Chapter 1 – Ensuring Access to Asylum

Asylum policy is the subfield of European migration policy that most strongly demands that Human Rights serve as guardrails and guiding principles.[22] 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.[23]

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).

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22 For an overview, see C. Costello, *The Human Rights of Migrants and Refugees in European Law* (2016), at 171–277; V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017).

23 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/EU (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.

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 set a fairly high minimum standard for the asylum status of those eligible for international protection in the EU.[24] 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 would also deserve critical evaluation from a Human Rights perspective.[25]

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 fulfill 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.

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,[26] new

24 However, severe deficits in the implementation of these standards persist in individual Member States, leading to disparities between EU Member States as to the application of the refugee definition, sometimes described as 'asylum lottery'; see European Council on Refugees and Exiles, Asylum Statistics in Europe: Fact-sheet, June 2020, available at https://bit.ly/30zw2IH.

25 Some of the latter will be addressed in subsequent chapters, such as the issues of detention (Chapter 2), inadequate procedural safeguards (Chapter 3), inequalities regarding the right to family reunification (Chapter 4), and the undermining of institutionalized support for refugees (Chapter 7).

26 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.

forms of containment of migrants have emerged 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 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 the meaning of international law is not triggered. Jurisdiction usually requires the physical presence of a person on State territory or, in certain instances, the extraterritorial exercise of public authority of the State concerned. Both triggers are apparently avoided when the authority is exercised by other States (for details, see section 1.2.2).

The most prominent example of non-departure policy is the cooperation with Turkey, as laid down in the EU–Turkey 'statement' in March 2016,[27] although it also contains elements of the 'protection elsewhere' approach. The aim of non-departure is expressly declared in the commitment of the Turkish government to prevent new routes for 'irregular migration' being opened.[28] The general subtext of the statement is directed at deterring attempts by migrants to depart from Turkey to access EU territory (for a more extensive discussion of the EU–Turkey 'statement', see below in this section as well as the section on trend 3).

While the cooperation with Turkey is meant to limit the access of irregular migrants to Greece, European cooperation with Libyan authorities is supposed to do the same with regard to Italy and Malta – that is, to

27 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/.

28 Ibid., at para. 3.

achieve the closure of the 'central Mediterranean route'.[29] Bilateral cooperation between Italy and Libyan authorities on questions of border control started as early as in 2012.[30] A Memorandum of Understanding between Libya and Italy of 2017[31] refers to and reactivates a number of formal and informal agreements on mobility control, inter alia the 2008 Treaty of Friendship, Partnership and Cooperation[32] 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.[33]

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29 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 "Boat Migrants" in the Central Mediterranean and Australia', 32 *Leiden Journal of International Law* (2019) 715.

30 For a reference to the 'Tripoli Declaration of 21 January 2012' see 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 https://www.difesa.it/EN/Primo_Piano/Pagine/20131129_Italy%E2%80%93Libyacooperationagreements.aspx.

31 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.

32 Cf. the unofficial translation 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.

33 According to Art. 19(2) of the Treaty, establishing 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, see S. Klepp, *Italy and its Libyan Cooperation Program: Pioneer of the European Union's Refugee Policy*?, 1 August

The 2017 memorandum, which was tacitly renewed in February 2020, forms the basis of the since-intensified cooperation between Italy and Libya on maritime and land border controls as well as for the financing of such measures.[34]

Meanwhile, not only Member States but also the EU itself had become engaged in various forms of cooperations with Libya in the field of migration control. In 2017, the European Council, in its Malta Declaration, promised EU support for the 'training, equipment and support' of the Libyan coastguard.[35] Through the EU Emergency Trust Fund for Africa,[36] 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'.[37] Both Italy and the EU are engaged in the funding, deliv-

2010, available at https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy.

34 Art. 1(c) and Art. 2(1), Art. 4 of the Memorandum.

35 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.

36 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 was subject to a complaint filed with the European Court of Auditors (ECA) in April 2020, see GLAN/ASCI/ARGI, 'Legal Complaint against EU Financial Complicity in Illegal Push-Backs to Libya', Press statement, 27 April 2020, available at https://www.glanlaw.org/eu-complicity-in-libyan-abuses. The ECA however, refused to initiate a special review of the program, referring to limited resources, prompting the NGOs involved in the case to file a petition to the European Parliament, see GLAN, 'Petition to European Parliament Challenging EU's Material Support to Libyan Abuses Against Migrants', Press statement, 11 June 2020, available at https://www.glanlaw.org/single-post/2020/06/11/petition-to-european-parliament-challenges-eu-s-material-support-to-libyan-abuses-against.

37 Since 2015 until early 2021, the total sum allocated by the EU to Libya for migration control under the EU Emergency Trust Fund for Africa amounted to around EUR 455 million of which around EUR 57 million were invested in the Libyan border management system, cf. EEAS, Factsheet EU–Libya Relations, 2 March 2021, available at https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations.

ery, and maintenance of coast guard equipment – such as vessels – and the training of Libyan coast guard personnel.[38]

Following these developments, the Libyan government declared a Search and Rescue (SAR) zone to the International Maritime Organization in 2017,[39] but it has yet to establish adequate rescue coordination facilities as required by international maritime law.[40] The Italian Maritime Rescue Coordination Center (MRCC) in Rome cooperates with the Libyan coast guard in asking them to pick up rescues.[41] Cases of coordination and cooperation have been well documented, such as the sharing of information about the position of migrant vessels detected by EU aerial surveillance under the Frontex Multipurpose Aerial Surveillance (MAS) framework.[42]

The logistical support and operational cooperation with the Libyan coast guard by EU Member States and the EU itself in order to have 'pull-back' operations conducted raises serious questions regarding their international responsibility for ensuing Human Rights violations in Libya. Numerous reports bear testimony to the devastating Human Rights situa-

38 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.

39 European Parliament, Parliamentary questions, available at 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.

40 In March 2021, the European Commission described the Libyan Maritime Rescue Coordination Centre (MRCC) as 'very basic', cf. European Parliament, Parliamentary questions, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-000027_EN.html, answer given by Mr Várhelyi on behalf of the European Commission, 30 March 2021, available at https://www.europarl.europa.eu/doceo/document/E-9-2021-000027-ASW_EN.html.

41 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.

42 See e.g. Alarm Phone et al., *Remote Control: the EU-Libya Collaboration in Mass Interceptions of Migrants in the Central Mediterranean* (2020), available at https://eu-libya.info/img/RemoteControl_Report_0620.pdf; United Nations High Commissioner for Human Rights, *'Lethal Disregard': Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea* (2021), at 20, available at https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf.

tion of (retained or returned) migrants in Libya, including their systematic subjection to arbitrary detention and torture.[43]

Both types of cooperation – with Turkey on the one hand, with Libya on the other – 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.[44] 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.[45] However, the plans on the part of the EU are opposed by many African countries of origin and transit, so that the swift implementation of further 'disembarkation arrangements' – or even the establishment of the 'regional disembarkation platforms' in North Africa originally called for by the European Council[46] – 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).[47] As an example, in May 2021, Home Affairs

43 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; United Nations Security Council, United Nations Support Mission in Libya, Report of the Secretary-General, UN Doc. S/2020/41, 15 January 2020.

44 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; European Council, Conclusions, 28 June 2016, at para. 2, available at https://www.consilium.europa.eu/media/21645/28-euco-conclusions.pdf.

45 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.

46 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/.

47 Valletta Summit on Migration, Action Plan, 11–12 November 2015, available at https://www.consilium.europa.eu/media/21839/action_plan_en.pdf.

Commissioner Ylva Johansson declared that she was seeking a deal with Tunisia allowing for EU economic support in exchange for a commitment from the Tunisian government to 'engage in managing the borders'. 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.[48]

These developments were supplemented by Frontex's considerable increase in power over the recent years. The successive extension of the European Border and Coast Guard Agency's mandate and equipment is also reflected in its power to conclude working arrangements with authorities from third countries. The 2019 Frontex Regulation (Regulation 1869/2019) permits cooperation with third countries that are not directly neighboring EU Member States. Among other things, the new regulation explicitly authorizes the Union to conclude status agreements with these third countries for Frontex operations on their territories and the deployment of border management and repatriation teams there.[49] Since 2019, a considerable number of new (or renewed) status agreements and working arrangements have been concluded with third countries by the Union and Frontex respectively.[50] On the basis of such agreements, Frontex launched its first three official operations on the territory of third countries, in

48 Such cooperation arrangements have been concluded 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 (E.L.Rev.)* (2019) 824. On a recent push of the Commission toward concluding an agreement with Tunisia, see Deutsche Welle, 'EU Seeks Migration Deals with Libya and Tunisia', 20 May 2021, available at https://www.dw.com/en/eu-seeks-migration-deals-with-libya-and-tunisia/a-57592161.

49 See Art. 73(3) Frontex Regulation, in comparison to Art. 54(4) interpreted in light of Art. 54(3) of the repealed Regulation 1624/2016. The latter provision referred to 'neighbouring' third countries.

50 Since 2019, the EU has negotiated five agreements with the Western Balkan states Albania, Montenegro, Serbia, Bosnia and Herzegovina, and North Macedonia (the latter two not yet entered into force), cf. Statewatch, *Blackmail in the Balkans: How the EU is Externalising its Asylum Policies* (2021), available at https://www.statewatch.org/analyses/2021/blackmail-in-the-balkans-how-the-eu-is-externalising-its-asylum-policies/#_ftnref41. A list of working arrangement, such as the 2020 arrangement with Georgia, is available at https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries.

Albania (2019), Montenegro (2020) and Serbia (2021).[51] Further, the European Border Surveillance System (Eurosur) was integrated into the Frontex framework in 2019.[52] 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 notably to detect and prevent irregular immigration, a term that is applied also to forced migration of individuals entitled to international protection. Both developments should 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

51 Frontex, Press statements of 21.05.2019, 14.10.2020, and 16.06.2021, available at https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-first-operation-in-western-balkans-znTNWM; https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-second-operation-in-montenegro-C0Pc3E; https://frontex.europa.eu/media-centre/news/news-release/frontex-expands-presence-in-western-balkans-with-operation-in-serbia-9WRMiW.

52 Art. 18–23 Frontex Regulation.

possibility of applying for asylum at the border (Art. 3(1) and 43 Asylum Procedures Directive).[53]

As regards push-back measures, an increasing number of incidents have been reported since 2015 at land borders in Central and South-Eastern Europe. Numerous accounts of migrants trying to enter Hungarian territory being pushed back to Serbia have been reported.[54] Such push-backs have continued even after the CJEU ruled, in December 2020, that the underlying Hungarian legislation breached EU law.[55] As the practice is still prescribed by national law, the Hungarian Police continues to publish daily statistics, and reported more than 10.000 push-backs in the first three months of 2021 alone.[56] The ECtHR also found the practices of 'hot returns' conducted by the Hungarian authorities to be in violation of the ECHR – in particular, the prohibition of collective expulsions (see Chapter 3).[57] The Court determined that Hungary had failed to secure effective means of legal entry to lodge an application for international protection.[58] Beyond Hungary, many other instances in EU Member States have been reported, such as thousands of push-back operations at the Croatian border with Bosnia-Herzegovina, often involving violence against migrants.[59]

As regards non-disembarkation policies, Italy and Malta, among other European countries bordering the Mediterranean, have also resorted to policies such as the closure of their ports to the entry of migrants saved at sea, mainly by NGO-chartered rescue ships. While already threatening to do so in 2017[60], Italy in 2018 and 2019 repeatedly closed its ports to NGOs and other vessels conducting SAR operations, such as the *Aquarius*,

53 Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Asylum Procedures Directive).

54 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.

55 CJEU, Case C-808/18, *Commission v. Hungary* (EU:C:2020:1029).

56 ASGI et al., *Pushing Back Responsibility*, April 2021, 10, available at https://helsinki.hu/en/pushing-back-responsibility/.

57 ECtHR, *Shahzad v. Hungary*, Appl. no. 12625/17, Judgment of 8 July 2021.

58 Ibid., at para. 62–66.

59 European Center for Constitutional and Human Rights, *Push-Backs in Croatia: Complaint before the UN Human Rights Committee*, 11 December 2020, available at https://www.ecchr.eu/en/case/push-backs-croatia-complaint-un-human-rights-council/; Human Rights Watch, *Violent Pushbacks on Croatia Border Require EU Action*, 22 October 2020, available at https://www.hrw.org/news/2020/10/29/violent-pushbacks-croatia-border-require-eu-action.

60 European Parliament: Parliamentary questions, Immigration emergency in Italy: closure of Italian ports to prevent clandestine migrants from disembarking, 28

the *Lifeline*, the *Sea-Watch*, the *Sea Eye*, and the *Diciotti*. This policy led to a 'disembarkation crisis',[61] leaving rescued migrants on those ships 'stranded at sea for weeks'[62] 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.[63] 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.[64] 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.[65] In March and April 2020, Italy and Malta temporarily closed their ports to SAR vessels, arguing that they had stopped being a 'place of safety' due to the COVID-19 pandemic.[66]

July 2017, available at https://www.europarl.europa.eu/doceo/document/E-8-2017-005108_EN.pdf.

61 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.

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

63 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.

64 Ibid., at 4 et seq.; UNHCR, Italy Fact Sheet (2019), at 2.

65 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.

66 On the development and possible further conflicts with international law, see A. Farahat and N. Markard, *Closed Ports, Dubious Partners: The European Policy of Outsourcing Responsibility: Study Update* (2020), available at https://eu.boell.org/sites/default/files/2020-05/HBS-POS%20study-A4_25-05-20-2.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. This leads to situations in which access to adequate asylum procedures and/or effective protection is not ensured. Measures shifting jurisdiction (re-)delegate responsibilities within Europe, or even beyond to non-European countries.

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).[67]

As mentioned above, referring migrants who try to reach EU territory to 'protection elsewhere', in this case Turkey, is a key element of the EU–Turkey statement, concluded in March 2016.[68] It raises the question of whether the required level of protection for refugees is met by Turkey.[69] 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.[70] Nonetheless, the EU–Turkey statement seems to be regarded as a model for EU migration policy during the process of reforming the CEAS. For instance, in the revision process of the Asylum Procedures Directive, it was proposed to lower the standards for a 'safe third country',

67 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).

68 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/.

69 For a detailed socio-legal analysis, see H. Kaya, *The EU-Turkey Statement on Refugees: Assessing Its Impact on Fundamental Rights* (2020).

70 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.

by requiring only that parts of that country meet the requirements for protection.[71]

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,[72] an asylum application in another Member State would be inadmissible in most 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,[73] which was meant to remedy some of the deficiencies of the Dublin system.[74]

Furthermore, as the Dublin system is being amended it becomes clear that the Commission holds on to what has been described as the 'no choice, first entry' logic of the existing system, rather than envisaging a distribution mechanism that actually guarantees the rights of migrants to

71 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.

72 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 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; UNHCR, 'Act now to alleviate suffering at reception centres on Greek islands – UNHCR's Grandi', Press Statement, 21 February 2020, available at https://www.unhcr.org/news/press/2020/2/5e4fe4074/act-alleviate-suffering-reception-centres-greek-islands-unhcrs-grandi.html; 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.

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

74 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.

access a functioning asylum system.[75] Some highly problematic provisions have so far been proposed in the CEAS reform process, aimed at a new Regulation replacing the current Dublin III Regulation: 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,[76] thus possibly reducing Member State flexibility to comply with Human Rights norms, particularly in cases of emergency. At the same time, the draft aimed 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.[77] In a similar vein, it was proposed to shorten or eliminate time limits for transfers from one Member State to another,[78] 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,[79] 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

Ensuring access to asylum should be the core content of the Human Right to asylum, next to guaranteeing a particular status after having completed a procedure determining the need for international protection. However, such a Human Right has yet to emerge as an undisputed part of international law.[80] The Universal Declaration of Human Rights, in Art. 14, postulates only the right 'to seek' asylum, a carefully drafted compromise

75 See F. Maiani, *A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact* (2020), available at https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/.

76 European Commission, Proposal for a recast Dublin Regulation, COM(2016) 270, 4 May 2016, Art. 19.

77 Ibid., Art. 3(3).

78 Ibid., Art. 30.

79 European Commission, Proposal for a Regulation on Asylum and Migration Management, COM(2020) 610, 23 September 2020, Art. 25, Art. 8(5), Art. 35.

80 On the relations between asylum and non-refoulement, see V. Chetail, *International Migration Law* (2019), at 190–194.

that leaves in abeyance the corresponding duty of the requested State to actually provide protection. Ensuing attempts in the 1970s at drafting a binding convention on territorial asylum have failed, both in the UN and the Council of Europe.[81]

The most important rule of international law that, to some extent, ensures access to asylum is the principle of non-refoulement – that is, the prohibition on expelling or returning a person to a State in which his or her fundamental Human Rights are threatened. The principle of non-refoulement has developed into an independent Human Right. It includes an unconditional right to be admitted and protected, including of persons arriving at the borders of a State, whenever the possible alternatives to provisionally granting access to the territory would entail the risk of Human Rights violations.[82] This principle not only protects persons 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). The prohibition of refoulement is explicitly provided for in Art. 33(1) of the 1951 Refugee Convention and Art. 3 CAT. 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 in 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 volume. 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.

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

81 A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (2009), chapter 1.

82 J. Hathaway, *The Rights of Refugees under International Law* (2nd ed. 2021), at 313–464; Lauterpacht and Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87.

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 EU Charter of Fundamental Rights does, in Art. 18 EU-CFR, guarantee the right to asylum. In the case-law of the CJEU thus far, this has not been used as an independent source of a fundamental right ensuring access to asylum.[83] However, as a constitutional guarantee having the same legal value as the EU Treaties (Art. 6(1) TEU), it at any rate informs the construction of the relevant legislation of the Common European Asylum System. The principle of non-refoulement is firmly established as a fundamental right of EU law: While Art. 4 EU-CFR mirrors (with the very same wording) Art. 3 ECHR,[84] Art. 19(2) EU-CFR mirrors the case-law of the ECtHR on Art. 3 ECHR[85] 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.

In light of the legal constraints imposed by international and EU law, 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 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.[86] Furthermore, the treatment of migrants pulled back or hindered from departure in the third county (the country of transit, e.g., Libya) may itself amount to Human Rights violations, including by subjecting migrants to torture or inhuman or degrading treatment.

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83 Cf. CJEU, Case C-528/11, *Zuheyr Frayeh Halaf* (EU:C:2013:342).

84 See Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, on Art. 4 EU-CFR.

85 See ibid., on Art. 19(1) EU-CFR.

86 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.

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.[87] Such attribution also depends on the kind and degree of support from European actors for the country concerned (e.g., deployment of vessels, training of coast guards, sharing of information regarding the location of migrant boats etc.). 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). Establishing 'jurisdiction' of the European country as required for the applicability of the ECHR according to Art. 1 ECHR will often be difficult.[88] 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.[89]

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.[90] According to these principles, direct responsibility for the acts of another State is only incurred in very limited circumstances. Pursuant 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

87 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).

88 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.

89 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.

90 M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (2018), at 84.

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),[91] 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.[92]

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.[93] 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

91 Or Art. 48(1) ARIO, respectively.

92 International Law Commission, *Yearbook of the International Law Commission* (2001), vol. II, Part Two, commentary on Art. 47 ASR, at para. 1 and 3.

93 The argument is based on the wording of the ILC's Commentary on Art. 16(5) ASR, which states that a 'State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'. However, even scholars who require 'intent' argue that, under certain conditions, the criterion should be interpreted broadly, so that one may infer the intention from objective criteria, particularly when internationally wrongful acts are committed 'manifestly' or 'systematically'; see H.P. Aust, *Complicity and the Law of State Responsibility* (2011), at 230 et seq. and 245; Nolte and Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law', 58 *International & Comparative Law Quarterly (ICLQ)* (2009) 1, at 15.

effect of the action, the knowledge of its causation, and the possibility of acting differently.[94] 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'.[95] Applying this standard, it would be hard to deny the fulfillment of the knowledge criterion in respect of lasting 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).[96]

However, it is not yet fully established how the general principles on State responsibility and responsibility of International Organizations – as laid down in ASR and 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[97] when discussing the establishment of jurisdiction under Art. 1 ECHR. The question of attribution 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

94 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.

95 HR Committee, 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.

96 In the case of Libya, this result may follow even if one interprets Art. 16 ASR as requiring intent, see H.P. Aust, *Complicity and the Law of State Responsibility* (2011), at 245.

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

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.[98]

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 more recent decision, the ECtHR again situated the ECHR within 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.*[99]

Hence, we hold that 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 indisputably constitute 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.[100] 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 measures at land borders. This was confirmed by the ECtHR's Grand Chamber decision in the case of *N.D. and N.T.*[101] In this decision, however, the Court established a new criterion for the assessment of violations of the prohibition of collective expulsions: States may refuse entry to aliens and may even push back

98 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.

99 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.

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

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

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' for the person concerned not to make use of these means of legal entry.[102] The limits of this newly established exception are far from clear, given that the Court highlighted several aspects of the particular case.[103] In any case, the Court established this criterion for the interpretation of Art. 4 Protocol No. 4 ECHR 'without prejudice to the application of Articles 2 and 3' of the Convention.[104] Given the absolute nature of these rights and the resulting prohibitions on refoulement, the standards established by the ECtHR in *N.D. and N.T* do not apply to persons in need of protection.[105]

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 finding, as Art. 4 of the Schengen Borders Code[106] 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

102 Ibid., at para. 201.

103 Thym, 'Menschenrechtliche Trendwende? Zu den EGMR-Entscheidungen über "heiße Zurückweisungen" an den EU-Außengrenzen und humanitäre Visa für Flüchtlinge', 80 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2020) 989, at 996 et seq.; cf. ECtHR, *Shahzad v. Hungary*, Appl. no. 12625/17, Judgment of 8 July 2021, at para. 60 et seq.

104 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.

105 This is the general view of the legal commentators, see, e.g., ECRE, *Across Borders: The Impact of N.D. and N.T. v. Spain in Europe*, Legal Note 10 (2021), at para. 7–9; Thym, 'Menschenrechtliche Trendwende?', 80 *ZaöRV* (2020) 989, at 999; Lübbe, 'Unklares zu den Pushbacks an den Außengrenzen', *Europarecht* (2020) 450, at 456 et seq.

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

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) – does not explicitly oblige any specific State to permit disembarkation. While UNCLOS obliges States 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 in conjunction with the principle of non-refoulement (Art. 3 ECHR)[107] as well as positive duties attached to the right to life (Art. 2 ECHR).[108] These may well leave a coastal state with no other option but to allow for disembarkation on its own soil.

The same may follow from the duty to render assistance to persons in distress at sea,[109] 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

107 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.

108 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.

109 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; see also the Study Update (2020), available at https://eu.boell.org/sites/default/files/2020-05/HBS-POS%20study-A4_25-05-20-2.pdf?dimension1=anna2020.

Rescue Convention (SAR Convention),[110] and Regulation V/33 of the 1974 International Convention for the Safety of Life at Sea (SOLAS).[111] Rescues must be delivered to a 'place of safety'.[112] 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'.[113] 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.[114]

A recent study, taking into account numerous reports on the current Human Rights situation in Northern African Mediterranean countries, concluded that none of these countries generally qualify as 'places of safety' in the sense of the aforementioned provisions.[115] While this result seems obvious for Libya, given its record of Human Rights violations,

110 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 States except for Egypt and Israel. The 2004 amendments were not ratified by Malta.

111 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.

112 SOLAS (2004) regulation V/33, para. 1.1; SAR Convention (2004), Annex 3.1.9.

113 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.

114 SAR Convention (2004), Annex 3.1.9 and 4.8.5.

115 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; see also the Study Update (2020) available at https://eu.boell.org/sites/default/files/2020-05/HBS-POS%20study-A4_25-05-20-2.pdf?dimension1=anna2020.

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 LGBTIQ migrants, who face persecution in all Northern African countries. At the same 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.[116] This is why EU Member States, in order to comply with their duty to render assistance to persons in distress at sea, would have to allow for disembarkation on the soil of an EU Member State.

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 these rights in the context of (non-)disembarkation policies. It should, therefore, enact a set of rules according to which Member States must allow migrants to disembark, combined with a mechanism of transfer (for example, by quota) based on the principle of solidarity among Member States.[117] 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), disembarkation shall take place in the Member State hosting the Frontex operation.[118] This provision could serve

116 Ibid., at 18–31.

117 Cf. European Commission, COM(2020) 610, 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.

118 Art. 4 and 10 Regulation 656/2014 establishing rules for the surveillance of the external sea borders.

as a model for a codification that allows disembarkation in costal Member States in general.

1.2.5 Specific issue: Limits to 'protection elsewhere'

Based on the concept of 'protection elsewhere', refugees are referred or transferred to third countries that are said to provide sufficient protection. The idea of excluding persons from refugee status by referring him or her to 'protection elsewhere' – mostly applied as a rule of (in)admissibility of protection claims[119] – has no firm and explicit basis in international law. It is built on 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.[120] 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 right to asylum and that asylum seekers must not be entitled to 'choose' their specific country of refuge, the concept of 'protection elsewhere' is mostly accepted – for example, by the United Nations High Commissioner for Refugees (UNHCR)[121] and by the authors of the 2007 Michigan Guidelines, a highly relevant scholarly opinion.[122] 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.[123]

In the context of the EU, the concept of 'protection elsewhere' is applied by referring or transferring refugees to third countries that are identified

119 See, e.g., Art. 33(2) Asylum Procedures Directive.

120 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.

121 UNHCR, Position on Readmission Agreements, 'Protection Elsewhere' and Asylum Policy (1994), at 465, available at https://www.refworld.org/docid/3ae6b31cb8.html.

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

123 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.

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, particularly 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 Commission's proposal of 2016 and 2020 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 protection' provided that further criteria are met.[124] 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 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 ongoing 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 as well as to lower the standard for referrals to 'safe third countries' by assuming a necessary 'connection'[125] between any asylum seeker and a third country solely on the basis that the country was transited by, and is geographically close

124 European Commission, Proposal for an Asylum Procedures Regulation, COM(2016) 467, 13 July 2016, Art. 45(1)(e). The Commission's amended proposal of 23 September 2020, COM(2020) 611, leaves the relevant parts unchanged.

125 On the concept, see Lübbe, 'Das Verbindungsprinzip im fragmentierten europäischen Asylraum', 50 *Europarecht (EuR)* (2015) 329.

to the country of origin of, the asylum seeker.[126] 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.[127] 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).*[128]

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

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

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

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

that the refugee affected cannot be required to provide comprehensive information about the Human Rights situation in the third country.[129]

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.[130] This requires the 'determination of more than the mere absence of persecution or serious harm'[131] and obliges Member States to show that the safeguards provided for in Art. 38 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 that must be observed both in future EU legislation and in any conclusion or application, by the EU or its Member States, of cooperation arrangements with third countries on matters of migration control.

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

Other legal 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).[132]

The rights from the ECHR are mirrored and partly expanded by the safeguards enshrined in the EU-CFR. The current Dublin III Regulation

129 Foster, ibid.

130 EASO, *Evidence and Credibility Assessment in the Context of the Common European Asylum System* (2018), at 164.

131 Ibid., at 167.

132 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.

(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 recognized under Articles 1 [dignity], 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]'.[133] While the CJEU has hitherto left open the question of whether Art. 18 EU-CFR amounts to a free-standing right to asylum,[134] 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'.[135]

The Dublin system must fully respect the aforementioned Human Rights and fundamental rights. A revised Dublin Regulation, or its successor, 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[136] may not only lead to violations of 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.[137]

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133 Dublin III Regulation, recital 39.

134 CJEU, Case C-528/11, *Zuheyr Frayeh Halaf* (EU:C:2013:342).

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

136 European Commission, Proposal for a recast Dublin Regulation, COM(2016) 270, 4 May 2016, at 16.

137 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.

In order to guarantee these rights, including under exceptional circumstances, and to avoid leaving persons in limbo as 'refugees in orbit', the Dublin Regulation 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 new Dublin Regulation that does not systematically avoid such conflict would be unlawful.[138]

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.[139] 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.[140] 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

eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf, 43, at 51.

138 M. Pelzer, *Die Rechtsstellung von Asylbewerbern im Asylzuständigkeitssystem der EU* (2020), at 148 et seq. and 243 et seq.; L.-M. Lührs, *Überstellungsschutz und gegenseitiges Vertrauen* (2021), at 52 and 244 et seq.

139 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.

140 For an overview, see M.-C. Foblets 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.

'genuine and effective access to means of legal entry'.[141] 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.[142] This calls for legislation in the EU to provide for such forms of regular access to protection, which notably must also be 'effective'.[143]

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. Humanitarian visas stand out among other pathways in that they are based on a well-established legal instrument (visas) and existing governmental institutions (embassies and consulates). Moreover, this instrument allows for the external pre-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, given that 16 of them have, or have had, schemes for issuing humanitarian visas.[144]

In fact, in 2018 the European Parliament issued an initiative report calling on the Commission to table a legislative proposal establishing a

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141 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; confirmed in *Shahzad v. Hungary*, Appl. no. 12625/17, Judgment of 8 July 2021, at para. 62.

142 Daniel Thym has called it a doctrinal 'seed' (*Samen*) planted by the Court which may sprout in its later case-law, although he doubts that this will actually happen; see Thym, 'Menschenrechtliche Trendwende?', 80 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2020) 989, at 1007 and 1010.

143 However, the reluctance of EU Member States in this respect is considerable. For example, in a 2019 hearing 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. See below, section 3.2.2 on the ECtHR decision which, in 2020, declared the complaints by M.N. and others to be inadmissible.

144 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.

'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.[145] This call to provide a regular pathway to access international protection in the EU is based on the duty of the EU to take positive action to guarantee the principle of non-refoulement,[146] 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). 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.[147] 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.[148] Given the ongoing structural risk of human and fun-

145 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; 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.

146 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.

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

148 The Court held that the Visa Code was not applicable to such visa applications as in the case decide 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 due to the lack of 'jurisdiction' in such cases, the ECHR does not apply to State Parties'

damental rights violations referred to by AG 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.

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 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 the 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 should 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 body of experts 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.

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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.

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.

Recommendation 2: End push-backs and closure of ports

Member States must refrain from any push-back measures as such practices violate the ECHR and the EU-CFR. 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 measures involving the coordination of Frontex, the same is not true for measures conducted by Member States independently – the vast majority of all (sea) border control measures.[149] 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.[150] Establishing such an

149 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.

150 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

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

A new 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 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 obligations, 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.

Sheet (2019), at 2, available at https://data2.unhcr.org/en/documents/download/68161.

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. 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.