

IN-DEPTH ANALYSIS

Requested by the DROI subcommittee



EU External Migration Policy and the Protection of Human Rights



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EU External Migration Policy and the Protection of Human Rights

ABSTRACT

This in-depth analysis focuses on the human rights implications of EU external migration policy interventions: (1) identifying human rights obligations owed to third-country nationals when engaging in cooperation with third countries and non-EU actors; (2) assessing the means and level of compliance with these obligations when designing and implementing the main policy instruments; and (3) determining the existence and adequacy of operational, reporting, monitoring and accountability mechanisms available in each case to track and respond to potential violations. Particular attention is paid to soft-law tools, on account of their enhanced potential to erode the enforceability of obligations, to downgrade democratic accountability and generally undermine the rule of law. Paving the way for the New Pact on Migration and Asylum, special emphasis is placed on cooperation under the Global Approach to Migration and Mobility, the EU Agenda on Migration and the Migration Partnership Framework, including informal arrangements concluded by Frontex or by the Member States themselves. Four case studies guide the analysis and illustrate findings: (1) the EU-Turkey Statement; (2) the multi-modal cooperation with Libya; (3) the Joint Way Forward with Afghanistan; and (4) collaboration with Niger under the EUCAP Sahel mission. The in-depth analysis reveals that the full effect of the EU fundamental rights *acquis* in extra-territorial situations has not been duly accounted for and proposes a system to ensure compliance with the relevant standards covering the pre-conclusion, design, adoption, implementation, evaluation and review phases, highlighting the role of the European Parliament and civil society organisations.

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Table of Abbreviations

ACHPR	African Convention on Human and People’s Rights
ACHR	American Convention on Human Rights
AG	Advocate General
APD	Asylum Procedures Directive
AU	African Union
CAT	United Nations Convention Against Torture
CFR	Charter of Fundamental Rights of the EU
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CSR	Convention Relating to the Status of Refugees
CSDP	Common Security and Defence Policy
DROI	Human Rights Subcommittee
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
EC	European Council
ECA	European Court of Auditors
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
EEAS	European External Action Service
EDF	European Union Development Fund
EP	European Parliament
EP Res	European Parliament Resolution
ETM	Emergency Transfer Mechanism
EU	European Union
EUBAM	European Union Border Assistance Mission in Libya
EUCAP	European Union Capacity Building Mission in Niger
EUNAVFORMED	European Union Naval Force Mediterranean
EURA	European Union Readmission Agreement
EUTFA	European Union Emergency Trust Fund for Africa
FRA	European Union Fundamental Rights Agency
FRO	Fundamental Rights Officer

GAMM	Global Approach to Migration and Mobility
GNA	Government of National Accord
HRC	United Nations Human Right Committee
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Person
IOM	International Organization for Migration
JHA	Justice and Home Affairs
JIT	Joint Investigative Team
JO	Joint Operation
JRC	Joint Readmission Committee
JRO	Joint Return Operation
JWF	Joint Way Forward
JWG	Joint Working Group
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of the European Parliament
MoU	Memorandum of Understanding
MP	Mobility Partnership
MPF	Migration Partnership Framework
MS	Member State
NGO	Non-Governmental Organisation
OCT	Operational Cooperation Team
OHCHR	Office of the High Commissioner for Human Rights
PCA	Partnership and Cooperation Agreement
QD	Qualification Directive
SAR	Search and Rescue
SOLAS	Safety of Life at Sea
SOM	Smuggling of Migrants
SOP	Standard Operating Procedure
SRR	Search and Rescue Region
STC	Safe Third Country
TCN	Third-Country National

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
THB	Trafficking in Human Beings
TTF	Trilateral Task Force
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
WA	Working Arrangement

Executive Summary

1. As detailed in the **introduction**, this in-depth analysis aims at supporting the DROI subcommittee in the drafting of an own-initiative report on human rights protection and the EU external migration policy, focusing on the human rights implications of EU and Member States' (MSs) interventions in this domain: (1) identifying the human rights obligations owed to third-country nationals (TCNs) when cooperating with third countries and non-EU actors; (2) assessing the means and level of compliance with these obligations when designing and implementing the main policy instruments; and (3) determining the existence and adequacy of operational, reporting, monitoring and accountability mechanisms available in each case to track and respond to potential violations.
2. **Section 2** identifies the main **human rights obligations**, taking the universality and indivisibility of human rights, alongside the promotion of democratic principles and values including respect for human dignity, the rule of law and the principles of freedom, equality and solidarity, which the EU must uphold in both its internal and external action (Articles 2 and 21 TEU), as a starting point. The Charter of Fundamental Rights provides the primary reference (Article 6 TEU) for establishing the minimum set of protections with which the EU and its MSs must comply when exercising their powers and when 'implementing Union law' (Article 51(1) CFR). The right to life; the right to integrity and the prohibition of ill-treatment; the prohibition of slavery and forced labour; the right to liberty and security; the right to asylum; the right to leave any country including one's own; the prohibitions of *refoulement* and collective expulsion; as well as the rights to good administration and to an effective remedy are elaborated upon, highlighting specific contexts in which each should especially be taken in consideration. The question of extraterritorial applicability is also dealt with, reaching the conclusion that the fundamental rights *acquis* applies whenever a situation is governed by EU law, whether the action/omission concerned is undertaken within the territorial boundaries of MSs or not.
3. **Section 3** analyses the **EU external migration policy framework**, paying particular attention to cooperation under the Global Approach to Migration and Mobility, the EU Agenda on Migration and the Migration Partnership Framework, paving the way for the forthcoming New Pact on Migration and Asylum. Special emphasis is placed on soft-law instruments, including informal arrangements concluded by the Union, its agencies and bodies, or by the MSs themselves, including Mobility Partnerships, Working Arrangements, as well as a series of Statements, Declarations, Standard Operating Procedures (SOPs), and Memoranda of Understanding (MoUs) that have proliferated to increase return and readmission rates to third countries and to prevent irregular migration towards the EU. Intended as non-binding, their enhanced potential to erode the enforceability of human rights obligations, to downgrade democratic accountability and judicial oversight, and generally to undermine the rule of law, is a common feature shared across the spectrum of measures reviewed. No detailed assessment of their impact on TCN rights or of their compatibility with the EU Charter has been undertaken by the actors adopting and/or implementing the measures concerned, and the scarcity of publicly available data regarding their application in practice does not allow for independent monitoring and systematic evaluation. Their hard-law counterparts in EURAs and readmission clauses in partnership and cooperation agreements offer a point of comparison. EU extraterritorial maritime intervention, in the form of Frontex-coordinated missions and the EUNAVFORMED Operations *Sophia* and *IRINI*, is also examined, taking into account their cooperation with Libyan forces and the facilitation of interdiction and pullbacks at sea, in contravention of search and rescue obligations at their intersection with human rights and refugee law standards.

Four case studies, undertaking a detailed analysis of the key policy tools and strategic approach underpinning their design and implementation to determine their compatibility with the EU

fundamental rights *acquis*, assessing the effectiveness of any accountability channels that may have been foreseen, including legal remedies as well as any related reporting, monitoring and evaluation mechanisms, are included in Annex I. **Section 1** of that Annex scrutinizes cooperation under the **EU-Turkey Statement**; **Section 2** examines the multi-factor collaboration with **Libya** and, in particular, with the Libyan Coastguard; **Section 3** explores the implementation of the **Joint Way Forward with Afghanistan**; and **Section 4** delves into the cooperation with **Niger** under the **EUCAP Sahel mission**. The four case studies follow the same structure; (1) mapping out the main measures agreed upon with the third country or non-EU actor concerned; (2) reviewing the manner in which human rights safeguards may or may not have been incorporated and taken into account in their application; and (3) identifying the provisions of EU law that are engaged and should have been taken in consideration when designing and implementing the relevant policy tools to ensure compliance with the fundamental rights *acquis*. In all four cases serious gaps have been identified, revealing an insufficient amount of attention to the foreseeable effects of the measures concerned on the rights of TCNs, if not the outright incompatibility of some of the arrangements foreseen with the Charter and the EU Treaties. Independent monitoring, implementation guidelines, evaluation and review mechanisms as well as redress procedures are typically absent. In some cases, the applicability of EU law, including the fundamental rights *acquis*, has not been adequately acknowledged, rendering the applicability of relevant provisions in primary and secondary law uncertain.

4. As related in the **Conclusions**, the in-depth analysis reveals that the full effect of the EU fundamental rights *acquis* in extra-territorial situations has not been duly accounted for, giving rise to defective compliance with the relevant obligations on the part of the EU and its MSs. It should be clear from the outset that EU primary law requires the observance of fundamental rights, including those of TCNs, in all EU internal and external action (Articles 2, 6 and 21 TEU) by all EU institutions, bodies and agencies and by the MSs when implementing EU law (Article 51 CFR). This requires not only the abstract recognition of applicability of the relevant standards in general terms, but also appropriate operationalisation through detailed and specific instruments that allow for effective protection in practice.
5. The **Recommendations** include proposals for the European Parliament to action **annulment proceedings** (Article 263 TFEU) to challenge measures adopted in disregard of the appropriate legal basis, without observance of the ordinary legislative procedure, hence impinging on the Parliament's legislative prerogatives and eroding the principle of political accountability and democratic oversight. A suggestion for the Parliament to make use of its **budgetary control powers** to ensure compliance with EU legality principles, particularly fundamental rights, of EU funding in support of external migration policy actions is also included, as is a recommendation to deploy the Parliament's **monitoring capacities** to their fullest extent, including within the CFSP and CSDP areas. The section also highlights the role of the European Parliament and the potential contribution of civil society organisations, by proposing a **comprehensive compliance system** to ensure conformity with the relevant standards covering the pre-conclusion, design, adoption, implementation, evaluation and review phases, through:
 - (a) A **pre-conclusion assessment** that determines the concrete human rights situation along the specific migration route to which the envisaged agreement/arrangement/action/funding refers and that establishes any additional human rights risks the intended measure may foreseeably give rise to;
 - (b) Specific **benchmarks** and concrete **indicators** should be used to conduct pre-conclusion assessments so that, if the country concerned does not reach the minimum level required to be

classified as a Safe Third Country (STC), no operational cooperation should be established that affects the rights of TCNs;

- (c) Concrete **mitigation actions** should be designed to counter any surmountable risks that may be detected, setting out the measures to be adopted to guarantee compliance with human rights;
- (d) For any **funding** allocated in support of the agreements/arrangements/actions concerned, a demonstrable and measurable **link to the safeguarding and consolidation of human rights** should be shown for compliance with Treaty provisions (Article 21(2)(a)-(b) TEU);
- (e) If and only when human rights risks have been adequately mitigated, a detailed and enforceable **human rights clause** should be inserted in all agreements/arrangements/actions/funding decisions that are finally adopted, making specific provision for the protection of TCN rights;
- (f) Appropriate elaboration in **operationalisation clauses** that provide for **specific safeguards** when the agreement/arrangement/action/funding is being implemented in practice should be included;
- (g) A **body in charge of the adequate implementation** of the agreement/arrangement/action/funding adopted should be created with the specific mandate to check compliance with fundamental rights;
- (h) **Implementation guidelines** should be produced, on the basis of the specific benchmarks and concrete indicators, specifying the ways in which the agreement/arrangement/action/funding at hand should be applied in practice so as to ensure compliance with fundamental rights;
- (i) The implementation body should **report periodically** on specific ways in which compliance with fundamental rights, and specifically with the rights of TCNs, has been ensured in practice;
- (j) An **independent monitoring mechanism** should be foreseen that includes representation of experts from different backgrounds, who are given access to all materials necessary to perform their task and allowed to conduct unannounced visits to relevant locations and interview competent actors;
- (k) A **periodic evaluation** should be undertaken by an independent body at regular intervals with the responsibility to assess how compliance with fundamental rights, and specifically with TCN rights, has been guaranteed, reviewing the full remit of activities and formulating recommendations for improvement or derogation of specific actions/components as appropriate;
- (l) There should be a **follow up mechanism**, overseen by the European Parliament, whereby evaluation results and expert recommendations are duly incorporated in the relevant agreement/arrangement/action/funding and reviews and adjustments are introduced as necessary;
- (m) It should be clear and remain possible at all times for the persons impacted by the relevant agreement/arrangement/action/funding to challenge any decisions with a detrimental effect adopted in their regard in a process that complies with **effective remedy** standards;
- (n) Pre-assessment reports, the text of the relevant agreement/arrangement/action/funding adopted, the implementation guidelines, the implementation reports, the monitoring reports, the post-implementation evaluations and the follow up (review and reform) reports should be communicated to the European Parliament and be **publicly accessible** to ensure compliance with Article 41 CFR;
- (o) Any **damage** incurred should be adequately **repaired** through an effective system of redress (Article 47 CFR) and the action/omission giving rise to the violation immediately amended for

compliance with the relevant TCN right or, when not possible, immediately suspended or cancelled;

- (p) The creation of an **EU Special Representative on the Rights of Migrants** that oversees the correct application of the above provisions, with Ombud's attributions to act on TCNs' behalf, should be explored, using the equivalent UN Special Rapporteur as a model to design her mission and role.

1 Introduction

1.1 Background and Objectives

This in-depth analysis aims at supporting the Human Rights Subcommittee (DROI), the rapporteur and other opinion-giving committees, in the preparation of an own-initiative report regarding human rights protection and EU external migration policy. The focus, therefore, is on the human rights implications of EU cooperation with third countries, established by: (1) identifying the human rights obligations owed to third-country nationals (TCNs) when engaging in cooperation with non-EU countries and international stakeholders, resulting from the relevant UN and regional human rights instruments¹, the 1951 Refugee Convention (CSR)², the EU treaties³, and the EU Charter of Fundamental Rights⁴; (2) assessing the means of compliance with these obligations when designing and implementing the main instruments of the EU external migration policy; and (3) establishing the existence and adequacy of operational, reporting, monitoring and accountability mechanisms available in each case to track and respond to potential violations.

The in-depth analysis notes continuing efforts by the European Parliament in promoting human rights within all EU external action⁵ and considers existing commitments by EU Member States (MSs) under the 2030 Agenda for Sustainable Development⁶, specifically to ‘cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status’ (para. 29). It is mindful of the need for a people-centred and human rights-based approach, that provides for long-term, coherent and sustainable policy solutions, benefitting all parties involved⁷, in line with the partnership principle and in compliance with the need to guarantee that ‘[t]he Union’s action on the international scene [is] guided by the principles which have inspired its own creation’, which includes ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law’ (Article 21(1) Treaty on European Union (TEU)).

1.2 Scope and Structure

This in-depth analysis deals with existing and developing forms of cooperation with third countries in the fields of migration, borders and asylum (except financial support), paying particular attention to informalised, soft-law tools (Cassarino, 2017), mindful of their enhanced potential to erode the enforceability of obligations, to downgrade democratic accountability and generally to undermine the rule of law (Molinari, 2019). Special emphasis is placed on Mobility Partnerships⁸, cooperation under the

¹ With particular attention being paid to the European Convention on Human Rights [1950] ETS No 5 (‘ECHR’), due to its special status within the EU legal order as a source of EU general principles of fundamental rights protection (Art. 6(3) TEU; Art. 52(3) CFR).

² Convention Relating to the Status of Refugees [1951] 189 UNTS 150 (‘CSR’).

³ Treaty on European Union [2012] OJ C 326/1 (‘TEU’); and Treaty on the Functioning of the EU [2012] OJ C 326/1 (‘TFEU’).

⁴ Charter of Fundamental Rights of the EU [2012] C 326/391 (‘CFR’); and Explanations Relating to the Charter of Fundamental Rights [2012] OJ C 303/17 (‘CFR Explanations’).

⁵ European Parliament, Resolution of 25 October 2016 on human rights and migration in third countries (2015/2316(INI)); Resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)); Resolution of 18 April 2018 on progress on the UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees (2018/2642(RSP)); Resolution of 15 January 2020 on human rights and democracy in the world and the European Union’s policy on the matter – annual report 2018 (2019/2125(INI)).

⁶ United Nations General Assembly (UNGA) Resolution, Transforming our world: the 2030 Agenda for Sustainable Development, (2015) A/RES/70/1.

⁷ EP Res (2018/2642(RSP)), para. 24. See also EP Res (2015/2342(INI)), paras K-L and 40.

⁸ On Mobility Partnerships, see <https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements_en>.

Migration Partnership Framework (MPF)⁹, including informal arrangements on migration and return concluded by Frontex or by the Member States (MSs) themselves, taking the form of Standard Operating Procedures (SOPs) or Memoranda of Understanding (MoUs). However, classic 'hard-law' EU Readmission Agreements and readmission clauses in EU association and cooperation treaties are also covered, as are the mandates of Common Security and Defence Policy (CSDP) missions with migration components, such as EUNAVFORMED Operation *Sophia* and its successor *IRINI*.¹⁰

Following this introduction, **Section 2** overviews key human rights obligations of the EU and/or its MSs when engaging in external action and cooperating with third countries. **Section 3** then maps out the EU policy framework regarding external action and cooperation with third countries on migration, borders and asylum, identifying the main tools employed under the Global Approach to Migration and Mobility (GAMM)¹¹, the Agenda on Migration¹², and the MPF as well as assessing the level to which they ensure compliance with TCNs' human rights. Four specific case studies are presented in Annex I, 'zooming in' and undertaking a detailed evaluation, assessing the effectiveness of human rights oversight mechanisms, including reporting and monitoring tools. The four selected case studies are: (1) the EU-Turkey Statement¹³, which led to emergence of the 'hotspot approach', transforming EU asylum policy; (2) the multi-actor cooperation with Libya, defining the EU's engagement in the Mediterranean regarding border control, search and rescue (SAR) together with the fight against migrant smuggling and trafficking by sea; (3) the Joint Way Forward (JWF) with Afghanistan¹⁴, serving as a blueprint for other informal arrangements on return and readmission pursued with other countries; and (4) the cooperation with Niger, which is one of the MPF's short-term priority countries, hosting the European Union Capacity Building Mission in Niger (EUCAP) Sahel mission¹⁵, coordinating external action on defence, security, borders, migration and asylum in a key region of transit, thus covering a spectrum of different configurations of actors, policies, and implications. **Section 4** closes with a summary of findings and recommendations.

1.3 Methodology

Considering the timeline brevity for delivery and current lockdown conditions amidst the Covid-19 pandemic, this analysis relies solely on desk research, taking into account previous studies for the Human Rights Subcommittee and the Committee on Civil Liberties, Justice and Home Affairs (LIBE), official declarations, policy documents, implementation reports, law and case law as well as related literature in law, politics and external relations. One limitation of this approach is that it does not allow for detailed conclusions on the application of relevant instruments in practice, although it does offer a comprehensive overview of the different policy tools and policy frameworks in a coherent and systematic way. It highlights the main concerns observable from the manner in which policy tools and policy frameworks have been designed and how their implementation has been evaluated for compliance with the applicable provisions.

⁹ Establishing a new Partnership Framework, COM(2016) 385 final, 7.6.2016.

¹⁰ On Operation Sophia, see Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFORMED), [2015] OJ L 122/31; and Council Decision (CFSP) 2019/535 of 29 March 2019 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), [2019] OJ L 92/1. On Operation IRINI, see Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI), [2020] OJ L 101/4.

¹¹ Global Approach to Migration and Mobility, COM(2011) 743 final, 18.11.2011.

¹² A European Agenda on Migration, COM(2015) 240 final, 13.5.2015.

¹³ EU-Turkey Statement, 18.3.2016 <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>.

¹⁴ Joint Way Forward on migration issues between Afghanistan and the EU, 2.10.2016 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf>.

¹⁵ EUCAP Sahel Niger <https://eeas.europa.eu/csdp-missions-operations/eucap-sahel-niger_en>.

A legal-doctrinal approach is applied to the evaluation of the relevant human rights obligations in Section 2, while a content exploration of the key policy documents is undertaken in Section 3. Most of the analysis is carried within the selected case studies (Annex I), following the same structure: (1) overview of key policy tools; (2) manner in which human rights safeguards have been incorporated and taken into account in their implementation; (3) the provisions of EU law that are applicable and should have been taken into account when designing and implementing the relevant policy tools to ensure compliance with human rights.

2 Relevant Human Rights Obligations

The universality and indivisibility of human rights, alongside the promotion of democratic principles and values including respect for human dignity, the rule of law together with the principles of freedom, equality and solidarity form ‘the cornerstones of the EU’s ethical and legal acquis’¹⁶, which the EU must ‘promote’ in both its internal and external action (Articles 2 and 21 TEU). The Union has assumed the specific mission of being ‘the leading global actor in the universal promotion and protection of human rights’¹⁷, in particular through the advancement of and compliance with its own Charter of Fundamental Rights and the relevant international human rights law instruments, which the Charter ‘reaffirms’ (Preamble, Recital 5 Charter of Fundamental Rights of the EU (CFR)).

Alongside general principles, the Charter provides the primary reference in relation to human rights within the EU legal order (Article 6 TEU). It will, accordingly, be taken as the starting point for establishing the minimum set of protections with which the EU and its MSs must comply ‘when [...] implementing Union law’ (Article 51(1) CFR). The Charter Explanations will be referred to, as required by the Treaties (Article 6(1) TEU), to clarify the meaning and scope of relevant provisions. They are intended as ‘a way of providing guidance in the interpretation of th[e] Charter’ and ‘shall be given due regard’ in this exercise (Article 52(7) CFR).

2.1 The Main Rights

There is a series of rights that the Charter recognises as being applicable to all persons, which are of particular relevance in the context of external and extra-territorial EU and MS action in the areas of migration, borders and asylum. Due to space constraints, only a selection of the key protections is elaborated upon in the next subsections, highlighting specific contexts in which each should especially be taken in consideration.

2.1.1 The Right to Life

The right to life is recognised to ‘everyone’ in Article 2 CFR, which is based directly on the correlative provision of the European Convention on Human Rights (ECHR) (CFR Explanations, p. 17). One of the key implications of the right to life is that it forbids the unreasonable, unjustifiable and disproportionate use of force in action adopted to implement migration or border controls for the prevention of entry of irregular migrants (Cogolati/Verlinden/Schmitt, 2015, p. 23).

In the maritime context, this translates into a positive duty to render assistance to persons in distress and deliver (proactive) Search and Rescue (SAR) services to ensure that persons in danger of being lost are retrieved from the water and disembarked at a ‘place of safety’ (Ratcovich, 2015; Komp, 2016). The UN Convention on the Law of the Sea (UNCLOS)¹⁸, alongside the SAR Convention¹⁹ and the Safety of Life at Sea (SOLAS) Convention²⁰, all make clear that the obligation is universal and benefits ‘any person’

¹⁶ EP Res (2019/2125(INI)), para. B. See also EP Res (2015/2342(INI)), para. R.

¹⁷ EP Res (2019/2125(INI)), para. B. See also EP Res (2015/2342(INI)), para. R.

¹⁸ UN Convention on the Law of the Sea [1982] 1833 UNTS 3 (‘UNCLOS’), Art 98.

¹⁹ International Convention on Maritime Search and Rescue [1979] 1405 UNTS 119 (‘SAR Convention’).

²⁰ International Convention for the Safety of Life at Sea [1974] 1184 UNTS 278 (‘SOLAS Convention’).

irrespective of nationality or legal status, which includes seaborne refugees and ‘boat migrants’ (SAR Convention, Annex, para. 2.1.10). The territorial ambit extends ‘throughout the ocean’ (Nandan/Rosenne, 1995, p. 177); the use of the generic ‘at sea’ in the relevant provisions does not allow for geographical restrictions. This means that, regardless of where a vessel encounters a ship in distress, it is duty-bound to assist it and failure to do so should be prosecuted and punished with appropriate, dissuasive penalties. Awareness of a distress situation through whatever means — including satellite imagery or radar detection — triggers the obligation to assist (SOLAS Convention, Ch V, Reg 33(1); SAR Convention, Annex, paras 4.2.1, 4.3; and Papastavridis, 2020). Hence, an approach such as that adopted by Frontex during Joint Operation (JO) *Triton/Themis*, according to which ‘instructions to move [...] outside *Triton* operational area’ to render assistance to migrant boats ‘will not be considered’²¹, is in direct contravention of this obligation and constitutes a serious violation of the right to life. Whether rescue constitutes a ‘pull factor’²² to irregular migration is irrelevant; this claim has moreover been solidly disproven through statistical data available in the public domain (Cusumano, 2019; Villa, 2020).

2.1.2 The Right to Integrity and the Prohibition of Ill-Treatment

Article 3(1) CFR enshrines the right of ‘everyone’ to respect for their physical and mental integrity²³, while Article 4 CFR prohibits in unqualified terms any form of torture and inhuman or degrading treatment or punishment also with universal remit. These provisions match the equivalent absolute prohibition contained in Article 3 ECHR (CFR Explanations, p. 18) and its intersection with Article 8 ECHR, which, amongst its different components, guarantees the physical aspect of the right to private life²⁴.

Apart from the implicit protection against *refoulement* that especially the latter provision entails (Cogolati/Verlinden/Schmitt, 2015, p. 21-24)²⁵, as elaborated below, both are particularly relevant in the context of return and readmission policy in two additional respects. Firstly, they are important in that they can be breached not only in the country of destination where the TCN concerned may be forcibly removed, but can also be violated if the removal *itself* is undertaken through excessive recourse to force or without due regard to the specific vulnerabilities of the person concerned²⁶, such as trauma, ill health, disability, or age in the case of children or elderly individuals²⁷. Secondly, the additional context in which they become significant relates to the conditions of detention. Both according to the ECHR case law²⁸ and the jurisprudence of the UN Human Rights Committee²⁹, it is a well-established principle under human rights law that all detained persons — including those in offshore locations — must ‘be treated with humanity and with respect for the inherent dignity of the human person’ (Article 10 International Covenant on Civil and Political Rights (ICCPR))³⁰. Indeed, the Court of Justice of the European Union (CJEU) has adopted this very standard in its own case law (Costello, 2015, ch 7; Tsourdi, 2016)³¹. Detention/reception conditions in camps, prisons and centres accommodating migrants and refugees, for instance in Turkey, Libya, and Niger, within facilities funded by the EU and/or administered by EU-trained personnel, need to be in

²¹ Letter by Frontex Director of Operations, Klaus Rösler, to Italian General Director of Immigration and Border Police, Dr Giovanni Pinto, Ref 19846/25.11.2014 <<https://assets.documentcloud.org/documents/3531242/Rosler-Pinto-Frontex-Letter-2014.pdf>>.

²² Frontex, Risk Analysis for 2017, p. 32

<http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf>

²³ See also Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR-I 7079, paras 70, 78-80.

²⁴ See e.g. ECtHR, *Costello-Roberts v. UK*, App 13134/87, 25.3.1993.

²⁵ See e.g. Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* [2011] ECR I-13905.

²⁶ See e.g. Case C-578/16 PPU *C.K.* ECLI:EU:C:2017:127.

²⁷ See e.g. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App 13178/03, 12.10.2006.

²⁸ See e.g. ECtHR, *Abdi Mahamud v. Malta*, App 56796/13, 3.5.2016, para. 89.

²⁹ See e.g. Human Rights Committee (HRC), *C v. Australia*, Comm 900/1999, 28.10.2002.

³⁰ International Covenant on Civil and Political Rights [1969] 999 UNTS 171 (‘ICCPR’).

³¹ Case C-474/13 *Pham* ECLI:EU:C:2014:2096, para. 21. See also European Asylum Support Office (EASO), ‘Detention of applicants for international protection in the context of the CEAS’ (January 2019)

<<https://www.easo.europa.eu/sites/default/files/Detention-JA-EN.pdf>>.

conformity with this standard. Beyond the avoidance of mistreatment, this obligation also entails a positive duty of care, with which compliance is obligatory independently from ‘the material resources available’ to the State party concerned.³² Detention/reception without provision for essential needs and without an opportunity to contact family or counsel or without access to adequate medical attention is in breach of this obligation³³.

2.1.3 The Prohibition of Slavery and Forced Labour

The Charter forbids slavery and servitude and makes clear that human trafficking, as an extreme form of exploitation, is also included within the provision’s scope (Article 5 CFR). The source of inspiration is Article 4 ECHR, expressed as a non-limitable, non-derogable prohibition and the related case law of the Strasbourg Court, which obliges State parties not only to adopt specific legislation banning the conduct, but also actively to prosecute offenders and effectively protect the victims thereof, even in extra-territorial scenarios³⁴.

The same reasoning has been adopted within the UN Palermo Protocols on Human Trafficking³⁵ and Migrant Smuggling³⁶, which the EU has ratified³⁷. The lines between the two are difficult to demarcate in practice (Gallagher, 2010; Gallagher/David, 2014), with smuggled migrants being exposed to harm akin to trafficking and/or experiencing abuse that leads to exploitative relations that are indistinguishable from trafficking. In trafficking cases, the relevant Protocol calls for cooperation to prevent and combat the crime, while protecting and assisting the victims thereof (Article 2 THB Protocol), reminding States that ‘the[ir] rights, obligations and responsibilities [...] under international law’ remain unaltered (Article 14(1) THB Protocol). The same applies in smuggling situations, where the related UN Protocol aims to ‘prevent and combat the smuggling of migrants [...] while protecting the rights of smuggled migrants’ (Article 2 SOM Protocol). Any measures adopted to suppress the crime must comply with ‘relevant domestic and international law’ (Article 8(7) SOM Protocol), taking into account ‘other rights, obligations and responsibilities of States and individuals under international law’ (Article 19 SOM Protocol). Accordingly, the distinction between victims and perpetrators needs to be clearly established within all policy and executive measures adopted in this regard.

The criminalisation of irregular migration, therefore, subverts the rationale underpinning the Protocols (Carrera et al., 2018)³⁸. For refugees, it contravenes the explicit exoneration clause in the Refugee Convention, according to which Contracting Parties ‘shall not’ (in imperative terms) ‘impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened [...] enter or are present in their territory without authorization’ (Article 31). The only condition — which should not be interpreted so strictly as to render it without effect — is that ‘they present themselves without delay to the authorities and show good cause for their illegal entry or presence’. Attempting to escape persecution, ill-treatment, or serious harm should be considered a ‘good

³² HRC, General Comment No 21, 12.5.2004, paras 3 and 4.

³³ HRC, *Madafferi v Australia*, Comm 1011/2001, 26.7.2004 (detention against medical opinion); *Luyeye v. Zaire*, Comm 90/1981, 21.7.1983 (obligation to sleep on the floor in a small cell with no permission for family contact); *Parkanyi v. Hungary*, Comm 410/1990, 22.3.1991 (very reduced daily time for personal hygiene and outdoor exercise).

³⁴ ECtHR, *Siliadin v. France*, App 73316/01, 26.7.2005; *Rantsev v. Cyprus and Russia*, App 25965/04, 7.1.2010.

³⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime [2000] 2237 UNTS 319 (‘THB Protocol’).

³⁶ Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime [2000] 2241 UNTS 480 (‘SOM Protocol’).

³⁷ See status of ratifications of THB Protocol: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en>; and SOM Protocol: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18>.

³⁸ Cf. Anti-Trafficking Directive 2011/36/EU [2011] OJ L 101/1; Directive 2004/81/EC on the residence permit issued to TCNs victims of trafficking [2004] OJ L 261/19; Directive 2012/29/EU on the rights and protection of trafficking victims [2012] OJ L 315/57; Facilitation Directive [2002] OJ L 328/17.

cause' (Goodwin-Gill, 2003). So, measures that penalise refugees, legally or in practice, upon arrival in the country of destination or while en route, should be considered incompatible with this provision.

2.1.4 The Right to Liberty and Security

The right to liberty and security in Article 6 CFR is tailored on Article 5 ECHR, so that 'the limitations which may legitimately be imposed on [it] may not exceed those permitted by the ECHR' (CFR Explanations p. 19). This means that detention is not allowed on account simply of the person's condition as an 'irregular migrant'. Under Article 5(1)(f) ECHR, only 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition' are permitted, but subject to several criteria. Detention must be provided for by law; it must pursue a legitimate aim and be appropriate for achieving it; and it must be necessary in the particular case. Hence, where other less intrusive measures can be adopted to attain the objective pursued, they have preference; detention is justified only as a last resort. In addition, detention must have a sufficient legal basis warranting the deprivation of liberty; an effective remedy must be available for the detainee to contest the measure; and the duration and conditions of detention must be adequate and ensure 'dignified standards of living'³⁹. The overall objective is to ensure protection against arbitrariness (Moreno-Lax, 2011).

Non-individual, large-scale, automatic and/or long-term detention do not meet these criteria and are, thus, incompatible with the Charter, including in extra-territorial situations. The protection of Article 5 ECHR has been explicitly extended to the high seas⁴⁰, so that the 'retention' of asylum seekers aboard vessels, functioning as ad hoc reception/detention facilities in international waters are in violation of the relevant guarantees⁴¹. The prohibition of arbitrary detention also applies when acting on foreign territory⁴², which holds particular relevance when cooperating with third countries for the accommodation of asylum seekers (Turkey), the containment of irregular migrants (Libya), or the evacuation of refugees (Niger) discussed in the case studies in Annex I. Custodial measures adopted to enforce removal (Afghanistan) as well as interdiction at sea, in so far as they constitute a restriction of physical freedom, risk breaching Article 6 CFR, unless accompanied with appropriate legal safeguards along with prompt and effective judicial review. Over-demand or the saturation of facilities do not constitute 'a justification for any derogation from meeting [the relevant] standards'⁴³.

2.1.5 The Right to Asylum

According to Article 18 CFR, the right to asylum must be guaranteed with due respect for the rules of the 1951 Geneva Convention and in accordance with the EU Treaties. Although the Geneva Convention does not include an explicit clause in this regard, 'the right to seek and be granted asylum' (Article 22(7) ACHR) or 'to seek and obtain asylum' (Article 12(3) African Convention on Human and People's Rights (ACHPR)) has been included in two regional instruments of human rights protection⁴⁴, following Article 14 Universal Declaration on Human Rights (UDHR). In the EU, the right to asylum has been recognised as a right of the individual (Lenaerts, 2010, p. 289), 'follow[ing] from the general principles of [EU] law'⁴⁵. Prior to the Charter's codification, the right to asylum was recognised in domestic legislation and in national constitutions, granting international protection to persons who qualify as refugees under the 1951

³⁹ Case C-79/13 *Saciri* ECLI:EU:C:2014:103, paras 39-40.

⁴⁰ ECtHR, *Rigopoulous v. Spain*, App 37388/97, 12.1.1999; *Medvedyev v. France*, App 3394/03, 29.3.2010.

⁴¹ Cf. UNHCR, 'UNHCR, IOM, urge European states to disembark rescued migrants and refugees on board the Captain Morgan vessels', 21.5.2020 <<https://www.unhcr.org/mt/13951-unhcr-iom-urge-european-states-to-disembark-rescued-migrants-and-refugees-on-board-the-captain-morgan-vessels.html>>.

⁴² ECtHR, *Al-Saadoon and Mufdhi v. UK*, App 61498/08, 2.3.2010; *Al-Skeini v. UK*, App 55721/07, 7.7.2011.

⁴³ *Saciri* (n 39), para. 50.

⁴⁴ American Convention on Human Rights [1969] 1144 UNTS 123 ('ACHR'); African Charter on Human and Peoples' Rights [1981] 1520 UNTS 217 ('ACHPR').

⁴⁵ Opinion of AG Maduro in Case C-465/07 *Elgafaji* ECLI:EU:C:2008:479, para. 21.

Convention criteria (Moreno-Lax, 2017a, p. 365; Worster, 2014). This was understood as the only meaningful way of complying with the principle of *non-refoulement*. The Qualification Directive, in harmonising MSs' practice, followed this approach, using refugee and subsidiary protection qualification criteria as a basis to grant international protection in the EU (Articles 13 and 18 Qualification Directive (QD))⁴⁶. International protection has been defined in EU law as a territorial form of protection, taking the form of refugee status or subsidiary protection (Article 2(a), (e) and (g) QD) and including a residence permit authorising the TCN concerned to 'reside on [the] territory' of the issuing MS (Articles 2(m) and 24 QD). The term 'international protection' is used as synonymous with 'asylum', a harmonised policy on which the EU 'shall develop' under the terms of Article 78(1) Treaty on the Functioning of the European Union (TFEU), specifically 'with a view to offering appropriate status to any third-country national [fearing persecution or serious harm] and ensuring compliance with the principle of *non-refoulement*'.

2.1.6 The Right to Leave any Country including One's Own and the Right to 'Flee'

An aspect of the right to asylum which the European Parliament has recognised within its Resolutions as a vital element in ensuring the effectiveness of migrant rights, and especially those of the forcibly displaced, is the right to leave any country including one's own.⁴⁷ The right is contained as a legally-binding provision in Article 12 ICCPR and Article 2 of Protocol 4 ECHR with universal scope and not conditioned on lawful residence within the territory of a State party (Nowak, 1993, p. 204). The right applies to 'everyone', regardless of legal status and whether or not that person meets the specific criteria to be eligible for international protection. Its extra-territorial relevance has been recognised, inter alia, in the 'Passport cases' by the UN Human Rights Committee, condemning both the State of residence and the State of nationality for unduly obstructing the right to leave by denying renewal of a passport (Harvey/Barnidge, 2007).

Although justifiable and non-discriminatory restrictions can be imposed on the right to leave on grounds of security or public order, 'the application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality'⁴⁸. This means that restrictions must be provided for by law and 'must not impair the essence of the right' by rendering it ineffective in practice⁴⁹. Most crucially, restrictions must remain 'consistent with the other rights recognised in the [...] Covenant' (Article 12(3) ICCPR; Article 2(3) Protocol 4 ECHR), which makes the intersection with the prohibition of torture particularly significant. If restrictions on the right to leave entail exposure to ill-treatment, they must be considered to be in breach of the composite 'right to flee', emerging from the intersection between the two provisions. Precluding departure from Libya, through measures adopted by the Libyan Coastguard with the financial, logistical and political support of the EU, as elaborated in Section 4, constitutes a case in point. When the right to leave is used to escape persecution or serious harm, the absolute nature of the prohibition of ill-treatment, with which it converges, disallows considerations of proportionality and triggers instead a duty to take positive action to avoid its occurrence. Any limitations adopted directly or by a proxy third actor, which impinge on the right to flee and preclude access to asylum, become incompatible with Article 18 CFR (Moreno-Lax, 2017a, pp. 391-393; Moreno-Lax, forthcoming).

2.1.7 The Prohibition of Refoulement and Collective Expulsion

The principle of *non-refoulement* is the cornerstone of the international refugee protection regime (Article 33 CSR), but its importance is paramount in more general terms (Wouters, 2009). Included, as it is, in all major human rights instruments, whether implicitly (Article 3 ECHR; Article 7 ICCPR) or explicitly (Article 3 CAT)⁵⁰, international human rights law provides further protection beyond (and in addition to) that offered

⁴⁶ Qualification Directive 2011/95/EU [2011] OJ L 337/9 ('QD').

⁴⁷ EP Res (2018/2642(RSP)), para. A.

⁴⁸ HRC, General Comment No 27: Article 12 (Freedom of Movement), (1999) CCPR/C/21/Rev.1/Add.9, para. 16.

⁴⁹ *Ibid.*, para. 13.

⁵⁰ UN Convention against Torture [1984] 1465 UNTS 85 ('CAT').

by international refugee law. This is the aggregate standard encapsulated in Articles 4 and 19(2) CFR, according to which '[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. The CFR standard thus 'incorporates' the international human rights law standard (CFR Explanations, p. 24), allowing for no conditions, no limitations and no derogations of any kind⁵¹.

The principle forbids in absolute terms all measures that may expose 'any person' — not just refugees — to ill-treatment and other irreversible harm (Cogolati/Verlinden/Schmitt, 2015, p. 21-24; Costello/Foster, 2015). This includes expulsion and rejection at the border, in both territorial and extra-territorial settings. In fact, 'the ordinary meaning of *refouler* is to drive back, repel, or re-conduct, which does not presuppose a presence in-country' (Lauterpacht/Bethlehem, 2003, p. 87), thereby supporting the view that the principle encompasses interdiction on the high seas or forcible containment within foreign territory, thus creating a positive duty to prevent the harm from materialising⁵². This interpretation is endorsed by UN human rights treaty bodies, which amounts to a very strong international consensus on the principle's scope⁵³.

The prohibition covers scenarios of direct and indirect (also called 'chain') *refoulement*⁵⁴ and it protects individuals whether alone or within a group⁵⁵. Collective expulsions are explicitly banned by Article 19(1) CFR. The provision has the 'same meaning and scope' as Article 4 Protocol 4 ECHR, whose purpose is to guarantee that every decision to expel, deport, or *refouler*, is based on an individual examination of the specific circumstances of each case and ensuring that no measure is taken without adequate procedural guarantees (CFR Explanations, p. 24, referring explicitly also to Article 13 ICCPR). Particular mention is made in the Charter Explanations to 'persons having the nationality of a particular State' as making up a collective to bear specifically in mind when contemplating group measures (p. 24). Measures that target a particular nationality, like Syrians within the EU-Turkey Statement, should thus be looked at as posing a significant risk of non-compliance with the prohibition of collective expulsion and as requiring special precautions.

2.1.8 Procedural Guarantees

The rights to good administration and to an effective remedy are guaranteed in Articles 41 and 47 CFR with a general remit, entailing a range of ancillary safeguards (Craig, 2014; Aalto et al. 2014). Under Article 41 CFR, 'every person' (including TCNs) has the right to have their affairs handled fairly, impartially and within a reasonable time frame by every EU institution, body or agency — including Frontex, the EUNAVFORMED or the EUCAP Sahel command, as appropriate. This includes: the right to be heard *before* any measure which may adversely affect them is taken; the right to have access to their file; the obligation to provide reasons for any decisions (*cf.* Article 296 TFEU); and the duty to repair any damage caused as a result (*cf.* Article 340 TFEU). This is a direct consequence of the EU being subject to the rule of law (CFR Explanations, p. 28)⁵⁶.

The right to an effective remedy, regulated separately in Article 47 CFR, is an important aspect of the right to good administration (CFR Explanations, p. 28). It purports to ensure that, in the event of a violation of *any* right guaranteed by EU law (CFR Explanations, p. 29), 'everyone' is given access to *judicial* protection

⁵¹ ECtHR, *Soering v. UK*, App 14038/88, 7.7.1989.

⁵² ECtHR, *Hirsi Jamaa and Others v. Italy*, App 27765/09, 23.2.2012; *Al-Saadoon* (n 42).

⁵³ HRC General Comment No 31: The nature of the general legal obligation imposed on States parties, (2004) CCPR/C/21/Rev.1/Add. 13; and CAT Committee, General Comment No 2: Implementation of Article 2 by States parties, (2008) CAT/C/GC/2.

⁵⁴ ECtHR, *M.S.S. v. Belgium and Greece*, App 30696/09, 21.1.2011.

⁵⁵ ECtHR, *N.D. and N.T. v. Spain*, Apps 8675/15 and 8697/15, 13.2.2020.

⁵⁶ Case 294/83 'Les Verts' v. European Parliament [1986] ECR 1339.

and is afforded appropriate redress. The right under EU law is ‘more extensive’ than under Article 13 ECHR, from which it draws inspiration, ‘since it guarantees the right to an effective remedy *before a court*’ and generalises protections normally confined to civil and criminal law suits under Article 6 ECHR (CFR Explanations, pp. 29-30, emphasis added). To this effect, the provision ensures that ‘everyone’ is given a fair, public hearing within a reasonable time by an impartial, independent tribunal, ‘previously established by law’, having access to legal advice, defence and representation, if necessary through the provision of legal aid, so as to ensure effective access to justice. Moreover, accessing and exercising appeal rights must be practicable and proactively facilitated, especially via linguistic and legal assistance⁵⁷. Furthermore, in cases where there may be a risk of irreversible harm, remedies must have ‘automatic suspensive effect’⁵⁸, capable of halting execution of the measure concerned *before* it takes place⁵⁹.

2.2 Scope of Application: Questions of Jurisdiction and Responsibility

In the EU’s constitutional context, there is a pervasive requirement for the Union and its MSs to comply with fundamental rights in all spheres governed by EU law (Article 2 and 6 TEU; Article 51 CFR). Within the Charter specifically, there is no jurisdictional clause, akin to Article 1 ECHR or Article 2 ICCPR, acting as a threshold criterion on which its applicability may be dependent. Instead, Article 51(1) makes clear that the Charter applies whenever EU organs exercise their competences and whenever MSs implement EU law.

Accordingly, if any of the EU institutions, bodies, offices or agencies act outside the MSs’ territories, the extra-territoriality of the action is immaterial when establishing the Charter’s applicability. Article 51 CFR reflects a general understanding that EU fundamental rights obligations track EU activities, whether they take place within or without territorial boundaries (Moreno-Lax/Costello, 2014; Moreno-Lax, 2017a, pp. 290-292). The Union, as an international organisation, does not possess sovereign territory of its own, thus rendering as ill-suited any recourse to territorial parameters in defining the reach of its legal *acquis*. Rather, the Charter’s field of application is autonomously regulated by the ‘general provisions governing interpretation and application of the Charter’ in Title VII thereof. The logic is that of competences and their application within the EU legal order (Eeckhout, 2002), irrespective of the geographical space within which these powers may be exercised. The Charter’s scope of application is to be determined by reference to the general scope of EU law’s application. The point is not to identify an independent field of application of the Charter, but to determine the remit of EU law and its relevance in a particular situation (Peers, 2012). The Charter applies whenever EU institutions, bodies and agencies exercise their powers according to the provisions of EU law.

The Charter also applies to MSs when they ‘are implementing EU law’ (Article 51(1) CFR). The meaning of ‘implementing’, according to the CJEU, covers ‘all situations where MSs fulfil their obligations under [...] EU law’ (Lenaerts, 2012, p. 378), which includes: (1) when they transpose EU legislation; (2) when they apply or restrict provisions of primary or secondary law; or (3) when they derogate from EU legal requirements (CFR Explanations, p. 32). Exercising a discretionary option under EU law has also been treated as ‘implementing EU law’⁶⁰. Even where EU rules defer to MS preferences, the CJEU has understood that such references ‘do not mean that the MSs may undermine the effectiveness of [EU law]’⁶¹. All implementing decisions ‘must comply with the rights and observe the principles provided for under the Charter’⁶². MSs are not permitted to jeopardise the exercise of fundamental rights conferred on individuals by EU law or

⁵⁷ *M.S.S.* (n 54), para. 319.

⁵⁸ ECtHR, *Gebremedhin v. France*, App 25389/05, 26.4.2007, para. 66.

⁵⁹ ECtHR, *Conka v. Belgium*, App 51564/99, 5.2.2002, para. 79.

⁶⁰ *N.S.* (n 25), paras 64-68.

⁶¹ Case C-571/10 *Kamberaj*, ECLI:EU:C:2012:233, para. 78.

⁶² *Ibid.*, para. 80.

to nullify their substance⁶³. Furthermore, as the Charter requires that EU rights be ‘observed and promoted’ (Article 51(1) CFR), failures to act are also relevant, with omissions being equally answerable to fundamental rights.

There are already examples of the Charter being applied to extra-territorial action within the Common Foreign and Security Policy (CFSP). In *Bank Saderat Iran*, for instance, the obligation to provide reasons, the rights of the defence and the right to effective judicial protection were considered to apply (and to have been violated) by a series of restrictive measures adopted by the Council as part of the programme against Iran aiming at the prevention of nuclear proliferation⁶⁴. The bank had been included in a list of organisations supporting the government, based on undisclosed evidence, which led to the freezing of its funds. The CJEU found in favour of the bank, establishing the applicability of EU law and of the Charter, without considering whether the Union or its MSs had exerted ‘jurisdiction’ or ‘effective control’ (as would have been preceptive under Article 1 ECHR).

Recent legislation regulating Frontex’ interventions and the action of participating MSs in Frontex-coordinated missions explicitly recognise the Charter’s applicability in extra-territorial settings. Article 71 of the recast European Border and Coast Guard (EBCG) Regulation expressly foresees the requirement of compliance with EU fundamental rights ‘including where cooperation with third countries takes place on the territory of those third countries’⁶⁵.

The key question, therefore, is not whether the Charter applies territorially or extra-territorially, but whether or not a particular situation is governed by EU law (Dougan, 2015). If that is so, the Charter’s application follows automatically. There are no places where powers conferred by EU law on EU organs or EU MSs can be exercised without due regard being given to fundamental rights. This is because ‘situations cannot exist which are covered [...] by [EU] law without [...] fundamental rights being applicable’; ‘[t]he applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter’⁶⁶.

3 The EU External Migration Policy Framework

3.1 Evolution of the Policy Framework

There has been a progressive refinement of the migration policy framework, with increased attention being paid to the strategic importance of EU external action. Since the Lisbon Treaty’s entry into force, three key documents have shaped the EU’s strategy in this domain: The GAMM; the EU Agenda on Migration; and the MPF. The link between the internal and external aspects of migration policy will also form the basis of the forthcoming New Pact on Migration and Asylum. The below analysis intends to identify issues and problems that should be rectified in the design of the future framework for the New Pact to deliver ‘a more resilient, more humane and more effective [...] system’, in line with the Commission’s stated vision⁶⁷.

3.1.1 The Global Approach to Migration and Mobility (GAMM)

The GAMM’s stated ambition is to develop a ‘coherent and comprehensive migration policy for the EU’ (GAMM, p. 2), taking into account the Union’s short-term and long-term needs. It is organised around four thematic priorities: (1) legal migration and mobility; (2) the fight against irregular migration; (3) asylum;

⁶³ Case C-502/10 *Singh*, ECLI:EU:C:2012:636, para. 51; Case C-508/10 *Commission v. The Netherlands*, ECLI:EU:C:2012:243, paras 69.

⁶⁴ Case T-494/10 *Bank Saderat Iran*, ECLI:EU:T:2013:59 (appeal dismissed in Case C-200/13 P, ECLI:EU:C:2016:284).

⁶⁵ Recast European Border and Coast Guard Regulation 2019/1896 [2019] L 295/1 (‘EBCG Regulation’).

⁶⁶ Case C-617/10 *Fransson*, ECLI:EU:C:2013:105, para. 21.

⁶⁷ Commission Work Programme 2020, COM(2020) 37 final, 29.1.2020, p. 8; Political Guidelines for the Next European Commission 2019-2024, pp. 15-16 <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf>.

and (4) the migration-development nexus (GAMM, p. 6). Yet, the key focus is the fight against irregular migration, on the premise that, 'without well-functioning border controls, lower levels of irregular migration and an effective return policy, it will not be possible for the EU to offer more opportunities for legal migration' (GAMM, p. 5). No special consideration is given in this context to those who are forcibly displaced and must, in the absence of legal pathways, resort to unauthorised channels to reach the EU⁶⁸.

Human rights are said to occupy a central place in the GAMM, which refers to a 'migrant-centred' approach. However, rather than a detailed evaluation of relevant actions, in the only publicly available biennial report on the GAMM's implementation, it is stated that 'protection of the human rights of migrants is a cross-cutting priority in the EU's cooperation with third countries [...] [which] is reflected in the numerous projects carried out [...] focusing on protecting migrants'⁶⁹. The document then lists the relevant projects, but fails to examine concrete compliance with TCN rights or to engage with a dedicated report from the UN Special Rapporteur on the human rights of migrants (Crépeau, 2013). It does not mention or address any of the Rapporteur's criticisms, albeit acknowledging that he 'formulated a list of recommendations which will be important to consider in the future implementation of the GAMM'⁷⁰. No specific follow up is foreseen to ensure alignment with the Rapporteur's observations. Thereafter, rather than publishing GAMM implementation reports, the Commission has provided a regular 'GAMM update' to the Council, listing the different activities, but not assessing their impact on TCN rights in practice or establishing their compatibility with the Charter⁷¹.

3.1.2 The EU Agenda on Migration

The Agenda on Migration is focused on short- and medium-term measures required to address the 2015 'refugee crisis' and its aftermath. It centres, therefore, on 'immediate action' (Agenda, p. 3) in targeting: deaths at sea; smuggling networks; the relocation and resettlement of refugees; help to MSs at the external frontiers of the EU; and cooperation with third countries 'to tackle migration upstream' (Agenda, p. 5). The Agenda identifies 'four pillars to manage migration better' (p. 6), gearing efforts across the four pillars towards containing unauthorised movement, reinforcing return and readmission, enhancing border controls and 'support [for] third countries developing their own solutions to better manage their borders' (Agenda, p. 11), including the strategic use of visa policy and development cooperation (*cf.* Landau, 2019).

The need to respect TCN rights is mentioned in regard to asylum and return procedures, which are also the only areas where monitoring and evaluation mechanisms are contemplated, although not specifically for compliance with fundamental rights (Agenda, p. 10 and 12-13). Subsequent implementation reports do not assess the impact of priority actions on the rights of TCNs. There is a concerning statement in one of these periodic reports that seems to imply that '[t]he humanitarian imperative and fundamental rights are guiding principles of the EU's approach to refugees and migrants [constituting] the drivers for *many* [rather than all] of the specific actions'⁷². The specific actions listed include only SAR at sea, the hotspots and relocation provisions, along with asylum and integration measures *within* MSs, which seems to ignore the extra-territorial applicability of the fundamental rights *acquis* when cooperating with third countries. There

⁶⁸ Available statistics show that up to 90 % of those subsequently recognised as qualifying for international protection entered the EU irregularly. See European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), para. E.

⁶⁹ Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM(2014) 96 final, 21.2.2014, p. 17.

⁷⁰ GAMM Implementation Report (n 69), p. 18.

⁷¹ The latest of these updates was delivered in November 2019. See GAMM Update, Annex to Council doc. 13452/19, 7.11.2019 <<https://www.statewatch.org/news/2019/dec/eu-council-MIGR-GAMM-Update-13452-19.pdf>>.

⁷² State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, 10.2.2016, p. 15 (emphasis added).

are, otherwise, only sporadic references to the human rights obligations of those third countries⁷³, but no acknowledgement of the EU's and its MSs' own duties in these situations. There are, instead, assertions that 'initiatives [...] aiming to tackle smuggling [...] and trafficking [...] [are] empowering migrants by giving them more rights and more protection [...] mak[ing] migration easier and safer'⁷⁴, without any substantiation.

3.1.3 The Migration Partnership Framework (MPF)

The MPF is designed as the implementation mechanism for the Agenda's external dimension, placing migration 'at the top of the EU's external relations priorities' (MPF, p. 3). It is based on intensified cooperation with third countries, taking the form of rapid result-oriented 'partnerships', pursuing migration management through 'all means available' (MPF, p. 2). This entails a multi-dimensional engagement, beyond the 'migration toolkit alone' (MPF, p. 3), including: the coordination of EU action and MSs' bilateral efforts; the mainstreaming of MPF goals in all EU policies; and increased financial assistance and targeted support to 16 priority countries⁷⁵. Furthermore, there should be operational cooperation, using 'all [...] tools' with a 'mix of positive and negative incentives', 'bringing maximum leverage' (MPF, pp. 6 and 9), guided 'by the ability and willingness of the [third] countries to cooperate on migration management, notably in effectively preventing irregular migration and readmitting irregular migrants', which constitutes the foremost goal (MPF, p. 6)⁷⁶.

There are three short-term priorities: (1) Numerically 'increase the rate of return' (MPF, p. 6), regardless of qualitative considerations, which are not mentioned, including fundamental rights. This is to be achieved 'not necessarily [through] formal readmission agreements' (MPF, p. 7), but also with the use of informal arrangements, which heightens the risk of *refoulement* (Giuffré, 2020). (2) '[E]nable migrants [...] to stay close to home', by '[w]ork[ing] with key partners to improve the[ir] legislative and institutional framework for migration', providing them with '[c]oncrete assistance for capacity building on border and migration management', without due attention to the need for guaranteeing the right to leave any country, including one's own, and the right to seek asylum. (3) '[S]ave lives in the Mediterranean', which has yet to materialise in the launch of an EU-wide mission with a specific SAR mandate and is, instead, intended to be achieved through Frontex-coordinated border control deployments, collaboration with the Libyan Coastguard and the EUNAVFORMED operations fighting smuggling and trafficking by sea (MPF, p. 6).

In the long term, actions should tackle the root causes of unwanted migration. Enhanced conditionality is to be employed, 'to ensure that development assistance helps partner countries manage migration more effectively, and also incentivises them to effectively cooperate on readmission of irregular migrants' (MPF, p. 9). However, this contravenes Article 208 TFEU, which stipulates that development assistance 'shall have as its primary objective the reduction and, in the long term, the eradication of poverty'. The use of development aid as an incentive for migration control may undermine meaningful action on root causes in practice (Landau, 2019). Democratisation and development efforts may not necessarily be assisted by enhancing control capacities of regimes with dubious human rights records. 'Restoring order', bringing

⁷³ See e.g. Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM(2017) 471 final, 6.9.2017, pp. 7 (regarding Silk Route countries), 9 (regarding Egypt), and 14 (regarding Libya). See also Progress report on the European Agenda on Migration, COM(2017) 669 final, 15.11.2017, pp. 8 (Libya) and 13 (Silk Route countries); Progress report on the Implementation of the European Agenda on Migration, COM(2018) 250 final, 14.3.2018, pp. 11 (Libya) and 15 (Morocco); Progress report on the Implementation of the European Agenda on Migration, COM(2018) 301 final, 16.5.2018, p. 13 (Horn of Africa); Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 16.10.2019, p. 11 (Morocco).

⁷⁴ Managing Migration in All its Aspects: Progress under the European Agenda on Migration, COM(2018) 798 final, 4.12.2018, p. 8.

⁷⁵ Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan.

⁷⁶ See also EC Conclusions, 28.6.2016, Council doc. EUCO 26/16, paras 1-8.

'robustness' to external border systems (MPF, pp. 5 and 13) and 'stemming the irregular flows' (MPF, p. 6) can have detrimental effects on TCN rights. Yet, progress reports on the MPF do not assess compliance with fundamental rights, limiting themselves to stating that '[i]n all cases [without specification], the humanitarian and human rights imperatives of EU policy need to stay at the core of the approach'⁷⁷. Generally, references to TCN rights are made only in the context of information campaigns and reintegration projects⁷⁸, for the purposes of ensuring readmissions⁷⁹, or to account for cooperation with the Libyan Coastguard⁸⁰.

3.2 Main Delivery Tools

Several implementation tools have been devised under the GAMM, the Agenda on Migration and the MPF to achieve the Union's migration management objectives. To be explored in turns, these are: Mobility Partnerships (MPs); EU readmission agreements (EURAs), readmission clauses in other EU agreements and informal arrangements fostering returns; Frontex' action in the Mediterranean and its cooperation with third countries as well as the mandates of new CSDP missions with a migration or border control component. A table summarising existing human rights compliance mechanisms for the different tools is provided in Annex II.

3.2.1 Mobility Partnerships

The 'dialogues on migration, mobility and security' are the GAMM's key implementation tool (GAMM, p. 2), intended to provide an overarching framework for long-term, comprehensive cooperation with third countries in the form of MPs, exploiting synergies across policy fields and fostering coherence between internal and external policies. MPs were introduced in 2007, as a way of enhancing cooperation on return and readmission in exchange for circular migration opportunities⁸¹. They currently exist with Armenia, Azerbaijan, Belarus, Cape Verde, Georgia, Jordan, Morocco, Moldova, Tunisia, Ethiopia, India, and Nigeria⁸².

Although intended as comprehensive instruments, MPs are predominantly focused on irregular migration (García Andrade et al., 2015, pp. 22 and 30-33). They all have the same template, which indicates a process of adhesion to EU preferences, rather than genuine (equal footing) negotiation (Lavenex/Stucky, 2011, p. 131). The structure comprises general and specific objectives along with implementation instruments, organised around the GAMM's four pillars. While clauses regarding legal migration are vague and generally worded, commitments on return and readmission, border management and the fight against irregular immigration are specific and more detailed. The Annex of initiatives and projects available to cooperating countries and the MSs voluntarily joining the MP, reinforces this conclusion⁸³. This has led critics to speak of 'immobility partnerships' (Weinar, 2012) or '(in)security partnerships' (Carrera/Hernández i Sagraera, 2009).

⁷⁷ First Progress Report on the Partnership Framework, COM(2016) 700 final, 18.10.2016, p. 2.

⁷⁸ Second Progress Report: First Deliverables on the Partnership Framework, COM(2016) 960 final, 14.12.2016, p. 7-8 (Libya and Western African countries); Third Progress Report on the Partnership Framework, COM(2017) 205 final, 2.3.2017, p. 17 (Rabat Process countries); Fifth Progress Report on the Partnership Framework, COM(2017) 471 final, 6.9.2017, p. 7 (Ethiopia and Silk Route countries), 9 (Egypt), and 14 (Libya).

⁷⁹ Third Progress Report on the Partnership Framework (n 78), p. 2; Fourth Progress Report on the Partnership Framework, COM(2017) 350 final, 13.6.2017, p. 11.

⁸⁰ Fourth Progress Report on the Partnership Framework (n 79), p. 9.

⁸¹ Circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248, 16.5.2007.

⁸² 'Mobility partnerships, visa facilitation and readmission agreements', undated <https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements_en>.

⁸³ See e.g. Joint Declaration on a Mobility Partnerships between the European Union and the Republic of Moldova, Council doc. 9460/08, 21.5.2008. Cf. Joint Declaration on a Mobility Partnership between the European Union and Armenia, Council doc. 14963/11, 6.10.2011. Cf. Joint Declaration on a Mobility Partnership between the Republic of Belarus and the European Union and its Member States, Council doc. DS 1233/1/15 REV 1, 4.5.2015, which has no Annex.

Their soft-law nature makes them un-enforceable and capable of side-lining democratic accountability and judicial oversight, through exclusion of the Parliament's input and the CJEU's jurisdiction. MPs informalise relations (Cassarino, 2017), 'softifying' legal commitments and increasing the risk of human rights violations (Moreno-Lax, 2017b), which go unmonitored and unrepaired, since in formal terms they are non-binding. In fact, there is no mechanism foreseen among the implementation measures listed in MPs to control their conformity with fundamental rights and neither are any remedies contemplated. There are only general statements in their Preambles that MPs are entered into, 'while respecting human rights'⁸⁴. But these are not accompanied by any operational details. An independent evaluation of the MPs with Cape Verde, Georgia and Moldova noted that the EU and MSs' officials consulted 'felt' that MPs facilitated policy reforms by partner countries in different areas, including human rights and refugee protection. However, evaluators could not corroborate the degree to which such reforms could be attributed to MPs and concluded that the role of MPs in practice could not be established with any certainty (Langley/Alberola, 2018, p. 27). The public unavailability of MP scoreboards, the lack of reliable data and the absence of a streamlined approach to track implementation systematically make corroboration impossible (Tittle-Mosser, 2020, s2.3.1).

3.2.2 Readmission Clauses, EURAs and Informal Return Arrangements

EU association and cooperation agreements started to include clauses regarding migration, and especially return and readmission, from the early 1990s (Coleman, 2009). Following the 2002 EC Council of Seville, these clauses became more sophisticated⁸⁵, including several elements amongst which were the establishment of a preventive policy against unauthorised immigration along with cooperation on return and readmission, visa policy and border control (Partnership and Cooperation Agreement (PCA) with Tajikistan, Article 70)⁸⁶. These clauses create enforceable commitments on the parties for each to readmit 'any of [their] nationals illegally present on the territory [of the other party]', acting with celerity 'upon request by [its counterpart] and without further formalities', 'provid[ing] their nationals with appropriate identity documents for such purposes' (PCA with Tajikistan, Article 70(3)). In addition, these clauses contain a *rendezvous* provision, entailing that both parties must 'agree to conclude, upon request and as soon as possible', a fully-fledged readmission agreement with a view to facilitating the implementation of readmission duties and creating new TCN readmission obligations. A broad commitment to adhere to human rights is contained in a 'general principles' clause and in a provision promoting 'cooperation on matters relating to democracy' (PCA with Tajikistan, Articles 2 and 66).

A more recent approach is to negotiate association agreements in parallel with EURAs, using the former as leverage. Alternatively, the Commission may offer visa facilitation agreements in exchange for EURAs to achieve readmission objectives (García Andrade et al., 2015, pp. 35-36). EURAs are the main instrument upon which the GAMM is focused, as it allows the EU to press partner countries to readmit not only their own nationals, but also any TCN who may have transited through their territories to reach the EU. The EURA establishes this TCN readmission obligation on an apparently reciprocal basis, formulating a detailed administrative and operational framework for its implementation, including evidence rules, deadlines, modalities of transportation and data protection obligations. So far, there are 17 EURAs, predominantly with Eastern Partnership countries together with countries in the Caucasus and Western Balkans⁸⁷.

⁸⁴ See e.g. EU-Moldova MP (n 83), Preamble, Recital 7.

⁸⁵ EC Conclusions on intensified cooperation on the management of migration flows with third countries, Council doc. 13894/02, 14.11.2002.

⁸⁶ See e.g. PCA with the Republic of Tajikistan of 11 October 2004 [2009] OJ L 350/ 3.

⁸⁷ The full list of countries which have concluded an EURA is, in chronological order: Hong-Kong (2002); Macao (2003); Sri-Lanka (2004); Albania (2005); Russia (2006); FYROM, BiH, Montenegro, Serbia, Moldova, Ukraine (2007); Pakistan (2009); Georgia (2010); Armenia, Azerbaijan, Turkey, and Cape Verde (2014). See <https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en>.

Currently, negotiations are stalled with strategic partners in the Mediterranean, including Morocco, Algeria and Tunisia.

Saving clauses are usually part of EURAs, whereby agreements ‘shall be without prejudice to the rights, obligations and responsibilities of the Union, of its MSs and [the partner third country] arising from international law and, in particular, from the [Refugee] Convention’ (Cape Verde EURA, Article 17)⁸⁸. No specific provision is made, though, for *non-refoulement*, in particular to avoid indirect or chain *refoulement* after readmission. The assumption is that parties will adopt return decisions in line with their respective obligations and internal rules on the matter, which for EU MSs are enshrined in the Return Directive⁸⁹. But, in the Commission’s own words, ‘[m]any doubts are raised about the conclusion of EURAs with countries with a weak human rights and international protection records’ (EURAs Evaluation, p. 12)⁹⁰. A possible remedy would be to include a suspension clause, allowing the unilateral interruption of the EURA, when it may otherwise lead to persistent human rights violations (EURAs Evaluation, p. 12). Alternatively, EURAs could contain a provision committing the parties to treat returnees in line with international human rights and, if the readmitting country has not yet ratified the main instruments, the EURA should explicitly transpose the substance of the main obligations, thus obliging both sides to comply with them (EURAs Evaluation, p. 12). However, post-2011 EURAs have yet to include either a suspension or a human rights compliance clause.

A Joint Readmission Committee (JRC), with representatives from the EU and its counterpart, has responsibility to oversee the EURA’s implementation, but there is no explicit requirement to focus on fundamental rights (Cape Verde EURA, Article 18). In the only (published) evaluation of EURAs, the Commission recommended that more attention be paid to human rights, possibly inviting non-governmental organisations (NGOs) and international organisations with relevant expertise to JRC meetings. This would also bring in a certain degree of independence, which is indispensable for any monitoring system to be effective, following the maxim: *nemo monitor in re sua* (Return Handbook, p. 43)⁹¹. The Commission also recommended that, to discharge their mandate properly, JRCs should, at least, draw on relevant information regarding the situation ‘on the ground’, considering documentation from NGOs and international organisations, so as to reach appropriate conclusions. However, these recommendations have yet to be taken on board (EURAs Evaluation, p. 10).

Implementing protocols may be adopted by the JRCs to agree on the technicalities of enforced removals, including ‘conditions for escorted returns’, but without specific provision for fundamental rights (Cape Verde EURA, Article 19(1)(b)). On the EU side, since Article 8(6) of the Return Directive became binding in 2010, by 2014 only ‘half’ of all Frontex-coordinated joint return operations (JROs) have been monitored by independent monitors physically present throughout the procedure (EU Return Policy, p. 5)⁹². According to the Return Handbook, this is because ‘Article 8(6) [of the Return Directive] does not imply an obligation to monitor each single removal operation’ or ‘a subjective right of a returnee to be monitored’ (p. 43). This contrasts with Article 41 CFR, which specifies that good administration standards apply to ‘any individual measure which would affect [persons] adversely’. Another limitation of the current system is that return operations are considered to conclude ‘[on] arrival at the airport of destination’ (EU Return Policy, p. 5)⁹³. There is no post-return monitoring of the situation of returnees that serves to guarantee treatment in line with fundamental rights, avoiding direct or indirect *refoulement*. The Commission undertook a pilot project in this regard during 2011 and stated that it ‘could decide to extend such a project to all third countries

⁸⁸ See, e.g., EURA with Cape Verde, [2013] L 282/15. See also Preamble, Recital 6.

⁸⁹ Return Directive 2008/115/EC [2008] OJ L 348/98.

⁹⁰ Evaluation of EU Readmission Agreements, COM(2011) 76 final, 23.2.2011.

⁹¹ Return Handbook, C(2017) 6505, 27.9.2017.

⁹² On EU Return Policy, COM(2014) 199 final, 28.3.2014.

⁹³ See also 2018 Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex, Art 15(3) <https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_Conduct_for_Return_Operations_and_Return_Interventions.pdf>.

with [an] EURAs' (EURAs Evaluation, p. 13-14), but this has yet to happen. To the contrary, the revised Return Handbook specifies that 'forced-return monitoring [...] does not cover post-return monitoring' (pp. 42-43).

Finally, one central problem facing EURAs is 'the continued use of bilateral agreements' between MSs and third countries. A key limitation in this approach is that 'human rights and international protection guarantees in EURAs may be ineffective if MSs do not return irregular migrants under EURAs'; this is why the Commission recommended that MSs 'apply EURAs to all their returns' (EURAs Evaluation, p. 4). Yet, all post-2011 EURAs include a clause allowing 'other formal or informal arrangements' (Cape Verde EURA, Article 17(2)). Since the main objective is to accelerate and increase readmissions, many such informal arrangements have proliferated, both at MS and EU level, including with countries of origin with high recognition rates for asylum seekers⁹⁴.

EU level arrangements, concluded with no input from the Parliament, are intended as 'a first step [...] towards the launch of formal negotiations for fully-fledged readmission agreements', yet, in practice, they do 'facilitate cooperation on the readmission of own nationals'⁹⁵ on an autonomous basis. The Commission report on these arrangements contains an important contradiction. On the one hand, they are meant to 'focus on the feasibility of achieving results, while respecting international and European law', presumably including EU fundamental rights (p. 1). On the other hand, 'being non-legally binding, they do not have any effect on MS and third country's obligations under international, EU and national law' (p. 2), meaning there are no specific means of denouncing or repairing possible violations. Being un-enforceable, the proclamation of conformity with international and EU law has only nominal value. This is particularly worrisome, if it is noted that a declared effect is that '[a]rrivals of irregular migrants' have 'dropped substantially' (p. 2), without due consideration to the impact these arrangements have on the rights to leave and to seek asylum.

The texts of those arrangements that are publicly accessible do not contain safeguards for TCN rights. The EU-Bangladesh SOPs, for example, makes no mention of human rights. The Admission Procedure for the Return of Ethiopians, by contrast, formally states that it 'will be applied [...] in full compliance with the human rights of Ethiopian nationals provided under relevant international instruments' (Preamble, Recital 2), but it then asserts that the 'Admission Procedure is not an international agreement and not intended to create legal rights or obligations under domestic or international law' (paragraph 1). This is particularly concerning in light of the envisaged cooperation with the Ethiopian Security Services, including for the transmission of rejected asylum seekers' personal information (paragraph 3(c)). Ethiopians have been amongst the top nationalities of recognised refugees and asylum applicants in the EU, with Ethiopian IDPs representing one of the major 'massive displacement' crises of the past decade⁹⁶. The challenge these informal arrangements pose to the core EU principles of democratic legitimacy and judicial protection should lead to their replacement with properly drafted, regularly monitored, hard-law alternatives. As soft-law, officially unpublished texts, they are structurally incapable of ensuring compliance with EU

⁹⁴ E.g. Joint Way Forward on Migration Issues between Afghanistan and the EU, 2.10.2016

<https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf>; EU-Bangladesh Standard Operating Procedures for the identification and return of persons without an authorisation to stay, 20.9.2017

<<https://lifos.migrationsverket.se/dokument?documentAttachmentId=46631>>; Admission procedures for the return of Ethiopians from European Union Member States, Council doc. 15762/17, 18.12.2017

<<https://www.statewatch.org/news/2018/jan/eu-council-regugees-return-ethiopians-15762-17.pdf>>; EU-Guinea good practices for the efficient operation of the return procedure, Council doc. ST 11428 2017 INIT, 24.7.2017, unpublished

<https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=LD&DOC_ID=ST-11428-2017-INIT>. According to the Commission (n 95), similar sets of good practices have also been concluded with Ivory Coast in June 2017, with Ghana in July 2017, and with The Gambia in October 2017, but none of these texts has been published.

⁹⁵ Letter from European Commission Director General for Migration and Home Affairs, Mr Matthias Ruete, to European Parliament LIBE Committee Chair, Mr Jean-Claude Moraes, home.ddg1.c.1(2017)5906281 <<https://www.statewatch.org/news/2017/nov/eu-com-letter-to-ep-readmissions.pdf>>.

⁹⁶ UNHCR, Global Trends: Forced Displacement in 2019 <<https://www.unhcr.org/globaltrends2019/>>.

fundamental rights, if only because, pursuant to the principle of legality, all measures that interfere with individual rights need to be provided for 'by law', which makes soft-law instruments inadequate by definition (Article 52(1) CFR).

The extent to which these agreements interact with Frontex Working Arrangements (WAs) with third countries is unclear. The Agency has concluded WAs with 18 countries, including Turkey, and has mandates to negotiate a further 8 with, among others, Niger and Libya⁹⁷. WAs are intended as 'technical' arrangements that facilitate the Agency's work in its areas of competence. They do not constitute legal agreements and are supposed not to create binding obligations. Although they contain general clauses, according to which '[i]n the implementation of the intended cooperation [...] the [cooperating] authorities [...] afford full respect for human rights', there is no operationalisation of this commitment in the remainder of the text⁹⁸. This contrasts with the more detailed clauses regarding information exchange, training, risk analysis, liaison officers, technical assistance projects, and participation in joint operations (JOs). The human rights credentials of any third country's cooperating authority are not considered prior to concluding a WA and nor is the partner State's record or the likely impact on individuals' rights (Fink, 2012). The situation may improve after the 2019 EBCG reform. Article 76(2) now requires the Commission to 'draw up a model for [WAs] [...] [that] shall include provisions related to fundamental rights and data protection safeguards addressing practical measures'. Then, Article 72(3) requires that '[w]hen implementing such [WAs], MSs shall assess and take into account the general situation in the third country on a regular basis', although no provision is made for termination or suspension in light of human rights violations, nor is it indicated how the assessment is to be conducted or how to ensure its relevance and independence. Article 73(8) introduces a periodic reporting obligation on Frontex, whereby '[t]he Agency shall include an assessment of the cooperation with third countries in its annual reports', but without specifying the level of detail and whether or not fundamental rights compliance should be addressed. The Parliament is currently informed of WAs but should hereinafter be provided with 'detailed information' on *planned* WAs, including their 'envisaged content', before conclusion (Article 76(4)). Yet, it will have neither veto powers nor any decisional input, which leaves untouched the democratic legitimacy deficit of these arrangements. The same is true with regard to judicial oversight. With the nature of future WAs remaining non-legal, the CJEU will continue to lack jurisdiction to review their validity under Article 263 TFEU. Moreover, with WAs continuing as non-binding, any references to fundamental rights will remain unenforceable for individuals affected by their application⁹⁹.

3.2.3 Action at Sea: Frontex JO Triton/Themis and EUNAVFORMED Sophia and IRINI

Following calls to 'save lives' and step up the 'fight against smugglers'¹⁰⁰, and as a means of implementing the Agenda on Migration and MPF objectives, Frontex has been given additional means and powers in two subsequent reforms of its founding Regulation in 2016 and in 2019, which has facilitated its coordinating role of joint maritime operations, especially in the Central Mediterranean. Enhanced EU presence at sea has also been achieved through the EUNAVFORMED Operation *Sophia* in 2015-2019 and Operation *IRINI* in 2020.

⁹⁷ List of Frontex WAs <<https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>>.

⁹⁸ See, e.g., WA with Nigeria, 19.1.2012, para. 1.2

<https://frontex.europa.eu/assets/Key_Documents/Working_Arrangements/WA_with_Nigeria.pdf>; WA with Turkey, 18.5.2012, para. 15 <https://frontex.europa.eu/assets/Key_Documents/Working_Arrangements/WA_with_Turkey.pdf>; WA with Kosovo, 25.5.2016, para. 1(iii) <https://frontex.europa.eu/assets/Key_Documents/Working_Arrangements/WA_with_Kosovo.pdf>.

⁹⁹ On the limitations of the Frontex' complaints mechanism (Art 111 EBCG Regulation), for lack of compliance with effective remedy standards, see Moreno-Lax 2017a, ch 6.

¹⁰⁰ Former Justice and Home Affairs (JHA) Commissioner Avramopoulos, 'Recent human smuggling incidents in the Mediterranean', Speech, 13.1.2015 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_3262>.

JO *Triton*, renamed *Themis* in February 2018¹⁰¹, is the EU border control operation that replaced the Italian security-rescue mission *Mare Nostrum*¹⁰², launched after the *Hirsi* judgment condemned its previous push-back collaboration with Libya¹⁰³. *Triton's* underpinning assumption is that interdiction may be considered akin to rescue, in that it prevents loss of life by deterring departures¹⁰⁴. The mission's operational area, naval assets and financial means were expanded in 2015, to help Frontex 'fulfil its dual role of co-ordinating operational border support [...] and helping to save the lives of migrants at sea'¹⁰⁵. In practice, though, the agency's SAR mandate remained unchanged. While saving lives was designated as 'an absolute priority', the focus in practice was still 'primarily border management'¹⁰⁶, since 'Frontex is not a search and rescue body'¹⁰⁷. As a result, only a portion of all rescues have been carried out by Frontex-coordinated assets (Cusumano, 2019, pp. 10-11). This is the consequence of *Triton's* (and now *Themis's*) operational area lying far away from Libyan waters, where most distress incidents occur, and due to the strategic choice that 'instructions to move [...] outside [the JO's] operational area' for the purpose of rendering assistance to migrant vessels '[would] not be considered'¹⁰⁸, to avoid 'act[ing] as a pull factor'.¹⁰⁹ The incompatibility of this practice with UNCLOS as well as the SAR and SOLAS Conventions has not been given sufficient attention.

Another expression of this 'interdiction by omission' strategy (Moreno-Lax, 2020a) is the withdrawal of naval assets from areas frequented by 'boat migrants' in a bid to evade rescue responsibilities. This characterises the latest period of Operation *Sophia*¹¹⁰, launched in 2015 to support *Triton*. Although justified as an endeavour to 'save lives by reducing crossings'¹¹¹, its mandate was to engage in a 'systematic effort to capture and destroy vessels used by the smugglers'¹¹², so as 'to better contain the growing flows of illegal migration'¹¹³. In October 2015, a UN Security Council Resolution authorised MSs to intervene on the high seas, using 'all measures commensurate to the specific circumstances' to 'inspect', 'seize' and 'dispose of' migrant vessels, so as to 'disrupt the organised criminal enterprises engaged in migrant smuggling and human trafficking' off the Libyan coast¹¹⁴. In the course of their interventions, *Sophia* assets were occasionally called upon to assist migrant vessels in distress. Although the operation played a relatively minor role in the number of rescues (Cusumano, 2019, pp. 13-14), such that its contribution could not be 'regarded as decisive in terms of a pull factor'¹¹⁵, disagreement amongst participating MSs led to

¹⁰¹ Frontex Press Releases <<https://frontex.europa.eu/search-results/?q=Triton&p=1>> and <<https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy/>>.

¹⁰² 'Mare Nostrum Operation', Marina Militare, undated <<http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>>.

¹⁰³ *Hirsi* (n 52).

¹⁰⁴ EC, Presidency Conclusions, EUCO 169/13, 25.10.2013, para. 46.

¹⁰⁵ *European Agenda on Migration*, COM(2015) 240, 13.5.2015, p. 3.

¹⁰⁶ 'Frontex launches call for participation of the EU Member States in Joint Operation Triton', 26.9.2014 <<https://frontex.europa.eu/media-centre/news-release/frontex-launches-call-for-participation-of-the-eu-member-states-in-joint-operation-triton-b9nupQ>>. This is still the case under *Themis* <<https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy/>>.

¹⁰⁷ 'Frontex Joint Operation "Triton"—Concerted Efforts to Manage Migration in the Central Mediterranean', MEMO, 7.10.2014 <https://www.europa-nu.nl/id/vjohgqgsbzzn/nieuws/frontex_joint_operation_triton_concerted>.

¹⁰⁸ Letter by Frontex Director of Operations to Italian General Director of Immigration and Border Police (n 21).

¹⁰⁹ Frontex, Risk Analysis for 2017, p. 32

<http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf>.

¹¹⁰ 'EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019', 29.3.2019

<<https://www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/>>.

¹¹¹ 'European Union Naval Force – Mediterranean Operation Sophia', 15.9.2016 <https://eeas.europa.eu/sites/eeas/files/factsheet_eunavfor_med_en_0.pdf>.

¹¹² EC Statement, EUCO/18/15, 23.4.2015.

¹¹³ EC Presidency Conclusions, EUCO 22/15, 26.6.2015.

¹¹⁴ United Nations Security Council (UNSC) Resolution 2240(2015), S/RES/2240 (2015), paras 5, 8, 10–12.

¹¹⁵ *EUNAVFOR Med Op Sophia – Six monthly report*, 1 January–31 October 2016, pp. 7-8 <<http://statewatch.org/news/2016/dec/eu-council-eunavformed-jan-oct-2016-report-restricted.pdf>>.

the withdrawal of naval assets. In their stead, to avoid contact with migrant vessels and related rescue responsibilities, since March 2019, surveillance drones were deployed to capture relevant information on smuggling/distress incidents¹¹⁶. Details were then communicated to the Libyan Coastguard for their intervention, through the intermediation of the Italian authorities, who acted as ‘a communication relay’¹¹⁷. As a result, intercepted ‘boat migrants’ were pulled back to Libya, disregarding *non-refoulement* and related safeguards¹¹⁸.

Mission *IRINI*, which took over on 31 March 2020, has re-incorporated maritime assets, but on the proviso that ‘[they] will be withdrawn from the relevant areas’ if they prove attractive to boat migrants¹¹⁹. Whilst the mission primarily aims at enforcing the UN arms embargo against Libya¹²⁰, it will also continue to ‘support the fight against human smuggling and trafficking networks’¹²¹. However, the rhetoric has changed with justification for the operation moving away from saving lives to contributing to peace and stability in Libya. The plan is seemingly to deploy ships ‘at least 100 kilometres off the Libyan coast, where chances to conduct rescue operations are lower’¹²². If rescues occur, information about disembarkation will apparently be kept secret, raising suspicion that the mission may facilitate pullbacks to Libya¹²³.

The secrecy of operational plans and mission evaluations makes it impossible to assess the extent to which Frontex and EUNAVFORMED proceedings conform with fundamental rights. With Frontex’ Fundamental Rights Officer being understaffed and the Consultative Forum¹²⁴, supposed to advise the Agency on fundamental rights issues, having difficulty in accessing timely information to discharge its monitoring duties and have its recommendations implemented, compliance with fundamental rights is at risk.¹²⁵ The fact that the Frontex complaints mechanism is little known, that it entails no public hearing or other formal procedure for the parties to confront each other’s positions, being subject to no specific time frame, admissibility criteria or procedural guarantees, including the right to appeal and to judicial review, puts it at variance with effective remedy standards (Article 111 EBCG Regulation *cf.* Articles 41 and 47 CFR). Furthermore, no similar arrangements exist in regard to *Sophia* and *IRINI*. Media reports and academic investigations on specific incidents warrant, however, the conclusion that TCN rights are not always

¹¹⁶ ‘Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over’, *The Guardian*, 4.8.2019 <<https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu>>.

¹¹⁷ Letter of Director-General for Migration and Home Affairs to Frontex Executive Director, Ref. Ares(2019)1755075, 18.3.2019 <<http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019/1362751%20Rev.pdf>>.

¹¹⁸ This practice has been denounced in ECtHR, *S.S. and Others v. Italy*, App 21660/18 (pending) <<https://www.glanlaw.org/ss-case>>; in an individual complaint to the UN HRC, in *S.D.G. v. Italy* (pending) <https://c5e65ece-003b-4d73-aa76-854664da4e33.filesusr.com/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf>; in a submission to the CAT Committee against Italy <<https://centre-csdm.org/wp-content/uploads/2020/07/CAT-Art.-20-Inquiry-CSDM-01.07.2020.pdf>>; and it forms the basis of a request to the ICC Prosecutor to start proceedings against EU/MSs agents for crimes against humanity <<https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>>.

¹¹⁹ ‘Operation Sophia to be closed down and replaced’, *Politico*, 17.2.2020 <<https://www.politico.eu/article/operation-sophia-to-be-closed-down-and-replaced/>>.

¹²⁰ ‘EU launches Operation IRINI to enforce Libya arms embargo’, 31.3.2020 <<https://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/>>.

¹²¹ ‘A new EU military operation in the Mediterranean: Irini is born to enforce Libya arms embargo’, 1.4.2020 <https://eeas.europa.eu/headquarters/headquarters-homepage/76869/new-eu-military-operation-mediterranean-irini-born-enforce-libya-arms-embargo_en>.

¹²² EEAS Non-paper on EUNAVFORMED Op. Sophia, (RESTRICTED) 5995/20, 12.2.2020, p. 3 <<http://www.statewatch.org/news/2020/feb/eu-eeas-note-coreper-operation-sophia-rescue-5995-20.pdf>>.

¹²³ ‘Operation Irini in Libya: Part of the Solution, or Part of the Problem?’, *CEPS in Brief*, 2.4.2020 <<https://www.ceps.eu/operation-irini-in-libya/>>.

¹²⁴ Created in 2012, the Consultative Forum brings together key European institutions, international and civil society organisations to advise the European Border and Coast Guard Agency in fundamental rights matters.

¹²⁵ Frontex Consultative Forum, Sixth Annual Report / 2018, 1.3.2019 <<https://frontex.europa.eu/fundamental-rights/consultative-forum/documents/>>. The point has been confirmed in email correspondence with the Forum.

respected and hardly ever redressed by Frontex and the EUNAVFORMED¹²⁶. The sharing with Libyan forces of European Border Surveillance system (EUROSUR) information, captured by EU aircraft, for the purposes of ‘aerial *refoulement*’, is a particularly alarming trend, which disregards the most basic protections to which TCNs at sea are entitled¹²⁷.

5 Conclusions and Recommendations

The analysis of EU and MS external migration policy covered in the previous sections and, particularly, in the case studies in Annex I reveals a conspicuous lack of appreciation for the full reach and importance of the fundamental rights *acquis* when engaging in extra-territorial activity, especially at sea and when cooperating with third countries through formal or informal means. The overwhelming focus on the fight against irregular migration, with limited attention to the situation of forcibly displaced persons in need of international protection and the unsystematic approach to the protection of TCN rights, has brought about defective compliance with relevant obligations. It should be abundantly clear from the outset that EU primary law requires the observance of fundamental rights, including those of TCNs, in all EU internal and external actions (Articles 2, 6 and 21 TEU) by all EU institutions, bodies and agencies as well as by the MSs when implementing EU law (Article 51 CFR). This requires not only the abstract recognition of applicability of the relevant standards in general terms, but also appropriate operationalisation through detailed and specific instruments that allow for effective protection in practice.

The informalisation of relations with third countries, whether in the form of Frontex WA, EU-wide Statements, SOPs, Good Practices documents, bilateral MoUs, or multilateral Protocols receiving EU financial support, entails additional risks. These arrangements side-line democratic accountability, disregarding constitutional provisions contained in the EU Treaties concerning the full extent of the European Parliament’s role in EU external relations (e.g. Article 218 TFEU). Being non-binding, they also avoid the CJEU’s jurisdiction, which accordingly cannot perform the control of legality that normally attaches to EU acts (Article 263 TFEU). Most importantly, their soft-law nature makes them by definition unenforceable. Any provision made in such instruments for the observance of fundamental rights and their application cannot provide an appropriate remedy, because they cannot be relied upon in court proceedings by the individuals affected, thereby undermining good governance and judicial protection safeguards (Articles 41 and 47 CFR).

There are three main tools of legal, budgetary and implementation control at the disposal of the Parliament to ensure compliance with the requirements of legality and democratic and judicial oversight:

- a) **The Parliament should contest the legality of any measures that fail to observe fundamental rights and impinge upon its competences under the Treaties:** The soft-law instruments scrutinized in the previous sections and in the case studies in Annex I should be repealed and replaced with hard-law equivalents that comply with the principle of legality and the rule of law, which requires that any measure interfering with fundamental rights be provided for by laws that are published and accessible by the individuals concerned, offering guarantees against arbitrariness, subject to the principle of proportionality and preserving the essence of the rights concerned (Article 52(1) CFR). Arguably, such laws, when referring to EU action, need to take the form of EU legislative acts. Drawing on the CJEU argumentation in a previous case regarding border surveillance, it can be concluded that where instruments such as the EU-Turkey Statement, cooperation arrangements with Libya, the Joint Way

¹²⁶ See, e.g., ‘Revealed: the great European refugee scandal’, *The Guardian*, 12.3.2020
<<https://www.theguardian.com/world/2020/mar/12/revealed-the-great-european-refugee-scandal>>.

¹²⁷ ‘Respingimenti per via aerea, la nuova strategia europea’, *Open Migration*, 17.6.2020
<<https://openmigration.org/analisi/respingimenti-per-via-aerea-la-nuova-strategia-europea/>>.

Forward with Afghanistan and the measures adopted to implement the EUCAP Sahel Niger mission confer, directly or indirectly, 'powers of public authority' on EU and/or third country actors with which the EU cooperates, this 'mean[s] that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required'¹²⁸. The fact that the measures concerned 'are [intended as] "non-binding" cannot affect [this conclusion]'¹²⁹. Because these instruments allow for 'far-reaching enforcement measures, yet do[] not ensure the right of persons intercepted [...] to claim asylum and associated rights'¹³⁰, they should be opposed by the Parliament and revisited for alignment with the CFR requirements (Article 263 TFEU).

The European Parliament has in the past successfully challenged the inadequacy of non-legislative measures regarding operational cooperation coordinated by Frontex affecting fundamental rights. Council Decision 2010/252/EU was adopted in disregard of the appropriate legal basis, which required that the ordinary legislative procedure be followed¹³¹. The measures concerned 'require[d] political choices falling within the responsibilities of the EU legislature'¹³². They, therefore, unlawfully impinged on the Parliament's prerogatives on matters within its competence and were annulled by the CJEU.

The need to select the appropriate legal basis also applies to envisaged action within the area of external migration policy. Cooperation with third countries must be pursued following the rules provided for in the Treaties on 'development cooperation' (Article 208 TFEU), on 'economic, financial and technical cooperation with third countries', including 'financial assistance' (Article 212 TFEU), and on 'humanitarian aid' (Article 214 TFEU), which require that '[t]he Parliament and the Council [rather than the MSs or the Council alone] [...] adopt the measures necessary for the[ir] implementation' *jointly* and through 'the ordinary legislative procedure' (Articles 209(1), 212(2) and 214(3) TFEU). Otherwise, the Parliament has at its disposal legal tools to challenge non-compliance (Article 263 TFEU), which it should use to preserve its competences as co-legislator in the areas concerned and to guarantee Parliamentary scrutiny and the observance of the principles of democracy and political accountability (Article 2 TEU)¹³³.

- b) **The Parliament should make use of its powers of implementation scrutiny and budgetary control:** Failing the contestation of legality or alongside it, the measures concerned should at least be unequivocally acknowledged and closely monitored as 'implementation' measures of the wider EU policy and legal frameworks to which they relate — be it the Return Directive, the EBCG Regulation, EUNAVFORMED Decisions, the EU-Turkey EURA, the EUCAP Sahel Niger Decision, or the European Development Fund (EDF) Regulation — attracting the application of the fundamental rights *acquis*, including the substantive rights and procedural guarantees of the Charter. EU bodies can act and finance actions, only if and when EU law allows them to intervene and exercise their powers, which they must do in line with the CFR. Otherwise, their interventions become invalid. As the CJEU case law makes clear, there can be no situations in which EU bodies may act, without EU law (including fundamental rights) being applicable (Section 2.2). Defective implementation can and should be held to account by the European Parliament, including through its powers of budgetary control and the auditing procedures before the European Court of Auditors (ECA). The ECA has specifically been assigned the task of 'assist[ing] the European Parliament [...] in exercising their powers of control over the implementation of the [EU] budget' (Article 287(4) TFEU). In this regard, it 'may also, at any time, submit observations, particularly in the form of special reports, on specific questions and deliver

¹²⁸ Case C-355/10 *Parliament v Council* ECLI:EU:C:2012:516, para. 77.

¹²⁹ *Ibid.*, para. 80.

¹³⁰ *Ibid.*, para. 49.

¹³¹ Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2010] OJ L 111/20.

¹³² C-355/10 (n 128), paras 60 and 76-78.

¹³³ This was the Parliament's main submission in the C-355/10 (n 128), para. 47.

opinions at the request of one of the other institutions of the Union' (Article 287(4) TFEU). The European Parliament should make use of this possibility to ensure that funding decisions under the EU Trust Fund for Africa (EUTF) and related allocations comply with EU legality principles and, in particular, fundamental rights.

- c) In addition, **the Parliament should deploy its full monitoring capacities, including within the CFSP**: Implementation control of external actions and commitments under the CFSP is entrusted to the CFSP High Representative, who bears overall responsibility for the entire policy area and must monitor progress at periodic intervals and report back to the European Council (Article 18(2) TEU). The Parliament must, in turn, be 'regularly consult[ed]' on the main aspects of all CFSP initiatives — including within the CSDP (Article 42(1) TEU) — and must be kept 'inform[ed]' by the CFSP High Representative 'of how those policies evolve' to such an extent as to enable the Members of the European Parliament (MEPs) to formulate the views of the Parliament and possibly make recommendations, which have to be 'duly taken into consideration' (Article 36 TEU). The financial implications of CFSP actions must be agreed in consultation with the Parliament (Article 41(3) TEU). Failure to comply with any of these provisions can be enforced by the CJEU (Article 275 TFEU), which also retains the power to adjudicate on the legality of decisions providing for restrictive measures with adverse effects on individuals, in relation to whom the principle of effective judicial protection applies¹³⁴. Recourse to these provisions constitutes the third channel through which the Parliament can ensure legal and political accountability of EU external migration policy action.

On the understanding that the fundamental rights *acquis* is fully binding in these situations, concrete precautions should be taken to ensure compliance with the relevant provisions, in particular with a view to adopting a New Pact on Migration and Asylum that delivers 'a more humane [...] system'¹³⁵. The Parliament, in addition to actioning the above mechanisms, should insist that all agreements with third countries and all arrangements for external action are adopted following a **comprehensive compliance system** that ensures conformity with fundamental rights, covering the entire formulation-implementation cycle, through:

- 1) A **pre-conclusion assessment** that determines the concrete human rights situation on the ground along the specific migration route to which the envisaged agreement/arrangement/action/funding refers, including any section in the partner country concerned and/or at sea, and that establishes any additional human rights risks the intended agreement/arrangement/action/funding may foreseeably give rise to, relying on a variety of reliable sources and in partnership with the relevant Consultative Forum (e.g. of Frontex, if the Agency is to be involved in subsequent implementation), specialist NGOs and international organisations, including the International Organization for Migration (IOM) and the UN High Commissioner for Refugees (UNHCR), as coordinators of the Global Compacts on Migration and Refugees, and upon consultation with the European Parliament;
- 2) Specific **benchmarks** and concrete **indicators**, paying particular attention to the right to leave, the right to asylum, the prohibition of ill-treatment, the *non-refoulement* principle, the right to liberty, the prohibition of collective expulsion and procedural guarantees, developed jointly with the European Union Fundamental Rights Agency (FRA), specialist NGOs and international organisations, including United Nations Development Programme (UNDP) and the Office of the High Commissioner for Human Rights (OHCHR), should be used to conduct pre-conclusion assessments so that, if the country concerned does not reach the minimum level required to be classified as a 'safe third country' (STC) according to the criteria contained in the Asylum Procedures Directive (APD)¹³⁶, no operational

¹³⁴ Case C-581/11 P *Mugraby* ECLI:EU:C:2012:466, para. 81.

¹³⁵ Commission Work Programme 2020, COM(2020) 37 final, 29.1.2020, p. 8.

¹³⁶ Asylum Procedures Directive 2013/32/EU, [2013] OJ L 180/60 ('APD').

cooperation should be established that entails the containment in or the removal to that country of TCNs;

- 3) Concrete **mitigation actions** should be designed to counter any surmountable risks that may have been detected, clearly setting out the measures to be adopted to guarantee compliance with human rights, without which operational cooperation should not be initiated, on consideration that the fundamental rights *acquis* prohibits the pursuance of actions that are likely to violate the relevant protections¹³⁷;
- 4) For any **funding** allocated in support of the specific agreement/arrangement/action, a demonstrable and measurable **link to the safeguarding and consolidation of human rights** should be shown for compliance with Treaty provisions (Article 21(2)(a)-(b) TEU);
- 5) If and only when human rights risks have been adequately mitigated and appropriate safeguards introduced to foreclose foreseeable dangers, a detailed and enforceable **human rights clause** should be introduced in all agreements/arrangements/actions/funding decisions that are finally adopted, making specific provision for the protection of TCN rights;
- 6) Appropriate elaboration in **operationalisation clauses** that provide for **specific safeguards** when the agreement/arrangement/action/funding is being implemented in practice should be included, such as the specification that all forcible returns must be monitored, including the post-arrival phase to make sure that there are no risks of violations, including direct, indirect or chain *refoulement*;
- 7) A **body in charge of the adequate implementation** of the agreement/arrangement/action/funding adopted should be created with the specific mandate to check compliance with fundamental rights and, in particular, with TCN rights that works closely with specialist NGOs and international organisations, including migrant rights organisations in the countries with which the EU or the MSs cooperate;
- 8) **Implementation guidelines** should be produced by the Commission, in consultation with FRA and specialist NGOs and international organisations, on the basis of the specific benchmarks and concrete indicators developed in the framework of the pre-conclusion assessment and the mitigation strategy identified to avoid violations, specifying the ways in which the agreement/arrangement/action/funding at hand should be applied in practice so as to ensure compliance with fundamental rights, in line with Treaty prescriptions (Articles 3(5) and 21 TEU), and especially the rights of TCNs;
- 9) The implementation body should report periodically to the Council, the Commission and the European Parliament, on specific ways in which compliance with fundamental rights, and specifically with the rights of TCNs, has been ensured in practice, how any risks have been mitigated and which safeguards have been activated in cases where they became necessary to avoid or to redress violations. **Periodic reports** by the implementation body should assess compliance with fundamental rights having recourse to relevant and up-to-date sources from specialist NGOs and international organisations, including migrant rights organisations in the countries within which the relevant activity is being implemented and by reference to the specific benchmarks and concrete indicators developed in the pre-conclusion assessment framework, so as to ensure consistency and comparability of results through time;
- 10) A specific **monitoring mechanism** should be foreseen that meets the criterion of independence and includes a wide representation of experts from different backgrounds with relevant knowledge of

¹³⁷ ECtHR case law precludes parties, including the EU MSs, from entering into agreements, whatever their form and nomenclature, that conflict with or impede the full realisation of ECHR protections. See *Al-Saadoon* (n 42), para. 138; *Hirsi* (n 52), para. 129.

realities on the ground, who are given access to all the relevant materials to undertake their task and allowed to conduct unannounced spot visits to relevant locations and interview competent actors. The mandate of Frontex' Consultative Forum and/or FRA's Scientific Committee, if appropriately resourced and funded, could be reformed and expanded to play this role and cover all EU and MS external actions;

- 11) A **periodic evaluation** should be undertaken by an independent body at regular intervals, by an actor with no political, financial or operational stake in the relevant activities, again having recourse to specialists with relevant knowledge of EU fundamental rights law, EU external migration policy and the practical realities of the country/route/situation concerned, with the responsibility to assess how compliance with fundamental rights, and specifically with the rights of TCNs, has been guaranteed, using specific benchmarks and concrete indicators, reviewing the full remit of activities, including mitigation actions and remedies, as well as formulating recommendations for improvement or derogation of specific actions/components of the agreement/arrangement/action/funding at hand;
- 12) There should be a **follow up mechanism**, overseen by the European Parliament in pursuance of its monitoring competence (Article 36 TEU), whereby evaluation results and expert recommendations are duly incorporated in the relevant agreement/arrangement/action/funding and appropriate reviews and adjustments are introduced as necessary and/or detailed justifications for non-observance provided;
- 13) It should be clear and remain possible at all times for the persons impacted by the implementation of the relevant agreement/arrangement/action/funding to challenge any decisions with a detrimental effect adopted in their regard in a process that complies with **effective remedy** standards, including suspensive effect that halts the measure concerned *before* it is executed to prevent irreversible harm;
- 14) Pre-assessment reports, the text of the relevant agreement/arrangement/action/funding adopted, the implementation guidelines, the implementation reports, the monitoring reports, the post-implementation evaluations and the follow up (review and reform) reports should be communicated to the European Parliament and be **publicly accessible** through a dedicated website of the relevant agreement/arrangement/action/funding, to ensure compliance with Article 41 CFR;
- 15) Any **damage** incurred should be adequately **repaired** through an effective system of redress (Article 47 CFR) and the action/omission giving rise to the violation immediately amended for compliance with the relevant TCN right or, when not possible, immediately suspended until a further, specific assessment identifies appropriate mitigation arrangements or concludes to the cancellation of the relevant initiative.
- 16) The creation of an **EU Special Representative on the Rights of Migrants** that oversees the correct application of the above provisions, with Ombud's attributions to act on TCNs' behalf, should be explored, using the equivalent UN Special Rapporteur as a model to design her mission and role.

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ANNEXES

Annex I: Compliance Assessment Case Studies

The case studies in this Annex provide four examples of practical cooperation between the EU and four countries with strategic importance for delivery of the GAMM, the Agenda on Migration and the MPF scrutinized in Section 3. The main focus is on human rights implementation and oversight mechanisms, assessing their effectiveness, identifying the fundamental rights obligations of the EU and the MSs that are engaged in each case.

1. EU-Turkey Statement

1.1 Snapshot¹³⁸

On 18 March 2016, the EU and Turkey reached agreement, in the form of a press ‘statement’ not intended to produce legally-binding effects, whereby Turkey accepted ‘rapid return of all migrants not in need of international protection crossing from Turkey to Greece and to take back all irregular migrants intercepted in Turkish waters’¹³⁹. This arrangement entails that migrants arriving in Greece must be registered and their asylum applications processed in line with the APD. It also establishes that for every Syrian readmitted to Turkey, another will be resettled in the EU and that Turkey ought to take measures to prevent irregular arrivals on the Greek islands. In exchange, the EU commits EUR 6 billion for a Refugee Facility, to invigorate the visa liberalisation process and to advance accession negotiations.

According to the latest available implementation report, irregular arrivals into the EU fell to 150 000 in 2018, which was the lowest figure in five years, and 25 000 Syrian refugees have been resettled in the EU under the ‘one for one’ formula (Progress Report, 2019b, pp. 1 and 6)¹⁴⁰. This contrasts with the rate of irregular arrivals in Turkey, which conducted 270 000 apprehensions of irregular border crossers in the first half of 2019 and was accommodating 4 million Syrian refugees, the highest number of any host country in the world (Progress Report, 2019b, p. 5). Under the Statement, Turkey has accepted 1 908 removals and blocked the exit of most irregular migrants, bringing daily rates down by 90 % (Progress Report, 2019b, p. 6).

The presumption underpinning the Statement is that Turkey is a STC for returns from Greece for most Syrians, even if the APD criteria are not met (Articles 38 and 39 APD). Turkey’s geographical limitation to the Geneva Convention denies the possibility of receiving protection *qua* Convention refugees to all nationals of non-European countries, who can obtain only ‘conditional refugee’ status, granted on a temporary basis under the 2014 Turkish Law on Foreigners, while awaiting return or resettlement elsewhere¹⁴¹. From the outset, the Parliamentary Assembly of the Council of Europe¹⁴², scholars (Labayle/de Bruycker, 2016; Roman/Peers, 2016) and NGOs have thus challenged the definition of Turkey as a STC¹⁴³.

¹³⁸ This section draws on Moreno-Lax/Giuffré, 2019 (advanced version).

¹³⁹ EU-Turkey Statement, 18.3.2016 <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>.

¹⁴⁰ Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 16.10.2019.

¹⁴¹ Turkish Law on Foreigners and International Protection <http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf>.

¹⁴² PACE Res 2109 (2016) on ‘The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016’, 20.4.2016

<<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22738&lang=en>>.

¹⁴³ NGO concerns persist. See, e.g., HRW, *Letter to EU Ministers: Address Rights Concerns in Turkey at Ministerial Meeting*, 9.7.2020 <<https://www.hrw.org/news/2020/07/09/letter-eu-ministers-address-rights-concerns-turkey-ministerial-meeting>>.

Grave human rights violations, including violent pushbacks and illegal mass deportations to Syria, are on the rise¹⁴⁴. Turkey is also returning people to Afghanistan, Iraq and Pakistan, where they may face persecution and extreme danger to their lives (Alpes et al., 2017a). Reliable sources reveal that 'Turkish border guards are shooting and beating Syrian asylum seekers trying to reach Turkey', with the situation worsening since the outbreak of Covid-19.¹⁴⁵ Incursions into Syrian territory by Erdogan's forces bombing Kurdish militia, disregarding risks to civilians, have compounded the state of affairs¹⁴⁶. The latest pre-accession report on Turkey, in fact, denounces the 'serious backsliding' of fundamental rights since the failed coup of 2016, deploring that, '[w]hile the legal framework includes general guarantees [...] it still needs to be brought in line with the [ECHR]'. Corruption, the lack of independence of the judiciary and impunity, make the enforcement of rights and the prosecution of violations deficient and at odds with the EU *acquis*¹⁴⁷.

1.2 Human Rights Implementation and Oversight Mechanisms

An EU Special Coordinator has been charged with effective implementation of the Statement.¹⁴⁸ Alongside Greece, a Joint Action Plan has been drawn up with a view to speeding up its application, focusing on: shortening asylum claims' processing times; 'limiting appeal steps'; increasing 'detention capacities'; accelerating relocation and returns; along with sealing off borders to avoid secondary movements¹⁴⁹. No particular attention is paid to the fundamental rights impact of these measures (Alpes et al., 2017b).

Dedicated reports have been issued on progress regarding implementation of the Joint Action Plan up to September 2017¹⁵⁰, when they were interrupted. Thereafter, the state of play has been included in implementation reports on the Agenda on Migration, which has reduced coverage substantially (from 15 to 2-3 pages). No specific section is dedicated to assessing the effect on TCN rights, neither in Greece nor in Turkey. The focus is on the Statement objectives of 'speeding up [...] the processing of asylum applications', 'ensuring [...] pre-removal capacity' and 'prevent[ing] new sea or land routes for irregular migration' (Progress Report, 2017, pp. 9-10). '[T]he situation of human rights of refugees' is mentioned nowhere except in regard to projects funded through the Refugee Facility (Progress Report, 2017, p. 11)¹⁵¹, considered part of the 'EU support for protection abroad' (Progress Report, 2019a, p. 15)¹⁵². Otherwise, the Statement, having 'led to a substantial reduction of irregular arrivals,' is praised as having 'paid off in tackling migrant smuggling' (Progress Report, 2019a, p. 2). No independent monitoring or other follow up action has been envisaged in relation to TCN rights and no specific remedies have been made available. The procedural rights foreseen in the APD and Return Directive are supposedly applicable, but concerns have been expressed about their observance in practice and the fact that no additional guarantees have

¹⁴⁴ AI, *Turkey: Syrians Still Risk Deportation from Turkey*, 20.11.2019

<<https://www.amnesty.org/en/documents/eur44/1436/2019/en/>>; and *Turkey: Halt Illegal Deportation of People to Syria and Ensure Their Safety*, 29.5.2020 <<https://www.amnesty.org/en/documents/eur44/2429/2020/en/>>.

¹⁴⁵ Human Rights Watch (HRW), 'Turkey/Syria: Border Guards Shoot, Block Fleeing Syrians', 3.2.2018

<<https://www.hrw.org/news/2018/02/03/turkey/syria-border-guards-shoot-block-fleeing-syrians>>; 'Turkey police shoot Syrian refugee dead during coronavirus curfew', *The New Arab*, 28.4.2020 <<https://english.alaraby.co.uk/english/news/2020/4/28/turkey-police-shoot-syrian-refugee-dead-during-coronavirus-curfew>>.

¹⁴⁶ 'Turkey bombs Syrian Kurdish militia allied to U.S.-backed force', *Reuters*, 20.10.2016 <<http://www.reuters.com/article/us-mideast-crisis-syria-kurds-idUSKCN12K0ERm>>; 'Turkey Launches Deadly Airstrikes Against Syrian Forces', *New York Times*, 3.2.2020 <<https://www.nytimes.com/2020/02/03/world/middleeast/turkey-syria-idlib.html>>.

¹⁴⁷ Turkey 2019 Report, SWD(2019) 220 final, 29.5.2019, pp. 7, 22 and 27.

¹⁴⁸ European Commission Fact Sheet, Implementing the EU-Turkey Statement – Questions and Answers, 28.9.2016 <[http://europa.eu/rapid/press-release MEMO-16-3204_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3204_en.htm)>.

¹⁴⁹ Fourth report on the Progress made in the implementation of the EU-Turkey Statement, COM(2016) 792 final, 8.12.2016, Annex I.

¹⁵⁰ Seventh Report on the Progress made in the implementation of the EU-Turkey Statement, COM(2017) 470 final, 6.9.2017.

¹⁵¹ See also Progress report on the Implementation of the European Agenda on Migration, COM(2018) 250 final, 14.3.2018, Annex II.

¹⁵² Progress report on the Implementation of the European Agenda on Migration, COM(2019) 126 final, 6.3.2019.

been foreseen to cater for the enhanced risks of *refoulement* and collective expulsion the Statement generates (Guild et al., 2017).

Regarding the situation of TCN rights in Turkey, the latest EU pre-accession report notes, in fact, that ‘international protection applicants face serious difficulties in accessing registration’ and that ‘an exception’ has been introduced to the principle of *non-refoulement* on security grounds by an emergency Decree of October 2016, which ‘allows for deportation while the asylum procedure is still pending’. It also mentions that ‘[r]eports [...] of deportations of Syrian nationals, in violation of the principle of *non-refoulement*, continued in 2018’, but, because ‘the EU does not have access to the Turkish-Syrian border’, the Commission is explicitly ‘not monitoring returns to Syria’ (Pre-accession Report, 2019, pp. 47-49, emphasis added).

Regarding the situation in the EU, the Statement implementation measures through the hotspots system, rather than improving protection in Greece, have exacerbated pre-existing shortcomings¹⁵³. As of October 2019, there were ‘more than 31 000 people present in hotspots designed for a maximum of around 8 000 – in spite of over 20 000 transfers to the mainland [that] year’ (Progress Report, 2019b, p. 3). The result is a return-orientated system of prolonged detention in inadequate facilities, where ‘serious fundamental rights gaps persist [and] where reception conditions remain sub-standard’ (FRA Revised Opinion, 2019, p. 7)¹⁵⁴.

Entrenchment of the Statement + hotspots scheme as part of the Union’s common asylum and migration policy ‘has brought about serious fundamental rights challenges, which remain unresolved’ (FRA Revised Opinion, 2019, p. 8) and that the Covid-19 pandemic has aggravated. In February 2020, Turkey threatened to suspend the Statement¹⁵⁵, purportedly due to the lack of European support for its military operations in Syria (Rayes, 2020). In response, Greece suspended the right to asylum and blocked large numbers of TCNs in transit,¹⁵⁶ leaving them to face severe hardship.¹⁵⁷ Reports of violent interdictions and pushbacks emerged (Mann/Keady-Tabbal, 2020). Yet, the Commission’s reaction has been equivocal, with its President congratulating the country for acting as ‘Europe’s shield’¹⁵⁸ and failing to launch infringement proceedings. Other pushback incidents continue to be reported, deserving a thorough investigation¹⁵⁹.

1.3 Charter Applicability and Fundamental Rights Responsibility of the EU / MSs

One key obstacle to the establishment of responsibility for any TCN rights violations ensuing from the Statement concerns its attributability to the EU. For the Charter to apply, the relevant action/omission must be an act of the Union organs or be a form of EU law implementation by the MSs (Article 51 CFR).

¹⁵³ M.S.S. (n 54); and N.S. (n 25).

¹⁵⁴ FRA, Update of the 2016 Opinion on fundamental rights in the ‘hotspots’ set up in Greece and Italy (February 2019), p. 7 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf>.

¹⁵⁵ ‘Erdogan says border will stay open until EU meets his demands’, *New Europe*, 11.3.2020 <<https://www.neweurope.eu/article/erdogan-says-border-will-stay-open-until-eu-meets-his-demands/>>.

¹⁵⁶ ‘Refugees told “Europe is closed” as tensions rise at Greece-Turkey border’, *The Guardian*, 6.3.2020 <<https://www.theguardian.com/world/2020/mar/06/refugees-europe-closed-tensions-greece-turkey-border>>.

¹⁵⁷ UNHCR, ‘Statement on the situation at the Turkey-EU border’, 2.3.2020 <<https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>>.

¹⁵⁸ ‘Greece is “Europe’s shield” in migrant crisis, says EU chief von der Leyen on visit to Turkey border’, *Euronews*, 4.3.2020 <<https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>>. Cf. Commissioner Johansson in ‘Greece warned by EU it must uphold the right to asylum’, *The Guardian*, 12.3.2020 <<https://www.theguardian.com/world/2020/mar/12/greece-warned-by-eu-it-must-uphold-the-right-to-asylum>>.

¹⁵⁹ For a summary of allegations and sources, see ‘Greece minister: Smugglers spread false rumors about pushbacks’, *Info Migrants*, 1.9.2020 <<https://www.infomigrants.net/en/post/26966/greece-minister-smugglers-spread-false-rumors-about-pushbacks>>.

However, the General Court has considered that the Statement, rather than being an act of the EU, is solely attributable to the MSs, holding itself incompetent to adjudicate on its compatibility with fundamental rights¹⁶⁰. Whether this interpretation is correct has been the subject of academic controversy (e.g. Cannizzaro, 2017; Molinari, 2019; Vitiello, 2020). At least one key factor escapes the Court's logic: It is unclear how MSs had the power to commit 'the EU' to re-energise accession negotiations, promise visa facilitation, or create a Refugee Facility from the EU budget, if they were indeed acting in their autonomous international law capacity and completely outside the EU framework. In contradistinction, the EU Ombudsman considers that 'the political aspect of the Agreement does not absolve [EU institutions] of [their] responsibility to ensure that [their] actions are in compliance with the EU's fundamental rights commitments' and has called on the Commission to 'do more to demonstrate that its implementation [...] seeks to respect [those] commitments' by 'deal[ing] more explicitly with the human rights implications' of the Statement.¹⁶¹

The other situation in which Article 51 CFR becomes relevant is with regard to MS action, 'when they are implementing Union law'. If the Statement is interpreted as an informal means of implementing the 2014 EU-Turkey Readmission Agreement¹⁶², then the Charter becomes applicable. Article 18(7) of the Agreement explicitly provides MSs with the choice to 'return [...] a person under other formal or informal arrangements' outside the Agreement's framework. In similar situations, like in relation to discretionary clauses in the Dublin Regulation¹⁶³, the CJEU has considered actions in pursuance of the option allowed to MSs by an instrument of EU law to amount to 'implementation' for the purposes of Article 51 CFR, which renders the MS concerned liable under the Charter. This means that all fundamental rights identified in Section 2 are to be respected, protected and fulfilled in any cooperation established with Turkey. If no guarantee can be given in this regard, then the relevant action needs to be immediately discontinued and any violations duly repaired.

2 Multi-modal Cooperation with Libya

2.1 Snapshot¹⁶⁴

To counter irregular migration through the Central Mediterranean, the Commission, in a 2017 Communication building on the MPF, set out goals to step up the Libyan Coastguard and strengthen Libya's borders¹⁶⁵. Additionally, on 2 February 2017, Italy and Libya signed a MoU 'to combat illegal immigration, human trafficking and contraband and on reinforcing border security'¹⁶⁶.

Despite the dangerous situation in Libya since Gaddafi's overthrow in 2011, as per the EU's own account¹⁶⁷, parties to the MoU agreed to cooperate to 'stem irregular migrant flows' (Article 1a). To that end, Italy committed to provide the Libyan Coastguard with the financial, technical and technological means (Articles 1b and 1c), to fund detention centres, train their personnel, and support return and readmission out of Libya (Article 2). Article 4 reiterates that it is for Italy, including with EU funding, to cover the expense.

The MoU has been endorsed in the Malta Declaration, which 'welcomes and [...] support[s] Italy in its implementation', pledging funds and capacity building, with the explicit aim of 'preventing departures

¹⁶⁰ Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v. European Council* [2017] ECLI:EU:T:2017:128.

¹⁶¹ Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, 18.1.2017 <<https://www.ombudsman.europa.eu/en/decision/en/75160>>.

¹⁶² EU-Turkey Readmission Agreement [2014] OJ L 134/3.

¹⁶³ *N.S.* (n 25).

¹⁶⁴ This section draws on Moreno-Lax, 2020b.

¹⁶⁵ Migration on the Central Mediterranean route: Managing flows, saving lives, JOIN(2017) 4 final, 25.1.2017.

¹⁶⁶ Unofficial translation of the Italy-Libya MoU <<http://www.statewatch.org/news/2017/feb/it-libya-memo-eng.htm>>.

¹⁶⁷ See, e.g., 'Internal EU report exposes Libya turmoil', *EUObserver*, 20.2.2017 <<https://euobserver.com/migration/136973>>.

and managing returns' (paragraph 6(j))¹⁶⁸. Despite the wealth of sources denouncing the situation facing TCNs in Libya¹⁶⁹, which has prompted an investigation into atrocity crimes against migrants by the International Criminal Court (ICC)¹⁷⁰, human rights violations have created no impediment to the EU's backing of the MoU.

Until September 2019, the EU had allocated funding in excess of EUR 367 million for migration management in Libya, which trebles the EUR 103 million grant to support good governance, health, civil society, youth and education, mediation and stability activities¹⁷¹. An EU project was awarded in July 2017 to the Italian Coastguard, channelling EUR 46.3 million to '[s]trengthen[...] the operational capacities of the Libyan coastguards' for 'maritime surveillance and rescuing at sea'¹⁷². A second tranche of EUR 45 million was allocated in December 2018. Both stem from the EUTF¹⁷³.

The EU's direct involvement in these initiatives is also facilitated by the EU Border Assistance Mission to Libya (EUBAM)¹⁷⁴, whose mandate has been extended to cover 'border management' as well as 'advice and capacity-building in the area of [...] migration [and] border security'¹⁷⁵. The extension of *Sophia's* mission was to a similar effect¹⁷⁶. The operation delivered training to the Libyan Coastguard since October 2016, launching a second package in January 2017, following the signature of a MoU with the Libyan Coastguard¹⁷⁷.

The same applies to Malta. In November 2019, it emerged that it too had reached an agreement for cooperation to intercept migrants and return them back to Libya, on the basis that 'it follow[s] a similar understanding reached between the Libyan and Italian governments'¹⁷⁸. In the first quarter of 2020, the Libyan Coastguard has prevented 2 000 migrants from reaching Maltese shores in pursuance of this arrangement¹⁷⁹, which was subsequently drafted as a MoU on 28 May 2020¹⁸⁰, committing the parties to launch coordination centres in Tripoli and Valetta to better organise operations¹⁸¹. Drawing on the Italian model, Malta pledges to 'finance in full both these centres' (Article 3) and seek the EU's financial support

¹⁶⁸ Malta Declaration, 3.2.2017 <<http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>>.

¹⁶⁹ AI, 'Libya's Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants', 11.12.2017 <<https://www.amnesty.org/en/documents/mde19/7561/2017/en/>>, counting over 20 reports from reliable monitors, including UN and EU sources. See further list of nearly 50 reports by AI and HRW spanning the period 2013 to 2019 appended to their joint Third-Party Intervention in S.S. (n 118), 'Submissions to the European Court of Human Rights', Annex, 12.11.2019 <https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf>.

¹⁷⁰ ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 8.5.2019, paras 21–22 <<https://www.icc-cpi.int/Pages/item.aspx?name=180508-otp-statement-libya-UNSC>>.

¹⁷¹ 'EU-Libya relations', EEAS Factsheet, 25.9.2019 <https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations>.

¹⁷² 'EU Trust Fund for Africa Adopts EUR 46 Million Programme to Support Integrated Migration and Border Management in Libya', Commission Press Release, 28.07.2017 <http://europa.eu/rapid/press-release_IP-17-2187_en.htm>.

¹⁷³ DEC - Support to Integrated border and migration management in Libya - Second phase T05-EUTF-NOA-LY-07 <<https://eutf.akvoapp.org/en/project/7601/>>.

¹⁷⁴ EUBAM <https://eeas.europa.eu/csdp-missions-operations/eubamlibya_en>.

¹⁷⁵ 'EUBAM Libya: mission extended, budget approved', EC Press Release, 4.8.2016

<<http://www.consilium.europa.eu/en/press/press-releases/2016/08/04-eubam-libya-mission-extended/>>.

¹⁷⁶ Council Decision (CFSP) 2016/993 of 20 June 2016 Amending Decision (CFSP) 2015/778 [2016] OJ L 162/18.

¹⁷⁷ 'Operation SOPHIA: package 2 of the Libyan Navy Coast Guard and Libyan Navy training launched today', EEAS Press Release, 30.1.2017 <https://eeas.europa.eu/headquarters/headquartershomepage/19518/operation-sophia-package-2-libyan-navy-coast-guard-and-libyan-navy-training-launchedtoday_en>.

¹⁷⁸ 'Exposed: Malta's secret migrant deal with Libya', *Times of Malta*, 10.11.2019 <<https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800>>.

¹⁷⁹ 'Libyan coastguard stopped 2000 migrants from reaching Malta', *Times of Malta*, 23.6.2020 <<https://timesofmalta.com/articles/view/libyan-coastguard-stopped-2000-migrants-from-reaching-malta.800499>>.

¹⁸⁰ Malta-Libya MoU, 28.5.2020 <<https://www.statewatch.org/news/2020/jun/malta-libya-mou-immigration.pdf>>.

¹⁸¹ 'Malta-Libya deal sets up centres "against illegal migration"', *Times of Malta*, 28.5.2020 <<https://timesofmalta.com/articles/view/abela-ministers-return-from-libya-after-positive-migration-talks.794840>>.

‘to help the [Government of National Accord (GNA)] in securing the [...] borders of Libya’ (Article 5), but without any reference to human rights.

2.2 Human Rights Implementation and Oversight Mechanisms

Whilst the Malta-Libya MoU does not mention human rights, limiting itself to stating that ‘the implementation of this Memorandum should not contravene with [sic] rights and obligations under other international conventions signed by either party’ (Article 6), the Italy-Libya MoU stipulates that ‘[t]he Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements of which the two Countries are part of’ (Article 5). It also sets up a specific structure, the ‘Joint [Italy-Libya] Commission’, charged with overseeing the correct application of the MoU (Article 3), but with no specific focus on the rights of TCNs. Joint Commission decisions being neither published nor public, it is impossible to determine whether or not human rights are considered in practice. There are, otherwise, no safeguards or remedies contemplated to contest pullbacks and other initiatives under the MoU. Its legality has, in fact, been challenged in national courts. The Trapani Tribunal has declared the MoU unconstitutional and incompatible with human rights, refugee law and maritime law obligations, explicitly stating that Libya cannot be considered a ‘place of safety’ for the purposes of disembarkation¹⁸². The ensuing practice of *refoulement* by proxy has been denounced in a string of cases pending in the European Court of Human Rights (ECtHR), the UN Human Rights Committee and the UN Committee Against Torture, and it forms the basis of a request for an ICC inquiry¹⁸³.

However, on the EU side there are no dedicated instruments for monitoring or evaluating the EU’s support to the MoU’s implementation and its compatibility with TCN rights, at least in the public domain. Commission and European External Action Service (EEAS) press releases provide limited information, which is insufficient to reconstruct the relevant decision-making processes and establish the role of human rights considerations. From the available data in one of its latest factsheets on Libya, the EEAS appears to disregard the impact of EU interventions on the ground. It limits itself to praising the establishment in November 2017 of a Trilateral Task Force (TTF) between the EU, the African Union (AU) and the UN, aimed at accelerating voluntary returns and humanitarian evacuations out of Libya. According to the EEAS, the TTF has contributed to 48 000 assisted returns and 4 000 evacuations up to September 2019. A EUR 44 million package has been delivered to UN agencies since 2014, part of which has been used to sponsor this initiative¹⁸⁴. Yet, the report fails to mention that there remain about 800 000 migrants and 50 000 registered refugees and asylum-seekers still ‘trapped’ in Libya in appalling conditions¹⁸⁵.

Training and assistance provided to the Libyan Coastguard is meant to cover SAR and interdiction techniques ‘with a particular focus on human rights’ (EEAS Factsheet, 2019). But with the relevant documentation remaining confidential, it is impossible to assess the quality and value of the material. The EEAS Factsheet also states that ‘[w]hile operating off the coast of Libya [...] Operation *Sophia* has been involved in rescuing over 44 900 lives’, but then provides no details on disembarkation. Also unreported is the role played by EUROSUR data and EUNAVFORMED communications in enabling interdictions by the Libyan Coastguard. As related by the Director-General for Migration in a letter to the Frontex Executive Director in March 2019, ‘the increased performance of the Libyan Coastguard [...] [is] a *direct consequence* of the support EU provided both in terms of training and equipment’. The letter also clarifies that ‘[m]any

¹⁸² Tribunale di Trapani, 3.6.2019 <https://www.asgi.it/wp-content/uploads/2019/06/2019_tribunale_trapani_vos_thalassa.pdf>.

¹⁸³ (n 118).

¹⁸⁴ ‘EU-Libya relations’, EEAS Factsheet, 25.9.2019 <https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations>.

¹⁸⁵ ‘UNHCR and IOM joint statement: International approach to refugees and migrants in Libya must change’, UNHCR Press Release, 11.7.2019 <<https://www.unhcr.org/uk/news/press/2019/7/5d2765d04/unhcr-iom-joint-statement-international-approach-refugees-migrants-libya.html>>.

of the recent sightings of migrants in the Libyan SRR have been provided by aerial assets of EUNAVFORMED and were notified *directly* to the Libyan [authorities]' (emphasis added)¹⁸⁶. There seems to be no particular concern that this procedure facilitates *refoulement*, impedes access to asylum and exposes migrants to abuse by the Libyan Coastguard.

Several actors, including the UN Secretary-General, have denounced the Libyan Coastguard's violent behaviour¹⁸⁷, including the firing of live shots¹⁸⁸, the intimidation of NGO rescue boats¹⁸⁹ and the use of lethal force against migrants¹⁹⁰ (Heller/Pezzani, 2018). These findings have been confirmed by the Panel of Experts on Libya, established by the UN Security Council, which has exposed 'the coastguard [as being] *directly involved* in [...] grave human rights violations', including 'executions, torture and deprivation of food, water and access to sanitation [...] [as well as] enslavement of sub-Saharan migrants' (emphasis added)¹⁹¹. The ICC prosecutor has echoed these concerns, denouncing the 'serious and widespread crimes against migrants attempting to transit through Libya'. She has labelled Libya as a 'marketplace for the trafficking of human beings', where 'thousands of vulnerable migrants [...] are being held in detention centres [...] in inhumane conditions'¹⁹², where they are exposed to 'unlawful killings [...]; kidnappings [...]; torture; [...] rape, and other ill-treatment [...] in official and unofficial detention centres'¹⁹³. Thus, the fact that the EU has provided funding for official detention centres through the EUTFA is highly problematic¹⁹⁴. Whether EU funds have ended up in unofficial detention centres too is currently under investigation in Italy and a complaint has been filed for the ECA to launch similar proceedings into financial mismanagement giving rise to indirect responsibility for human rights abuses against migrants in Libya¹⁹⁵.

2.3 Charter Applicability and Fundamental Rights Responsibility of the EU / MSs

The intention with which policy action is undertaken does not absolve compliance with human rights *in practice*. What matters in a human rights analysis are impact and effects, rather than the rationale or motives for action, however noble these may be. All actions by EU agencies and organs 'with[in] their respective powers' need to conform with the Charter (Article 51 CFR). There are no situations in which EU law authorises the EU to act without having to comply with fundamental rights. This is made explicit in the instruments governing EUROSUR, Frontex and the EUNAVFORMED. Operation *Sophia* was due to be

¹⁸⁶ Letter of Director-General for Migration and Home Affairs to Frontex Executive Director, Ref. Ares(2019)1755075, 18.3.2019 <[http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019\)1362751%20Rev.pdf](http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf)>. See also (n 118).

¹⁸⁷ UNSC, Report S/2018/140, para. 49.

¹⁸⁸ 'Migranti. Guardia costiera libica spara contro motovedetta italiana', *Avvenire*, 26.5.2017 <<https://www.avvenire.it/attualita/pagine/guardia-costiera-libica-spara-contro-vedetta-italiana>>.

¹⁸⁹ 'Rescue Ship Says Libyan Coast Guard Shot at and Boarded It, Seeking Migrants', *Reuters*, 26.9.2017 <<https://uk.reuters.com/article/uk-europe-migrants-libya-ngo/rescue-ship-says-libyan-coast-guard-shot-at-and-boarded-it-seeking-migrants-idUKKCN1C12LJ>>.

¹⁹⁰ 'Video Shows Libyan Coastguard Whipping Rescued Migrants', *The Times*, 14.2.2017 <<https://www.thetimes.co.uk/article/video-shows-libyan-coastguard-whipping-rescued-migrants-6d8g2jqz6>>; HRW, 'EU: Shifting Rescue to Libya Risks Lives, Italy Should Direct Safe Rescues', 19.6.2017 <<https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>>.

¹⁹¹ Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), S/2017/466, 1.6.2017, para. 104 <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2017_466.pdf>.

¹⁹² ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 9.5.2017, paras 25–27 <<https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>>.

¹⁹³ ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 8.11.2017, paras 31 and 41 <https://www.icc-cpi.int/Pages/item.aspx?name=otp_lib_unsc>.

¹⁹⁴ Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 16.10.2019, p. 9 and fn. 19.

¹⁹⁵ ASGI, 'Fondo Africa sotto esame al Consiglio di Stato', 19.7.2019 <<https://www.asgi.it/notizie/fondo-africa-sotto-esame-al-consiglio-di-stato/>>; and Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' (IBM) Programme Submitted by Global Legal Action Network (GLAN), Association for Juridical Studies on Immigration (ASGI), and Italian Recreational and Cultural Association (ARCI), 27.4.2020 <<https://www.statewatch.org/news/2020/apr/eu-libya-legal-complaint-finance-27-4-20.pdf>>.

conducted 'in accordance with international law', in particular with SAR obligations, requiring disembarkation in a 'place of safety', in line with refugee law, human rights and the *non-refoulement* principle (Recital 6 Council Decision 2015/778). The same applies to the *IRINI* Operation (Article 1(1) Council Decision 2020/472). Frontex, for its part, is explicitly subject to guaranteeing fundamental rights in all its activities (Articles 1 and 5(4) EBCG Regulation), as are MSs, including Italy and Malta, which remain bound by the duty of 'full compliance with EU law, including respect for fundamental rights' when 'ensur[ing] the management of their external borders' (Article 7(3) EBCG Regulation), whatever means they employ. In their cooperation with Libya, '[t]he Agency and MSs shall comply with Union law, including norms and standards which form part of the [fundamental rights] *acquis* [...]' (Article 71(3) EBCG Regulation), both substantive and procedural, including effective remedies with suspensive effect capable of avoiding irreversible harm from materialising on return to Libya.

When cooperation entails the transfer of information, this requires the conclusion of a specific agreement (Article 72(1) EBCG Regulation), which 'shall comply with Union and international law on fundamental rights and on international protection, including the Charter, the [ECHR] and the 1951 [Refugee] Convention [...] and [...] the principle of *non-refoulement*' (Article 72(3) EBCG Regulation). The EBCG Regulation requires that '[w]hen implementing such agreements and arrangements, MSs shall assess and take into account the general situation in the third country on a regular basis' (Article 72(3)). Furthermore, if the purported transfer 'provides a third country with data that could be used to identify persons or groups of persons [...] who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment, or any other violation of fundamental rights', according to Article 89(5), it 'shall be prohibited' without exception.

Cooperation with Libya, whether through JO *Triton/Themis*, EUNAVFORMED, the EUBAM or on a bilateral Italy-Libya/Malta-Libya basis for 'the management of their external borders' (Article 7(3) EBCG Regulation), entails the obligation of conforming with TCN rights within Libya and in distress at sea, particularly to make sure that their life is not endangered and they are not subjected to ill-treatment, collective expulsion or *refoulement*. Even if there were no specific provisions in the relevant legislative instruments, primary law requires the observance of fundamental rights in all EU internal and external action (Articles 2, 6 and 21 TEU).

Regarding funding, EU development funds, including allocations from the EUTF, must comply with the relevant standards. 89 % of total contributions to the EUTF consist of transfers from the EU Development Fund (EDF) and the EU budget¹⁹⁶, which makes Article 208 TFEU and the EDF Regulation relevant. Article 1(2) of the EDF Regulation requires that the 'primary objective' of transfers 'shall be the reduction and, in the long term, the eradication of poverty', rather than migration management or border control. The provision also stipulates that funding must demonstrably contribute to 'consolidating and supporting [...] human rights and the relevant principles of international law' and to 'implementing a rights-based approach encompassing all human rights'¹⁹⁷. Allocations must be 'adapted to the [...] commitment and progress with regard to human rights' of the third country concerned (Article 2(4) EDF Regulation). Otherwise, transfers will not be valid. In fact, in a similar situation regarding allocations for a border security project in the Philippines, the CJEU annulled the decision concerned for a lack of 'direct connection' with development objectives¹⁹⁸.

Failure to comply with development objectives, coupled with the fact that EUTF funding to Libya has been allocated without an *ex ante* assessment of its impact on human rights and without any safeguards

¹⁹⁶ 'European Union Emergency Trust Fund for Africa: Flexible but lacking focus', ECA Special Report No 32 (2018), para. 7 <https://www.eca.europa.eu/Lists/ECADocuments/SR18_32/SR_EUTF_AFRICA_EN.pdf>.

¹⁹⁷ European Development Fund Regulation (EU) 2015/322, [2015] OJ L 58/1 ('EDF Regulation').

¹⁹⁸ Case C-403/05 *Parliament v. Commission* ECLI:EU:C:2007:624, para. 66.

to ensure it does not contribute to violations, has led to the aforementioned complaint to the ECA, supported by a coalition of thirteen civil society organisations¹⁹⁹. The complaint relies on an ECA Special Report, which concludes that there are serious deficiencies in the implementation of the EUTFA with regard to Libya concerning allocations made without clear review criteria, without verifiable human rights benchmarks and without appropriate reporting, monitoring or evaluation for compliance with the relevant standards²⁰⁰.

3 EU-Afghanistan Joint Way Forward

3.1 Snapshot

Afghans are the top nationality arriving in the EU through the Eastern Mediterranean route. As such, they are the main refugee population group affected by the EU-Turkey Statement²⁰¹, including those being forcibly expelled by Turkey in contravention of the *non-refoulement* principle²⁰². For several years in succession, they have also been amongst the main beneficiaries of international protection in the EU²⁰³. In 2020, Afghanistan remains the third source country of refugees worldwide, after Syria and Venezuela, according to UNHCR²⁰⁴.

The JWF Declaration was signed in October 2016, after EEAS-led negotiations, without participation of (or input from) the Parliament²⁰⁵. Rather than as an instrument enhancing the implementation of a pre-existing EURA, unlike the EU-Turkey Statement, the JWF is self-standing but, like the EU-Turkey Statement, is intended as non-binding. It is projected to pave the way for further cooperation, presumably culminating in a fully-fledged EURA. Although the core objective is to ‘establish a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals who do not fulfil the conditions in force for entry to, presence in, or residence on the territory of the EU’ (Preamble, Recital 4 and Part I), the wider goal includes the prevention of irregular migration on a more general basis (Preamble, Recital 2).

Most provisions relate to facilitation of the return process and contain detailed rules on travel documents, proof of nationality, exchange of information, etc. to that effect (Part II). Provision is made for the organisation of removals both through regular and charter flights, including ‘joint flights [...] organised and coordinated by Frontex’ (Part II(3)), thereby enabling the Agency to assume a leading role in implementing the Declaration, although without referring to the Return Directive or the EBCG Regulation. Part III commits the parties to undertake information campaigns, to dissuade potential irregular migrants from undertaking the journey, without a mention of forcibly displaced persons in need of international protection, for whom no specific channels of safe and legal access to asylum have been provided. Most costs are to be covered by the EU (Part IV). In addition, the Union has undertaken to ‘enhance its efforts to support the Afghan Government in tackling trafficking in human beings and migrant smuggling’ (Part V (1)), again with no consideration for those at risk of persecution and serious harm. Such assistance is

¹⁹⁹ (n 196). See Joint Statement, ‘EU: Time to review and remedy cooperation policies facilitating abuse of refugees and migrants in Libya’, 27.4.2020 <<https://www.statewatch.org/media/documents/news/2020/apr/eu-libya-legal-complaint-finance-statement-27-4-20.pdf>>.

²⁰⁰ ECA Special Report (n 197).

²⁰¹ Turkey 2019 Report, SWD(2019) 220 final, 29.5.2019, pp. 46 and 48.

²⁰² See e.g. AI, ‘Turkey “safe country” sham revealed as dozens of Afghans forcibly returned hours after EU refugee deal’, 23.3.2016 <<https://www.amnesty.org/en/latest/news/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/>>.

²⁰³ Progress report on the Implementation of the European Agenda on Migration, COM(2019) 126 final, 6.3.2019, pp. 3-4.

²⁰⁴ UNHCR, figures at a glance, 18.6.2020 <<https://www.unhcr.org/uk/figures-at-a-glance.html#:~:text=UNHCR%20personnel&text=As%20of%2031%20May%202020,and%20sub%20and%20field%20offices>>.

²⁰⁵ Joint Way Forward on migration issues between Afghanistan and the EU, 2.10.2016

<https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf>.

envisaged to include specifically ‘capacity-building for law enforcement agencies’, which are responsible for some of the most egregious human rights abuses that turn Afghans into refugees²⁰⁶.

A Joint Working Group (JWG) with representatives from both parties is scheduled to meet regularly to facilitate implementation of the JWF (Part VI). It has explicit monitoring and reporting attributions and the power to explore further arrangements and propose amendments. But no specific provision has been made for the JWG to cater for the rights of returnees, so as to make sure that removals and reintegration are indeed performed while ‘respecting the[ir] safety, dignity and human rights’ (Preamble, Recital 5).

3.2 Human Rights Implementation and Oversight Mechanisms

The Declaration includes a commitment to implement the JWF in line with the parties’ respective obligations, including under the 1951 Convention, the EU Charter and the ICCPR (Preamble, Recital 5). There is also some prioritisation for voluntary returns over enforced removals (Part I (3)) and a reintegration package for those who avail themselves of such an option (Annex). Provision is made for humanitarian considerations, with the EU pledging to consider the situation of particularly vulnerable groups, to ensure they ‘receive adequate protection, assistance and care throughout the whole process’ (Part I(4)). Whilst unaccompanied minors are not excluded from the JWF, it is intended that they are ‘not to be returned without successful tracing of family members or without adequate reception and care-taking arrangements having been put in place in Afghanistan’ (Part I (5)), although there is no specification of what ‘adequate’ means in this framework.

Regarding the logistics of enforced returns, to facilitate the execution of non-scheduled flights, ‘EU MSs intend to provide flight data, the maximum number of returnees and personal information of the pool of returnees for each flight [...]’ (Part II (4)), without making any mention of data protection guarantees or considering the risks of communicating potential refugees’ personal details. Returnees to Afghanistan have, indeed, been exposed to retaliation, victimisation and generalised violence, as reports from different sources (including EASO) recount, with several organisations calling for a moratorium on removals from Europe²⁰⁷.

Although the JWG must monitor implementation of the JWF and report to the EU-Afghanistan High Level Dialogue on Migration (Part VI (a)), the frequency of monitoring and reporting exercises, the content, the benchmarks to be considered and publication conditions have not been specified. In fact, little is known of the JWG’s work and of the results of the JWF’s implementation as a whole.

Faced with this opacity, the LIBE Committee Chair formally requested the Commission to inform Parliament of the state of play in September 2017. The Commission’s reply contains few details and simply states that implementation proceeds ‘in a satisfactory manner’, with irregular arrivals from Afghanistan dropping ‘from 54 385 in 2016 to 3 125 between January and July 2017’ and the number of returns (without disaggregating voluntary from forced returns) increasing ‘from 1 520 in 2015 to 8 325 in 2016’. The letter also indicates that ‘17 charter flights have taken place with 269 returnees on board’ since the ‘entry into force’ of the JWF and states that the MSs are ‘in general satisfied with the cooperation with Afghan

²⁰⁶ EASO, ‘COI Report: Afghanistan - Security situation’ (June 2019)

<https://coi.easo.europa.eu/administration/easo/PLib/Afghanistan_security_situation_2019.pdf>.

²⁰⁷ AI, ‘Afghanistan: Forced Back to Danger: Asylum-Seekers Returned from Europe to Afghanistan’, 5.10.2017

<<https://www.amnesty.org/en/documents/asa11/6866/2017/en/>>; Asylos, ‘Afghanistan: Situation of young male ‘Westernised’ returnees to Kabul’ (August 2017) <https://www.ecoi.net/en/file/local/1405844/1226_1503654307_afg2017-05-afghanistan-situation-of-young-male-westernised-returnees-to-kabul-1.pdf>; EASO, ‘EASO Country of Origin Information Report: Afghanistan

– Individuals targeted under societal and legal norms’, 30.11.2017

<<https://www.easo.europa.eu/sites/default/files/publications/coi-Afghanistan-targeting-society.pdf>>.

authorities; any obstacles to cooperation are discussed [...] at the regular Joint Working Group meetings'²⁰⁸.

Further questions have been formulated by individual MEPs, requesting the Commission to expand on this information. On 22 November 2017, a group of MEPs requested clarification of the MSs from which the 17 charter flights had departed, which MSs coordinated them and whether or not Frontex was involved. They also asked about the gender and age breakdown of returnees together with an indication of the total costs of operations and their allocation between the MSs and EU budgets²⁰⁹. In its reply, the Commission indicated that 23 charter flights had been carried out up to 21 December 2017, all 'coordinated and financed' by Frontex, costing EUR 5.5 million, departing from Austria, Denmark, Finland, Germany, Hungary and Sweden. Although the vast majority of the 358 returnees were adult males, 6 minors and 11 females were also deported 'as part of a family'. Neither the Commission nor Frontex were able to indicate returnees' ages²¹⁰. Considering the gaps in information provided, a follow up question was formulated in August 2019, requiring the Commission to disclose: the total number of persons repatriated in 2018 under the JWF; an indication of their gender and exact age; the total number of flights arranged; the MSs of departure; and the coordinating authority. The question further asked for a detailed breakdown of costs borne by the MSs and EU, specifying the origin of the funds²¹¹. A holding reply was delivered in November 2019 with no further details, committing to submit them at some latter point²¹².

3.3 Charter Applicability and Fundamental Rights Responsibility of the EU / MSs

That Frontex has coordinated and financed all return flights under the JWF renders EU law applicable, including EBCG Regulation provisions on JROs and cooperation with third countries. For their part, MSs remain liable under the EBCG Regulation and Return Directive. Indeed, the JWF should be classified as an agreement of those contemplated in Article 72(1) of the EBCG Regulation, allowing MSs to 'cooperate at an operational level with one or more third countries in relation to the areas covered by [the EBCG] Regulation'. Both the Agency and participating MSs are hence subject to observance of the EU Charter (Article 51 CFR; Articles 72(3) and 73 EBCG Regulation). Moreover, before embarking on cooperation with the Afghan authorities, MSs should have 'assess[ed] and take[n] into account the general situation [there]', which they must continue to monitor 'on a regular basis' (Article 72(3) EBCG Regulation) when implementing the JWF.

This means that the specific safeguards applicable to return operations must be complied with, including monitoring provisions for compliance with fundamental rights (Articles 10(1)(e) and 50(2) EBCG Regulation). This covers the exchange of 'personal information' in the pre-removal phase, as envisaged in Part II (4) of the JWF. Unless it can be discarded through appropriate means (opened to appeal and with adequate judicial protection guarantees) that it will not 'be used to identify persons [...] who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment, or *any other violation of fundamental rights*', the exchange 'shall be prohibited' (Article 89(5) EBCG Regulation). In addition, Frontex 'shall ensure that the respect for fundamental rights, the principle of *non-refoulement*,

²⁰⁸ 'EU readmission developments – State of play October 2017', Letter from European Commission Director General for Migration and Home Affairs, Mr Matthias Ruete, to European Parliament LIBE Committee Chair, Mr Jean-Claude Moraes, home.ddg1.c.1(2017)5906281 <<https://www.statewatch.org/news/2017/nov/eu-com-letter-to-ep-readmissions.pdf>>.

²⁰⁹ Parliamentary Question for written answer E-007189-17, 22.11.2017 <https://www.europarl.europa.eu/doceo/document/E-8-2017-007189_EN.html>.

²¹⁰ Answer by Mr Avramopoulos on behalf of the Commission E-007189/2017(ASW), 13.2.2018 <https://www.europarl.europa.eu/doceo/document/E-8-2017-007189-ASW_EN.html>.

²¹¹ Parliamentary Question for written answer E-002577-19, 29.8.2019 <https://www.europarl.europa.eu/doceo/document/E-9-2019-002577_EN.html>.

²¹² Answer by Mr Avramopoulos on behalf of the Commission E-002577/2019, 15.11.2019 <https://www.europarl.europa.eu/doceo/document/E-9-2019-002577-ASW_EN.html>.

the proportionate use of means of constraint and the dignity of the returnee are guaranteed during the entire return operation', and this entails that 'at least one [...] forced-return monitor [...] shall be present throughout the entire return operation until arrival at the third country of return' (Article 50(3) EBCG Regulation). The guarantees in Article 8(6) of the Return Directive apply as well. Forced-return monitors must carry out their functions 'on the basis of objective and transparent criteria and shall cover the whole operation' (Article 50(5) EBCG Regulation). They are obligated to submit a report 'on each forced-return operation' organised or coordinated by Frontex, on the basis of which the executive director must conduct a 'detailed evaluation' that s/he must transmit every six months to the Parliament, the Council, the Commission and the Agency's management board, 'covering all return operations conducted in the previous semester, together with the observations of the fundamental rights officer' (Article 50(7) EBCG Regulation). The anomaly of MEPs having to request information on the JWF implementation via Parliamentary questions should thus be immediately corrected.

MSs must, in turn, comply with all the fundamental rights guarantees contained in the Charter and Return Directive. JWF removals should be deemed part of 'all necessary measures to enforce [a] return decision' contemplated in Article 8(1) of the Directive. So, action under the JWF should be considered as 'implementation' of EU law (Article 51 CFR), which must thus be undertaken 'in accordance with fundamental rights and with due respect for the dignity and physical integrity of the TCN concerned' (Article 8(4) Return Directive), and taking due account of 'the best interests of the child; family life; the state of health of the TCN concerned, and respect the principle of *non-refoulement*' (Article 5 Return Directive). The procedural safeguards in Chapter III of the Directive also remain applicable in regard to the form of return decisions, the obligation to provide reasons, and the duty to inform of legal remedies in writing (Article 12(1) Return Directive). Most importantly, TCNs subject to JWF removals must be given an 'effective remedy to appeal against or seek review of [any and all] decisions related to return' (Article 13(1) Return Directive) in proceedings that comply with Articles 41 and 47 CFR requirements, including as regards suspensive effect.

4 EU-Niger Cooperation and the EUCAP Sahel

4.1 Snapshot

Since the collapse of Libya's government, Niger has gained prominence as a key migration hub in the Sahel — one of the world's poorest regions, rising as the EU's main strategic partner in the fight against irregular migration through West Africa. Its security situation has been unstable since the 1990s and aggravated by a string of armed uprisings in the 2000s, the emergence of Boko Haram and ongoing conflict in Mali. Militarisation, desertification, under-development and the lack of alternative livelihoods have provided a breeding ground for trafficking in arms, drugs and human beings. The central government has no control over several parts of the country, which are in the hands of militias, trafficking rings and terrorist cells (Tinti/Westcott, 2016). From a total population of 22 million, there are 291 000 Nigerien IDPs displaced by terrorist violence and 58 000 Malian refugees accommodated in UNHCR-run camps across the country²¹³.

The EUCAP Sahel Niger was launched in 2012 as a CSDP civilian mission with a security mandate²¹⁴. It is part of the wider EU Strategy for Security and Development in the Sahel²¹⁵. The initial objective was 'to prevent [terrorist] attacks in the Sahel region and [...] on EU territory, [and] to reduce and contain drug and

²¹³ International Rescue Committee, 'Country Profile: Niger', (June 2020) <<https://www.rescue.org/country/niger>>; UNHCR, 'Refugee Situations: Niger', 31.5.2020 <<https://data2.unhcr.org/en/country/ner>>.

²¹⁴ Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger) [2012] OJ L 187/48. See also EUCAP Sahel Niger, 'About' <https://eeas.europa.eu/csdp-missions-operations/eucap-sahel-niger_en>.

²¹⁵ EEAS, Strategy for Security and Development in the Sahel, (March 2011)

<http://www.eeas.europa.eu/archives/docs/africa/docs/sahel_strategy_en.pdf>.

other criminal trafficking destined for Europe' (p. 4). However, its mandate was revised in 2014 to focus on irregular migration more directly²¹⁶. Currently, the mission's main task is to provide training, advice and equipment to the Nigerien authorities, to enhance their counter-migrant smuggling capabilities²¹⁷.

Since then, more than 13 000 officials have been trained, contributing to an increase in seizures by Nigerien authorities²¹⁸. Cooperation has also been strengthened through other MPF initiatives, within which Niger is a priority country. The focus has been on designing a National Migration Strategy, including the adoption of anti-migrant smuggling legislation in 2015 and a comprehensive Action Plan²¹⁹. Implementation has been facilitated through the deployment of a Joint Investigation Team (JIT), based in Niamey, agreed upon in a trilateral protocol of March 2017 between Niger, France and Spain, with an allocation of EUR 11.5 million for projects undertaken by the police forces of these three countries, financed through the EU budget²²⁰.

The JIT is one of many cooperation mechanisms deployed by the EU Delegation in Niger, in which other EU missions and agencies also participate, including Europol, EUCAP Mali and Frontex²²¹, via the EUBAM operation in Libya and the deployment of a liaison officer in Niger²²². Niger is amongst the main EUTFA beneficiaries, receiving a total of EUR 186 million for migration management and border security projects²²³.

Regional efforts have complemented bilateral engagement with Niger. A Joint Declaration of August 2017, signed in Paris by the EU, Germany, Italy, France, Spain, Niger, Chad and the Libyan GNA, commits all parties to enhance cooperation 'in conformity with international law' to counter irregular migration at all stages of the journey. The key focus is on the fight against smugglers, 'to limit irregular migration to Europe and protect migrants against human rights violations'²²⁴. A comprehensive strategy is proposed that combines direct action against smuggling networks, including the reinforcement of border controls in Niger and Chad²²⁵, with the 'prevention of departures' and the 'return of irregular migrants to their countries of origin'. However, there is no specific reference to: freedom of movement under Economic Community of West African States (ECOWAS) rules; the right to leave any country; the right to seek asylum; or the principle of *non-refoulement*²²⁶. EU countries commit to financing the relevant actions, including work through the EUCAP Sahel Niger and support to assisted returns and reintegration programmes as well as accepting the

²¹⁶ Council Decision 2014/482/CFSP of 22 July 2014 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger) [2014] OJ L 217/31.

²¹⁷ EEAS, The EUCAP Sahel Niger civilian mission – Update: April 2016, <http://www.eeas.europa.eu/archives/docs/csdp/missions-and-operations/eucap-sahel-niger/pdf/factsheet_eucap_sahel_niger_en.pdf>.

²¹⁸ EUCAP Sahel Niger – Partnership for Security in the Sahel, Factsheet 2019 <https://eeas.europa.eu/sites/eeas/files/eucap_sahel_niger_general_factsheet_en_2019.pdf>.

²¹⁹ EEAS, Niger Action and Progress under the Migration Partnership Framework June 2016 – June 2017 <https://eeas.europa.eu/sites/eeas/files/factsheet_work_under_partnership_framework_with_niger.pdf>.

²²⁰ Création d'une Équipe Conjointe d'Investigation (ECI) pour la lutte contre les réseaux criminels liés à l'immigration irrégulière, la traite des êtres humains et le trafic des migrants, 15.2.2017 <https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger/creation-dune-equipe-conjointe-dinvestigation-eci-pour-la-lutte-contre_en>.

²²¹ Document d'action fonds fiduciaire d'urgence de l'UE en faveur de la stabilité et de la lutte contre les causes profondes de la migration irrégulière et du phénomène des personnes déplacées en Afrique, undated, pp. 13 ff. <https://ec.europa.eu/trustfundforafrica/sites/eutfa/files/final_t05-eutf-sah-ne-05_eci_avenant_1.pdf>.

²²² Frontex Liaison Officers to non-EU countries, undated <<https://frontex.europa.eu/partners/liaison-officers-network/>>.

²²³ EUTFA: Niger, undated <https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/niger_en>. This encompasses 3 migration management projects (EUR 47 million); 2 governance projects (EUR 101.5 million), one on the JIT and another supporting the reinforcement of the justice, security and border control system; and 4 resilience projects (EUR 37.6 million), two regarding displaced populations and another two complementing action on migration management.

²²⁴ Rencontre à Paris sur la migration: Déclaration conjointe 'Relever le défi de la migration et de l'asile', 28.8.2017, para. 1 (own translation) <https://ec.europa.eu/commission/presscorner/detail/fr/STATEMENT_17_2981>.

²²⁵ Ibid., para. 2.2(1).

²²⁶ Ibid., para. 2.1(2) (own translation).

resettlement of refugees evacuated from Libya²²⁷. An 'operational cooperation team' (OCT) has been established for the joint implementation of the actions foreseen, working in consultation with the European Commission and the CFSP High Representative²²⁸.

A follow-up Declaration, adopted after a meeting of the OCT in Niamey held in March 2018, opens up the cooperation framework to other West African countries, including the Ivory Coast, Burkina Faso, Guinea, Senegal, Mauritania, as well as the UN, the AU, the G5 Sahel and the Community of Sahel-Saharan States²²⁹. The Declaration contains an Action Plan foreseeing: (1) reinforcement of national legislation in the fight against irregular migration; (2) enhancement of operational capacities at national level through the creation of JITs, rapid-action teams, the conclusion of WAs with Frontex and the improvement of information exchange networks; (3) enhancement of technical and material capabilities of the national defence and security forces; (4) development of judicial cooperation schemes; (5) improvement of border controls; (6) investment in sustainable development; and (7) protection of migrants and trafficking victims through the return/reintegration and evacuation programmes coordinated by the TTF in Libya. A dedicated mechanism is tasked with overseeing implementation of the action points.

Regarding international protection, one such TTF programme targeting Niger is the Emergency Transfer Mechanism (ETM) to evacuate refugees, especially those detained in Libya, for their onwards resettlement. The ETM was established in November 2017, via a MoU between UNHCR and the Nigerien government, and extended in December 2019 for a further two years²³⁰. EUR 45 million has been received from the EUTFa to fund this initiative. So far, a total 3 208 refugees have been evacuated²³¹ — of an estimated 823 000 people requiring humanitarian assistance and the more than 4 500 in need of immediate release and protection in Libya²³². On arrival in Niger, evacuees undergo a refugee status determination procedure. A resettlement file is completed by UNHCR and submitted to potential host countries, which may agree to resettle evacuees on this basis or will conduct a resettlement mission for further screening in situ. Meanwhile, evacuees are either hosted within a closed centre in Hamdallaye or, if particularly vulnerable, at guesthouses in Niamey. Amongst the EU MSs, only Belgium, Finland, France, Germany, Italy, Luxembourg, Malta, The Netherlands and Sweden have resettled 2 454 ETM and non-ETM refugees from Niger, alongside Canada, Norway, Switzerland, the UK and the US. However, all resettlement flights have been suspended since March 2020 due to Covid-19²³³.

4.2 Human Rights Implementation and Oversight Mechanisms

Implementation of the JIT protocol has been reported in a Commission document, detailing the number of operations conducted in 2018 (82 in total)²³⁴. The overall assessment is positive, considering JIT activities to have contributed to the 80 % reduction of migration flows towards Italy, but without mentioning human rights considerations regarding *non-refoulement*, access to asylum, or the right to leave²³⁵. The general

²²⁷ Ibid., para. 2.2 and Annex.

²²⁸ Ibid., para. 2.5.

²²⁹ Rencontre à Niamey sur la migration - Déclaration conjointe suivant la réunion de coordination de la lutte contre le trafic illicite de migrants et la traite des êtres humains, 16.3.2018

<https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_2067>.

²³⁰ UNHCR, 'Emergency Transit Mechanism – Factsheet', (June 2020)

<<https://reliefweb.int/sites/reliefweb.int/files/resources/77083.pdf>>.

²³¹ Ibid., p. 2.

²³² UNHCR, Global Focus: Operations Worldwide – Libya 2020 <<https://reporting.unhcr.org/node/12003?y=2020#year>>. This represents a 50 % increase in the total number of persons of concern for UNHCR since clashes restarted in April 2019.

²³³ (n 231), p. 2.

²³⁴ Document d'action fonds fiduciaire d'urgence de l'UE en faveur de la stabilité et de la lutte contre les causes profondes de la migration irrégulière et du phénomène des personnes déplacées en Afrique,

<https://ec.europa.eu/trustfundforafrica/sites/eutfa/files/final_t05-eutf-sah-ne-05_eci_avenant_1.pdf>.

²³⁵ Ibid., p. 6.

understanding is that, 'since human trafficking and migrant smuggling constitute grave violations of human rights, the project has a positive impact in this regard'²³⁶, assimilating the fight against smugglers and traffickers to a human rights protection measure in and of itself. The Commission states that JIT activities are undertaken 'according to the relevant international human rights standards'²³⁷, but it does not provide any substantiation. The report also discloses synergies between the JIT and other elements of the EUCAP Sahel Niger, which provide support for the detection of irregular movements, sometimes including aerial means²³⁸.

The latest factsheet of EUCAP Sahel Niger states that '[t]he promotion of human rights is imperative to the mission's objectives' and explains that '[t]o better integrate them into the security sector, the mission regularly trains key actors on [...] human rights' (p. 2). However, the only measure specified is that 3 000 copies of the Nigerien penal code have been handed down to the Ministry of Justice²³⁹. Otherwise, no reports or evaluations assessing the specific task of assisting in the 'development of a [...] human rights-based approach among the various Nigerien security actors in the fight against terrorism and organised crime' (EUCAP Sahel Niger Decision, Article 2) have been published, either in relation to the JIT protocol, or regarding implementation of the 2017 Paris Declaration and the 2018 Niamey Action Plan. Both of these latter arrangements contain references to the need for protecting migrants' human rights, to comply with the 1951 Refugee Convention and assist those in danger of losing their lives in the desert (2017 Paris Declaration, paras 1 and 2.2(1); Niamey Action Plan, para. 2). The general report on the Sahel regional action plan celebrates cooperation with Niger as 'particularly fruitful', resulting in 'a significant decrease in departures from Libya since mid-July 2017', containing general statements on human rights and a list of projects financed with the corresponding amounts, but no analysis of concrete compliance with the relevant standards²⁴⁰.

Independent reports on the impact of legislative reform from 2015 are critical of the EU's approach (Castillejo, 2019). The new law criminalises all forms of irregular migration, including transport *within* Niger²⁴¹, which is problematic, considering that many of the targeted persons are ECOWAS nationals, who under the ECOWAS Free Movement Protocol are entitled to travel within the territory of States Parties²⁴². It, therefore, raises issues concerning the right to freedom of movement within a country (Article 2(1) Protocol 4 ECHR; Article 12(1) ICCPR), the limitations of which require compliance with the principles of legality, proportionality and non-discrimination (Article 2(3) Protocol 4 ECHR; Article 12(3) ICCPR). It may also interfere with the right to asylum and the right to leave any country, including when they intersect with *non-refoulement*, which does not allow for any restrictions or derogations. This broad criminalisation of mobility has pushed irregular routes underground, increasing smuggling prices and the dangers for migrants²⁴³. The reform is considered to be 'born out of European policies' and contributing to 'migrants tak[ing] enormous risks and regularly end[ing] up dead'²⁴⁴. From an economic perspective, migration had

²³⁶ Ibid., p. 17 (own translation).

²³⁷ Ibid. (own translation).

²³⁸ Ibid., p. 12.

²³⁹ EUCAP Sahel Niger Factsheet 2019 (n 219).

²⁴⁰ Annual Report Sahel Regional Action Plan 2017/2018, SWD(2019) 9 final, 24.1.2019, pp. 1, 17, and addendum II.

²⁴¹ Loi No 2015-36 du 26 mai 2015 relative au trafic illicite de migrants

<https://www.unodc.org/res/cld/document/ner/2015/loi_relative_au_trafic_illicite_de_migrants_html/Loi_N2015-36_relative_au_trafic_illicite_de_migrants.pdf>.

²⁴² Protocol relating to Free Movement of Persons, Residence and Establishment, ECOWAS/979, A/P.1/5/79

<<https://documentation.ecowas.int/legal-documents/protocols/>>.

²⁴³ 'The dangerous link between migration, development and security for the externalisation of borders in Africa. Case studies on Sudan, Niger and Tunisia', ARCI (July 2018), pp. 12-15 <<https://www.statewatch.org/news/2018/jul/report-frontiere-2018-english.pdf>>.

²⁴⁴ 'EU Strategy Stems Migrant Flow from Niger, But at What Cost?', *IRIN News*, 2.2.2017

<<https://www.irinnews.org/node/259270>>. See also 'Why More Migrants Are Dying in the Sahara', *New York Times*, 22.8.2017

<<https://nyti.ms/2vVm6Lv>>.

previously helped development, by generating opportunities to service ‘visitors’²⁴⁵. The 2015 law has meant that over 10 000 operators have become unemployed and at risk of joining smuggling networks. Experts deplore that now ‘migrant management is chiefly security-based and repressive’ (Danda, 2017, p. 48). The overall perception is that EU strategy consists in shifting responsibility to Niger for migration control through the transfer of funds and capacity building, rather than fostering peace and sustainable development (Danda, 2017, p. 54).

Regarding refugees, although the 2017 Paris Declaration refers to the fight against smuggling as having to ‘go hand in hand’ with the opening of legal pathways to asylum (para. 2.2(3)), the ETM scheme’s implementation has been unsatisfactory. The main problem has been the slow ‘turnover’ of refugees, due to the low number of resettlement offers by the MSs. Without rapid acceptance of potential beneficiaries, new arrivals to the ETM are put on hold, so as to not exceed capacity, which blocks access to safety²⁴⁶. In March 2018, the Nigerien government suspended the scheme precisely ‘because of the slow pace of onward resettlements out of Niger’²⁴⁷ until the backlog is dealt with²⁴⁸. This slowness, combined with the programme’s limited scale compared to the level of need, has made the scheme incapable of sparing refugees the dangers to which they are exposed in Libya, as exemplified by the Tajoura detention centre’s bombing in July 2019, without detainees having been evacuated²⁴⁹. The situation had been denounced by UNHCR several months prior to the attack²⁵⁰, in response to which it has urged the EU to change its approach, making human rights, rather than the containment of irregular migration, the ‘core element’ of its engagement²⁵¹.

4.3 Charter Applicability and Fundamental Rights Responsibility of the EU / MSs

Making human rights the ‘core element’ of the EU’s engagement is in fact required by EU law. Apart from the obligations on Frontex, as per the EBCG Regulation, and the duty to spend EUTF funding in line with EDF rules (section 4.2.3 above), EUCAP Sahel Niger is also subject to compliance with fundamental rights. Not only is the EU’s extra-territorial conduct pursued through the mission relevant under Article 51 CFR (including actions by the JIT along those implementing the Paris Declaration and the Niamey Action Plan) but also the surrounding security decisions impacting TCNs in Niger. The recast EUCAP Sahel Niger Decision clearly stipulates that, in the fulfilment of its mandate, the mission, including all its components and different functions, ‘shall [...] aim at contributing to the development of a [...] human-rights-based approach among the various Nigerien security actors in the fight against terrorism and organised crime’ (Article 2).

Even if there were no explicit provision for an obligation to respect human rights in its constitutive instrument, the mission and all MSs contributing to it remain subject to ‘uphold and promote [...] human rights’ under primary law (Article 3(5) TEU). The obligation is composite. It is insufficient to engage in a best

²⁴⁵ Hall, ‘Selling Sand in the desert: The Economic impact of Migration in Agadez’, IOM Niger (January 2017)

<<https://reliefweb.int/sites/reliefweb.int/files/resources/IOM-The-economic-impact-of-migration-in-Agadez.pdf>>.

²⁴⁶ For a detailed analysis, see ASGI, ‘The “Emergency Transit Mechanism” program and the resettlement from the Niger. Legal analysis, current and future concerns’ (November 2018)

<<https://www.statewatch.org/news/2019/jul/ASGI%20Resettlement%20ETM%20-%20ENGLISH.pdf>>.

²⁴⁷ Annual Report Sahel Regional Action Plan 2017/2018, SWD(2019) 9 final, 24.1.2019, p. 12.

²⁴⁸ Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 16.10.2019, pp. 9-10.

²⁴⁹ ‘Libya: Air raid kills dozens at Tripoli migrant detention centre’, *Al Jazeera*, 3.7.2019

<www.aljazeera.com/news/2019/07/deadly-strike-hits-tripoli-migrant-detention-centre-official-190703001156711.html>.

²⁵⁰ UNHCR, ‘Amid hostilities in Libya, 146 refugees evacuated to Italy’, 29.4.2019

<www.unhcr.org/news/press/2019/4/5cc701e04/amid-hostilities-libya-146-refugees-evacuated-italy.html>.

²⁵¹ UNHCR, ‘UNHCR and IOM joint statement: International approach to refugees and migrants in Libya must change’, Press Release, 11.7.2019 <www.unhcr.org/uk/news/press/2019/7/5d2765d04/unhcr-iom-joint-statement-international-approach-refugees-migrants-libya.html>; UNHCR, ‘UNHCR, IOM condemn attack on Tajoura, call for an immediate investigation of those responsible’, Press Release, 3.7.2019

<www.unhcr.org/5d1c836c4?utm_source=&utm_medium=email&utm_content=here&utm_campaign=>.

endeavours effort to simply 'promote' human rights. The EU and its MSs must at all times 'uphold' them in 'their relations with the wider world' (Article 3(5) TEU). When pursuing external policies and actions, the Union as a whole 'shall' (in imperative terms) 'consolidate [...] human rights' through demonstrable means (Article 21(2)(b) TEU) and 'foster the sustainable [...] development of developing countries, with the primary aim of eradicating poverty', rather than containing irregular migration (Article 21(2)(d) TEU).

The foreseeable extra-territorial impact of decisions within the CFSP must also abide by that duty (Bartels, 2014). As an EU institution (Article 13(1) TEU), the European Council remains subject to the Charter (Article 51 CFR), when defining the strategic interests and objectives of the Union, including those within the CFSP (Article 22(1) and 23 TEU). In regard to MSs, concerning actions under the JIT protocol, the Paris Declaration or the Niamey Action Plan, the Treaty requires that, when '[...] *undertaking any action* on the international scene or *entering into any commitment* which could affect the Union's interests [...] MSs *shall* ensure [...] that the Union is able to assert its interests *and values* on the international scene', which includes human rights (Article 32 TEU, emphasis added). All actions and commitments must 'contribute to [...] the protection of human rights' (Article 3(5) TEU). There must be a readily perceptible and measurable link between the actions and commitments undertaken and an improvement in the human rights situation of the country or region concerned. Faced with evidence to the contrary, such actions and commitments must be suspended or permanently cancelled, if proven irreconcilable with the dual obligation to 'uphold and promote' human rights (Article 3(5) TEU). The Commission's assertion in its Progress Report on the Sahel Regional Action Plan that '[t]he situation in the five Sahel countries remains fragile, *if not worsening*' (p. 1, emphasis added)²⁵², should lead to a thorough evaluation of the relevant measures and the underpinning strategy. Incompatibility with fundamental rights, including TCN rights, should prompt an immediate change of approach.

²⁵² Annual Report Sahel Regional Action Plan 2017/2018, SWD(2019) 9 final, 24.1.2019.

Annex II: Human Rights Compliance Mechanisms under the GAMM, the Agenda on Migration and the MPF

	Pre-launch TCN rights assessment	EP Input	Civil Society Consultation	Publication	Public Access	TCN rights clause	TCN rights safeguards	Implementation guidelines	Implementation follow up	Periodic reporting	Independent monitoring	Evaluation	Remedy	Judicial oversight
MPs	N	N	N	N	Y	Preamble	N	N	Y (but not on TCN rights)	Scoreboards (not on TCN rights)	N	Y (COM)	N	N
Readmission Clauses	N	Y	N	Y	Y	N (but general HR clauses)	N	Return Handbook (referral to Return Directive)	Y (but not on TCN rights)	Y (but not on TCN rights)	N	Y (COM)	Return Directive	Y
EURAs	N	Y	N	Y	Y	General saving clause	N	Implementing protocols & Return Handbook	Joint Return Committees (no focus on TCN rights)	Joint Return Committees (no focus on TCN rights)	Y (forced return monitoring, but not post return)	Y (COM)	Return Directive	Y
Informal Return Arrangements	N	N	N	N	N	Variation	N	Unknown	Variation (WG in SOPs)	N	N	N	N	N
Frontex WAs	N	N	N	N	Y	Y	N	N	Y (Contact Points)	EBCG Regulation	N	EBCG Regulation	N	N
Post-2019 WAs	Y	info	N	N	Y	Y	Y	Model WA	Y (Contact Points)	EBCG Regulation	N	EBCG Regulation	N	N
Triton/Themis JO	Unknown	N	N	N	N (secret OP)	Unknown	Unknown	Unknown	Unknown	EBCG Regulation	N	EBCG Regulation	N	N
Sophia/Irini JO	Unknown	N	N	Y	N (secret OP)	Y	N	Unknown	Unknown	Y (Council Decisions)	N	N	N	N

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