</sup> furnishes yet another example of the multiple faces of the rule of law crisis.

Despite the trend just described, we also notice that a considerable number of judges in the countries most affected by populist assaults on the independence of the judiciary resist the pressure. One means by which they draw attention to these developments, and seek to restore the rule of law in their respective countries, is referring questions to the CJEU, indicated for example by the multitude of preliminary references to the CJEU by Polish and Hungarian courts in recent years.<sup>520</sup>

Notably, cases of assaults on judicial independence and the rule of law are not limited to one particular group of EU Member States. For example, in a case widely discussed by the German public in 2018, a Tunisian national living in Germany for more than a decade and suspected of posing a threat to public security was deported to Tunisia despite a pending urgent preliminary ruling procedure and concerns of the administrative court of first instance that the deportee could face torture in his home country. The Higher Administrative Court of North Rhine-Westphalia later ruled that the deportation was ‘evidently unlawful’ and that the behavior of the ministry of the State of North Rhine-Westphalia involved in the case – namely, the admittedly deliberate concealment of the deportation date despite request of the administrative court of first instance – was ‘incompatible with the rule of law and the separation of powers’.<sup>521</sup>

### Trend 3: Challenges to the ECHR as a guardian of migrants’ Human Rights

We furthermore observe a tendency in Europe to challenge the relevance and legitimacy of the ECHR in its interpretation by the ECtHR. This trend comes in a variety of forms.

First, the development concerns the domestic implementation of ECtHR judgments in Member States. There has been a certain reluctance in the past years to fully implement ECtHR decisions, leading inter alia to a high number of ‘repetitive cases’ hindering the effective work of the Court.<sup>522</sup> In a similar vein, efforts were made to limit the ambit of ECtHR decisions by

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<https://www.kormany.hu/en/ministry-of-justice/news/government-to-postpone-the-coming-into-force-of-the-act-on-public-administration-courts>. For an example of the criticism, see the report of the Venice Commission from 19 March 2019 on the legislative acts (Opinion no. 943/2018), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e).

<sup>519</sup> Hungarian Helsinki Committee, Disciplinary Action Threatens Judge for Turning to EU Court of Justice, Statement, 7 November 2019, available at <https://www.helsinki.hu/en/disciplinary-action-threatens-judge-for-turning-to-cjeu/>.

<sup>520</sup> See Bárd, ‘Luxemburg as the Last Resort’, *Verfassungsblog* (2019), available at <https://verfassungsblog.de/luxemburg-as-the-last-resort/>.

<sup>521</sup> Higher Administrative Court of North Rhine-Westphalia (*Oberverwaltungsgericht Nordrhein-Westfalen*), Decision of 15 August 2018 (17 B 1029/18).

<sup>522</sup> On this problem, see Council of Europe: Committee of Ministers, Supervision of the execution of judgments and decisions of the European Court of Human Rights 2018: 12<sup>th</sup> Annual Report, April 2019, at 13, available at <https://rm.coe.int/annual-report-2018/168093f3da>. Repetitive cases – those cases ‘relating to a structural and/or general problem already raised before the Committee in the context of one or several leading cases’ (at 91) – account for the vast majority of new cases coming to the Court – in 2018, 88 % of the 1272 new

stressing the focus on the particular context of the Court's decisions.<sup>523</sup> These developments concern not only specific Member States but have been described as a wider European trend of 'principled resistance' to the ECHR and the full implementation of ECtHR judgments.<sup>524</sup>

At the same time, the overloading and resulting backlog of cases waiting to be heard by the ECtHR, and the length of proceedings, further weakens the impact of the Court; justice delivered too late often does not have substantial influence on domestic discourse, and governments may even take into account the considerable delay when resorting to temporary practices of questionable conformity with Convention rights, knowing that measures may already be completed by the time the ECtHR renders a decision.

Beyond these questions of implementation of ECtHR decisions, there have also been Member State initiatives – particularly during the so-called Interlaken reform process (2010–2019) – to change the architecture and legal basis of the ECHR and ECtHR itself – for example, by strengthening the principle of subsidiarity. Most notably, in 2018 Denmark intended to massively limit the competence of the ECtHR in asylum and immigration cases to 'the most exceptional circumstances'.<sup>525</sup>

## 7.2 Legal evaluation

### 7.2.1 General legal framework regarding Human Rights infrastructure

Duties to provide for functioning and effective institutions and mechanisms to protect Human Rights already follow as an annex or logical implication from all substantive guarantees of Human Rights in international law, as discussed in the previous chapters. As normative principles always depend on certain structures and institutions to take effect, these principles presuppose a legal and political endorsement of Human Rights infrastructures. For example, due respect for the Human Right to non-refoulement requires a functioning administration to assess claims of protection as well as a judiciary to examine and correct possible breaches of this right by state officials.

In light of this inference, it comes as no surprise that explicit provisions specifically referring to institutional aspects of the protection of Human Rights are rather sparse in international law. The concrete shaping of these institutions is often regarded as a prerogative of States, so long as the substantive Human Rights guarantees are (somehow) implemented. However, some abstract (re-)statements of the obligations of States to render Human Rights effective as well

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cases were classified as repetitive cases (at 52). Several EU Member States (Bulgaria, Greece, Hungary, Italy and Romania) are among the main states with cases under 'enhanced supervision' (at 71).

<sup>523</sup> Federal Constitutional Court of Germany (*Bundesverfassungsgericht*), Judgment of 12 June 2018 (2 BvR 1738/12).

<sup>524</sup> M. Breuer (ed.), *Principled Resistance to ECtHR Judgments: A New Paradigm?* (2019).

<sup>525</sup> See, e.g., the draft Copenhagen Declaration, 5 February 2018, para. 26, available at [https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft\\_copenhagen\\_declaration\\_05.02.18.pdf](https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf). This was, however, defused in the final version of the Copenhagen Declaration 2018, available at [https://www.echr.coe.int/Documents/Copenhagen\\_Declaration\\_ENG.pdf](https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf).



as more specific provisions can be found in international law and in EU law, including provisions of soft law.

The preamble of the UDHR recalls the pledge of States to the ‘promotion’ of the observance of Human Rights under the UN Charter, as does the preamble to the ICCPR to the very same ‘obligation’ of States. States Parties to the ICCPR are also required to ‘give effect’ to the rights under the Covenant by domestic legislation or other measures; importantly, they must provide for effective remedies before ‘competent authorities’, having the power to enforce such remedies when granted (Art. 2 ICCPR). The UN Human Rights treaties also stipulate certain procedures before treaty bodies (such as the Human Rights Committee or the Committee against Torture) to monitor the observance of Human Rights by States Parties. Most importantly, the treaties oblige States Parties to submit periodic reports on the implementation of their treaty obligations (States Parties’ Reports; see, e.g., Art. 40 ICCPR, Art. 16 ICESCR, Art. 19 CAT, Art. 44 CRC) while a number of treaties also provide for individual complaints procedures (e.g., First Optional Protocol to the ICCPR, Art. 22 CAT, Optional Protocol to CRC on a communications procedure).

In a similar vein, Art. 1 ECHR obliges the Contracting Parties to ‘secure’ the substantive rights enshrined in the Convention. Effective remedies for violations of Convention rights have to be provided before national authorities (Art. 13 ECHR), and the ECtHR in Strasbourg is vested with the power to receive individual applications from victims of Human Rights violations (Art. 34 ECHR). Other Human Rights treaties in the framework of the Council of Europe – such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which provides the legal basis for the work of the Committee for the Prevention of Torture (CPT) – are also essential to the Human Rights infrastructure.

The States committed to implement the Global Compact for Migration promise to ‘ensure’ the ‘effective respect for and protection and fulfilment of the human rights of all migrants’ (GCM, Recital 15(f)), while the Global Compact on Refugees urges States to do likewise (GCR, para. 9). A more specific catalog of the rights of civil society agents in defense of Human Rights was provided by the UN General Assembly in the 1998 Declaration on Human Rights Defenders.

The interconnectedness of the Human Rights regime and the respect for the rule of law has already been discussed (see Chapter 3). Respect for the rule of law and for judicial independence is a prerequisite for Human Rights protections to become alive and effective. As early as 1948, the preamble of the UDHR stated that it was ‘essential’ for Human Rights to be ‘protected by the rule of law’. More recently, the GCM and GCR have reaffirmed the importance of the rule of law, the former by stating that it is ‘fundamental to all aspects of migration governance’ (cf. GCM, Recital 15(d); GCR, para. 9).

Particular significance has always been attributed to the rule of law in the framework of the Council of Europe. Its importance was acknowledged by references in the preambles to the

1949 Statute of the Council of Europe<sup>526</sup> and to the ECHR. Furthermore, the Statute of the 1990 European Commission for Democracy through Law ('Venice Commission') – an advisory body of the Council of Europe, which provides politically important (though not legally binding) opinions on constitutional law – refers to the rule of law as a priority objective.<sup>527</sup>

The commitment to both effective Human Rights protections and the rule of law is mirrored in the EU Treaties. Human Rights and the rule of law are not only referred to in the preamble to the TEU but characterized as foundational values of the Union and its Member States in Art. 2 TEU. The preamble of the EU-CFR repeats that the Union is 'based' on the rule of law and not only affirms the Convention from the ECHR but even explicitly embraces the case-law of the ECtHR. The Charter furthermore gives specific meaning to the rule of law as providing for the right to good administration (Art. 41 EU-CFR) and to an effective remedy (Art. 47 EU-CFR). The latter also follows from the TFEU, which obliges Member States to ensure effective legal protection through sufficient remedies in the fields governed by EU law (Art. 19(1) TFEU).

### **7.2.2 Specific issue: Criminalization of private actors involved in SAR activities and other migrants' Human Rights defenders in civil society**

Providing search and rescue (SAR) – that is, assistance to people in distress at sea – is a duty of all states and shipmasters under international law. This duty to SAR follows from a number of provisions of international law, most notably the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1979 International Convention on Maritime Search and Rescue (SAR Convention), and the 1982 UN Convention on the Law of the Sea (UNCLOS). Shipmasters both of private and governmental vessels are obliged to assist those in distress at sea, irrespective of their nationality, status, or the circumstances in which they were found (Art. 98(1) UNCLOS; Annex 2.1.10 to the SAR Convention).

The criminalization of NGOs<sup>528</sup> and other private actors conducting SAR operations, including the seizure of SAR vessels, thus constitutes a violation of international law as it prohibits the fulfillment of the duties mentioned above. There is, arguably, even a positive obligation of EU Member States bordering the Mediterranean Sea to actively conduct SAR in order to assist people in distress at sea.<sup>529</sup> Following this assumption, the failure to do so would constitute a first rights violation (by omission) while the hindrance of private SAR activity would constitute

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<sup>526</sup> Art. 3 of the Statute makes respect for the principle of the Rule of Law even a precondition for accession of new member States to the Organisation.

<sup>527</sup> Art. 1 Revised Statute of the European Commission for Democracy through Law, Resolution (2002)3, 21 February 2002, available at [https://www.venice.coe.int/WebForms/pages/?p=01\\_01\\_Statute](https://www.venice.coe.int/WebForms/pages/?p=01_01_Statute).

<sup>528</sup> On the important role of NGOs as 'entities acting in the collective interest of European civil society', see P. Staszczuk, *A Legal Analysis of NGOs and European Civil Society* (2019).

<sup>529</sup> This may follow from Art. 98(2) UNCLOS; see A. Farahat and N. Markard, *Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility*, February 2020, at 37 et seq., available at <https://eu.boell.org/en/2020/02/18/places-safety-mediterranean-eus-policy-outsourcing-responsibility>. On disembarkation, see also Chapter 1 of this study.

a second violation. UNHCR,<sup>530</sup> the European Parliament,<sup>531</sup> and the FRA<sup>532</sup> come to similar conclusions, asking EU Member States to prevent humanitarian assistance in SAR from being criminalized.

The criminalization of civil society Human Rights defenders assisting migrants in distress at sea, as well as those more generally assisting migrants who try to enter EU territory irregularly, is also out of alignment with the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 Palermo Convention against Transnational Organised Crime. The Protocol defines ‘smuggling of migrants’ as ‘procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’.<sup>533</sup> As an *argumentum a contrario*, one may infer that support of irregular migration in the case of an altruistic motivation does not amount to ‘smuggling’ and, thus, is to be exempted from criminalization.

The criminalization of SAR activities and other forms of altruistic assistance for irregular migration is also contrary to the UN Declaration on Human Rights Defenders. According to this Declaration, ‘everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of Human Rights and fundamental freedoms at the national and international levels’ (Art. 1 Declaration on Human Rights Defenders). The Declaration also protects the right of individuals and associations of individuals to ‘participate in peaceful activities against violations of Human Rights and fundamental freedoms’ (Art. 12(1) of the Declaration). In this regard, ‘everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights’ (Art. 12(3) of the Declaration).

Despite these provisions, EU law not only fails to outlaw criminalization of humanitarian actors but even buttresses such measures, most notably by way of the Facilitation Directive (Directive 2002/90/EC).<sup>534</sup> This Directive, as it stands, asks Member States to sanction ‘any person who intentionally assists a person who is not a national of a Member State to enter, or transit

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<sup>530</sup> UNHCR, General legal considerations: Search-and-rescue operations involving refugees and migrants at sea (2017), available at <https://www.refworld.org/docid/5a2e9efd4.html>.

<sup>531</sup> European Parliament, Guidelines for Member States to prevent humanitarian assistance from being criminalized, Resolution of 5 July 2018, P8\_TA(2018)0314, available at [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0314\\_EN.pdf?redirect](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0314_EN.pdf?redirect).

<sup>532</sup> FRA, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations: 2018 (2018), available at <https://fra.europa.eu/en/publication/2018/ngos-sar-activities>; FRA, 2019 update: NGO ships involved in search and rescue in the Mediterranean and criminal investigations (2019), available at <https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities>.

<sup>533</sup> Art. 3 UN Protocol against the Smuggling of Migrants; see also the enumeration of certain criminal acts enabling the smuggling of migrants in Art. 6 UN Protocol against the Smuggling of Migrants.

<sup>534</sup> Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (Facilitation Directive). On this matter, see also Ghezelbash, Moreno-Lax, Klein and Opeskin, ‘Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia’, 67(2) *International and Comparative Law Quarterly* (2018) 315, at 347 et seq.

across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens' (Art. 1(1)(a) Facilitation Directive), while leaving it up to the Member States' discretion to refrain from such sanction 'where the aim of the behaviour is to provide humanitarian assistance to the person concerned' (Art. 1(2) Facilitation Directive).

The EU's definition of facilitation of entry and transit in the Directive thus suffers from two main deficiencies: it does not insist on any requirement of 'financial or other material benefit' nor does it oblige Member States to exempt 'humanitarian assistance' from the definition, but, on the contrary, leaves discretion to Member States to decide whether they want to criminalize humanitarian actors.<sup>535</sup> The wide concept of the Facilitation Directive, leaving the option to encompass humanitarian actors, is thus also contrary to the UN Smuggling Protocol (see above).

In the absence of a reform of the Facilitation Directive to introduce an explicit exemption for humanitarian assistance, Member States, when making use of their discretionary power, are required to interpret the law as it stands in conformity with international Human Rights law, and thus should not criminalize anybody for rescuing persons in distress or for supporting immigration in other ways driven by an altruistic motivation. However, this obligation of EU Member States does not obliterate the EU's accountability for reiterating and specifying these duties on the level of EU law (see above, introductory chapter). The 'Guidance' on the implementation of the Facilitation Directive issued by the European Commission in 2020 in this respect is insufficient as it is not legally binding.<sup>536</sup>

### 7.2.3 Specific issue: Requirements to strengthen migrants' Human Rights defenders

The positive obligation on the part of the EU to foster Human Rights by supporting civil society actors in Member States defending the rights of migrants is of a very general nature. Nevertheless, the EU is accountable for such support within the scope of its powers. The EU's general commitment to Human Rights implies obligations to support such measures as are necessary to render Human Rights effective (see section 7.2.1 above).

These obligations have been specified in a number of documents. Notably, the 1998 UN Declaration on Human Rights Defenders states the duty of States to effectively guarantee the rights of civil society engaged in the defense of Human Rights through, inter alia, appropriate

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<sup>535</sup> S. Carrera et al., *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants* (2016), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf); S. Carrera et al., *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update* (2018), at 106, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL\\_STU\(2018\)608838\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf).

<sup>536</sup> European Commission, Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, 23 September 2020, C(2020) 6470, available at [https://ec.europa.eu/info/sites/info/files/commission-guidance-implementation-facilitation-unauthorised-entry\\_en.pdf](https://ec.europa.eu/info/sites/info/files/commission-guidance-implementation-facilitation-unauthorised-entry_en.pdf).

legislative and administrative acts (Art. 2(1) of the Declaration on Human Rights Defenders) in general and, for example, by promoting and facilitating the teaching of Human Rights at all levels of education, such as the training of lawyers, law enforcement officers and public officials (Art. 15 of the Declaration). A UN Special Rapporteur on the situation of Human Rights defenders monitors the implementation of the Declaration.<sup>537</sup> A 2008 Declaration by the Committee of Ministers of the Council of Europe reaffirms the importance of the 1998 UN Declaration and, among other things, calls on Council of Europe Member States to ‘take effective measures to prevent attacks on or harassment of human rights defenders’, to ‘take effective measures to protect, promote and respect Human Rights defenders and ensure respect for their activities’ and to provide for a legal basis to enable individual or associated Human Rights defenders ‘to freely carry out activities’.<sup>538</sup>

These requirements are mirrored and specified in EU law. While the general obligation to protect and promote Human Rights is stated in Art. 2 TEU (see above), numerous provisions, institutions and programs establish, or require, specific measures. Interestingly, the 2004 EU Guidelines on Human Rights Defenders<sup>539</sup> endorse the UN Declaration on Human Rights Defenders but focus on the supports for Human Rights defenders *outside* the EU as, at the time, this was regarded as an issue of external relations policy. More importantly, the mandate of the FRA, according to its founding Regulation, requires the Agency to ‘closely cooperate with non-governmental organisations and with institutions of civil society, active in the field of fundamental rights’ within the framework of the Fundamental Rights Platform as a cooperation network (Art. 10(1) FRA Regulation).

#### 7.2.4 Specific Issue: Obligations and options to ensure the independence of judges deciding on migration law cases

As to the populist pressure on judges protecting the rights of migrants and the more general rule of law crisis in a number of EU Member States identified in the first section of this chapter,

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<sup>537</sup> The mandate was established in 2000 by the UN Commission on Human Rights Resolution 2000/61 and renewed by the UN Human Rights Council Decision 43/115 in 2020.

<sup>538</sup> Council of Europe: Committee of Ministers, Declaration on Council of Europe action to improve the protection of human rights defenders and promote their activities, adopted on 6 February 2008, available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d3e52](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d3e52). In a similar vein, the 2014 OSCE Guidelines on the Protection of Human Rights Defenders identify the right to defend human rights as a ‘universally recognized right’, requiring states not only to refrain from acts that violate the rights of human rights defenders because of their work and to protect human rights defenders from abuses by third parties but also to take ‘proactive steps’ to promote the full realization of the rights of human rights defenders, available at <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders>.

<sup>539</sup> Council of the EU, Ensuring Protection: European Union Guidelines on Human Rights Defenders, 10056/1/04, 14 June 2004, available at <https://www.refworld.org/docid/4705f6762.html>. On the lack of implementation of the guidelines: European Parliament, Resolution of 17 June 2010 on EU policies in favour of human rights defenders, 2009/2199(INI), available at <https://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0226>.

legal questions arise both in respect of identifying the legal obligations and in relation to the EU's options for responding to such rule of law deficits.

Legal definitions of the exact meaning of the rule of law are rare and it remains notoriously contested as a concept, with the rule of law, *Rechtsstaat* or *État de droit* understood differently in each EU Member State due to different constitutional traditions. However, a comprehensive definition is not needed for the present purposes (the assessment of Member State challenges to an independent judiciary) and it may be sufficient here to state that, among other important elements such as legality (understood as supremacy of law), there is a solid consensus that access to justice before impartial and independent courts constitutes an indispensable requirement for the rule of law.<sup>540</sup>

While the importance of the rule of law is reaffirmed in numerous documents of international law (see section 7.2.1), it is frequently referred to in preambles in a rather general way, so that its legal status often remains questionable. Specific and legally binding obligations concerning the rule of law are rather scarce in international law. The rights to a fair trial and to a fair procedure, enshrined in Art. 6 and 13 ECHR, are important exceptions in this respect and protect essential parts of the rule of law (for details on these provisions, see Chapter 3).

As to dealing with the rule of law crisis in a number of EU Member States of the past years, rule of law guarantees in primary EU law have proven to be of paramount importance, most notably the recognition of the rule of law as a foundational value (Art. 2 TEU) and the substantive provisions in Art. 41 and 47 EU-CFR and Art. 19(1) TFEU (see above, 7.2.1). For example, regarding Poland's 2018 Law on the Supreme Court, mentioned in section 7.2.1 above,<sup>541</sup> the CJEU has confirmed that the lowering of the retirement age for Polish Supreme Court judges undermines, where serving judges are affected, the principle of irremovability of judges and judicial independence and, thus, infringes EU law (second subparagraph of Art. 19(1) TEU).<sup>542</sup> The compulsorily retired Supreme Court judges were reinstated in late 2018, following interim measures ordered by the CJEU.<sup>543</sup>

However, Art. 19(1) TEU (requiring sufficient remedies for effective legal protection), as well as Art. 41 EU-CFR (right to good administration) and Art. 47 EU-CFR (right to an effective remedy), have only a limited scope of application. They oblige Member States only 'in the fields covered by Union law' (Art. 19(1) TEU) or 'when they are implementing Union law' (Art. 51 EU-

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<sup>540</sup> See, e.g., the definitions by the European Commission and the Venice Commission: European Commission, Further strengthening the Rule of Law within the Union: State of play and possible next steps, COM(2019) 163 final, 3 April 2019, at 1; Venice Commission, Report on the rule of law, CDL-AD(2011)003rev, 25–26 March 2011, at 10, available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e).

<sup>541</sup> Law on the Supreme Court (*Ustawa o Sądzie Najwyższym*) of 8 December 2017, Polish Official Journal 2018, item 5, which entered into force on 3 April 2018.

<sup>542</sup> CJEU, C-619/18, *Commission v. Poland* (EU:C:2019:531).

<sup>543</sup> CJEU, C-619/18, *Commission v. Poland* (EU:C:2018:852), in French.

CFR) respectively. As these limitations do not apply to Art. 2 TEU, the actual status of the foundational values enshrined in this provision – and among them the rule of law – is of great importance and needs further concretization. This, however, is beyond the focus of this study.<sup>544</sup>

When it comes to the rule of law, procedural aspects may be as important as substantive guarantees. There is already a wide array of different procedures to protect the rule of law in EU Member States.<sup>545</sup> Most important among these are infringement proceedings (Art. 258 TFEU), preliminary references from national courts (Art. 267 TFEU), and breach of value procedures (Art. 7(1) and (2) TEU procedures), possibly leading to the suspension of certain (e.g., voting) rights of the Member State concerned. These are supplemented by the EU Justice Scoreboard monitoring instrument,<sup>546</sup> the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania,<sup>547</sup> and the 2014 European Commission Framework for addressing systemic threats to the rule of law in any of the Member States, allowing for a staged dialogue with the States affected.

Despite this arsenal of different instruments, their application by the EU in response to the rule of law crisis has sometimes been described as ‘too late, too long, too mild’<sup>548</sup>. Some have criticized the idea of a staged dialogue as part of the pre-Art. 7 TEU procedure as ineffective, particularly in comparison with infringement proceedings and preliminary references. However, the Art. 7 TEU procedure may be the most appropriate legal instrument to respond to a ‘systemic deficiency’<sup>549</sup> such as the challenge of judicial independence in a Member State, while infringement proceedings and preliminary references may be very helpful as an auxiliary thereto, as well as in dealing with more particular cases.

In a wider political context, however, further consequences could be considered. One option is the limitation of the amount allocated to Member States in question under the long-term

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<sup>544</sup> On their applicability and primacy, see von Bogdandy and Spieker, ‘Countering the Judicial Silencing of Critics: Art. 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges’, 15 *European Constitutional Law Review (EuConst)* (2019) 391; for a short version, see von Bogdandy and Spieker, ‘Countering the Judicial Silencing of Critics: Novel Ways to Enforce European Values’, *Verfassungsblog* (2019), available at <https://verfassungsblog.de/countering-the-judicial-silencing-of-critics-novel-ways-to-enforce-european-values/>.

<sup>545</sup> For an overview, see European Parliament, Protecting the rule of law in the EU: Existing mechanisms and possible improvements, Briefing (2019), available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS\\_BRI\(2019\)642280\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI(2019)642280_EN.pdf).

<sup>546</sup> European Commission, EU Justice Scoreboard, available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en).

<sup>547</sup> European Commission, Cooperation and Verification Mechanism for Bulgaria and Romania, available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en).

<sup>548</sup> Kustra-Rogatka, ‘The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism’, *Verfassungsblog* (2019), available at <https://verfassungsblog.de/the-rule-of-law-crisis-as-the-watershed-moment-for-the-european-constitutionalism/>.

<sup>549</sup> von Bogdandy, ‘Tyranei der Werte? Herausforderungen und Grundlagen einer europäischen Dogmatik systemischer Defizite’, 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2019) 503.

budget. Another option could be to enable the Commission to suspend the disbursement of certain funds already agreed on. However, such methods, which may be regarded as punitive, could only be measures of last resort, would have to strictly observe the principle of proportionality, and would still entail heavy political risks for European cohesion.

## 7.3 Recommendations

### **Recommendation 1: Strengthen migrants' Human Rights defenders by amending the Facilitation Directive and adopting consistent EU supporting policies**

The criminalization of civil society SAR activities is contrary to the international law of the sea and to the UN Declaration on Human Rights Defenders. It is also incompatible with the Union's commitment to protect Human Rights. We therefore recommend the EU to develop consistent support policies for NGOs and other civil society actors engaged in defending migrants' Human Rights. These measures should encompass both protection from and support against attacks from Member State governments as well as positive assistance, such as funding, training, and fostering information exchange.

As a first and necessary step, the EU should decriminalize rescue operations of civil society actors and amend the Facilitation Directive 2002/90 accordingly. Art. 1(1)(a) and Art. 1(2) of this Directive currently do not insist on a requirement of 'financial or other material benefit' in defining the facilitation of entry or transit, and do not oblige Member States to exempt 'humanitarian assistance' but, rather, leave discretion to those States to decide whether to criminalize humanitarian actors. The exemption of humanitarian actors should be obligatory: it must not be an option for Member States to criminalize humanitarian assistance – which is contrary also to the definition of 'smuggling of migrants' in the UN Protocol against the Smuggling of Migrants.<sup>550</sup>

On a more operational level, the European Commission should also take a much clearer stance on the criminalization of activities of humanitarian actors by Member States. While the FRA has – albeit cautiously – addressed this issue in the past, implying a rejection of the criminalization of rescue operations in the Mediterranean Sea, the Commission has remained largely silent on the question in the context of, for example, the imposition of sanctions against the crews of NGO SAR vessels. This contradicts not only the general EU commitment to the protection of Human Rights as enshrined in Art. 2 TEU but also specific promises made by the Commission in 2013 in the aftermath of the Lampedusa tragedy: '*Shipmasters and merchant vessels* should be reassured once and for all that helping migrants in distress will not lead to sanctions of any kind and that fast and safe disembarkation points will be available. It has to

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<sup>550</sup> Art. 3 UN Protocol against the Smuggling of Migrants: 'procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.



be clear that, provided they are acting in good faith, *they would not face any negative legal consequences for providing such assistance.*<sup>551</sup> This declaration stands in sharp contrast with the subsequent silence and inactivity of the Commission regarding the persecution by Member States of humanitarian actors rescuing migrants in distress at sea.

As to positive measures, the FRA's Fundamental Rights Platform (FRP) already provides for a forum and network for cooperation with civil society organizations from across the EU.<sup>552</sup> As the FRA mandate encompasses capacity-building for civil society organizations, it should increase its efforts in those Member States in which humanitarian actors have come under the most severe political and legal pressure in recent years. A positive example of such support is the 2019 training of NGO lawyers in Hungary and from neighboring EU Member States with an external EU border, conducted by the FRA in cooperation with UNHCR.<sup>553</sup>

### **Recommendation 2: Take a firm stance on violations of EU migration law**

We recommend the EU take a firm stance on, and adopt a systematic approach to, violations of the EU asylum and immigration *acquis* in Member States. The EU should not tolerate political pressure on migration law judges in Member States. The independence of the judiciary in Member States is indispensable to guarantee the effective application of EU law in general, and the asylum and immigration *acquis* in particular. The independence and impartiality of the judiciary forms a cornerstone of the rule of law, as protected by various provisions of both international and EU law.

As the EU regards itself as a value-based community, a clear stance should be taken by its bodies on any developments in Member States undermining Human Rights infrastructures and the rule of law.<sup>554</sup> The European Commission should, therefore, thoroughly pursue ongoing infringement and Art. 7 TEU procedures regarding judicial reforms in Member States.

Additional measures linked to financial aspects of EU membership should also be considered – for example, permitting the Commission to suspend the disbursement of funds to the Member States concerned. In order to ensure that poorer regions do not disproportionately suffer from such measures, financial support could be directed away from governments and go directly to companies and other recipients or be disbursed by civil society organizations.<sup>555</sup>

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<sup>551</sup> European Commission, 'Lampedusa follow up: Concrete actions to prevent loss of life in the Mediterranean and better address migratory and asylum flows', Press release, 4 December 2013, available at [http://europa.eu/rapid/press-release\\_IP-13-1199\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1199_en.htm) (emphasis added).

<sup>552</sup> Art. 10 FRA Regulation; for further information on the Fundamental Rights Platform, see <https://fra.europa.eu/en/cooperation/civil-society>.

<sup>553</sup> FRA, 'Training NGO lawyers on the Schengen Borders Code and fundamental rights', Press release, 26 April 2019, available at <https://fra.europa.eu/en/news/2019/training-ngo-lawyers-schengen-borders-code-and-fundamental-rights>.

<sup>554</sup> For an overview, see C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (2016).

<sup>555</sup> J. Šelih, I. Bond and C. Dolan, *Can EU funds promote the rule of law in Europe?*, Policy Paper (2017), at 2, available at [https://cer.eu/sites/default/files/pbrief\\_structural\\_funds\\_nov17.pdf](https://cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf).

However, before any measure that could be interpreted as ‘punitive’ is taken, all possible effects and alternatives should be carefully examined and weighed. Such measures should be considered as options of last resort. Infringement and Art. 7 TEU procedures can only have short- and medium-term effect in preventing the actual dismantling of democratic institutions in a Member State and as a normative assertion of the validity and effectiveness of the fundamental values of the EU. In the long term, respect for Human Rights and the rule of law in Member States cannot be based on the motivation of avoiding sanctions, but must instead be grounded in an actual commitment to shared values.

Finally, any such measures must also respect the principles of coherence and proportionality. For example, in order to ensure coherence, the EU should systematically examine the possibility of launching infringement procedures and, ultimately, Art. 7 TEU procedures against Greece, Italy, and Malta regarding the policies of criminalizing humanitarian actors.

### **Recommendation 3: Strengthen the role of the ECtHR as a ‘migrants court’ by acceding to the ECHR**

We call upon the EU to adopt a clear political stance on any Member State attempt to challenge the legitimacy and relevance of the ECHR and the ECtHR. There should be no doubt that full respect for the ECHR and the decisions of the ECtHR are an integral aspect of membership in the EU and is among its core values.

Furthermore, we recommend the EU actively strengthen respect for the ECHR and the decisions of the ECtHR by revitalizing the accession process of the EU to the ECHR as foreseen in Art. 6(2) TEU, despite the negative Opinion issued by the CJEU in 2014.<sup>556</sup> This would credibly underline the EU’s commitment to the Convention and, at the same time, would send an important message to the Member States.

A duty of the EU to accede to the ECHR does not follow from international law but it is a legal obligation under Art. 6(2) TEU. However, the accession process has stagnated since the CJEU’s Opinion. Despite some rather vague public statements in favor of completing the accession process, the Commission does not seem eager to do so. This does not come as a surprise, considering that accession to the ECHR would also limit the Commission’s discretion by submitting the EU legislature to the judicial review of the ECtHR regarding its compliance with Human Rights.<sup>557</sup>

Legal scholarship has convincingly demonstrated that it is possible to reconcile the autonomy of EU law (the CJEU’s core concern) with membership in the pan-European Human Rights

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<sup>556</sup> CJEU (Full Court), Opinion 2/13, *ECHR II* (EU:C:2014:2454).

<sup>557</sup> On the status of the accession process, see European Parliament, Completion of EU accession to the ECHR: Area of Justice and Fundamental Rights, Legislative Train Schedule 06.2019 (2019).

protection system.<sup>558</sup> The reluctance on the part of the EU institutions to explore these possibilities is all the more worrying as the EU is apparently determined to shield the gaps in its own system of fundamental rights protection, including Human Rights violations in the context of the Dublin system, against ‘outside’ interference. If the EU, at long last, were to accede to the ECHR, this would also reinforce the ECtHR’s role as a crucial component of the Human Rights infrastructure defending the rights of migrants.

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<sup>558</sup> Halberstam, “‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward”, 16 *German Law Journal (GLJ)* (2015) 105.



## Annex: Panel of Experts

### Individual Experts

Dr. Alberto Achermann, LL.M. (EUI), University of Bern, Associate Professor for Migration Law, and Vice President of the Swiss National Commission for the Prevention of Torture (NCPT)

Dr. Adam Bodnar, LL.M. (CEU), Polish Commissioner for Human Rights, Warsaw

Dr. Cathryn Costello, Hertie School Berlin, Professor of Fundamental Rights and Co-Director of the Centre for Fundamental Rights

Dr. Marie-Bénédicte Dembour, DPhil (Oxford), Ghent University, Human Rights Centre, Professor of Law and Anthropology

Dr. Anuscheh Farahat, LL.M. (Berkeley), Friedrich-Alexander-University Erlangen-Nuremberg, Professor for Public Law, Migration Law and Human Rights Law

Dr. Kees Groenendijk, Radboud University Nijmegen, Emeritus Professor of Sociology and Migration Law

Dr. Matthias Lehnert, Attorney-at-Law, Berlin (panel member until June 2019)

Dr. Nora Markard, MA (King's College), University of Münster, Professor for International Public Law and International Human Rights

Dr. Violeta Moreno-Lax, MA (College of Europe), Queen Mary University of London, Senior Lecturer in Law

Dr. Marei Pelzer, Fulda University of Applied Sciences, Professor for Law of Social Work and Social Services

Dr. Lieneke Slingenberg, Free University Amsterdam, Associate Professor for Migration Law

### Expert Institutions

German Institute for Human Rights (Deutsches Institut für Menschenrechte, DIMR), Berlin

European Center for Constitutional and Human Rights (ECCHR), Berlin

