



ARTICLES

SPECIAL SECTION – THE NEW FRONTIERS OF EU ADMINISTRATIVE LAW: IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS?

EXTERNAL MIGRATION AND ASYLUM MANAGEMENT: ACCOUNTABILITY FOR EXECUTIVE ACTION OUTSIDE EU-TERRITORY

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ABSTRACT: EU migration and asylum law, an area of administrative law *par excellence*, has from the moment that the EU acquired competences in this field, had a very strong external dimension. By looking at three areas of EU migration and asylum policy: visa policy, refugee resettlement and border management through Frontex operational activity, it will be shown that, notwithstanding significant improvements, a restrictive interpretation of the scope of EU law and the multi-level structure of EU executive action continue to pose challenges in holding the EU and its Member States to account.

KEYWORDS: EU migration and asylum policy – external dimension – executive action – Charter of Fundamental Rights of the European Union – accountability mechanisms – cooperation with third countries.

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I. INTRODUCTION

EU migration and asylum law, an area of administrative law *par excellence*, has from the moment that the EU acquired competences in this field, had a very strong external dimension. This external dimension has been shaped both by legally binding instruments (EU legislation, international agreements), as well as by instruments of a less than clear legal value (mobility partnerships, action plans and memoranda of understanding).¹ One could group the EU-Turkey Statement in response to the 2015 refugee crisis into the latter category. Although broadly reported as an agreement between the EU and Turkey, the General Court has recently ruled that, without pronouncing itself on the legal nature of the “deal”, it was in any case concluded by the Member States rather than the EU.²

In the field of migration and asylum, the EU’s integrated administration, through which EU law is implemented by the EU’s institutions, bodies and agencies, as well as the Member States’ competent authorities, is mirrored externally.³ Likewise, the implementation of EU law may take the form of legally binding decision making, such as the handling of individual visa applications, but it may also take place through more factual executive action, such as the joint patrolling against human smuggling and the training of third country border guards. The often unclear division of responsibilities between Member States and EU actors, including EU agencies such as the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (Frontex), is amplified in the external domain where executive action is often supported by, or carried out in cooperation with, international organisations, such as the International Organization for Migration (IOM) or the United Nations High Commissioner for Refugees (UNHCR), or with third country authorities.

In the field of migration and asylum, States have often resorted to externalisation in an attempt to prevent access to territory, allowing them to evade administrative and constitutional safeguards, as well as international obligations at home, whilst simultaneously co-opting third countries in achieving their own policy objectives.⁴ Externalisation often amounts to a policy of deterrence, stopping third country nationals from

¹ J.J. RIJPMAN, M. CREMONA, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law*, in *EUI Working Paper Series*, no. 1, 2007.

² EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. On the question of whether the agreement is to be considered an agreement under public international law: M. DEN HEIJER, T. SPIJKERBOER, *Is the EU-Turkey refugee and migration deal a treaty?*, in *EU Law Analysis*, 7 April 2016, eulawanalysis.blogspot.nl; General Court, orders of 28 February 2017, cases T-192/16, T-193/16 and T-257/16 T-192/16, *NF, NG and MN v European Council* (appeals have been lodged before the Court of Justice, cases C-208/17 P, C-209/17 P and C-210/17 P).

³ H. HOFMANN, *Mapping the European Administrative Space*, in *West European Politics*, 2008, p. 662 *et seq.*

⁴ S. LAVANEX, *Shifting up and out: The foreign policy of European immigration control*, in *West European Politics*, 2006, p. 329 *et seq.*

reaching EU territory and preventing them from entering into direct contact with EU or Member States' authorities. Rather than a strategy for migration control, it is often presented in terms of security and/or humanitarian concerns.⁵ This holds true also for instance for the EU's Common Foreign and Security Mission Operation Sophia, as well as for the EU-Turkey Statement, both claiming to target human smuggling and to prevent people from undertaking dangerous journeys.⁶

As EU and Member States' authorities increasingly act themselves on third country territory, on the basis of EU legislation and/or agreements concluded by the EU with third countries, there is room for greater scrutiny of the executive action in this area. The European Court of Human Rights, already early on, made it clear that it would not allow a Contracting Party to engage in conduct in contravention of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) outside its own territory.⁷ The Charter of Fundamental Rights of the European Union (Charter) provides for even greater opportunities to control the actions of the EU bodies and agencies, as well as the Member States when they act outside EU territory but within the scope of EU law. In addition, non-judicial remedies are developed to ensure compliance with fundamental rights.

This *Article* will illustrate the above by looking at three areas of EU migration and asylum policy with a strong external dimension: visa policy, refugee resettlement and border management through Frontex operational activity.⁸ In all three areas there have been recent political, legislative or judicial developments, which shed light on the scrutiny of EU external action in the field of migration and asylum law, from the perspective of the individual. EU external action is understood in this context as the implementation of EU law outside the territory of the Member States, be this by EU institutions or agencies, or by Member States' authorities. It will be shown that, notwithstanding significant improvements, a restrictive interpretation of the scope of EU law and the multi-level structure of EU executive action make it difficult to hold the EU or its Member States accountable for possible wrongdoings. This difficulty is exacerbated in the external field, due to the involvement of non-EU actors and the fact that those affected are generally non-EU citizens who find themselves outside EU territory, which may practically impede their access to accountability mechanisms.

⁵ B. FRELICK, M. KYSEL, J. PODKUL, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, in *Journal on Migration and Human Security*, 2016, p. 193.

⁶ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

⁷ European Court of Human Rights, judgment of 16 November 2004, no. 31821/96, *Issa et al. v. Turkey*, para. 71.

⁸ Hence no attention will be paid to CFSP missions with (secondary) migration and asylum management objectives or executive action by the Member States that has no link with the EU's migration and asylum policy.

II. EU VISA POLICY

The EU's visa policy is a clear example of "remote policing", aimed at preventing the arrival of unwanted third country nationals, supported by the private enforcement of carrier sanctions.⁹ Third countries whose nationals are under an obligation to obtain a visa to visit the Schengen area are listed in Regulation 539/2001.¹⁰ The rules and conditions governing the issuance of visas were laid down in a regulation in 2009, the Visa Code.¹¹ A Visa Information System (VIS), technically supporting the visa application process and registering a set of applicants' data, including fingerprints, has been up and running since 2011.¹²

II.1. JUDICIAL REVIEW OF DECISIONS

The Common Consular Instructions, the predecessor of the Visa Code, gave consular authorities considerable discretion in their decision of whether or not to grant a visa, allowing also for national rules to supplement the reasons for denying a visa.¹³ This changed with the advent of the Visa Code, which was specifically intended to improve the rights of third country nationals in the visa application process.¹⁴ Art. 32 of the Visa Code now contains an exhaustive list of, admittedly broadly formulated, criteria which Member States are not allowed to supplement, as was held by the Court of Justice in the *Koushkaki* case.¹⁵

The Visa Code also introduced a right of appeal against the refusal, revocation or annulment of a visa, although not against decisions of non-admissibility.¹⁶ Art. 23, para. 3, of the Visa Code provides for this right against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State. National laws are however subject to Art. 47, para. 1, of the Charter, which

⁹ D. BIGO, E. GUILD, *Policing at Distance: Schengen Visa Policies*, in D. BIGO, E. GUILD (eds), *Controlling Frontiers: Free Movement Into and Within Europe*, Aldershot: Ashgate, 2005, p. 234.

¹⁰ Regulation (EC) 539/2001 of the Council of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

¹¹ Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

¹² Regulation (EC) 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

¹³ Common Consular Instructions on Visas for Diplomatic Mission and Consular Posts, part V, point 2.4.

¹⁴ A. MELONI, *The Community Code on Visas: Harmonisation at Last?*, in *European Law Review*, 2009, p. 671 *et seq.*

¹⁵ Court of Justice, judgment of 19 December 2013, case C-84/12, *Koushkaki* [GC], para. 55.

¹⁶ This *Article* will focus on the review of the decision on the application for a Schengen visa, not on the provision on the protection of personal data under the VIS, although here as well the fact that the data subject is outside EU territory may lead to similar problems in terms of access to justice.

states that anybody “whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”.

Art. 47 of the Charter is based on Art. 13 of the ECHR. However, where the ECHR refers to a remedy before a national authority, the Charter provides for more protection by requiring an effective remedy before a court.¹⁷ Accordingly, the European Commission in 2014 started infringement proceedings against a number of Member States, after which most amended their national laws.¹⁸ In the meantime, the question of whether the provision requires Member States to provide for a right of appeal before a court of law, rather than an administrative body, has reached the Court of Justice by way of a preliminary reference from Poland, one of the Member States that continues to exclude judicial review.¹⁹ Although one could argue that there is no substantive right to a visa, it should be recalled that the Court in *Koushkaki* held that, despite the large discretion that Member States retain in applying the provisions of the Visa Code, they cannot refuse a visa on grounds not provided for in that Code.²⁰

Moreover, as regards the scope of the appeal, in the *Zakaria* case the Court of Justice was asked whether the right to appeal a refusal of entry under the Schengen Borders Code should include a right to challenge the way in which checks were conducted and, if not, whether this would infringe Art. 47 of the Charter. In that case, a third country national did not wish to appeal the refusal of entry, but rather the way in which he had been treated by national border guards, which he alleged had infringed his fundamental rights. The Court made it very clear that if a situation falls within the scope of EU law Member States ought to provide for appropriate legal remedies for infringement of fundamental rights.²¹

II.2. JUDICIAL REVIEW IN CASE OF REPRESENTATION

An application for a Schengen visa should be made at the consulate of the Schengen Member State of (main) destination or, in the absence thereof, the Member State of first entry.²² Art. 8 of the Visa Code provides Member States with the possibility of concluding bilateral representation arrangements and stipulates that Member States shall

¹⁷ The Court of Justice enshrined that right as a general principle of Union law in its judgment of 15 May 1986, case 222/84, *Johnston*, paras 18-19.

¹⁸ A. MELONI, *Visa Code Regulation (EC) No 810/2009*, in K. HAILBRONNER, D. THYM (eds), *EU Immigration and Asylum Law – A Commentary*, Baden-Baden: Nomos, 2016, p. 169.

¹⁹ Court of Justice, request for a preliminary ruling lodged on 19 July 2016, case C-403/16, *El Hassani*.

²⁰ See also the Opinion of AG Mengozzi delivered on 7 February 2017, case C-638/16 PPU, *X and X*, para. 82, with reference to Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N. S. et al.* [GC], paras 68 and 69.

²¹ Court of Justice, judgment of 17 January 2013, case C-23/12, *Zakaria*, para. 40.

²² Art. 5 of the Visa Code.

endeavor to do so in countries where they do not have consular services.²³ It provides that where the representing Member State considers refusing a visa, the visa application will be referred to the represented Member State in order for it to take the final decision.²⁴ However, Art. 8, para. 4, let. d), allows for a derogation from this obligation to consult with the represented Member State. Under the Commission proposal for a recast of the Visa Code, this obligation would be deleted in full.²⁵

A number of Dutch courts have held that where the representation agreement does not provide for consultation with the represented Member State – in the cases at hand the Netherlands – appeal against a refusal lies with the representing Member State.²⁶ Moreover, the obligation under Dutch law to refer an administrative appeal to the correct authority in case it is wrongly directed at another administrative authority does not apply.²⁷ This raises questions regarding the right to effective judicial protection guaranteed by Art. 47 of the Charter and principles of good administration.²⁸ This right applies to everyone within the scope of the Charter, including third-country nationals whose legal position is regulated by EU law, even if they have not (yet) been issued a permit to stay.²⁹ The same holds true for the right to good administration, which – although included under the heading of citizens' rights – applies to everyone within the scope of the Charter. Although the right is directed at the EU institutions and bodies, it applies as a general principle also to the Member States when they implement EU law.³⁰

Considering that the Commission's proposal for a recast removes the possibility for involvement in the procedure by the represented Member State, it seems all the more opportune to ask the Court of Justice for clarification. From the perspective of mutual recognition and trust – that underpin the Area of Freedom, Security and Justice – differ-

²³ Under the Commission's recast proposal of 2014, in the absence of a consulate of the responsible Member State, the applicant may apply at any of the other Schengen consulates present ("mandatory representation"). See Art. 5 of the Commission Proposal for a Regulation of the European Parliament and the Council on the Union Code on Visas (Visa Code) (recast), COM(2014) 164 final.

²⁴ Art. 8, para. 2, of the Visa Code.

²⁵ Art. 39 of the Proposal for a Regulation COM(2014) 164.

²⁶ District Court of The Hague, judgment of 3 April 2013, No. AWB 12/34042; District Court of The Hague (Roermond seat), judgment of 9 December 2011, No. AWB 11/119995.

²⁷ District Court of The Hague, judgment of 24 April 2013, No. AWB 12/30040.

²⁸ E. BROUWER, *Wanneer een staat een visum weigert namens een andere staat – Vertegenwoordigingsafspraken in het EU-visumbeleid en het recht op effectieve rechtsbescherming*, in *Tijdschrift voor Europees en Economisch Recht*, 2015, p. 164 *et seq.*; see also Meijers Committee, *Response to the Open Consultation – Improving procedures for obtaining short-stay 'Schengen' visas*, 17 June 2013, www.commissie-meijers.nl.

²⁹ Court of Justice, judgment of 22 November 2012, case C-277/11, *M.; Zakaria*, cit.

³⁰ Court of Justice, judgment of 17 July 2014, joined cases C-141/12 and C-372/12, *Y.S. and M.S.*, para. 68. The scope of the Charter and that of general principles in as far as they apply to the Member States is the same, whenever they act within the scope of EU law: see Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC], para. 21.

ences in national rules applying to the appeal should not necessarily be problematic or amount to a violation of fundamental rights. However, one could imagine that in accordance with the Court's case law in *N.S.*, that presumption of mutual trust is rebuttable.³¹ Also, it could well be that in line with the Court's case law in *C.K. et al.*, there may be specific personal circumstances in which the appeal should lie with the represented Member State. This could be the case where the absence of legal aid, for instance as regards the provision of translations, would unreasonably impede applicants' access to justice.³²

II.3. HUMANITARIAN VISA

Art. 25 of the Visa Code allows Member States to exceptionally issue a visa with a limited territorial validity on humanitarian grounds. This provision became central to the discussion on humanitarian visas as a means of allowing refugees from conflict-ridden countries a safe passage to Europe. It was argued that the provision on territorially-limited Schengen visas allowed for the introduction of a humanitarian visa on a larger scale.³³ In Belgium, in a number of cases that were the subject of much media coverage, the argument was made – and initially accepted by the Belgian judge – that Art. 4 of the Charter not only allowed but even required that a Schengen visa be issued on humanitarian grounds to Syrian applicants fleeing the civil war in their home country.³⁴

In one of these cases, *X and X*, preliminary questions were referred to the Court of Justice, in essence asking whether indeed under the Visa Code there is an obligation for the Member States to issue a territorially limited Schengen visa, where there is a risk that the applicants will otherwise fall victim to torture or inhumane or degrading treatment.³⁵ The case concerned a family from Aleppo (Syria), that had travelled to and from Beirut (Lebanon) in order to apply at the Belgian Embassy for visas with limited territorial validity. The visas would allow them to leave Syria and seek asylum in Belgium.

Contrary to the Advocate General's opinion, the Court argued that the delivery of a humanitarian visa for the purpose of requesting asylum did not fall within the scope of EU law and hence not within the scope of the Charter. It ruled that the request made by the Syrian family was a request for a long-term visa, which had not been harmonised at EU level and therefore remained within the remit of the Member States' competences.³⁶ The Court added that to conclude otherwise would enable third country nationals to

³¹ *N. S. et al.* [GC], cit.

³² Court of Justice, judgment of 16 February 2017, case C-578/16 PPU, *C.K. et al.*

³³ See e.g. U.I. JENSEN, *Humanitarian Visas: Option or Obligation?*, Study for the LIBE Committee of the European Parliament, 2014, www.europarl.europa.eu, and S. PEERS, *Do potential asylum-seekers have the right to a Schengen visa?*, in *EU Law Analysis*, 20 January 2014, eulawanalysis.blogspot.nl.

³⁴ VRT, *Asylum secretary rejects visa for Aleppo Syrians*, in *Flandersnews.be*, 27 October 2016, dere-dactie.be.

³⁵ Court of Justice, judgment of 7 March 2017, case C-638/16 PPU, *X and X* [GC].

³⁶ *Ibid.*, paras 42-45.

request asylum outside the EU, which the EU asylum *acquis* excludes, and would *de facto* amend the laws on international protection in the Member States.³⁷ The Court thus seemed to reaffirm one of the principles of the global refugee system, namely the territoriality of that regime, which requires an asylum seeker to be outside her own country and which does not impose obligations on Member States outside their own borders.

The Court's reasoning has been criticised for bringing the applicants outside the scope of the Visa Code on the basis of the purpose for which they requested the visa. As the Advocate General argued, the applicants' intention cannot alter the nature or purpose of their application, nor can it convert their claim into an application for a long-term visa, thereby placing them outside the scope of the Visa Code and EU law more generally.³⁸ Moreno-Lax draws a comparison between the position of visa applicants and asylum seekers who, under a similar reasoning, would be excluded from the remit of the asylum directives upon a negative decision on their request.³⁹

The Court's decision is, however, consistent with earlier cases such as *Iida*⁴⁰ and *Ymeraga*,⁴¹ which were also invoked by the intervening Member States. In those cases, the Court held that the Charter did not apply to a refusal to grant a residence permit to a third country national family member because the third country nationals in question did not satisfy the conditions for the grant of that card. The Advocate General sought to distinguish these cases, arguing that the Syrian family in the *X and X* case did fall within the material and personal scope of the Visa Code, being of a nationality requiring a visa to cross the Schengen external border.⁴² The Court, however, reached its conclusion without referring to either the Advocate General's Opinion or its previous case law.

In theory, the Belgian authorities could have made a distinction between non-admissibility (for having submitted the wrong application) and refusal (for posing a risk of not returning home upon expiry of the visa). In both cases the outcome would likely be based on the invocation of Art. 4 of the Charter, as the request for a visa in order to seek protection in the Member State of destination will be considered to indicate that the applicants intend to stay for more than three months. Against a non-admissibility decision, the Visa Code would not have granted an appeal possibility, whereas against a refusal it does. Still, it should be remembered that the exclusion of the possibility of appeal against admissibility decisions has been criticised.⁴³ More important, issuing an

³⁷ *Ibid.*, para. 49.

³⁸ Opinion of AG Mengozzi, *X and X*, cit., para. 50.

³⁹ V. MORENO-LAX, *Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part I)*, in *EU Immigration and Asylum Law and Policy*, 16 February 2017, eumigrationlawblog.eu.

⁴⁰ Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida*.

⁴¹ Court of Justice, judgment of 8 May 2013, case C-87/12, *Ymeraga*.

⁴² *X and X* [GC], cit., paras 58-60.

⁴³ A. MELONI, *The Community Code on Visas*, cit., p. 692.

admissibility decision could itself be considered an application of the Visa Code, thereby bringing the action within the scope of EU law and therefore the remit of the Charter.

If anything, the Court's decision to exclude the facts of the case from the scope of application of the Charter was motivated by its wish not to intervene in a highly sensitive area, aware of the potentially far-reaching consequences for Member States' protection systems. It was the ambiguity of the notion of the scope of EU law, which determines the application of the Charter, that allowed it to do so.

II.4. THE EXTRA-TERRITORIAL APPLICABILITY OF THE CHARTER

Whereas Art. 1 of the ECHR clearly limits the territorial scope of the Convention to the contracting parties' territory, and the Strasbourg case law limits its extra-territorial effect to situations of effective control, similar restrictions do not exist as regards the Charter. In the *X and X* case, the Court confirmed that "the question is not to identify an independent field of application of the Charter, but to determine the remit of EU law and its relevance to a particular situation".⁴⁴

The Court and the Advocate General may have differed on the outcome of the case, but they did so on the basis of a differing assessment of whether the situation at hand fell within the scope of EU law. They did not, at least not openly, disagree on the conclusion that once a situation falls within the scope of EU law, the Charter applies, be it internally or externally. AG Mengozzi was very explicit in his Opinion that Member State authorities acting in the context of EU law are required to observe the Charter, irrespective of any territorial criterion or the legal situation of the persons to which it applies.⁴⁵ As regards the content of the rights contained in the Charter, AG Mengozzi recalled that, whilst the Charter follows the level of protection of the ECHR, nothing prevents the Union from providing more extensive protection.⁴⁶

The EU is bound by the Charter "whenever it exercises its competences, both internally and externally, either directly or through the intermediation of the Member States 'implementing EU law'".⁴⁷ Moreover, the EU's institutions, bodies and agencies remain bound by the Charter, also when they act outside the EU legal framework.⁴⁸ The follow-

⁴⁴ V. MORENO-LAX, C. COSTELLO, *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, 2014, p. 1680.

⁴⁵ Opinion of AG Mengozzi, *X and X*, cit., para. 89. Compare the Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16 P, *Front Polisario*, paras 270-272.

⁴⁶ Art. 52, para. 3, of the Charter. Opinion of AG Mengozzi, *X and X*, cit., para. 99.

⁴⁷ V. MORENO-LAX, C. COSTELLO, *The Extraterritorial Application of the EU Charter of Fundamental Rights*, cit., p. 1682.

⁴⁸ As was the case of the Commission in the conclusion of Memoranda of Understanding with Member States such as Cyprus within the context of the financial crisis: Court of Justice, judgment of 20 September 2016, joined cases C-8/15 P to C-10/15 P, *Ledra Advertising* [GC], para. 67.

ing two examples, relating to resettlement and cooperation on border management, may serve to illustrate how the Charter can play a role in ensuring the compatibility of external action by the EU and its Member States' executive authorities. However, they will also show how the definition of scope of EU law continues to raise questions, as does the multi-actor nature of the EU's external executive action.

III. REFUGEE RESETTLEMENT

Refugee resettlement has been defined as the "selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status".⁴⁹ Refugee settlement serves as a protection tool and an expression of international solidarity, allowing for a durable solution for refugees and alleviating the pressure on refugee receiving countries.⁵⁰ The UNHCR plays an important role in resettlement. UNHCR identifies refugees in need of resettlement as part of its mandate and refers them for consideration to States that are willing to offer permanent residence.

In addition to persons that fall under the definition of the 1951 Geneva Convention,⁵¹ persons in need of subsidiary protection – due to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order – also fall within its mandate. Determination as a refugee under UNHCR's mandate is a precondition to be considered by States for resettlement.⁵² UNHCR divides its resettlement submissions by category (including categories of particularly vulnerable refugees, such as women and children at risk, as well as torture victims) and priority level (emergency, urgent and normal).⁵³

There is no obligation on States to allow for resettlement, which is therefore considered a voluntary and discretionary act of benevolence. States will normally engage in a further examination of the files of the individuals that have been pre-selected by UNHCR or engage in on-the-spot interviews. Some States impose additional requirements – such as the chance of successful integration in the resettlement State – or engage in extensive background checks. Nonetheless, recent figures show that the large majority of refugees referred by the UNHCR (91,8 percent) are accepted by resettlement countries.⁵⁴ This makes the initial Refugee Status Determination (RSD) by the UNCHR of paramount importance for the individuals concerned.

⁴⁹ UNHCR, *Resettlement Handbook*, Geneva, July 2011, www.unhcr.org, p. 3.

⁵⁰ *Ibid.*

⁵¹ Art. 1 of the Convention Relating to the Status of Refugees, Geneva, 28 July 1951.

⁵² UNHCR, *Resettlement Handbook*, cit., p. 21.

⁵³ *Ibid.*, p. 245 *et seq.*

⁵⁴ UNHCR, *Global Resettlement Needs*, 2017, www.unhcr.org, p. 63.

Alexander concluded in 1999 that the UNHCR RSD procedures lagged behind developments in administrative and human rights law.⁵⁵ In September 2005, the UNHCR published a manual on Procedural Standards for RSD under the UNHCR's mandate, which significantly improved asylum seekers' rights, introducing the duty to state reasons and the possibility to appeal a negative RSD decision with another protection office.⁵⁶ Still UNHCR appears to operate below international standards, as well as its own position on a fair and effective RSD procedure for States.⁵⁷ The lack of procedural safeguards has been replicated at the stage of State examination of UNHCR referrals for resettlement. On occasion EU Member States have refused resettlement without stating reasons, making it difficult for the UNCHR to refer the individual in question to another State.

Resettlement is increasingly seen as a means of providing a safe pathway to refugee protection, and promoted by the UNHCR as such. However, it must be stressed that resettlement cannot be a substitute for national asylum procedures, since there is no obligation for States to allow for resettlement. Only in its most extensive form, where a full asylum procedure is provided for outside national territory followed by a transfer to the asylum granting State, does resettlement overlap with the notion of extra-territorial processing.⁵⁸ Arguably, it also gives UNHCR a role that it was never intended to play, shifting responsibility from States to the UN.⁵⁹

III.1. EU RESETTLEMENT INITIATIVES

A majority of EU Member States have in one way or another engaged in resettlement, either on an *ad hoc* basis or in the framework of more structured programmes, both with and without the involvement of the UNHCR. However, national rules on resettlement remain diverse both in form and substance.⁶⁰

Member States have proven to be unreceptive to harmonisation attempts, emphasising the political nature of the decision to resettle. As a result, EU initiatives in this field have consisted primarily of the provision of financial support under the European Refugee Fund (ERF), running from 2008-2013, and its successor the Asylum, Migration

⁵⁵ M. ALEXANDER, *Refugee Status Determination Conducted by the UNHCR*, in *International Journal of Refugee Law*, 1999, p. 251 *et seq.*

⁵⁶ UNHCR, *Procedural Standards for Refugee Standard Determination under UNHCR's Mandate*, 20 November 2003, www.unhcr.org.

⁵⁷ M. KAGAN, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, in *International Journal of Refugee Law*, 2006, pp. 23 and 27.

⁵⁸ Dutch Advisory Committee on Migration Affairs, *External Processing: conditions applying to the processing of asylum applications outside the European Union*, Advisory Report no. 32, December 2010, acvz.org, p. 49.

⁵⁹ M. KAGAN, *The Beleaguered Gatekeeper*, cit., p. 4.

⁶⁰ D. PERRIN, F. McNAMARA, *Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames*, EUI Research Report 2013/03, www.migrationpolicycentre.eu.

and Integration Fund (AMIF) running until 2020.⁶¹ In 2012, a decision to amend the ERF established the Joint EU resettlement programme, under which the Commission adopts annual common Union resettlement priorities.⁶² This has been taken over in the AMIF. Administrative cooperation is supported by the EASO, which has the competence to “coordinate exchanges of information and other actions on resettlement taken by Member States”, as well as the European Resettlement Network, an initiative co-funded by the AMIF and involving also the UNHCR and the IOM.⁶³

Resettlement initiatives by the EU, which are aimed at bringing over refugees from outside the Union, should be distinguished from pilot projects aimed at transferring recognized refugees from one Member State to another as a means of intra-EU solidarity.⁶⁴ Likewise resettlement should be distinguished from relocation, which refers to the transfer of asylum seekers from one Member States to another, together with the responsibility for their asylum claim, again as a means of intra-EU solidarity.⁶⁵

III.2. RESETTLEMENT IN THE REFUGEE CRISIS

It was the refugee crisis that prompted Member States to further increase and coordinate their resettlement efforts. Representatives of the Governments of Member States meeting within the Council on 20 July 2015 committed to resettling 20.000 people.⁶⁶ On top of this, the EU-Turkey Statement of 18 March 2016 added a commitment from the Member States to resettle another Syrian from Turkey to the Member States, for every Syrian re-admitted by Turkey from the Greek islands, within the framework of the existing com-

⁶¹ Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows; Art. 17 of Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund.

⁶² Decision 281/2012/EU of the European Parliament and of the Council of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’.

⁶³ Art. 7 of Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

⁶⁴ See for instance EU Pilot Projects on Intra-EU Relocation from Malta (EUREMA), implemented under ERF Community Actions.

⁶⁵ Relocation was decided upon by the Council during the 2015 refugee crisis as an emergency measure under Art. 78, para. 3, TFEU. Decision (EU) 2015/1523 of the Council of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Decision (EU) 2015/1601 of the Council of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁶⁶ Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection, Brussels, 22 July 2015, Council document 11130/15. See also the Commission Recommendation C(2015) 3560 final of 8 June 2015 on a European Resettlement Scheme.

mitments from 20 July 2015.⁶⁷ Any further need for resettlement would be carried out under another voluntary arrangement up to a limit of an additional 54,000 persons.⁶⁸

The fact that the pledge by the Member States to commit to the resettlement of 20,000 people was taken by the Representatives of the Member States underlines that resettlement is considered a voluntary act by the individual Member States. This seems to be confirmed by the General Court's conclusion that the EU-Turkey Statement was really an agreement between the Member States and Turkey, rather than between the EU and Turkey. However, in the period following the conclusion of the "deal", it was the Commission, in close consultation with Turkey and the Justice and Home Affairs Counsellors, that drafted Standard Operating Procedures (SOPs) for the resettlement of Syrian refugees under the EU-Turkey Statement⁶⁹, which were subsequently endorsed by the Representatives of the Governments of the Member States.⁷⁰

What is interesting about the SOPs is that they clearly set out the selection criteria for the Syrian refugees that would be eligible for resettlement, essentially replicating the UNHCR resettlement submission categories.⁷¹ In addition they provide for a number of exclusion grounds. A Member State may, for instance, refuse resettlement in order to preserve the proportion in overall numbers between the different individual submission categories. Moreover, priority is to be given to persons who have not previously entered or tried to enter the EU irregularly.⁷² The procedure relies heavily upon a pre-selection made by the UNHCR, which however does not include a RSD.⁷³ While the participating States retain the right to decide on and reject candidates in individual cases, the participating State "should reject a candidate only in case he or she does not meet the eligibility criteria".⁷⁴

On the basis of the General Court's ruling quoted above, as well as the "adoption" of the SOPs with endorsement by the Member States, rather than by Council Decision, it would be difficult to maintain that the SOPs are binding under EU law. Even under public international law, they could only be considered to constitute binding obligations if the

⁶⁷ EU-Turkey Statement (2016).

⁶⁸ *Ibid.* Any commitments undertaken under that additional framework could be offset against non-allocated places under Decision 2015/1601, i.e. the places for relocation from Italy and Greece: Decision (EU) 2016/1754 of the Council of 29 September 2016 amending Decision (EU) 2015/1601.

⁶⁹ See Presidency of the Council, Standard Operating Procedures implementing the Mechanism for Resettlement from Turkey to the EU as set out in the EU-Turkey Statement of 18 March 2016, Brussels, 5 April 2016, Council document 7462/16.

⁷⁰ Presidency of the Council, Standard Operating Procedures implementing the Mechanism for Resettlement from Turkey to the EU as set out in the EU-Turkey Statement of 18 March 2016 – Endorsement, Brussels, 27 April 2016, Council document 8366/16.

⁷¹ *Ibid.*, p. 4.

⁷² *Ibid.*

⁷³ *Ibid.*, p. 6.

⁷⁴ *Ibid.*, p. 8.

EU-Turkey Statement to which they give effect were to be considered an agreement under public international law. Nonetheless, considering Member States' support for the SOPs, they *de facto* form the regulatory framework within which resettlement under the EU-Turkey Statement will take place. From that perspective it is worrying that they provide for even fewer procedural safeguards than the UNHCR's resettlement procedure. It is clear that the SOPs are not EU law and Member States implementing these therefore escape scrutiny under the Charter. Presumably the Charter would apply to the EU institutions and agencies if they were involved in their implementation.⁷⁵ The Charter would also apply if the SOPs were included in EU legislation, such as in the Commission proposal for a regulation establishing a Union resettlement framework of June 2015.⁷⁶

III.3. PROPOSAL FOR AN EU RESETTLEMENT MECHANISM

In 2016, the Commission proposed a regulation to create "a more structured, harmonised and permanent framework for resettlement".⁷⁷ It presented its proposal as an essential part of the Common European Asylum System (CEAS).⁷⁸ The regulation would go further than any prior involvement of the EU in resettlement in so far as it not only provides for establishing priorities, but also procedures and exclusion grounds, as well as the adoption of a resettlement plan by the Council that determines the maximum numbers of people to be resettled under the proposed regulation.⁷⁹ The eligibility criteria in the Commission proposal largely overlap with the UNHCR's submission criteria.⁸⁰ Aside from the exclusion criteria that would exclude a person from refugee status in the first place (e.g. for having committed war crimes), there are other – more problematic – exceptions, such as the exclusion of anyone who has been irregularly in the territory of the Member States prior to resettlement or to whom resettlement has been refused in the preceding five years.⁸¹

⁷⁵ *Ledra Advertising* [GC], cit., para. 67.

⁷⁶ Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework, COM(2016) 468 final.

⁷⁷ *Ibid.*, p. 2.

⁷⁸ *Ibid.*, p. 3.

⁷⁹ *Ibid.*, Art. 7.

⁸⁰ *Ibid.*, Art. 5.

⁸¹ *Ibid.*, Art. 6. See also the critical opinions of the Committee of the Regions and the Economic and Social Committee in this regard: Opinion of the European Economic and Social Committee of 25-26 January 2017 on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council' (COM(2016) 468 final — 2016/0225 COD), 2017/C 125/05, point 2.5; Opinion of the European Committee of the Regions of 8-9 February 2017, Reform of the Common European Asylum System Package II and a Union Resettlement Framework, cor.europa.eu, point 27.

The proposal provides for both ordinary and expedited resettlement procedures for targeted Union resettlement schemes.⁸² Interestingly, UNHCR or the EASO, under its proposed new mandate, may refer to the Member States third country nationals that, according to their assessment, fall within the scope of the Regulation.⁸³ In addition, UNHCR may be requested to carry out a full RSD.⁸⁴ Member States are explicitly allowed to give preference on the basis of family or socio-economic ties, and can ask UNHCR to take into account such considerations.⁸⁵ The Commission's proposal states that Member States shall make the assessment of whether third country nationals are eligible for resettlement on the basis of documentary evidence, a personal interview or a combination of both.⁸⁶ There is no duty to provide reasons for negative decisions and there is no possibility to appeal negative decisions. Instead it is simply stated that in such event no resettlement will take place.⁸⁷ If the Commission proposal were to be adopted without amendments this would raise important questions in terms of judicial protection and good administration.

III.4. APPLICABILITY OF THE CHARTER OF FUNDAMENTAL RIGHTS TO EU RESETTLEMENT

The Commission's explanatory memorandum contains the by now obligatory statement that the Regulation respects fundamental rights.⁸⁸ It specifically states that it is without prejudice to the right to asylum and the prohibition of *refoulement*. At the same time recital 19 of the proposal makes it clear that there would be no subjective right to resettlement. The explanatory memorandum furthermore stresses that the proposal does not create any right to be admitted to the territory of the Member States for the purpose of being granted international protection.⁸⁹ The reference to the right to asylum and the prohibition of *refoulement* should therefore be understood as an affirmation of those rights solely within EU territory.

It could be argued that, following the Court's reasoning in the *X and X* case, an individual who does not fall within the eligibility criteria would not be within the scope of the regulation and therefore also outside the scope of the protection of the Charter. However, any resettlement taking place under the Union framework would have to be

⁸² Arts 8, 10 and 11 of the Proposal for a Regulation COM(2016) 468.

⁸³ *Ibid.*, Art. 10, para. 8; Commission Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final.

⁸⁴ Art. 10, para. 8, of the Proposal for a Regulation COM(2016) 468.

⁸⁵ *Ibid.*, Art. 10, para. 8.

⁸⁶ *Ibid.*, Art. 10, para. 3.

⁸⁷ *Ibid.*, Art. 10, para. 6.

⁸⁸ *Ibid.*, pp. 8-9.

⁸⁹ *Ibid.*, p. 10.

considered to fall within the scope of EU law, in any case after preselection. Although there is no right to resettlement, the appropriate comparison would once more be with an applicant for asylum, who during her application is protected by the Charter, irrespective of whether her claim is ultimately accepted.

The argument could even be made that the Charter should apply if preselection were to be done by EASO. Agencies' expert opinions must be considered preparatory acts and can therefore not be challenged.⁹⁰ However, the refusal to preselect a candidate for resettlement by EASO would effectively close the way to resettlement resulting in a *de facto* final decision. Substantively the same would be true where preselection is carried out by the UNHCR, although an UN Agency is of course not bound by the Charter. Whilst this would not in theory exclude the possibility of triggering the international responsibility of the UNHCR, neither the Member States nor the EU could be held responsible for the UN Agency's actions, as they lack effective control.⁹¹

Assuming that the Charter and general principles of EU law apply in full to the EU's institutions and agencies, as well as the Member States when acting under the Union framework, the current proposal must be considered to provide insufficient procedural safeguards. The EU framework would even set standards below those of the UNHCR.

The right to be heard, as part of the general principle of good administration, would require that a person considered for resettlement be allowed to make her views known.⁹² That right applies also where the legislation in question does not expressly provide for such a procedural requirement, although it does not necessarily require an interview.⁹³ Still, the way in which the proposal prescribes that Member States should reach a decision on resettlement – on the basis of documentary evidence and/or an interview – would allow a Member State to reach a decision on resettlement without hearing the person concerned. Likewise, the absence of a duty to state reasons must be considered contrary to the principle of good administration. This duty is moreover closely related to the right to an effective remedy laid down in Art. 47 of the Charter which, given the absence of the possibility to appeal a negative decision, must be considered infringed as well.⁹⁴

⁹⁰ Consistent case law of the Court of Justice holds that recourse can only be had against the decision terminating the procedure: Court of Justice: judgment of 11 November 1981, case 60/81, *IBM*, para. 12; judgment of 13 October 2011, joined cases C-463/10 P and C-475/10 P, *Deutsche Post*, para. 53.

⁹¹ International Law Commission, Draft Articles on the Responsibility of International Organizations, in *Report of the International Law Commission*, sixty-third session, 2011, UN Doc. A/66/10 (DARIO), p. 54 *et seq.*

⁹² *M.*, cit., para. 87 and Court of Justice, judgment of 5 November 2014, case C-166/13, *Mukarubega*, para. 46.

⁹³ Court of Justice, judgment of 18 December 2008, *Sopropé*, case C-349/07, para. 38; *M.*, cit., para. 86; judgment of 10 September 2013, *G. and R.*, case C-383/13 PPU, para. 32.

⁹⁴ M. RENEMAN, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford: Hart Publishing, 2014, p. 106.

Even if the argument that the Charter applies in full to resettlement activity under the Union framework is accepted, it would be very difficult for an individual to challenge a negative decision on resettlement, be it on procedural or substantive grounds. In the absence of a right to resettlement and in view of the practical predicament in which candidates for resettlement will find themselves, access to a judge may be illusory.

IV. FRONTEX COORDINATED JOINT OPERATIONS IN THIRD COUNTRY TERRITORY

In the above examples one of the key questions is whether the Member States are acting within the scope of EU law. The final example will look at joint operational activity for the management of the EU's external borders, taking place however within, and with the cooperation of, third countries. In that situation it is not the scope of EU law but rather the multiplicity of actors that makes it difficult to hold executive authority to account. The involvement of third country authorities adds a layer of complexity to the already unclear division of responsibility between EU and Member States' border guard authorities during joint operations. A similar difficulty was touched upon in the preceding section when it was pointed out that it would be impossible to hold the UNHCR, as an intergovernmental organisation, to account under the Charter despite the close connection between its referrals and Member State decisions.

IV.1. FRONTEX AS AN EXECUTIVE ACTOR

The European Border and Coast Guard Agency, known by the French acronym of its original name (Frontex), was initially set up in 2004 with the aim of supporting Member States' joint operational cooperation for the management of the external borders.⁹⁵ Ever since its establishment its tasks and powers as well as its financial resources have been steadily growing, most importantly with the adoption of its current legal basis in 2016.⁹⁶ It is an independent agency which currently has three roles: 1) a regulatory role, providing the Commission, Council and Member States with technical and situational information related to the management of the external borders; 2) a supervisory role, assessing the vulnerability of Member States border management systems on a rolling basis and participating in the Schengen Evaluation System; and 3) an operational role.⁹⁷ In its operational

⁹⁵ Regulation (EC) 2007/2004 of the Council 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 (Frontex Regulation). Its current legal basis is Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (EBCG Regulation).

⁹⁶ J.J. RIJPMAN, *Frontex and the European system of border guards: the future of border European border management*, in M. FLETCHER, E. HERLIN-KARNELL, C. MATERA (eds), *The European Union as an Area of Freedom, Security and Justice*, London: Routledge, 2016, p. 217 *et seq.*

⁹⁷ J.J. RIJPMAN, *The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?*, Study for the LIBE Committee of the European Parliament, 2016, www.europarl.europa.eu.

role, the Agency can initiate, finance and support joint operational border activity as well as joint return operations of the Member States' border guard authorities.⁹⁸ Despite the fact that successive amendments to its founding regulation have given the Agency an increasingly important influence over Member States' conduct during these operations, it does not itself utilise any autonomous law enforcement powers. Instead, national border guards from a Member State may exercise a range of law enforcement powers under the law of the host Member State in the context of joint operations.⁹⁹

IV.2. RESPONSIBILITY FOR FUNDAMENTAL RIGHTS VIOLATIONS

Frontex has from the outset been subject to criticism for failing to ensure compliance with fundamental rights during joint operational activity.¹⁰⁰ Part of the difficulty here lies with the unclear division of responsibilities, resulting in the EU's official stance that since the Agency does not dispose of executive powers and only coordinates Member States' activities, it cannot be held responsible for any possible violation of fundamental rights.¹⁰¹ Indeed, responsibility for any such violations would primarily lie with the Member State hosting an operation, as this is the Member State that exercises command and control.¹⁰² This would be the general finding both under public international law, as well as ECHR and EU law. Moreover, Fink has argued that in addition to the host Member State participating Member States, as well as Frontex itself, may also incur liability. This liability is based on the doctrine of positive obligations and incurred for what she calls associated conduct, i.e. behaviour that facilitates or fails to prevent foreseeable breaches of fundamental rights.¹⁰³ With respect to the Agency, this argument is supported by the range of obligations that have been imposed upon Frontex to respect and guarantee compliance with fundamental rights during joint operations, as well as

⁹⁸ Arts 15 and 28 of the EBCG Regulation.

⁹⁹ *Ibid.*, Art. 40.

¹⁰⁰ See for instance Human Rights Watch, Report of 21 September 2011, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, but also the Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013.

¹⁰¹ See for instance: Frontex, Opinion from Frontex on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, p. 2.

¹⁰² M. FINK, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (PhD dissertation, Leiden University, forthcoming 2018).

¹⁰³ M. FINK, *Frontex and Human Rights*, cit., *passim*; R. MUNGIANU, *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge: Cambridge University Press, 2016, p. 226, argues that under public international law, both Frontex and the participating Member States could incur derivative responsibility for providing aid and assistance (Art. 14 DARIO and Art. 16 of the Draft Articles on State Responsibility for Internationally Wrongful Acts – i.e. International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts of 3 August 2001, UN Doc. A/56/10).

the duty imposed on its Executive Director to withdraw financial support, suspend or terminate a joint operation in case of serious and persistent human rights violations.¹⁰⁴

IV.3. FUNDAMENTAL RIGHTS ACCOUNTABILITY MECHANISMS

The mainstreaming of fundamental rights in the Agency's activities initially developed in practice and was later codified and reinforced by legislative amendments.¹⁰⁵ Frontex is now equipped with a Fundamental Rights Officer (FRO) and a Consultative Forum, both of which contribute to fundamental rights monitoring. Additionally, Frontex has drawn up a Fundamental Rights Strategy, adopted a Code of Conduct which sets out behavioural standards for all persons participating in Frontex activities, and has included fundamental rights training in the common core curricula for border guards.¹⁰⁶

Upon the recommendation of the European Ombudsman, the 2016 Regulation introduced an individual complaints mechanism.¹⁰⁷ This is an important step forward, even if its effectiveness will need to be proven in practice. A standardised complaint form has been made available on the Frontex website in six different languages, out of which four are non-EU languages (Arabic, Urdu, Pashtu and Tigrinya). Any person who considers that the action of staff (be they Frontex or national) has resulted in a breach of their fundamental rights may submit a written complaint the Agency. The FRO is responsible for handling these complaints, including determining their admissibility and forwarding them to the Agency and/or Member States and ensuring appropriate follow-up. Yet, despite the increased attention paid to fundamental rights, and the introduction of the individual complaints procedure, the continuing disagreement over the respective responsibilities of participating Member States and the Agency means that judicial review, and by extension respect for Art. 47 of the Charter, will not always be guaranteed. Not only will there be practical impediments to access to justice, it will also be next to impossible for an individual to establish precisely which actor contributed to what extent to the violation of her fundamental rights.

Accountability of the Agency should also not be confused with the civil or criminal liability of individual Frontex staff or visiting border guards. In this regard, the 2004 Regulation merely stated that visiting border guards and agency staff working in another Member State than their own would be subject to the national law of that Member State.¹⁰⁸ In addition, it provided that the Protocol on the privileges and immunities of the European Communities would apply to the Agency, meaning that its staff would be

¹⁰⁴ Arts 25, 26 and 28, para. 6, of the EBCG Regulation.

¹⁰⁵ P. SLOMINSKI, *The Power of Legal Norms in the EU's External Border Control*, in *International Migration*, 2013, p. 41 *et seq.*

¹⁰⁶ Arts 34-36, 70 and 71 of the EBCG Regulation.

¹⁰⁷ *Ibid.*, Art. 72.

¹⁰⁸ Art. 10 of the Frontex Regulation.

immune from legal proceedings in respect of acts performed by them in their official capacity.¹⁰⁹ In 2007, the first amendment to the Frontex Regulation made it clear that the civil and criminal liability of the visiting border guards would be governed by the law of the host Member States.¹¹⁰ The reference to the criminal and civil liability of Agency staff was deleted at that time, whereas the Protocol continued to apply.¹¹¹ In 2011, another amendment to the Frontex Regulation introduced the provision that visiting border guards would remain subject to “appropriate disciplinary or other measures in accordance with its national law” for breaches of fundamental rights.¹¹²

IV.4. FRONTEX AS AN EXTERNAL EXECUTIVE ACTOR

From the outset, Frontex tasks have included the facilitation of operational cooperation between Member States and third countries. For that purpose it concludes working arrangements on the management of operational cooperation with the authorities of third countries, generally the authorities responsible for border management in those countries.¹¹³ The 2011 amendment to the Frontex Regulation introduced the possibility for the Agency to send liaison officers to third countries and to launch and finance technical assistance projects in third countries independently.¹¹⁴ In bilateral agreements with third countries, Member States may include provisions on the role of the Agency and the powers of guest officers in the context of joint operations.¹¹⁵ Although Frontex has not made much use of these provisions so far, the 2015 refugee crisis and the EU’s focus on cooperation with third countries in response, is likely to change that. The Agency appointed a liaison officer in Turkey in April 2016 and will shortly designate a liaison officer for the Western Balkans.

Frontex is generally not considered to have international legal personality. Commentators seem to agree that working arrangements are to be considered non-binding under public international law.¹¹⁶ In fact, without exception the arrangements contain a provision to this effect, confirming the absence of any intention to be legally binding. Where the previous version of the Frontex Regulation rather enigmatically stipulated that these working arrangement were “to be concluded in accordance with the relevant

¹⁰⁹ *Ibid.*, Art. 18.

¹¹⁰ Current Arts 42 and 43 of the EBCG Regulation.

¹¹¹ *Ibid.*, Art. 59.

¹¹² *Ibid.*, Art. 21, para. 5.

¹¹³ *Ibid.*, Art. 54, para. 2.

¹¹⁴ *Ibid.*, Arts 54, para. 9, and 55.

¹¹⁵ *Ibid.*, Art. 54, para. 10.

¹¹⁶ A. OTT, E. VOS, F. COMAN-KUND, *EU Agencies and their International Mandate: A New Category of Global Actors*, CLEER Working Paper 2013/7, p. 32.

provisions of the TFEU”, the current Regulation prescribes that they shall receive the Commission's prior approval and that the European Parliament must be informed.¹¹⁷

The most important innovation that was brought about by the 2016 change of Frontex's legal basis, is the possibility for the Agency to coordinate operational cooperation between Member States and third countries. It may carry out actions at the external borders involving one or more Member States and a third country neighbouring at least one of those Member States, *including on the territory of that third country*.¹¹⁸ This naturally further complicates the already complex picture of responsibility during Frontex coordinated joint operations.

In situations where a joint operation includes the exercise of executive powers by border guards from the Member States on third country territory, a status agreement must be concluded by the Union with the country concerned under Art. 218 TEU.¹¹⁹ The status agreement shall cover all aspects that are necessary for carrying out the actions. It must be based on a model status agreement, which was published by the Commission on 22 November 2016.¹²⁰ The Commission is currently negotiating with Serbia, has received a mandate from the Council to start negotiations with FYR of Macedonia and intends to present a proposal for negotiating mandates for status agreements with Albania, Bosnia and Herzegovina, and Montenegro.¹²¹

The Model Status Agreement confirms that joint operations in third countries may only serve to control those stretches of a third country's border that are also part of the EU's external border (e.g. the Serbian-Hungarian border) and therefore not those parts of the third country's external border with other third countries (e.g. Serbian-Montenegrin border).¹²² This seems in line with the Agency's mandate, which is limited to the management of operational cooperation at the external borders of the EU and not the control of irregular migration more generally. It does not, however, exclude cooperation in other areas of border management covered by the Frontex Regulation. It also leaves open the question of whether cooperation with countries on the other side of the Mediterranean in the context of sea borders operations would be permissible.¹²³

¹¹⁷ Art. 54, para. 2, of the EBCG Regulation.

¹¹⁸ *Ibid.*, Art. 54, para. 3.

¹¹⁹ *Ibid.*, Art. 54, para. 4.

¹²⁰ See Communication COM/2016/0747 final of 14 September 2016 from the Commission to the European Parliament and the Council, Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (Model Status Agreement).

¹²¹ Fourth Report COM(2017) 325 final of 13 June 2017 from the Commission to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard, p. 12.

¹²² Art. 2, para. 2, of the Model Status Agreement.

¹²³ In the judgment of 5 September 2012, case C-355/10, *Parliament v. Council* [GC], the Court of Justice left the question as to the geographical scope of the Schengen Borders Code in the context of Fron-

Like any joint operation, joint operational activity with third countries is based on an operational plan.¹²⁴ Operational plans, detailing the *modus operandi* of a joint operation, have been used from the very start of Frontex operations. A first explicit reference to the Operational Plan was introduced only by the 2011 amendment of the Frontex Regulation. The plan is agreed between the executive director and the host Member State, in consultation with the participating Member States. Not until the adoption of the 2016 Regulation was the binding nature of the plan made explicit in the Regulation.¹²⁵ In the external sphere, however, the question of the binding nature of the plan arises again, as the Model Status Agreement is silent as to who concludes the operational plan and what its legal status is.¹²⁶

Unlike the Working Arrangement and the Operational Plan, a Status Agreement would need to qualify as an agreement under public international law for which the Commission's Model Status Agreement forms a blueprint. When looking at the content of the Model Status Agreement it replicates on the one hand the most important provisions of the Frontex Regulation, most importantly giving visiting border guards the authority to exercise those powers that are required for border control, under rules and regulations of the third country and under the instructions of the third country's border authorities.¹²⁷ On the other hand, in stipulating the privileges and immunities of the visiting border guards, it replicates the provisions of the EU Status of Forces/Mission Agreements of European Security and Defence Policy (ESDP) missions.¹²⁸ It essentially provides visiting EU border guards with immunity from the criminal, civil and administrative jurisdiction of the third country in respect of acts carried out in an official capacity.¹²⁹

tex-coordinated joint operations at sea unanswered. It did however seem to imply that rules on interception, disembarkation and search and rescue fall within the concept of surveillance.

¹²⁴ Art. 16 of the EBCG Regulation.

¹²⁵ It does however remain unclear how the operational plan should be qualified under EU law. It is not an implementing measure under Art. 290 TFEU, considering that it requires the approval of both the Executive Director, representing the Agency and participating Member States. It could therefore more readily be compared as a cross-over between an interinstitutional agreement and an agreement between Member States. Thanks to Melanie Fink for pointing out this analogy.

¹²⁶ Art. 3 of the Model Status Agreement.

¹²⁷ *Ibid.*, Art. 4.

¹²⁸ Council, Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State, 8720/05 Limite, 18 May 2005; Council, Draft Model Agreement on the status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), 10564/05 Limite, 27 June 2005.

¹²⁹ Art. 6 of the Model Status Agreement.

IV.5. ACCOUNTABILITY FOR FUNDAMENTAL RIGHTS VIOLATIONS ON THIRD COUNTRY TERRITORY

The EBCG Regulation states that Frontex and the Member States must comply with EU law, also when cooperation with third countries takes place on the territory of those countries.¹³⁰ It specifically stipulates that the status agreement shall ensure the full respect of fundamental rights during these operations.¹³¹ How does it aim to do so?

The Model Status Agreement provides that the Executive Director may suspend an action in cases of breach of fundamental rights.¹³² On the one hand the threshold for doing so is lower than under the Frontex Regulation, which requires the violations to be serious or persistent. On the other hand, it is not an obligation (shall), but a possibility (may). The Model Status Agreement further states that each party shall have a complaint mechanism in place.¹³³ Although there is no reference to an individual complaints mechanism, it seems that the purpose of this provision is to have a similar mechanism as that of the Agency available also in the third country.

The Model Status Agreement imposes a general duty on all participating border guards to fully respect fundamental rights in the exercise of their tasks.¹³⁴ Participating border guards, whilst enjoying immunity from jurisdiction of the third country, are not exempt from the jurisdiction of their respective home Member State.¹³⁵

All neighbouring countries of the EU, with the exception of Belarus, are members of the Council of Europe. They are also all parties to the 1951 Refugee Convention, although Turkey retains a geographic limitation to its ratification limiting refugee status to European refugees. Northern African countries are, for obvious reasons, not party to the ECHR. With the exception of Libya, they are signatories of the 1951 Refugee Convention. There is a strong argument to be made for limiting joint operational activity on the territory of non-EU countries to members of the Council of Europe. Since the prime responsibility for breaches of fundamental rights in the context of such operations lies with the host State, i.e. the third country, this would at least guarantee the possibility for individuals to bring a complaint before the European Court of Human Rights, since the Charter and general principles of EU law cannot apply to third countries.

It would be more difficult to establish the responsibility of participating Member States under the ECHR, as this would require that the visiting border guards exercise effective jurisdiction in line with the case law of the European Court of Human Rights on

¹³⁰ Art. 54, para. 1, of the EBCG Regulation.

¹³¹ *Ibid.*, Art. 54, para. 4.

¹³² Art. 5 of the Model Status Agreement.

¹³³ *Ibid.*, Art. 8, para. 2.

¹³⁴ *Ibid.*, Art. 8, para. 1.

¹³⁵ *Ibid.*, Art. 6, para. 7.

extra-territorial application of the Convention.¹³⁶ Until the EU accedes to the ECHR, there is also no possibility to challenge Frontex's actions under the ECHR.

The Charter would of course apply in full to Frontex as well as the participating Member States as there can be no doubt that they act within the scope of EU law. Unlike CFSP missions, which are excluded from judicial review on the basis of Art. 24, para. 1, TEU, joint operational activity in the field of border management is fully within the jurisdiction of the CJEU.¹³⁷ However, the difficulty would be to establish a sufficiently serious breach that is required under EU liability law, as neither Frontex nor the participating Member States can be considered to have legal decision-making powers over operations on third country territory.¹³⁸ This would not however exclude the liability of Frontex for associated conduct, were it to disregard the options it has to withdraw from the operation in case of fundamental rights violations.

Despite the attention that is paid to the need to respect fundamental rights during joint operations in third country territory and the establishment of accountability mechanisms, such as the complaints procedure, in practice it may prove difficult to hold all actors involved responsible. In both practical and legal terms, the EU and ECHR liability regimes do not sufficiently reflect the multi-actor reality in EU external administrative action. Moreover, notwithstanding the conclusion of a Status Agreement, Member States' border guards *de facto* fall under the control and command of a third country that is not bound by the EU administrative and fundamental rights safeguards that would apply were a joint operation to take place on EU territory.

V. CONCLUSION

The three examples that have been discussed in this *Article* serve to show that EU external administrative action takes place in a complex reality that involves Member States' authorities, the EU institutions and agencies, as well as third country authorities and IGOs, such as UNHCR. Despite a continuing trend to externalise migration and asylum policies, it has become harder for Member States to escape fundamental rights constraints by "moving out", to the extent that they themselves or EU institutions or agencies continue to play an active role in the implementation of these policies.

¹³⁶ *Issa et al. v. Turkey*, cit., para. 71.

¹³⁷ Art. 24, para. 1, TEU. See also *Ledra Advertising* [GC], cit., para. 67. The limitation of the Court's jurisdiction in Art. 276 TFEU as regards the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State is limited to judicial cooperation in criminal matters and police cooperation. On the exclusion of judicial review of CFSP missions see M. CREMONA, "Effective Judicial Review is of the Essence of the Rule of Law": Challenging Common Foreign and Security Policy Measures Before the Court of Justice, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 671 *et seq.*

¹³⁸ See M. FINK, *Frontex and Human Rights*, cit.

First of all, the integration of the Schengen *acquis* in the EU legal order, the full jurisdiction of the CJEU and the recast of Schengen rules as EU instruments, have meant that the EU system of judicial protection applies in full. Second, the EU legislator has improved the position of third country nationals, either by prescribing the possibility of judicial review or by inserting accountability mechanisms that provide for some form of redress in case of a violation of fundamental rights. Third, the Charter applies to the EU institutions and agencies in whatever capacity or legal framework they operate, and to the Member States whenever they act within the scope of EU law, which means that EU administrative action continues to be bound by the Charter also outside the EU's geographical borders. Importantly, the Charter not only protects classic fundamental rights, but also a range of administrative rights, in particular the right to good administration. As this *Article* has shown, these administrative rights may take on a special relevance in the context of migration and asylum in which procedural safeguards are key to arriving at carefully considered decisions.

There are however difficulties that remain. The first is inherent in the nature of external action and the category of people most likely to be affected: third country nationals such as refugees, who are often in a vulnerable position and not able effectively to make use of the accountability mechanisms that have been established – without legal aid and practical assistance for instance with internet access, translation and even literacy. Second, non-judicial accountability mechanisms, as we have seen in the example of Frontex coordinated border management operations, are a response to the unclear division of responsibilities between different actors. They should however not be allowed to become a substitute for a system of judicial responsibility that does justice to the multi-actor nature of EU external administrative action. In particular when cooperating with non-EU actors, the EU should insist on full respect for fundamental rights also by its partners.

Third is the notorious difficulty in defining when Member States act within the scope of EU law, as illustrated by the *X and X* case. The question of scope becomes ever more important as Member States increasingly resort to coordinated bilateral or multilateral cooperation with third countries, outside the framework of EU law. The EU-Turkey Statement forms a case in point. Even if the Court were to uphold the General Court's decision that this "deal" is not a measure concluded by the European Council, nor an international agreement, in its implementation the Member States must still be considered as acting within the scope of EU law when declaring an asylum request inadmissible or issuing a return decision. The question of scope is also relevant where the EU decides to formalise initiatives such as resettlement, which were previously in the hands of the Member States alone, thus potentially bringing them within the scope of EU law.

Although increased scrutiny of EU external administrative action must at face value be considered a positive development, it may also pose some problems. If the applicability of the Charter becomes a side-effect of the EU becoming more closely involved in areas previously left to the Member States, it may instill in Member States a suspicion

against EU action, hampering initiatives that in themselves are much needed, such as the EU Framework for Resettlement. If the full application of the Charter, such as was feared in the *X and X* case, would have disruptive effects on the EU's visa regime, but also put into question the foundations of the global refugee system, unchecked application of the Charter would ultimately defeat its purpose.