The EU's Neo-Refoulement Instruments and Rule of Law Problems: The EU Accession to the ECHR as a Solution?

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List of Abbreviations

AA = Accession Agreement between the EU and the Council of Europe

AG = Advocate General

AFSJ = Area of Freedom, Security, and Justice

ARIO = Articles on the Responsibility of International Organization

ARSIWA = Articles on the Responsibility of States for Internationally Wrongful Acts

CFREU = Charter of Fundamental Rights of the European Union

CEAS = Common European Asylum System

CDDH = Steering Committee for Human Rights

CJEU = Court of Justice of the European Union

CSDP = Common Security and Defense Policy

CFSP = Common Foreign and Security Policy

DAA = Draft Accession Agreement of 2013 between the EU and the Council of Europe

EBCG = European Border and Coast Guard

EEC = European Economic Community

ECHR = European Convention on Human Rights

ECtHR = European Court of Human Rights

EUBAM = European Union Border Assistance Mission

GC = General Court of the European Union

ICCPR = International Covenant on Civil and Political Rights

ILC = International Law Commission

NATO = North Atlantic Treaty Organisation

OHCHR = Office of the United Nations High Commissioner for Human Rights

OLAF = European Anti-Fraud Office

SAR = International Convention on Maritime Search and Rescue

SOLAS = International Convention for the Safety of Life at Sea

STC = Safe Third Country

TEU = Treaty on the European Union

TFEU = Treaty on the Functioning of the European Union

UNCLOS = United Nations Convention on the Law of the Sea

UNHCR = United Nations High Commissioner for Refugees

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1. Introduction

The number of asylum applications in the EU has risen significantly since the outbreak of the conflict in Syria in 2011.[1] In 2015, well over 1 million refugees applied for asylum in the EU.[2] Compared to the year before, that number had more than doubled. These applications for asylum were not evenly distributed over the member states. Border states such as Italy, Greece, and Hungary experienced the steepest increase of asylum applications in their countries.[3] Soon the system and resources proved to be inadequate to accommodate this increase.[4] NGOs such as Human Rights Watch and Amnesty International documented the disgraceful conditions the refugees had to face once they entered European territory.[5] From highly limited access to toilets, showers, and food in Greece, to refusal of medical attention and criminal detention in overcrowded hangars in Hungary, basic human rights could no longer be guaranteed. The seriousness of the issues were even further highlighted by the high death toll on the Mediterranean Sea. Between January and August 2015, more than 2000 people hoping to make it to Europe perished on the Mediterranean Sea.[6] Evidently, the EU needed to act, considering its commitment to human rights as evidenced by the Charter. However, almost a decade later the Mediterranean Sea has become the deadliest border in the world.[7] Over 25,000 migrants have died or have disappeared on their journey to Europe since

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[1] J Mitchell, 'The Dublin Regulation and Systemic Flaws' (2017) 18 San Diego International Law Journal 295

[2] See Eurostat, 'First Time Asylum Applicants (Non-EU Citizens), EU, 2008-2022' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844#:~:text=Highlights&text=In%202022%2C%20881%20220%20first,by%2064%25%20compared%20with%202021.&text=The%20number%20of%20first%2Dtime,to%20the%20war%20in%20Syria.> (accessed 28 March 2023)

[3] Mitchell (n 1)

[4] ibid

[5] See eg Human Rights Watch, 'Serbia: Police Abusing Migrants, Asylum Seekers' (15 April 2015) <https://www.hrw.org/news/2015/04/15/serbia-police-abusing-migrants-asylum-seekers> accessed 28 March 2023; Human Rights Watch, 'Hungary: Abysmal Conditions in Border Detention' (11 September 2015) <https://www.hrw.org/news/2015/09/11/hungary-abysmal-conditions-border-detention> accessed 28 March 2023; Amnesty International, 'Greece: Humanitarian Crisis Mounts as Refugee Support System Pushed to Breaking Point' (25 June 2015) <https://www.amnesty.org/en/latest/news/2015/06/greece-humanitarian-crisis-mounts-as-refugee-support-system-pushed-to-breaking-point/> accessed 28 March 2023

[6] International Organization for Migration, 'Deadly Milestone as Mediterranean Migrant Deaths Pass 2,000' (4 August 2015) <https://www.iom.int/news/deadly-milestone-mediterranean-migrant-deaths-pass-2000> (accessed 28 March 2023)

[7] International Organization for Migration, '50,000 Lives Lost during Migration: Analysis of Missing Migrants Project Data 2014–2022' (23 November 2022) <https://missingmigrants.iom.int/sites/g/files/tmzbdl601/files/publication/file/2022%2050k%20deaths.pdf> (accessed 6 March 2023)

2014.[8] Human rights violations have become commonplace. How is it possible that this continues to happen at the border of a legal order that respects and is bound by the rule of law? This introductory chapter demonstrates that this is the logical consequence of the EU's migration policy, which is focused on 'neo-refoulement', as it developed during the migration 'crisis'. It describes the political process in which this policy was formed and identifies three shifts taking place during that time, resulting in the use of three neo-refoulement instruments. After this introductory section, the main research question is formulated, as well as sub-questions.

1.1. The EU Response to the Migration 'Crisis'

Before exploring how the EU reacted to the migration 'crisis' it is first important to establish the context in which they had to act. In this regard it is also important to note that the term migration 'crisis' is disputed.[9] The migratory inflow in 2015 can neither be called unexpected[10] nor unprecedented.[11] After the collapse of Yugoslavia and the subsequent civil wars the EU also experienced a high number of refugees seeking to enter the EU. The response in that situation was the Temporary Protection Directive, which was adopted in 2001, and which primary purpose was to establish

> minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.[12]

This Directive can be triggered by a Council Decision, which was done for the first time with regards to refugees from Ukraine, after Russia's invasion in 2022.[13] The Temporary Protection Directive was thus never triggered in response to the inflow of Syrian and other non-European refugees in 2015 and the years after. This showcases that the migration 'crisis'

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[8] ibid

[9] See N Idriz, 'The EU–Turkey Statement or the "Refugee Deal": The Extra-legal Deal of Extraordinary Times?' in D Siegel and V Nagy (eds) *The Migration Crisis? Criminalization, Security and Survival* (Eleven International Publishing 2018) 61

[10] See S Sassen, 'A Massive Loss of Habitat: New Drives for Migration' (2016) 2(2) Sociology of Development 204

[11] Idriz (n 9)

[12] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7, art. 1

[13] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection

was first and foremost a consequence of the lack of political will, which eventually resulted in a human rights crisis.[14]

So how did the EU respond instead? Van Middelaar analysed the situation by comparing the stream of migrants approaching Europe to a flood.[15] This analogy can be criticised due to the fact that, as described before, the migratory inflow was neither unexpected[16] nor unprecedented[17]. Besides, framing it as such distracts from the fact that this migratory inflow consists of humans, who are entitled to a wide range of rights. Still, it might reflect how (some of) the Member States of the EU viewed the situation. Van Middelaar notes that there were three theoretical possibilities to control this 'flood'.[18] Firstly, the EU could try to resolve the issue at the source. In other words, to resolve the issues that cause migrants to leave their homes. Secondly, the EU could 'build a dam' to prevent the migrants from entering. Thirdly, the EU could choose for irrigation, to redirect the incoming stream in a controlled manner. The first option was mostly disregarded, so a choice had to be made whether the second or the third option would become the dominant response.[19] Here, simply put, there was a divide between the supranational Union institutions and the governments. The former, supported by Germany, advocated for the third option: redistributing the migrants across Europe through compulsory asylum quota by using the existing channels. This would require a great share of solidarity. The governments, conversely, argued for better defensive border politics. After difficult political negotiations the compulsory quotas were introduced and the supranational institutions seemed to have won the battle.[20] This, however, was not done on the basis of unanimity, but on the basis of a qualified majority, which was only possible in the CEAS since the Lisbon Treaty. Yet, it was unusual to proceed to a vote on such a delicate topic and the Czech Republic, Slovakia, Hungary and Romania voted against, some of them already indicating that they were not going to comply with the made agreements.[21] Yet, the rules were made. According to van Middelaar, this tendency to solve problems with what he calls rules-politics is typical for the Union. He contrasts this with events-politics, which is characterised by improvised decision-making to get a grip on an

[14] Idriz (n 9)
[15] L van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Agenda Publishing 2019) 95
[16] See Sassen (n 10)
[17] See Idriz (n 9)
[18] Van Middelaar (n 15)
[19] ibid
[20] See Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece
[21] van Middelaar (n 15)

unforeseen event.[22] The introduction of the quota was a disaster, only a few hundred migrants were redistributed. The issue was thus far from solved.

Therefore, the Union started to make work of the second possible option: the construction of a strong dam protecting the Union from migrants. The Union employed three main instruments to achieve this, which can be seen as exemplary for the approach of the Union.[23] First, it established 'a European Border and Coast Guard to ensure a strong and shared management of the external borders', which essentially reinforced the already existing agency Frontex.[24] Second, the Union increasingly started to make use of soft law agreements with third countries.[25] The prime example of such an agreement is the EU-Turkey Statement. This can also be seen as 'reverse Lisbonisation', as it is a step back to pure intergovernmentalism rather than a unified use of 'the Union method', which refers to supranational decision-making through the ordinary legislative procedure.[26] Third, the Union started using CSDP-based migration control missions.[27] The choice for these policies rather than for an internal solution, such as triggering the Temporary Protection Directive, reflect three shifts. First, whereas triggering the Temporary Protection Directive or quote would reflect a more rights-based approach, the policies the Union chose are clearly security-focused. Rather than a human rights issue, migration became a security issue, in which human rights 'are largely disclaimed'.[28] Second, as van Middelaar noted, the Union's approach shifted from rules-politics to event-politics with a stronger role for executive

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[22] ibid 100

[23] A Bendiek and R Bossong, 'Shifting Boundaries of the EU's Foreign and Security Policy: A Challenge to the Rule of Law' (2019) SWP Research Paper 12

[24] European Commission, 'A European Border and Coast Guard to Protect Europe's External Borders' (Press Release, 15 December 2015) <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6327> (accessed 30 March 2023)

[25] J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: a Challenge to Democratic and Judicial Controls in the EU' in S Carrera, J Santos Vara, and T 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) 21

[26] S Carrera, L den Hertog, and M Stefan, 'The EU-Turkey Deal: Reversing "Lisbonisation" in EU Migration and Asylum Policies' in S Carrera, JS Vara, and T 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

[27] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) <http://data.europa.eu/eli/dec/2015/778/oj> accessed 14 April 2023.

[28] V Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-Through-Interdiction/Rescue-Without-Protection" Paradigm' (2018) 56(1) Journal of Common Market Studies 119; See also A Gomez Arana and S McArdle, 'The EU and the Migration Crisis: Reinforcing a Security-Based Approach to Migration?' in S Carrera, JS Vara, and T 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) 272

power.[29] Third, whereas a choice for an internal solution would have required policies within the internal dimension of migration, the choice of defensive border politics required a shift to the external dimension.

This clearly reflects the implicit aim of the Union's migration policy: *neo-refoulement*. Neo-refoulement is a concept developed by Hyndman and Mountz that refers to 'a geographically based strategy of preventing the possibility of asylum through a new form of forced return different from non-refoulement'.[30] Whereas refoulement is clearly prohibited in both international and European law, the security-based strategy of neo-refoulement makes use of the presumption that non-refoulement obligations only arise in case migrants are on your territory or, since the *Al-Skeini* and the *Hirsi* judgement, under your effective control. Therefore, EU strategies are now centred around the 'legal or extra-legal return of asylum seekers and other migrants to transit countries or regions of origin *before* they reach the sovereign territory in which they could make a claim'.[31] Kochenov and Ganty point out that the Union uses these 'legal techniques' to ensure 'that the whole spectrum of denying non-citizens rights - from dignity to the right to life - is never presented as a violation of EU law'.[32]

1.2. Rule of Law Approach

The Union employs these strategies to exploit inadequacies in its human rights protection system and this way side-steps human rights obligations vis-a-vis migrants. As this thesis will demonstrate, however, the used neo-refoulement strategies often violate both European and international human rights law. Although asylum and migration policy is typically examined from a human rights perspective, Tsourdi decided to approach the issues through a rule of law lens due to the systemic nature of the violations in the EU.[33] She motivated her choice for a rule of law approach with two reasons. First, she wanted to ascertain whether the fundamental rights failings at national level were linked to a lack of resources or insufficient institutional capacity at administrative or judicial levels. Second, she wanted to examine whether the failings should be considered to be an element of the rule of

[29] van Middelaar (n 15)
[30] J Hyndman and A Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) Government and Opposition 248, 250
[31] ibid
[32] D Kochenov and S Ganty, 'EU Lawlessness Law: Europe's Passport Apartheid From Indifference To Torture and Killing' (2023) Jean Monnet Working Paper No 2/2022 (NYU Law School) 1
[33] Tsourdi E, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) 17 European Constitutional Law Review 471

law backsliding occurring in some member states. Exploring in particular the internal dimension of asylum and migration policy, she concluded that it should indeed be seen as 'one of the many faces of "rule of law backsliding"'.[34] This conclusion reveals that mere policy-specific responses to these issues will not result in the required improvements. Instead, more systemic, institutional solutions are necessary to ensure human rights are complied with.

That is precisely the value of using a rule of law lens to examine migration and asylum policy. Understanding something to be a rule of law issue, reveals that the problem is more systemic and cannot be solved by mere policy-specific responses. It requires a deeper institutional analysis and solution. The two reasons Tsourdi gave for her choice to use a rule of law perspective cannot be immediately translated to the context of the EU itself, as it seems unlikely the EU suffers from a weak institutional capacity and few would argue that the EU itself suffers from rule of law backsliding. However, the rule of law approach can nevertheless be beneficial to reveal the bigger systemic issues of the EU's institutional set-up that form part of the problem of human rights failings in asylum and migration policy.

The external dimension of the EU's migration policy has been repeatedly criticised from a rule of law perspective as well.[35] This rule of law criticism is broad and ranges from arguments that the EU bypasses judicial scrutiny and democratic scrutiny,[36] arguments about the lack of effective accountability mechanisms,[37] to arguments about the lack of transparency in the external dimension of migration.[38] These criticisms partly arise out of the current institutional set-up in which the CJEU is often excluded from exercising jurisdiction, albeit sometimes due to its own restrictive rulings.[39] Resolving this issue might arguably require Treaty change, which is currently highly unlikely.[40] Yet, finding a solution for these

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[34] ibid 496

[35] See eg S Carrera, J Santos Vara, and T Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis : Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019); Bendiek and Bossong (n 23); C Molinari, 'The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) 44 European Law Review 824

[36] Santos Vara (n 25); V Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in in S Carrera, J Santos Vara, and T 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) 290

[37] Bendiek and Bossong (n 23)

[38] M Gatti, 'The Right to Transparency in the External Dimension of the EU Migration Policy: Past and Future Secrets' in E Kassoti and N Idriz (eds) *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (TMC Asser Press 2022) 97

[39] See more in Chapter 4

[40] See A Lazowski and R Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16(1) German Law Journal 179

rule of law issues is of paramount importance as the rule of law is a foundational value of the EU, and more importantly, the rule of law is supposed to control power through law.[41] However, the current institutional set-up seems to allow for uncontrolled exercise of power and thus challenges the rule of law, as the literature has pointed out.[42] Considering change in this institutional set-up is unlikely, it is necessary to look elsewhere for a solution.

1.3. EU Accession to the ECHR as a Solution?

In this light, De Coninck points out that in the discussion on some rule of law issues arising out of the EU's asylum and migration policy one potential solution is sometimes overlooked: the EU accession to the ECHR.[43] The EU is currently not integrated in the international human rights system, as it has not acceded to the ECHR yet.[44] Consequently, there is no external accountability mechanism, as is the case for European states through the ECtHR, even though the EU exercises 'legal authority comparable to state authority'.[45] For the Member States of the EU, the ECtHR already functions as an external safeguard of the rule of law as it can indirectly safeguard rule of law elements. It has thus become a 'cornerstone' of the rule of law in Europe.[46] It has also been called an 'international watchdog regarding grave human rights violations and massive breakdowns in the rule of law'.[47] In this light, the EU accession to the ECHR could thus be an interesting solution for rule of law issues that arise out of the external dimension of the EU's migration and asylum policy. As the ECtHR for the Member States already functions as the 'cornerstone' of the rule of law in Europe, it could be expected it will also become this for the EU. This way it could potentially take away at least some of the rule of law concerns. This solution is particularly attractive due to the fact that the new accession agreement has been finished in large part and might finally happen soon.

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[41] G Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press 2013) 19

[42] See note 35

[43] J de Coninck, 'Incongruity in Accountability: Contesting EU De Facto Impunity for International Human Rights Violations in the Field of Asylum and Migration: the EU-Turkey Statement' (2017) Jean Monnet Working Papers Paper 03/2017 <https://lib.ugent.be/en/catalog/pug01:8546814> accessed 28 June 2023

[44] See G de Búrca, 'The Road not Taken: The European Union as a Global Human Rights Actor' (2011) 105(4) American Journal of International Law 659

[45] S Taekema, 'The Procedural Rule of Law: Examining Waldron's Argument on Dignity and Agency' (2013) 21 Annual Review of Law and Ethics 133, 143

[46] Y Haeck and C Burbano Herrera, *Procederen voor het Europees Hof voor de Rechten van de Mens* (Intersentia Publishers 2011) vii (own translation)

[47] S Greer and L Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12(4) Human Rights Law Review 655, 677

EU accession to the ECHR is not a new idea. De Búrca writes that the European Political Community Treaty of 1952 had envisioned to fully integrate the Community in the international human rights system, but that this Treaty was never adopted due to political unwillingness in France.[48] Still, the intention to integrate the Community in the international human rights system remained intact. In the 90s, the Court of Justice was asked about the possibility of the Community to accede to the Convention. However, in Opinion 2/94, it shot down this attempt, arguing that accession would require a Treaty change.[49] The necessary Treaty change came with the Treaty of Lisbon, which in its new Article 6(2) TEU stipulated the obligation of the Union to accede to the Convention. In 2013, negotiations between the Council of Europe and the EU resulted in a Draft Accession Agreement (DAA).

The CJEU, however, in its seminal and controversial *Opinion 2/13* ruled that the DAA was incompatible with European law.[50] This was a highly controversial and surprising position, considering that all observing member states,[51] AG Kokott (save from some minor modifications),[52] and most academic contributions took the position that the DAA was compatible.[53] The CJEU found ten problems divided into five categories. That is, it saw problems relating to the autonomy of EU law, Article 344 TFEU (dispute settlement between Member States), the co-respondent mechanism, the prior-involvement-mechanism, and the jurisdiction over the CFSP. Many authors have condemned the position of the CJEU,[54] and the opinion seems to be based on 'a concept of the autonomy of EU law that borders on autarky'.[55]

Yet, EU accession to the ECHR remains a legal obligation per Article 6 TEU. After *Opinion 2/13* it took a while for the political institutions of the Union to respond, but in 2013 the Commission, through its Vice-President Timmermans, confirmed accession was still a

[48] De Búrca (n 44)
[49] *Opinion 2/94* (1996) ECLI:EU:C:1996:140
[50] *Opinion 2/13* (2014) ECLI:EU:C:2014:2454
[51] ibid
[52] Opinion of Advocate General Kokott in *Opinion 2/13* [2014] ECLI:EU:C:2014:2475
[53] See for example P Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013); F Korenica, *The EU Accession to the ECHR. Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015)
[54] See for example ibid; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 Fordham International Law Journal 955; B de Witte and Š Imamovic, 'Opinion 2/13 on accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 European Law Review 683
[55] Eeckhout (n 54) 992

priority.[56] After that announcement, a period of noteworthy radio silence followed. Only in 2019, the EU informed the Council of Europe it was ready to resume the negotiation.[57] Subsequently, in November 2019, the Steering Committee for Human Rights (CDDH) proposed to continue the negotiation within an ad hoc group consisting of representatives of then 47 Member States of the Council of Europe and a representative of the EU. In January 2020, this was approved and the CDDH Ad Hoc Negotiation Group ("47+1") resumed the negotiation process in September 2020.[58] Essentially, the negotiation would be structured around the ten issues identified by the CJEU in *Opinion 2/13*. These issues were divided over four 'baskets', namely EU-specific mechanisms of the procedure before the ECtHR (Basket 1), Operation of inter-party applications (Article 33 of the Convention) and of references for an advisory opinion (Protocol No. 16) in relation to EU member states (Basket 2), the principle of mutual trust (Basket 3), and EU acts in the CFSP (Basket 4).[59] Over the following year the negotiation proceeded. After its invasion of Ukraine, the Russian Federation ceased to be a member of the Council of Europe and thus the negotiation group continued in a '46+1 format'.[60]

During the 17th negotiation meeting taking place in February 2023, the ambition to conclude an overall agreement in advance of the Fourth Summit of Council of Europe heads of state and government was first pronounced.[61] This Summit took place on the 16th and 17th of May 2023 in Reykjavik 'to refocus the mission' of the Council of Europe 'in light of new threats to democracy and human rights, and to support Ukraine'.[62] Therefore, the final negotiation meeting took place in late March 2023. During this meeting, the final reservations

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[56] First Vice-President Frans Timmermans, 'Commission Statement: EU Framework for Democracy, Rule of Law and Fundamental Rights' (Speech delivered to the European Parliament, 12 February 2015) <http://europa.eu/rapid/press-release_SPEECH-15-4402_en.htm> accessed 1 May 2023.

[57] See Council of Europe, 'EU Accession to the ECHR'<https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#{%2230166137%22:[0]}> accessed 1 May 2023

[58] Council of Europe and European Commission, 'The EU's accession to the European Convention on Human Rights' (Joint statement on behalf of the Council of Europe and the European Commission, 29 September 2020) <https://www.coe.int/en/web/portal/-/the-eu-s-accession-to-the-european-convention-on-human-rights> accessed 1 May 2023

[59] Council of Europe, 'Paper by the Chair to structure the discussion at the sixth meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights' <https://rm.coe.int/paper-by-the-chair-to-steer-the-discussion-at-the-6th-meeting-47-1-202/1680a06225> accessed 1 May 2023

[60] Council of Europe (n 57)

[61] Council of Europe, Meeting Report of the 17th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights' (46+1(2023)R17, 2 February 2023) <https://rm.coe.int/cddh-46-1-2023-r17-en/1680aa0e8f> accessed 1 May 2023

[62] See Council of Europe, 'Council of Europe Summit, <https://www.coe.int/en/web/portal/fourth-council-of-europe-summit> accessed 1 May 2023

were taken away and agreements under three of the four baskets were finalised.[63] However, no solution was found for the issue under Basket 4: the jurisdiction over CFSP acts.[64] The EU indicated that it would resolve the issue of CFSP jurisdiction internally.[65] As this was not achieved yet, the Group asked the EU to keep them updated because they would not be able to give their final agreement on the proposal before the EU resolved its issue. [66] What shape this internal solution of the EU will take precisely is not yet known. If the EU manages to find a solution, the other parties will need to give their final agreement, after which the accession instrument also still needs to pass the scrutiny of the Parliamentary Assembly, the European Parliament, the ECtHR and the CJEU.

1.4. Research Question and Sub-Questions

After the accession, the ECtHR will be able to externally control the EU, in a similar manner as it controls the Member States. By fulfilling this function, the ECtHR has become an important institutional safeguard for the rule of law for the Member States. It is conceivable that after accession the ECtHR will also be able to become this safeguard vis-a-vis the EU. Considering the rule of law issues arising out of the external dimension of the EU's migration policy, accession could be especially important in that regard. It could potentially form a solution for these rule of law concerns. This thesis thus aims to answer the following research question:

> To what extent can EU accession to the ECHR under the terms of the new accession agreement resolve rule of law issues that arise out of the external dimension of the EU's migration policy?

To be able to answer this question, the following 4 sub-questions are raised:

1. What are the most relevant rule of law elements that accession, under the terms of the new AA, can be expected to contribute to?
2. How do the three neo-refoulement instruments of the EU challenge the rule of law as defined based on subquestion 1?

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[63] Council of Europe, Meeting Report of the 18th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights' (46+1(2023)R18, 17 March 2023) <https://rm.coe.int/meeting-report-18th-meeting/1680aa9807> accessed 1 May 2023
[64] ibid
[65] See Meeting Report 18 (n 63)
[66] ibid

3. What are the current possibilities of the ECtHR to safeguard the rule of law with regard to the three neo-refoulement instruments of the EU and what are the shortcomings of the current situation?
4. What are the implications of EU Accession to the ECHR, under the terms of the new Accession Agreement, on the rule of law with regard to the neo-refoulement instruments of the EU?

This main research question is of social and academic relevance. Research into a solution for rule of law problems in the field of migration and asylum of the EU holds significant social relevance. Currently, a humanitarian emergency is occurring at the Mediterranean Sea, which has become the deadliest border in the world.[67] As this problem has proved to be systemic, this thesis demonstrates how this problem can persist due to rule of law problems. Offering and examining a potential solution to these problems could strengthen the rule of law, and indirectly also human rights protection. Additionally, the research on the implications of accession to the ECHR on the neo-refoulement instruments could be relevant for human rights practitioners. This thesis is also of academic relevance as it combines and links three separate fields of research, namely the external dimension of migration and asylum, the rule of law, and the upcoming accession of the EU to the ECHR. Although those first two research fields are often linked already as mentioned in this introductory chapter, this thesis adds to this research by offering a thorough analysis of rule of law concerns arising out of three migration instruments of the EU. An original approach is the suggestion of the EU accession to the ECHR as a solution for the earlier identified rule of law problems. That remained unstudied so far and thus formed a gap in the knowledge that this thesis hopes to fill.

1.5. Methodology

This thesis conducts doctrinal research to answer the main research questions and the related sub-questions. The basis for the approach used is a specific conceptualization of the concept of the rule of law. This concept is defined and justified in Chapter 2. The basis for the created working definition of the rule of law is sought in EU law, as this study concerns threats to the

[67] International Organization for Migration, '50,000 Lives Lost during Migration: Analysis of Missing Migrants Project Data 2014–2022' (23 November 2022) <https://missingmigrants.iom.int/sites/g/files/tmzbdl601/files/publication/file/2022%2050k%20deaths.pdf> (accessed 6 March 2023)

EU rule of law. To 'find' the definition of EU rule of law, academic literature, case law of the CJEU concerning the rule of law that attracted significant scholarly attention, the Commission Rule of Law Framework, and the Conditionality Regulation are examined. In the determination of the final definition significant weight is given to this Conditionality Regulation as it represents the latest view on the rule of law from the European co-legislators and is *inter alia* inspired by the case law of the CJEU and the Commission Rule of law Framework. However, for the specific purpose of this study a narrower definition is necessary. In this light, it is examined with reference to relevant academic literature on the topic how the ECtHR can serve as a safeguard for the rule of law for Member States. These findings, taken in conjunction with the EU rule of law, form the basis for the specific working definition created for this study.

The analysis in Chapter 2 is based on an examination of the text of the Charter, the case law of the CJEU, accessed through CURIA, and academic literature. As the CJEU is the ultimate interpreter of the Treaties, the case law of the CJEU on the topic of application of the Charter was taken to be decisive for the answer to the subquestion in this Chapter.

The analysis in Chapter 4 is essentially three-fold for all three neo-refoulement instruments. First, the legal framework is discussed by analyzing the relevant EU legislation and academic literature. In case of the proliferation of soft law, the EU-Turkey Statement is examined. As there are not official legal sources, this is done by analyzing the relevant press releases of the Commission and Council and the relevant academic literature. Second, the incongruence between the acts of the EU and the human rights obligation is examined through use of NGO reports, relevant academic literature, and reports of UNHCR. Three, the possibility of the CJEU to offer effective judicial protection and to hold the EU accountable is examined. In the cases of Frontex and soft law, this is done through an analysis of the rulings of the CJEU, accessed through CURIA, on respectively direct actions concerning Frontex and direct actions concerning the EU-Turkey Statement. In case of migration control CSDP Missions, there is no case law, but this absence is explained with reference to the legal architecture of the CFSP in EU primary law.

Chapter 5 analyses the current possibilities of the ECtHR to function as a safeguard for the rule of law. The research material here consist of relevant academic literature, the ARSIWA, as the ECtHR takes inspiration from this authoritative document in determining responsibility for violations, and relevant case law of the ECtHR, which is accessed through HUDOC. As there is no case law of the ECtHR specifically on Frontex or CSDP missions, the analysis is limited to cases that are comparable and drew significant scholarly attention.

In case of the EU-Turkey Statement, the examined case concerned the implementation of this Statement.

Chapter 6 analyses the implications of accession on individual applications directed at the EU concerning the neo-refoulement instruments. This analysis is mostly based on the negotiation documents and meeting reports of the CDDH 46+1 group and the new Accession Agreement.[68] As these documents do not always give conclusive results, older case law of the ECtHR concerning difficult issues of attribution involving international organisations are examined, as are the ARIO, as it might inspire the ECtHR in its future relation to the EU.

Judgements issued after May 2023 are excluded from the research material, and only cases published in English were examined, due to language constraints. One important flaw that has to be mentioned is that the Accession Agreement was not yet complete when this study was conducted. As there was no solution for the issue of CFSP jurisdiction, the exact implications are unknown. Instead, this study briefly and preliminarily examined the effects of two potential solutions: a re-attribution mechanism and an interpretative declaration. In this regard, it is also important to mention an overarching sidenote. Accession is far from concluded. If a solution will be found for the issue of CFSP jurisdiction, the agreement still needs to pass the scrutiny of the CJEU, the ECtHR, the European Parliament and the Parliamentary Assembly. These are considerable obstacles and might again slow-down the accession project further. Nevertheless, this study offers a relevant picture of what could be.

1.6. Overview of Chapters

Each of the sub-questions above will be answered in a separate chapter, which, with this introduction and the conclusion, results in 6 chapters.

Chapter 2, the theoretical framework, aims to provide an answer to the first sub-question. It first explores the contested concept of the rule of law in the context of the EU and identifies a number of elements that surely belong to the concept with reference to theory, case law, and legislative documents. Particular attention is paid to the external dimension in this regard. After these elements are identified, it is necessary to consider how and why accession to the ECHR could in theory strengthen these elements, and which elements could benefit from accession in particular. This is done by first explaining the role of the ECtHR with regard to the Contracting Parties to the Convention, and, second, by a detailed analysis

[68] See Council of Europe (n 57)

of the new Accession Agreement. Taken together, this allows for the adoption of the following working definition of the rule of law, which is specifically tailored for this project.

Chapter 3 discusses whether and how the neo-refoulement instruments affect the rule-of-law-principles of legality and effective judicial protection. It is divided into three sections, each dealing with one of the main instruments: Frontex, Soft law, and CSDP-missions. The working definition of the rule of law as developed in Chapter 2 will guide the discussion in this chapter and forms the basis of the analysis.

Chapter 5 discusses the fourth sub-question, analysing the current possibilities of the ECtHR to safeguard the rule of law with regard to the three neo-refoulement instruments of the EU. In light of the finding of the previous chapter and the working definition of the rule of law, it first explores how access to the ECtHR is obtained. Then it offers an examination of the general approach of the ECtHR to the EU and to cases in which the EU is involved. Subsequently, the scope is narrowed to the three neo-refoulement instruments, analysing whether the ECtHR could safeguard the principle of effective judicial protection and legality.

Chapter 6 addresses the fifth sub-question and examines the implications of accession to the ECHR under the terms of the Accession Agreement on the rule of law, as defined in Chapter 2, with regard to the neo-refoulement instruments of the EU.

Chapter 7 offers the conclusion and reflects on the main research question of this thesis.

2. Theoretical Framework

This chapter develops the theoretical framework necessary to answer the main research question of this thesis: To what extent can accession to the ECHR under the terms of the new accession agreement resolve rule of law issues that arise out of the external dimension of the EU's migration policy? This research question has two important elements that need elaboration in this chapter, namely the rule of law and the accession to the ECHR under the terms of the new Accession Agreement (AA). Importantly, these two elements need to be considered in conjunction with each other for the purposes of this thesis. The rule of law is a broad concept, holding various elements under its 'umbrella', some of which might be more relevant than others in light of the potential implications of the accession to the ECHR. Therefore the sub-question that this chapter answers is: What are the most relevant rule of law elements that accession, under the terms of the new AA, might be expected to contribute to?

To answer this question, it is first necessary to explore what the contested concept of the rule of law means in the context of the EU, also with particular attention to its external dimension. The second section then explains why accession to the ECtHR in theory could safeguard the rule of law with reference to the purpose of the ECtHR with regard to Member States of the Convention. The fourth section examines the precise terms of the new AA in detail. The fifth section contains the conclusion and the answer to the main question of this section.

2.1. The Rule of Law

'Integration through the rule of law is what defines what the European Union stands for', according to Koen Lenaerts in his extrajudicial writing.[69] As one of the foundational values of Article 2 TEU, the principle of the rule of law indeed takes an important place in the EU framework. Not only internally, but also externally the rule of law is of major importance for the Union. The rule of law is both used as a benchmark to assess candidate countries and as a guiding principle in its relations with the global world.[70] Per Article 21, one of the EU's objectives is to develop and consolidate the rule of law in its external affairs.[71] Although disagreements exist about an exact definition of the rule of law, any view on the rule of law

[69] K Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) 21(1) German Law Journal 29
[70] L Pech, 'The Rule of Law as a Guiding Principle of the European Union's External Action' (2012) 3 CLEER Working Paper
[71] ibid

includes 'at least two core elements', namely the control of power, and law.[72] It 'presupposes that governmental power can be exercised and controlled through law'.[73] This is only the core, however, and the rule of law can include more elements, depending on the view and the legal system. How does the EU define the rule of law?

Although the founding EEC Treaty made no explicit reference to the rule of law, the concept itself 'has been implicitly embedded in the legal order of the Community from its inception'.[74] After all, the EEC Treaty explicitly defined the limits of power of the various supranational institutions and indicated that transgressions would be sanctioned, individual rights respected and judicial protection guaranteed.[75] This required an active Court of Justice with a broad mandate to ensure that all this would be observed. It was thus this Court that for the first time made the implicit explicit: in *Les Verts* it ruled that the European Community was a 'community based on the rule of law' in the sense that neither the institutions nor the Member States could avoid judicial review because the Treaty had established 'a complete system of legal remedies and procedures'.[76] With the Treaty of Amsterdam, the rule of law was promoted to a foundational principle that was common to all Member States and received an important place in the Treaties.[77] Finally then with the Treaty of Lisbon, the rule of law received another promotion: from a foundational principle to a foundational value.

Notwithstanding this promotion, a definition was omitted.[78] A choice that is understandable, considering that most national constitutions also do not define the concept of the rule of law, and leave it to national courts to precisely determine the meaning and scope of the rule of law.[79] Whereas this might already be a difficult task for national courts, it is especially difficult for a supranational court which needs to take each different tradition into account and find the proverbial golden mean. After all, within the legal system of the EU, the rule of law cannot just be a legal philosophical concept with no clear meaning, but has to be a legally binding and enforceable constitutional principle.[80] Yet, this is not an easy task

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[72] Lautenbach (n 41) 19
[73] ibid 19
[74] A Magen and L Pech, 'The Rule of Law and the European Union' in C May and A Winchester (eds) *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 235, 237
[75] ibid
[76] C-294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECLI:EU:C:1986:166 para 23
[77] Article 6(1) TEU, as amended by the Treaty of Amsterdam [1997]
[78] A Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) 54(5) Journal of Common Market Studies 1050
[79] L Pech, 'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 European Constitutional Law Review 359
[80] L Pech and D Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgements since the Portuguese Judges Case' (2021) Sieps Report

considering the many different theoretical conceptions[81] and the fact that the Venice Commission[82] identified at least three rule of law traditions in Europe.[83]

Over time, the meaning and scope of the rule of law in the EU context became more and more clear and delineated due to the efforts of various EU institutions.[84] Although there also exist more formal or thin conceptions of the rule of law, which conceive the rule of law to be about the process in which law is made and applied, without regard for substantive content of the law,[85] it is crystal clear that a thin understanding of the rule of law is not in line with the spirit of Article 2 TEU.[86] The fact that it is a foundational *value* already reveals a normative component. Although legally it might mean the same as principle,[87] semantically it carries a stronger normative connotation with it. That normative aspect fits a substantive conception better than a highly formal one. This substantive conception builds on the procedural elements of the formal conception, but emphasises the substantive content of the law, which needs to meet certain elements of political morality.[88] In the most common substantive rule of law conception, these elements are met by establishing individual rights that reflect the 'values which underpin the rule of law'.[89]

The Commission started to develop a more clear definition of the rule of law in the shape of its Rule of Law framework, in response to rule of law backsliding in some Member States.[90] Without a clear definition or framework, it was hard for the Commission to enforce compliance with the rule of law in these Member States.[91] The Rule of Law framework was intended to better monitor and address rule of law challenges, and in order to do so the

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[81] See eg B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004); J Beatson, 'Formal and Substantive Conceptions of the Rule of Law' in *Key Ideas in Law: The Rule of Law and the Separation of Powers,* (Hart Publishing 2021) 17; P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in R Bellamy (ed) *The Rule of Law and the Separation of Powers* (Routledge 2005) 95

[82] The Venice Commission is an advisory body of the Council of Europe and although there work is in no way legally binding it exerts normative influence as it s recommendations and reports are widely used by states and international organisations

[83] Venice Commission, 'Report on the Rule of Law' (Venice, 25-26 March 2011)', 86th plenary session; The traditions are the *rule of law* in the British tradition, *état de droit,* and *rechtsstaat*..

[84] L Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 Hague Journal on the Rule of Law 107

[85] Beatson (n 81)

[86] Magen (n 78)

[87] Pech (n 79); Tsourdi (n 33)

[88] Tamanaha (n 81)

[89] M Foran, 'The Rule of Good Law: Form, Substance and Fundamental Rights' (2019) 78(3) The Cambridge Law Journal 570, 571

[90] European Commission, 'A New EU Framework to Strengthen the Rule of Law' (Communication) COM (2014) 158 final

[91] Pech (n 79)

framework includes a set of principles that define the 'core meaning of the rule of law'.[92] This non-exhaustive list includes 'legality, legal certainty, prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law'.[93] This list is based on the jurisprudence of the CJEU, the ECHR, the work of the Venice Commission, which in turn is all based on the common tradition of the Member States.

Following the Commission, the EU co-legislators adopted the Rule of Law Conditionality Regulation 2020/2092, which for the first contains a clear definition of the rule of law in legislation. According to Pech, this has now led to a 'well-established and well-defined' rule of law in the EU.[94] The preamble of the Conditionality Regulation also contains the following description of the rule of law:

> The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality, implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected.[95]

This clearly embraces a thick conception of the rule of law.[96] In its Framework, the Commission clearly indicated that the rule of law 'is a constitutional principle with both formal and substantive components', as the CJEU in its case law does not only refer to formal and procedural elements, but also specifically includes human rights.[97] Also an examination of the recent case law of the Court of Justice reveals that the Court has a relatively thick understanding of the rule of law.[98] The Commission's Rule of law Framework thus asserts that the rule of law, human rights, and democracy are 'intrinsically linked' and compliance

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[92] COM (2014) 158 (n 90) 4
[93] ibid
[94] Pech (n 84)
[95] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget
[96] Magen (n 78)
[97] COM (2014) 158 (n 90) 4
[98] T von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2013) 37 Fordham International Law Journal 1311

with the principles of the rule of law is 'the vehicle for ensuring compliance with and respect for democracy and human rights'.[99] The triangular relation between democracy, fundamental rights, and the rule of law is thus co-constitutive.[100] Yet, the Union institutions have clearly chosen to address the current institutional problems in some member states in 'rule-of-law-language'. This way, they have promoted the concept of the rule of law to a *primus inter pares*.[101] This is quite a natural choice, considering the 'inherent elasticity' of the rule of law,[102] and the fact that the CJEU and many national courts use the rule of law as an 'umbrella-principle' already.[103]

However, Tsourdi is not convinced that the EU institutions have taken on a fully co-constitutive approach to human rights and the rule of law.[104] She argues that internal Council documents provide no definitive answer to the question, and that the Commission approach, although seemingly co-constitutive, to some extent still distinguishes the rule of law from human rights.[105] An argument for her perspective can also be found in the above-quoted preamble of the Conditionality Regulation. Although the first sentence seems to embrace a co-constitutive approach, the second sentence, containing the list of principles that are to be respected under the rule of law, does not explicitly incorporate human rights. Some fundamental rights are *implicitly* recognized under its scope, such as the right to a fair trial under the right of effective judicial protection. Essentially, this is also in line with the case law of the Court, the supreme interpreter of the Treaties, which has never directly pronounced itself on the issue of the rule of law. It has only ruled in *Portuguese Judges* that Article 19 TEU, understood as a reflection of Article 47 of the Charter (right to an effective remedy and to a fair trial) 'gives concrete expression to the value of the Rule of Law'.[106] This fits in a rather procedural conception of the rule of law, but it is unclear whether it truly moves to a fully substantive version of the rule of law. Den Hertog also submits that the rule of law and human rights do not 'fuse into one substantive notion' after analysing the rule of law in legal

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[99] ibid
[100] See S Carrera, E Guild and N Hernanz, 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism' (2013) CEPS 4 <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf> (accessed 9 June 2023)
[101] Magen (n 78)
[102] ibid 1058
[103] Pech (n 79)
[104] Tsourdi (n 33)
[105] ibid
[106] C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [2018] ECLI:EU:C:2018:117 para 32

doctrine, Court documents, and documents of the legislator.[107] Instead, he defines the 'specific focus of the rule of law in the EU' as 'effective legal remedies to ensure the protection of human rights', which he uses as a working definition.[108] He points out that legality, the separation of powers, and the protection against the arbitrariness of executive powers 'are inherent prerequisites of this focus'.[109]

2.1.1. The Elements of the Rule of Law

It is thus clear that disagreement continues to exist about the exact nature of the rule of law. It remains a contested concept and 'to be true to the idea of the rule of law [it] has to contain a share of vagueness'.[110] According to Cheltenham, the 'high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning'.[111] Yet, taking together the legislative instruments created by the Council and the EP, the Rule of Law Framework created by the Commission, the case law of the CJEU, and the writing of experts it is possible to distil at least the minimum requirements of the rule of law. Article 2 of the Conditionality Regulation reflects these minimum requirements well. Therefore, the EU rule of law contains the following elements:

1. legality;
2. legal certainty;
3. prohibition of arbitrariness of executive powers;
4. effective judicial protection;
5. the separation of powers;
6. and non-discrimination and equality before the law

It is now necessary to briefly define what is understood under each of these 6 elements. The first element is legality, which is considered to be the 'central element' of the rule of law.[112] In a formal sense it refers to 'a demand that government only operates through law and remains within the boundaries of competences described by law'.[113] It demands that law conforms to a number of 'quality requirements', namely: generality, promulgation, non-

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[107] L den Hertog, *The Rule of Law in the External Dimension of EU Migration and Asylum Policy: Organisational Dynamics between Legitimation and Constraint* (Wolf Legal Publishers 2014) 246
[108] ibid 55
[109] ibid 55
[110] P Bárd, S Carrera, and D Kochenov, 'An EU mechanism on Democracy, the Rule of Law, and Fundamental Right' (2016) CEPS Papers in Liberty and Security in Europe iv
[111] S Chesterman, 'An International Rule of Law?' (2008) 56 American Journal of Comparative Law 331, 332
[112] Lautenbach (n 41)
[113] ibid 37

retroactivity, clarity, stability, and congruence between official acts and declared rules.[114] These requirements are in the first place addressed to the legislator, but that last element is addressed to the executive power, and indirectly to the judiciary.[115] After all, the principle of legality demands judicial review to 'prevent discrepancy between the law and acts of government'.[116] Here it also becomes clear why legality is considered to be the 'central element' of the rule of law, as it already implies and overlaps with the principles of legal certainty, effective judicial protection, and the prohibition of arbitrariness of executive powers.

In the EU context legality is thus to be understood as demanding compliance with the 'premises, principles, and norms that underpin the EU's legal order as proclaimed by the Treaties and authoritative judgments of the European Court', also by the public administration.[117] As the EU itself refers to the Venice Commission's work on the rule of law,[118] it is also helpful to see how the Venice Commission construes the principle of legality. It provides a number of requirements, as it states that it 'first implies that the law must be followed', that it requires that authorities 'require authorisation to act and that they act within the powers that have been conferred upon them' and that 'no person can be punished except for the breach of a previously enacted or determined law and that the law cannot be violated with impunity' and, finally, that the law should be enforced'.[119] The Conditionality Regulation also reflects the broadness of the principle by adding that the principle of legality implies 'a transparent, accountable, democratic and pluralistic law-making process'. Additionally, the reference in the Conditionality Regulation to paragraph 63 of *CAS Succhi di Frutta* implies that the EU understands legality to necessarily demand consequences for non-compliance with the law.[120] It requires that non-complying parties are held accountable for their actions.[121] In this respect, Gkliati also points out that a clear attribution of responsibility is necessary to comply with the principle of legality. Therefore, she coined the term 'systemic accountability' as opposed to 'individual accountability'.

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[114] ibid 38-40
[115] ibid 42
[116] ibid 42
[117] C Kilpatrick and J Scott, 'Challenging EU legality' in C Kilpatrick and J Scott (eds) *Contemporary Challenges to EU Legality* (Oxford University Press 2021) 1
[118] Conditionality Regulation (n 95) preamble para 16
[119] Venice Commission (n 83) para 42
[120] C-496/99 P *CAS Succhi di Frutta* [2004] ECLI:EU:C:2004:236 para 63
[121] M Gkliati, 'A Nexus Approach to the Responsibility of the European Border and Coast Guard: From Individual to Systemic Accountability' Seminar, Controlling Migration through Cooperation: Recent trends in the Externalisation of Migration Control Friday 2 February 2018 Tilburg University

Legality does not only require' remedying the violation for the individual claimant (individual accountability) but putting effort in dealing with the structural issues that underlie and cause or allow for the violation, in order to prevent further similar future violations'(systemic accountability).[122]

Secondly, legal certainty refers to 'the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly'.[123] The Rule of Law Conditionality Regulation refers to the CJEU's ruling that 'the effect of [Union] legislation must be clear and predictable for those who are subject to it'.[124] Clarity and predictability are thus required by the principle of legal certainty. The Venice Commission places its focus on making the law accessible and applying the law in a foreseeable manner to ensure the law is clear and precise.[125]

Thirdly, with regard to the prohibition of arbitrariness of the executive powers, the Rule of Law Conditionality Regulation refers to *Hoechst*, which stipulates that any action by the public authorities must have a legal basis, and it reaffirms that if that is not the case, an effective remedy should be available.[126] In this sense, it is closely related to the principles of legality and legal certainty, but it places a stronger focus on executive action.

The fourth element, effective judicial protection, is in itself a broad principle. Prechal and Widdershoven write that it 'requires that there must be actual access to the courts, which must be independent and impartial and be competent to rule on both facts and the law. The possibility of applying to a court for a remedy may not be restricted, and certainly not denied altogether'.[127] It essentially requires that individuals have access to justice. Understood in the procedural sense,[128] this consists of three elements, which are all distilled from Prechal and Widdershoven's definition. First, individuals should have access to a court or judicial procedure. Second, this court should be independent and impartial, and third, this court

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[122] ibid 20

[123] T Tridimas, *The General Principles of EC Law* (Oxford University Press 1999) 163

[124] Joined Cases 212 to 217/80, *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato* [1981] ECLI:EU:C:1981:270 para 10

[125] Venice Commission (n 83) para 44

[126] Joined Cases 46/87 and 227/88, *Hoechst* [1989] ECLI:EU:C:1989:337 para 19

[127] S Prechal and R Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4(2) Review of European Administrative Law 31

[128] See J Gerards and L Glas, 'Access to Justice in the European Convention on Human Rights System' (2017) 35(1) Netherlands Quarterly of Human Rights 11

should have remedial powers. These elements are also reflected in the work of the Venice Commission.[129]

The fifth element, the separation of powers, classically demands a distinction between the executive power, the legislative power, and the judicial power. With regards to Member States, the Court of Justice also applies the principle as such.[130] However, regarding the EU itself, the CJEU has instead of a separation of power-doctrine developed the principle of institutional balance.[131] This 'leads the Court to supervise the respect by the institutions of the competences conferred on them'.[132] It is thus prohibited to encroach on the powers conferred to another institution or to delegate powers in such a way that it would affect the institutional balance.[133] The principle of separation of powers should thus in the context of the EU itself be interpreted as the principle of institutional balance.

The sixth and final element is non-discrimination and equality before the law, which is self-explanatory. The choice to include this separately is quite peculiar, however. Due to the fact that effective judicial protection, including regarding fundamental rights, is already incorporated. Pech wonders whether it makes conceptual sense to distinguish the principles of non-discrimination and equality before the law from the broader notion of fundamental rights.[134] Interestingly, in the preamble non-discrimination and equality before the law is omitted as an element of the rule of law.

Altogether, this rule of law conception is thus neither merely formal nor fully substantive as respect for human rights is not one of the intrinsic elements. Nevertheless, in the EU context the rule of law demands compliance with human rights obligations anyway through the principle of legality. After all, the Charter of Fundamental Rights is a binding instrument of primary law in the Union, which contains a significant number of human rights obligations for the EU. As the principle of legality 'implies that the law must be followed' and 'that the law cannot be violated with impunity',[135] violations of Charter-protected human rights that are not addressed undermine the principle of legality and thus the rule of law.

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[129] See Venice Commission (n 83) para 53-58
[130] See eg C-477/16 PPU *Kovalkovas* [2016] ECLI:EU:C:2016:861 para 36
[131] J Jacqué, 'The Principle of Institutional Balance' (2004) 41 Common Market Law Review 383; G Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17(3) European Law Journal 304
[132] ibid 385
[133] ibid
[134] Pech (n 84)
[135] Venice Commission (n 83) para 42

2.1.2. The Rule of Law in the External Dimension

Considering that this thesis will explore the external dimension of migration policy, it is necessary to still explore what this rule of law conception means externally. There are a number of arguments for the perspective that the same rule of law conception that constitutes the foundation of the EU internally, should also be adhered to in external affairs.

The first argument is positivist in nature. The Treaties simply oblige the Union to respect the rule of law in external affairs. In this regard, Article 21 is crystal clear:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[136]

This article explicitly covers all external Union action, comprising the CFSP as well as other external policies.[137] The rule of law is thus a guiding principle in external affairs. This wording is not very strong, as it does not necessarily require the rule of law as an outcome, but rather as a 'point of reference for decision makers'.[138] Still, external policies that negate the rule of law are prohibited by this article. The EU is thus obliged in its external action to respect the rule of law.[139] The CJEU has also clearly ruled this way in for example *Rosneft* and *Kadi*. In both cases, it highlighted the importance of judicial review and the availability of effective judicial protection for the rule of law in the external policy of the Union.[140]

An argument with a stronger normative embedding is the argument of constitutional integrity. This is the idea that ' while the constitution relates to the self-government and self-consciousness of a particular people, this does not entail that what is done at the margins of the constitution is subject to fundamentally different principles of constitutional morality'.[141] The law does not stop at the border. The external rule of law should not differ from the

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[136] Article 21 TEU
[137] H Blanke and S Mangiameli, 'Article 21 [The Principles and Objectives of the Union's External Action]' in *The Treaty on European Union. A Commentary* (Springer 2013) 833
[138] ibid
[139] ibid
[140] See eg K Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights' (2009) 9(2) Human Rights Law Review 288; S Poli, 'The Common Foreign Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law' (2017) 54(6) Common Market Law Review 1799
[141] T Poole, 'The Constitution and Foreign Affairs' (2016) 69 Current Legal Problems 143, 168

internal rule of law. It should always apply, also when authorities act outside of the borders of the EU.

Finally, there are more instrumental arguments for the EU to respect the rule of law in its external affairs. In the first place, it is essential for the credibility of the EU in the international area as a promoter of the rule of law.[142] The promotion of human rights and the rule of law still is a key part of how the EU presents itself on the international stage.[143] To not respect the rule of law itself externally would make the EU vulnerable for the criticism that it is hypocritical. This would make the EU's objective to promote the rule of law even harder to achieve. Additionally, some of the EU member states are facing a 'rule of law crisis'.[144] How could the EU credibly demand improvements in the rule of law if it does not adhere to it properly itself? To credibly demand change, it should not only respect the rule of law internally, but also externally.

Consequently, incongruences between human rights obligations externally and external acts of the EU, as they undermine the principle of legality and the rule of law if they are not properly addressed, cannot coexist with an EU that respects the rule of law in its external action. In this regard, it is thus important to briefly examine whether and when the EU's human rights obligations apply externally and extraterritorially. It is important to examine this question because the Charter does not contain a jurisdictional clause limiting its scope to the territory of the EU Member States. Due to the Charter's close relation with the ECHR and specifically the homogeneity clause of Article 52(3) CFREU, the argument could be advanced that extraterritoriality standards of the ECHR and as developed by the ECtHR should be transposed to the Charter.[145] Article 1 of the ECHR obliges states to offer the protection of the Convention to 'everyone within their jurisdiction', and thus also to foreigners if they fall under the states' jurisdiction.[146] Over time, the ECtHR has developed its understanding of what 'jurisdiction' exactly means.[147] It moved away from the notion of

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[142] L den Hertog, *The Rule of Law in the External Dimension of EU Migration and Asylum Policy: Organisational Dynamics between Legitimation and Constraint* (Wolf Legal Publishers 2014)
[143] De Búrca (n 44)
[144] L Pech and K Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3
[145] S Peers and others, 'The EU Charter of Fundamental Rights and Immigration and Asylum Law' in S Peers and others (eds) *EU Immigration and Asylum Law (Text and Commentary)* (Brill Nijhof, second revised edition, 2015) 27
[146] Mitchell (n 1)
[147] C Costello, 'Courting Access to Asylum in Europe, Recent Supranational Jurisprudence Explored' (2012) 12 Human Rights Law Review 287; M Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27(3) European Journal of International Law 817; C Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?' (2021) Zoom in 82, Questions of

espace juridique it introduced in *Bankovich*, which meant that the application of the Convention was 'primarily territorial' and only exceptionally applied extraterritorially.[148] Although still maintaining that application was 'primarily territorial' in line with *Bankovic*, in *Al-Skeini*, the ECtHR revised its *Bankovic*-view and essentially foresaw two different categories of extraterritorial jurisdiction: a spatial basis and a personal basis.[149] This spatial basis triggers extraterritorial jurisdiction when a state 'exercises effective control of an area outside [its] national territory'.[150] The personal basis triggers extraterritorial jurisdiction of a state over 'acts of its authorities which produce effects outside its own territory' on individuals.[151] This second basis applies for diplomatic and consular agents, in the exercise of public powers by state agents on third state territory, and through the use of force.[152] In the context of migration, the *Al-Skeini* framework was applied in the case of *Hirsi Jamaa*, where Italy was held to have jurisdiction over the refugees it had intercepted on the high seas, as it exercised *de jure* and *de facto* control over them.[153] AG Wathelet suggested in his advisory opinion in the CJEU case *Front Polisario* that this framework should also be extended to the Charter.[154]

However, some also reject the argument that the ECHR standard should be transposed to the Charter.[155] They rightfully argue that taking the homogeneity clause of Article 52(3) as the basis for this claim is erroneous, as Advocate General Mengozzi explained in his advisory opinion as a response to the Belgian government's argument that the ECHR standard should be transposed to the Charter in *X and X v Belgium*.[156] The homogeneity Article only stipulates that Charter rights that have corresponding rights in the ECHR should be interpreted to have the same meaning and scope as those corresponding ECHR-rights. It does not refer to the Charter as a whole. It would be an error to conflate those two different issues.[157] There is thus

International Law; V Moreno-Lax and C Costello, 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model' in S Peers and others (eds) *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) 1657

[148] Mallory (n 147)

[149] ibid

[150] *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) para 138

[151] ibid para 133

[152] ibid; Mallory (n 147)

[153] *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012) para 81

[154] Opinion of Advocate General Wathelet in C-104/i6 P *Front Polisario* ECLI:EU:C:2016:677

[155] E Kassoti, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga' (2020) 12(2) European Journal of Legal Studies 117; Moreno-Lax and Costello (n 147)

[156] Opinion of Advocate General Mengozzi in C-638/16 PPU *X and X v Belgium* ECLI:EU:C:2017:93

[157] Kassoti (n 155)

no literal basis for this argument. Therefore, territorial considerations are immaterial when determining the scope of the Charter.[158]

Rather, the only requirement for application of the Charter is that an issue falls in the scope of EU law.[159] Kasotti demonstrated that 'Article 51(1) of the Charter envisages a parallelism between EU action and application of the Charter'.[160] Moreno-Lax and Costello reached the same conclusion based on an analysis of the text of the Treaties and the Charter.[161] Referring back to Article 2, 6, and 21 TEU and Article 51 of the Charter, they conclude that 'the Charter seems to reflect a general understanding that EU fundamental rights obligations simply track EU activities, whether they take place within or without territorial boundaries'.[162] The pre-Lisbon case *Kadi* also lends support for this point, as it essentially introduced the principle that 'compliance with fundamental rights is a condition of legality of all EU acts'.[163] Post-Lisbon this principle has also been applied by the CJEU to trade agreements with third states as for example in *Opinion 1/15*.[164]

All in all, it is clear that the EU is bound by the rule of law in its external affairs. Due to the fact that the rule of law, through the principle of legality, also requires that authority is held accountable for incongruences between human rights law and acts of authority, the rule of law indirectly requires the EU to respect its human rights obligations. Since the human rights obligations enshrined in the Charter of the EU are triggered whenever an issue falls in the scope of EU law, irrespective of any territorial consideration, the human rights obligations of the EU apply in the external dimension of migration and asylum. Therefore, ignoring or violating these obligations challenges the principle of legality and thus the rule of law.

2.2. The ECtHR as Rule of Law Protector

The previous section made a range of arguments demonstrating that the EU should respect the rule of law in its external affairs. However, there is currently no external entity that could subject the EU to the rule of law, whereas with regard to states there is the EU itself and the

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158 Kassoti (n 155); Moreno-Lax and Costello (n 147)
159 ibid; Moreno-Lax and Costello (n 147)
160 Kassoti (n 155) 134
161 Moreno-Lax and Costello (n 147)
162 ibid 1661
163 M Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in M Cremona and J Scott (eds) *EU Law Beyond Borders: the Extraterritorial Reach of EU Law* (Oxford University Press 2019) 64, 75
164 ibid

ECtHR. Considering the EU exercises 'legal authority comparable to state authority', as Taekema observed, an issue arises.[165] The EU is currently not integrated in the international human rights system. Consequently, the EU cannot be held accountable by a human rights court if it violates human rights. Considering the EU's far-reaching competences, its policies surely affect human rights. If non-compliance with binding human rights obligations remains without consequence, the principle of legality is compromised. For the Contracting Parties to the ECHR, the ECtHR fulfils this function of external safeguard already. Although the ECtHR cannot rule on rule of law violations directly as it is not one of the protected 'rights' of the Convention,[166] it can indirectly safeguard rule of law elements. This way it is a 'cornerstone' of the rule of law in Europe.[167] It has developed into an 'international watchdog regarding grave human rights violations and massive breakdowns in the rule of law'.[168]It has achieved this through its main function, which is to ensure 'the accountability of individual Member States on the specific subject-matter of human rights protection'.[169]

The ECtHR can achieve this due to a number of factors. In the first place, it offers individuals effective judicial protection for human rights violations. It can offer all three elements of effective judicial protection mentioned above. It provides 'direct and unrestricted access to an international judicial body, subject to some formal requirements and conditions of jurisdiction' and thus relatively easily allows victims to bring a claim against states.[170] Secondly, the impartiality and independence of the Court is beyond doubt.[171] Thirdly, it has remedial powers as it can condemn its Member States for violations and order them to pay damages.[172] Increasingly, it also indicates specific measures or remedies States should adopt to remedy the found violation.[173] Stiansen empirically demonstrated that the ECtHR 'has been able to promote faster compliance' through this newer practice.[174] Although the system is still primarily based on individual applications that achieve individual justice, over time it

[165] Taekema (n 45) 143
[166] See Haeck and Burbano Herrera (n 46) 229
[167] ibid vii (own translation)
[168] Greer and Wildhaber (n 47) 677
[169] B Cali, 'The Purposes of the European Human Rights System: One or Many?'(2008) European Human Rights Law Review 299, 299
[170] W Verrijdt, 'The Limits of the International Petition Right for Individuals: A Case Study of the ECtHR' in B Keirsbilck, W Devroe, and E Claes (eds) *Facing the Limits of the Law* (Springer 2009) 333, 335
[171] ibid
[172] ibid
[173] L Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) European Journal of International Law 125
[174] Ø Stiansen, ' Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments' (2021) 51(2) British Journal of Political Science 899, 905

developed into delivering 'constitutional justice'.[175] This is demonstrated by the fact that the ECtHR now also delivers so-called pilot judgements, in which it 'identifies a structural dysfunction in the national legal system that has given or may give rise to similar applications', and judgments of principle, where it decides a case 'on a level of generality that makes it possible to apply the decision to comparable pending applications'.[176] This way, it addresses non-compliance with human rights obligations in a more systemic manner.

The ECtHR can thus provide individuals with access to a judicial procedure and a remedy for human rights violations. These human rights violations form an 'incongruence between official acts and declared rules' and are thus not in line with the principle of legality. Judicial review in the Member State and domestic remedies should prevent these incongruencies, but in situations in which this does not suffice or is not available, the ECtHR offers an external safeguard.[177] This unavailability in itself can challenge the rule of law, as the principle of legality requires access to justice, as does the principle of effective judicial protection. Yet, due to the presence of the ECtHR, the incongruence can still be addressed and the state can be held accountable such that the individual is still protected against the abuse of coercive state power, which is one of the main aims of the rule of law.[178] In other words, the ECtHR logically plays an important role in the 'most judicial aspect' of the rule of law, which is effective judicial protection, and the judicial element of legality, which is holding the executive accountable for incongruencies between its acts and human rights law. After the EU accession to the ECHR, the ECtHR could become this external rule of law safeguard for the EU itself. Whether it can fulfil this role for the EU as well, depends on the precise terms of the accession, which will be governed by the Accession Agreement (AA), This instrument is examined below. In light of the above conclusion about the role of the ECtHR for the rule of law, the section below explores how the accession agreement regulates future claims against the EU.

[175] Greer and Wildhaber (n 47)
[176] L Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn' (2014) 14 Human Rights Law Review 671, 676
[177] J Kuijper, 'Reaction to Leonard Besselink's ACELG BLOG' (BlogActiv, 6 January 2015) <https://pure.uva.nl/ws/files/2686578/177414_Reaction_to_Leonard_Besselink_s_ACELG_Blog_ACELG.pdf> accessed 16 May 2023
[178] Lautenbach (n 41)

2.3. The Accession Agreement

This part examines the terms of the new accession agreement, on which the EU and the Council of Europe agreed on the 17th of March 2023. The negotiation group tried to amend the earlier Draft Accession Agreement (DAA), concluded in 2013, in such a way that it would now pass the scrutiny of the CJEU. It thus took the points of criticism of the CJEU's *Opinion 2/13* and tried to find a solution for them. This part does not speculate whether the instrument will pass the scrutiny of the CJEU, but rather explores this new agreement by examining its procedural implications for claims brought against the EU. In this regard there is one important caveat. The negotiation group failed to reach an agreement on the issue of jurisdiction over CFSP acts.[179] The EU indicated that it would resolve the issue of CFSP jurisdiction internally.[180] As this was not achieved yet, the Group asked the EU to keep them updated because they would not be able to give their final agreement on the proposal before the EU resolved its issue. [181] What shape this internal solution of the EU will take precisely is not yet known. If the EU manages to find a solution, the other parties will need to give their final agreement, after which the accession instrument also still needs to pass the scrutiny of the Parliamentary Assembly, the European Parliament, the ECtHR and the CJEU. In the absence of a formal agreement on the jurisdiction over CFSP-matters, a number of different possibilities of 'an internal solution' are described.

The earlier DAA of 2013 that was the subject of the negative *Opinion 2/13* of the CJEU serves as the basis for the new agreement. It contains the same 12 articles as before, but the new agreement either changes the text of some articles, supplements them, or adds sub-articles aiming to respond to the criticism of the CJEU. On a general level, the principle of procedural equality between Contracting Parties to the ECHR thus also remained a priority.[182] In the absence of any specific rules in the AA, the general procedural rules will thus apply. This is reflected by Article 1 of the AA, which **c**overs various matters related to the scope of accession and necessary adjustments that need to be made to the ECHR to cater for the fact that the EU is not a state. It firstly stipulates that the EU shal accede to the ECHR, to the Protocol to the Convention and to Protocol No. 6 to the Convention. It then amends

[179] Council of Europe Meeting Report 18 (n 63)
[180] ibid
[181] ibid
[182] See Gragl (n 53)

Article 59 of the ECHR, allowing the European Union to accede to it. Importantly, it also stipulates that the AA will constitute an integral part of the Convention.

Furthermore, it regulates that the Convention will 'impose obligations on acts, measures, or omissions' of the EU's 'institutions, bodies, offices or agencies, or of persons acting on their behalf'.[183] To safeguard the principle of conferral, it also stipulates that the ECtHR will never require the EU to 'adopt a measure for which it has no competence under European Union law'.[184] Over recent years, the ECtHR has started to exercise more influence over the execution of its judgements, for example through its pilot judgement procedure, in which it orders general measures.[185] The above clause in the AA ensures that these measures will never require the EU to go beyond its mandate by, for example, creating a new remedy. Additionally, it stipulates that acts of Member States of the EU shall still be attributed to that Member State, even if that act follows from an obligation arising out of EU law. One final important point under Article 1 concerns the interpretation of the jurisdictional clause of Article 1 of the ECHR. First, it stipulates that the Convention applies to everyone within the territory of the European Union to which the TEU and the TFEU apply. Second, with regard to individuals outside the territory of a Contracting Party, the AA determines that the EU will be held to the same standards as other Contracting states. It is thus determined by the 'effective control' test, as developed in *Al-Skeini* (see Section 1.2 of this Chapter). The scope of application is thus essentially the same for the EU as for state parties to the Convention.

The same can be said about the procedural rules of admissibility. Just like with state parties, applicants bringing a claim against the EU need to meet two conditions.[186] First, in line with Article 34 of the Convention, individual applications can only be brought by persons, non-governmental organisations or groups of individuals. Second, per Article 35(1) of the Convention, individuals need to exhaust local remedies before the ECtHR can admit to hear a claim.This rule is not only important to satisfy the subsidiarity principle inherent in the Convention system, it is also of utmost importance for the autonomy of EU law.[187] The prior involvement of the CJEU should guarantee that the ECtHR is never to give an original or mistaken interpretation of EU law. What would this mean for claims brought against the EU?

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[183] Council of Europe, 'Consolidated version of the draft Accession Instruments (as of 7 October 2022)'<https://rm.coe.int/consolidated-version-of-the-draft-accession-instruments-as-of-7-octobe/1680a8eb37> accessed 9 June 2023, art. 1(3); hereinafter this document will be referred to as AA

[184] ibid

[185] Glas (n 176)

[186] J Krommendijk, 'EU Accession to the ECHR: Completing the Complete System of EU Remedies?' (2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418811> accessed 9 June 2023

[187] Gragl (n 53)

In this regard, it is first important to note that Article 5 AA stipulates that proceedings before the CJEU will not be seen as international proceedings, but that Article 35 of the Convention will be interpreted to include proceedings before the CJEU as domestic proceedings. Only direct actions are considered to be a domestic remedy. Individuals bringing an application directed directly at the EU, should thus first start and exhaust the available direct actions: the action for annulment, the action for inaction, or the action for damages.[188] Importantly, the ECtHR made clear in the *Vagrancy* cases that the exhaustion-of-domestic-remedies rule does not require individuals to make clearly inadmissible claims.[189] It is thus not necessary to start a claim when it is abundantly clear that that claim will not result in redress.[190]

The indirect action, the preliminary reference procedure, will thus not enable individuals to lodge an application before the ECtHR, as the explanatory report to the AA confirms.[191] If applicants consider the judgement given by the CJEU in the preliminary reference procedure to violate fundamental rights protected by the Convention, it cannot bring the claim directly against the EU, but should rather bring it against the Member State that referred the preliminary question and implemented the judgement of the CJEU, provided that domestic remedies in that Member State are exhausted.[192]

To accommodate for this unique situation in which 'a legal act is enacted by one High Contracting Party and implemented by another', an EU-specific mechanism is created by Article 3 of the AA.[193] This Article introduces the co-respondent mechanism, by amending the title of Article 36 of the Convention and adding the following paragraph:

> The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.[194]

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[188] Krommendijk (n 186)
[189] *De Wilde, Ooms and Versyp v Belgium*, App. Nos.2832/66, 2835/66 & 2899/66 (ECtHR, 18 November 1970)
[190] Gragl (n 53); T Lock, 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg' (2010) 35 European Law Review 777
[191] Explanatory Report to the AA (n 183) para 65
[192] Krommendijk (n 186)
[193] Explanatory Report to the AA (n 183)para 38
[194] AA (n 183) art. 3

The co-respondent mechanism thus results in a system of 'shared responsibility', where the co-respondent is equally bound by the judgement of the ECtHR as the respondent.[195] Importantly, this mechanism ensures that individuals do not have to venture into the division of competences between the EU and the Member State, since the applicant can direct their claim at either the EU or the Member State. Without this mechanism, the Court would need to declare applications inadmissible if it would be directed at the incorrect respondent.[196] Moreover, the applicant only needs to exhaust the domestic remedies of either the EU or the Member State, and not both.[197]

Article 3(2) AA stipulates that the EU can become a co-respondent in applications directed at one or more of its Member States if that application 'appears to call into question the compatibility with the Convention rights at issue' of a provision of European Union law, 'notably where that violation could have been avoided only by disregarding an obligation under European Union law'.[198] Under Article 3(3) Member States can also become a co-respondent, albeit under slightly different conditions. They can only become co-respondent in case an application is directed at the EU and it 'appears' that this application concerns the compatibility between the Convention and EU primary law.[199] For Member States, the option is thus more limited than for the EU itself.[200] Besides these options, it is also possible that, in cases where the application is already brought against both the EU and one or more of its Member States, the status of either the EU or one or more of its Member States changes to co-respondent if the conditions of Article 3(2) or 3(3) are met.[201]

In case these conditions have been met, the EU or its Member States can become a co-respondent either upon their own initiative, or by invitation of the ECtHR. The co-respondent procedure can only be terminated in case the above conditions 'are no longer met according to a reasoned assessment of the EU'.[202] As an additional safeguard to protect the autonomy of EU law, the CJEU will receive sufficient time to assess the compatibility of the piece of European law in question with the ECHR when the EU is a co-respondent and the CJEU had not assessed the issue before. This prior-involvement was necessary due to the fact that in the co-respondent mechanism the domestic remedy at the EU level does not always

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[195] Gragl (n 53) 149
[196] Gragl (n 53)
[197] ibid
[198] AA (n 183) art. 3(2)
[199] ibid art. 3(3)
[200] Krommendijk (n 186)
[201] AA (n 183) art. 3(4)
[202] ibid art. 3(5a)

have to be exhausted, as the applicant might have exhausted remedies at the Member State level. Without the prior-involvement of the CJEU, the ECtHR would have needed to deliver 'an own original interpretation of EU law' or would have decided the case on the basis of a wrong interpretation of EU law.[203]

Considering it would violate the autonomy of EU law to have an external Court decide on the apportionment of responsibility for a violation,[204] the ECtHR cannot rule that only one of the respondents is responsible. It has to hold both the respondent and the co-respondent(s) jointly responsible,[205] after which the EU is responsible to determine who the real perpetrator is and who thus is responsible for the repair.[206] It can be expected that the EU will develop internal rules on the apportionment of responsibility.[207]

Although it might seem that this special EU-specific mechanism violates the principle of procedural equality, the explanatory report explains that it is not a 'procedural privilege', but rather 'a way to avoid gaps in participation, accountability and enforceability in the Convention system'.[208] Krommendijk concurs with this view and emphasises the advantages in this regard of the co-respondent mechanism.[209] He points out three such advantages. The first advantage concerns the admissibility of applications. Due to the fact that the co-responsibility mechanism ensures that individuals only have to exhaust domestic remedies at either the Member State or the EU and that the attribution of responsibility does not affect the admissibility of a claim, it becomes easier for individuals to submit an admissible claim.[210] Second, due to the fact that the co-respondent is also bound by the judgement of the case, the judgments will have broader implications. Third, in cases in which previously the *Bosphorus* presumption would have been applied due to the fact that Member States enjoy no discretion in the execution of an obligation arising out of EU law, the ECtHR can now hold both the EU, the enactor of the legal act, and the Member State, the executor of the legal act, responsible.[211]

The remainder of the AA covers some for this study less relevant points such as that the EU is allowed to make reservations in line with Article 57 of the Convention (Article 2

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[203] Krommendijk (n 186)
[204] See *Opinion 2/13* (n 50) para 230
[205] AA (n 183) art. 3(7)
[206] J Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48(4) Common Market Law Review 995
[207] Krommendijk (n 186)
[208] Explanatory Report to the AA (n 183) para 39
[209] Krommendijk (n 186)
[210] ibid
[211] ibid

AA) and it stipulates some rules for the future institutional interlacing. Although the EU is not becoming a member of the Council of Europe, some of the organs of the Council of Europe, such as the Parliamentary Assembly and the Committee of Ministers also exercise functions as an organ under the Convention. To ensure the procedural equality between the EU and the other High Contracting Parties to the ECHR it was decided that provision should be made in order to allow the EU to participate in these organs when they exercise their functions under the Convention.

Unfortunately, the AA is not complete. After the CJEU made clear in *Opinion 2/13* that granting the ECtHR jurisdiction over CFSP matters, while the CJEU did not have jurisdiction itself, would violate the autonomy of EU law,[212] the negotiation group needed to resolve this issue in the AA. It was foreseen that this was a difficult issue.[213] Various solutions were suggested in the academic literature. Besselink proposed to adopt a 'Notwithstanding Protocol', essentially side-stepping the Court and seeking accession to the ECtHR despite *Opinion 2/13*.[214] Łazowski and Wessel suggested 'a more limited modification' by amending Protocol No 8 on the accession of the EU to the ECHR 'as to allow for accession despite the Court's limited jurisdiction in relation to CFSP'.[215] However, they admitted that this was a 'political fantasy', as the Member States were against further Treaty amendments.[216] At the same time, complying with the position of the CJEU in *Opinion 2/13* also proves difficult due to the fact that Article 57 of the ECHR prohibits a reservation of a general character. It is thus not strange that the Negotiation Group thus did not manage to resolve the issue, prompting the EU delegation to look for an internal solution. As it is currently unknown what shape this solution will take, a number of possibilities are briefly discussed below. The discussion starts with the proposal for a re-attribution mechanism that was made by the EU delegation in the negotiation, but that was shot down by

[212] *Opinion 2/13* (n 50) para 256

[213] T Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is it Still Possible and Is it Still Desirable?' (2015) 11 European Constitutional Law Review 239; P Tacik, 'After the Dust Has Settled: How to Construct the New Accession Agreement After Opinion 2/13 of the CJEU' (2017) 18 German Law Journal 919

[214] L Besselink, 'Acceding to the ECHR Notwithstanding the Court of Justice Opinion 2/13' (BlogActiv, 24 December 2014) <http://acelg.blogactiv.eu/2014/12/24/acceding-to-the-echr-notwithstanding-the-court-of-justiceopinion-213/#more-469> accessed 16 May 2023

[215] Lazowski and Wessel (n 40)

[216] ibid 206; Evidence can also be found in Council Document 7977/15, where Treaty change is not considered as an option for resolving the accession issue

the non-EU Members of the Council of Europe.[217] Still, considering the members welcomed the starting point of the proposal, it is included in this discussion. Although it is unlikely it will be introduced, the internal solution of the EU could take inspiration from it. Subsequently, the current leading option of the 'interpretative declaration' is discussed.

At the 12th Meeting of the Negotiation the EU delegation proposed to insert a new Article 1(4a), creating a re-attribution mechanism for CFSP acts. The lengthy article sets out the following procedure: in case an application is directed at the EU and the EU considers the application to concern the CFSP and it is clear the CJEU does not have jurisdiction, the EU will designate one or more member states as responsible for the alleged violation, which will become the respondent(s) instead of the EU. In case it is not clear whether the CJEU has jurisdiction, the EU can request the ECtHR to stay the procedure and grant the CJEU time to determine whether it has jurisdiction, which the ECtHR is obliged to do. Consequently, there are two options:

1. The CJEU finds that it has jurisdiction and the EU can stay a respondent before the ECtHR, which will be able to rule on the issue
2. The CJEU finds that it does not have jurisdiction, meaning that the EU cannot stay respondent. Instead, the EU will allocate responsibility to one or more Member States, who will become respondent before the ECtHR instead of the EU.

The EU considered that this second scenario where it is unclear whether the CJEU has jurisdiction will only rarely occur due to the exhaustion of remedies rule. After all, the EU's *Foto-Frost*-doctrine obliges national courts to refer questions to the CJEU in case the validity of an EU measure is questioned.[218] In most cases, the CJEU will thus have clarified whether it has jurisdiction. After the EU has re-attributed responsibility to one or more Member States, the applicant has to exhaust remedies in all Member States that were designated to be responsible by the EU.[219]

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[217] Council of Europe, 'Meeting Report of the 12th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights' (47+1(2021)R12, 10 December 2021) <https://rm.coe.int/cddh-47-1-2021-r12-en/1680a4e547> accessed 23 June 2023

[218] C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452 paras 11-20

[219] The last paragraph of the text proposal for the new article 1(4a) reads as follows: 'Where remedies have not been exhausted in at least one Member State jurisdiction, the proceedings before the Court are to be stayed in order to allow the applicant to pursue domestic remedies in the designated Member State(s), if those remedies are still available'.

After the proposal for the re-attribution mechanism failed, the EU is reportedly considering an interpretative declaration concerning the CFSP as a solution.[220] The Council of Europe is highly supportive of this idea, but currently there is no agreement about such a declaration.[221] Interestingly, Kuijper saw interpretative declaration as a solution for all the points of criticism raised by the CJEU in *Opinion 2/13*, except for the issue of CFSP jurisdiction.[222] It is not an easy task to create an interpretative declaration that would not amount to a general reservation with regard to CFSP acts that would still satisfy the CJEU.

2.4. Conclusion

By way of conclusion, this section provides an answer to the question of what the most relevant rule of law elements are that accession, under the terms of the new AA, might be expected to contribute to. This way it clarifies which of the six elements of the rule of law are examined in this thesis. The core of the rule of law 'presupposes that governmental power can be exercised and controlled through law',[223] but the rule of law in the EU is broader, as it consists of the principles of legality, legal certainty, the prohibition of the arbitrariness of power, effective judicial protection, separation of powers, and non-discrimination and equality before the law. Although this is a relatively substantive conception, it does not see human rights and the rule of law as fully co-constitutive. Yet, due to the EU's commitment to human rights through the Charter, the rule of law, through the principle of legality, still demands compliance with human rights and procedural safeguards in case of violations. In this sense, the EU accession to the ECHR could benefit the rule of law.

The two immediate consequences of accession are, first, that the ECHR will become an integrated part of the EU legal order, and second, that the ECtHR can exercise jurisdiction over the EU and will become the ultimate final arbiter on human rights issues. This thesis will limit itself to examining the effects of this second consequence on the rule of law challenges that arise out of the external dimension of the EU's migration policy. This can be

[220] See 'Geannoteerde agenda van de bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 8 en 9 december' (December 2022) <https://open.overheid.nl/documenten/ronl-8ef5c0285d2b43b46ecb7e93e42ad3985c4a911b/pdf> accessed 16 May 2023

[221] Rijksoverheid, 'Reactie op verzoek commissie over de kabinetsinzet ten aanzien van de Top van de Raad van Europa van 16-17 mei in Reykjavik', 1 Mei 2023, <https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2023Z07788&did=2023D18338> accessed 16 May 2023

[222] Kuijper (n 177)

[223] Lautenbach (n 41) 20

justified by two arguments. First, the already binding Charter offers per Article 52 and 53 at least the same level of protection as the ECHR. Second, as will become clear in later chapters, the rule of law issues that arise out of the external dimension of the EU's migration policy do not arise out of the fact that rights on paper are insufficiently protected, but rather that the (procedural) protection of those rights is insufficient. Because of this focus on the second consequence, this thesis naturally focuses on the judicial aspect of the rule of law. This choice is due to the role of the ECtHR. As mentioned before, the main purpose of the Court is to ensure 'the accountability of individual Member states on the specific subject-matter of human rights protection',[224] which it achieved by granting individuals the possibility to submit applications. Due to the importance given to the principle of procedural equality in the accession negotiation, the AA seems to envision a similar role for the ECtHR with regards to the EU. This role reflects mostly two essential elements of the rule of law: accountability, as an important element of legality, and effective judicial protection. Through this it became an international 'watchdog' of the rule of law.[225] It is in that light that this thesis limits its analysis to two out of the six rule of law elements: the 'judicial element' of legality, namely ensuring that states are held accountable for incongruences between human rights law and their acts, and effective judicial protection. These two principles are conceptually intertwined, as pointed out before, but for the purpose of this study they are dealt with separately.

With regards to legality, this study limits its analysis to its 'judicial element' as a safeguard for executive action, namely ensuring systemic accountability for incongruences between human rights law and acts of government. Although legality puts a number of obligations on the legislature as well, this study limits itself to the obligation it puts on the executive branch of government. This choice is made due to the development that in the external dimension of migration the focus shifts from 'rules politics' to 'events politics', resulting in a stronger role for executive power as described in Chapter 1. That is not to say that the requirements of the principle of legality for the legislature in the external dimension of migration are irrelevant or unchallenged, but due to time and space constraints this study limits itself to the legality requirement of 'congruence between acts and rules'. This requirement is narrowed down for the purpose of this study to 'congruence between acts and *human rights obligation*' due to the specific function of the ECtHR as a human rights court.

[224] Cali (n 169) 299
[225] Greer and Wildhaber (n 47) 677

The principle of legality requires that states comply with any applicable law, but as the ECtHR only has jurisdiction over human rights violations it would be pointless to examine this in a broader context.

The specific focus of this study of the ECtHR as a solution to rule of law issues arising out of the EU's external dimension of migration and asylum also explains the focus on the role for the judiciary that is demanded by the legality requirement of congruence between the law and executive acts of government. This requirement of systemic accountability demands that all actors involved in the incongruence need to be held accountable for their violations.[226] The importance of accountability for legality, and thus for the rule of law, is also demonstrated by the EU itself as it refers to *CAS Succhi di Frutta* in the Conditionality Regulation.[227] Due to the accession to the ECHR, the EU can be held accountable if it fails to comply with the Convention. Additionally, the co-respondent mechanism seems to ensure that systemic accountability can be achieved by holding all perpetrators accountable. It is thus relevant to examine this principle.

The same applies to the principle of effective judicial protection. The importance for the rule of law is demonstrated by the rulings of the CJEU in *Les Verts* and in *Portuguese Judges*. This principle requires access to a court, which is impartial and independent, and an effective remedy. There is no problem with regards to the latter two elements at the CJEU. However, the academic literature, as already mentioned in the introductory Chapter 1, points out that the EU manages to bypass the judicial scrutiny of the CJEU,[228] which suggests a problem with regard to the first element: access to a court.Considering the ECtHR is an additional venue to obtain access to a court, it is relevant to explore to what extent accession could take away the concerns in this regard. As this chapter already established that there are no concerns regarding the impartiality and independence of the ECtHR and that it enjoys considerable remedial powers and that this is unlikely to change due to the accession of the EU, this study limits itself to examining the implications of accession on access to a court as an element of effective judicial protection.

That is not to say that accession will not have any effects on the other four elements (legal certainty, prohibition of arbitrariness of executive power, separation of powers, and non-discrimination and equality before the law), but it is argued that this would occur indirectly as a consequence of the effects accession has on legality and effective judicial

[226] Gkliati (n 121)
[227] *CAS Succhi di Frutta* (n 120) para 63
[228] Santos Vara (n 25); Mitsilegas (n 36)

protection. If the ECtHR can offer access to justice (effective judicial protection) and can hold the correct perpetrators accountable for violations (legality), it can ensure that non-discrimination and equality before the law are protected and it can prohibit the arbitrary exercise of public power if it violates human rights. Additionally, holding the correct perpetrator accountable is beneficial for legal certainty. With regard to the element of separations of powers, the influence of the ECtHR is most indirect. As a human rights court, it has 'an extremely limited jurisdiction in matters of "separation of powers"'.[229] The ECtHR cannot invalidate legal instruments in its entirety on the basis that the EU did not follow the correct procedure and thereby side-stepped important democratic safeguards. Of course, the ECtHR could rule that the implementation of a certain core element of such an instrument violates human rights. This way it could send the EU back to the drawing table, which might thus safeguard the separation of powers indirectly.

In conclusion, this study adopts the following working definition of the rule of law, which is specifically tailored for this project: *ensuring systemic accountability for incongruences between human rights law and acts of authority through ensuring access to a court.* This working condition reflects both the element of legality and effective judicial protection, which is constructed as an instrument to ensure respect for the principle of legality. This reflects the interconnectedness of this principle. It also remains close to the foundations of the rule of law, as one of its central aims is to protect individuals from arbitrary state power.[230]

[229] D Kosař, 'Policing Separation of Powers: A New Role for the European Court of Human Rights?' (2012) 8(1) European Constitutional Law Review 33, 62
[230] Lautenbach (n 41)

3. Rule of Law Concerns related to the Neo-Refoulement Instruments

Chapter 1 established that the EU essentially opted for a strategy of neo-refoulement to control the inflow of migrants. Three of the main instruments it used to achieve this are its border agency Frontex, the use of soft law agreements with third states, and CSDP-based migration control missions.[231] As indicated in Chapter 1 as well, these 'legal techniques' are used to ensure 'that the whole spectrum of denying non-citizens rights - from dignity to the right to life - is never presented as a violation of EU law'.[232] This chapter demonstrates that these techniques undermine the rule of law principles of legality and effective judicial protection and answers the following question: how do these three neo-refoulement instruments of the EU challenge the rule of law as defined in Chapter 2?

The in Chapter 2 developed rule of law working definition is used to assess whether the rule of law is challenged by the three neo-refoulement instruments. This definition is: *ensuring systemic accountability for incongruences between human rights law and acts of authority through ensuring access to a court.* As set out in Chapter 2, this definition reflects the principles of legality and effective judicial protection. The principle of legality is reflected by the first part and thus requires that accountability for incongruences between human rights law and acts of authority is ensured. Since the principle of legality requires compliance with legal obligations, including human rights obligations, and that the law cannot be violated with impunity, human rights obligations, which remain unaddressed, challenge the principle of legality and the rule of law. The principle of effective judicial protection is reflected by the second part of the definition and thus requires that access to a court is ensured.

In this Chapter the three instruments are examined separately. It is important to note, however, that the EU often uses a combination of these instruments in practice. Nevertheless, they are dealt with in three separate sections here as they each challenge rule of law requirements in a different way. Each of these sections first sets out the legal framework of the respective neo-refoulement instrument, with particular attention to its development during the migration 'crisis'. Subsequently, in line with the working definition of the rule of law, it is established that the EU fails to satisfy the legality-requirement of ensuring systemic accountability for incongruences between human rights law and acts of government, after which it is established that this is in large part due to the unavailability of effective judicial procedures to remedy the violation.

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[231] See Bendiek and Bossong (n 23)
[232] Kochenov and Ganty (n 32) 1

3.1. Frontex

3.1.1. Legal Framework

On the 15th of December 2015, the European Commission proposed to establish 'a European Border and Coast Guard to ensure a strong and shared management of the external borders'.[233] This 'new agency' would essentially reinforce the already existing Frontex, aiming to better control migration, to improve the internal security of the Union, and to maintain the principle of free movement of persons in the Schengen area.[234] European Commission First Vice-President Frans Timmermans called the creation a 'move to a truly integrated system of border management'.[235] The reinforced Frontex would better integrate Frontex with national border authorities, 'who will continue to exercise the day-to-day management of the external border'.[236] This new system of border management differed in some significant aspects from the old system.

Frontex was established in 2004 to 'facilitate and render more effective the application of existing and future Community measures relating to the management of external borders'.[237] It had to coordinate Member States' implementation of those measures. After all, the Frontex Regulation explicitly states that management of the external border remains the responsibility of the Member States.[238] The six main tasks listed under Article 3 of the Frontex Regulation also reflect this rather supplementary role. Besides coordination of operational cooperation, the Agency would need to assist Member States on training of national border officers, carry out risk analyses, keep track of the development of relevant research, assist Member States at the external borders in case they need technical and operational assistance, and support Member States in organising joint return operations.[239]

Frontex has seen its competences grow significantly over the years.[240] This started in 2007 already with the RABIT Regulation, which assigned Frontex the competence to oversee and control Rapid Border Intervention Teams with powerful executive powers that could be

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[233] European Commission Press Release (n 24)
[234] ibid
[235] ibid
[236] ibid
[237] Council Regulation EC 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union Art. 1(2)
[238] ibid
[239] ibid Article 2
[240] R Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU.* (Cambridge University Press 2016)

deployed in case of excessive flows of illegal migration,[241] and for now ended with the 2019 amendment of the EBCG Regulation in 2019, assigning Frontex disciplinary power over its standing corps with far-going executive power in operations.[242] To highlight this development: compared to the six tasks listed in the first Frontex Regulation, the latest version of the EBCG Regulation lists no less than 33 tasks. The establishment of the European Border and Coast Guard in the midst of the migration crisis most significantly intensified the security practices of Frontex.[243]

Three developments reflecting this intensification of security practices can be highlighted. First, Frontex has taken a leading role in many migration control and return operations.[244] It now plays a central role in the EU's asylum policy, which is now centred around border control and return operations.[245] Border control operations aim to detect, prevent, and respond to irregular migration flows, whereas return operations aim to return migrants for whom it is immediately obvious do not have a right to stay.[246] Although Member States still retain responsibility for border control and return operations at the external border, Frontex's role has become increasingly important. This role is essentially three-fold. First, Frontex provides financial and technical support and human resources. Second, it functions as the main coordinator of the operation, making the operational plan and ensuring that Frontex officers are present at every level of the operation, and especially at the ground. Third, Frontex has to monitor compliance with legal requirements during the operation.[247] Frontex can issue instructions to the host state, which then has the obligation to comply with these instructions to the greatest possible extent. Whereas officially it is thus still the host state of the operation that is primarily responsible, *de facto* Frontex seems to take the lead.[248]

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[241] E Papastavridis, ' "Fortress Europe" and Frontex: Within or Without International Law?' (2010) 79(1) Nordic Journal of International Law 75

[242] M Gkliati, 'The Next Phase of the The European Border and Coast Guard: Responsibility for Returns and Push-backs in Hungary and Greece' (2022) 7(1) European Papers 171

[243] S Léonard and C Kaunert, 'The Securitisation of Migration in the European Union: Frontex and its Evolving Security Practices' (2022) 48(6) Journal of Ethnic and Migration Studies 1417

[244] Mungianu (n 240)

[245] J Santos Vara, 'The European Border and Coast Guard in the New Regulation: Towards Centralization in Border Management' in S Carrera, D Curtin and A Geddes (eds) *20 Year Anniversary of the Tampere Programme: Europeanisation Dynamics of the Area of Freedom, Security and Justice* (European University Institute 2020) 67

[246] M Fink, *Frontex and Human Rights: Responsibility in 'Multi-actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018)

[247] ibid

[248] ibid; Gkliati (n 242); Mungianu (n 240)

Second, since the amendments of 2019 Frontex again gained more competences and now employs its own standing corpse with a capacity of 10.000 operational staff.[249] Frontex directly instructs and thus directly controls these officers and was assigned far-going executive powers to deploy them.[250] Furthermore, the 2019 amendment of the EBCG Regulation also conferred upon Frontex the power to organise return operations on its own initiative, flying refugees back in their own aircrafts.[251] Still, primary responsibility remains located in the host state, since Frontex does not have the competence to examine the asylum claim itself.[252]

Third, over time Frontex acquired the competence to conduct operations on the high seas and on third state territory. Regulation No. 656/2014 formed the legal basis for Frontex to for the first time leave EU territory and enter the high seas. The Regulation does not 'guarantee the right to access to an asylum procedure nor the access to an effective remedy in the case of applications made at the high seas'.[253] The Regulation reaffirms the commitment to the prohibition of refoulement, but without ensuring adequate access to judicial avenues to claim the right of non-refoulement that seems to remain an empty promise. However, considering the fact that the Charter should apply automatically in case of EU action, refugees intercepted by a Frontex operation at the high seas should be able to count on all Charter rights, including access to justice guarantees. Additionally, Frontex acquired a mandate to execute operations on the territory of non-EU countries in 2016 Whereas this was initially limited to neighbouring countries,[254] in 2019 this was extended to non-neighbouring third countries.[255] After in 2010 the Africa-Frontex Intelligence Community (AFIC) was launched, which was focused on information sharing, training of border guards, and delegation of experts,[256] it could be expected that Frontex is going to take an active part in migration operations in African transit and origin states. According to NGO Statewatch, the

[249] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard Article 5(2)
[250] ibid art. 36(2)(d); art. 54
[251] Gkliati (n 242)
[252] ibid
[253] J Santos Vara and S Sánchez-Tabernero, 'In Deep Water: Towards a Greater Commitment for Human Rights in Sea Operations Coordinated by Frontex?' (2016) 18(1) European Journal of Migration and Law 81, 87
[254] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard Article 54(3)
[255] Regulation (EU) 2019/1896 (n 249)
[256] A Moraczewska, 'The Africa-Frontex Intelligence Community: The EU-African Information Sharing Platform on Migration and Border Issues' in J P Laine, I Moyo, and C Changwe Nshimbi (eds) *Expanding Boundaries* (Taylor & Francis Group 2020) 39

Council is negotiating agreements for cooperation with Senegal and Mauritania,[257] but much is still unclear, which also resulted in questions in the European Parliament.[258] More is known about the status agreements concluded with neighbouring European (Albania, Montenegro, Serbia, and recently also North-Macedonia, and Bosnia-Herzegovina) and non-neighbouring European states (Moldova). The status agreements with Albania, Montenegro and Serbia are very similar, but the status agreement with Moldova, as a non-neighbouring state, follows a slightly different model.[259]

3.1.2. Rule of Law Concerns

The following part discusses how the Operations of Frontex undermine the rule of law, and specifically the principles of legality and effective judicial protection.

Legality

Already since its inception, Frontex operations are linked to grave human rights violations.[260] During the migration crisis these allegations have grown stronger, to the point that there is little doubt about Frontex complicity.[261] Frontex is claimed to take active part in push-backs. Push-backs, which refer to the practice of forcing refugees to return to the country they came from or preventing them (often by force) from entering a country without following the proper legal procedures, are illegal under both international and EU law. They violate the principle of non-refoulement (CFREU Article 19), which prohibits states to return individuals to a place where there is a real chance they become a victim of torture or other forms of ill-treatment. This prohibition also implies a positive obligation: the obligation to grant individuals access to an asylum procedure so that it is possible to ascertain whether there is a

[257] Statewatch, 'EU: Tracking the Pact: Plan for Frontex to Deploy "vessels, surveillance equipment, and carry out operational tasks" in Senegal and Mauritania' (21 July 2022) <https://www.statewatch.org/news/2022/july/eu-tracking-the-pact-plan-for-frontex-to-deploy-vessels-surveillance-equipment-and-carry-out-operational-tasks-in-senegal-and-mauritania/> accessed 30 March 2023

[258] Question for written answer E-000156/2023 to the Commission by Özlem Demirel, 'Frontex agreements with Senegal and Mauritania' (18 January 2023) <https://www.europarl.europa.eu/doceo/document/E-9-2023-000156_EN.html> accessed 30 March 2023

[259] L 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) 24(3) European Journal of Migration and Law 330, 356

[260] Papastavridis (n 241)

[261] Amnesty International, 'The Human Cost of Fortress Europe'. Human Rights Violations Against Migrants and Refugees at Europe's Borders' (2014) <https://www.amnesty.org/en/documents/eur05/001/2014/en/> accessed 11 May 2022; Gkliati (n 242); D Kochenov and Ganty (n 32)

risk of torture or ill-treatment in the home country.[262] Despite the obvious illegal nature of push-backs, they are currently commonplace in both the Aegean Sea and at the Hungarian-Serbian border.[263] The recent OLAF report on the activities of Frontex heavily implies that Frontex is fully aware of these practices and consciously and literally looks in a different direction.[264] Although under the duty of mutual trust, Frontex needs to presume that Member States with which it cooperates comply with human rights obligations,[265] this presumption is rebutted in case of systemic deficiencies[266] in human rights protection is established or a risk *in concreto* that the transferred person will suffer inhuman or degrading treatment due to the transfer.[267] The fact that Frontex still continues to assist in these operations is thus highly problematic, especially in light of its tasks to monitor compliance with human rights and the fact that it has been demonstrated that Frontex takes a leading role in border control operations.[268]

This persisting incongruence between human rights obligations and the acts of Frontex challenges the principle of legality in itself. The fact that the Frontex and the EU are not held accountable for human rights violations exacerbates this challenge. National courts could hold the host state of Frontex operations accountable, but this does not satisfy systemic accountability, which requires that responsibility is adequately distributed. An additional issue in this regard is the fact that Frontex now employs its own standing corpse, over which national judges might not have jurisdiction. On third state territory, it might even be more difficult to hold the EU accountable as more issues arise. First, although the EBCG Regulation explicitly reaffirms that Frontex will on third-state territory comply with Union law including human rights obligations,[269] difficulties arise in case of non-compliance. The status agreements contain mechanisms for preventive control mechanisms, such as monitoring by the European Commission and the Fundamental Rights Officer, and possibilities to suspend and terminate operations in case of suspected risks at human rights

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[262] M Giuffre, 'Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations' in V Moreno-Lax and E Papastavridis (eds) *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill 2017) 248

[263] Kochenov and Ganty (n 32); Gkliati (n 242)

[264] European Anti-Fraud Office (OLAF), 'OLAF Investigation in the European Border and Coast Guard Agency (Frontex)' (Report, 2021) https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_final_report_fr_0.pdf accessed 31 March 2023; See eg Section 2.2.1 in which it is described how Frontex officers relocated a Frontex aerial asset to avoid witnessing fundamental rights violations.

[265] ibid

[266] C-411/10 and C-493/10 *NS and ME* [2011] EU:C:2011:865

[267] C-578/16 PPU *CK and others* [2017] EU:C:2017:127

[268] Mungianu (n 240); M Fink (n 246)

[269] Regulation (EU) 2019/1896 (n 249) art. 73(1)

violations.[270] Yet, in case of human rights violations it is exceedingly difficult to combat non-compliance. Under the status agreements, the (third country) host state is *de lege* responsible for the operation, but Frontex has significant influence over the operational plan of the operation. Although operational plans for operations with third-states are quite intransparent,[271] operations so far show that Frontex exercises a 'decisive influence through its intervention in the chain of command' as well.[272] Yet, the status agreements provide that 'in case of damage caused by a member of the team in the exercise of official functions in the course', the host state is liable.[273] Only in cases of 'gross negligence or wilful misconduct or if the act was not committed in the exercise of official functions' can the host state ask Frontex to pay for the compensation.[274] This stands in the way of achieving systemic accountability, meaning that the principle of legality is not satisfied.

Effective Judicial Protection

The fact that the human rights violations can continue is in part due to the fact that the principle of effective judicial protection is compromised. Although national courts can sometimes offer access to a remedy for claims directed at the host state, national courts do not have the competence to hold the EU and Frontex accountable. These courts can thus not achieve systemic accountability. Considering this section focuses on Frontex itself, it will limit itself to an analysis of the possibility of effective judicial protection with regards to claims directed at Frontex. The only court that can hear claims directed at Frontex is the CJEU. After all, national courts do not have the competence to hold the EU accountable. Before the CJEU, there are three available routes to a remedy: the action for annulment, the action for inaction, and the action for damages. However, this section demonstrates that migrants face insurmountable obstacles when trying to obtain access to the CJEU through either one of the remedies.

Action for Inaction

The legal basis for the action for inaction can be found in Article 265 TFEU, which grants both EU institutions, Member States, and individuals access to a remedy in cases of unlawful inaction by EU institutions, bodies, offices, or agencies. Individuals can only challenge a

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[270] Letourneux (n 259)
[271] M Gkliati and J Kilpatrick, 'Frontex Cooperation with Third Countries: Examining the Human Rights Implications' (2021) 68 Forced Migration Review 16
[272] Letourneux (n 259)
[273] Agreement between the European Union and the Republic of Serbia on the status of the European Border and Coast Guard Agency teams and officers in the Republic of Serbia [2019] art. 6
[274] ibid

failure to act after the institution or agency at issue has first been called upon to act.[275] Although there are no strict standing requirements, few actions for inaction are actually held admissible.[276] The issue lies in the strict definition of 'inaction' adopted by the Court. Although the literal text of Article 265 gives few hints at what failure to act is supposed to mean exactly, the Court over time chose to view it as a 'failure to adopt a position' rather than a 'failure to fulfil obligations'.[277] Defining a position or publishing an opinion on why the institution or agency did not act is already considered to be an act, making the action for inaction inadmissible. Despite this difficulty, some civil society organisations brought actions for annulment against Frontex in the past years.[278]

However, the issue of the action for inaction is well-illustrated by the first of those cases against Frontex brought before the CJEU. In *SS and ST*, two African nationals residing in Turkey claimed that while trying to reach European territory they 'were violently rounded up, assaulted, robbed, abducted, detained, forcibly transferred back to sea, collectively expelled, and ultimately abandoned on rafts with no means of navigation, food or water'.[279] This also resulted in the death of one of the migrants, and all happened in the presence of Frontex officers.[280] The main claims of the migrants was that Frontex had failed to comply with its obligation under Article 46(4) of the EBCG Regulation, stipulating that Frontex needs to suspend or withdraw operations if it observes fundamental rights violations that are 'of a serious nature or are likely to persist'. [281] The case was held inadmissible however, because Frontex had explained in a letter that it did not consider the conditions of Article 46(4) of the EBCG Regulation to be met, because it stated that its 'actions in the Aegean Sea region had been carried out in strict compliance with the applicable legal framework, including in accordance with the responsibilities stemming from fundamental rights'.[282] The Court again emphasised that 'Article 265 TFEU refers to a failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different

[275] I Daukšienė and A Budnikas, 'Has the Action for Failure to Act in the European Union Lost its Purpose?' (2014) 7(2) Baltic Journal of Law & Politics 209
[276] ibid
[277] ibid 221
[278] S Nicolosi, ''Frontex and Migrants' Access to Justice: Drifting Effective Judicial Protection?'. (Verfassungsblog, 7 September 2022) <https://verfassungsblog.de/frontex-and-migrants-access-to-justice/> accessed 4 April 2023
[279] Front-Lex, 'First Ever Case vs. Frontex: Terminate Operation in Greece' (Front-Lex, May 2021) <https://www.front-lex.eu/court-case-frontex> accessed 4 April 2023
[280] ibid
[281] Regulation (EU) 2019/1896 (n 249) art 46(4)
[282] T-282/21 *SS and ST v. Frontex* [2022] para 3

from that desired or considered necessary by the persons concerned'.[283] Therefore, the adoption of the position in the letter was sufficient for Frontex to avoid unlawful inaction. The Court thus pointed the applicants to the action for annulment.[284]

The Action for Annulment

The difficulty with the action for annulment, however, is that it has stringent standing criteria. The legal basis of the action for annulment can be found in Article 263 TFEU, giving the CJEU jurisdiction to 'review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'.[285] Per the fourth paragraph of this article, individuals also have access to this action, but this is subject to the so-called *Plaumann* test. This requires individuals to be individually and directly concerned by the act they want to challenge. This is a notoriously high standard,[286] which is even more difficult to meet for individuals with a claim against an EU agency.[287] The main reason for this is that Frontex does not adopt legal acts, but it rather acts through 'administrative factual conduct'.[288] Although this conduct unquestionably affects third parties, the absence of a clear understanding by the Court of 'legal effects' 'reduces the quality of EU norms and judicial protection'.[289] This all makes it incredibly difficult to, as an individual, hold Frontex accountable through an action for annulment. This is also reflected by the fact that there are currently no actions for annulment pending against Frontex, nor have there ever been.

Action for Damages

The final option then is the action for damages. Since it has no strict standing requirements, Fink has suggested transforming it into a human rights remedy.[290] Yet, so far that has not happened. As a legal avenue to hold Frontex accountable it knows significant obstacles in the form of substantive requirements. The basis for the action for damages, also known as the non-contractual liability of the Union or EU public liability law can be found in two different

[283] ibid para 16
[284] ibid para 33
[285] art. 263 TFEU
[286] See eg: H Roer-Eide and M Eliantonio, 'The Meaning of Regulatory Act Explained: Are There Any Significant Improvements for the Standing of Non-Privileged Applicants in Annulment Actions? (2013) 14(9) German Law Journal 1851; M Eliantonio and B Kas, 'Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?' (2010) 3(2) Journal of Politics & Law 121
[287] M Fink, ' The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21(3) German Law Journal 532; Nicolosi (n 30)
[288] N Xanthoulis, 'Administrative Factual Conduct: Legal Effects and Judicial Control in EU Law' (2019) 12(1) Review of European Administrative Law 39
[289] ibid 43
[290] Fink (n 287)

articles: article 268 TFEU and the second paragraph of article 340 TFEU. These articles allow parties to bring cases before the CJEU to obtain compensation for damage caused by unlawful acts and conduct of the EU institutions, bodies, and agencies.[291] In *Bergaderm*, the CJEU aligned Union liability and state liability, meaning that the following three substantive requirements need to be met in order to obtain compensation: (1) a sufficiently serious breach of Union law, which confers rights upon individuals, must be established, (2) there must be actual damage, and (3) there needs to exist a direct causal link between the damage and the breach that is attributable to the EU institution, body, or agency.[292] These standards are often difficult to meet.[293]

With regards to Frontex, two specific difficulties arise. The first concerns the difficulty of actually attributing the breach (and thus the damage) to Frontex. This difficulty is caused by the multiplicity of actors involved in the border control and return operations.[294] Although Frontex might *de facto* take a leading role in operations, the host state usually retains responsibility. Although Frontex' competences have significantly widened and deepened over the past years, accountability standards have remained unchanged,[295] widening an already existing accountability gap.[296] Moreover, Frontex acts through the physical conduct of its officers. Article 340 TFEU stipulates that the EU will make good any damage caused 'by its servants in the performance of their duties'.[297] Due to the CJEU's strict interpretation of this clause, the EU only incurs liability for conduct of its officers in case a strong and direct legal relationship can be established between the officer and the EU, which also requires that the officer was performing a task for the EU.[298] In many cases, Frontex officers are officially deployed by the host state and thus fall under the authority of the host state, meaning that no direct legal relationship between the officer and the EU can be established.[299] It thus remains difficult to attribute unlawful conduct to Frontex.[300] A second

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[291] K Gutman, 'The Non-Contractual Liability of the Union: Principle, Practice, and Promise' in P Giliker (ed) *Research Handbook on EU Tort Law* (Edward Elgar Publishing 2017) 26
[292] ibid
[293] Fink (n 287); ibid
[294] M Gkliati, *Systemic Accountability of the European Border and Coast Guard: the Legal Responsibility of Frontex for Human Rights Violations* (PhD thesis, Leiden University, 2021)
[295] M Gkliati and J Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in Frontex Operations' (2022) 17(4) Utrecht Law Review 57
[296] A Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in B Ryan and V Mitsilegas (eds) *Immigration and Asylum Law and Policy in Europe* (Brill 2010) 225
[297] art 340 TFEU
[298] Fink (n 287)
[299] ibid
[300] Mungianu (n 240); Baldaccini (n 296)

obstacle could concern the 'sufficiently serious' requirement in the sense that the CJEU has not yet clarified how this should be interpreted in cases involving human rights violations.[301] Is any human rights violation 'sufficiently serious'? Or would it need to meet a certain standard of gravity? In any case, it seems that this should not form a major issue considering the gravity of the violations in for example *Hamoudi*, the first action for damages brought against Frontex.[302] Alaa Hamoudi, a Syrian national, was violently pushed-back and abandoned at sea for 17 hours by a joint operation of the Greek border guard and Frontex, while he was trying to reach European soil The case is still pending, and will be an opportunity for the Court to clarify the 'sufficiently serious' requirement. Yet, considering the difficulty of attributing this act to Frontex, it is highly uncertain Alaa Hamoudi will receive compensation and Frontex will be held accountable.

The slight positive note in this respect can be bound in the fact that Frontex now directly controls its own standing corps. This might make it slightly easier to attribute wrongful conduct in return operations to Frontex. In line with the CJEU's interpretation of Article 340 TFEU, it is now possible to establish the necessary strong and direct legal link between the officer and the agency.[303] The fact that Frontex now also *de jure* controls officers, might thus make it more feasible to hold the agency accountable through the action for damages in the future.

Still, the difficulties presented above demonstrate that it is excessively difficult to obtain access to justice with regard to human rights violations committed during a Frontex operation. Migrants do not enjoy meaningful access to a court and it is highly unlikely they can obtain a remedy from the CJEU. This compromises the principle of effective judicial protection.

3.1.3. Concluding Remarks

Despite established non-compliance of Frontex with human rights obligations, it is virtually impossible to find pathways to justice and to hold the agency accountable. This way the principles of legality and effective judicial protection, essential elements of the rule of law, are challenged. This challenge is highly interrelated. Due to the fact that there are no effective gateways to justice, the principle of legality cannot be satisfied, as the EU cannot be held

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[301] Fink (n 287)
[302] Front-Lex, 'For the First Time, a "Pushback" Victim Sues Frontex for Half a Million Euro' (March 2022) <https://www.front-lex.eu/alaa-hamoudi> accessed 4 March 2023
[303] ibid

accountable for the persisting incongruence between its human rights obligations and its acts. The unavailability of an effective remedy follows from the high standing criteria of the action for annulment, and the inaptness of the action for inaction and action for damages as a remedy for human rights violations. With the decision to also allow Frontex to operate on the territory of third states, these problems are only exacerbated.

3.2. Soft Law Instruments

The second neo-refoulement instrument of the EU takes the shape of soft law. The most prominent example of this is the EU-Turkey Statement. Before examining that example in more detail, the general definition of soft law and the proliferation of the use of soft law instruments is discussed first.

Santos Vara defines soft law to be 'in-between hard law and non-legal norms'.[304] Soft law then refers to legal obligations not associated with hard enforcement mechanisms or non-binding norms combined with some type of enforcement.[305] This characterization in essence follows the often used definition of soft law given by Snyder and completed by Stefan, who define soft law as 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects and also legal effects'.[306] Since it is not always clear whether the EU's informal migration agreements carry legal obligations with them, this definition of soft law allows for focus on the legal effects of the agreements, regardless of their non-binding or binding nature.[307] During and in the aftermath of 2015, a general development to use soft law or informal instruments in the external dimension of migration could be observed.[308] This is not necessarily a new development, but the development accelerated due to the 'emergency-nature' of the migration 'crisis'.[309] This tendency is also

[304] Santos Vara (n 25) 21
[305] ibid
[306] O Stefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects' (2012) 75(5) Modern Law Review 879
[307] Santos Vara (n 25)
[308] See V Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: the Hard Implications of Soft Law' in E Tsourdi and P de Bruycker (eds) *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 282; J Santos Vara (n 25); C Molinari, 'The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) 44 European Law Review 824; E Frasca, 'More or Less (Soft) Law? The Case of Third Country Migration Cooperation and the Long-Term Effects of EU Preference for Soft Law Instruments' (2021) 1 Queen Mary Law Journal 1; E Fahey, 'Hyper-Legalisation and De-Legalisation in the AFSJ: on Contradictions in EU External Migration Law' in S Carrera, J Santos Vara, and T 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) 116
[309] Idriz (n 9)

reflected in the New Pact on Migration and Asylum presented in September 2020, which emphasises the promotion of 'mutually beneficial partnerships with key third countries'.[310]

Besides informal return and readmission agreements with third countries, such as the EU-Turkey Statement, informal instruments have also been used for various different goals.[311] In this regard, agreements on border control in third states, as discussed in the section on Frontex, and asylum capacity building in third states stand out most.[312] Santos Vara distinguishes between two forms of informal migration agreements. There are informal programs such as the Global Approach to Migration and Mobility (GAMM), already established in 2005, which are placed in the EU framework, but are informal due to their non-binding nature.[313] The EU-Turkey deal is of a different order. It is also informal and not legally binding, but additionally it is placed outside of the EU framework.[314] Both types of instruments fit Santos Vara's definition of soft law

3.2.1. EU-Turkey Statement

In 2015, the Union was pushing to find a durable solution for the most problematic migratory inflow: inflow on the Greek-Turkish border. In October 2015, 200.000 refugees travelled over the Aegean Sea from Turkey to Greece, causing chaos on the Greek islands and coastal cities due to the inadequate facilities there.[315] It was clear that this could not be contained with just extending the powers of Frontex. Help from Turkey was crucial. Already in September 2015, the Commission, the Council and Member States individually agreed to collaborate with Turkey.[316] For years, Italy and Spain had outsourced their border controls to North-African states such as Libya and Morocco, which had indeed decreased the flow of refugees approaching their territory.[317] Such an agreement, giving Turkey an important role in halting the migration flow, was the aim of the various Union institutions. The first result was booked already on the 15th of October, when the EU–Turkey Joint Action Plan was

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[310] European Commission, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity', 23 September 2020, Press Release IP/20/1706 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706> accessed 25 May 2023

[311] Frasca (n 308)

[312] ibid

[313] See also Moreno Lax (n 308)

[314] Santos Vara (n 25)

[315] van Middelaar (n 15)

[316] S Smeets and D Beach, 'When Success is an Orphan: Informal Institutional Governance and the EU-Turkey Deal' (2020) 43(1) West European Politics 129

[317] See C Finotelli, 'Southern Europe: Twenty-Five Years of Immigration Control on the Waterfront' in A Ripoll Servent and F Trauner (eds) *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2017) 240

announced, which was formalised at the EU–Turkey Summit of 29 November 2015.[318] Yet, in December it turned out that Turkey was incapable or unwilling of following this action plan, and another 100.000 people crossed the Aegean Sea.[319]After meetings at the start of March between Turkey and Angela Merkel, supported by Dutch PM Mark Rutte, a second agreement was reached on the 18th of March, when European Council presented the EU-Turkey statement.[320]

The Statement, also known as the EU-Turkey Deal, contained a number of important points. Turkey agreed to 'take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU'.[321] Additionally, any irregular migrant arriving in Greece from Turkey will be returned to Turkey. This would also include refugees from Syria, Afghanistan and Iraq, who are in need of and have the right to international protection. The rationale behind the EU-Turkey Statement is that this international protection should then be sought in Turkey. The statement reaffirms that this will happen in accordance with EU and international law, and thus also with the principle of non-refoulement. Still, McDuff sees the EU-Turkey Statement as a form of 'neo refoulement'.[322] Although in this case, refugees reach the territory of the Member States, they are still denied their right to an asylum procedure and deported to a third state. In return for taking back migrants, the EU would admit one Syrian refugee from Turkey for every Syrian returned from Greece to Turkey. Additionally, Turkey would receive 6 billion Euros from the EU Member States, Visa liberalisation, accession of Turkey to the EU would be re-energized and the work on the upgrading of the Customs Union for Turkey would be continued.[323] The Statement seemed to achieve its goal: the number of refugees arriving on Member State territory fell from 61,000 in February to 13,000 in April.[324] Although the Statement is often seen as the major cause of

[318] European Commission, 'EU-Turkey Joint Action Plan', (MEMO/15/5860, 15 October 2015) <https://ec.europa.eu/commission/presscorner/detail/de/MEMO_15_5860) accessed 26 June 2023
[319] van Middelaar (n 15)
[320] European Council, 'EU-Turkey statement'(Press Release 144/16, 18 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 6 April 2023
[321] ibid
[322] E McDuff, 'Courting Asylum: How Asylum Claimants in Greece are Using Judicial Power to Combat Neo-Refoulement and the EU-Turkey Safe Third Country Agreement' (2019) 9(2) FLUX: International Relations Review 70
[323] See also Finotelli (n 317)
[324] van Middelaar (n 15)

this decline, Spijkerboer showed that the decline actually precedes the conclusion of the Statement.[325]

Although the content of the agreement is definitely important, the form of the agreement is arguably more important. The legal basis in the Treaties to form international agreements can be found in Article 216 TFEU and the procedure for this is stipulated in detail in Article 218 TFEU. However, this procedure was not followed nor does the EU-Turkey statement take the shape of a 'normal' international agreement between the EU and third states.[326] The EU-Turkey statement was only published through Press Release 144/16 and not in the official journal of the EU. It rather takes the shape of a political declaration by the EU heads of Governments and States and was thus officially concluded outside of the Union framework. Although the Commission, as Guardian of the Treaties, approved that the Member States acted outside of the Treaty framework, it seems to be at odds with the Court's *ERTA* doctrine, which stipulates that when a field is covered by EU law, external action becomes an exclusive competence of the EU.[327] Action by Member States should thus not be permitted, and could be seen as a violation of the principle of loyal cooperation.[328] Yet, the Union institutions agreed to create the agreement with Turkey outside of the Treaty framework.

3.2.2. Rule of Law Concerns

The following part discusses how soft law instruments can cause incongruence between human rights obligations and acts of government. This is discussed with reference to the EU-Turkey Statement, considering this Statement is used by the EU as a model for future informal partnerships with third states.[329]

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[325] T Spijkerboer, 'Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths? (Border Criminologies, 28 September 2016) <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu> accessed 6 April 2023; See also I van Liempt and others, 'Evidence-based Assessment of Migration Deals: the Case of the EU-Turkey Statement' (Knowledge Platform: Security and the Rule of Law, 2017) <https://www.kpsrl.org/publication/evidence-based-assessment-of-migration-deals-the-case-of-the-eu-turkey-statement> accessed 6 April 2023

[326] Carrera, Hertog, and Stefan (n 26); M Gatti and A Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law' in S Carrera, JS Vara, and T 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) 175; Idriz (n 9)

[327] Carrera, den Hertog, and Stefan (n 26)

[328] ibid

[329] See D Vitiello, 'Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond' in V Mitsilegas, V Moreno-Lax, and N Vavoula (eds) *Securitising Asylum Flows. Deflection, Criminalisation and Challenges for Human Rights.* (Brill 2020) 130

Legality

Molinari points out that 'the legal effects of a deal cannot be limited to the conferral of rights and the imposition of obligations upon its signatories, but must necessarily encompass its content, especially its consequences on the fundamental rights of third parties'.[330] This point finds support in Snyder's list of effects that European soft law can produce, which includes legal effects on third parties.[331] Stefan also affirms that the effects of soft law on rights and obligations of third parties should be taken into account.[332] Advocate General Bobek in the *Belgium* case also made the point that, considering the proliferation of soft law instruments, 'there are norms generating significant legal effects that find themselves beyond the binary logic of binding/non-binding legal rules'.[333]

The EU-Turkey statement is an example of a non-binding instrument that generates legal effects in the sense that it affects the human rights of third parties. The statement adversely affects the human rights of migrants in a number of ways,[334] but most significantly it affects the right to asylum. The problem lies in the fact that under the Statement refugees in need of international protection are also returned to Turkey under the presumption that they can seek international protection there.[335] Consequently, Member States could fast-track asylum procedures and hold asylum claims inadmissible on the basis that the person in question could have sought international protection status in Turkey.[336] According to the Procedures Directive, such fast-tracked procedures and declaring applications for international protection inadmissible are only allowed if the migrant entered Member State territory from a 'safe third country' (STC). Therefore, the Statement implicitly seems to accept Turkey as an STC, although it officially leaves this decision to national asylum authorities. This choice has been widely criticised.[337] Article 38 of the Procedures Directive

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[330] Molinari (n 35) 23

[331] F Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations' in G. Winter (ed), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos Verl-Ges 1996) 463

[332] Stefan (n 306)

[333] Opinion of AG Bobek in C-16/16 P *Kingdom of Belgium v European Commission* [2017] EU:C:2017:959 para 4

[334] See J Alpes, S Tunaboylu, and I van Liempt, 'Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece over Access to Asylum' (2017) 29 Robert Schuman Centre for Advanced Studies Policy Brief

[335] S Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23(1-2) European Law Journal 94

[336] H Kaya, *The EU-Turkey Statement on Refugees: Assessing Its Impact on Fundamental Rights* (Edward Elgar Publishing 2020)

[337] O Ulusoy and H Battjes, 'Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement' (2017) VU Migration Law Series No 15; M Gkliati, 'The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee' (2017) 10 European Journal

stipulates that an STC needs to meet the following conditions: requires an STC that life and liberty are no threatened on account of race, religion, nationality, membership of a particular social group or political opinion, that there is no risk of serious harm, that the principle of non-refoulement is guaranteed, and that it is possible to request refugee status and if necessary receive protection in line with the Geneva Convention. Turkey does not seem to meet those conditions.

Already beforehand, it seemed clear that Turkey would not meet these standards. First of all, Turkey has a geographical limitation on the Geneva Convention, limiting international protection status to European nationals.[338] Additionally, in the years prior to the EU-Turkey Statement, the ECtHR ruled on multiple occasions that the conditions of migrants in Turkey violated human rights.[339] In *Abdolkhani and Karimnia v Turkey*, the ECtHR, finding a violation of Article 3 and 13 ECHR, was 'struck by the fact that both the administrative and judicial authorities remained totally passive regarding the applicants' serious allegations of a risk of ill-treatment if returned to Iraq or Iran'.[340] It follows that prior to the EU-Turkey deal neither non-refoulement nor access to an asylum procedure was guaranteed in Turkey. Despite the affirmation in the EU-Turkey Statement that international law would be complied with, research demonstrates that is not the case.[341] Kaya observes that in the implementation of the Statement 'it is evident that there is a shortfall in guaranteeing 'the right to have rights'.[342] It is also commonplace that returnees are held in *de facto* detention.[343] Ulusoy and Battjes, examining what happened with the refugees who were returned to Turkey from Greece, also conclude that access to international protection is 'exceptional' and that procedural rights are violated to such an extent that it risks violations of the principle of non-refoulement.[344]

With the presumption that Turkey is a STC thus rebutted, the EU itself is also implicated in violations of the right to asylum and refoulement. In Greece, applications for international protection of Syrians were held inadmissible by the Greek asylum service, so

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of Legal Studies 81; R Lehner, 'The 'EU-Turkey- "Deal": Legal Challenges and Pitfalls' (2019) 57(2) International Migration 176; McDuff (n 322)

[338] Gkliati (n 337)

[339] ibid

[340] *Abdolkhani and Karimnia v Turkey*, app. no. 30471/08, (ECtHR, 22 September 2009) para 113

[341] Ulusoy and Battjes (n 337)

[342] Kaya (n 336) 217

[343] S Tunaboylu and J Alpes, 'The EU-Turkey Deal: What Happens to People who Return to Turkey?'(2017) 54 Forced Migration Review 84

[344] Ulusoy and Battjes (n 337) 7

that these refugees could be returned to Turkey.[345] This not only violates the Procedures Directive, but more importantly also the right to asylum. The right to asylum includes the right to be granted international protection status if appropriate and, taken together with the right to effective judicial protection, to have your application examined fairly.[346] Ulusoy and Battjes conclude that the EU-Turkey Statement has 'created a vacuum for persons who are in need of international protection', as Greek authorities justify their decision not to grant international protection by arguing that it is to be obtained in Turkey, whereas Turkish authorities justify limited access to asylum there on the grounds that the Greek authorities already examined the claim.[347]

The persisting human rights violations in itself challenge the principle of legality, but this challenge is exacerbated due to the fact that the EU cannot be held accountable. Again, national courts cannot hold the EU accountable, whereas the preceding analysis made clear that the EU played an important role in the creation of the Statement. Although the Statement does not itself identify that Turkey is an STC, it is clearly the 'trigger' for the recognition of Turkey as an STC.[348] The requirement of systemic accountability can thus not be achieved without holding the EU accountable.

Effective Judicial Protection

Like in the case of Frontex, the fact that the EU-Turkey Statement could continue to produce effects that violate human rights in part arises from an obstructed access to justice before the CJEU. The fact that it is hard to challenge the legality of the Statement is due to the process of de-legalislation.[349] It can be defined as the 'practice of putting issues, laws, practices and litigation beyond the scope of genuine and meaningful judicial review'.[350] Again the EU-Turkey deal serves as a good example. Soon after the deal was concluded, three actions for annulment brought by refugees reached the General Court (GC).[351] Considering that the cases were highly similar, the first of those cases, *NF*, will suffice as an example. This case was brought by a Pakistani national, who feared persecution in Pakistan and had from Turkey

[345] Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal' (February 14, 2017) <https://www.amnesty.org/en/documents/eur25/5664/2017/en/> accessed 12 April 2023
[346] Nicolosi (n 335)
[347] Ulusoy and Battjes (n 337) 30
[348] ibid
[349] Frasca (n 308); Fahey (n 308)
[350] Fahey (n 308) 126
[351] T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128; T-193/16 *NG v European Council* [2017] ECLI:EU:T:2017:129; T-257/16 *NM v European Council* [2017] ECLI:EU:T:2017:130

travelled to Greece, where he claimed he was forced to submit an asylum application for the sole purpose of being returned to Turkey, where the risk of refoulement seemed evident. He sought to have the EU-Turkey Statement annulled, as he argued that it was an international agreement entered into by the EU. He thus brought an action for annulment under Article 263 TFEU, which allows the CJEU to review

> 'the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties.'

It follows that in case of the EU-Turkey Statement the GC needed to answer two questions in the affirmative to be able to hear the case. First, was the EU-Turkey Statement an EU act? Second, was it intended to produce legal effects vis-à-vis third parties?

The GC started to examine the first question, pointing out that the mere classification as an act of the Member States does not automatically lead to the Court declining jurisdiction in case the reality differs from that classification.[352] It thus examined who the authors were of the EU-Turkey Statement, regardless of the Council's assertion that it was not an international agreement of the EU in the sense of Article 218 TFEU. The examination of the words used in the Press Release did not result in a conclusive answer, due to its ambiguous nature. It then also examined the official preparatory materials of earlier meetings, and concluded that the members of the European Council acted in their capacity as heads of state and government and that it was thus a deal between the Member States and Turkey, not between the EU and Turkey. It thus dismissed the case on the ground of lack of jurisdiction.[353] In the appeal, the CJEU followed the GC's reasoning and declared the appeal to be 'manifestly inadmissible'.[354]

The conclusion of the GC yielded much criticism.[355] Based on the factual situation and the circumstances of the case, Gatti and Ott conclude that the EU-Turkey Statement was 'entered into by the European Council on behalf of the EU, not by the Member States on their

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[352] T-192/16 *NF* (n 351) para 44-45
[353] ibid para 75
[354] Joined Cases C-208/17 P to C-210/17 P *NF and others v European Council* [2018] ECLI:EU:C:2018:705 para 31
[355] See eg Idriz (n 9); Gatti and Ott (n 326); Fahey (n 308); E Kasotti and A Carrozzini, 'One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement' in E Kassoti and N Idriz (eds) *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (TMC Asser Press 2022) 237

own behalf'.[356] Kassotti and Carozzini add that under the international rules on treaty-making, the Statement would also be seen as an international agreement between the EU and Turkey.[357] Also the fact that 2 billion of the 6 billion promised to Turkey came directly out of the EU budget points to a different conclusion.[358] The conclusion of the GC also seems to directly contradict its own long-standing case law, namely the *ERTA*-doctrine, also known as the doctrine of implied external powers.[359] In *ERTA*, the Court decided that when the Community adopts a common policy, the Member States give up the power to act individually and 'undertake obligations with third countries which affect those rules'.[360] The EU-Turkey Statement definitely affected the common rules in the field of asylum and migration in various ways. For example, the implicit recognition of Turkey as an STC altered the scope of the 'safe third country' concept.[361] In fact, acting externally outside of the Treaty framework in case the Union has an exclusive external competence in line with *ERTA*, violates the principle of loyal cooperation.[362] Yet, the General Court decided otherwise, showing significant deference to the executive again. It prompted Goldner Lang to accuse the Court of judicial passivism in migration and asylum cases.[363]

Although the Court in *NF* avoided the question of whether the Statement produced legal effects, it remains an important issue and warrants a brief examination of the CJEU's case law. After all, even if the Court would have found the Statement to be authored by the EU, the action for annulment would only be admissible if it also produced 'legal effects vis-à-vis third parties'.[364] In the seminal *ERTA*, the Court clarified that review was possible for 'all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'.[365] Importantly, with questions of admissibility, substance prevails over form in the *ERTA* test. In this light it has also decided in the past in *Grimaldi* that

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[356] Gatti and Ott (n 326) 182
[357] Kasotti and Carozzini (n 355)
[358] European Commission, The EU Facility for Refugees in Turkey. Factsheet (July 2019) <https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-02/frit_factsheet.pdf> accessed 14 April 2023
[359] Idriz (n 9); Carrera, den Hertog, and Stefan (n 26)
[360] Case 22/70 *Commission v Council (ERTA)* [1971] ECLI:EU:C:1971:32 para 17
[361] Idriz (n 9)
[362] Carrera, den Hertog, and Stefan (n 26); The Court confirmed this in the *PFOS* case where Sweden had acted individually on the international scene in an area in which the Union has exclusive competence and the CJEU ruled it failed to comply with the principle of loyal cooperation, see C-246/07 *Commission v Sweden (PFOS)* 2010 ECLI:EU:C:2010:203
[363] I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' in T Capeta, I Goldner Lang, and T Perišin (eds) *The Changing European Union: A Critical View on the Role of Law and the Courts* (Bloomsbury Publishing 2022) Chapter 9
[364] art. 263 TFEU
[365] Case 22/70 *ERTA* (n 351) para 42

recommendations, a soft law instrument, 'cannot be regarded as having no legal effect',[366] despite their soft law form.[367] No mention is made about the necessity that legal effects need to be binding for the Court to be able to exercise judicial review, but that element was added in subsequent case law.[368] The yardstick thus changed from 'having legal effects' to 'having binding legal force' despite the fact that the former yardstick is better grounded in the Treaties. Nevertheless, in competition and state aid case law, the CJEU recognized the binding legal effects of soft law instruments in over 600 cases.[369] Although in those cases it often grounds that conclusion in the obligations the soft law instruments put on the Member States, to which these instruments are often addressed. In *Polska Telefonia Cyfrowa (PTC)*, the court emphasises the distinction between legally binding force and legal effects, but according to Stefan it fails to appreciate the effects of soft law on the rights of individuals.[370] Consequently, the CJEU will review soft law instruments only in limited cases, and most likely not when the legal effects are limited to effects on the rights of third parties, due to its restrictive reading of the term 'legal effects' in Article 263 TFEU.

The problematic nature of de-legalisation in relation to effective judicial protection is obvious. Due to its form, soft law instruments are excluded from judicial scrutiny, which blocks access to justice and the possibility to hold the responsible authors accountable, essential elements of the rule of law. The preceding analysis also demonstrates that this need not have been the case. In the case of the EU-Turkey Statement, the CJEU contradicted its own case law by declining jurisdiction. Its passivism also seems to contradict the rule of law, which makes the choice of the Court all the more peculiar.

As the EU-Turkey Statement is thus not seen as EU law, but rather an international 'agreement' of the Member States of the EU with Turkey, national courts have the competence to hear cases involving the Statement and offer effective judicial protection. This proved to be true in part. In the first months after the EU-Turkey Statement was concluded, this Greek Asylum Appeals Committee blocked return to Turkey in 390 out of 393 decisions.[371] However, it was restructured in June 2016, soon after its first rulings that Turkey was not an STC. Gkliati writes that 'the first indication of the practice of the new Appeals

[366] C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECLI:EU:C:1989:646 para 18
[367] See A Arnull, 'EU Recommendations and Judicial Review' (2018) 14 European Constitutional Law Review 609
[368] Opinion of AG Bobek, C-16/16 P (n 333)
[369] O Stefan, *Soft Law in Court : Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer 2013)
[370] Stefan (n 306)
[371] Gkliati (337)

Committees confirms their alignment with the EU-Turkey deal'.[372] Indeed, by the end of 2017 the restructured Committee had held all 20 appeals inadmissible, thus allowing the return of the migrants to Turkey, despite the fact that this obviously violates human rights.[373] One case also reached the Greek Council of State, which agreed with the Appeal Committee to declare the appeal inadmissible, agreeing that Turkey was an STC due to the diplomatic assurances given by the European Commission.[374] It dedicated the case purely on the basis of the STC concept, and did not consider the legality of the Statement.[375] In fact, it seems 'very difficult to challenge the legality of the deal itself', before a national court due to the fact that the Statement is very brief and does not itself address whether Turkey is an STC or not.[376] Nevertheless, although the substantial outcome of the cases might not have been desirable, it is clear that migrants procedurally enjoy access to a court concerning the implementation and execution of the EU-Turkey Statement. Still, it can be questioned whether this satisfies the principle of effective judicial protection. After all, this principle also requires that the specific judicial body hearing the claim is independent and impartial.[377] The timing of the restructuring of the Greek Asylum Appeals Committee and the subsequent alignment with the EU-Turkey Deal can cause some doubt about the independence and impartiality of this Committee.

3.2.3. Concluding Remarks

The proliferation of soft law instruments for migration control thus challenges the principles of effective judicial protection and legality, as demonstrated by the EU-Turkey Statement. Although the Statement itself stipulates that the implementation of the provisions of the Statement needs to be in line with human rights obligations, the Statement still 'triggers' the recognition of Turkey as an STC, which violates the principle of non-refoulement. Despite this non-compliance, which challenges the principle of legality, it is highly difficult to challenge the EU-Turkey Statement. Due to the decision of the CJEU that the EU-Turkey Statement is not part of EU law, it is now impossible to challenge the legality of it before the CJEU. Before the CJEU, effective judicial protection is thus compromised. In some cases,

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[372] ibid 122
[373] Amnesty International (n 345)
[374] N Idriz, 'A 'Complete' System of Legal Remedies? The EU-Turkey Deal as a Litmus Test' (Verfassungsblog, 30 September 2020) <https://verfassungsblog.de/a-complete-system-of-legal-remedies/> accessed 25 May 2023
[375] ibid
[376] ibid
[377] See Prechal and Widdershoven (n 127)

national courts can step in and offer effective judicial protection. Nevertheless, the brief analysis on the Greek Asylum Appeals Committee reveals that it can be questioned how effective this judicial protection is. Anyway, national courts cannot satisfy the legality-requirement of systemic accountability, as they lack the competence to hold the EU accountable.

3.3. CSDP-Based Migration Control Missions

Although the number of refugees entering the EU dropped in the spring of 2015,[378] many refugees still tried to cross the Mediterranean to reach Europe with the help of smugglers, which resulted in many tragic drownings. In April 2015, 800 migrants drowned near the coast of the Italian island of Lampedusa.[379] After a special meeting of the European Council organised to respond to the tragedy at the Mediterranean Sea, the Council announced it would strengthen the EU's presence at sea, fight traffickers in accordance with international law and prevent illegal migration flows.[380] In May, the Commission presented the new European Agenda on Migration, which further clarified how the EU was going to tackle the problem at the Mediterranean Sea.[381] It stated that it was 'working on a possible Common Security and Defence Policy (CSDP) operation in the Mediterranean to dismantle traffickers' networks and fight smuggling of people, in accordance with international law'.[382] Less than a week later Council Decision (CFSP) 2015/778 created the EU 'military crisis management operation' EUNAVFOR MED better known as Operation Sophia.[383] This 'militarisation of extraterritorial immigration control' became an important aspect of the EU's migration policy.[384] Other CSDP-based migration management operations were started or reinforced, mostly in Africa, although these are not military but civilian missions.[385] Officially these

[378] van Middelaar (n 15)
[379] A Bonomolo and S Kirchgaessner, 'UN Says 800 Migrants Dead in Boat Disaster as Italy Launches Rescue of Two More Vessels' (The Guardian, 20 April 2015) <https://www.theguardian.com/world/2015/apr/20/italy-pm-matteo-renzi-migrant-shipwreck-crisis-srebrenica-massacre> accessed 14 April 2023
[380] European Council, 'Special meeting of the European Council, 23 April 2015 - statement' (Press Release 204/15, 23 April 2015) <https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/> accessed 14 April 2023
[381] European Commision, 'Managing migration better in all aspects: A European Agenda on Migration' (Press Release IP/15/4919, 13 May 2015) <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4956> accessed 14 April 2023
[382] ibid
[383] Council Decision (CFSP) 2015/778 of 18 May 2015 (n 27)
[384] Mitsilegas (n 36)
[385] See eg M Bøås, 'EU Migration Management in the Sahel: Unintended Consequences on the Ground in Niger?' (2021) 42(1) Third World Quarterly 52; A Molnár and M Vécsey, 'The EU's Missions and Operations

CSDP missions are also intended to address 'the root causes' of migration, and could therefore in van Middelaar's analytical framework be seen as an instrument to stop the flood at the source. However, in fact these missions are a clear example of neo-refoulement, and thus should be considered as a defensive-border-policy that is intended to construct a dam. This is exemplified by research on CDSP-based missions in Niger (EUCAP Sahel Niger), which demonstrates that the mission in fact undermines stability in Niger.[386]

This section first examines the legal framework of such missions, focusing on Operation Sophia, which is now replaced by Operation Irini, after which the potential of non-compliance with (human rights) law is established, challenging the principle of legality. Due to the legal architecture of the CFSP, the principle of effective judicial protection is also severely challenged, which is then discussed.

3.3.1. Legal Framework

Migration control legally falls under the AFSJ, which rules are laid down under Title V of the TFEU. Chapter 2 of this Title covers 'policies on border checks, asylum and immigration'. Conversely, Article 43 TEU, which lists the operational tasks of the CSDP, makes no mention of migration. It does allow the Union to use civilian and military means for humanitarian and rescue tasks and for 'tasks of combat forces in crisis management'. Migration control thus does not legally fall under the CSDP.[387] Yet, Operation Sophia was introduced by a Council Decision on the basis of Article 42(4) TEU, making it a non-legislative act of the CSDP. It was introduced to combat human smuggling and trafficking networks on the Mediterranean Sea, accompanying Frontex's mission Triton.[388] It was to achieve this through the identification, capture, and disposal 'of vessels and assets used or suspected of being used by smugglers or traffickers, in accordance with applicable international law, including UNCLOS and any UN Security Council Resolution'.[389] Its legal framework evolved over time, responding to the various UN Security Council Resolutions on the tragedies in the Mediterranean Sea, which authorised Member States and the EU 'to use

from the Central Mediterranean to West-Africa in the Context of the Migration Crisis' (2022) 15(1) International Journal of Euro-Mediterranean Studies 55

[386] Bøås (n 385)

[387] Bendiek and Bossong (n 23)

[388] See G Butler and M Ratcovich, 'Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea' (2016) 85 Nordic Journal of International Law 235; G Bevilacqua, 'Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities' in G Andreone (ed) *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests* (Springer 2017) 165

[389] Council Decision (CFSP) 2015/778 (n 27) art. 1

enforcement jurisdiction against irregular migration on the high seas'.[390] To do this, almost all Member States contributed to the mission, which would be led by the Italian Navy's *Giuseppe Garibaldi* aircraft carrier.[391] The first phase of the mission was to gather intelligence. Subsequently, the second phase would involve the searching and seizing of suspected vessels at the high seas and on the territorial waters of Libya. In the final phase of the mission, those suspected vessels would be destroyed and human traffickers would be apprehended.[392] All of this would need to happen in accordance with international law, and specifically in accordance with UNCLOS, SOLAS and SAR.[393]

That final phase would never be reached, however. Operation Sophia 'incidentally' turned mostly into a Search and Rescue Operation, saving thousands of people.[394] The SAR obliges states to return saved people in distress at sea to a 'place of safety'.[395] At this 'place of safety' the survivor's life should no longer be threatened, their basic human needs should be met, and 'transportation arrangements can be made for the survivor's next or final destination'.[396] The SAR stipulates that it is an obligation for the state in whose SAR zone the people are rescued to arrange this place of safety, be it on their own territory or in a third state.[397] Additionally, since the ECtHR *Hirsi* judgment it is clear that the saved people at sea are under the jurisdiction of the state to which the vessel that saved the people at sea belonged, meaning that the ECHR, and thus the principle of non-refoulement, applies.[398] Although Operation Sophia was thus not primarily meant as a humanitarian mission, international law obligations forced it to become one.[399] Since Italy led the operation, it had to ensure 'a place of safety' for the saved migrants. Since other Member States refused to systematically take in refugees or arrange a fair distribution, a conflict arose between Italy and the other Member States.[400] Unable to find a sustainable solution for the distribution, the

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[390] Bevilacqua (n 388) 185; See also Mitsilegas (n 36); United Nations Security Council, 'Resolution 2240 (2015) Adopted by the Security Council at Its 7554th Meeting, on 9 October 2015', UN Doc S/RES/2240 (2015)
[391] Butler and Ratcovich (n 388)
[392] ibid
[393] Council Decision (CFSP) 2015/778 (n 27) recital 6
[394] Bevilacqua (n 388)
[395] International Maritime Organization, 'International Convention on Maritime Search and Rescue (SAR), 27 April 1979, 1405 UNTS 93 (entered into force 22 June 1985)' article 1.3
[396] IMO-Maritime Safety Committee 'Guidelines on the treatment of persons rescued at sea' (MSC Guidelines) art 6.12 Resolution MSC.167(78) (20 May 2004)
[397] Bevilacqua (n 388)
[398] P Müller and P Slominski, 'Breaking the Legal Link but not the Law? The Externalization of EU Migration Control Through Orchestration in the Central Mediterranean' (2021) 28(6) Journal of European Public Policy 801
[399] Bendiek and Bossong (n 23)
[400] ibid

nature of Operation Sophia was amended in a number of ways. In 2018, the deployment of vessels was stopped, essentially suspending rescue at sea.[401] Instead, the mission would supplement the civilian mission EUBAM Libya and focus more on capacity-building of the Libyan Coast Guard, both with resources and through training. Additionally, with the maritime component gone, the operation is now focused on aerial surveillance.[402]

3.3.2. Rule of law Concerns

The following part discusses how CSDP-based migration control missions undermine the principles of legality and effective judicial protection. This is discussed with reference to the situation in Libya, where the EU was most active through its Operation Sophia and EUBAM Libya.

Legality

Due to how the mission was changed, the EU now seems to use CSDP missions to 'bypass' non-refoulement obligations.[403] On the basis of the intelligence it gathered through its aerial surveillance, the EU will alert the Libyan Coast Guard and point them to migrants spotted at sea. The Libyan Coast Guard, trained by the EU mission, will then take back these migrants to Libya.[404] It is well documented that human rights of migrants in Libya are systemically violated.[405] Migrants saved at sea are taken back and arbitrarily detained in detention centres, with no genuine possibility of judicial review.[406] The OHCHR assessed the conditions in the detention centres to be inhuman.[407] Furthermore, migrants are exposed to sexual violence, torture, and forced labour.[408] It is thus clear that Libya cannot be considered an STC, as the

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401 ibid
402 ibid
403 M Riddervold, 'A Humanitarian Mission in Line with Human Rights? Assessing Sophia, the EU's Naval Response to the Migration Crisis' (2018) 27(2) European Security 158, 169
404 Kochenov and Ganty (n 32); Amnesty International, 'EU: Diminished "Operation Sophia" Abandons Refugees and Migrants to Reckless Libyan Coast Guard' (27 March 2019) <https://www.amnesty.org/en/latest/press-release/2019/03/eu-diminished-operation-sophia-abandons-refugees-and-migrants-to-reckless-libyan-coast-guard/> accessed 18 April 2023
405 See ibid; OHCHR and UN Support Mission in Libya, 'Detained and Dehumanized: Report on Human Rights Abuses against Migrants in Libya' (13 December 2016) <https://www.ohchr.org/sites/default/files/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> accessed 18 April 2023; Human Rights Watch, 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya' (21 January 2019) <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya> accessed 18 April 2023
406 Human Rights Watch (n 405)
407 OHCHR and UN Support Mission in Libya (n 405)
408 ibid

UNHCR also affirmed.[409] Consequently, if the EU would actively return migrants to Libya it would amount to a violation of the non-refoulement principle. However, since the EU only assists the Libyan Coast Guard, the question of whether the EU violates international law through this 'refoulement by proxy' is complicated.[410] D'Argent and Kuritzky argue that to characterise 'the current EU collaboration with Libya as illegal is a stretch in light of international law as it stands'.[411] Conversely, Ferstman argues that it the current practices fail to meet 'the legal obligation of due diligence applicable to the foreseeable human rights risks of arbitrary detention, torture, inhuman and degrading treatment, or refoulement'.[412]

Even though the Charter applies due to the fact that the EU CSDP mission is in the scope of EU law, there is thus uncertainty whether this 'refoulement by proxy' triggers EU responsibility for the human rights violations in Libya. However, a brief examination of the Treaties and the case law of the CJEU suggests the EU 'is required under EU law to ensure that its policies [do] not have negative effects on human rights in third countries',[413] this in turn suggests that the EU is responsible for human rights violations in Libya due to its role in them. The violations of human rights in Libya thus also violate the principle of legality. After all, Articles 3(5) and Article 21 TEU both, in different ways, stipulate that the EU needs to 'uphold', 'promote' or 'contribute to' human rights protection in 'the wider world' or on 'the international scene'. The CJEU also recognizes this. Bartels gives the example of the *Zaoui* case, in which the applicants brought an action for damages for the death of a family member killed by a Hamas bomb in Israel.[414] They argued the EU was responsible for this due to its financial support for education in the Palestinian territories, which, according to the applicant, had caused Hamas to attack. Although the CJEU considered that the requirement of causality was not met, the 'Court did not question the assumption that the EU might be responsible for a violation of the applicant's human rights by a third party in a third

[409] UNHCR, 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea' (September 2020) < https://www.refworld.org/docid/5f1edee24.html> accessed 18 April 2023

[410] P d'Argent and M Kuritzky, 'Refoulement by Proxy: The Mediterranean Migrant Crisis and the Training of Libyan Coast Guards by EUNAVFOR MED Operation Sophia' (2017) 47 Israel Yearbook of Human Rights 233; Müller and Slominski (n 398)

[411] ibid 235

[412] C Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459, 483

[413] L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 24(4) The European Journal of International Law 1071, 1074

[414] ibid; For the case, see: C–288/03 P, *Zaoui* [2004] ECLI:EU:C:2004:633

country'.[415] In the later *Mugraby* in different factual circumstances the Court again did not challenge this assumption.[416] In case of the CSDP missions and the violations committed by Libya, the EU seems to fulfil an instrumental role in the pull-backs of the Libyan Coast Guard. This entity only exists due to the material support of the EU and reacts and functions due to the fact that it is alerted by the EU of migrants trying to reach Europe by boat.[417] This might well satisfy the causality requirement. Consequently, the EU fails to meet its human rights obligations vis-a-vis migrants in its military migration control missions, causing an incongruence between its human rights obligations and its acts, which challenges the principle of legality, as explained in Chapter 2.

Effective Judicial Protection

This challenge to legality can currently not be remedied however, due to the fact that the missions are CSDP-based. The CSDP is part of the CFSP. The CFSP has a special place in the European legal order, which is exemplified by the fact that its rules are laid down in the TEU rather than in the TFEU.[418] Due to the CFSP's strong intergovernmental character,[419] CFSP decisions are in nature sometimes closer to international law decisions than to EU acts.[420] After all, in the CFSP decisions are taken in the Council by unanimity and the European Parliament is only involved through a consultation requirement. Additionally, Article 24(1) exempts the Court of Justice from exercising full jurisdiction with regard to CFSP acts. It can exercise jurisdictions in only two situations. First, it can 'monitor compliance with Article 40' TFEU.[421] This article contains the non-affection clause, which stipulates that 'implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions' in the other policy fields, and vice versa.[422] Essentially, this exception allows the Court to verify if a specific CFSP act truly belongs to the CFSP, or whether it would have been more appropriate to adopt it on a different legal

[415] ibid 1076
[416] See: C–581/11 P *Mugraby* [2012] ECLI:EU:C:2012:466
[417] M Giuffrè and V Moreno-Lax, 'The Rise of Consensual Containment: from "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in S Singh Juss (ed) *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 101
[418] P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67(1) International and Comparative Law Quarterly 1
[419] A Engel, 'Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases' (2015) 21(1) European Public Law 47
[420] P Craig and G de Búrca, 'EU International Relations Law' in *EU Law. Text, Cases, and Materials* (Oxford University Press, 7th edition, 2020) 381
[421] art. 24(1) TEU
[422] art. 40 TEU

basis.[423] Second, it can 'review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU'. This article mostly repeats Article 40 TFEU, but specifies the second exception. It adds that the Court will have jurisdiction to hear actions for annulment about acts that provide for restrictive measures against individuals.[424]

The CJEU thus only has limited jurisdiction over CFSP acts, which is a much discussed rule of law issue.[425] Over time, the CJEU has broadened its jurisdiction because in a series of cases[426] it has interpreted its jurisdictional carve-out narrowly, and its two 'claw-backs' broadly, on the basis that effective judicial protection, as essential part of the rule of law, should be of overriding importance.[427] Consequently, especially regarding acts that provide for restrictive measures against individuals the Court has now a relatively broad mandate, showcasing that the CFSP is no longer completely isolated from the European legal order.[428] Although most other CFSP acts are directed at third states, military missions, such as Operation Sophia, definitely affect individuals. For such missions, the Court still faces a gap in its jurisdiction.[429]

This could change quickly, however. The Commission has brought an appeal in *KS and KD (EULEX Kosovo)* that is highly relevant for the issue of CFSP jurisdiction and ECHR accession.[430] The case concerns an action for damages brought by relatives of victims of war crimes in Kosovo who claim that EULEX Kosovo, the Union's largest CSDP Mission, violated the procedural limb of the right to life. Although the General Court rejected jurisdiction, the Commission essentially claims that the General Court erred in law by failing

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[423] Engel (n 403)

[424] art. 275 TFEU

[425] See eg Pech (n 79); Poli (n 140); C Hillion and R Wessel, '"The Good, the Bad, and the Ugly": Three Levels of Judicial Control over the CFSP' in S Blockmans and P Koutrakos (eds) *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing, 2018) 65; C Hillion, 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' in M Cremona and A Thies (eds) *The European Court of Justice and External Relations: Constitutional Challenges* (Hart Publishing, 2014) 47

[426] See C-658/11 *Parliament v Council (Mauritius)* [2014] ECLI:EU:C:2014:2025; C-439/13 *Elitaliana v Eulex Kosovo* [2015] EU:C:2015:753; C-455/14 *H v Council* [2016] ECLI:EU:C:2016:569; C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI:EU:C:2017:236; C-134/19 P *Bank Refah Kargaran v. Council* [2020] ECLI:EU:C:2020:793

[427] See P van Elsuwege, 'A Court of Justice Upholding the Rule of Law in the Common Foreign and Security Policy: H. v. Council' (2017) 54(3) Common Market Law Review 842; M Kuisma, 'Jurisdiction, Rule of Law, and Unity of EU Law in Rosneft' (2018) 37 Yearbook of European Law 3; Poli (n 140); P van Elsuwege and F Gremmelpez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16(1) European Constitutional Law Review 8

[428] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture" in S Blockmans and P Koutrakos (eds) *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 12

[429] Poli (n 140)

[430] C-44/22 P Appeal brought on 19 January 2022 by European Commission against the order of the General Court (Ninth Chamber) delivered on 10 November 2021 in T-771/20 *KS and KD v Council and Others*

to interpret its jurisdiction in the CFSP in light of the overriding principles of effective judicial protection for human rights violations and the rule of law. If the CJEU decides to side with the Commission in this appeal, it essentially assumes jurisdiction to hear action for damages for human rights violations even if an issue falls in the scope of the CFSP. If this would be the case, the rule of law issue related to CSDP missions would be resolved in large part.

Currently, however, the only conceivable possibility is that an individual would bring an action for annulment arguing that the CFSP Decision out of which Operation Sophia arose violated the non-affectation clause of Article 40 TEU. This is highly unlikely to succeed. First, it seems virtually impossible that the individual would meet the strict standing criteria of Article 263 TFEU, which are discussed earlier in this chapter with regard to Frontex. Second, so far the Court has essentially ignored Article 40 TEU in its judgments, possibly due to the fact that it contains no clear conflict resolution tool.[431] Instead, it applies the centre of gravity test, examining whether the CFSP forms 'the center of gravity' of the decision.[432] The main aim of Operation Sophia clearly seems to be migration control, which would require an AFSJ basis. Nonetheless, security is also a legitimate aim and considering that a dual legal basis for a CFSP act is not possible, it is highly uncertain how the CJEU would decide this issue.[433]All in all this seems a far-fetched option and does not take away from the fact that the lack of access to justice with regard to CSDP-based military missions presents a clear rule of law problem.

3.3.3. Concluding Remarks

The use of CSDP-based migration control missions, like Operation Sophia, thus challenges the principles of legality and effective judicial protection, and thus also the rule of law. With regard to Operation Sophia, the challenge of legality arises out of the fact that the EU supports the Libyan Coast Guard in pulling-back migrants, who are subsequently arbitrarily detained and subject to various forms of ill-treatment. Although some scholars argue that it is a stretch to argue that this violates human rights law, it does violate EU law, as the EU needs to uphold human rights in its external relations. Due to the EU's instrumental contribution to

[431] C Matera and R Wessel, 'Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements' (2014) 49 Revista de Derecho Comunitario Europeo 1047; P van Elsuwege and G van der Loo, 'Legal Basis Litigation in Relation to International Agreements: Commission v. Council (Enhanced Partnership and Cooperation Agreement with Kazakhstan)' (2019) 56 Common Market Law Review 1333

[432] Van Elsuwege and van der Loo (n 415)

[433] C Eckes, 'The CFSP and Other EU Policies: A Difference in Nature?' (2015) 20(4) European Foreign Affairs Review 535

the violations committed by Libya, it fails to meet that obligation. Nevertheless, it currently seems not possible to remedy this failure, as the CJEU has a limited jurisdiction over the CFSP and can thus not offer a remedy to victims of human rights violations with regards to Operation Sophia. The principle of effective judicial protection is thus also compromised.

3.4. Conclusion

The Union's neo-refoulement instruments - Frontex, CSDP missions, and Soft Law - take a dominant place in the migration policy that arose as a response to the migration crisis. The analysis in this chapter has shown that the Union uses these instruments to avoid its human rights obligations and to ensure that it cannot be held accountable for potential human rights violations. The Treaties demand that the Union should seek to promote human rights and the rule of law on the international scene. Currently, how the Union engages with migration externally stands diametrically opposed to what the foundational values demand of the Union. Yet, the Court is passive in this regard and allows the other institutions to pursue their neo-refoulement strategies.[434] This has resulted in what Kochenov and Ganty have called 'EU lawlessness law', which 'aims at successfully establishing a system of sophisticated tools to assault and dispossess of rights the former colonial non-citizens at the border, exclude any responsibility and deploying legality to create lawlessness and the complete annihilation of rights for the racialised non-Europeans from the former colonies'.[435] Working under the guise of legality, EU lawlessness law 'annihilate[s] the very essence of the rule of law and the protection of human rights'.[436] Essentially, it disconnects the rule of law from the external dimension of the EU's migration policy.[437]

The core of the EU's migration policy is thus to evade existing human rights obligations by side-stepping judicial review through the use of soft law or CSDP missions. This way, the neo-refoulement strategies of the Union contribute to 'disintegration through law'.[438] Effective judicial protection is compromised by all three instruments, but in a different manner. With the soft law agreements, like the EU-Turkey Statement, the EU avoids the EU legal framework altogether, placing the CJEU off-side. The CSDP missions are still part of the EU framework, but due to the specific place of the CFSP in the EU legal

[434] Goldner Lang (n 363)
[435] Kochenov and Ganty (n 32) 35
[436] ibid 15
[437] ibid
[438] E Cannizzaro, 'Disintegration through Law?' (2018) 1(3) European Papers 3

architecture, the CJEU has no jurisdiction (yet). The issue of Frontex is different. Frontex is a fully integrated part of the EU legal framework. Yet, the growing executive power of agencies forms a challenge to the rule of law,[439] due to the difficulty of obtaining a remedy and holding an agency accountable for non-compliance.[440] This difficulty arises out of the fact that the EU lacks an effective human rights mechanism internally.[441] The difficulties of obtaining a remedy through the action for inaction, action for annulment, or the action for damages were pointed out, demonstrating that the CJEU is simply not a specialised human rights court.[442]

Besides exploiting these internal inadequacies in its human rights protection system, it also exploits another inadequacy, namely that the EU is 'insufficiently integrated with the international human rights system'.[443] The CJEU insists on the autonomy of European law, and as most famously exemplified in *Kadi*, even found that the Union's own system of fundamental rights prevailed over international law. Of course the EU takes inspiration from the ECHR and other international human rights documents, but with the introduction of the Charter, its own system and the CJEU's interpretation thereof is leading in practice.[444] Consequently, the EU is on paper committed to human rights, but lacks an effective accountability mechanism. It can currently not be held accountable by an external court. Due to the fact that the CJEU is thus, as demonstrated above, incapable of stepping in, the EU can never be held accountable for its neo-refoulement strategies, undermining systemic accountability and thus the principle of legality.

Exploiting these inadequacies in order to side-step human rights obligations erodes the rule of law. This way, the European migration 'crisis' has turned into an EU constitutional crisis 'in the sense that migration and asylum as EU legal areas have developed by threatening the core foundations of the EU as a project'.[445] It is now 8 years after 2015, the

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[439] See M Scholten and A Brenninkmeijer, *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar Publishing 2020)

[440] See S Prechal and R Widdershoven, 'Principle of Effective Judicial Protection' in M Scholten and A Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar Publishing 2020) 80; G Brandsma and C Moser, 'Accountability in a Multi-Jurisdictional Legal Order' in M Scholten and A Brenninkmeijer (eds) *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar Publishing 2020) 60

[441] De Búrca (n 44)

[442] Lenaerts (n 69)

[443] De Búrca (n 44)

[444] ibid

[445] A Loxa and V Stoyanova, 'Migration as a Constitutional Crisis for the European Union' in V Stoyanova and S Smet (eds) *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022) 139, 158

peak of the migration 'crisis', but the 'crisis' is still not over. Measures that were initially presented as exceptional and incidental measures and which were justified by the fact there was a 'crisis' have become a permanent feature of the EU response.[446] In fact, the New Asylum and Migration Pact of 2020, continues on the same path.[447] It is thus clear that the EU will not stop with its rule-of-law-eroding neo-refoulement strategies any time soon.

[446] D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' (2019) 19(4) The European Journal of International Law 1173
[447] Loxa and Stoyanova (n 445)

4. The Current Situation before the ECtHR

Before examining the implications of the new draft accession agreement, it is important to examine how the ECtHR currently treats cases that involve the EU and to see to what extent it can already function as a safeguard for the rule of law, understood as requiring *ensuring systemic accountability for incongruences between human rights law and acts of authority through ensuring access to a court.* It answers the following question: what are the current possibilities of the ECtHR to safeguard the rule of law with regard to the three neo-refoulement instruments of the EU and what are the shortcomings of the current situation?

Considering the ECtHR itself is not responsible for the in Chapter 4 established incongruence between human rights obligations and the acts of the EU, this chapter focuses on the element of effective judicial protection and systemic accountability. In other words, it explores whether and how individuals can obtain access to the ECtHR. The first section examines the general admissibility criteria of the ECtHR, after which the second section explores the ECtHR's general approach to the EU, after which the third part examines how the ECtHR deals with multi-actor situations. The fourth part of this chapter then briefly considers the current possibilities of the ECtHR to safeguard the rule of law with regard to the three neo-refoulement instruments.

4.1. Access to the ECtHR

The individual right to petition still maintains a central position in the Convention system.[448] This right is currently encapsulated by Article 34 of the Convention, stipulating that the Court may receive applications from any individual who claims to be a victim of a violation by a Contracting Party of a right protected by the ECHR. The procedural admissibility criteria are listed under Article 35 ECHR. First of all, the Court will only accept applications if all domestic remedies have been exhausted. This rule is generally applied in a flexible manner and is not absolute or applied automatically.[449] Tied to this rule is a time limit that stipulates that an application must be submitted within 4 months after a final decision was taken in the domestic system. Article 34(2) ECHR then excludes anonymous applications from being accepted and ensures that the Court will not deal with matters that

[448] Gerards and Glas (n 128)
[449] Registry of the European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (2022) <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 3 May 2023

are substantially the same as matters that were in an earlier procedure already examined by the Court. Finally, Article 34(3) ECHR determines that the Court shall hold individual applications inadmissible if they are 'manifestly ill-founded' and, since the entry into force of Protocol No. 14, if 'the applicant has not suffered a significant disadvantage'.[450] That last criterion has not made the individual application procedure 'significantly less accessible'.[451] The ECtHR will find complaints of violations of for example Article 3 ECHR always significant. [452]

Besides these procedural grounds for inadmissibility, cases can of course be held inadmissible due to a lack of jurisdiction. Firstly, the jurisdiction *ratione temporis* only covers the time after the Convention or its relevant Protocols went into force for the relevant party. Secondly, the Court can declare cases to be inadmissible *ratione loci*. This means that the Court can only hear cases in which the violation of rights protected by the Convention occurred within the jurisdiction of the Contracting parties, in line with Article 1 of the Convention. As mentioned before in Chapter 2, the ECtHR over time developed its understanding of what 'within the jurisdiction' of the Contracting Parties exactly means. Although jurisdiction is primarily territorial, in *Al-Skeini* the Court determined that extraterritorial jurisdiction could either be triggered when a state 'exercises effective control of an area outside [its] national territory',[453] or when acts of authorities of a state 'produce effects outside its own territory'.[454] Finally, the ECtHR can declare cases inadmissible *ratione personae*, meaning that it can only hear cases in which the violation is committed by a Contracting Party. This has important implications for cases that relate to European Union law, considering that the EU is not a contracting party yet. How the ECtHR has treated cases that relate to European Union law, is explored below.

4.2. The General Approach towards the EU

Ever since the CJEU started to develop itself as a human rights court, there have been two separate final arbiters on human rights issues in Europe. Generally, 'a parallel development'

[450] art. 34(3)(b) ECHR
[451] A Buyse, 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35§3(b) ECHR' in B McGonigle Leyh and others (eds) *The Realization of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak* (Intersentia 2014) 107
[452] ibid
[453] *Al-Skeini* (n 150) para 138
[454] ibid para 133

between the two courts was observed,[455] mainly due to the fact that the CJEU gave the ECHR 'special significance' when adjudicating on human rights issues.[456] Although small inconsistencies in the case law emerged,[457] direct confrontation between the courts was avoided.[458] The ECtHR refrained from reviewing Community-related acts by applying 'the equivalent protection' doctrine.[459] In *M v Germany* this Commission held that transfering powers to an international organisation was allowed as long as human rights within that organisation were equivalently protected.[460] Regarding acts of the Community, the ECtHR had no jurisdiction as the Community was not a contracting party to the Convention.

Although the Community itself could thus not be held responsible, in *Matthews* the ECtHR made clear that contracting parties could still be held responsible for violations of the Convention even if that violation was the consequence of a correct implementation of Community law.[461] How exactly this judgement related to the 'equivalent protection' doctrine, was unclear until in 2005 the ECtHR pronounced itself clearly on the matter in the seminal *Bosphorus* case. Here, the ECtHR held that human rights protection in the Union was equivalent to the standards set by the ECHR, both substantively and procedurally, referring to the not yet binding Charter and the preliminary reference procedure.[462] Under this *Bosphorus*-presumption, if a state is merely executing a community-obligation without having discretion itself and the full mechanism of protection available has been exhausted, the ECtHR will presume the state has not failed to meet its Convention-obligations, unless human rights protection is 'manifestly deficient'.[463] This judgement was the start of a 'phase of comity' between the two Courts.[464] Two changes in the Lisbon Treaty further improved the relationship. First, the Charter became a binding legal instrument. Second, the new Article 6(2) TEU stipulated the obligation of the Union to accede to the Convention. However the CJEU temporarily blocked accession due to its negative *Opinion 2/13*.

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[455] F Fabbrini and J Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) 35(1) Yearbook of European Law 145
[456] See *Hoechts* (n 126)
[457] R Lawson, 'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg' (1994) in R Lawson and M de Blois (eds) *The Dynamics of the Protection of Human Rights in Europe* (Martinus Nijhoff Publishers 1994) 219
[458] Fabbrini and Larik (n 455)
[459] C Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 Human Rights Law Review 87
[460] *M & Co v Federal Republic of Germany,* App. no. 13258/87 (ECtHR, 9 February 1990)
[461] C Costello (n 459)
[462] See L Glas and J Krommendijk, 'From Opinion 2/13 to Avotin̦s: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts' (2017) 17(3) Human Rights Law Review 567, 568-569
[463] *Bosphorus Hava Yollari Turizm v Ireland,* App. no. 45036/98 (ECtHR, 30 June 2005) para 156
[464] Fabbrini and Larik (n 455)

The ECtHR described *Opinion 2/13* as 'great disappointment'.[465] Nevertheless, the ECtHR continued to apply the *Bosphorus*-presumption in *Avotiņš*.[466] It was expected that, as a reaction to *Opinion 2/13*, Strasbourg would apply the test more in a more stringent manner.[467] Whether the test was really more stringent than before is hard to say, since cases involving the Bosphorus presumption are scarce.[468] However, in *Avotiņš* the Court came very close to rebutting the presumption on the basis that there was a manifest deficiency in the protection of human rights.[469] Only due to the specifics of the case, the ECtHR did not find the manifest deficiency.[470] It did for the first time find a 'manifest deficiency' in the case of *Bivolaru and Moldovan*, which concerned an application of a European Arrest Warrant.[471] Still it continues to apply its *Bosphorus*-doctrine, also after *Opinion 2/13*.

Consequently, although the ECtHR cannot hold the EU as a whole accountable, it can hold individual member states accountable for acts that follow from EU policies, such as in *Bivolaru and Moldovan*, where the Strasbourg Court found that France was responsible for a violation of the Convention. Additionally, the Court increasingly makes use of 'judgments of principle', which are judgments of a high level of generality that can thus apply to comparable situations.[472] An example of such a ruling is *M.S.S v. Belgium and Greece*, about the automatic application of the principle of mutual trust within the context of the Dublin Regulation of the EU on the expulsion of asylum seekers from Belgium to Greece. After it had ruled that the reception conditions for asylum seekers in Greece were inhuman and degrading, it approached other Member States of the EU to inquire which steps they were taking to make sure the application of the principle of mutual trust would not be automatic.[473] With this more general justice approach, the ECtHR can thus already exercise quite some influence over EU policies. Moreover, in *Senator Lines*, the applicant claimed that the ECtHR should hold all member states responsible for an act of the European Commission. The ECtHR did not reject the case on the basis that it was impossible to hold all Member

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[465] Registry of the European Court of Human Rights, *Annual Report 2014* (2015) 6 <https://www.echr.coe.int/documents/annual_report_2014_eng.pdf> accessed 27 June 2023
[466] *Avotiņš v Latvia*, App No 17502/07 (ECtHR, 23 May 2016)
[467] Fabbrini and Larik (n 455)
[468] Glas and Krommendijk (n 462)
[469] P Gragl, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case' (2017) 13(3) European Constitutional Law Review 551
[470] ibid
[471] *Bivolaru and Moldovan v. France*, App No 40324/16 et 12623/17 (ECtHR, 25 March 2021)
[472] See Glas (n 176)
[473] ibid

States responsible for an act of the Commission, but declared the case inadmissible on other grounds.[474] It did the same in *Connolly*.[475] The theoretical possibility thus still exists.

Still, the fact that the EU has not acceded to the Convention significantly weakens human rights protection relating to acts attributable to the EU. This is of course mostly due to the fact that the EU itself can never be held responsible as long as they do not become a party to the Convention.[476] However, there is also an accountability gap with regards to the Member States of the EU and their responsibility over EU acts.[477] Despite the fact that the Court in *Matthews* decided that contracting parties could still be held responsible for violations of the Convention even if that violation arose due to a correct implementation of Community law, this gap continues to exist for two reasons.[478] First, although the earlier mentioned *Bosphorus*-presumption allows the ECtHR to exercise some scrutiny, this is less strict than under normal circumstances. After all, the ECtHR will only interfere if human rights protection was 'manifestly deficient'. This is a high threshold, which is exemplified by the fact that the ECtHR has so far only rebutted the *Bosphorus*-presumption once, in *Bivolaru and Moldovan*. Second, the ECtHR determined in *Connolly* that it cannot hold Member States responsible for a violation of the Convention if the authorities of the Member States were not directly or indirectly involved.[479] Due to this, the Court did not verify whether the conditions of the *Bosphorus*-presumption were met. Consequently, even in case human rights protection was 'manifestly deficient' the Court would have been barred from exercising its jurisdiction.

4.3. Multi-Actor Situations before the ECtHR

The ECtHR can thus in some situations hold EU Member States responsible even in case the EU is involved. In such multi-actor situations, however, establishing the responsible party can be quite difficult. The ECtHR needs to decide whether the alleged violation can be attributed to a Member State. The Court thus not do this explicitly and usually examines this together with the issue of jurisdiction, despite the fact that Article 1 of the ECHR only concerns the discrete issue of "breach" rather than that of "attribution", in that it defines the scope of Convention rights and obligations, but does not stipulate when parties have

474 Fink (n 246)
475 *Connolly v 15 Member States of the EU*, App No 73274/01 (ECtHR, 9 December 2009)
476 Lock (n 190)
477 ibid
478 ibid
479 *Connolly* (n 475)

committed an act or omission'.[480]In other words, jurisdiction concerns the question 'did the conduct breach an obligation of the state, i.e. did that obligation even apply to that particular conduct?', whereas attribution concerns the question 'is the conduct that of the relevant state?'.[481] The ECtHR has indeed held in *Catan* that 'the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law'.[482] It reaffirmed this in later cases.[483]

Yet, it seems that the Court in some cases does equate the two, despite its assertions that it does not.[484] Rooney even concludes that the jurisdiction test has become an attribution test.[485] Milanovic reaches a slightly different conclusion after the *Jaloud* case. He argues that the ECtHR in fact applies two different attribution tests, one to establish jurisdiction, and a second to establish a violation.[486] With regard to the former, which he calls 'attribution of jurisdiction-establishing conduct', the court establishes whether the relevant conduct can be attributed to a state in order to examine whether the Convention applies in that case. After jurisdiction is then determined, the Court moves on to the second attribution test, which he calls attribution of violation-establishing conduct.[487] Here, 'the Court establishes the attribution to the [the state] of the actual alleged violations'.[488] This second test, however, becomes completely trivial due to the fact that the first test is already performed.[489] Jorritsma reaches a similar conclusion.[490] Essentially, the Court thus first performs an 'attribution of jurisdiction-establishing conduct'-test, after which jurisdiction and wrongfulness can be

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[480] A Sarvarian, 'The EU Accession to the ECHR and the Law of International Responsibility' in V Kosta, N Skoutaris, and V Tzevelekos (eds) *The EU Accession to the ECHR* (Bloomsbury 2014) 87, 94

[481] M Milanovic, 'Jurisdiction, Attribution and Responsibility in Jaloud' (EJIL:TALK!, 11 December 2014) <https://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/> accessed 29 May 2023

[482] *Catan and Others v Moldova and Russia,* App. Nos. 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012)

[483] See eg *Jaloud v the Netherlands,* App. No. 47708/08 (ECtHR, 20 November 2014)

[484] Sarvarian (n 480); M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011); J Rooney, 'The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands' (2015) 62(3) Netherlands International Law Review 407; For an example of a case, see: *Nada v Switzerland,* App. No. 10593/08 (ECtHR, 12 September 2012)

[485] Rooney (n 484)

[486] Milanovic (n 481)

[487] ibid

[488] ibid section IV

[489] ibid

[490] R Jorritsma, 'Unraveling Attribution, Control and Jurisdiction: Some Reflections on the Case Law of the European Court of Human Rights' in H Ruiz Fabri (ed) *International Law and Litigation: A Look into Procedure* (Nomos 2019) 659

established. Thus, in situations in which the EU and Member States are involved, the Court will first verify to which party the alleged wrongful conduct can be attributed.

4.4. The ECtHR and the Neo-Refoulement Instruments of the EU

4.4.1. Frontex

While victims of alleged human rights violations of Frontex can thus not direct their application at the EU, they can direct the claim at the host state of the respective operation. The Bosphorus presumption does generally not apply, due to the fact that Member States enjoy sufficient discretion in Frontex operations. In the absence of any ECHR-specific rules on attribution, the ECtHR subscribes to the general rules on international attribution.[491] It would thus apply the ARSIWA. The general rule in this regard is that only public conduct triggers state responsibility, meaning that a violation of 'anyone who is empowered to exercise public authority' can trigger state responsibility.[492] Normally, these are state organs, however, the ARSIWA also provides rules for persons who are not formally a state organ. The relevant article with regard to officers deployed by Frontex is Article 6, which deals with 'transferred organs' and reads as follows:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Three requirements that need to be met to hold the host state accountable can be distilled from this article: the deployed officers must be an organ of the sending state, the transferred organ 'is acting in the exercise of elements of the governmental authority' of the host state, and it is placed at the disposal of the host state.[493]

Regarding the responsibility of the host state for the conduct of Frontex officers, the first requirement already results in difficulties. After all, the ARSIWA is an interstate instrument and Frontex is not a state organ. Yet, since there are no specific rules on lent organs from international organisations, it can be assumed that the general rule applies to Frontex.[494] The second and third requirements are usually taken together, with the focus on the third. The element 'placed at the disposal' requires that the lent organ exercises authority 'with the consent, under the authority of and for the purpose of the receiving state'.[495]

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[491] Fink (n 246)
[492] ibid 98
[493] ibid
[494] ibid
[495] ibid 115

Essentially, this means that the lent organ needs to be under the genuine and exclusive normative control of the host state.[496] A crucial aspect here is that it acts on the instruction of the host state and is subject to their law.[497] In this regard, this normative control can be established *de iure* and need not not be established *de facto* as well.[498] Mungianu and Fink both consider this requirement to be met.[499] After all, as observed before, deployed officers only receive instructions from the host state. It is true that Frontex can submit its view on the instructions to the host state, but it only needs to follow these instructions as far as possible. Additionally, the instructions always need to be in line with the operational plan, which the host state needs to agree on before the operation. Moreover, according to the EBCG Regulation, deployed officers are subject to the law of the host state.

However, due to the growing competences of Frontex two caveats emerged. The first problem is that Frontex received formal control over some of its officers in 2019 with the amendments of the EBCG Regulation.[500] The host states thus no longer exercises exclusive normative control over some officers. Rather, Gkliati argues that the control Frontex exercises over its statutory staff meets the requirements of Article 6 ARSIWA due to the fact that Frontex employs these officers and holds disciplinary powers over them.[501] Considering the fact that the ECtHR generally applies the 'exclusive authority' standard strictly,[502] it can no longer hold the host state responsible in such cases. Besides this attribution problem, the two earlier identified accountability gaps potentially also form a problem. First, it is theoretically possible to hold all EU Member States responsible for a violation committed by a statutory officer of Frontex. However, the *Conolly* gap prevents the ECtHR to accept this option in this case, due to the fact that the authorities of the Member States have not acted in such a case. Second, in case an attempt would be made to direct an application at the home state of a statutory Frontex officer, the ECtHR might apply the *Bosphorus* presumption and exercise limited scrutiny. After all, Frontex officers do not have any discretion with regard to compliance with their instructions. So far, the ECtHR has never applied the *Bosphorus* doctrine to non-legislative instruments, so it is uncertain whether it would move in this

[496] Special Rapporteur Ago, 'Third Report on State Responsibility' (UN Doc A/CN.4/246, Twenty-Third Session 1971)
[497] Fink (n 246)
[498] ibid
[499] ibid; Mungianu (n 240)
[500] Gkliati (n 242)
[501] ibid
[502] See Fink (n 246); M den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (2012) SHARES Research Paper ACIL 2012-04 1

direction. It could also be questioned whether the Court would deem human rights protection with regard to non-legislative instruments 'equivalently protected', as instructions are not subject to the same level of human rights safeguards as legislative instruments.[503]

The second caveat arises from the fact that Frontex is increasingly active on third-state territory. Here, third states that are members to the ECHR and third states that are not members to the ECHR should be distinguished. With regard to the former, the ECtHR can still hold the host state responsible due to the fact that it exercises normative control over the officers. The status agreements concluded with these third states determine explicitly that the host state is responsible for violations. Although it is questionable whether the ECtHR would accept this *lex specialis* as the basis for its decision, the general rules on attribution point in the same direction.[504] With regard to non-ECHR member states, however, the situation is significantly different. Although currently not much is known about how these operations will take shape, it seems difficult for the ECtHR to grasp jurisdiction in this case. After all, if the host state receives *de lege* exclusive control, the ECtHR does not have jurisdiction. If Frontex would deploy its statutory staff, the ECtHR does not have jurisdiction to hold the EU accountable, and the conduct cannot be attributed to the home state either. Only in situations in which the home state of the officers retains some level of control, could the ECtHR exercise its jurisdiction.

4.4.2. Soft Law Instruments

The ECtHR is not a 'court of fourth instance' and can thus not directly review soft law instruments such as the EU-Turkey Statement, it can rule on human rights complaints brought against the implementation of certain provisions of soft law instruments. This way, it can still exert influence on those soft law instruments, albeit indirectly.[505] Neither the *Conolly* gap nor the *Bosphorus* presumption form an obstacle in this regard, as member state authorities are involved in the implementation and enjoy discretion. It is now examined how the ECtHR has dealt with and could deal with the EU-Turkey Statement as an example of a soft law instrument.

Although the EU-Turkey Statement was concluded by all EU Member States and Turkey, the implementation largely falls on Greece, which could send refugees back to

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503 Fink (n 246)

504 Letourneux (n 259)

505 See A Dicle Ergin, '"Protection" or "Instrumentalization" of Refugees: Will the European Court of Human Rights Fill in the Gaps in Pushback Cases After the Greece/Turkey Border Events?' in E Kassoti and N Idriz (eds) *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022) 193

Turkey with a fast-track procedure. The first case brought before the ECtHR on the implementation of the EU-Turkey Statement was *JR and others v Greece*. In this case, the applicants claimed that the fact that they were placed in detention in terrible conditions in Greece violated Article 5 and 3 ECHR. The Court answered this question in the negative, pointing to the fact that the detention had been brief and did not meet the required standard of severity to be considered a violation of Article 3 ECHR. Relevant for this study is the fact that the Court referred to the EU-Turkey Statement as 'an agreement concluded between the Member States of the European Union and Turkey'.[506] On the question of authorship of the deal it thus implicitly follows the CJEU in determining that it is a deal by the Member States of the EU and not by the EU. This essentially also already follows from the fact that the ECtHR did not apply the *Bosphorus*-test. Although Greece clearly had discretion, if it would have considered the violation to arise out of an EU law obligation, it would have applied the test and stated that the conditions for the *Bosphorus*-presumption were not met. Interestingly, it also refers to it both as a 'declaration' and an 'agreement', avoiding the question about the legal nature of the Statement.[507] The Court has yet to answer the most relevant question with regard to the EU-Turkey Statement. Can Turkey be seen as an STC? Can asylum seekers be returned to Turkey? It will answer this question in the pending case of *JB v Greece*, where the applicant claimed that their return to Turkey violated Article 3 and 13 ECHR.[508]

4.4.3. CSDP-Based Migration Control Missions

The current possibilities of the ECtHR to provide access to justice and accountability for human rights violations with regards to CSDP missions like the EU's Operation Sophia are complex. With regard to the predecessor of Operation Sophia, Italy's Operation Mare Nostrum, the ECtHR could exercise its jurisdiction like it did in its seminal *Hirsi* decision. Although this decision clarified that Italy was responsible for a violation of the principle of non-refoulement if it returned the migrants it saved on the high seas to Libya, the situation is different with regards to EU missions like Operation Sophia. In the first place that is due to the fact that the EU has still not acceded to the ECHR, and in the second place due to the fact

[506] *JR and Others v Greece*, App. No. 22696/16 (ECtHR, 25 January 2018) para 7
[507] A Pijnenburg, 'JR and Others v Greece: What Does the Court (Not) Say about the EU-Turkey Statement?'(Strasbourg Observers, 21 February 2018) <https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/> accessed 10 May 2023
[508] Communicated Case, *JB v Greece*, app no. 54796/16 (pending); See also RSA, 'The European Court of Human Rights communicated the case of B.J. (v. Greece) and has addressed the Greek government with specific questions' (30 May 2017) <https://rsaegean.org/en/the-european-court-of-human-rights-communicated-the-case-of-b-j-v-greece-and-has-addressed-the-greek-government-with-specific-questions/> accessed 10 May 2023

that the practices of Operation Sophia differed from the practices of Mare Nostrum, mostly as a response to the *Hirsi* judgement.[509] As described in Chapter 4.3, the EU missions use aerial surveillance to alert the Libyan Coast Guard of vessels with migrants on board. The Libyan Coast Guard then pulls-back these vessels to Libya, where the migrants are detained in circumstances that surely violate the ECHR.[510] Could the ECtHR provide access to justice and fill in the accountability gap?

In order to answer this question a complex issue of attributability arises. This question needs to be answered with reference to the ARSIWA again. Considering that the ECtHR cannot hold the EU or Libya accountable, the only possibility remaining is one or more EU Member States. It is hard, however, to pinpoint which of the EU member states are responsible for the CSDP mission. Operation Sophia had an Italian commander and flagship, but officially fell under the responsibility of the Political and Security Committee (PSC), which in turn fell under the responsibility of the Council and the High Representative of the Union for Foreign Affairs and Security Policy.[511] It is thus the EU that exercised normative control over the Operation. None of the EU Member States seem to have exercised the required exclusive normative control to meet the standard of Article 6 ASR. The CSDP mission was simply not 'placed at the disposal' of any of the EU Member States. This is highlighted by *Behrami and Behrami*, where the Court held that 'conduct of "subsidiary organs" of international organisations is attributable to the organisation'.[512] Since CSDP-based missions 'have an accepted distinct legal capacity under EU law as "subsidiary organs" of the EU' and Member States do not seem to exercise effective control,[513] the conduct cannot be attributed to the Member States.

4.5. Conclusion

To what extent can the ECtHR now already ensure *systemic accountability for incongruences between human rights law and acts of authority through ensuring access to a court*? Although it has no strict admissibility criteria, cases against the EU are currently incompatible *ratione personae*. Consequently, it is impossible for the ECtHR to satisfy the

[509] J Greenberg, 'Counterpedagagoy, Sovereignty, and Migration at the European Court of Human Rights' (2021) 46(2) Law & Social Inquiry 518
[510] See OHCHR and UN Support Mission in Libya (n 405) Human Rights Watch (n 405)
[511] Council Decision (CFSP) 2015/778 of 18 May 2015 (n 27)
[512] *Behrami and Behrami v. France*, App. No. 71412/01, (ECtHR, 2 May 2007); See also Krommendijk (n 154) 17
[513] Krommendijk (n 154) 17

legality-requirement of systemic accountability. As becomes apparent from this section, due to the *Matthews* doctrine and the related *Bosphorus*-presumption, the ECtHR can ensure access to a court for alleged human rights violations committed by EU Member States, even if these violations arise out of cooperation with the EU. Yet, two general caveats exist in this regard. Due to the *Bosphorus*-presumption, in cases in which the Member State had no discretion in implementing an EU law obligation, the ECtHR will only find the Member State responsible in case human rights protection was 'manifestly deficient'. Additionally, due to the *Connolly* gap, the ECtHR is only able to find a Member State responsible for a violation if their authorities acted. With regard to the neo-refoulement instruments of the EU, and in particular in case of Frontex and CSDP missions, a third caveat arises: the complexity of the multiplicity of actors often prevents the ECtHR from being able to attribute wrongful conduct to a Member State. This is especially the case for CSDP missions, but also for Frontex missions in which Frontex has the exclusive control over its staff, and situations in which Frontex is active on non-ECHR Contracting State territory. Nevertheless, for situations in which Frontex does not have exclusive control over its staff, which is currently the 'ordinary' situation, and for the implementation of the EU-Turkey Statement, the ECtHR can offer effective judicial protection. Still, the ECtHR cannot offer effective judicial protection for situations concerning CSDP missions of the EU. All in all, the ECtHR can thus ensure access to a court with regard to the implementation of the EU-Turkey Statement and specific Frontex situations, but can currently in no case ensure systemic accountability for incongruences between human rights obligations and acts of the EU.

5. The Implications of Accession

In Chapter 3 it was demonstrated that the neo-refoulement strategies of the EU undermine the rule of law, which was defined in Chapter 2 as *ensuring systemic accountability for incongruences between human rights law and acts of authority through ensuring access to a court*. In Chapter 5 it became clear that, although the ECtHR can in limited situations offer access to a court, it can currently not fully satisfy the legality-requirement of systemic accountability. After accession, this can be expected to change, as the ECtHR does not have to declare cases against the EU incompatible *ratione personae* anymore. Additionally, Chapter 2 also established that the AA stipulates that the admissibility criteria for claims directed at the EU are as similar as possible to the usual criteria, meaning that individuals bringing an application directed directly at the EU, should thus first start and exhaust the available direct actions: the action for annulment, the action for inaction, or the action for damages.[514] It could thus also be expected that the Court becomes more accessible. This chapter explores whether this expectation is justified and answers the question: what are the implications of EU Accession to the ECHR, under the terms of the new Accession Agreement, on the rule of law with regard to the neo-refoulement instruments of the EU?

This chapter examines how the ECtHR would deal with claims directed against the EU concerning each of the three main neo-refoulement instruments. From this analysis it will be possible to draw a conclusion whether the ECtHR after accession can ensure access to a court and that way ensure systemic accountability for incongruences between human rights law and acts of the EU. Like in Chapter 5, the situation again involves a multiplicity of actors and extra-territorial action, which again results in complex questions of attribution and jurisdiction. Article 1(6) of the AA attempts to clarify such situations by stipulating that the expression 'everyone within their jurisdiction' 'shall be understood, with regard to the European Union, as referring to persons within the territories of the member States'.[515] With regard to extraterritorial application, this provision stipulates that the EU needs to secure the Convention rights to persons 'who, if the alleged violation in question had been attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party'.[516] This formulation is quite peculiar, especially due to the use of 'attributable'. This again seems to conflate two different points, namely establishing

[514] Krommendijk (n 186)
[515] AA (n 183) art. 1(6)
[516] ibid

jurisdiction under Article 1 of the ECHR with establishing state responsibility for an internationally wrongful act.

In this light, it is thus likely that the ECtHR would again precede the jurisdiction test with the by Milanovic identified test of attribution of 'jurisdiction-establishing' conduct.[517] Jorritsma, taking the same position,[518] concluded that in such cases the ECtHR asks the following questions in the following order:

- Is the conduct attributable to the respondent in the case?
- Is the conduct unlawful?
    - Are the jurisdiction-requirements met such that the Convention applies?
    - Is there a breach of the Convention?
- Can responsibility for a breach be allocated to the respondent?

This section thus explores how the ECtHR will consider claims directed against the EU concerning the main neo-refoulement instruments on the basis of these questions. As specific provision will be made for acts falling in the scope of the CFSP, the section on CSDP-missions takes a different approach and examines the consequences of the different options for that specific provision.

5.1. Frontex

5.1.1. Attributability of Conduct

As Chapter 3.1 demonstrated, Frontex operates in complex multi-actor situations, in which it is sometimes difficult to establish which involved entity bears responsibility. Whether or not the ECtHR could hold the EU accountable for violations committed by Frontex, depends in large part on whether it can attribute responsibility to Frontex. The ECHR does not contain any specific rules on attribution, nor does the Accession Agreement. It could thus be expected that the ECtHR will take inspiration from general international law, as it also does in case of attribution of conduct to states, and as it has done in the past in relation to cases in which UN organs were involved.[519] Therefore, after accession the ECtHR will still consider international responsibility for international organisations in light of the ARIO.[520] One potential caveat should be mentioned here. Considering the centrality of the principle of

[517] Milanovic (n 481)
[518] Jorritsma (n 490)
[519] See eg *Behrami and Behrami* (n 512)
[520] Fink (n 287) See eg *Jaloud* (n 483)

procedural equality in the accession negotiation, it is conceivable that the ECtHR would apply the ARSIWA instead of the ARIO. Yet, due to the fact that the EU is an international organization and not a state, and the ARIO is intended to cover international organizations, this seems like an unlikely option.

Attribution of conduct to an international organisation is governed by Article 6, 7, and 8 of the ARIO. Article 6 stipulates 'conduct of an organ or agent of an international organisation in the performance of functions of that organ or agent shall be considered an act of that organisation'.[521] Agent is in this regard broadly defined as 'any person through whom [the organisation] acts'.[522] Klein notes that this 'agent may or may not be connected to the organisation by formal organic ties, and, in the latter case, acts may be attributed to the organisation if the entity or person is under the control of the organisation'.[523] In other words, either a *de iure* or a *de facto* link suffices to attribute the conduct of the agent to the international organisation.[524] It is important, however, that this agent is fully seconded to the international organisation.[525] For foreign organs, organs that are transferred by a state to the international organisation, Article 7 establishes the rules. This rule applies in case the 'state retains disciplinary powers and criminal jurisdiction' over the transferred organ.[526] It attributes conduct of officers or organs 'placed at the disposal of the international organisation' to that international organisation they are seconded to 'if the organisation exercises effective control over that conduct'.[527] Again 'organ' is to be understood 'in the widest sense'.[528] Here, the 'effective control' test thus requires the existence of a *de facto* link.[529] The ILC notes that this needs to be examined on a case-by-case basis taking account of the 'full factual circumstances and particular context'.[530] Fink simplifies this by pointing out that attribution 'lies with the entity that gives orders at the operational level'.[531] A factor

[521] ARIO Article 6(1)
[522] Fink (n 246)
[523] P Klein, 'The Attribution of Acts to International Organizations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsbility* (Oxford University Press 2010) 297, 298
[524] ibid
[525] ibid
[526] International Law Commission (ILC), 'Draft articles on the responsibility of international organizations, with
commentaries', art. 7, comm (1)
[527] ARIO Article 7
[528] ILC (n 526) art. 7, comm (2)
[529] Fink (n 246)
[530] ILC (n 526) art. 7, comm (4)
[531] Fink (n 246) 130

in determining whether control is effective may also be the exclusivity of the control,[532] although Fink disputes that exclusivity is not required *per se*.[533]

The ECtHR takes inspiration from the ARIO, but seems to adopt a slightly different approach with regards to Article 7 since *Behrami and Behrami*. The case concerned the conduct of organs placed at the disposal of the UN Kosovo Force, which was under the operational command of the UN.[534] Despite the fact that the Court observed 'the effectiveness or unity of NATO command in operational matters', it determined that the conduct was attributable to the UN Security Council because it 'retained ultimate authority and control so that operational command only was delegated'.[535] It reaffirmed this approach in later cases.[536] The ECtHR thus seems to construct 'effective control' to mean 'ultimate control', whereas the ILC constructs it as 'operational control'.[537] However, in *Al Jedda* the Court came close to overturning *Behrami and Behrami*, as it seemed to apply a mixture of an 'operational control' and 'ultimate control' test.[538] Consequently, it is not all clear what the current approach of the ECtHR is.

To attribute conduct of an officer to Frontex under Article 6 ARIO it is essential that the respective officer is fully seconded to Frontex. This is, however, rarely the case. It is true that coordinating staff and seconded national experts are fully seconded in principle, but during operations there seems to be a second transfer of authority as the host state retains responsibility.[539] It is thus more appropriate to explore the attributability of conduct to Frontex through the lens of Article 7 ARIO.

In Chapter 4.1.1, the role of Frontex in border control and return operations was discussed, which ranges from financing the operation, creating the operational plan, supervising the operation, and instructing the host state. Before the EBCG Regulation amendment of 2019, it would never directly instruct deployed officers. However, since Frontex has its own statutory corpse this changed, which has important implications for attributability. Here it is thus important to distinguish between situations in which Frontex cannot issue direct commands to deployed officers, and situations in which it can do so. With

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[532] A Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control* (Cambridge University Press 2016)
[533] Fink (n 246)
[534] *Behrami and Behrami v. France* (n 512)
[535] ibid para 139 and 133
[536] Klein (n 523)
[537] ILC (n 526) art 7, comm (10)
[538] Fink (n 246)
[539] ibid

regards to the first situation, Frontex thus has a decisive influence on the operation, but only exercises this influence from a distance. Whether conduct can be attributed to Frontex in this regard depends on which criterion the ECtHR will adopt. If it fully returns to its *Behrami and Behrami* line, the conduct can be attributed to Frontex, because it seems to exercise 'ultimate control and authority'.[540] However, if it continues on the path of *Al Jedda*, in which it moved towards the ILC's interpretation of Article 7 ARIO, the conduct cannot be attributed to Frontex, as it does not exercise operational control due to its inability to issue directions to deployed officers.[541] This is different with regards to the second situation, in which Frontex exercises operational control over its own statutory staff. In this case, either conception of effective control, be it as 'ultimate control' or 'operational control', could be applied, meaning that the conduct of the statutory staff of Frontex can be attributed to Frontex under Article 7 ARIO.[542]

This analysis demonstrates that the attribution of conduct is complicated due to the multiplicity of actors in Frontex operations. Yet, this attribution of 'jurisdiction-establishing conduct' is essential because if the applicant fails to attribute the conduct to the correct entity the case will be held inadmissible. It is here that a provision of the AA might be of help. The co-respondent mechanism, under Article 3 of the AA, was envisioned to ensure that the attribution of conduct to the wrong entity does not affect the admissibility of a claim.[543] Applicants can thus direct their claim at the EU for violations committed by Frontex, and if that violation 'calls into question the compatibility of a provision of the primary law of the EU with the Convention rights at issue', Member States can become co-respondent to the case either by invitation of the ECtHR or upon their own initiative, and vice versa.[544]

> where an application is directed against both the EU and an EU member State, the mechanism would also be applied if the EU or the member State was not the party that acted or omitted to act in respect of the applicant, but was instead the party that provided the legal basis for that act or omission. In this case, the co-respondent mechanism would allow the application not to be declared inadmissible in respect of that party on the basis that it is incompatible *ratione personae*.[545]

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[540] ibid
[541] ibid
[542] Gkliati (n 242)
[543] P Gragl, 'A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights' (2014) 51 Common Market Law Review 13
[544] Explanatory Report to AA (n 183) para 49
[545] ibid para 43

Although this seems to ease the attribution of 'jurisdiction-establishing conduct', a number of significant caveats need to be identified. First, neither Member State nor the EU can be forced to become co-respondent.[546] However, if the EU by a reasoned proposal concludes that the material conditions for triggering the co-respondent mechanism are met, the EU itself or the relevant Member State 'will [...] accept to become co-respondent'.[547] In any case, the EU holds the power in this procedure. In case neither the Member State nor the EU undertakes action to become a co-respondent, cases can thus still be held inadmissible due to an incorrect attribution of conduct. A second caveat also concerns the triggering of the mechanism. In cases where the claim is directed at the EU, the Member States may only become co-respondent if that claim raises doubts about the conformity of EU primary law with Convention rights. In the case of Frontex, this will not be the case, as primary law does not give rise to the violations. In cases where the claim is directed at one or more Member States, the EU may become co-respondent if that claim raises doubt about the conformity of a provision of (primary or secondary) EU law with Convention rights.[548] Although this is broader, it still seems inapplicable to Frontex. After all, violations in Frontex operations do not normally arise out of a provision of Union law, but rather take the shape of factual conduct. Additionally, the AA stipulates that this mechanism will be triggered 'notably where that violation could have been avoided only by disregarding an obligation under European Union law'.[549] Gragl pointed out that despite the fact that the word 'notably' suggests a broad application, this provision can only be interpreted as to mean that the co-respondent mechanism will only be applied in cases where Member States do not enjoy any discretion when acting contrary to the Convention.[550] Again, in Frontex Operations, Member States do enjoy discretion as they have to approve the operational plan and only have to follow Frontex' instructions as far as possible. Altogether, the relevance of the co-respondent mechanism for Frontex operations seems to be minimal.

5.1.2. Unlawfulness

If the attribution of 'jurisdiction-establishing conduct' is successful, the Court proceeds to examine the second question: was the conduct unlawful? The first subquestion to be answered then is the question of jurisdiction. Here, distinction can be made between two

[546] ibid para 53
[547] ibid para 53
[548] ibid para 48
[549] ibid art. 3(2) and 3(3)
[550] Gragl (n 543)

different situations: situations that take place on the territory of EU Member States, and situations that take place outside of the territory of EU Member States. The first situation does not result in any difficulties in determining jurisdiction. As the AA also provides, the ECHR applies in this situation.[551] With regard to the second situation, as observed before, the AA seems to conflate the issues of attribution and jurisdiction. However, Milanovic made clear that this is not necessarily the case.[552] Although in determining both attribution and extraterritorial jurisdiction the notion of 'effective control' plays a crucial role, it does so in a different way. With regards to attribution, as discussed above, effective control over the relevant public authorities is required. For extraterritorial jurisdiction, effective control over individuals is necessary, constructed as 'acts of its authorities which produce effects outside its own territory' on individuals.[553] This is thus a slightly different question. With regards to Frontex operations on third state territory or on the high seas, individuals who fall victim to push-back operations are likely to fall under the EU's jurisdiction considering the *Hirsi* case. Determining jurisdiction for such violations should thus not form a major issue after accession.

The second sub-question with regards to the unlawfulness of the conduct, is whether the conduct actually constituted a breach of the Convention. This brief section does not deliver a full analysis on the merits of possible claims, but instead points out that there seem to be sufficient grounds to find that Frontex violated the Convention. After all, in Chapter 3.1.2 it was already pointed out that the participation of Frontex in illegal push-back operations is well-documented. Recently, the ECtHR, has condemned Greece for similar push-back operations in the case of *Safi and Others v. Greece*. Here, the Court found that Greece had violated Article 2 (right to life) under its procedural limb and Article 3 (prohibition of torture).[554]

5.1.3. Attributability of Responsibility

The ARIO provides for essentially two scenarios in which an responsibility can be attributed to international organisations: direct responsibility through actions of omission that violate an obligation, or indirect responsibility through complicity in the commission of a wrongful act by a state or another international organisation.

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[551] AA (n 181) art. 1(6)
[552] Milanovic (n 481)
[553] *Al-Skeini* (n 50) para 133
[554] *Safi and Others v Greece,* App. No. 5418/15 (ECtHR, 7 July 2022)

The former is governed by Article 6 and 7 of the ARIO, which were discussed in detail in section 2.2 of this Chapter. As Milanovic pointed out, this second examination of attributability (violation-establishing conduct) thus becomes trivial,[555] as the same conclusion is reached: Frontex exercises effective control over its statutory officers and is thus responsible for their conduct, but Frontex only exercises ultimate control over other deployed officers, making it questionable whether Frontex can be held responsible for their conduct.

However, besides direct responsibility, the ARIO also provides for the possibility to hold international organisations indirectly responsible through complicity with an international wrongful act. This examination does not have to be trivial, as this can also be triggered if jurisdiction is not exercised.[556] This derivative responsibility is governed by Articles 14 (aid or assistance), 15 (direction and control), and 16 (coercion) of the ARIO. Whereas the latter is not relevant for this context, the first two are potentially interesting. Both Article 14 and Article 15 of the ARIO strongly resemble the corresponding Article 16 and 17 of the ARSIWA.

- a state commits an internationally wrongful act
- the act would also have been wrongful if committed by the international organisation
- the aid or assistance or the direction and control needs to have 'contributed significantly' to the commission of an internationally wrongful act[557]
- the aid or assistance or the direction and control was exercised 'with knowledge of the circumstances of the internationally wrongful act'.[558]

Considering the ECtHR has so far not applied these articles of the ARIO, it needs to be assumed that the ECtHR will treat derivative responsibility of international organisations similarly as it treats derivative responsibility of states.

Over the past years, the ECtHR has developed its own doctrine with little reference to Article 16 and 17 ARSIWA.[559] Although this doctrine was developed mostly with regard to

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[555] Milanovic (n 481)
[556] A Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg? (2018) 20(4) European Journal of Migration and Law 396
[557] ILC (n 526) art. 14, comm(4)
[558] ARIO art. 14
[559] See M Milanovic, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights' in G Kajtár, B Çali, and M Milanovic (eds) *Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals* (Oxford University Press 2022) 221

relationships between the state and private actors in e.g. *Turkey v Cyprus*, it was also applied in a state-state context for the first time in *El-Masri*.[560] The case concerned an applicant who was arrested in Macedonia by Macedonian agents who then transferred him to American CIA agents who mistreated him on Macedonian territory before taking him to a detention centre in Afghanistan.[561] The Court held Macedonia responsible for the mistreatment in Macedonia and for the arbitrary detention in Afghanistan and thus found a violation of Article 3 and 5 ECHR, on the basis that 'the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[562] Milanovic points out that the Court uses this 'acquiescence or connivance formula as an attribution test, whereas virtually all prior cases employing this terminology and actually applying it to the facts, used it in the analysis of a state failure to fulfil positive substantive or procedural obligations'.[563] In *El-Masri*, however, the Court held that Macedonia was 'directly responsible' for the violation, not for failure to protect the victim.[564] In later cases with comparable facts to *El-Masri* the Court did not pronounce that the respondent state was directly responsible and pointed more in the direction of failure to fulfil positive obligations.[565] Yet, also in these cases it essentially required two elements to be met. First, there is the element of acquiescence or connivance, which requires that the respondent state has a certain degree of knowledge or certainty, or in the case of connivance, even malicious intent. Second, in terms of causality, it requires that the respondent state in some way facilitated the wrongful act, or created 'the necessary conditions' for the act.[566] In this way, the ECtHR approach still strongly resembles Article 16 and 17 of the ARSIWA.

Applying this to an international organisation is unchartered territory, but its relevance can be conceived for situations in which Frontex cannot issue direct instructions to deployed officers, but has, like it always does, created the operational plan and financed the operation. If in this situation a host state has been found responsible for a violation of the principle of non-refoulement due to push-back operations, could Frontex incur derivative responsibility? Frontex did facilitate the wrongful act through financial and operational support and in that way, it could be argued, created 'the necessary conditions' for the

[560] ibid
[561] *El-Masri v. the former Yugoslav Republic of Macedonia*, app. no. 39630/09 (ECtHR, 13 December 2012)
[562] ibid para 206
[563] Milanovic (n 559) 230
[564] *El Masri* (n 551) para 211
[565] Milanovic (n 549)
[566] ibid

wrongful act. Additionally, it cannot be argued that Frontex is unaware of the fundamental rights violations that take place during its operations, especially in light of the critical OLAF Report.[567] Along these lines, it could be argued that Frontex could indeed incur derivative responsibility for aiding and assisting the commission of an international wrongful act. It cannot incur indirect responsibility for direction and control, however, considering that this would require that Frontex would issue binding decisions on the host state.[568] This is not the case, as the host state needs to approve of the Operational Plan and only has to follow instructions of Frontex as far as possible.[569] In other words, the host state has a margin of manoeuvre. It has to be pointed out, however, that it can be questioned whether the ECtHR would find that Frontex provides the 'necessary conditions', as the Operational Plan itself never sets out conduct that would violate the Convention. Another caveat in this scenario is that if the host state is not a Contracting Party to the ECHR, derivative responsibility becomes more difficult. After all, the principle of commonality requires that the conduct also needs to be unlawful for the third state, thus requiring that this state is under a human rights obligation of for example the ICCPR or of customary international law.[570]

5.2. Soft Law Instruments

To explore to what extent the ECtHR can safeguard the principles of legality and effective judicial protection in relation to soft law instruments, it is again necessary to examine how the ECtHR would deal with complaints directed at the EU concerning soft law instruments. Due to the complexity of the situation and the multiplicity of actors involved, it is first necessary to explore the attribution of 'jurisdiction-establishing' conduct. Here, complications arise immediately due to the fact that neither the EU nor the EU is directly involved in the commission of the violation. After all, in Chapter 3.2.2 it was pointed out with the example of the EU-Turkey Statement that the implementation of the agreed terms almost entirely fell on Greece. Consequently, all potential violations are committed by Greece, and not by the EU. Therefore, Article 6 and 7 of the ARIO are not applicable as there are no agents or lent organs under the control of the EU involved in such a direct manner. Still, as established in Chapter 3.2 as well, the acts of Greece are the consequence of the EU-Turkey Statement. The AA makes provision for such a situation with the creation of the co-

[567] European Anti-Fraud Office (OLAF) (n 264)
[568] ILC (n 526) art 15., comm(4)
[569] Fink (n 246)
[570] Giuffre and Moreno-Lax (n 417)

respondent mechanism. This mechanism was specifically created to address potential accountability gaps due to the 'unique situation in the Convention system in which a legal act is enacted by one High Contracting Party and implemented by another'.[571] Could the co-respondent mechanism be triggered in cases where the EU adopts a soft law instrument of which the provisions are implemented by a Member State resulting in a human rights violation?

The first obstacle in this regard concerns the question whether the soft law instrument constitutes EU law. Although enough arguments point in this direction in the case of the EU-Turkey Statement, the CJEU ruled that it was an agreement between the Member States of the EU individually (see Chapter 3.2). Although the ECtHR has not pronounced itself directly on this question, its case law related to the EU-Turkey Statement seems to suggest that the ECtHR followed the line of the CJEU.[572] The question would also be whether the ECtHR could even take a different position in this regard. Despite referring to 'European Union law' repeatedly, it fails to provide a definition of this. Consequently, it is unclear whether it would be possible for the ECtHR to consider a soft law instrument to be EU law, whereas the CJEU ruled that this instrument fell outside of the EU framework. It is clear that this would violate the autonomy of EU law, as the ECtHR would give an original interpretation of EU law. It thus seems unlikely the ECtHR would seek this outright normative conflict. Instead, it seems more likely that it will follow the CJEU's rulings on whether an instrument constitutes EU law. Consequently, it is highly unlikely soft law instruments will constitute European Union law in the eyes of the ECtHR.

Even if the ECtHR would find soft law instruments like the EU-Turkey Statement to be EU law, there are two other reasons the co-respondent mechanism cannot be applied. First, Member States often have considerable margin for manoeuvre in the implementation of provisions of soft law instruments. As Gragl observed, the co-respondent is likely to only be triggered in cases in which Member States have no discretion in implementing and executing EU obligations.[573] Second, soft law instruments often do not contain clear legal obligations. The EU-Turkey Statement did not explicitly stipulate that Turkey was to be recognized as an STC, although it was the logical consequence of the Statement.[574] Therefore, the soft law instruments *ipso facto* are compliant with the Convention. It thus fails to satisfy the material

[571] Explanatory Report to the AA (n 183) para 38
[572] Pijnenburg (n 507)
[573] P Gragl (n 543)
[574] Ulusoy and Battjes (n 377)

conditions for triggering the co-respondent mechanism, as the requirement is that the violation 'calls into question the compatibility' of a provision of EU law with the Convention.[575]

Consequently, it is highly unlikely the co-respondent mechanism can be used to hold the EU accountable for its role in violations arising out of the implementation of soft law instruments. As it also seems impossible to attribute this conduct to the EU, the Court will have to declare applications directed at the EU inadmissible due to incompatibility *ratione personae*. The Court will thus not proceed to the questions of lawfulness and responsibility and this study will therefore also not analyse this further

5.3. CSDP-Based Migration Control Missions

Currently, as it is still unknown what shape the 'internal solution' of the EU will take, it is difficult to precisely assess the implications of accession on violations that arise out of CSDP-based missions. This section thus considers the implications of the different options that were on the table during the negotiation: the re-attribution mechanism and the interpretative declaration.

5.3.1. Re-Attribution Mechanism

As discussed in Chapter 2.4.2, the re-attribution mechanism was envisioned to be applied in cases in which applications before the ECtHR were made about acts or omissions falling in the scope of the CFSP and the CJEU had no jurisdiction. In such a case, the EU would reattribute the act or omission to one or more Member States who 'will become respondent(s) in the proceedings in lieu of the EU'.[576] As Chapter 3.3.2 demonstrated, the CJEU is unlikely to have jurisdiction over CDSP-based migration control missions. Consequently, applications concerning the EU's Operation *Sophia* or *Irina* would under this mechanism have been re-attributed to one or more Member States. Because internal EU rules on re-attribution were not created yet, it is difficult to assess which Member State(s) would have been designated. After re-attribution, 'the action shall be deemed to be directed against the designated member State(s)'.[577] This seems quite problematic considering the ECtHR's rulings in the before-

[575] Explanatory report to AA (n 183) para 49
[576] ibid para 26c
[577] Council of Europe, Negotiating Document for the 12th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights: Proposals in the area of Basket 4 ("Common Foreign and Security Policy") <https://rm.coe.int/non-paper-eu-delegation-text-proposals-basket-4/1680a4e349> accessed June 2023

mentioned *Behrami and Behrami*, where the Court held that 'conduct of "subsidiary organs" of international organisations is attributable to the organisation'.[578] Since CSDP-based missions 'have an accepted distinct legal capacity under EU law as "subsidiary organs" of the EU' and Member States do not seem to exercise effective control,[579] the conduct cannot be attributed to the Member States as was also demonstrated in Chapter 4.4.3. If the Court would continue to apply this in, the application would thus be held inadmissible as the 'jurisdiction-establishing' conduct cannot be attributed to the Member States.

5.3.2. The Current AA without Specific Provision

This stands in contrast to what would happen in the imaginary scenario in which the EU would stay respondent. As Chapter 3.3 demonstrated, the Union's CSDP-based migration control missions are currently only indirectly involved in human rights violations. The missions support the Libyan Coast Guard which is responsible for pull-back and gross human rights violations. Although the EU is considered to exercise full ultimate and operational control over CSDP operations through the Council and its Political and Security Committee, meeting the requirement of Article 7 ARIO,[580] it does exercise neither operational nor ultimate control over the Libyan Coast Guard. Consequently, direct responsibility for these violations seems to be ruled out. Neither does it exercise the necessary 'full and exclusive control' over the individuals as was the case in *Hirsi*.[581] Therefore, the EU does not exercise jurisdiction.

That leaves the possibility of derivative responsibility, as this can also be triggered if jurisdiction is not exercised.[582] In Section 2 of this Chapter it was established that four conditions need to be satisfied in order to incur derivative responsibility. Despite the fact that Libya is not a party to the ECHR, the first condition to trigger derivative responsibility, that Libya committed an internationally wrongful act, can be considered to be met due to the fact that the ICCPR applies to Libya.[583] After all, the ICCPR also prohibits arbitrary detention, torture and inhuman and degrading treatment, and forced labour. Libya thus violates its human rights obligations under the ICCPR, as is well documented.[584] The second condition is

[578] Krommendijk (n 186) 17
[579] ibid 17
[580] Fink (n 246)
[581] Pijnenburg (n 556)
[582] ibid
[583] Giuffrè and Moreno-Lax (n 417)
[584] OHCHR and UN Support Mission in Libya (n 405) Human Rights Watch (n 504)

also met as it is clear that if the EU would have committed the acts now committed by Libya it would have been wrongful as well due to the fact that both the ECHR and CFR apply. Although the obligations do not arise out of the same instruments, a commonality of obligations can thus be observed. The second and third condition, as interpreted by the ECtHR in *El Masri*, require that the international organisation created the 'necessary conditions' for the wrongful act and that this happened with 'acquiescence or connivance' of its authorities. Regarding that latter element, the EU is certainly aware of the situation in Libya as it is well documented, and can with a high degree of certainty know that migrants are arbitrarily detained contrary to Article 5 ECHR and fall subject to ill-treatment contrary to Article 3 ECHR.[585] The element of causality should also be considered to be met.[586] The Libyan Coast Guard only exists due to EU financial and material support,[587] and acts when the EU alerts them of vessels they need to pull-back. This way, the EU provides the 'necessary conditions' for the unlawful act to occur. Under the current AA, which does not make provision for jurisdiction over the CFSP, the ECtHR could thus offer access to justice and hold the EU accountable for assisting Libya through its CDSP-based migration control missions in the commission of human rights violations. However, this will never truly happen as the CJEU in *Opinion 2/13* prohibited the ECtHR to exercise jurisdiction over the CFSP as long as the CJEU cannot itself exercise jurisdiction.

5.3.3. Interpretative Declaration

Although it is still unclear how the interpretative declaration will look like, it is clear that any solution aside from Treaty amendments of the adoption of a 'Notwithstanding Protocol' requires a restriction in the jurisdiction of the ECtHR.[588] *Opinion 2/13* simply does not allow a situation in which the ECtHR would be able to exercise its jurisdiction without the prior involvement of the CJEU. As the CJEU cannot exercise jurisdiction over CDSP-based migration control missions, the ECtHR will also be excluded. Consequently, an interpretive declaration would also need to shield the EU from incurring responsibility.

[585] Giuffrè and Moreno-Lax (n 417)
[586] See also ibid
[587] ibid
[588] Tacik (n 213)

5.4. Conclusion

Altogether, EU accession to the ECHR will have different implications on how the ECtHR will consider claims and whether it can ensure *systemic accountability for incongruences between human rights law and acts of authority through ensuring access to a court* for each of the three neo-refoulement instruments. Both for claims concerning soft law agreements and CSDP-missions, it is unlikely accession will change much. With regard to soft law, the EU still seems to escape accountability due to the fact that the ECtHR is likely to have to follow the CJEU in determining what constitutes EU law. Consequently, the ECtHR will not be able to declare claims directed at the EU concerning soft law admissible. The co-respondent mechanism does not resolve this issue. The ECtHR will thus continue to be able to grant access to a remedy for claims directed at the Member States concerning the implementation of soft law agreements, but will not be able to achieve systemic accountability. With regard to CSDP missions, it can ensure neither access to a court nor systemic accountability. Although the current solution for jurisdiction over issues falling in the scope of the CFSP is still unknown, it is already possible to conclude that the ECtHR will remain relatively powerless concerning claims directed at CSDP missions due to the fact that the conduct is only attributable to the EU. The situation is different for claims concerning Frontex. Here mixed implications can be observed with regard to the principles of effective judicial protection and legality. The previous chapter already demonstrated that without accession the ECtHR could already offer access to justice for claims directed at Member States, after accession it can in theory also do so for claims directed at Frontex directly. However, as becomes evident from this section, it might still be difficult to have such a claim admitted due to the difficulty of attributing the 'jurisdiction-establishing conduct'. This difficulty does not seem to be remedied by the co-respondent mechanism, as this mechanism does not seem applicable to situations in which the Member State still has discretion and the violations arise from physical conduct rather than from a clear legal Union law obligation. Nevertheless, much will depend on how the ECtHR will deploy this mechanism. If it chooses to broadly interpret the provisions of the AA, it might apply it to complaints about Frontex Operations. This would take away the difficult issue of attributability. However, if the ECtHR does not opt for such an approach, it is still possible to bring admissible claims against Frontex. With strong legal counsel, applicants should be able to attribute conduct to the correct entity. Consequently, the EU's non-compliance with human rights law could finally

be addressed and the legality-requirement of systemic accountability be achieved with regard to Frontex.

6. Conclusion

This concluding chapter reflects on the findings of earlier chapters and provides an answer to the main research question of this thesis: *to what extent can EU accession to the ECHR under the terms of the new accession agreement resolve rule of law issues that arise out of the external dimension of the EU's migration policy?*

The introductory Chapter 1 explained the rationale behind that question. It established that the implicit aim of the EU's migration policy seems to be focused around *neo-refoulement*: the strategy of preventing asylum obligations by ensuring that migrants are returned before they are in EU Member State territory or under the effective control of the EU. These security-focused asylum policies proliferated and were strengthened during the so-called 'migration crisis', even though the inflow of migrants was neither unprecedented nor unexpected.[589] Yet, this 'crisis-language' served as a justification for the security-based neo-refoulement instruments.[590] Three such instruments were identified as exemplary for the EU approach: Frontex, soft law instruments, and CSDP-based migration control missions. Through using these instruments, the EU and its Member States hope to avoid human rights obligations and responsibility for human rights violations vis a vis migrants. Despite the fact that human rights violations related to neo-refoulement strategies are well-documented,[591] the EU has never been held accountable for violations committed related to the three main neo-refoulement instruments. As Tsourdi suggested, systemic human rights violations can be a symptom of rule of law backsliding, revealing problems regarding the institutional set-up.[592] If that is the case, an upcoming change in the international institutional set-up, the EU accession to the ECHR, could maybe take away some rule of law concerns.

After a thorough examination of the EU's rule of law taken in conjunction with the expected capabilities of the ECtHR after accession, Chapter 2 offered the following working definition of the rule of law: *ensuring systemic accountability for incongruences between human rights law and acts of government through ensuring access to a court.* This definition mainly reflects two important rule of law elements: legality, as reflected by the requirement

[589] Idriz (n 9)
[590] N Baerwaldt, 'The European Refugee Crisis: Crisis for Whom?' (European Border Communities, 27 March 2019) <https://scholarlypublications.universiteitleiden.nl/access/item%3A2970686/view> accessed 13 June 2023
[591] See Amnesty International (n 261); Amnesty International (n 345); Human Rights Watch (n 405); OHCHR and UN Support Mission in Libya (n 405);
[592] Tsourdi (n 33)

of systemic accountability for incongruences between human rights law and acts of state, and effective judicial protection, as reflected by the requirement of access to a court.

Chapter 3 then demonstrated that each of the three identified neo-refoulement instruments undermine the rule of law as in each case systemic accountability for incongruences between human rights law and acts of state cannot be achieved due to the fact that there is often no access to the CJEU, which is currently the only court that can satisfy the requirement of systemic accountability with regard to the EU. In the case of Frontex, the seemingly insurmountable admission criteria of the action for annulment and the inaptness of the action for damages for human rights violations stand in the way of a remedy. In the case of soft law, the CJEU has asserted that it has no jurisdiction as it considers soft law to not exercise binding legal effects. In the case of CSDP missions, the jurisdictional carve-out in the CFSP prohibits the CJEU from providing access to a court with regard to CSDP-missions. Consequently, the EU can continue its policies that are incongruent with human rights obligations without being held accountable. This undermines the rule of law.

Chapter 5 demonstrated that the ECtHR currently is unable to take away these rule of law concerns. In the first place it cannot offer systemic accountability as the EU is not (yet?) a Contracting Party. It is capable of offering access to a court, satisfying the principle of effective judicial protection, for violations committed by EU Member States arising out of the implementation of soft law and for the host state of Frontex operations as long as the violation is not committed by Frontex' statutory staff. With regard to CSDP missions, the Court seems to stand powerless as it cannot hold the EU Member States accountable due to the fact that the EU exercises effective control over such missions. It can thus only take away some rule of law concerns in part.

Chapter 6 demonstrated that accession will not change much in this regard. It can be expected that with regard to soft law and CSDP missions nothing will change. It seems virtually impossible to attribute violations triggered by soft law instruments to the EU, and the co-respondent mechanism will be of no help in this regard. With regard to CSDP missions, in light of the CJEU's *Opinion 2/13* it can be expected that the EU's 'internal solution' for the issue of CFSP jurisdiction will prevent the ECtHR from exercising jurisdiction. Accession does have implications for cases directed at Frontex. Although the issue of attribution will remain complex, it will be possible for the ECtHR to ensure access to a court and ensure systemic accountability for incongruences between human rights obligations and acts of Frontex's statutory staff. For violations that are not committed by Frontex' statutory staff, it will remain difficult to hold Frontex accountable, despite its active

role in operations. The co-respondent mechanism seems to be inapplicable in such cases, unless the ECtHR would opt to interpret its conditions for application broadly. Nevertheless, it is theoretically conceivable that the ECtHR will hold Frontex, and thus the EU, accountable for complicity in human rights violations for which the host state takes primary responsibility.

It is thus clear that the EU accession to the ECHR will only to a small extent resolve the rule of law issues that arise out of the external dimension of the EU's migration and asylum policy. For a large part, the accountability gap remains to exist even after the ECtHR gains jurisdiction over the EU. Still, accession has beneficial implications for the rule of law, as it does improve systemic accountability and effective judicial protection for incongruences between human rights obligations and acts of Frontex. Unfortunately, it fails to achieve this for soft law instruments and most likely for CSDP missions as well. This is worrying in light of the Council's new agreement on migration policy. If this agreement passes through the European Parliament, stricter external border procedures will allow Member States to more quickly return migrants to a wider range of states.[593] In this light, the EU also released a statement that it was working on a partnership with Tunisia.[594] A migration agreement with Tunisia modelled after the EU-Turkey Statement could thus be in the works. Almost a decade after the start of the 'migration crisis', measures that were presented as incidental and exceptional have become commonplace.[595] As this thesis demonstrated, neither the CJEU nor the ECtHR after accession will be able to satisfy the legality-requirement of systemic accountability in case of violations triggered by soft law agreements. The EU thus continues to exploit these inadequacies in its institutional set-up and undermines the rule of law, and unfortunately the accession to the ECHR cannot serve as the desired solution.

On a general level, it is worrying how easily imagined 'crisis' situations can result in policies that ignore and undermine rule of law requirements, despite the fact that the rule of law is a 'foundational value' of the EU. Inconvenient human rights obligations are easily sidestepped by the EU and its Member States without consequence. The accession to the ECHR might make it slightly more difficult for the EU to do this, and the ECtHR can indeed serve as a valuable safeguard for the rule of law due its ability to ensure access to a court and

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[593] European Council, 'Migration policy: Council reaches agreement on key asylum and migration laws' (Press Release, 8 June 2023) <https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/> accessed 13 June 2023

[594] European Union and Tunisia Joint Statement (Statement/23/3202, 11 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3202> accessed 13 June 2023

[595] Davitti (n 446)

systemic accountability. Yet, it remains important to continue to search for additional safeguards and ways to ensure that the EU complies with rule of law requirements in order to ensure that it will become more difficult for the EU and its Member States to avoid binding human rights obligations they deem inconvenient.

One interesting possibility in this regard is another external international court: the International Criminal Court (ICC). Kalpouzos suggests that international criminal law could 'highlight the structures of asymmetry and injustice' of the current migration policies.[596] As a group of international lawyers in 2019 sued Frontex officials for crimes against humanity before the ICC,[597] examining the potential of this court to safeguard the rule of law regarding the EU's migration policies would be an interesting avenue for further research. Yet, for improving accountability safeguards and effective judicial protection we should also keep looking to the EU itself and the internal possibilities. In this regard, the importance of the earlier mentioned appeal in the *EU-Les Kosovo* case before the CJEU cannot be overstated. If the CJEU follows the argument of the Commission, many rule of law concerns arising out of the use of CSDP-based military missions seem to disappear. The solution to the problem of soft law instruments created outside of the EU-Framework is not within sight, though the CJEU seems to have the key to the solution in this case as well. As it seems unlikely the Court will revise its judgments concerning the EU-Turkey Statement, systemic accountability will remain out of reach. Nevertheless, it remains important to continue to examine how individual Member States can be held accountable, either before the ECtHR, national courts, or the Human Rights Committee. This might indirectly prompt the EU and its Member States to comply with human rights obligations and respect the rule of law in the external dimension of migration.

[596] I Kalzoupos, 'International Criminal Law and the Violence against Migrants' (2020) 21(3) German Law Journal 571

[597] Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute, 'EU Migration Policies in the Central Mediterranean and Libya' <https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> accessed 28 June 2023

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