



ASILE

Global Asylum
Governance and
the European
Union's Role

EU Third Country Arrangements:

Human Rights
Compatibility & Attribution
of Responsibility

March 2023

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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement n° 870787. This document reflects only the author's view and the Commission is not responsible for any use that may be made of the information it contains.



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LIST OF ABBREVIATIONS

ARIO	Articles on the Responsibility of International Organisations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CJEU	Court of Justice of the European Union
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ETM	Emergency Transit Mechanism
EU	European Union
EU CEAS	EU Common European Asylum System
EUAPD	EU Asylum Procedures Directive
EUQD	EU Qualification Directive
EURCD	EU Reception Conditions Directive
EUCFR	Charter of Fundamental Rights of the European Union
EUTF	Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa
EUFRA	EU Fundamental Rights Agency
FLO	Frontex Liaison Officers
FRIT	Facility for Refugees in Turkey



GCR	Global Compact on Refugees
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
IO	International Organisation
IOM	International Organization for Migration
IPA	Instrument for Pre-accession Assistance
Madad Fund	EU Regional Trust Fund in Response to the Syrian Crisis
MoU	Memorandum of Understanding
PIL	Public International Law
Refugee Convention	1951 Convention and 1967 Protocol Relating to the Status of Refugees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of the Treaties
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees



EXECUTIVE SUMMARY

The paper identifies specific forms of EU cooperation with selected third countries that give rise to questions of compatibility with binding norms of international, European and EU law. The paper further applies principles of responsibility attribution under international and European human rights law to often complex multi-actor migration management contexts.

In particular, we identify four types of EU arrangements with third countries that raise particular rights compatibility or responsibility attribution questions. Our examination of these different forms of cooperation is based on recent ASILE Country Reports on asylum governance in Turkey, Serbia, Tunisia and Niger.

The four forms of EU cooperation raising particular compatibility or attribution concerns are:

- The use of safe third country concepts, including the EU-Turkey Statement;
- Return and readmission agreements, in particular the readmission of third country nationals from Italy to Tunisia;
- Funding, equipment and training of border control and migration management in third states; and
- The deployment of Frontex officers in third states, most notably joint operations undertaken by Frontex in Serbia.

These examples are not meant to provide an exhaustive account of legal issues in EU third country arrangements. Rather, these examples are chosen to highlight particular cases of EU arrangements raising complex rights compatibility issues or responsibility attribution concerns.

With respect to **the EU's use of safe third country concepts**, we find that while the lawful use of the safe third country concept as a procedural device is generally accepted in both international and EU asylum law, the implementation of such concepts may lead to breaches of human rights and EU law in individual cases. Both the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) have distilled a number of principles governing the application of safe third country concepts in their respective caselaw.

In relation to the safe third country component of the EU-Turkey Statement, no complaints are known to have been brought before the ECtHR and no Greek court or tribunal has referred any question on the interpretation of EU asylum standards with a view to considering Turkey as a 'safe third country' before the CJEU.



While there have been attempts to hold the European Council as an EU institution responsible for alleged incompatibility with EU law of the EU-Turkey statement's stipulation of return of asylum seekers to Turkey, the CJEU did not consider the statement as an act of the European Council or of any other institution, body, office or agency of the EU. Nevertheless, the implementation of specific measures under the Statement – including resettlement, visa liberalisation and funding under the EU Facility for Refugees in Turkey – may be attributed to the EU under relevant general international law rules, as they are clearly implemented by EU institutions.

EU and individual Member States' **return and readmission agreements** may raise compatibility concerns with respect to the right to access an asylum procedure, the right to leave, the principle of *non-refoulement* and the prohibition against collective expulsion. In particular, practices such as so-called 'hot returns', involving expulsion immediately after arrival to the EU, as well as interceptions on the high seas or 'pull backs' by cooperating countries before the arrival to the EU raise serious compatibility concerns.

In particular, Italy's confidential readmission agreement for the return of Tunisian nationals without access to an asylum procedure has raised such rights concerns. While the ECtHR has found that readmission from Italy to Tunisia did not violate the prohibition against collective expulsion in one concrete case, civil society organisations continue to report that the practice is incompatible with the rights set out above.

We find that a lack of transparency in European return and readmission agreements makes attribution of responsibility in concrete cases extremely difficult and such agreements should be thus open to public scrutiny. Moreover, vague human rights clauses in such agreements cannot shield the EU and Member States from their international obligations in the case of breach.

The EU's **funding, equipment and training of border control and migration management in third states** raise complex questions of indirect responsibility under general international law rules. This form of arrangements is widespread, with arrangements in all four countries including funding, equipment and training of the third states' migration control apparatus.

Previous ASILE research has identified cooperation which raises particular rights compatibility concerns, including:

- European funding and capacity-building of the Tunisian Coast Guard, which in turn carries out interception at sea;



- EU funding of Serbian border control, which includes systematic pushbacks of protection seekers; and
- in the case of Niger's Emergency Transit Mechanism (ETM), European support to the Libyan Coast Guard.

The rules on international responsibility include *indirect* responsibility for breaches of international law when one state or international organisation (in this case the EU) provides 'aid or assistance' to the primary state that in fact carries out the wrongful act. Responsibility here is indirect as it does not require attribution of the primary wrongful act on the part of the 'assisting' state.

Funding, equipment and training in this context may lead to indirect responsibility on the part of the EU or a Member State where European aid and assistance contributes significantly to the wrongful act, with the requisite level of knowledge or intent and where the wrongful act would have breached the EU or Member State's own international obligations.

Finally, with respect to the **deployment of Frontex officers in third states**, we find that as a general rule Frontex remains bound by its EU Charter obligations when operating in third states. We specifically address the 2019 EU-Serbia Status Agreement, which empowers Frontex officers to carry out joint operations on Serbian territory with their Serbian counterparts. Under the Agreement, Frontex officers are afforded criminal, civil and administrative immunity from Serbian jurisdiction.

While the ECHR does not govern Frontex operations in Serbia – as the EU is not a party to the Convention – the EU Charter applies to EU 'institutions, bodies, offices and agencies' and its application is not bound to the geographic area of the EU, but rather extends to wherever the activities of EU agencies take place. As a result, EU Charter obligations follow Frontex activities in third countries, allowing for the attribution of responsibility to the EU for the conduct of Frontex officers in cases of breaches of fundamental rights in Serbia.

Structure

- The paper first identifies specific forms of EU cooperation that give rise to questions of compatibility with binding international, European and EU law obligations (Chapter 2).
- Second, the paper sets out the core principles of attribution of responsibility under general international law for both the EU and its Member States (Chapter 3).



- Third, the paper outlines principles of responsibility attribution under relevant international and European human rights law instruments, with a focus on the extraterritorial application of key treaties (Chapter 4).
- Finally, the paper applies these principles to the specific forms of EU cooperation, suggesting situations where the conduct of the EU or its Member States may lead to attribution for breaches of fundamental rights (Chapter 5).



1 Introduction

This working paper analyses specific forms of EU cooperation with selected third countries that give rise to questions of compatibility with binding norms of international, European and EU law. The paper also applies principles of the law of state responsibility under general international law and European human rights law to these forms of EU cooperation with selected third countries. This analysis assesses in which circumstances responsibility for breaches of European and EU law can be attributed to the EU and/or its Member States in the course of such cooperation.

Our focus here is on issues of *compatibility* with obligations related to human rights and refugee law at the level of international, European and EU law raised by EU cooperation with selected third countries. The working paper is equally focused on questions of *attribution* of responsibility for breach of obligations in the course of this cooperation. Attribution here refers to the mechanism used to assess whether and which acts or omissions are considered the conduct of a state or international organisation at the level of international law.¹

Attribution of responsibility is distinct from questions of accountability, which relates to adjudication or enforcement of breaches of legal norms, either in judicial, administrative or political forms. The paper does not include findings on accountability, although the importance of research on accountability should be emphasized, as without accountability the enforcement of the norms presented here will be impossible.

Dual complexities cloud the question of attribution for breaches of international or European law to the EU or its Member States in this context. Firstly, in many cases, breaches of the rights of asylum seekers and refugees take place outside EU territory, for example on the high seas or the territory of the third state. Secondly, complex constellations of actors involved in EU containment approaches blur questions of attribution for conduct resulting in rights violations. As a result of these complexities, in most cases the EU or its Member States will share responsibility with other actors, most notably the third state.

¹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' *Yearbook of the International Law Commission* 2001, vol II (ARSIWA), art 2; James D Fry, 'Attribution of responsibility' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014) 101.



Shared responsibility under international law has been described as ‘indistinct’² and ‘undeveloped’³. Recent scholarly work and jurisprudence, has begun the work of filling in the gaps, exploring the growing number of situations involving multiple actors contributing to breaches of international obligations, including in the context of human rights law.⁴ According to *Nollkaemper and Jacobs*, shared responsibility comprises four elements: the presence of multiple actors, their contribution to a single harmful outcome, a lack of responsibility based on causation, and responsibility allocated separately rather than collectively.⁵ The fundamental point here is that allocation of responsibility to one entity *does not exclude* the responsibility of other, contributing entities.⁶

Rather than putting forward a decisive definition, we consider shared responsibility as an umbrella term describing situations where two or more entities – namely states or international organisations – may be held responsible for internationally wrongful acts in the course of cooperation. Thus, shared responsibility includes both forms of direct responsibility, often termed ‘joint’ or ‘concurrent’ responsibility, as well as situations of indirect responsibility, such as where one entity provides aid or assistance to a primary actor.

The paper adopts a doctrinal approach, with a focus on binding sources of international and European law. Non-binding instruments and sources are used where they aid interpretation or the application of binding legal standards, including the work of the International Law Commission (ILC) on the international responsibility of states and international organisations. This doctrinal approach serves to provide a comprehensive overview of the state of international law with

² Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 457.

³ In 1988, Noyes and Smith found: ‘The scholarly literature is surprisingly devoid of reference to the circumstances or consequences of multiple state responsibility. Judicial or arbitral decisions addressing a state’s assertions that other states share responsibility are essentially unknown.’ John E Noyes and Brian D Smith, ‘State responsibility and the principle of joint and several liability’ (1988) 13 *Yale Journal of International Law* 225.

⁴ See André Nollkaemper, ‘Introduction’ in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014); André Nollkaemper, ‘Shared responsibility for human rights violations: A relational account’ in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Taylor & Francis 2016) 35.

⁵ André Nollkaemper and Dov Jacobs, ‘Shared responsibility in international law: a conceptual framework’ *Michigan Journal of International Law* (2013) 359, 366-8.

⁶ André Nollkaemper, ‘Shared responsibility for human rights violations: A relational account’ in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Taylor & Francis 2016) 35.



respect to complex questions of attribution for extraterritorial conduct, while also acknowledging the limits of current legal standards and the potential for normative developments in this area.

This paper also builds on existing ASILE work, including previous work on a typology of categories of cooperation with third countries, encompassing:

- Funding, equipment and training of border control and migration management
- Funding of refugee protection
- Supporting national asylum systems
- Supporting anti-smuggling legislation and policy
- Deployment of Frontex Liaison Officers
- The use of 'safe third country' concepts
- Evacuation mechanisms
- Resettlement and complementary pathways.⁷

Furthermore, findings from the recently published *ASILE Country Reports*, based on empirical research in Serbia, Tunisia, Turkey and Niger, have informed the choice of third country arrangements in Chapter 5. These four country reports investigate arrangements between the EU and third countries that provide modalities and facilities for protection, but also prevent onwards movement towards EU borders, hence constituting elements of containment.⁸

Drawing on these previous publications, the present paper considers attribution of responsibility on the part of EU actors with respect to the use of 'safe third country' concepts; the cooperation on return and readmission; the funding,

⁷ Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries - Instruments and Actors* (ASILE, January 2021).

⁸ See Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country Report Serbia* (ASILE, August 2022); Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022); Gamze Ovacık, Meltem Ineli-Ciger, Orçun Ulusoy and Thomas Spijkerboer, *Country Report Turkey* (ASILE, August 2022); Bachirou Ayouba Tinni, Abdoulaye Hamadou and Thomas Spijkerboer, *Country Report Niger* (ASILE, August 2022).



equipment and training of border control and migration management; and the deployment of Frontex officers in third states.

2 Four Forms of EU Cooperation Raising Compatibility and Attribution Questions

As explored extensively in previous ASILE research, EU cooperation with Turkey, Serbia, Tunisia and Niger raises a range of questions as to compatibility with the rights of asylum seekers and refugees and the extent to which responsibility for any breaches of these rights is attributable to the EU or its Member States.⁹

First, the **EU's use of safe third country concepts** remain a key rights compatibility issue and, in some cases, can raise questions of attribution. The question remains whether the returns of Syrian asylum seekers from the Greek islands under the EU-Turkey Statement are compatible with the right to seek asylum and the principle of *non-refoulement* as well as other refugee protection obligations. In particular, the question of whether Turkey may be considered a safe third country as a matter of international and European law is at issue. With respect to attribution, this question is particularly pressing given the conclusion of the Court of Justice of the European Union (CJEU) that the Statement cannot be regarded as a measure adopted by the European Council, but rather that the Statement was an act of the 28 Member States acting outside the EU framework.¹⁰

Second, the **implementation of return and readmission agreements** raise compatibility and responsibility issues. In particular, Italy's readmission of Tunisians without affording access to an asylum procedure has raised concerns related to the right to leave, prohibition of collective expulsion and non-

⁹ See Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries - Instruments and Actors* (ASILE, January 2021); Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country Report Serbia* (ASILE, August 2022); Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022); Gamze Ovacik, Meltem Ineli-Ciger, Orçun Ulusoy and Thomas Spijkerboer, *Country Report Turkey* (ASILE, August 2022); Bachirou Ayoub Tinni, Abdoulaye Hamadou and Thomas Spijkerboer, *Country Report Niger* (ASILE, August 2022).

¹⁰ CJEU Cases T-192/16, T-193/16 and T-257/16 *NF v European Council, NG v European Council and NM v European Council*, orders of the General Court of 28 February 2017; cf. Joined Cases C-208/17 P, C-209/17 P and C-210/17 P *NF and Others v European Council*, order of the Court of 12 September 2018. For a discussion of *these rulings*, see Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries - Instruments and Actors* (ASILE, January 2021) 17-25; Gamze Ovacik, Meltem Ineli-Ciger, Orçun Ulusoy and Thomas Spijkerboer, *Country Report Turkey* (ASILE, August 2022) 37-9.



refoulement.¹¹ While the ECtHR has found this readmission practice not to breach Article 4 Protocol 4 ECHR in *Khlaifia and others vs Italy*,¹² civil society organisations report the practice as implemented violates the prohibition of collective expulsion.¹³

Third, **EU funding, equipment and training of border control and migration management** in third states raises both compatibility and attribution issues. For example, both European funding and capacity-building of the Tunisian Coast Guard has resulted in an increase in the Coast Guard's capacity to conduct intercept sea vessels and return them to Tunisia.¹⁴ Such pullbacks may be in breach of the right to leave and the international maritime law requirement that people rescued at sea are brought to a place of safety.¹⁵ A further example is the EU's funding of Serbia's border control apparatus, under the auspices of Instrument for Pre-accession Assistance (IPA) and the Madad Fund . ASILE research has uncovered systematic pushbacks carried out by national officers at Serbia's southern border, in breach of the right to seek asylum, the principle of non-refoulement and the prohibition against collective expulsion. Finally, refugees evacuated to Niger under the EU-funded Emergency Transit Mechanism (ETM) are the same individuals subject to pullbacks by the Libyan Coast Guard, which itself receives extensive funding, equipment and training from both the EU and individual Member States.¹⁶ Such EU support raises complex questions of indirect responsibility under general international law, explored in this paper.

Finally, the **deployment of Frontex officers in third states** may raise attribution questions. While Frontex liaison officers are present in all four states, a 2019

¹¹ Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 57-8.

¹² *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 15 December 2016).

¹³ Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022).

¹⁴ Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022).

¹⁵ For a full account of relevant rights in this context, see Nikolas Feith Tan and Jens Vedsted-Hansen, *Catalogue of International and Regional Legal Standards: Refugee and Human Rights Law Standards Applicable to Asylum Governance* (ASILE, October 2021).

¹⁶ On European support for the Libyan Coast Guard, see Memorandum of Understanding (Libya-Italy) http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf accessed 21 March 2023; European Commission, 'EU delivers support to border management in Libya' https://neighbourhood-enlargement.ec.europa.eu/news/eu-delivers-support-border-management-libya-2020-07-16_en accessed 21 March 2023. On the Emergency Transit Mechanism, see UNHCR Factsheet 'Emergency Transit Mechanism' May 2021 <https://reporting.unhcr.org/document/266> accessed 21 March 2023; Laura Lambert, 'Extraterritorial asylum processing: the Libya-Niger emergency transit mechanism.' *Forced Migration Review* 68 (2021) 18-21.



Frontex status agreement with Serbia allows for officers from the EU agency to carry out joint operations on Serbian territory. The Agreement affords Frontex officers criminal, civil and administrative immunity from Serbian jurisdiction. As a result, in the event of rights violations by Frontex officers, accountability relies upon on the agency's internal complaints mechanism.¹⁷ This arrangement raises the question of the EU agency's direct or indirect responsibility for any breaches of fundamental rights in the course of its Serbia operations.

3 Attribution of responsibility under general international law

This section provides an overview of the law of international responsibility as it relates to both states and international organisations under both general international law and European law. The law of international responsibility provides a framework of rules governing responsibility for breaches of primary rules of international law, such as international human rights or refugee law.¹⁸

The law of international responsibility is not concerned with the content of primary rules, nor whether a violation has occurred, but rather the question of which entity or entities bear responsibility for breach.¹⁹ Central to a finding of international responsibility is the question of attribution, the key mechanism to assess whether a particular act or omission can be ascribed to a state or international organisation as a matter of international law.

This section deals with the two leading instruments on international responsibility at the level of general international law: the *Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)*²⁰ and *Articles on the Responsibility of International Organisations (ARIO)*.²¹

¹⁷ See further Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country Report Serbia* (ASILE, August 2022) 5 and Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries - Instruments and Actors* (ASILE, January 2021) 34.

¹⁸ James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 64.

¹⁹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' *Yearbook of the International Law Commission* 2001, vol II, Part Two, 31.

²⁰ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' *Yearbook of the International Law Commission* 2001, vol II (ARSIWA).

²¹ International Law Commission, 'Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts' *Yearbook of the International Law Commission* 2011, vol II (ARIO).



3.1 Articles on State Responsibility

The ARSIWA were adopted by the International Law Commission (ILC) in 2001. Although the ARSIWA are not formally binding, broad state practice accompanied by *opinio iuris* suggest that at least parts of it have become customary international law.²²

The ARSIWA requires two elements to arrive at **direct state responsibility**: According to Article 2, an internationally wrongful act occurs when the action or omission is, first, attributable to the state under international law and, second, constitutes a breach of an international obligation of the state. There is no distinction between territorial and extraterritorial acts or omissions.²³

The element of attribution is *inter alia* fulfilled, if it occurs through either conduct of *de jure* or *de facto* state organs (Art 4), of organs placed at the disposal of the state by another state (Art 6), of other persons or entities exercising elements of governmental authority (Art 5) and acting in this capacity even if they exceed the given authority (Art 7), or any other persons acting on the instructions, direction or control of the state (Art 8). Non-attributable conduct will still be considered an act of the respective state, if the state acknowledges and adopts the act as its own (Art 11).

The second element, a breach of international obligations, occurs when the act is not in conformity with any sort of international obligation – arising from treaty, custom or general principles of international law – existing at the time of the act (Art 13).²⁴ Article 1 ARSIWA includes breaches of international obligations resulting from treaty and non-treaty obligations, such as customary law, including

²² Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 107; Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 277 f. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* [2007] ICJ Rep 43, para 420.

²³ Maarten Den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 59 f.

²⁴ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries' *Yearbook of the International Law Commission* 2001, vol II, Part Two, 35 para 7; *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, para 56.



obligations towards individuals under, for example, international human rights law.²⁵

In the context of EU third country arrangements, the acts of immigration or border authorities will be attributable to the state, even when acting extraterritorially.²⁶ Who is a state organ under Article 4 not only depends on the definition in national or international law (*de jure* organ), but also whether persons or entities constitute *de facto* state organs. The latter is the case, if these persons or entities are completely dependent on the state.²⁷ At present, there is no jurisprudence finding attribution based on the conduct of *de facto* state organs in the context of migration control. However, this provision may indeed become relevant in connection with private companies or other non-state actors providing services in this area.²⁸ In addition, such private actors may fall under Article 5, if (*de jure*) authorised to fulfil public functions, such as private security firms.²⁹ Their conduct may further be attributable to a state under Article 8, if acting under the instruction, direction or control of the state.³⁰

Article 6, regulating situations where one state places its organs at the disposal of another state, has received a narrow definition in the relevant case law. The respective organ must be at the exclusive authority of the other state.³¹ For

²⁵ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries' *Yearbook of the International Law Commission* 2001, vol II, Part Two, 32 para 5.

²⁶ Anuscheh Farahat and Nora Markard, *Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility* (Heinrich Böll Stiftung 2020) 44 ff; Nikolas Feith Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University 2019) 164.

²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Judgment [1986] ICJ Rep 14, para 109; see further *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* [2007] ICJ Rep 43, para 392.

²⁸ Nikolas Feith Tan, 'International Cooperation on Refugees: Between Protection and Deterrence' (PhD thesis, Aarhus University 2019) 166.

²⁹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries' *Yearbook of the International Law Commission* 2001, vol II, Part Two, 43, para 2.

³⁰ Maarten Den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 69. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Judgment [1986] ICJ Rep 14, para 109; *Prosecutor v Dusko Tadić* (Judgment, Appeals Chamber) ICTY 94-1-A (15 July 1999) para 122; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* [2007] ICJ Rep 43, para 393 f.

³¹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries' *Yearbook of the International Law Commission* 2001, vol II, Part Two, 44 para 3.



instance in the ECtHR case of *Xhavara and Others*, Italy was policing the Albanian border at sea based on a bilateral treaty. However, the Italian navy officers were not under the exclusive authority of Albania and, thus, the conduct was found to be not attributable to Albania.³²

From these rules on attribution, responsibility of two or more states may arise where they breach an international obligation and exercise jurisdiction simultaneously or in concert (concurrent or joint responsibility). Joint responsibility, where one act is attributable to several states and for each of them constitutes a breach of their international obligations, is regulated in Article 47 ARSIWA, which recognises the responsibility of plural states in such a case.³³

Chapter IV of the ARSIWA includes rules on state responsibility in connections with the acts of another state, i.e. derived or **indirect responsibility**. These rules are highly relevant for third country agreements. Responsibility here is indirect, in the sense it does not require attribution of the primary wrongful act on the part of the 'assisting' state.³⁴ Moreover, indirect responsibility does not necessarily require jurisdiction over the victims of the wrongful act, thus opening up a finding of responsibility without the essential human rights law precondition for direct responsibility.³⁵

Article 16 provides that a state is internationally responsible for its *aid or assistance* in the wrongful act of another state, if it does so *with knowledge* of the circumstances and the act would be internationally *wrongful if committed by that state*. In the *Bosnian Genocide* case, the ICJ further noted that this provision constituted customary international law³⁶ and also the Venice Commission found

³² *Xhavara and Others v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2001); see, however, *X. and Y. v Switzerland* App nos 7289/75 and 7349/76 (European Commission of Human Rights, 14 July 1977); *Droz and Janousek v France and Spain* App no 12747/87 (ECtHR, 26 June 1992).

³³ See International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' *Yearbook of the International Law Commission* 2001, vol II, Part Two, 124 para 3; *Oil Platforms (Islamic Republic of Iran v United States of America)* Merits [2003] ICJ Rep 4; *Saddam Hussein v Albania and twenty other states* App no 23276/04 (Admissibility decision) (ECtHR, 19 March 2006); *Ilse Hess v the United Kingdom* App no 6231/73 (Admissibility decision) (ECtHR, 28 May 1975).

³⁴ Mariagiulia Giuffr , 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-Backs to Libya?' (2012) 24 *International Journal of Refugee Law* 692, 725.

³⁵ Compare Section 4.2 on the issue of jurisdiction under the ECHR and Chapter 5.3 for examples of indirect responsibility.

³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* [2007] ICJ Rep 43, para 420.



Article 16 applicable to European states in the context of ECHR breaches.³⁷ According to Article 17, a State is further responsible if it *directs or controls* the wrongful acts of another state under the same two prerequisites.³⁸

In order to constitute 'aid or assistance' the conduct must not be essential for the wrongful act of the primary responsible state. However, it must contribute significantly to the act. Regarding the element of 'knowledge' different interpretations exist, from knowledge of the circumstances of the wrongful act to wrongful intent.³⁹ For the third element of 'wrongfulness', it is sufficient that both states are in breach of international obligations, even if they may arise from different sources.⁴⁰

3.2 Articles on Responsibility of International Organisations

Whereas the ARSIWA are primarily relevant regarding the responsibility of EU Member States, the EU itself is an international organisation (IO).⁴¹ Hence, the ARIO are relevant for assessing international responsibility for wrongful acts of the EU itself. Article 1(2) furthermore holds that the ARIO apply to the international responsibility of a state in connection with the conduct of an IO.

Similar to the ARSIWA, the ARIO foresee responsibility when an internationally wrongful act is attributable to the IO and constitutes a breach of its international obligations (Art 4).⁴²

³⁷ European Commission for Democracy Through the Law (Venice Commission), *On the International Legal Obligations of Council of Europe Members States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no 363/2005, CDL-AD(2006)009, para 44 f.

³⁸ *Big Brother Watch and others v the United Kingdom* App nos 58170/13, 62322/14 and 24960/15 (ECtHR Grand Chamber, 25 May 2021) para 495.

³⁹ See further Section 5.3 below.

⁴⁰ Nikolas Feith Tan, 'International Cooperation on Refugees: Between Protection and Deterrence' (PhD thesis, Aarhus University 2019) 183 ff

⁴¹ Consolidated version of the Treaty on European Union [2016] OJ C 202/1 (TEU), art 47; see further Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016) 53. On the question of international legal personality of other entities of the EU, such as Frontex, see Niels Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law: International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law' (2016) 35 *Yearbook of European Law* 1, 471-483.

⁴² Compare Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, 381 ff on the differences between ARSIWA and ARIO regarding the principles of independent and exclusive responsibility.



Breach of international obligations

The breach of international obligations might be more difficult to establish with regards to IOs in comparison to states, since IOs are less often parties to human rights treaties.⁴³ However, customary international law can create further binding obligations for IOs that are relevant for the assessment of a possible breach.⁴⁴ Following this logic, as regards human rights obligations, the EU is only party to the *UN Convention on the Rights of Persons with Disabilities* (CRPD)⁴⁵ and thus would be bound by this treaty alone and potentially customary international law.

Yet, due to the EU's internal rules, human rights obligations stem from three formal sources binding the EU and Member States when acting within the scope of EU law: The EU recognizes the *Charter of Fundamental Rights of the EU* (EUCFR)⁴⁶ as primary law in Article 6(1) of the *Treaty on European Union* (TEU). Article 6(2) TEU also foresees the accession to the *European Convention on Human Rights* (ECHR)⁴⁷ in the future. Even before Article 6 TEU existed, the ECHR was seen as an inspiration for EU human rights principles by the CJEU.⁴⁸ Furthermore, the ECHR, just as national constitutional traditions and international treaties signed by the Member States, to varying degrees form general principles of EU law, cf. Article 6(3) TEU.⁴⁹

⁴³ See in detail Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 *European Journal of International Law* 1133.

⁴⁴ CJEU Case C-286/90 *Poulsen* para 9; Case C-27/11 *Vinkov* para 33; Case C-292/14 *Elliniko Dimosio v Stroumpoulis and others*; see Theodore Konstadinides, 'The Meso Level: Means of Interaction between EU and International Law: Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) 35 *Yearbook of European Law* 1, 513-532.

⁴⁵ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

⁴⁶ Charter of Fundamental Rights of the European Union [2016] OJ C 202/389 (EUCFR).

⁴⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005 (ECHR).

⁴⁸ Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases and Materials* (7th edition, Oxford University Press 2020) 414.

⁴⁹ *Ibid* 414 f; see further CJEU Case 29/69 *Stauder v City of Ulm*; Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* paras 3 f; Case 4/73 *Nold v Commission* para 13: 'As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. (...) Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.' Although international human rights are rarely relied upon by the CJEU, several cases exist in particular regarding migration and asylum, see i.a. CJEU Case C-540/03 *Parliament v Council*; Joined Cases C-175-179/08 *Aydin Salahadin Abdulla v Germany*; Joined Cases C-57 and 101/09 *Bundesrepublik Deutschland v B and D*.



The differentiation between the internal rules of an IO and international law is generally more difficult than those of a state and international law.⁵⁰ As the ARIO Commentary explains this stems

from the fact that the rules of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; other rules of the organization may be viewed as part of international law.⁵¹

Hence, the question remains whether obligations of EU law equal the *international* legal obligations referenced in the ARIO. European debates and the CJEU case law might cast doubt on the assumption that the breach of EU human rights also constitutes an international wrongful act, due to the insistence on the *sui generis* character of the EU as an IO as well as the autonomy and supremacy of EU law.⁵² Nevertheless, the CJEU has referred to international legal obligations in its case law on several occasions⁵³ and also its line of reasoning in the *Kadi* cases was serving the purpose of upholding the respective higher standard of protection. Hence, it cannot be derived from these cases that the Court would assume primacy of EU law over international law, where the latter gives a higher level of protection.⁵⁴ In addition, even other international agreements concluded by the Member States have been found binding upon the EU.⁵⁵

Systematically, the question must be answered by international law and Article 5 ARIO states: 'The characterization of an act of an international organization as internationally wrongful is governed by international law.' According to the *ICJ Advisory Opinion on the Agreement between the WHO and Egypt*, international organizations are 'bound by any obligations incumbent upon them under general

⁵⁰ Compare ARSIWA, art 3.

⁵¹ International Law Commission, 'Draft articles on the responsibility of international organizations, with commentaries' *Yearbook of the International Law Commission* 2011, vol II, Part Two, 54.

⁵² See CJEU Case 6/64 *Costa v E.N.E.L.* for the *sui generis* nature of the EU; *Opinion 2/13 pursuant to Article 218(11) TFEU* for reasons why the EU has not acceded to the ECHR yet; see further Joined Cases C-402 and 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)*; Case T-315/01 *Kadi v Council and Commission (Kadi II)*.

⁵³ See e.g., CJEU Case 4/73 *Nold v Commission* para 13; Case C-540/03 *Parliament v Council*; Cases C-175-179/08 *Aydin Salahadin Abdulla v Germany*; Cases C-57 and 101/09 *Bundesrepublik Deutschland v B and D*; see further Israel de Jesús Butler and Olivier De Schutter, 'Binding the EU to International Human Rights Law' (2008) 27 *Yearbook of European Law* 277-320, 281 ff.

⁵⁴ *Ibid.*

⁵⁵ CJEU Case 22-24/72 *International Fruit Company*; Case 38/75 *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen*.



rules of international law, under their constitutions or under international agreements to which they are parties.⁵⁶

Article 10 ARIO further elaborates:

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, *regardless of the origin or character of the obligation concerned.*
2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization *towards its members under the rules of the organization.*⁵⁷

The “rules of the organization” are further defined in Article 2 (b) ARIO as meaning ‘in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization’. Hence, the text of the ARIO seems to include the obligations created by the EU treaties.⁵⁸ And good reasons of coherence have been invoked by scholars to argue for binding the EU to international human rights law.⁵⁹

Yet, also amongst international law scholars, the views seem divided on whether really all internal rules of an IO form international obligations. Consequently, the ARIO Commentary does not give a definitive answer to the question.⁶⁰

Attribution of the wrongful act

Chapter II ARIO regulates the element of attribution. The conduct of organs or agents, as defined by Art 2(c) and (d), in the performance of their functions, as defined by the rules of the organization, are attributable (Art 6). Further, organs and agents of an IO or state placed at the disposal of another IO is attributable to the latter, if it exercises effective control over the conduct (Art 7). Also in cases,

⁵⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, para 37.

⁵⁷ Emphasis added.

⁵⁸ See i.a. TEU, arts 3 (5), 6, 21; see further Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1 (TFEU) art 205.

⁵⁹ Israel de Jesús Butler and Olivier De Schutter, ‘Binding the EU to International Human Rights Law’ (2008) 27 *Yearbook of European Law* 277.

⁶⁰ International Law Commission, ‘Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts, with commentaries’ *Yearbook of the International Law Commission* 2011, vol II, Part Two, 63 with further references; see in particular discussion in Christiane Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’ (2011) 8 *International Organizations Law Review* 2, 397-482.



where the conduct exceeds the authority of that organ or agent, it will be attributable to the IO, if done in an official capacity and within the overall functions of the IO (Art 8). Non-attributable conduct will be considered an act of the IO, if and to the extent the IO acknowledges and adopts the conduct as its own (Art 9).

For the EU these rules may be relevant, for instance, where Member States contribute agents or forces to EU agencies, such as Frontex or EASO. In third country arrangements, liaison officers can be posted in partner states for assistance. More likely than putting them at the disposal of another IO, which exercises effective control over their conduct, such agents' conduct may fall under Chapter IV which regulates complicity in the commission of internationally wrongful acts.

According to Article 14 ARIO, the requirements for attribution are – similar to Article 16 ARSIWA – an act that constitutes aid or assistance, knowledge of the circumstances and that the act would also be wrongful, if committed by the contributing IO. Under the same requirements, an IO which directs and controls a state's or other IO's conduct is responsible according to Article 15 ARIO.

Furthermore, Article 17 ARIO regulates the case of circumvention. It states that the IO's responsibility also arises when it adopts decisions binding or causally authorising its members to commit acts that are internationally wrongful, if committed by the IO itself. This rule applies even if the act is not breaching an obligation of the respective member (Art 17 (3)).

Whereas Article 48 ARIO regulates the case of joint responsibility – similar to Article 47 ARSIWA, Article 47 ARIO allows several states or IOs injured by the same wrongful act to separately invoke the responsibility of the IO.



4 Attribution of responsibility under international and European human rights law

This chapter moves from a discussion of attribution of responsibility at the level of general international law to principles of responsibility attribution under relevant international and European human rights law instruments. The primary purpose of this chapter is to explore the concept of jurisdiction, the threshold test for the application of a human rights law instrument to a state or international organisation. Where a state or international organisation holds jurisdiction, it will usually be directly responsible for any breaches of obligations owed to the relevant individuals at the relevant time.⁶¹

At the level of international human rights law, the chapter focuses on the application of the ICCPR and CAT, which both contain a set of rights relevant to asylum seekers and refugees. These two instruments are presently only binding on states, though international organisations may become parties to human rights treaties – the EU, for example, ratified the CRPD in 2010.

Two European human rights treaties are of primary importance in the assessment of third country arrangements of the EU and its Member States: the EUCFR and the ECHR. While the EU has not yet acceded to the ECHR,⁶² it is binding on all EU Member States individually. Furthermore, the EU explicitly recognises the ECHR's fundamental rights as general principles of EU law.⁶³ The EUCFR and the ECHR both include clauses which safeguard the respective higher applicable human rights standard.⁶⁴

In general, the specialised human rights instruments explored below are not well suited to findings of shared responsibility, with their respective regimes geared toward the attribution of responsibility to a single state. Under the ICCPR and CAT, for example, a finding of shared direct responsibility may rely on a finding that two or more states exercise jurisdiction over an area or individual, while individual communications are presently only accepted with respect to a single state. The ECtHR has, in rare cases, found situations of shared responsibility,⁶⁵ for example in the context of two member states exercising a high degree of influence over a separatist region⁶⁶ and in the context of Dublin cooperation.⁶⁷ However, the Strasbourg Court is of course limited to assessing the responsibility of Council of Europe member states. Finally, the ECtHR has a case pending against 33 member states with respect to the human rights risks posed by global warming which claims that the respondent states share responsibility for forest fires in Portugal.⁶⁸



4.1 ICCPR and CAT

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR)⁶⁹ requires that a state party respects and ensures the rights of ‘all individuals within its territory and subject to its jurisdiction’. A restrictive, literal reading of Article 2(1) limits obligations under the Covenant to individuals both present within a state’s territory *and* subject to its jurisdiction. However, the Human Rights Committee has interpreted Article 2 disjunctively rather than cumulatively, thus opening up the possibility of an individual being subject to jurisdiction outside of a state party’s territory.⁷⁰ This reading is supported by Article 1 of the First Optional Protocol to the ICCPR, which excludes the words ‘within its territory’, referring only to ‘individuals subject to its jurisdiction’. In its General Comment 27 of 1994, the Committee noted: ‘The entitlement, under Article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory *or* under the jurisdiction of the State’.⁷¹

⁶¹ Samantha Besson, ‘The extraterritoriality of the European Convention on Human Rights: Why human rights depend on jurisdiction and what jurisdiction amounts to’ (2012) *Leiden Journal of International Law* 25(4), 857, 867.

⁶² Compare TEU, art 6(2); CJEU *Opinion 2/13*. Although the accession failed due to the CJEU Opinion in 2014, there is still a legal obligation for the EU to accede to the ECHR and negotiations have been resumed in 2020. Council of Europe, ‘EU Accession to the ECHR’ (*CDDH - System of the European Convention on Human Rights*) <<https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights>> accessed 23 March 2023.

⁶³ TEU, art 6(3); see further elaborations on the EU’s human rights obligation in Chapter 3.2. ‘Breach of international obligations’ above.

⁶⁴ See EUCFR arts 52, 53 and ECHR art 53.

⁶⁵ Maarten den Heijer, ‘Issues of Shared Responsibility Before the European Court of Human Rights’ (SHARES Research Paper 06 2012).

⁶⁶ See, for example, *Ilaşcu and Others v Moldova and Russia* (GC) App no 48787/99 (ECtHR, 8 July 2004).

⁶⁷ *MSS v Belgium and Greece* [GC] App no 30696/09 (ECtHR, 21 January 2011).

⁶⁸ *Duarte Agostinho and Others v Portugal and Others* App no 39371/20 (ECtHR, communicated 7 September 2020).

⁶⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷⁰ Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004) para 10; Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 370; Hugh King, ‘The extraterritorial human rights obligations of states.’ *Human Rights Law Review* (2009) 9(4) 521-556.

⁷¹ Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities) CCPR/C/21/Rev.1/Add.5 (1994) para 4 (emphasis added).



In its 2004 General Comment 31 on the nature of legal obligations under the Covenant, the Human Rights Committee reaffirmed the extraterritorial scope of Article 2 in relatively expansive terms:

States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.⁷²

In *Lopez Burgos v Uruguay*, discussed above, the Human Rights Committee reiterated the extraterritorial application of the Covenant in the following terms:

Article 2(1) of the Covenant... does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.⁷³

In *Celiberti de Casariego v Uruguay*, which concerned the arrest of a Uruguayan citizen by Uruguayan agents in Brazil, the Committee stated that it would be 'unconscionable' to 'interpret the responsibility under Article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory'.⁷⁴

With respect to the right to life, specifically, the Human Rights Committee in its General Comments 36 has emphasised that a state party holds jurisdiction with respect to:

all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner...⁷⁵

In the recent individual communication of *A.S., D.I., O.I. and G.D. v Italy*, which concerned the deadly sinking of a boat carrying 400 people south of Lampedusa,

⁷² Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004) para 10.

⁷³ *Lopez Burgos v Uruguay* Communication No 52/1979 (HRC, 29 July 1981) para 12(3).

⁷⁴ *Lilian Celiberti de Casariego v Uruguay* Communication no 56/1979 (HRC, 29 July 1981) para 10.3.

⁷⁵ Human Rights Committee, General Comment No. 36: Article 6: right to life CCPR/C/GC/36 (2019) para 63.



the Human Rights Committee applied this direct and foreseeable standard. The Committee found that distress signals, rescue coordination and the proximity of an Italian vessel to the boat in distress created 'a special relationship of dependency' between the people onboard and Italy. The Committee found that the individuals' right to life was 'directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable' such that Italy's jurisdiction under the ICCPR was triggered.⁷⁶

The Human Rights Committee has further confirmed that its approach to jurisdiction applies to all individuals, including asylum seekers and refugees in the territory or subject to the jurisdiction of a state party.⁷⁷ It then follows that if a person is subject to a state party's *authority or control* when acting extraterritorially, the state will owe obligations to that individual under the ICCPR.⁷⁸

Article 2(1) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁷⁹ obliges state parties to prevent acts of torture 'in any territory under its jurisdiction'. In its General Comment on Article 2 of 2008, the Committee Against Torture stated that the Convention requires:

that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also 'in any territory under its jurisdiction.' The Committee has recognised that 'any territory' includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.⁸⁰

In *JHA v Spain*, the Committee Against Torture considered an individual complaint relating to the maritime interception and subsequent detention by Spanish authorities of asylum seekers and migrants in Mauritania, pursuant to an *ad hoc*

⁷⁶ *A.S., D.I., O.I. and G.D. v Italy* Communication no. 3042/2017 (HRC 28 April 2021).

⁷⁷ Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004) para 10; Human Rights Committee, General Comment No. 36: Article 6: right to life CCPR/C/GC/36 (2019) para 22.

⁷⁸ On extraterritorial jurisdiction under the ICCPR, see Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in F Coomans and M T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff Publishers 2012) 15-89.

⁷⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 6 June 1987) 1465 UNTS 85 (CAT).

⁸⁰ Committee Against Torture, General Comment 2: Implementation of article 2 by States Parties, CAT/C/GC/2 (2008) para 16. See also Committee Against Torture, Concluding Observations: United States of America, CCPR/C/79/Add.50 (r 1995) para 284.



bilateral agreement. The Spanish Coast Guard responded to a distress call from *Marine I*, which had capsized in international waters. Spanish authorities towed the vessel toward the coast of Mauritania, where it remained for eight days.⁸¹ Following negotiations with Mauritanian authorities, the passengers were transferred to the port city of Nouadhibou. There the group was placed in an unused fish processing factory and guarded by Spanish security forces while authorities negotiated their repatriation. The Committee found that Spain's jurisdiction was enlivened by both its interception of a vessel in international waters and its subsequent detention of passengers on Mauritanian territory.⁸²

Moreover, extraterritorial jurisdiction under CAT is not limited to effective control over territory. In *Sonko v Spain*, concerning the return of a migrant to Morocco who later drowned, the Committee further found that Spanish officers 'exercised control over the persons on board the vessel and were therefore responsible for their safety'.⁸³ Thus, where a state party exercises *de jure or de facto effective control over a territory or person* in, for example, a vessel or a detention centre, the state will owe that individual obligations under CAT.⁸⁴

4.2 European Convention on Human Rights

Article 1 ECHR formulates an obligation on Council of Europe states to afford Convention rights 'to everyone within their jurisdiction.' What jurisdiction means for the purpose of protection under the ECHR has been defined by ECtHR in its case law on Article 1.⁸⁵ In addition, the ECtHR notes that the concept of jurisdiction under Article 1 ECHR must reflect its meaning in public international law⁸⁶ and accordingly that the threshold of jurisdiction must be established beyond reasonable doubt.⁸⁷

⁸¹ *JHA v Spain* Communication no 323/2007 (CAT, 21 November 2008) paras 2.1-3.

⁸² *JHA v Spain* Communication no 323/2007 (CAT, 21 November 2008).

⁸³ *Fatou Sonko v Spain* Communication no 368/2008 (CAT, 25 November 2011) paras 2.1, 10.3.

⁸⁴ On extraterritorial jurisdiction under the CAT, see Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff Publishers 2012) 255-299.

⁸⁵ See Council of Europe and European Court of Human Rights, *Guide on Article 1 of the European Convention on Human Rights: Obligation to respect human rights – Concepts of "jurisdiction" and imputability* (April 2022) available at https://www.echr.coe.int/documents/guide_art_1_eng.pdf accessed 23 March 2023; see in particular *Catan and Others v Moldova and Russia* (GC) App nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) para 103 ff with further references.

⁸⁶ *Ukraine v Russia (re Crimea)* (GC) App nos 20958/14 and 38334/18 (ECtHR, 16 December 2020) para 344.

⁸⁷ *Ukraine v Russia (re Crimea)* (GC) App nos 20958/14 and 38334/18 (ECtHR, 16 December 2020) para 265.



The question of jurisdiction is a preliminary one to the finding of responsibility for a breach of the ECHR, essentially serving similar purposes relating to state responsibility under this Convention as the attribution test under general international law.⁸⁸ The answer to the jurisdiction question will normally depend on the scope of application of the ECHR *ratione loci*, as further examined below. Whether an act or omission is attributable to a state may further be a question of the scope of application of the ECHR *ratione personae*. The ECtHR, however, often considers the questions of jurisdiction, attribution and responsibility at once.⁸⁹ Where a state holds jurisdiction, it will usually be directly responsible for any breaches of ECHR obligations owed to the relevant individuals at the relevant time.⁹⁰

Thus, jurisdiction under the ECHR is primarily territorial. For the purpose of responsibility attribution under the ECHR, it is irrelevant which specific national authority the breach is attributable to, even if a State has difficulties with securing compliance in all parts of its territory. Each Contracting State to the ECHR remains responsible for events on its national territory and, thus, the higher authorities of the State must prevent and remedy any breach of subordinates to secure compliance with the ECHR.⁹¹

The ECHR does not allow for territorial exclusions that would reduce its territorial scope selectively.⁹² This is also the case for border fences that are located some distance from the line forming the border, where territorial jurisdiction begins.⁹³ Particularly, the ECtHR has noted that the practical difficulties in the migration context cannot justify excluding this area from the ECHR's protections:

⁸⁸ See Section 3.1 above.

⁸⁹ Council of Europe and European Court of Human Rights, *Guide on Article 1 of the European Convention on Human Rights Obligation to respect human rights – Concepts of “jurisdiction” and imputability* (April 2022) available at https://www.echr.coe.int/documents/guide_art_1_eng.pdf accessed 23 March 2023 para 6; see *Loizidou v Turkey* (GC) App no 15318/89 (ECtHR, 18 December 1996) para 52; *Assanidze v Georgia* (GC) App no 71503/01 (ECtHR, 8 April 2004) para 144.

⁹⁰ Samantha Besson, 'The extraterritoriality of the European Convention on Human Rights: Why human rights depend on jurisdiction and what jurisdiction amounts to' (2012) 25 *Leiden Journal of International Law* 4, 857, 867.

⁹¹ *Assanidze v Georgia* (GC) App no 71503/01 (ECtHR, 8 April 2004) para 146 ff; *Ilaşcu and Others v Moldova and Russia* (GC) App no 48787/99 (ECtHR, 8 July 2004) para 319.

⁹² *Assanidze v Georgia* (GC) App no 71503/01 (ECtHR, 8 April 2004) para 140; *N.D. and N.T. v Spain* (GC) App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 106; *A.A. and Others v North Macedonia*, App nos 55798/16, 55808/16, 55817/16, 55820/16 and 55823/16 (ECtHR, 5 April 2022) paras 61 ff; compare ECHR, art 56 (1).

⁹³ *N.D. and N.T. v Spain* (GC) App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 109.



(T)he special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (...).⁹⁴

Regarding extraterritorial scope, the ECtHR has developed several exceptions to the territoriality principle in accordance with Article 31 (1) *Vienna Convention on the Law of Treaties* (VCLT).⁹⁵ According to the Court, a State's jurisdiction can be extended outside its own border either on the basis of the power or control exercised over a person (personal concept of jurisdiction or *ratione personae*) or on the basis of control actually exercised over the foreign territory in question (spatial concept of jurisdiction or *ratione loci*).⁹⁶ Hence, the crucial question is whether a state party exercises a sufficient degree of effective control over territory or authority and control over persons to trigger jurisdiction.

According to the ECtHR case law, jurisdiction *ratione loci* is usually not established during active military operations on the territory of another state, however might be established on the basis of 'effective control' during the occupation of such territory afterwards.⁹⁷ For the 'passive' state jurisdiction might also be impeded during the hostilities.⁹⁸

Jurisdiction *ratione personae* is particularly important in the context of asylum, since a state might exercise authority or control over a person in the case of joint interceptions or third country processing.⁹⁹ It can be established through the acts of *diplomatic agents* where they exercise authority and control over persons or

⁹⁴ *A.A. and Others v North Macedonia*, App nos 55798/16 and 4 others (ECtHR, 5 April 2022) para 63 with further references; see further *N.D. and N.T. v Spain* (GC) App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) paras 104 ff.

⁹⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT); *Banković and Others v Belgium and Others* (GC) App no 52207/99 (ECtHR, 12 December 2001) paras 61, 67, 71; *Catan and Others v Moldova and Russia* (GC) App nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) para 104; *M.N. and Others v Belgium* (GC) App no 3599/18 (ECtHR, 5 May 2020) para 99.

⁹⁶ *Al-Skeini and Others v the United Kingdom* (GC) App no 55721/07 (ECtHR, 7 July 2011) para 133 with further references.

⁹⁷ Compare *Hassan v United Kingdom* (GC) App no 29750/09 (ECtHR, 16 September 2014) paras 138 ff.

⁹⁸ *Georgia v Russia (II)* (GC) App no 38263/08 (ECtHR, 21 January 2021); compare *Shavlokhova and Others v Georgia*, App no 45431/08 (ECtHR, 5 October 2021) paras 32 ff; *Bekoyeva and Others v Georgia*, App no 48347/08 (ECtHR, 5 October 2021) paras 37 ff.

⁹⁹ Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 266.



their property.¹⁰⁰ The Court noted in *M.N. and Others v Belgium*, a case concerning humanitarian visa applications of Syrians in the Belgian embassy in Beirut, that it is insufficient that a decision by that state impacts the situation of the individuals abroad. Instead, exceptional circumstances must be established which show that the state effectively exercised authority over them. In this case, the diplomatic agents did not exercise *de facto* control over the applicants.¹⁰¹ However, jurisdiction based on acts of diplomatic and consular agents *on board of aircrafts and ships* registered or flying the flag of the respective state have been recognized under customary international law and treaty provisions.¹⁰²

Furthermore, the *use of force by state agents* can bring individuals under the jurisdiction of that state. This is the case, e.g., when an individual is handed over to state agents,¹⁰³ or in the case of incursions or targeted operations by armed forces or police.¹⁰⁴

Another exception of the territoriality principle relevant to EU third country arrangements is the possibility gain jurisdiction through the exercise of all or some of the public powers normally exercised by the *local government with its consent*.¹⁰⁵

Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as

¹⁰⁰ *Banković and Others v Belgium and Others* (GC) App no 52207/99 (ECtHR, 12 December 2001) para 73; see further Council of Europe and European Court of Human Rights, *Guide on Article 1 of the European Convention on Human Rights Obligation to respect human rights – Concepts of “jurisdiction” and imputability* (April 2022) available at https://www.echr.coe.int/documents/guide_art_1_eng.pdf accessed 23 March 2023 para 53 ff.

¹⁰¹ *M.N. and Others v Belgium* (GC) App no 3599/18 (ECtHR, 5 May 2020) paras 112 f.

¹⁰² *Cyprus v Turkey* (Commission decision, 26 May 1975); *Banković and Others v Belgium and Others* (GC) App no 52207/99 (ECtHR, 12 December 2001) para 73; *Medvedyev and Others v France* (GC) App no 3394/03 (ECtHR, 29 March 2010) para 65; *Hirsi Jamaa and Others v Italy* (GC) App no 27765/09 (ECtHR, 23 February 2012) para 75; *Bakanova v Lithuania*, App no 11167/12 (ECtHR, 31 May 2016) para 63.

¹⁰³ *Razvozhayev v Russia and Ukraine and Udaltsov v Russia*, App nos 75734/12, 2695/15 and 55325/15 (ECtHR, 19 November 2019) para 161.

¹⁰⁴ *Issa and Others v Turkey*, App no 31821/96 (ECtHR 16 November 2004) para 71; *Carter v Russia*, App no 20914/07 (ECtHR, 21 September 2021) para 130.

¹⁰⁵ *Banković and Others v Belgium and Others* (GC) App no 52207/99 (ECtHR, 12 December 2001) para 71.



long as the acts in question are attributable to it rather than to the territorial State (...).¹⁰⁶

Yet, not every agreement suffices to establish jurisdiction. In *Gentilhomme, Schaff-Benhadji and Zerouki v. France* the agreement between France and Algeria that French children could attend French public schools in Algeria was no basis to establish extraterritorial jurisdiction. The French authorities could only not the decision of Algeria that Algerian children including dual nationals, such as the applicants in the case, could not attend these schools anymore. Hence, this decision was imputable to Algeria, but not to France.¹⁰⁷

The ECtHR has further developed the *principle of equivalent protection* for cases where alleged violations occur in the course of implementing international obligations. Such may arise from the membership of an international organization to which sovereign powers have been transferred.¹⁰⁸ Measures adopted pursuant to such obligations must be deemed justified if the organization in question affords fundamental rights protection equivalent to that provided by the ECHR. They are, however, not justified, if the measures do not fall strictly within the scope of the international legal obligations and, therefore, could have been avoided by using the State's discretion during the implementation of the obligation.¹⁰⁹ For instance, in *M.S.S.*,¹¹⁰ the Belgian Government argued that they were only implementing the 'Dublin II' regulation¹¹¹. Yet, Article 3(2) Dublin II confers discretionary power not to expel the applicant to another Member State, which would have allowed the Belgian government to comply with the ECHR. Hence, Belgium was responsible for the violation.¹¹²

¹⁰⁶ *X. and Y. v Switzerland*, App nos 7289/75 and 7349/76 (Commission decision, 14 July 1977); *Gentilhomme, Schaff-Benhadji and Zerouki v France*, App nos 48205/99, 48207/99 and 48209/99 (ECtHR, 14 May 2002); *Al-Skeini and Others v the United Kingdom* (GC) App no 55721/07 (ECtHR, 7 July 2011) para 135.

¹⁰⁷ *Gentilhomme, Schaff-Benhadji and Zerouki v France*, App nos 48205/99, 48207/99 and 48209/99 (ECtHR, 14 May 2002) para 20.

¹⁰⁸ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (GC) App no 45036/98 (ECtHR, 30 June 2005).

¹⁰⁹ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (GC) App no 45036/98 (ECtHR, 30 June 2005); Council of Europe and European Court of Human Rights, *Guide on Article 1 of the European Convention on Human Rights Obligation to respect human rights – Concepts of "jurisdiction" and imputability* (April 2022) available at https://www.echr.coe.int/documents/guide_art_1_eng.pdf accessed 23 March 2023 para 110.

¹¹⁰ *M.S.S. v Belgium and Greece* (GC) App no 30696/09 (ECtHR, 21 January 2011) paras 339 f.

¹¹¹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003) OJ L 50/1 (Dublin II).

¹¹² See further *Nada v Switzerland* (GC) App no 10593/08 (ECtHR, 12 September 2012).



The measures are further not justified if the protection of the respective ECHR rights is manifestly deficient.¹¹³ In the case of structural deficiency in the internal workings of the international organization, the principle of equivalent protection applies, if the State that has transferred some sovereign powers to it ensured that the ECHR rights were afforded equivalent protection.¹¹⁴ If no structural deficiency within the international organization is alleged, but the complaint concerns a specific decision, the exception applies.¹¹⁵

4.3 EU Charter of Fundamental Rights

The standards of international protection provided by the Refugee Convention are explicitly integrated into the EU asylum *acquis* in both Article 78 of the *Treaty on the Functioning of the European Union* (TFEU)¹¹⁶ and Article 18 EUCFR.

The importance of and respect for human rights is also stated repeatedly in EU primary law, in particular Article 2, 6 and 21 TEU.¹¹⁷ In addition, the EU has the shared competence to regulate large parts of EU migration and asylum law as well as border controls and has done so in various regulations and directives creating specified obligations (EU secondary law).¹¹⁸ Thus, the extraterritorial application of these provisions will be discussed in the following sections.

¹¹³ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (GC) App no 45036/98 (ECtHR, 30 June 2005) paras 3 f, 156.

¹¹⁴ See *Gasparini v Italy and Belgium*, App no 10750/03 (ECtHR, 12 May 2009); *Rambus Inc. v Germany*, App no 40382/04 (ECtHR, 16 June 2009); *Klausecker v Germany*, App no 415/07 (ECtHR, 6 January 2015).

¹¹⁵ *Boivin v 34 member States of the Council of Europe*, App no 73250/01 (ECtHR, 9 September 2008); *Connolly v 15 member States of the European Union*, App no 73274/01 (ECtHR, 9 December 2008); *Beygo v 46 member States of the Council of Europe*, App no 36099/06 (ECtHR, 16 June 2009); *López Cifuentes v Spain*, App no 18754/06 (ECtHR, 7 July 2009).

¹¹⁶ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1 (TFEU).

¹¹⁷ Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) MN 59.08.

¹¹⁸ See Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (EU Asylum Procedures Directive, EUAPD); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96 (EU Reception Conditions Directive, EURCD); Directive 2011/95/EU of the European Parliament and of the Council of



Although the EUCFR is rooted in pre-existing international human rights, it may also provide more extensive protection than the ECHR according to its Article 52(3).¹¹⁹ Contrary to the ECHR, the EUCFR has no jurisdictional clause. Instead, Article 51(1) EUCFR stipulates:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Hence, no reference to jurisdiction or territoriality is made, but the applicability of EU law entails the applicability of Charter rights.¹²⁰ It addresses the EU institutions, bodies, offices and agencies as well as the Member States in their implementation of EU law. When these actors set measures outside the EU territory, the Charter will be applicable. It should be noted that the Treaties commonly do not refer to the territory or territorial jurisdiction of the Union, but that of the Member States. For EU spatial concepts, the Treaties usually use the term 'area', eg in the description of the internal market in Article 26(2) TFEU or the Area of Freedom,

13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 (EU Qualification Directive, EUQD); Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31 (EU Dublin III); Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1 (EURODAC Regulation).

¹¹⁹ Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) MN 59.05. See further EUCFR, art 53.

¹²⁰ CJEU Case C-617/10 *Åkerberg Fransson* (GC) para 21.



Security and Justice in Article 67(1) TFEU.¹²¹ In that sense, the human rights obligations 'simply track EU activities'¹²² internally and externally.

This is limited by Article 51(2) stating that the EUCFR does not extend the field of application of EU law beyond the given powers of the Union. Whether the EU is competent to act is informed by the concept of jurisdiction as understood in public international law (PIL), eg when delimiting its capacity to act from other sovereign states.¹²³ However, the CJEU has also gone beyond PIL interpretations of jurisdiction for the benefit of the principle of effectiveness of EU law.¹²⁴ In principle, the EUCFR's applicability is autonomously regulated by the general provisions governing the interpretation and application of the Charter in Title VII.

The meaning of 'implementation' thus has been interpreted broadly as including all situations where Member States fulfil their obligations under EU law.¹²⁵ This even includes the exercise of discretionary power of Member States under EU law.¹²⁶ Moreover, Member States may not undermine the exercise of individuals' fundamental rights in the implementation of EU Law¹²⁷ and the CJEU generally has interpreted the applicability of the Charter generously.¹²⁸

In sum, the applicability of the EUCFR follows a functional approach that is based on the activities of the EU and its Member States. Hence, the applicability of the EUCFR is not limited through the territoriality principle but depends on whether a situation is governed by EU law or not.¹²⁹

¹²¹ Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) MN 59.13.

¹²² *Ibid* MN 59.10.

¹²³ *Ibid* MN 59.15 ff with reference to CJEU case law on the applicability to the internal market rules, common fisheries policy and others.

¹²⁴ *Ibid* MN 59.25.

¹²⁵ Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 378.

¹²⁶ CJEU Joined Cases C-411/10 and C-493/10 *NS and ME* paras 64 ff.

¹²⁷ CJEU Case C-502/10 *Singh* para 51; Case C-508/10 *Commission v The Netherlands* paras 65, 73.

¹²⁸ See Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) MN 59.56 ff.

¹²⁹ *Ibid* MN 59.63.



5 Application to selected EU third country arrangements

This final substantive chapter applies the general principles of responsibility attribution outlined above to four current forms of EU cooperation with third states. These examples, which are non-exhaustive, are drawn from recent ASILE country studies on Turkey, Serbia, Tunisia and Niger and raise especially complex questions of rights compatibility and attribution under international and European law.

5.1 The EU's use of safe third country concepts

The concept of 'safe third countries'

Whereas the 'safe third country' concept has been subject to critical analysis in legal theory¹³⁰ and some authors have questioned its legality under international law,¹³¹ the criticism does not seem to warrant the conclusion that application of this concept is in all circumstances incompatible with states' obligations under international refugee law or human rights law. Neither can the concept be considered untenable under EU law where it has been made subject to definition in the Asylum Procedures Directive.¹³² Hence, referring asylum seekers to 'protection elsewhere'¹³³ based on the presumption of safety in another state than the one in which they are currently seeking protection has been conceptually

¹³⁰ Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law* (2003) 15(4) 567-677; Rainer Hofmann and Tillmann Löhr, 'Introduction to Chapter V: Requirements for Refugee Determination Procedures', in A. Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford University Press 2011) 1081, 1110-14; Violeta Moreno-Lax, 'The Legality of the 'Safe Third Country' Notion Contested: Insights from the Law of Treaties', in G.S. Goodwin-Gill and P. Weckel (eds), *Migration and Refugee Protection in the 21st Century. International Legal Aspects* (Brill/Nijhoff 2015) 665-721; James C. Hathaway, *The Rights of Refugees under International Law* (Second Edition, Cambridge University Press 2021), 332-334 and 368-374; Louisa Feline Freier, Eleni Karageorgiou and Kate Ogg, 'The Evolution of Safe Third Country Law And Practice, in C. Costello, M. Foster and J. McAdam, *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 519-34.

¹³¹ See in particular Violeta Moreno-Lax, *op.cit.*

¹³² Article 33(1)(c) in conjunction with Article 38 EUAPD.

¹³³ On 'protection elsewhere', see UNHCR, 'The Concept of 'Protection Elsewhere'', *International Journal of Refugee Law* (1995) 7(1) 123-27; Colloquium on Challenges in International Refugee Law, 'The Michigan Guidelines on Protection Elsewhere,' *Michigan Journal of International Law* vol 28:2 (2007) 207-21; Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', *Michigan Journal of International Law* vol 28:2 (2007) 223-86.



approved as a procedural device in the context of deciding on the admissibility of asylum applications in EU Member States.

'Safe third country' policies and practices do not as such necessarily involve specific arrangements with the third countries that are presumed to be safe by the authorities of the state refusing admission of asylum seekers with reference to such other states. In practice, however, the receiving state perceived as safe will normally have to consent to the readmission – or first admission in case the asylum seeker has not previously stayed in or transited through that country – for the sending state to be able to enforce the inadmissibility decision by removing the affected person to that third country. Furthermore, readmission agreements or other cooperation arrangements are generally considered necessary in order to ensure that the asylum seekers will be admitted to the third country and treated there in compliance with the requisite standards for the protection of asylum seekers and refugees.¹³⁴ Although responsibility for breaches of human rights obligations that may occur as a consequence of removal to a 'safe third country' will normally lie with the sending state, it is not inconceivable that the receiving state may incur responsibility as well, in particular in case of its active involvement in such transfer arrangements.

So far, the compatibility of the 'safe third country' concept as such with EU fundamental rights as stipulated in the EUCFR or with general principles of EU law has not been seriously challenged. Indeed, certain aspects of the rules defining the concept and governing its application have been analysed from a critical perspective in order to enhance compliance with states' obligations under international refugee law and EU fundamental rights.¹³⁵ The decisive question therefore seems to be the manner in which the 'safe third country' concept is being interpreted in general terms and applied in individual cases. The fundamental rights compatibility of practices based on the concept and, in case of lack of compliance, the attribution of responsibility for EU Member States in that regard shall be elucidated by an account of the approach taken by the ECtHR and the CJEU under the ECHR and EU primary and secondary law, respectively.

¹³⁴ Cf. UNHCR, *op.cit.* 126-27; 'Michigan Guidelines' point 16; Michelle Foster, *op.cit.* 283-85.

¹³⁵ See Jens Vedsted-Hansen, 'Asylum Procedures Directive 2013/32/EU', in D. Thym & K. Hailbronner (eds.), *EU Immigration and Asylum Law: Article-by-Article Commentary* (Third Edition, Beck/Hart/Nomos 2022) 1515-17 MN 3-6.



The ECtHR approach to 'safe third countries'

The most detailed examination of decisions to return asylum seekers to a third intermediary country, as opposed to the country of origin, has been carried out by the ECtHR in cases brought before the Court by asylum seekers complaining over removal by the authorities of an EU Member State to a non-EU third country without any examination of their need for international protection.¹³⁶ As the applicant asylum seekers claimed to have been exposed to a violation of Article 3 ECHR – and sometimes also of Article 4 Protocol 4 prohibiting collective expulsion and of Article 13 ECHR requiring access to an effective remedy – the ECtHR has reiterated that in cases where the authorities remove asylum seekers to a third country, this leaves the responsibility of the state intact with regard to its duty not to deport them if substantial grounds have been shown for believing that such action would expose them, directly (i.e., in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to, in particular, Article 3 ECHR.

With special focus on situations where states are going to remove an asylum seeker to a third country without examining the merits of her or his asylum claim, thus claiming it to be a 'safe third country', the ECtHR has pronounced the following general principles on states' duties under Article 3 ECHR:

[W]here a Contracting State seeks to remove the asylum seeker to a third country without examining the asylum request on the merits, the State's duty not to expose the individual to a real risk of treatment contrary to Article 3 is discharged in a manner different from that in cases of return to the country of origin.

While in the latter situation the expelling authorities examine whether the asylum claim is well founded and, accordingly, deal with the alleged risks in the country of origin, in the former situation the main issue before them is whether or not the individual will have *access to an adequate asylum procedure* in the receiving third country. That is so because the removing country acts on the basis that it would be for the receiving third country to examine the asylum request on the merits, if such a request is made to the relevant authorities of that country. In addition to this main question, where the alleged risk of being subjected to treatment contrary to Article 3 concerns, for example, *conditions of detention or living*

¹³⁶ *Ilias and Ahmed v Hungary* (GC) App no 47287/15 (ECtHR, 21 November 2019) paras 130-31; see similarly *M.K. and Others v Poland* App. nos. 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020) paras 172-73; *D.A. and Others v Poland* App no 51246/17 (ECtHR, 8 July 2021) paras 58-59; see also *T.Z. and Others v Poland* App no 41764/17 (ECtHR, 13 October 2022) paras 17-19.



conditions for asylum seekers in a receiving third country, that risk is also to be assessed by the expelling State.¹³⁷

Importantly, the ECtHR here emphasises a dual obligation of the state contemplating the removal of an asylum seeker to a third country without substantive examination of the asylum claim: In order to be considered 'safe', the third country in question has to fulfil *both procedural and substantive standards* relating to the treatment of asylum seekers and their applications in that not only the asylum procedure, but also the detention conditions and living conditions for such persons have to be in accordance with the requirements of Article 3 ECHR. It has been posited that the ECtHR's approach in 'safe third country' cases is primarily procedural,¹³⁸ and the Court has indeed emphasised its subsidiary role and the primary responsibility of the national authorities also in this type of cases.¹³⁹ However, the Court requires from the removing state an up-to-date assessment, notably, of the 'accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice'.¹⁴⁰

It would seem difficult to consider this requirement fulfilled in case the relevant third country's asylum system in its entirety does not live up to the standards necessary to comply with obligations under the ECHR, including the substantive criteria for identifying among asylum seekers those who need international protection of their ECHR rights. Even if the approach of the ECtHR to the examination of 'safe third country' decisions may be considered primarily procedural, the removing state is required to demonstrate that it has itself conducted an examination of the 'safety' in accordance with the standards set by the Court. Nonetheless, the core of these standards is essentially one of *non-refoulement* that does not require the third country to be in compliance with

¹³⁷ *Ilias and Ahmed v Hungary* (GC) App no 47287/15 (ECtHR, 21 November 2019) paras 130-31 (*italics added*); see also *M.K. and Others v Poland* App. nos. 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020) paras 172-73; *D.A. and Others v Poland* App no 51246/17 (ECtHR, 8 July 2021) paras 58-59; *T.Z. and Others v Poland* App no 41764/17 (ECtHR, 13 October 2022) paras 17-19.

¹³⁸ Louisa Feline Freier, Eleni Karageorgiou and Kate Ogg, 'The Evolution of Safe Third Country Law And Practice, in C. Costello, M. Foster and J. McAdam, *The Oxford Handbook of International Refugee Law* (OUP 2021) 524.

¹³⁹ *Ilias and Ahmed v Hungary* (GC) App no 47287/15 (ECtHR, 21 November 2019) para 150.

¹⁴⁰ *Ibid*, para 141; the somewhat wider term 'asylum system' is similarly applied by the Court in paras 138, 139, 148, 152 and 153 of the judgment.



neither the refugee definition nor the full scope of refugee rights under the Refugee Convention.¹⁴¹

The 'safe third country' concept in EU law: the CJEU approach

If a 'safe third country' decision made by an ECHR state does not comply with the abovementioned standard, the state will be responsible for violation of Article 3 ECHR and possibly other ECHR provisions, whether or not a finding of such responsibility results in full redress for the affected individuals.¹⁴² By contrast, EU Member States are systemically less exposed to being held responsible under EU law for non-compliance with EU asylum standards, including those defining the concept of 'safe third country' and governing its application.¹⁴³ EU legal responsibility is, however, distinct from state responsibility under general international law or relevant human rights treaties, and absence of responsibility under EU law does not in principle exempt the Member State from the latter forms of responsibility .

The CJEU has delivered several judgments finding the removal of asylum seekers from Hungary to Serbia on the basis that the latter is considered a 'safe third country' under that Member State's national legislation to be at variance with these EU asylum standards, partly because asylum seekers were routinely returned to Serbia regardless of their connection to the country.¹⁴⁴ So far, however, this has not resulted in effective state responsibility being attributed to Hungary under EU law. This is partly due to the prevailing system of questions of interpretation being referred from national courts to the CJEU for preliminary ruling, meaning that the individual case will subsequently be decided by the respective national court. Another part of the explanation is the fact that infringement proceedings against Member States are only brought before the CJEU by the Commission on a rather selective basis which can hardly be considered an effective means of securing state responsibility. Even in instances with rather clear breaches of Member States' obligations under EU law on asylum standards such a finding by the CJEU does not in and of itself effectively secure the

¹⁴¹ Cf. Louisa Feline Freier, Eleni Karageorgiou and Kate Ogg, 'The Evolution of Safe Third Country Law And Practice, in C. Costello, M. Foster and J. McAdam, *The Oxford Handbook of International Refugee Law* (OUP 2021) 525.

¹⁴² For an account of non-implemented ECtHR and CJEU judgments, see Grusa Matevzic, *Implementing judgments in the field of asylum and migration in odd days* (Hungarian Helsinki Committee 2022).

¹⁴³ Article 33(1)(c) and Article 38 EUAPD.

¹⁴⁴ CJEU Case C-564/18 *LH v Bevándorlási és Menekültügyi Hivatal*; CJEU Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others*; CJEU Case C-821/19 *European Commission v Hungary*.



enforcement of these standards and does not in reality constitute legal responsibility of the Member State in question.¹⁴⁵

The 'EU-Turkey Statement'

Specific issues of responsibility for potential breaches of international and European law and EU law in the context of 'safe third country' policies and practices have been raised in connection with EU cooperation with Turkey in the framework of migration management during and after the asylum and migration crisis in 2015-16.¹⁴⁶ Here the 'EU-Turkey statement' of 18 March 2016 has attracted particular attention from both legal and policy perspectives, not least because of its stipulation that asylum seekers arriving from Turkey to Greece were to be returned if, or rather when, their applications for asylum would be considered inadmissible by the Greek authorities on the basis of Turkey being either a 'first country of asylum' or a 'safe third country' for those applicants.¹⁴⁷

While the responsibility for individual decisions on inadmissibility and removal of asylum seekers to Turkey in accordance with the EU-Turkey statement would lie with the Greek state, this has apparently not been examined in practice insofar as no complaints over such decisions are known to have been examined in substance by the ECtHR.¹⁴⁸ In addition, no Greek court or tribunal has referred preliminary questions to the CJEU on the interpretation of EU asylum standards with a view to the compatibility with these standards of generally considering Turkey as a 'safe third country'.¹⁴⁹ An attempt by some of the affected asylum seekers to hold the

¹⁴⁵ See, for illustration, paras 42 and 144 and the operative paras of CJEU Case C-821/19 *European Commission v Hungary*, judgment of 16 November 2021.

¹⁴⁶ For an overview, see Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries – Instruments and Actors* (ASILE, March 2021), chapter 2.

¹⁴⁷ EU-Turkey statement, Press release 144/16 of 18 March 2016, issued by the General Secretariat of the Council, point 1.

¹⁴⁸ While *J.R. and Others v Greece* App no 22696/16 (ECtHR, 25 January 2018) concerned effects of the 'EU-Turkey statement', the ECtHR appears to have examined the case only under Articles 3 and 5 ECHR with a view to deciding on the ECHR compatibility of the conditions in the Greek detention centre and the deprivation of liberty, respectively, of the applicants awaiting removal to Turkey under the 'statement'. The case *J.B. v Greece* App no 54796/16 was communicated by the ECtHR to the respondent state on 18 May 2017, but the HUDOC database contains no information on subsequent proceedings of the case; according to the applicant's representative, they have not been informed on steps towards a forthcoming ECtHR ruling on the case (email of 5 March 2023 from NGO representing the applicant, on file with the author).

¹⁴⁹ See Asterios Kanavos, 'A critical approach of the concept of Turkey as a safe-third country under the scope of the EU-Turkey 'Common Statement' as interpreted by the Greek Council of State and



European Council as an EU institution responsible for alleged incompatibility with EU law of the EU-Turkey statement's stipulation of return of asylum seekers to Turkey failed since the CJEU did not consider the statement as an act of the European Council or of any other institution, body, office or agency of the EU.¹⁵⁰

Whether one would be in agreement or not with this ruling by the CJEU,¹⁵¹ it may seem to be the end of the matter in terms of attributing international responsibility to the EU as an international organisation. According to Article 6(2) ARIO, the rules of the organisation apply in the determination of the functions of its organs and agents, from which it should probably be inferred that the CJEU's legal characterisation of the EU-Turkey statement is to be considered decisive in this respect. Nonetheless, it could be argued that the interpretation by the CJEU, and in particular the General Court's legal qualification of the statement, is not entirely convincing, and that additional separate questions of responsibility for the EU may arise under general international law. Thus, some points of the statement are essentially stipulating measures that will necessarily be undertaken by the EU, raising the question of international legal responsibility both for these specific measures and, potentially, for the accompanying parts of the statement that do not in themselves create EU legal responsibility for the EU.¹⁵²

In particular, the commitment to resettle Syrians from Turkey to EU Member States under the 1:1 scheme to compensate the returns from Greece to Turkey

two different Independent Appeal Committees', blog entry on *EDAL, European Database of Asylum Law*, 10 July 2018. However, on 3 February 2023 the Greek Council of State submitted preliminary questions to the CJEU concerning national legislation designating Turkey as a 'safe third country', and the adoption of individual decisions on that basis, despite that third country's refusal of readmissions for a protracted period of time (ELENA Weekly Legal Update, 10 February 2023).

¹⁵⁰ CJEU, Cases T-192/16, T-193/16 and T-257/16 *NF v European Council, NG v European Council and NM v European Council*, orders of the General Court of 28 February 2017; CJEU, Joined Cases C-208/17 P, C-209/17 P and C-210/17 P *NF and Others v European Council*, order of the Court of 12 September 2018, dismissing the appeal as manifestly inadmissible.

¹⁵¹ For a critical analysis of the rulings, see Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice', 31(2) *Journal of Refugee Studies* (2017) 216-39, at 222-25; Sergio Carrera, Leonhard den Hertog and Marco Stefan, 'The EU-Turkey deal: reversing 'Lisbonisation' in EU migration and asylum policies', in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 155-74, at 157-63; Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries – Instruments and Actors* (ASILE, March 2021), 17-25.

¹⁵² See Mario Gatti and Andrea Ott, 'The EU-Turkey statement: legal nature and compatibility with EU institutional law', in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 179-82.



was undertaken by the EU as such and later implemented with the involvement of EU institutions.¹⁵³ The fulfilment of visa liberalisation was to be accelerated by the EU, just as the EU was to be in charge of the continued work on upgrading of the Customs Union and re-energising the accession process for Turkey.¹⁵⁴ Last, but not least, speeding up disbursement under the FRIT was a commitment to be fulfilled by the EU.¹⁵⁵ Taken together, these commitments clearly undertaken by, or on behalf of, the EU with a view to being implemented by EU institutions, could be considered attributable to the EU at the level of general international law under the ARIO responsibility criteria. Whether or not the EU would incur responsibility on this basis is another matter that shall not be pursued in this context.

Sub-Conclusion

The use of 'safe third country' concepts by the EU and its Member States differs from the third country arrangements examined in the following sections insofar as policies and practices based on the presumption of safety in third countries do not necessarily involve specific arrangements with the receiving countries in question. Yet, 'safe third country' policies display similar tendencies towards informal arrangements being entered into by, or on behalf of, the EU, as most notably illustrated by the EU-Turkey statement of March 2016. While responsibility for breaches of human rights obligations that may occur due to the removal of asylum seekers to a presumed 'safe third country' normally lies with the sending state, there may be instances where such removals can result in responsibility under general international law and, as the case may be, under human rights treaties being incurred by the receiving state as well. It cannot be excluded that certain actions relating to 'safe third country' issues could be considered attributable to the EU at the level of general international law. In sum, the human rights obligations of EU Member States provide the most effective basis for the attribution of responsibility in case of unlawful removal of asylum seekers to third countries as other mechanisms seem to be less effective or rarely used in practice.

¹⁵³ EU-Turkey statement, Press release 144/16 of 18 March 2016, issued by the General Secretariat of the Council, point 2.

¹⁵⁴ Ibid, points 5, 7 and 8.

¹⁵⁵ Ibid, point 6. On FRIT, see Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries – Instruments and Actors* (ASILE, March 2021) 12.



5.2 Cooperation on return and readmission agreements

A common practice is the return of persons who have no legal grounds for staying within the territory.¹⁵⁶ This return requires the EU's and Member States' cooperation with third countries in several ways. Returns concern on the one hand, persons who have been issued a return decision after the respective immigration procedure in one of the Member States.¹⁵⁷ On the other hand, this also concerns so-called 'hot returns'¹⁵⁸, where persons get expelled immediately after their arrival to the EU, as well as interceptions at the high seas or 'pull backs' by cooperating countries before the arrival to the EU¹⁵⁹. Furthermore, these actions can affect both, nationals of a country of origin and third country nationals.¹⁶⁰

Some elements of such cooperation may be based on contracts or non-binding political arrangements.¹⁶¹ In others, the cooperation is likely only based on the respective incentives, potentially accompanied by verbal agreements that are not public.¹⁶² This section deals with known return and readmission arrangements in

¹⁵⁶ Katharina Eisele, 'The EU's Readmission Policy: Of Agreements and Arrangements' in Sergio Carrera, Juan Santos and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019) 135.

¹⁵⁷ See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 (EU Return Directive); see in particular the possible exclusion from the Return Directive's scope under art 2 (2) of third country nationals who are apprehended or intercepted by the competent authorities in connection with the irregular crossing of the external border of a Member State.

¹⁵⁸ See *N.D. and N.T. v Spain* (GC) App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020); Constantin Hruschka, 'Hot Returns Remain Contrary to the ECHR: ND & NT before the ECHR' (*EU Immigration and Asylum Law and Policy*, 28 February 2020) <<https://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/>> accessed 12 November 2022.

¹⁵⁹ Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 58 ff; see already Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *European Journal of International Law* 591; Anuscheh Farahat and Nora Markard, 'Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility' (Heinrich Böll Stiftung 2020).

¹⁶⁰ See Section 5.1. above for a discussion of the 'safe third country' notion.

¹⁶¹ See Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries - Instruments and Actors* (ASILE, January 2021).

¹⁶² *Khlaifia and Others v Italy*, App no 16483/12 (ECtHR, 15 December 2016) para 36 ff; see Chris Jones, Romain Lanneau and Yaha Maccanico, 'Access Denied: Secrecy and the Externalisation of EU Migration Control' (Statewatch and Heinrich-Böll-Stiftung European Union 2022) <<https://www.statewatch.org/access-denied-secrecy-and-the-externalisation-of-eu-migration-control/>> accessed 17 March 2023. Compare Section 5.3 below for the accountability for various forms of assistance.



the ASILE focus country Tunisia, even if their content might not be publicly available, but which raise compatibility and responsibility issues.¹⁶³

The cooperation between the EU and Tunisia is based on several kinds of arrangements. Before 2011, the EU and its Member States entered into several *ad hoc* agreements with Tunisia targeting people smuggling, border controls and readmission. In 2012, the new Tunisian government and the EU agreed on a *Privileged Partnership* and a *2013-2017 Action Plan*. In 2014, this was followed by a *Mobility Partnership* for cooperation in all aspects of migration management that practically focuses on border control and readmission.¹⁶⁴ Beyond the EU arrangements, several Member States have bilateral legal agreements with Tunisia for readmission, security cooperation and visa facilitation.¹⁶⁵

The Italy-Tunisia readmission agreement

In particular, Italy's readmission agreement for the return of Tunisian nationals without affording access to an asylum procedure has raised concerns related to the right to access to the asylum procedure¹⁶⁶, the right to leave, prohibition of collective expulsion and *non-refoulement*.¹⁶⁷ Although, the safe third country notion does not apply to Tunisians being returned to Tunisia, the risk arising from excluding them on principle from access to an asylum procedure seems even

¹⁶³ For readmission issues in the other ASILE focus countries see Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country Report Serbia* (ASILE, August 2022) 22 ff; Gamze Ovacik, Meltem Inel-Ciger, Orçun Ulusoy and Thomas Spijkerboer, *Country Report Turkey* (ASILE, August 2022) 21 f, 30 ff; Bachirou Ayoub Tinni, Abdoulaye Hamadou and Thomas Spijkerboer, *Rapport de pays Niger* (ASILE, August 2022).

¹⁶⁴ Financially, the EU supports Tunisia's National Strategy on Migration with funding of € 12.8 million and the EUTF deploys funds of € 89 million in total. Moreover, Frontex has a European Migration Liaison Officer deployed to the EU Delegation. Nikolas Feith Tan and Jens Vedsted-Hansen, *Inventory and Typology of EU Arrangements with Third Countries - Instruments and Actors* (ASILE, January 2021) 46 ff; for an overview of instruments and actors in Tunisia see Table 7 and 8 in *ibid* 49. See further Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 20 ff.

¹⁶⁵ Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 20.

¹⁶⁶ See discussion of the right to access in Nikolas Feith Tan and Jens Vedsted-Hansen, *Catalogue of International and Regional Legal Standards: Refugee and Human Rights Law Standards Applicable to Asylum Governance* (ASILE, October 2021) 10 ff; Nikolas Feith Tan and Julia Kienast, *The Right of Asylum in Comparative Regional Perspectives* (ASILE, May 2022).

¹⁶⁷ Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 57-8; Anuscheh Farahat and Nora Markard, 'Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility' (Heinrich Böll Stiftung 2020) 29 ff.



bigger, since the potential consequence would be a direct *refoulement* to the country of origin, not a case of chain-*refoulement*.¹⁶⁸

The text of this agreement has not been made public.¹⁶⁹ Yet, the ECtHR for its ruling in *Khlaifia and Others* had received the minutes of meetings between the Italian and Tunisian Government as well as the *note verbale* of an initial agreement from 1998.¹⁷⁰ The latter revealed that 'the Italian Government agreed to support Tunisia's efforts to combat illegal immigration by providing technical and operational material assistance and by making a financial contribution.'¹⁷¹

Transparency issues and human rights compatibility

The lack of transparency in third country arrangements is not only concerning regarding their democratic legitimisation.¹⁷² The lack of clarity on the concrete conditions in the text of the arrangements as well as on the implementation actions also makes the attribution of responsibility extremely difficult.¹⁷³ Open publication of the cooperation agreements could give insights on the conditionalities of cooperation and, thus, allow the assessment of the EU's or Member States' effective control over and knowledge on the operations of the partner state, i.e. the legal elements for the attribution of responsibility.

In late 2022, the *Heinrich-Böll-Stiftung* European Union office commissioned a study by *Statewatch* to examine the transparency and accountability of the operational side of the EU's New Pact on Migration. Statewatch, with the help of many local researchers, submitted access to documents and freedom of information requests to public institutions in Bosnia and Herzegovina, Morocco and Niger, as well as the EU itself including on cooperation on deportation and readmission. The study demonstrates the difficulty to access such documents and the reluctance of institutions to give access. The report notes:

¹⁶⁸ Compare *J.A. and Others v Italy* App no 21329/18 (ECtHR, 30 March 2023) para 100 ff.

¹⁶⁹ See further Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 40 f.

¹⁷⁰ *Khlaifia and Others v Italy*, App no 16483/12 (ECtHR, 15 December 2016) paras 37, 39.

¹⁷¹ *Khlaifia and Others v Italy*, App no 16483/12 (ECtHR, 15 December 2016) para 40.

¹⁷² See Katharina Eisele, 'The EU's Readmission Policy: Of Agreements and Arrangements' in Sergio Carrera, Juan Santos and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019) 145 f with reference to Case C-658/11, *Parliament v Council* para 81.

¹⁷³ See Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 40 ff, 53.



[R]efusals have largely been based on the need to protect public security and international relations – as invoked by Frontex in response to a request for the draft of its planned working arrangement with Morocco.

These grounds for refusal fall squarely within the EU's rules on access to documents, and none of them can be appealed against on grounds of public interest. Herein lies a key problem with the 'partnerships' and other forms of externalisation cooperation undertaken by executive departments and agencies: they do not necessarily permit any form of democratic scrutiny. Undoubtedly, there are certain matters that it is justifiable to keep from public view. Whether the implementation of a policy agenda that presents grave risks to human rights is one of those matters, however, is open for debate.¹⁷⁴

Despite the lack of transparency, serious concerns exist regarding the human rights compatibility of the return of Tunisians under the Italian readmission agreement.¹⁷⁵ The ASILE country report on Tunisia has found that 'simplified repatriation procedures' are not allowing for asylum applications nor individual interviews, but cause the return on the simple basis of a verification of the Tunisian nationality.¹⁷⁶ This includes persons, who have stayed in Italy for a long time, who are seeking medical treatment or fear persecution due to their sexual orientation, religion or otherwise.¹⁷⁷ While the ECtHR in *Khlaifia and Others* has found that the return based on the readmission agreement between Italy and Tunisia did not violate Article 4 Protocol 4 ECHR in this particular case (because the applicants underwent identification twice and they had a 'genuine and effective possibility' to submit arguments against their expulsion¹⁷⁸), civil society organisations continue to report that the practice as implemented violates the prohibition of collective expulsion and the principle of *non-refoulement*.¹⁷⁹ In addition, the report raises concerns due to the lack of legal remedies for persons returned as well as the practice of detention upon return.¹⁸⁰

¹⁷⁴ Chris Jones, Romain Lanneau and Yaha Maccanico, 'Access Denied: Secrecy and the Externalisation of EU Migration Control' (Statewatch and Heinrich-Böll-Stiftung European Union 2022) <<https://www.statewatch.org/access-denied-secrecy-and-the-externalisation-of-eu-migration-control/>> accessed 17 March 2023, 11.

¹⁷⁵ Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 57.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.* 58.

¹⁷⁸ *Khlaifia and Others v Italy*, App no 16483/12 (ECtHR, 15 December 2016) para 254.

¹⁷⁹ *Khlaifia and Others v Italy*, App no 16483/12 (ECtHR, 15 December 2016) para 243 ff; compare Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 57 f.

¹⁸⁰ *Ibid.* 56 f, 60, 71.



The danger of human rights violations is insufficiently addressed by vague human rights clauses in cooperation agreements. If human rights compatibility is mentioned, it usually stays non-operational, and its implementation remains unclear.¹⁸¹ This circumstance is further aggravated by the strong securitization and containment focus of most agreements.¹⁸² Thus, regarding the question of responsibility for human rights violations that occur in the implementation of this sort of cooperation, these human right clauses cannot shield the EU and Member States from their international obligations. Moreover, the EU's monitoring of EU funded projects does not include the assessment of human rights impacts on principle and, if so, the reports are not publicly accessible.¹⁸³

For human rights violations that occur after the person is outside their jurisdiction and control, EU Member States can still be indirectly responsible under Article 16 ARSIWA, if the cooperation and arrangements provides aid or assistance in the wrongful act of another state.¹⁸⁴ The manifold reports of human rights violations in EU neighbouring states, such as Tunisia, but also Morocco, Egypt and others, can arguably ascertain the element of 'knowledge of the circumstances'.¹⁸⁵

The act of entering into an agreement that does not preclude the violation of human rights, but negligently leads to them on a regular basis will be attributable to the EU or the Member State. Although an abstract agreement without implementation does not constitute an infringement on human rights *per se*, the context here still raises the question, if the entering into these agreements – where the breach of human rights obligations during its implementation is clearly foreseeable despite theoretical duties to observe them in the text of the agreement and without the text or context securing compliance with these duties – might suffice to infringe human rights based on the neglect of obligations to protect. Additionally, preparing the ground for human rights violations by other states in this way, with requisite levels of knowledge, may amount to aid and assistance.¹⁸⁶ Admittedly, this line of reasoning is controversial and it remains to

¹⁸¹ Fatma Raach, Hiba Sha'at, and Thomas Spijkerboer, *Country Report Tunisia* (ASILE, August 2022) 55.

¹⁸² *Ibid* 70.

¹⁸³ *Ibid* 61.

¹⁸⁴ See below in Section 5.4.

¹⁸⁵ Anuscheh Farahat and Nora Markard, 'Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility' (Heinrich Böll Stiftung 2020) 18 ff.

¹⁸⁶ Compare Section 5.3 below.



be seen whether it will be backed in future case law and doctrine. The direct contradiction of Member States' obligations deriving from *jus cogens* will further render such agreements void according to Articles 53 and 63 VCLT.

Sub-Conclusion

In sum, during the implementation of return and readmission agreements responsibility for human rights violations can occur at several stages. Evidently, responsibility arises under the ECHR when the person is within the jurisdiction of EU Member States, or under the EUCFR, when the Member States implement EU law, such as the Returns Directive. For example, when the person is handed over to the authority of a third country, responsibility can arise through the conduct of border authorities, which will be attributable to the respective Member State.¹⁸⁷

More broadly, what makes cooperation of the EU with third countries so problematic is the blending of diplomacy and political negotiations with an area that is highly sensitive to human rights violations and, thus, requires clear rules and remedies to secure the rule of law. Human rights concerns regarding the returns of migrants relate in particular to the right to access to the asylum procedure, the right to leave a country, the prohibition of collective expulsion and *non-refoulement*. Also, the concrete operationalization of returns can raise human rights concerns, since persons have been hurt and killed in this process.¹⁸⁸ The frequent reliance on security requirements to refuse public access to the underlying agreements that the operational cooperation is based on, thus, seems excessive and hinders public scrutiny.

5.3 EU funding, equipment and training of border control and migration management

All four countries' EU arrangements include funding, equipment and training of border control and migration management. As noted above, ASILE research reveals forms of cooperation which raise particular rights compatibility concerns: European funding and capacity-building of the Tunisian Coast Guard and subsequent interception and summary return at sea; EU's funding of Serbian border control which includes systematic pushbacks of protection seekers; and, in the case of Niger's ETM, European support to the Libyan Coast Guard. These and

¹⁸⁷ Compare Section 3.1 above; for the conduct of Frontex officers, see Section 5.4 below.

¹⁸⁸ See e.g. European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to asylum, borders and immigration* (2020) 234.



similar forms of support, such as EU funding for Egypt's maritime border control,¹⁸⁹ raise complex questions of indirect responsibility and, in particular, aid and assistance under Article 16 ARSIWA and Article 14 ARIO.¹⁹⁰

As noted above, three elements are necessary for a finding of derived responsibility in this context. Firstly, the funding, equipment or training must contribute significantly to the wrongful act, but need not be essential to performance. Thus, the provision of financial assistance, patrol boats or other material equipment to third state authorities meet the material definition of aid and assistance envisaged by the ARSIWA and ARIO. Whether training is sufficiently linked to the subsequent wrongful act will turn on the facts and the nature of the training undertaken. Article 16 also includes a *nexus* requirement between the assistance given and the wrongful act, which requires that the aid and assistance be directly related to the wrongful act.

Secondly, and most crucially, a finding of indirect responsibility in this context turns on the knowledge or intent of the EU or its Member States in providing funding, equipment or training. The question of required level of knowledge or intent remains unresolved, leaving significant uncertainty in this area. While Article 16 only refers to 'knowledge' of the circumstances of the wrongful act on the part of the assisting state, the ILC Commentaries clarify that aid or assistance must be given 'with a view to' the commission of the wrongful act.

The phrase 'with a view to' appears to introduce the higher standard of *intention* on the part of the assisting state. According to the ILC Commentaries:

A State is not responsible for aid or assistance under Article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct of the aided or assisted State.¹⁹¹

Elsewhere the Commentaries use terms synonymous with intention, such as 'deliberately' and 'intended to', suggesting that Article 16 requires a level of

¹⁸⁹ Euractiv, 'EU funds border control deal in Egypt with migration via Libya on rise' 31 October 2022, available at <https://www.euractiv.com/section/global-europe/news/eu-funds-border-control-deal-in-egypt-with-migration-via-libya-on-rise/> accessed 21 March 2023.

¹⁹⁰ Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 *European Journal of International Law* 817.

¹⁹¹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' *Yearbook of the International Law Commission* 2001, vol II, Part Two, 66 para 5 (emphasis added).



knowledge approaching wrongful intent.¹⁹² In the *Genocide Case*, the ICJ considered, by analogy, the question of intent under Article 16 stating that, at a minimum, the assisting state or international organisation must be aware of the intent of the 'principal state'. The finding of the ICJ suggests that the minimum knowledge standard in situations of aid and assistance is *knowledge of the intent of the principal state*.

Various scholars have weighed in on the issue of knowledge and intent in Article 16. Jackson argues that knowing participation is sufficient, defined as 'something approaching practical certainty as to the circumstances of the principal wrongful act'.¹⁹³ In the context of Italy-Libya cooperation, *Moreno-Lax and Giuffré* argue that an overly strict intent requirement would lead to no responsibility for conduct that falls short of an express desire to violate obligations, but nonetheless involves acceptance of the risk that wrongful acts will occur.¹⁹⁴

Gammeltoft-Hansen and Hathaway argue for a broader reading requiring 'constructive' knowledge on the part of the assisting state, with reference to the ECtHR decision in *Hirsi*.¹⁹⁵ *Nolte and Aust* argue for a narrow interpretation of the intent requirement not to discourage ordinary forms of international cooperation to encourage the 'stability and smooth running of the international system as a whole'.¹⁹⁶

Finally, aid or assistance requires the existence of common obligations on behalf of both cooperating states with respect to the wrongful act. This third element may be unproblematic as the fundamental nature of the obligations at stake in migration control mean they are owed by almost all states via one source of international law or another. For example, funding, equipment or training resulting in the arbitrary detention of asylum seekers and refugees will amount to

¹⁹² Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 235.

¹⁹³ Miles Jackson, *Complicity in International Law* (Oxford University Press 2015) 161. See further Harriet Moynihan, *Aiding and assisting: Challenges in armed conflict and counterterrorism* (Chatham House, 2016).

¹⁹⁴ Mariagiulia Giuffré and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019).

¹⁹⁵ Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 280.

¹⁹⁶ Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers—Complicit States, Mixed Messages and International Law' (2009) 58 *International and Comparative Law Quarterly* 1, 16.



a breach of common obligations of the European state and Tunisia, relying on both treaty and customary law.

Sub-Conclusion

In sum, funding, equipment and training may lead to indirect responsibility on the basis of Article 16, but only where European aid and assistance contributes significantly to the wrongful act, with the requisite level of knowledge or intent and where the wrongful act would have breached the EU or Member State's own international obligations.

5.4 Frontex joint operations in third states

Under a 2019 Status Agreement Frontex officers carry out joint operations on Serbian territory with their Serbian counterparts.¹⁹⁷ According to recent ASILE research, the Agreement came into force on 1 May 2021 and resulted in a first Frontex mission along the Serbian-Bulgarian border from 16 June 2021.¹⁹⁸

Under the Agreement, Frontex officers 'assist Serbia in border management, carry out joint operations and deploy teams in the regions of Serbia that border the EU'.¹⁹⁹ Article 7 of the Agreement affords Frontex officers criminal, civil and administrative immunity from Serbian jurisdiction. Article 5 of the Agreement limits the function of Frontex staff to exercising border control and return powers under instructions from Serbian agents, though Serbian agents can authorise the use of force in the absence of Serbian officers. Under Article 6, both parties may suspend the operation of the Agreement in cases of breaches of fundamental rights, notably the principle of *non-refoulement*. Article 9(1) includes an obligation on the part of Frontex officers to respect fundamental rights. This Agreement, in general, and Article 7 in particular, raises questions around the responsibility of the EU agency for breaches of fundamental rights in the course of such joint operations.²⁰⁰

¹⁹⁷ Council Decision (EU) 2019/400 on the signing, on behalf of the Union, of the Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, *Official Journal* L 72/1, 22 January 2019.

¹⁹⁸ Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country Report Serbia* (ASILE, August 2022) 18.

¹⁹⁹ European Commission, 'Border management: EU signs agreement with Serbia on European Border and Coast Guard cooperation' (19 November 2019).

²⁰⁰ Frontex Liaison Officers (FLO) are also deployed in all four countries, but do not engage in joint operations.



According to ASILE's country report on Serbia, the Status Agreement was finalised without consultation and negotiated in secret between Frontex and Serbia. The immunity clause of Frontex staff, explained above, has raised particular concerns among Serbian experts, especially in the absence of a common monitoring mechanism of joint Serbia-Frontex operations at Serbian borders and the lack of sharing of field information regarding the implementation of the Agreement.²⁰¹ According to ASILE's country report, therefore, 'Frontex has the unilateral capacity to exclude itself from responsibility from the Serbian legal accountability system'.²⁰²

The Frontex-Serbia 2019 Status Agreement raises specific issues of attribution and responsibility where a joint operation results in breaches of international or European human rights law, as well as EU law. A number of authors have raised concerns about Frontex's operational role in third countries, including with respect to a lack of human rights safeguards,²⁰³ Frontex's responsibility for violations under international or EU human rights law, notably the Charter of Fundamental Rights of the European Union,²⁰⁴ and accountability mechanisms where breaches are established.²⁰⁵ We note that ASILE research to this point does not indicate evidence of fundamental rights violations in joint operations at the Serbia-Bulgaria border.²⁰⁶

First, it is clear that the ECHR does not govern Frontex operations in Serbia – as the EU is not a party to the Convention, its officers cannot be bound by it.²⁰⁷ On the other hand, the EU Charter applies to EU 'institutions, bodies, offices and agencies'.²⁰⁸ As discussed above, the Charter contains no jurisdictional clause and thus its application is not bound to the geographic area of the EU, but rather

²⁰¹ Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country Report Serbia* (ASILE, August 2022) 57.

²⁰² Ibid.

²⁰³ Florin Coman-Kund, 'The cooperation between the European Border And Coast Guard Agency and third countries according to the new Frontex regulation: Legal and practical implications', *The external dimension of EU agencies and bodies* (Edward Elgar Publishing 2019) 46.

²⁰⁴ Ibid.

²⁰⁵ Lena Karamanidou and Bernd Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex* (Respond worknig paper, 2020); Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 *German Law Journal* 532; Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country report Serbia* (ASILE, August 2022) 58.

²⁰⁶ Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country report Serbia* (ASILE, August 2022) 78.

²⁰⁷ Compare chapter 4 above.

²⁰⁸ EUCFR, art 51(1).



extends to wherever the activities of EU agencies take place (in the case of Frontex) or wherever EU law is applied (in the case of Member States).²⁰⁹

In sum, EU Charter obligations track Frontex activities in third countries, on the basis of the concept of 'portable responsibility'.²¹⁰ According to *Carrera et al*, this concept signifies that:

EU legal and fundamental rights standards must be upheld by all EU Member States and agencies when they engage in asylum and border processing abroad. The scope of the EU CFR encompasses every action or inaction falling directly or indirectly within the scope of EU law.²¹¹

As a result, Frontex remains bound by its EU Charter obligations when taking part in joint operations in third states, notably Serbia, and is not released of its Charter obligations notwithstanding immunity under Serbian law granted by the Status Agreement.

Second, at the level of general international law, the EU may bear direct international responsibility where an internationally wrongful act is attributable to Frontex officers and constitutes a breach of the EU Charter. There is no doubt that, as required by Article 4 ARIO, Frontex is an organ of the EU and thus the conduct of its officers is attributable to the EU as an international organisation for the purposes of ARIO.²¹² Moreover, Article 7 ARIO provides that the conduct of agents of European Member States placed at the disposal of Frontex is attributable to the latter as the agency exercises effective control over deputised officers.

Under Article 8 ARIO, conduct will be attributable to the EU even where it exceeds its authority if done in an official capacity and within the overall functions of the Agency. For example, a Frontex operation in Serbia that results in pushbacks in breach of the principle of *non-refoulement* and/or the prohibition against

²⁰⁹ See chapter 4.3 above.

²¹⁰ Sergio Carrera et al., *Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US: Lessons learned and feasibility for the EU* (Open Society European Policy Institute 2018) 54.

²¹¹ Ibid.

²¹² See also Laura Letourneux. 'Protecting the Borders from the Outside: An Analysis of the Status Agreements on Actions Carried Out by Frontex Concluded between the EU and Third Countries' (2022) *European Journal of Migration and Law* 24(3) 330-356.



collective expulsion would clearly attract the direct international responsibility of the agency, and hence of the EU.

Third, with respect to indirect forms of responsibility in the course of joint operations, Article 14 ARIO contains largely similar elements as Article 16 ARSIWA, discussed at length above. As a result, where Frontex agents provide support to Serbian officers in carrying out an internationally wrongful act, the Agency may bear indirect responsibility.

Such a finding would require an assessment of the Article 14 elements, namely: an act that constitutes aid or assistance, such as providing operational support on an unlawful pushback operation; knowledge of the circumstances, requiring knowledge on the part of Frontex officers that Serbian agents intended to act in breach of international law; and that the act would also be wrongful, if committed by the Agency itself, such as conduct amounting to, for example, *refoulement* or collective expulsion.

As a result, the conduct of Frontex officers leading to breaches of fundamental rights in Serbia is attributable to the EU under the law of international responsibility. However, accountability for such breaches are much more complex, especially in light of the immunity clause under Article 7 of the Status Agreement. Given the seeming lack of availability of recourse under either the ECHR and EU Charter, and correspondingly, the ECtHR and CJEU, the only recourse for a victim of a violation where Frontex bears direct or indirect responsibility would seem to be a complaint to the agency's human rights officer. This mechanism is contained in Article 9.5 of the Status Agreement, though as an internal complaints mechanism would not seem to meet the standard of an effective remedy within the meaning of Article 47 of the EU Charter as ultimate responsibility for investigation lies with the Agency's own executive director.²¹³

Sub-Conclusion

In sum, while the ECHR does not govern Frontex operations in Serbia – as the EU is not a party to the Convention – the EU Charter binds the activities of EU agencies beyond the territorial area of the Union. At the level of general international law, any wrongful conduct of Frontex officers in the course of joint operations on Serbian territory is attributable to the EU under the law of international

²¹³ Olga Djurovic, Rados Djurovic and Thomas Spijkerboer, *Country report Serbia* (August 2022) 57.



responsibility, even where it exceeds its authority, if done in an official capacity and within the overall functions of the Agency.

6 Conclusion

This paper set out by giving an overview of four forms of EU cooperation that raise questions of human rights compatibility and attribution of responsibility: the EU's use of safe third country concepts; the implementation of return and readmission agreements; EU funding, equipment and training of border control and migration management; and deployment of Frontex officers in third states.

To demonstrate how responsibility regarding these four areas of EU cooperation may be attributed, Chapter 3 first gave an overview of rules of general international law for the attribution of responsibility to both states and international organisations. Under these rules the possibility of shared responsibility by multiple states or states and IOs was foregrounded.

Chapter 4 then introduced the attribution of responsibility under specialised rules of human rights law, in particular the ICCPR and the CAT, the ECHR, and the EUCFR. In addition to the question of shared responsibility, the extraterritorial application of human rights provisions that usually rely on the criteria of jurisdiction was discussed.

Chapter 5 continued by applying the set-out rules to the four forms of EU cooperation with the aim to clarify the respective questions of human rights compatibility and responsibility attribution.

While the EU's use of safe third country concepts does not necessarily involve specific arrangements with receiving third countries, such 'safe third country' policies display similar tendencies as other forms of EU cooperation with third countries towards informal arrangements being entered into by, or on behalf of, the EU. In certain instances removal of asylum seekers to a presumed safe country may result in responsibility under general international law for the receiving state, and potentially for the EU as well. In practice, however, the human rights obligations of EU Member States provide the most effective basis for attribution of responsibility in case of unlawful removal to third countries.

Cooperation on returns and readmission shows that particularly the operationalisation of such agreements raises human rights concerns. However, the entering into agreements that is accompanied by a vast lack of transparency



and that foreshadows the breach of human rights obligations or at least fails to protect human rights by securing compliance, may further result in responsibility as well.

In addition, EU funding, equipment and training may lead to indirect responsibility on the basis of Article 16 ARSIWA or Article 14 ARIO, but only where European aid and assistance contributes significantly to the wrongful act, with the requisite level of knowledge or intent and where the wrongful act would have breached the EU or Member State's own international obligations.

Lastly, the EU Charter binds the activities of EU agencies such as Frontex beyond the territorial area of the Union. Any wrongful conduct of Frontex officers in the course of joint operations on Serbian territory is attributable to the EU under the law of international responsibility, even where it exceeds its authority, if done in an official capacity and within the overall functions of the Agency.



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The ASILE project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870787

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