Introduction: Nature and Purpose of this Study

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. In 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-five 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.[1] 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.

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1 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).

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,[2] space was created for a Human Rights framing of migration processes.[3] 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.[4] 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.[5] Individual and collective actors of civil society also play an important role in 'universalizing Human Rights through processes driven by non-State actors'.[6] This new paradigm is reflected in the wealth of legal scholarship dedicated to the Human Rights of migrants.[7] In particular the ECtHR's case-law has received widespread at-

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

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

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

5 See, e.g., B. Çali, L. Bianku and I. Motoc (eds), *Migration and the European Convention on Human Rights* (2021).

6 B. Leisering, *Menschenrechte an den europäischen Außengrenzen: Das Ringen um Schutzstandards für Flüchtlinge* (2016), at 195; trans. by the authors; on strategic litigation, see, e.g., Schüller, 'Strategien und Risiken zur Durchsetzung migrationsrelevanter Menschenrechte vor dem EGMR', *Zeitschrift für Ausländerrecht (ZAR)* (2015) 64.

7 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 (eds), *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).

tention,[8] with an outstanding study by Dembour.[9] In international refugee law, a Human Rights-based approach has largely replaced an older, intergovernmental paradigm.[10] The shift to a Human Rights paradigm is also reflected in research on the prohibition of refoulement.[11]

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 a growing number of instances in which 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

8 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. Azoulai 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.

9 M.-B. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015).

10 See, seminally, J. Hathaway, *The Law of Refugee Status* (1st ed. 1991); *The Rights of Refugees under International Law* (2nd ed. 2021); as to the pitfalls, see J. Wessels, *The Concealment Controversy: Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (2021).

11 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); F. de Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (2017).

extent that they are part of the unwritten body of customary international law.[12] 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 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'.[13] 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 transcending the limits of what can be argued legally.[14] 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 po-

12 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.

13 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.

14 For a nuanced defense of Human Rights maximalism, see Brems, 'Human Rights: Minimum and Maximum Perspectives', 9 *Human Rights Law Review* (2009) 349.

tential 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.[15] 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 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 that must 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

15 See, e.g., Thym, 'EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook', 50 *Common Market Law Review (CMLRev.)* (2013) 709; Thym, 'Migrationssteuerung im Einklang mit den Menschenrechten', *Zeitschrift für Ausländerrecht (ZAR)* (2018) 193; for an approach located halfway between maximalism and minimalism, see Groß, 'Menschenrechtliche Grenzen der Migrationssteuerung', in J. Markow and F. von Harbou (eds), *Philosophie des Migrationsrechts* (2020) 133.

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 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).[16] 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

16 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.

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 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 (EU-CFR). The latter mirror the former in the EU legal order. These Human Rights 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'[17] 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

17 V. Chetail, *International Migration Law* (2019), at 76 et seq.

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, 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 fundamental fights applies, unless it is rebutted by a detailed analysis of the relevant provisions.[18]

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

18 For a different approach, highlighting the functional differences between the levels of migration governance, see Nettesheim, 'Migration im Spannungsfeld von Freizügigkeit und Demokratie', 144 *Archiv des öffentlichen Rechts (AöR)* (2019) 358.

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 (HR Committee) 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.[19] 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.[20]

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.

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19 Çalı, 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.

20 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* (2012) 335.

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 due to the degree of discretion involved. 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.[21] 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.

21 See Kälin, 'Menschenrechtsverträge als Gewährleistungen einer objektiven Ordnung', 33 *Berichte der Deutschen Gesellschaft für Völkerrecht: Aktuelle Probleme des Menschenrechtsschutzes* (1994) 9, at 38.