

EU borders are common borders

Member States' responsibility for human rights protection at the EU's external borders

Policy brief

The ACVZ

The Advisory Council on Migration (ACVZ) is an independent advisory body established by law. The Council advises the government and parliament on migration issues. It reviews policy and legislation, putting forward improvements wherever possible. The ACVZ issues practical recommendations aimed at solving both existing and anticipated problems.

Disclaimer: The policy brief *'EU-grenzen zijn ook onze grenzen'* is first and foremost directed towards the Dutch government and thus written primarily from a national perspective. As the subject matter is relevant in a wider EU context and the Advisory Council on Migration wants to contribute to the EU debate on the responsibility for human rights violations at EU external borders, the report was translated into English. Besides some minor changes to the original report - in order to address other EU Member States as well - the content of the English version is identical to the Dutch one.

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'In a liberal democracy under the rule of law, people must be able to rely on an independent judiciary, a legislator that respects fundamental rights and an executive that adheres to the rules that have been agreed upon. Respect for these basic principles is a core value of the rule of law and is crucial for the legitimacy of legislation and policy'

ACVZ's programme on 'Effective legal protection'

Summary

For a long time now, there have been major concerns with respect to the human rights situation at the EU external borders. Reports of violations of international obligations, such as pushbacks, are numerous and ongoing. Who is responsible for these violations? Are EU Member States (also) partly responsible even if, like the Netherlands, they themselves are not geographically located on the EU's external borders? Can victims of these violations hold those responsible to account?

The EU external borders are our common borders. How these borders are controlled is a joint responsibility of all EU Member States. However, when (possible) human rights violations are committed in the operationalisation of this border control, what has happened, and who exactly is responsible for what, is not always clear. Such incidents often take place in rather inaccessible locations, such as at sea or in military zones. Often various parties are involved in border control, which can result in complex and ambiguous relationships between those actors when executing operations.

If international obligations are violated while controlling and protecting the external borders, an EU member state, or an international organisation such as the EU, can be held accountable by victims for an 'internationally wrongful act'. For this to be the case, however, it must be clear that the violation of the obligations can be 'attributed' to this state or organisation.

Pushbacks and pullbacks

A pushback is the refusal or return of migrants by the EU, without the migrants involved being given the opportunity to apply for asylum. This is contrary to international law, and is often associated with violence.

Pullback is the pulling back of migrants by countries outside the EU, such as Libya, to prevent them from reaching the EU. It is associated with human rights violations because there is a risk that people may die or are detained in appalling conditions.

It is not only difficult to determine what has happened and who is responsible, but also it is equally hard to obtain justice for the victims of human rights violations while trying to reach the EU. Legal protection is not available or not sufficiently effective. Individual victims often lack information as to how they can seek redress. Access to legal assistance is problematic. Many of them are not (or are no longer) on EU territory, which makes it even more difficult for them to submit a complaint or to take legal action.

Several reports indicate that internal complaints procedures, such as those of the European border and coast guard agency (Frontex) are not sufficiently effective. The EU and the Member States do not respond adequately to signs and reports of misconduct. When it comes to taking responsibility, they generally shift the blame to each other. The EU (and its institutions and agencies) cannot be brought before national courts or before the European Court of Human Rights (ECtHR). Victims can bring a case before the European Court of Justice (European Court) but these proceedings are subject to stringent requirements.

In short, the current violations and pushback practices at the EU's external borders are unacceptable and in contravention of international standards and European values. What is happening at the EU's borders is beyond the pale. The effective legal protection of victims is being undermined by a lack of clarity over who is responsible for what, and when, and by the above-mentioned obstacles to access to the courts. This also undermines the rule of law in EU migration policy as a whole. There is a tendency for Member States, and even EU institutions, to turn a blind eye and to pass the buck. Political will is needed to break this cycle.

Allowing these practices to continue will also give rise to legal risks for individual Member States and the EU in that they may be held accountable for these situations by or on behalf of victims of human rights violations. If policy is to be implemented in a lawful way, Member States must change their attitude from 'what can we get away with?' to 'what must we do?'

Clearly, Member States must refrain from becoming directly or indirectly involved in (possible) violations of human rights when implementing EU migration policy. In addition, national governments must do everything that is reasonably within their power to make sure that human rights are respected and guaranteed. This can, among other things, be achieved by making clear, formal and transparent agreements regarding the division of responsibilities in border control operations and migration partnerships. Member States can also take concrete steps to ensure effective monitoring of external border controls and functioning complaints procedures.

These steps must primarily be taken within a broader EU context and will require sufficient political will. Member States cannot and must not allow the continuation of human rights violations at EU's external borders, which are, by definition, common borders.

Recommendations

1. Take measures to avoid direct/indirect Member State responsibility for human rights violations through national support (in the form of personnel, funding or equipment) for EU border management;
2. Draw up clear agreements within the EU, and between the EU and third countries, on operational responsibility in the execution of EU asylum and migration policy;
3. Make human rights compliance more central and integral part of the development, implementation and monitoring of existing agreements and operational frameworks within EU asylum and migration policy;
4. Improve access to courts for victims of human rights violations in the field of EU asylum and migration policy;
5. Improve internal complaints procedures of EU agencies and establish effective national complaints procedures;
6. Strengthen independent monitoring of the execution of EU external border management.

1. Introduction

The control of the EU's external borders serves a legitimate purpose: to verify the right to enter EU territory. The way in which this control is executed, however, is the source of major concerns. There are numerous reports of human rights violations and pushbacks.

The recent humanitarian crisis situation at the border between Poland and Belarus is, unfortunately, not unique.¹ The now long list of violations also includes the large-scale (border) detention and institutionalised pushback practices in Greece, with or without the involvement of Frontex,² and the violent treatment of migrants by Croatian border guards.³ At the Hungarian border, migrants are denied basic necessities such as accommodation and even food.⁴ Reports on the notorious pushback practices of the Libyan coast guard, carried out with the support of Italy and (co-)financed by the EU, are also numerous.⁵

The (political) reactions to recent and relevant judgements by European courts are telling, with the boundaries of the law repeatedly being pushed, or judgements even being ignored.⁶ When, for example, the European Court of Human Rights (ECtHR) prohibited the collective expulsions from the EU in the case of *Hirsi versus Italy*,⁷ policy and practice changed to pullbacks from the North African coast. And where, in the case of *ND and NT versus Spain*⁸, the ECtHR ruled, among other things, that it must effectively be possible for migrants to apply for asylum at the border, commentators immediately feared that states would interpret this as approval of deportation and the hermetic sealing of their borders.⁹

Media report: situation at the border between Poland and Belarus

'Migrants are trapped between Belarus and Poland, like pawns in Lukashenko's political game. They wander starving through the cold forests, encountering violence from the border guards on both sides (...) The journey through the forests and marshes between Belarus, Poland and Lithuania made by thousands of migrants over the past few months has cost at least six people their lives. (...) The eastern Member States of the EU are not keen to receive those who have been helped over the border by Lukashenko's regime. The Polish government has admitted that it sends the majority of them back to Belarus. Pushbacks such as this are prohibited under international law but are also being carried out by border guards in Greece and Croatia.' (NRC, 11 October 2021)

Lack of clarity over responsibilities

The worrying situation at the EU's external borders is not only due to the treatment of migrants and the political reaction to court rulings. The crisis at our external borders is being perpetuated and aggravated¹⁰ by EU institutions, agencies and Member States systematically turning a blind eye or shifting the blame for serious

abuses onto each other. This is partly because EU migration policy is implemented at different levels (national, European, international), in different countries (including outside the EU) and through different forms of cooperation, which results in so-called hybrid operations with shared control. For example, an EU agency coordinates the operation, but a Member State that supplies personnel remains functionally responsible for 'their' officials.

Given the involvement of all these different parties, a border control operation is often simultaneously subject to multiple legal frameworks and operational plans. In practice, this means that roles, tasks and powers are not always properly coordinated. Moreover, not all agreements and plans are made public. This makes it even more difficult to determine who is responsible for what.¹¹

Moreover, the EU and the Member States are increasingly concluding migration partnerships with countries outside of the EU.¹² These agreements often take the form of informal, non-binding documents.¹³ Consequently, the division of responsibility for any violation of international obligations is not always clear, in terms of whether accountability of the countries involved for any misconduct on their part is excluded.¹⁴ The lack of clarity over who victims can turn to if their rights are violated, the mutual contestation of responsibility and practical obstacles undermine the effective functioning of the law and legal protection.

In this policy brief we aim first and foremost to provide insight into complex issues surrounding responsibility and accountability for human rights violations at the EU's external borders, and the (potential) legal consequences for EU Member States themselves (Section 2). In Section 3 we examine the system of effective legal protection in the EU: what action is open to individuals in order to obtain justice and which limitations are there in this context? Finally, we make a number of recommendations to national governments as to how they can fulfil their common and joint responsibility for EU border management in line with their own international obligations (Section 4).

2. Responsibility and accountability for human rights violations

2.1 Legal framework

States and/or international organisations such as the EU may be responsible and could be held accountable for an internationally wrongful act.¹⁵ This is the case if the conduct consisting of an action or omission (1) is attributable to the State or international organisation under international law; and 2) constitutes a breach of an international obligation of that State or international organisation.¹⁶

International obligations

To start with the latter requirement: EU Member States are party to numerous human rights conventions, including the Refugee Convention, the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and various conventions relating to maritime law, which include the obligation to search and rescue and saving lives at sea.¹⁷

In addition, they are bound by EU law, including European asylum and migration legislation and the EU Charter of Fundamental Rights. The Charter is part of primary EU law and applies to the actions of EU institutions, agencies and Member States when implementing or applying Union law (Article 51 of the Charter).¹⁸

ILC articles on State Responsibility¹⁹

The doctrine of state responsibility and responsibility of international organisations for violations of international law is not (yet) enshrined in a legally binding contractual document. However, the International Law Commission of the United Nations (ILC) has drawn up (draft) articles: *Draft Articles on State Responsibility, DARS, 2001* and *Draft Articles on the Responsibility of International Organizations DARIO, 2011*). Although, formally speaking, these provisions are not legally binding, the articles on state responsibility in particular are regarded internationally as authoritative, guiding principles. A number of provisions, for example Article 8 DARS on attribution, are recognised as customary international law.

EU Member States must guarantee the human rights included in the treaties of which they are signatories. The scope of their obligations under those treaties, such as the ECHR, is defined by their jurisdiction. If a Member State does not have jurisdiction, there is no obligation to guarantee the rights in the convention, and there can therefore be no question of responsibility, either.

Jurisdiction is in the first instance determined territorially: a state has jurisdiction over its own territory, and conduct can also have an effect outside the territory of the acting state or its representatives.²⁰ If the Netherlands, for example, deports someone to a country where they are then detained and mistreated, the Netherlands could be held responsible and accountable for the damage incurred.²¹

However, jurisdiction can also be extra-territorial, i.e. if there is *effective control* over another territory or over individuals who have carried out the act or omission on that territory.²² This is the case, for example, with an occupation, whereby one country effectively has control and authority over the territory of another country (or part of that territory). Effective control can also be said to exist if bodies or officials of one state exercise authority and (physical) control over individuals in the territory of another. Examples of this include situations where individuals are

present in an embassy or consulate, in vehicles or vessels under their own flag, on military bases or in detention centres.

Since the implementation of EU migration policy is increasingly taking place outside the EU, through cooperation with countries outside the EU, the question of when effective control is deemed to exist is becoming increasingly important.²³ ECtHR case law on this issue is casuistic, i.e. much depends on the specific circumstances of a case.²⁴

Alternative to 'effective control' test

Other 'models' have also been developed to determine the existence of extra-territorial jurisdiction. For example, the extent to which public powers are (legitimately) exercised in another territory could be a determining factor for jurisdiction.²⁵

Moreno-Lax has described a '*functional model*' along the same lines. In essence, this combines elements of the territorial and the personnel model, and includes all forms of the performance of public tasks that normally belong to a sovereign state. The model describes effective control as control which is decisive/crucial to the course of the events, even from a distance, assessed in the light of (the extent of) the impact on the ultimate violation.²⁶ The plaintiffs in the case of *S.S. versus Italy*, which is currently before the ECtHR, based their complaint on this model.

Finally, in the case of certain human rights, it is broadly accepted that they constitute peremptory norms which must always be respected by all, whether or not they are based on a contractual obligation (*ius cogens*).²⁷ This applies, for example, to the principle that nobody may be returned to a situation in which they are in danger (*non-refoulement*).

Attribution

The other prerequisite for the determination of an internationally wrongful act is that the conduct is attributable to the state or the international organisation. It is clear from the large number of provisions relating to this in the aforementioned ILC draft articles that this is a complex issue.

In short, actions or omissions can be directly or indirectly attributable. Direct attribution refers to conduct of State organs (or organs of an international organisation), of entities exercising elements of authority or of others if they operate under the direction or control of this State/international organisation. For example, the actions of Frontex as an EU agency are directly attributable to the EU.

Indirect attribution, on the other hand, involves responsibility of a State/international organisation in connection with the act of another State/international organisation. It could, for example, relate to a form of involvement such as aid or assistance but it could also involve the exercise of a

certain degree of direction or control, or even coercion. An (possible) example is the contribution of Italy to the Libyan coastguard operations; the case of *S.S. versus Italy*, which relates to this, is currently pending before the ECtHR.

The case of *S.S. versus Italy*

In this case, the European Court of Human Rights (ECtHR) is considering the question of the extent to which the financing and training of border guards in countries outside the EU by the EU and its Member States has implications for the accountability of these Member States in the event of the violation of human rights by these border guards. The case was brought on behalf of 17 survivors of a search and rescue operation in the Mediterranean Sea on 6 November 2017. 20 people drowned in the incident and dozens of others were subsequently held under inhumane conditions in Libya. The Libyan coast guard which carried out the operation was financed and trained by Italy and the EU.²⁸

For an act or omission to be attributed to an aiding or assisting actor, it is sufficient if that conduct contributed significantly to that act (or omission): it does not have to be essential to the performance of the international wrongful act. The State (or international organisation) primarily responsible remains the acting State (or international organisation). This is to prevent states or international organisations shifting their obligations and responsibilities by giving others orders or permission to conduct a certain way, thereby violating human rights.

It is with this same rationale that the doctrine of 'shared' responsibility was developed. This is the case in which multiple states and/or international organisations are responsibility for the same violation, or, for different violations simultaneously.²⁹

Shared responsibility between EU and the Member States

As an international organisation, the EU has its own legal personality with its own obligations, and is also independently responsible for the violation of its treaty obligations.³⁰ Thus, the EU is more than a collection of sovereign states.³¹

Does EU responsibility automatically mean that EU Member States can also be held accountable solely due to their membership? The basic principle under international law is that the legal personality of the EU protects the Member States from responsibility and accountability, unless agreed otherwise.³² Thus, the simple fact that the Netherlands is an EU Member State does not mean that the Netherlands is also automatically legally responsible for violations by EU institutions and agencies. A certain degree of involvement of the Member State is required, e.g. in accordance with the doctrine of attribution.³³

At the same time, States cannot, by (partially) 'outsourcing' a certain task to an international organisation, such as border control, shift away from their responsibility. It can be concluded from the case law of the ECtHR that European

countries, which are also EU Member States remain responsible under the ECHR, and that these (individual) obligations continue to apply alongside their (joint) actions in an EU context. It has also been argued that Member States act as the management of an international organisation (the European Council), and in this role are (jointly) responsible.³⁴

In short, the relationship between international organisations and their members is complex. The issue of responsibility and accountability is still under development. And it is an important issue, since the role and mandate of international organisations such as the EU continue to expand,³⁵ and thereby also the potential impact of their actions on migrants.

2.2. Put into practice

Human rights context

Within the human rights framework, obligations of governments consist of both 'negative' and 'positive' obligations. Negative obligations mean that the state must refrain from violating human rights, nor contribute to the violation: *to avoid doing something*. Positive obligations mean that the state must act to ensuring respect for and compliance with human rights: *to do something*.

2.2.1 Negative obligations

EU Member States are involved in EU asylum and migration policy in various ways: they participate in negotiations regarding legislation and regulations and draw up financial frameworks. They also provide practical support by deploying national officials in EU operations through EASO and/or Frontex, for example, or training missions in EU countries. Member States also regularly make financial or material contributions to EU border control, by despatching ships and aircrafts, for example. Finally, Member States also conclude bilateral agreements in the context of EU asylum and migration policy, such as the agreement between the Netherlands and Greece on the reception of unaccompanied minors in Athens.³⁶

What if the situation in these reception centres was such that the rights of minors were being systematically violated. To what extent would the Netherlands be responsible? Another example: national border guards form part of a Frontex operation in the Aegean Sea, which results into pushbacks and preventing migrants who have ended up in the water from being rescued. Or a plane financed by an EU Member State is being used for *border surveillance* in which the Libyan authorities violently pull back migrants and hold them in the notorious detention centres or hand them over for money to human traffickers.

In case of violations of international human rights obligations, it could be argued that EU Member States involved would also bear a certain amount of the

responsibility and would therefore run the risk of being held (partly) accountable. See also the above-mentioned case of *S.S. versus Italy*, which is currently before the ECtHR. The judgement in this case will be highly relevant to the issues of jurisdiction and attribution.

It would be most logical for victims of human rights violations to seek redress in/against the state or EU agency with whom the main responsibility lies and/or in whose territory the violation takes place. In the first example, therefore, this would be Greece, in the second Frontex in conjunction with Greece and/or Turkey, and in the third Libya.

However, current legal protection is not watertight. There is a chance that people will be sent from pillar to post and that no 'one-stop shop' with an effective legal remedy will be available to them. In the case of Libya, this is clearly problematic and in Section 3 of this policy brief we also note that, as things stand, the legal remedies against actions of Frontex as an EU agency remain inadequate. In addition, proceedings before national courts can sometimes be extremely lengthy or insufficiently effective.

An additional limitation may arise if Frontex operates outside EU territory and comes under the authority and control of the relevant host country.³⁷ This might mean that the actions of Frontex may no longer be classified as EU actions and, as a result, EU law (including legal remedies) would not apply.³⁸

Moreover, the EU's asylum and migration policy is executed in a rather fragmented way. Operations often run in parallel and legal frameworks often overlap. For example, the Management Board (MB), the decision-making body of Frontex, consists of both (representatives of) the Member States and of the European Commission. In addition to this role, the states and EU institution also have other roles, tasks and obligations. Alternatively, take, for example, the situation of a patrol boat sailing under the Libyan flag in international waters, where Italian officials, an EU member state, have direct *command and control* and prevent migrants from reaching Italian waters.

Another scenario: the Netherlands has lent a boat to Frontex, which is carrying out a joint operation with the Greeks in the Aegean Sea that involves pushbacks. This involves refoulement and, as a result, constitutes a violation of *ius cogens*, (norms under international law that are binding on every actor involved in all circumstances). Who is (potentially) responsible? It could be the Netherlands as flag state, Greece because that part of the Aegean Sea is Greek territory, Turkey because it fails to guarantee the rights of returned migrants and/or sends them on to an/another unsafe country, and the EU because it concerns a Frontex operation.

In addition, what are the implications of the EU-Turkey Statement? The European Court has held that this is an agreement between Turkey and (the heads of state of) the EU Member States.³⁹ If human rights are violated in the context of the

implementation of this agreement, does this mean that the victim can bring an action before national courts in all EU Member States because the governments are direct parties to this agreement? Or is closer involvement needed? (See section below).

These factors may well mean that 'complicit' States or actors rather than the primary responsible, also come into the picture when the question of responsibility and accountability is addressed. Ultimately, an accessible legal remedy in practice often holds more sway than who in theory is the 'most' responsible.

2.2.2. Positive obligations

International obligations go beyond preventing own personnel being directly or indirectly involved in human rights violations at the EU's external borders. In accordance with their positive human rights obligations⁴⁰ EU Member States must take all reasonable steps to prevent violations of human rights or to limit the damage caused by such violations, insofar as they are aware of them.⁴¹

'Reasonable steps' means steps which lie within the powers and capabilities of the member state, which do not impose a disproportionate burden on the state and which offer a genuine prospect of ending the violation or limiting the damage. 'Aware' means that the state 'knew about or could reasonably have been expected to know about' the situation. Violations can, for example, be foreseeable in that it is clear from public sources that they occur more than occasionally in similar situations.

If they are to comply with this positive obligation, EU Member States must do more than simply hold the other Member States, or the European Commission, to account over their responsibilities.⁴² They must look broadly at the available instruments that can help put an end to pushbacks and other human rights violations at EU's external borders. Whether or not individual Member States, if they fail to comply with the positive obligations, can also be held accountable for human rights violations will depend on the specific circumstances.

It is, however, important to bear in mind the complex dilemmas and practical limitations which occur in practice. The question is to what extent a national official, working on a patrol boat under the flag of country A in the context of an operation of country B in territorial waters of country C, can influence the actions of others or of managers directly *in situ*. The subsequent reporting of abuses is another matter: this must and should always be done.

EU Member States can also avoid responsibility for violations by discontinuing practical cooperation with agencies such as Frontex and participation in migration cooperation with third countries where necessary. This also indicates disapproval, or encourages a change in behaviour. The downside in that case is that they then no longer have an insight into what is happening at the borders, can no longer

report abuses and no longer have the opportunity to improve the situation through knowledge transfer (about human rights) or by imposing conditions on operations.

It would not be desirable if Member States do no longer want to get involved in European asylum and migration policy for fear of being held accountable for breaches of international law. In that case the EU cooperation would be significantly hampered, EU law would no longer serve as a shared framework for asylum and migration policy and every country would act on the basis of its own sovereignty, or undermine international law through other coalitions.⁴³

The Belarusian regime has recently been using migration as a 'weapon' against the EU, which has led to inhumane conditions and even deaths at the Polish border. Human rights are being disregarded and the absolute prohibition of refoulement is being violated. Within the EU, understanding has been expressed for Poland keeping the migrants out and sending them back due to the 'exceptional nature' of the situation. Back in the spring of 2020 migrants were also used as leverage, on that occasion by Turkey. This is a worrying development in which people are being used in a political power struggle between the EU and its neighbours to put pressure on the (cooperation in the) EU and to weaken it internally. This must be vigorously condemned. In addition, in these types of situations in particular, in which everything becomes strained, fundamental rights, the rule of law and human dignity must be a starting point and an anchor. Downplaying the importance of complying with treaty obligations is a slippery slope and undermines the objective of effective legal protection and the rule of law.

Conclusion

The EU's external borders are also the borders of all EU Member States. Consequently, how they are controlled affects all these states in different ways. They may be held legally responsible and accountable for what their own national personnel have done or failed to do. But, in addition, whoever the patrol boat belongs to and whoever is at the helm, under human rights conventions, such as the ECHR (which impacts on Union law), the Member States have a positive obligation to act and to report on the human rights situation at the EU's external borders. Even if individual Member States are helping to implement a joint migration policy in an EU context they are still individually responsible for ensuring the legal protection of those whose rights are being violated, and for actively striving for a mechanism which prevents the violation of fundamental rights at these external borders wherever possible.

3. Effective legal protection in the EU

3.1 Effective legal protection

An important part of effective legal protection (Article 47 EU Charter of Fundamental Rights) is the right to a fair trial (Article 6 ECHR).⁴⁴ In essence, this means effective access to a court, equality of arms and the right to defend yourself in legal proceedings. Criteria such as independence and impartiality of the judiciary are crucial to the effectiveness of legal protection,⁴⁵ as is the judge having his/her own investigatory powers and the authority to make binding decisions in disputes.⁴⁶

It also follows from European case law that, with regard to international organisations such as the EU⁴⁷ such preconditions do not, by definition, have to be the same but rather comparable. The legal protection in the EU is not sufficiently effective if shortcomings in these preconditions lead to an 'obviously inadequate' judicial process.⁴⁸ In this section we explore the effectiveness of legal protection in the EU.

What is effective legal protection?

Effective legal protection means that people must be able to challenge government decisions if they disagree with the rules or with how they are applied, and/or if they have incurred damage. This right is firmly embedded in national and European law (Article 47 of the EU Charter of Fundamental Rights (Charter), Articles 6 and 13 of the ECHR).⁴⁹ Effective legal protection consists of various elements which are considered in detail in case law, such as the right to legal aid, the offering of reasonable deadlines, the suspensive effect of appeals, etc.

3.2. Access to the courts: legal remedies

The limited options for taking the EU or its institutions and agencies to court are indicative of the shortcomings in the *rule of law* under Union law.

Only states or individuals can be brought before international judicial bodies such as the International Court of Justice or the International Criminal Court.⁵⁰ The EU is not (yet) party to the ECHR, so legal action cannot currently be taken directly against EU institutions or agencies in the ECtHR.⁵¹ EU Member States, however, all of which are party to the ECHR, due to ECHR case law and under certain conditions, remain responsible and liable under the ECHR when implementing EU policy.⁵² This indirect way of reviewing EU policy is, however, complex and tedious.

The European Court of Justice (CJEU) does, however, allow individuals to claim damages from the EU under Articles 268 and 340, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU).⁵³ The thresholds of the burden of

proof in these proceedings are high, there is little transparency due to limited access to documents, and, so far, the CJEU has been reluctant to find parties liable. This makes these proceedings difficult for individual victims of pushbacks to access.⁵⁴ Recently, a Dutch law firm instituted proceedings: it summoned Frontex before the CJEU on behalf of a Syrian family. It is not yet clear whether the case will be admissible.⁵⁵

Moreover, the EU enjoys immunity before national courts (Article 343 TFEU) in respect of the performance of its tasks. This derives from international law, and is important for the independent and effective functioning of an international organisation. At the same time, from the perspective of effective legal protection, it is difficult to justify the fact that the role and influence of the EU is becoming ever greater through mandate extensions and transfer of powers by states, while people who are directly impacted by acts or emissions cannot hold this organisation to account for the (serious) consequences of its actions, or only with great difficulty.

Immunity and effective legal protection

In the advisory report on the accountability of international organisations, the Advisory Committee on Public International Law (CAVV) noted that European and national case law increasingly points to the conflict between the immunity afforded under Article 343 TFEU and the EU's international obligations.⁵⁶ If international organisations fail to provide for adequate procedures themselves, the right to access to a court and a fair trial in particular may be jeopardised.

The obligation to respect immunity also comes into conflict with other treaty obligations, such as the guarantees of Article 6 ECHR on the right to a fair trial. The CAVV points to the authoritative academic trend which deems human rights to be 'of higher standard' other international rights and obligations, and to the fact that, in the case of immunity issues, national courts also regard the existence of a/another judicial process as crucial in their deliberations.

Taking Member States to court is easier. For example, decisions on admission and deportation can be contested in court at national level, and civil proceedings can often be brought to obtain compensation of damages due to failure to comply with human rights obligations, for example.⁵⁷ And where people cannot bring a member state before the CJEU, as stated, a complaint can be submitted to the ECtHR.

Finally, there are also practical obstacles which (can) limit the effectiveness of access to justice. For example, particularly for victims of violations at the external borders such as pushbacks, in practice there is very limited or no access to information on how to complain about unfair treatment or decisions by authorities.

Moreover, access to interpreters and legal aid can certainly not be taken for granted.

Should they have managed to overcome this barrier, then the migrants are often already elsewhere, because they have been deported, for example. Proceedings then often break down because, generally speaking, complaints can only be submitted by those who are directly affected by the action. Since proceedings can be lengthy, it can then be difficult in practice for legal aid providers to maintain contact with the victims.

3.3. Complaints procedures

Legal protection is not only about access to the judiciary. It is clear, among other things, from ECtHR case law that other, more administrative proceedings (*effective official investigations*, Article 13 ECHR) can play an important role in this context.⁵⁸ These will be in addition to access to the courts, because the majority of internal proceedings give rise to non-binding decisions.⁵⁹

Complaints procedures allow people to challenge bodies directly regarding their conduct and how they treat people. They can also ensure that potential errors or abuses are investigated without delay. The prerequisite is that these procedures are sufficiently accessible to individual victims. In addition, they must meet certain requirements in terms of good administration in accordance with Article 41 of the Charter, such as impartiality, fair treatment within a reasonable period of time⁶⁰ and the right to be heard.⁶¹

Establishing the facts

If it is to be determined who is responsible for failure to comply with obligations, it is essential to properly establish the facts. What exactly happened? Who was involved and what was the relationship or balance of power between them? Who could reasonably have been expected to know what happened? Is there a causal link between the action and the damage? In the case of (potential) pushbacks and human rights violations at the EU's external borders, in international waters and in the territory of other countries, establishing the facts is often a challenge. Not all documents relating to the division of responsibility are made public and therefore available for external review. In addition, many of the (alleged) violations of obligations under the conventions occur in locations that are difficult to access: on the open sea or in military zones along the border, which means that there are no witnesses.

Individuals have been able to submit a complaint to the EU agency Frontex in relation to violations of fundamental rights by staff deployed in a Frontex operation since 2016.⁶² In recent times, however, there has been a lot of discussion about this procedure, both in terms of its structure and its implementation.⁶³ It is clear

from the investigations that the complaints procedure is ineffective: complaints regarding employees of Member States were immediately forwarded to the Member States without their content being assessed, and there was no subsequent follow-up. Also, the assessment criteria and the time frame for processing complaints were unclear. In addition, the procedure is not sufficiently accessible due to stringent admissibility requirements. Due to a lack of information, victims did not know to whom they should address their complaints, or did not submit a complaint for fear of possible negative consequences for their proceedings. Finally, until now, the procedure has not been independent since the Executive Director of Frontex is indeed responsible for assessing complaints and for follow-up measures, and there is no opportunity for appeal.

Frontex is currently working on improving its complaints procedure, taking into account the recommendations made.⁶⁴ The successor to EASO, the newly established European Union Agency for Asylum (EUAA), also has its own complaints procedure but, as yet, there are no known practical experiences with this procedure.

In addition to the complaints procedure, Frontex has a number of other mechanisms to promote and protect human rights in the performance of its tasks. We refer specifically to *serious incident reporting (SIR)*. This is one of the sources on the basis of which Frontex must take action to prevent violations or to limit the damage caused by them, such as stopping the financing of or suspending operations (Article 46 Frontex Regulation). It requires Frontex employees to report *serious incidents*, including human rights violations, in the performance of the work. Frontex will then discuss the matter with the countries concerned and with the Frontex Management Board.

This instrument is potentially of major importance because it transcends individual cases, is not dependent on a complaint and, ultimately, can expose patterns in respect of which action must be taken. SIR is not included in the Frontex Regulation but is incorporated into the operational plans, which have not been made public. Consequently, so far, it has not been clear what exactly the procedure entails. The Frontex Management Board, among others, concluded that SIR was also inadequate. The Board made recommendations for improvement.⁶⁵

In addition, the EU system has other forms of complaints and monitoring mechanisms. The European Commission, for example, has various powers as guardian of Union law, such as infringement proceedings. The EU Fundamental Rights Agency (FRA) also regularly reports and advises on the situation at the EU's external borders and the monitoring of human rights. There are also national human rights institutions, which can collaborate in a European context with fellow institutions in other EU Member States. The European Ombudsman also has a complaints procedure and can undertake investigations on its own initiative (see below).

European Ombudsman

The European Ombudsman is formally embedded in the institutional structure of the EU. It is authorised to investigate complaints submitted by individuals and organisations concerning good governance, including violations of fundamental rights by institutions, bodies and agencies of the EU. The complainant must be located on EU territory, but their residence status is irrelevant. A complaint can also be submitted on behalf of someone who is located outside the EU. In addition, the European Ombudsman can initiate an investigation, such as the investigation into the actions of Frontex.⁶⁶ The individuals whose rights have been violated are not formally party to this. The Ombudsman's findings are not legally binding.

All of these bodies contribute to the system of legal protection but they all have their own shortcomings and do not, individually or in combination, constitute an effective legal remedy as set out in Article 47 of the Charter.⁶⁷

3.4. Criteria for effective monitoring

Given the crucial importance of accurate and independent establishment of the facts in specific cases of violations (see above), effective monitoring of the implementation of EU border management is a prerequisite for effective legal protection.⁶⁸ It is also important because it often takes a long time before a case comes before the court which can be problematic with respect to fact-finding.

Under the EU Pact on Migration and Asylum, the European Commission put forward a proposal to set up (national) monitoring mechanisms (Article 7 of the proposal for a Pre-screening regulation).⁶⁹ Given the (aforementioned) limitations in the existing monitoring and supervisory facilities, this proposal is a step in the right direction.⁷⁰ Based on case law and recommendations by a number of experts, an effective monitoring system must meet the following criteria:⁷¹

- Independence and autonomy;
- Clear mandate;
- Direct access to information, such as locations, individuals and documents;
- Adequate, long-term funding and resources;
- Well-qualified staff;
- Obligation to work in a transparent way and to account for findings;
- Enforceability of measures (further investigation) based on findings.

Conclusion

There are flaws in the existing system of legal protection at the EU's external borders. These include both limitations in terms of access to

European and national courts and shortcomings in a number of other monitoring mechanisms. Given the ongoing practice of pushbacks, pullbacks and other human rights violations, it is crucial that clear steps are taken towards improving the effectiveness of legal protection as part of the *rule of law* at EU level, including individual complaints procedures for EU agencies such as Frontex and an effective monitoring mechanism to document the situation at the EU's external borders.

4. Conclusions and recommendations

'States are responsible for border governance on their territory, and for any operations elsewhere where they exercise effective control or authority over an area, place, individual(s) or transaction. The transnational nature of some State actions in the context of governing international borders does not exempt States from fulfilling positive human rights obligations, nor from accountability rather, the responsibility of multiple States may be implicated in certain cases, for instance on the high seas, and elsewhere when States act extraterritorially.'

F.G. Morales, UN Human Rights Rapporteur, in report on pushbacks ⁷²

4.1. Responsibility of all EU Member States

The Dutch Advisory Council on Migration (ACVZ) believes that the current human rights violations and pushback practices at the EU's external borders must stop. They are unacceptable and entail serious risks from the perspective of the *rule of law*. EU Member States cannot allow EU external border management to be conducted in this way. It is unacceptable from a legal and moral perspective, and it is contrary to the common European values.⁷³

Allowing these practices to continue will also give rise to legal risks for the EU and for Member States. They may be held accountable. This also applies if, on the face of it, other countries (Member States where pushbacks and pullbacks take place) or organisations (such as Frontex) are more closely involved. If policy is to be implemented in a lawful way, the EU, EU institutions and agencies and EU Member States must change their attitude from '*what can we get away with?*' to '*what must we do?*'.

The EU's asylum and migration policy, including border management, is not yet sufficiently approached as a *joint* task for all Member States. National interests get in the way of a genuinely effective and thorough policy, in line with binding

international standards, not only in words but also in deeds.⁷⁴ The minimal progress in the negotiations over the EU Pact on Migration and Asylum is both telling and concerning. The lawful functioning of the EU system stands or falls with practical implementation and compliance with agreements. If this is to be achieved and the importance of effective legal protection is to be recognised and acted upon, political will is needed. This is essential if the tendency to turn a blind eye and to shift responsibility for human rights violations and pushbacks is to be broken, and these are to be prevented wherever possible in the future.

This joint responsibility means that the solution lies not only in and with the Member States at the EU's external borders or with the European Commission. All EU Member States have their own role to play here, not only on moral grounds but also from a legal perspective under the terms of Union law and other international obligations. Failure to fulfil this responsibility, or to fulfil it adequately, may have legal consequences, including (partial) accountability. Prioritising effective legal protection is a prerequisite for conduct that is lawful and in accordance with the rule of law in every policy area.

4.2 Recommendations

What does this responsibility mean for the involvement of individual Member States in controlling EU's external borders? The ACVZ proposes the following recommendations regarding the course of action for national governments of Member States.

4.2.1. Refrain from conduct contrary to human rights

Clearly, Member States themselves must not act contrary to their human rights obligations, either directly or indirectly. This means that the national governments, must adequately monitor the acts and omissions of staff working in the asylum and migration system, even if they are working outside of their own territory, and that governments must take appropriate action where necessary. It also includes making sure that financial, personnel and/or material support for joint EU border control operations is not contributing to violations, such as pushbacks or pullbacks.

Recommendation 1: Take measures to avoid direct/indirect Member State responsibility for human rights violations through national support (in the form of personnel, funding or equipment) for EU border management

- a. Where Member States offer support to EU border management in the form of personnel or practical assistance, they must permanently (in advance through a risk analysis, during and after) monitor that this support does not contribute in any way to violations of international obligations. Member States' governments must report on this periodically to their national parliaments.
- b. Member states must withdraw, suspend or strive to make changes to contributions to (EU) border control and migration cooperation with countries outside the EU in the event of reported links between the

activities for which these contributions were intended and human rights violations.

4.2.2. Measures to guarantee human rights

EU Member States must also do everything reasonably within their power to stop pushbacks and other human rights violations at the border or to limit the damage that they cause. It is important, therefore, that they continue to work in the Council of Europe, the Council of Ministers (of Justice and Home Affairs) and the European Council as well as in bilateral relations for better human rights compliance and effective legal protection throughout the EU, and consistently and unreservedly speak out against pushbacks and other violations in the context of (EU) border management. But words alone are not enough.

In the existing setup of operationalising EU asylum and migration policy, and EU border management in particular, the provisions on responsibility (for personnel, parts of the operation, locations) are often vague. Given the involvement of different services, countries and governance levels (national, European and/or hybrid), different legal regimes and implementing rules apply simultaneously. And many of these agreements are not publicly accessible. There is, therefore, a risk that the responsibility and accountability for violations is shifted and that it is therefore unclear where an individual victim can turn to obtain redress. As a result, there is a significant risk that the parties involved will get away with human rights violations.

There must be a joint effort to draw up clear(er) agreements for the implementation of EU asylum and migration policy in order to significantly increase the likelihood of policy being implemented in accordance with international obligations and in conformity with the rule of law. Neighbouring countries to the EU are increasingly using migrants as pawns in a geopolitical power struggle, in which the fundamental rights and effective legal protection of migrants are placed second, or even last. This specific issue requires further discussion and investigation.

Recommendation 2: Draw up clear agreements on operational responsibility in the execution of EU asylum and migration policy within the EU and between the EU and third countries

Strive, therefore, in an EU context for:

- a. an approach whereby it is clarified in advance in agreements, partnerships and operational plans, which entity is responsible for which parts of any execution of the policy and/or operation. This must be formally laid down and made public.

- b. maintaining full authority and control by the EU and/or EU Member States over personnel working to execute EU asylum and migration policy outside of EU territory. This is to prevent any human rights violations falling outside the scope of application of the EU Charter or the ECHR and to avoid legal loopholes in respect of international obligations and opportunities for effective legal protection.

Member states must (continue to) strive, within existing EU agreements and operational frameworks, for structural assessment of human rights compliance in the implementation of EU border management (and sanctions in the event of non-compliance). For example, by making human rights compliance a condition of cooperation or support in border management.

The Schengen Borders Code (SBC), for example, has procedural guarantees to ensure that refusal of access and deportation meet human rights standards. A system such as the Schengen Evaluation and Monitoring Mechanism (SEMM),⁷⁵ which uses peer review (i.e., among other things, Member states evaluating each other) can, for example, be used as a way of placing pressure on Member States to ensure human rights are observed in border management. From the perspective of democratic monitoring, the role of the European Parliament in overseeing the observance of human rights must be increased. Under the SEMM, for example, this role is currently limited to requesting and receiving information.

Recommendation 3: Make human rights compliance more central and integral part of the development, implementation and monitoring of existing agreements and operational frameworks within EU asylum and migration policy

- a. Focus in an EU context on strengthening human rights protection in existing legal and operational frameworks, such as in the Schengen Borders Code and the Schengen Evaluation and Monitoring Mechanism, and on increasing the (monitoring) role of the European Parliament in this context;
- b. Encourage the prevention of pushbacks by Member States by making practical assistance and financial support by the EU for border control conditional to human rights compliance;
- c. Use existing checklists to guarantee human rights in new *joint operations* such as, for example, those developed in 2017 by the Netherlands Institute for Human Rights and the Meijers Committee.⁷⁶

4.2.3 Strengthening the effectiveness of legal protection

Asylum seekers out at sea or stranded somewhere in a no man's land at EU external borders are focused on survival, avoiding violent attacks and getting into the EU. Most of them do not have access to information or legal aid. However, if

the legitimacy of state of EU actions is to be assessed, an efficient, accessible system of legal protection is essential. This includes not only access to courts but also more administrative options such as complaints procedures and supervisory and monitoring mechanisms. This is a fundamental requirement for ensuring the migration policy of the Member States and the EU as a whole is legitimate and in accordance with the rule of law.

It is true that, in theory, EU law provides for a high level of human rights protection. In practice however, procedural options for pursuing an action against the EU and its agencies in the courts are limited. If the EU accedes to the ECHR, victims will also be able to seek redress through the European Court of Human Rights. From the perspective of effective legal protection, this would be a positive development but the negotiations over accession are progressing slowly.

These failings in effective access to justice must be tackled as a priority. Moreover, it is difficult to broach shortcomings in the migration management system, and more particularly in border control, in courts other than in an individual case.

Recommendation 4: Improve access to courts for victims of human rights violations in the field of EU asylum and migration policy

- a. Focus on progress in the negotiations on the EU's accession to the ECHR and evaluate any interim solutions against criteria for legitimacy and rule of law.
- b. Make alternative courses of justice more accessible, given the immunity of the EU institutions and EU agencies before national courts.
- c. Follow the recommendations of the European Ombudsman regarding the ability of migrants to bring cases anonymously or through representatives (other than powers of attorney), to facilitate the highlighting of systematic abuses.

Independent, efficient complaints procedures form part of an effective system of legal protection. Complaints procedures mainly serve to draw attention to the circumstances of an individual case and are less suited to tackling systematic practices which violate international law. Nevertheless, concrete improvements are possible.

Recommendation 5: Improve internal complaints procedures of EU agencies and establish effective national complaints procedures

- a. Ensure effective national follow-up of complaints and reports forwarded by EU agencies to the Member States concerned.
- b. Ensure effective internal complaints procedures are in place in the national asylum and migration systems, in which national actions in the context of EU border control can be assessed, and examine them on a regular basis.
- c. Focus within EU context on:
 - improving the individual complaints procedure of Frontex in accordance with the recommendations of, among others, the European Parliament and the European Ombudsman;
 - applying lessons learned (through Frontex) regarding the functioning of complaints procedures when developing the complaints procedure within the EU Agency for Asylum (Article 48a EUAA Regulation).

Independent monitoring plays a crucial role in effective legal protection. Consequently, it is crucial that monitoring can actually take place where the problems occur. In addition, the monitoring process must be such that the findings of the monitors are also actually followed up on through concrete measures.

Recommendation 6: Strengthen independent monitoring of the execution of EU external border management

- a. Support existing monitoring and investigation of reported abuses in the implementation of EU legislation and regulations at the EU's external borders.
- b. Work in an EU context on removing practical obstacles to effective monitoring, such as limitations in terms of access to locations and source information.
- c. Include criteria proposed by experts for the monitoring system in Article 7 of the proposed Regulation on the pre-screening procedure (see Section 3.4).
- d. Broaden the monitoring mandate under the pre-screening regulation to include both border procedures and *border surveillance* situations prior to pre-screening.
- e. Impose sanctions on Member States which fail to conduct (follow-up) investigations into reported misconduct in the implementation of EU legislation and regulations.

¹ UNHCR, www.unhcr.org/nl/2021/11/noodhulp-asielzoekers-migranten-grens-wit-rusland-polen/, 16 November 2021; S, Carrera, *Walling of Responsibility? The Pushbacks at the EU's external borders with Belarus*, CEPS Policy Insights 2021-18, 25 November 2021.

² See the statements of Jonas Grimheden (Frontex Human Rights Officer) in <https://euobserver.com/migration/153666>; Greek Council for Refugees and Oxfam, *Detention as the Default: How Greece and the EU are generalising the administrative detention of migrants*, 16 November 2021. See also the Bellingcat investigation by N. Waters, E. Freudenthal and L. Williams, *Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks*, 23 October 2020; European Parliament LIBE Committee, *Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations. Working document*, 14 July 2021.

³ See, among others, the report by Pointer and Lighthouse: www.pointer.kro-ncrv.nl/gemaskerde-agenten-mishandelen-vluchtelingen-met-europese-steun, 6 October 2021. See also the government response Parliamentary Papers II 5 November 2021.

⁴ See, among others, the report by the Hungarian Helsinki Committee dated 23 April 2019, which can be found at www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf; Commissioner for Human Rights of the Council of Europe, *Report of visit to Hungary from 4 to 8 February 2019*, CommDH(2019)13, 21 May 2019

⁵ See Trouw, 'De EU helpt de Libische kustwacht vluchtelingen te onderscheppen en schendt dus het internationale recht' [EU helps Libyan coast guard intercept refugees, thereby violating international law], dated 29 April 2021. See also Lighthouse Reports, www.lighthousereports.nl/investigations/frontex-in-the-central-mediterranean/

⁶ Such as, for example, around the facilities at the Hungarian border. See Note 4 above.

⁷ ECtHR, *Hirsi Jamaa v. Italy*, no. 27765/09, 23 February 2012.

⁸ ECtHR, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, 13 February 2020.

⁹ See, among others, M. Pichl and D. Schmalz, 'Unlawful may not mean rightsless', 14 February 2020 in <https://verfassungsblog.de/unlawful-may-not-mean-rightsless/>; D. Thym, 'A restrictionist revolution? A counter-intuitive reading of ECtHR's N.D. and N.T.'s judgement on Hot Expulsions', 17 February 2020 in <https://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/>.

¹⁰ See, for example, also the increase in the number of migrants who die when crossing the Channel: <https://www.universiteitleiden.nl/nieuws/2021/11/jorrit-rijpma-over-toename-aantal-bootvluchtelingen-op-het-kanaal>.

¹¹ M. Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable', in: *German Law Journal*, april 2020, no. 21, pp. 532-548.

¹² This is a reference to the focus of the Member States on input outside the EU, such as migration partnerships with other countries and preventing migration by taking measures in, among others, the so-called transit countries.

¹³ See, among others, A. Ott, 'The "Contamination" of EU Law by Informalization?: International Arrangements in EU Migration Law', in <https://verfassungsblog.de/the-contamination-of-eu-law-by-informalization/>, 29 September 2020; N.F. Tan and J. Vedsted-Hansen, *Inventory and Typology of EU arrangements with third countries. Instruments and Actors*, ASILE project, January 2021.

¹⁴ ECRE, *Holding Frontex to Account. ECRE's proposals for strengthening non-judicial mechanisms for scrutiny of Frontex*, policy paper no. 7, May 2021.

¹⁵ In accordance with case law of the Supreme Court, whereby the failure of the Dutch state to comply with its human rights obligations is contrary to the duty of care deriving from Article 6:162 of the Dutch Civil Code, and thereby may (also) constitute a nationally wrongful act.

¹⁶ For an extensive analysis of this subject, including in relation to (cooperation on) migration, see: A. Pijnenburg, *At the Frontiers of State Responsibility. Socio-economic Rights and Cooperation on Migration*, 2021, Chapters 3-6, in particular.

¹⁷ UN Convention on the Law of the Sea (UNCLOS) and the international convention for the safety of life at sea (SOLAS).

¹⁸ The EU is an international organisation, not a state, and therefore does not have 'its own (sovereign) territory'. Article 51 of the Charter states that the scope of the Charter relates to the acts (and omissions) of the EU. Provisions from the Charter can therefore be invoked whenever Union law applies, irrespective of the geographical location: the human rights obligations 'follow' the EU intervention. In more general terms, it is clear from Article 51 that, in all their actions (under their flag), EU institutions, bodies, offices and agencies are fully bound by the Charter, as are Member States whenever they implement Union law.

¹⁹ See International Law Commission, *Draft Articles on State Responsibility*, Official Records of the General Assembly, Fifth-sixth Session (A/56/10); Resolution 66/100 of the United Nations General Assembly (8 December 2011), Responsibility of international organisations, UN Doc A/Res/66/100.

²⁰ ECtHR, *Soering v. United Kingdom*, no. 14/038/88, 7 July 1989.

²¹ See, for example, ECtHR, *Salah-Sheekh v. the Netherlands*, no. 1948/04, 11 January 2007; ABRVS, 3 November 2021, ECLI:NL:RVS:2021:2440.

²² ECtHR, *Hirsi Jamaa*, see supra note 7; Supreme Court, *Stichting Mothers of Screbrenica v. the Dutch State*, 19 July 2019, ECLI:NL:HR:2019:1223.

²³ T. Strik and A. Terlouw, 'Territorialiteit en vluchtelingenrecht: verantwoordelijkheid nemen, afschuiven of delen?' [Territoriality and refugee law: taking, shifting or sharing responsibility?] in: *De grenzen voorbij. De actualiteit van territorialiteit en jurisdictie, [Beyond borders. The topicality of territoriality and jurisdiction]*, NJV 2019, pp. 149-150.

²⁴ See, for example, V. Moreno-Lax, 'Unpacking Contactless Control: The Architecture of Functional Jurisdiction,' In: *German Law Journal*, no 21-3, 2020, pp. 385-416; A. Pijnenburg, *At the Frontiers of State Responsibility. Social-Economic Rights and Cooperation on Migration*, 2021; M. den Heijer, *Europe and extra-territorial asylum*, 2011.

²⁵ T. Gammeltoft-Hansen and J. Hathaway, 'Non-refoulement in a world of cooperative deterrence,' in *Columbian Journal of Transnational Law*, 53-2, 2015, p. 266 et seq.

²⁶ V. Moreno-Lax, see supra note 24.

²⁷ See also in this regard Advisory Committee on Public International Law (CAVV), *Advisory report on the draft conclusions of the International Law Commission on preemptory norms of general international law*, no 37, 27 July 2020.

²⁸ ECtHR, *S.S. and Others v. Italy*, no. 21660/18 (pending).

²⁹ Exploring this in detail would go beyond the purpose of this advisory report and, moreover, this doctrine has not yet been developed into applicable law. For more information, see A. Nollkaemper and D. Jacobs, 'Shared responsibility in international law: a conceptual framework,' in: *Michigan Journal of International Law*, no 34, 2012-2013, p. 359 et seq.; A. Nollkaemper and I. Plakokefalos (ed.), *The practice of shared responsibility in international law*, 2017.

³⁰ Given the formulation of the provisions, the DARIO articles (Draft Articles on the Responsibility of International Organizations) relate to obligations of international organisations in respect of other international organisations or states, rather than vis-à-vis the rights of individuals.

³¹ Moreover, this was used by the Court of Justice in the case relating to the legitimacy of the EU-Turkey Statement as an argument for the decision of inadmissibility: the Joint Statement was an agreement between the Member States and Turkey, not an EU agreement. European Court of Justice, cases T-192/16 *NF v. European Council* T-193/16 *NG v. European Council* and T-257/16 *NM v. European Council*, 28 February 2017.

³² See Article 64 DARIO (lex specialis). Examples are agreements in *status agreements* with other countries (218 TFEU), or Articles 84 and 85 of the Frontex Regulation, which contain provisions relating to national civil and criminal liability for damage caused by team members of the permanent EU coast and border guard during an operation in a receiving state.

³³ See also Supreme Court, *Nuhanovic v. The Netherlands*, 6 September 2013, ECLI:NL:HR:2013:BZ9225.

³⁴ CAVV, *Advisory Report on Responsibility of International Organisations*, no. 27, December 2015, pp. 15-16, 19.

³⁵ See in this regard, among others, C. Ryngaert, 'Member State Responsibility and International Organizations', *International Organizations Law Review*, no. 1, 2015; I.F. Dekker and R.A. Wessel, 'Identities of States in International Organizations' in *International Organizations Law Review*, no. 1, 2015.; and C. Brölmann, 'Member States and International Legal Responsibility: Developments of the Institutional Veil', in *International Organizations Law Review*, no. 1, 2015.

³⁶ Parliamentary Papers II, 27062 no. 111, 7 May 2020.

³⁷ While the Frontex Regulation does state that the agency and the Member States must comply with Union law, including the rights and standards which form part of the *acquis*, when cooperating with countries outside the EU, even if this cooperation takes place in the territory of that country, the question remains as to how this works in practice if the third country has authority: who can individual victims turn to in that case? See Article 71 (3) of the EU Border and Coast Guard Regulation 2019/1896, 13 November 2019.

³⁸ It is even more difficult if the country concerned is not a member of the Council of Europe and the ECHR is therefore not applicable, either. This significantly limits the options for invoking obligations before a court, and, as a result, the effectiveness of legal protection.

³⁹ Supra note 31, para. 73.

⁴⁰ ICJ, *Corfu Channel v. United Kingdom/Albania*, 9 April 1949; T. Strik and A. Terlouw, supra note 23, p. 142.

⁴¹ See, for example, ECtHR, *Opuz v. Turkey*, no. 33401/02, 9 juni 2009, para. 159.

⁴² See, for example, Parliamentary Papers II, 2020-2021, 19637 no. 699, dated 2 July 2021.

⁴³ ECRE, *Legal Note 11: Extraordinary Responses: Legislative Changes in Lithuania*, 3 September 2021; Commentary of the Polish Helsinki Committee on Polish legislation, which can be found at <https://www.hfhr.pl/en/the-draft-amendment-of-the-act-on-foreigners-and-the-act-on-granting-them-protection-violate-eu-asylum-law-principles-legal-opinion-of-the-hfhr/>; UNHCR, *Observations on the Order of the Cabinet of Minister of the Republic of Latvia on the Declaration of Emergency Situation (no 518)*, 13 October 2021; S. Carrera, *Walling off Responsibility? The Pushbacks at the EU's External Borders with Belarus*, CEPS Policy Insights 2021-18, 25 November 2021, Section 3.

⁴⁴ It is clear from Articles 52 (3) and 53 of the Charter that the human rights obligations under Union law offer at least the same protection as the ECHR. When interpreting and applying Article 47 of the Charter, the case law relating to Article 6 of the ECHR is therefore taken into account.

⁴⁵ This is in line with the case law of the ECtHR, which indicates that effectiveness depends primarily on composition, mandate and powers.

⁴⁶ The Court of Justice also expressed its opinion on criteria for 'effective review' in the case of *La Quadrature du Net* (CJEU, no. C-511/18, 8 October 2020): The Court stated herein that there must be access to assessment of the acts or omissions of law enforcement authorities by a (quasi) judicial body which meets the requirements for effective legal protection under Article 47 of the EU Charter of Fundamental Rights.

⁴⁷ The EU is an international organisation, has its own legal personality and is subject to its own international obligations, including the respect for and guaranteeing of human rights.

⁴⁸ See supra note 34.

⁴⁹ A. Prechal, 'Het beginsel van effectieve rechtsbescherming in het Europese migratierecht,' [The principle of effective legal protection in European migration law] in: *A&MR*, 2020-9, pp. 436-443.

⁵⁰ For more information on an attempt to do this, see: O. Shatz and J. Branco, *Communication to the Office of the Prosecutor of the International Criminal Court: EU Migration Policies in the Central Mediterranean and Libya (2014-2019)*, 2019.

⁵¹ For the background to the gradual commitment of the EU to comply with human rights, see: M. Kuijjer, 'Toetreding van de Europese Unie tot het EVRM. Het verjaardagscadeau voor het 60-jarige EVRM of een vreemde gast op het partijtje? [Accession of the European Union to the ECHR. 60th birthday present for the ECHR or an unwelcome guest at the party?],' in: *NJCM-Bulletin*, volume 35, no. 7, 2010.

⁵² Cf. ECtHR, *Bosphorus v. Ireland*, no. 45036/98, 30 June 2006.

⁵³ Article 268 TFEU: 'The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340'. Article 340, paragraph 2, TFEU: 'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

⁵⁴ M. Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable', in: *German Law Journal*, april 2020, no. 21, pp. 532-548.

⁵⁵ www.prakkendoliveira.nl/nl/nieuws/2021/eu-agentschap-frontex-voor-illegale-pushbacks-aangeklaagd, 20 oktober 2021.

⁵⁶ See supra note 34.

⁵⁷ Supreme Court, *Stichting Mothers of Srebrenica v. the Dutch State*, 19 July 2019, ECLI:NL:HR:2019:1223; Supreme Court, *Urgenda v. the Dutch State*, 20 December 2019, ECLI:NL:HR:2019:2006. See also the judgement in the case against Shell, dated 26 May 2021, ECLI:NL:RBDHA:2021:5337

⁵⁸ See in this regard, among others, FRA, *Migration: Fundamental Rights Issues at Land Border*, December 2020, Section 4.2; T. Strik, 'Fundamental rights as the cornerstone of Schengen', *European Journal of Migration and Law*, no 23-2021, pp. 508-534.

⁵⁹ S. Carrera and M. Stefan, 'Human rights complaints at international borders or during expulsion procedures', in S. Carrera and M. Stefan (ed.), *Fundamental Rights Challenges in border controls and expulsion of irregular immigrants in the EU. Complaints Mechanisms and Access to Justice*, 2020, p. 261.

⁶⁰ See also CJEU, *H.N.* C-604/12, 8 May 2014, Section 50.

⁶¹ CJEU, *Khaled Boudjlida*, C-249/13, 11 December 2014, Section 32.

⁶² Article 111 (2) Frontex Regulation: 'Any person who is directly affected by the actions or failure to act on the part of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation, return intervention or an operational activity of the Agency in a third country, and who considers herself/himself to have been the subject of a breach of her/his fundamental rights due to those actions or that failure to act, or any party representing such a person, may submit a complaint in writing to the Agency.'

⁶³ For an extensive analysis in this regard, see ECRE, Note 15 above p. 12 et seq. See also European Parliament, LIBE Committee, *Final Mission Report following the LIBE Mission to the European Border and Coast Guard Agency (Frontex) in Warsaw, Poland (24-25 February 2020)*, 2020.; European Ombudsman, *Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives*, 2021; FRA, *The revised European Border and Coast Guard Regulation and its fundamental rights implications: Opinion of the European Union Agency for Fundamental Rights*, 2018.

⁶⁴ For examples of concrete recommendations, see LIBE Committee European Parliament, *Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations. Working document*, 14 July 2021; Frontex Management Board working group: *Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea*, Final Report of the Frontex Management Board Working Group, 1 March 2021; European

Ombudsman, *Decision in OI/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer*, 15 June 2021; ECRE, *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard COM(2018) 631 final*, 2018.

⁶⁵ Frontex, *Management Board Updates: Conclusions of the Management Board's meeting on 5 March on the report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea*, 5 March 2021. See also the recommendations of ECRE, see *supra* note 14.

⁶⁶ European Ombudsman, *supra* note 63.

⁶⁷ The Advisory Committee points to the argument that an adequate complaints procedure could also fall within the scope of Article 47 (effective legal remedy), see CJEU in *Zakaria* (CJEU, *Mohamed Zakaria*, C-23/12, 17 January 2013, Section 40.

⁶⁸ See, among others, Meijers Committee, *Frontex and pushbacks: obligations and accountability*, CM2105, April 2021, Section 4; E. Guild; 'The Frontex Pushback Controversy. What oversight for Frontex (part I)', 19 April 2021, www.eumigrationlawblog.eu. For example, among others, cases on the *rendition schemes* which the US used in European countries to interrogate terrorist suspects emphasised the importance of *on-site fact finding* and monitoring. See, for example, ECtHR, *El-Mashi v. Macedonia*, no. 39630/09, 13 December 2021; ECtHR, *Nasr and Ghali v. Italy*, no. 44883/09, 23 February 2016; ECtHR, *Al Nashiri v. Romania*, no. 33234/12, 31 May 2018.

⁶⁹ COM(2020) 612 final, 23 September 2020.

⁷⁰ ACVZ, *Na woorden nu daden. Policy brief over EU Pact Migratie en Asiel* [After words, now deeds. Policy brief on EU Pact on Migration and Asylum], 9 November 2020; R. Lannaue, 'The Commission's Proposal for a new Independent Monitoring Mechanism at the external border of the EU: a necessary but limited mechanism', 22 February 2021, www.eumigrationlawblog.eu.

⁷¹ See the comments on the proposal concerning the monitoring mechanism under the screening regulation: OHCHR and UNHCR, *Note on Joint Consultation on Independent National Monitoring Mechanisms proposed in the EU Pact on Migration and Asylum*, 23 February 2021; FRA reports, see Note 149 above. ECRE et al *Joint NGO statement: Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability*, 10 November 2020,

⁷² F.G. Morales, Special Rapporteur on the human rights of migrants, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, A/HCR/47/30, 12 May 2021, Section 38.

⁷³ See in this regard also the speech of European Commissioner Johansson from 20 October 2021 at www.ec.europa.eu/commission/commissioners/2019-2024/johansson/accouncements/commissioner-johanssons-speech-plenary-debate-pushbacks-eu-external-border and the statement of the Commissioner for Human Rights of the Council of Europe: 'European states must stand up against pushbacks and the attempt to legalise them' from 21 October 2021.

⁷⁴ ACVZ, *supra* note 70; AIV (Advisory Council on International Affairs), *European Asylum Policy. Two Major Accords to Break the Impasse*, 1 December 2020.

⁷⁵ This mechanism is designed to check the extent to which the Member States are correctly applying the Schengen rules and to increase trust between Member States, and as an assessment framework for EU members states which are not (yet) part of Schengen. It was reviewed by the European Commission in 2020 (COM(2020) 799, 25 November 2020), and a new proposal was then put forward (COM2021) 278, 2 July 2021.

⁷⁶ Netherlands Institute for Human Rights in conjunction with the Meijers Committee, *Human Act or Devil's Pact? Human rights aspects of migration agreements between EU and third countries*, 18 May 2017.

Appendix: