Delmi

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Anti-smuggling and Anti-trafficking Measures

Are they compatible with the EU Charter of Fundamental Rights?

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Vladislava Stoyanova

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Preface

It is well known that human smuggling and human trafficking are serious threats to human security. At the European Union (EU) level, the struggle against these activities has generated a number of measures that are regularly incorporated within the broader framework of migration control. In such a context, anti-smuggling and anti-trafficking measures may have important consequences for the fundamental rights enjoyed by the very same people that are to be protected. This is because many of these anti-smuggling and anti-trafficking measures aim to contain people in third countries. As a consequence, the human right to leave your country and the right to asylum could be infringed upon by such measures.

This calls for an in-depth analysis of their compatibility with EU fundamental rights. The intricate relationship between migration control and human rights is being studied by researchers who typically consider the risks and consequences of anti-smuggling and anti-trafficking measures from a legal perspective. How can we avoid people being trafficked without affecting the right to leave? Could the fight against smuggling affect the right to asylum of those who cannot reach safe shores through legal pathways?

This Delmi report examines the question of whether the EU and its Member States are in fact violating different aspects of the human rights law with the anti-smuggling and anti-trafficking measures adopted in the past years. The EU's outsourcing of migration control to third countries makes the picture even more complex. The offshoring of border control brings across the perception that Member States have limited resources to safeguard the rights of people in third countries, who are susceptible to be trafficked, or who wish to pay for the services of smugglers. The study looks for an answer to the question of how we in the future can avoid creating these tensions between human right and the fight against smuggling and trafficking.

The report is written by Vladislava Stoyanova, Associate Professor at the Department of Law, Lund University. Stoyanova has published extensively in the field of human trafficking and slavery as well as on positive obligations under the European Convention of Human Rights.

External reviewers of the report have been Jens Vedstedt-Hansen, Professor at the Law Department, Aarhus University and Rebecca Stern, Senior Lecturer at the Department of Law, Uppsala University. The work on this report has been followed by Åsa Carlander-Hemingway, Chief of Unit at the Swedish Migration Agency and member of Delmi's Board of Directors. At Delmi, the Delegation Secretaries Constanza Vera-Larrucea, André Asplund and Daniel Silberstein have contributed to the review. Results and conclusions from this study were previously discussed at a seminar in Stockholm. As usual in the Delmi context, the author is however responsible for the content, results and policy recommendations in the report.

Stockholm, March 2020

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Summary

Combatting human smuggling and human trafficking has been one of the priority objectives of the EU and its Member States in their efforts to decrease the number of migrants arriving in EU territory. The development of strong cooperation with third-countries has been considered indispensable to the effectiveness of what is often described in EU documents as the 'fight' against human trafficking and smuggling. As part of this cooperation, third countries control movement, contain people and prevent their departures. These measures are undertaken with the expressed objectives of preventing migrants from losing their lives and becoming victims of human traffickers or of unscrupulous smugglers.

This Delmi report examines the compatibility of the EU measures against human smuggling and human trafficking with the EU Charter of Fundamental Rights. The measures that are part of the EU's externalisation and outsourcing of migration control to third countries are not new. However, since 2016 the EU has been prioritising these forms of controls by providing incentives for third countries to restrict the movement of migrants. While it cannot be denied that human smuggling and human trafficking can indeed lead to serious human suffering and even death, could it be that the EU and its Member States are actually violating human rights law with these anti-smuggling and anti-trafficking measures?

In its attempts to answer this question, the study provides a novel and distinctive addition to the research in this field. No previous study has specifically examined the question of whether the measures aimed at preventing human smuggling and human trafficking constitute human rights law violations. The study focuses on two rights from the EU Charter of Fundamental Rights: the right to life and the right to seek asylum. It concludes that the EU and its Member States might have failed to fulfil their positive obligations to ensure the right to life. It also concludes that the EU and its Member States might be in violation of the right to leave to seek asylum.

To reach these conclusions, the study examines the legal challenges related to the applicability of the EU Charter of Fundamental Rights to the anti-smuggling and anti-trafficking measures undertaken by the EU and its Member States. These challenges include the following factors. First, the individuals affected by the measures

are located in third countries. Second, the measures are undertaken by various actors, including countries of origin and transit, and it might be difficult to distinguish the role of each of these. Third, the measures are based on informal agreements with third countries.

The study argues that the EU Charter of Fundamental Rights applies to individuals located beyond the borders of the EU. The EU Charter applies to EU institutions and bodies even when they act outside the EU legal framework. This means that any informal agreements with third countries can be scrutinised against the standards of the EU Charter. Whether or not the Charter applies to EU Member States in this context is, however, much more questionable.

The EU and the EU Member States have positive obligations to ensure the right to life in the context of the anti-smuggling and anti-trafficking measures. Given the empirical doubts as to whether the current measures achieve this objective, alternative measures need to be considered. These alternatives, while ensuring the right to life, will have to also accommodate States' migration control interests. In light of these requirements, a possible alternative is offering safe routes to individuals in need of international protection. In addition, for the EU and its Member States to comply with their positive obligation to ensure the right to life, they need to initiate studies to assess the effectiveness of the current anti-smuggling and anti-trafficking measures. That is, to what extent the measures effectively ensure the right to life and to what extent any alternative measures (e.g. legal routes to entry) might be too burdensome or unreasonable.

Since the effects of the anti-smuggling and anti-trafficking measures are containment of people in third countries and preventing people from leaving, these measures interfere with the right to asylum. An integral element of this right is the right to leave in order to seek asylum. To be permissible, the measures that interfere with the right have to be 'provided by law'. Considering the informal nature of the arrangements that form the basis for the measures, this requirement does not seem to have been met. The measures could thus be declared contrary to human rights law, based solely on the failure to meet the 'provided by law' requirement.

The measures that interfere with this right have to pursue legitimate objectives in order to be permissible. It can be accepted that preserving the integrity of EU Member State borders by preventing arrivals is a legitimate objective. The objective of saving lives can also be accepted as legitimate.

It can, however, be questioned whether the chosen measures for achieving these objectives are necessary. There seem to be alternative measures that, in practice, might lead to the same number of people entering the EU yet at the same time better guarantee the right to leave to seek asylum. An example of such an alternative is offering legal and safe channels for exiting countries of origin and transit so that individuals can apply for asylum in EU Member States.

Sammanfattning

Att bekämpa människosmuggling och människohandel har varit ett av de främsta målen för EU och dess medlemsstater i deras ansträngningar att minska antalet migranter som når EU:s territorium. Utvecklingen av ett starkt samarbete med tredjeländer har visat sig vara nödvändig för effektiviteten i vad som i EU-dokument beskrivs som kampen mot människohandel och människosmuggling. Detta samarbete innebär att tredjeländer kontrollerar förflyttningar, håller kvar människor och förhindrar att dessa lämnar landet, detta i syfte att undvika att migranter faller offer för människohandel och skrupelfria smugglare.

Denna Delmi-rapport undersöker hur EU:s insatser mot handel och smuggling av människor är förenliga med EU:s stadgar om grundläggande rättigheter. Dessa insatser är en del av EU:s utlokalisering av ansvar för kontroll av migranter som sedan 2016 har prioriterats med utgångspunkten att skapa incitament för tredje länder att begränsa migration. Medan det inte kan förnekas att människosmuggling och människohandel kan leda till stort mänskligt lidande, eller till och med dödlig utgång, kan det finnas en risk att EU och dess medlemsstater begår brott mot mänskliga rättigheter via sina insatser mot människosmuggling och människohandel?

I sin målsättning att besvara denna fråga erbjuder studien ett nytt och distinkt bidrag till forskningsfältet. Inga tidigare studier har specifikt undersökt frågan om huruvida insatser mot människosmuggling och människohandel kan bryta mot mänskliga rättigheter. Denna studie fokuserar på två rättigheter från Europeiska unionens stadga om de grundläggande rättigheterna: rätten till liv och rättigheten att söka asyl. Studien slår fast att EU och dess medlemsstater kan ha misslyckats med att uppfylla sina positiva förpliktelser att säkerställa rätten till liv. Vidare dras slutsatsen att EU och dess medlemsstater kan verka i strid med rättigheten att lämna sitt ursprungsland för att söka asyl.

För att nå dessa slutsatser studeras de rättsliga utmaningarna förknippade med att tillämpa EU:s stadga om de grundläggande rättigheterna i relation till de åtgärder som EU och dess medlemsstater vidtagit mot människosmuggling och människohandel. Dessa utmaningar berör bland annat följande faktorer: För det första, befinner sig de personer som berörs av åtgärderna i tredjeländer. För det andra utförs

dessa åtgärder av ett flertal olika aktörer, inklusive sådana i ursprungs- och transitländer, och det kan därför vara komplicerat att särskilja aktörernas olika roller. För det tredje vilar åtgärderna på en grund av informella överenskommelser med tredje länder.

Studien hävdar att EU:s stadga om de grundläggande rättigheterna även gäller individer utanför EU:s gränser. Vidare gäller EU:s stadgar för institutioner och organ inom EU även då dessa verkar utanför EU:s rättsliga ramverk, vilket betyder att informella överenskommelser med tredjeländer kan komma att granskas i förhållande till EU:s stadgar. Det är dock betydligt mer tveksamt om EU:s stadgar gäller för enskilda EU-medlemsstater i detta sammanhang.

EU och dess medlemsstater har positiva förpliktelser att säkerställa rätten till liv i et sammanhang där insatser mot människosmuggling och människohandel genomförs. Den empiriska granskningen ger upphov till frågetecken om befintliga åtgärder är i linje med denna förpliktelse, varför alternativa insatser behöver övervägas. Dessa alternativ behöver också inrymma olika staters behov av kontroll över migrationen, men samtidigt säkerställa rätten till liv.

I ljuset av dessa krav är ett möjligt alternativ att erbjuda säkra vägar till personer som är i behov av internationellt skydd. För att EU och dess medlemsstater ska kunna agera, enligt deras positiva förpliktelser att säkerställa rätten till liv, behövs dessutom studier initieras för att kunna bedöma i vilken utsträckning nuvarande åtgärder mot människohandel och människosmuggling verkligen säkerställer rätten till liv, och huruvida alternativa åtgärder (t.ex. lagliga vägar) är för krävande eller orimliga.

Eftersom effekten av åtgärder mot smuggling och människohandel resulterar i tillbakahållande av människor och förhindrande av dem att lämna ursprungs- eller transitlandet kan dessa åtgärder stå i vägen för rätten att söka asyl. Som en del i denna rätt inkluderas rätten att lämna landet för att söka asyl.

För att vara tillåten behöver insatser som begränsar möjligheten att söka asyl vara fastställd i lag. Med tanke på de informella överenskommelser som skapat basen för insatserna verkar inte detta krav uppfyllas. Från det följer att insatserna kan ses stå i motsats till människorättslagstiftning enkom från oförmågan att möta kravet om ’fastställd i lag’. Enbart genom att inte uppfylla kravet om ’fastställd i lag’ kan de insatser som görs därför anses stå i motsats till de mänskliga rättigheterna.

De insatser som potentiellt inskränker rättigheterna att söka asyl och att lämna för att söka asyl behöver även ha legitima skäl att genomföras. Att förhindra flödet av migranter i syfte att behålla medlemsstaternas gränsintegritet, kan ses som ett legitimt skäl. Att rädda liv kan även vara ett legitimt skäl för att genomföra insatser.

Det kan dock ifrågasättas om de befintliga åtgärderna för att uppnå dessa mål är nödvändiga. Det tycks finnas alternativa åtgärder som i praktiken kan leda till samma antal människor som tar sig in i EU men samtidigt och på ett bättre sätt, säkerställer människors rätt att lämna sitt land för att söka asyl. Ett exempel på sådana alternativa insatser skulle kunna vara att erbjuda lagliga och säkra tillvägagångssätt för redan existerande ursprungs- och transitländer. Detta så att enskilda individer kan ansöka om visum i EU:s medlemsländer.

Glossary

Applicant for international protection

EU law defines this term as 'a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'.

Carrier sanctions

Penalties imposed on transport operators (e.g. airlines) for transporting individuals to a country where they are not entitled to enter under the applicable national legislation due to, for example, not having valid passports or valid visas.

Externalisation of border controls

Taking measures that affect individuals who are far away from the EU Member States' territory and borders for the purpose of preventing their arrivals.

Jurisdiction in human rights law

An initial threshold that determines whether the European Convention on Human Rights is applicable and can be invoked by individuals against a particular State. This is expressed in Article 1 of the Convention: '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms' enshrined in the Convention. It is presumed that a State has jurisdiction over its territory and all individuals therein can invoke the Convention against this specific State. Individuals located beyond the State's territory need to demonstrate a jurisdictional link with this particular State in order to invoke the Convention against it.

Human smuggling

Facilitation of illegal entry.

Human trafficking

Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, defines human trafficking as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'. The consent of a victim of trafficking in persons to the intended exploitation is irrelevant where any of these means have been used.

International protection

EU law defines this term as refugee status and subsidiary protection. However, in this study it is used in a broader sense to also reflect other protection grounds that might be invoked under human rights law or national legislation.

Non-refoulement

Prohibition to return beneficiaries of international protection (e.g. refugees) to a place where they are at risk of persecution or other forms of ill-treatment. This prohibition also covers people seeking international protection (i.e. asylum seekers) until a final decision is made on their application. The principle of non-refoulement also prohibits sending individuals to countries where they will be exposed to a risk of onward removal to a country where they may be at risk (indirect refoulement). This prohibition is laid down in Article 33 of the Refugee Convention, Article 3 of ECHR, and Articles 18 and 19 of the EU Charter of Fundamental Rights.

Positive human rights obligations

Obligations upon States to take measures to prevent or to remedy harm suffered by individuals.

Refugee

According to Article 1(A) of the Refugee Convention, a refugee is a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

Right to leave any country

Pursuant to Article 2(2) of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 'Everyone shall be free to leave any country, including his own'.

Right to life

Pursuant to Article 2 of the EU Charter of Fundamental Rights 'Everyone has the right to life'.

Right to seek asylum

Pursuant to Article 18 of the EU Charter of Fundamental Rights, 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'.

Abbreviations

CoE – Council of Europe

EASO – European Asylum Support Office

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU Charter – Charter of Fundamental Rights of the European Union

EUNAVFOR – European Union Naval Force

TFEU – Treaty on the Functioning of the European Union

UNHCR – United Nations High Commissioner for Refugees

UNODC – United Nations Office on Drug and Crime

1. Introduction

Aim and structure

The EU and the EU Member States have faced the challenge of increased migration pressure coming from outside their borders. This has made it essential for them to develop strong external actions to combat human smuggling and human trafficking. In this study, the terms 'external actions' in the field of migration and 'external dimension' of EU migration policy are used interchangeably and are understood as the development and consolidation of cooperation between the EU and EU Member States, on the one hand, and with third countries of origin or of transit, on the other.[1] Within this external dimension of EU migration policy, the undertaking of more effective measures against human trafficking and human smuggling has been a priority. Tackling human smuggling and human trafficking has been consistently put forward as one of the most important tools for responding to the migratory pressures.[2]

The reason for this strong emphasis on combating human trafficking and human smuggling is that, despite the formal legal distinction between the two, both constitute a means of irregular travel to and entry into the EU Member States.[3] When no legal channels exist to travel to and enter desired countries of destination, human trafficking and human smuggling provide the means for asylum seekers to access the EU territory. Given the wars and instabilities that characterise many regions in the world, the services offered by smugglers in terms of facilitation of movement and irregular border crossings (some of which might involve exploitative arrangements amounting to human trafficking) meet the demand for movement.[4]

Human smuggling and human trafficking can lead to serious human suffering and even death. Thousands of people have lost their lives while attempting to reach Europe.[5] Against this backdrop, measures aimed at preventing human smuggling and human trafficking appear justifiable. However, could these very measures at the same time also constitute human rights law violations? Might the EU and its Member States be violating human rights law with the anti-smuggling and anti-trafficking measures that form part of the 'external dimension' of EU migration policy?

To answer these questions, this study will undertake four steps, reflected in four parts. Part I, entitled 'Uncertainties concerning the definitions of human trafficking and human smuggling', clarifies the definitions of human trafficking and human smuggling under EU law. It highlights the ambiguities surrounding these definitions and the related difficulty in distinguishing between human smuggling and human trafficking. This is important because if there is no clarity concerning the meaning of these terms, there can be little understanding of the nature of the phenomena that the EU tries to address. When such an understanding is lacking, it might be difficult to propose measures for responding to these phenomena.

Part II, entitled 'Suppression of movement', clarifies the types and the nature of the measures undertaken by the EU and the EU Member States to address human smuggling and human trafficking. After providing an overview of these measures, Part II focuses on one specific group of measures; namely, those measures that form part of the external dimension of EU migration policy. These measures entail the outsourcing of border control to countries outside the EU.[6] In short, these measures lead to the containment of individuals, including transit migrants, and their prevention from leaving countries of origin and of transit, e.g. Libya. This has serious repercussions in terms of these migrants' ability to seek asylum and to escape the degrading conditions that they are exposed to within these countries.

The anti-smuggling and the anti-trafficking measures that are dealt with in this study are intrinsically linked to asylum law and policy when they are applied indiscriminately towards people attempting irregular entry into the EU Member States. Such measures inevitably affect asylum seekers, many of whom are likely to be in need of international protection (if they succeed in applying for it and having their claims examined), to the same extent as they affect migrants without any protection needs and possibly with no intention of applying for asylum. According to the 2018 EASO statistics, one in three first-instance decisions were positive, granting the applicant either refugee status or subsidiary protection. The overall recognition rate is likely higher considering that negative decisions (denial of international protection) can be reversed upon appeal. [7]

In sum, the human rights impact of the anti-smuggling and anti-trafficking measures is twofold. First, these measures often result in indiscriminately returning individuals to, or containing them in, harmful situations that are likely to violate human rights. Second, for those in need of international protection, the measures

have the additional effect of barring their access to territories and procedures where they could present their claim to protection for examination and, if they are refugees or eligible for other forms of protection, have protection granted. Part II of the study distinguishes and clarifies three characteristics of the anti-smuggling and anti-trafficking measures: extraterritoriality, involvement of many actors (i.e. EU, EU agencies, EU Member States and third countries), and informality. A meaningful answer to the question of whether the measures for the prevention of human smuggling and human trafficking constitute human rights law violations requires clarity as to which binding human rights law instruments might be relevant. Part III, entitled 'Thresholds for applying human rights law', provides this clarification. In the context of Europe, the European Convention on Human Rights (ECHR or the Convention) has been the most important human rights law instrument that is also backed up by an international court, i.e. the European Court of Human Rights (ECtHR or the Strasbourg Court). This court interprets the Convention and delivers binding judgments.

The EU is not yet party to the ECHR and the Convention is thus not legally binding for the EU.[8] This has serious negative implications for the possibility of holding the EU and EU agencies (e.g. the European Border and Coast Guard Agency, abbreviated as Frontex) accountable for any human rights law violations that they might commit when exercising external border controls, including anti-smuggling and anti-trafficking measures. All EU Member States are, however, parties to the ECHR. This means that the EU Member States are bound by the Convention in whatever measures they undertake, including measures required under EU law or as part of EU policies.[9]

It is important, however, to highlight that the Convention becomes applicable only if the affected individuals (i.e. the migrants whose movement is contained) are within the EU Member State's 'jurisdiction'. This creates difficulties that might render the ECHR inapplicable. Part III of the study therefore engages with another human rights law instrument by examining the relevance of the EU Charter of Fundamental Rights (the EU Charter).

With the entry into force of the Treaty of Lisbon, the EU Charter of Fundamental Rights became legally binding.[10] In contrast to the ECHR, the Charter does not contain a 'jurisdictional' clause. Instead, it is applicable to the EU bodies and to EU Member States 'when they are implementing Union law'.[11] The question that arises,

then, is whether the EU Charter provides for better possibilities to control the actions of the EU and the EU Member States when they act extraterritorially to prevent human smuggling and human trafficking. The study engages with this question and explains the difficult interpretative issues that the EU Charter raises.

In order to answer the question of whether the measures aimed at preventing human smuggling and human trafficking constitute human rights law violations, it must be clarified which substantive rights from the EU Charter might be at stake. Part IV, 'The right to life and the right to asylum', responds to this question by addressing two substantive rights: the right to life (Article 2 of the EU Charter) and the right to asylum (Article 18 of the EU Charter). Part IV clarifies under what circumstances it could be argued that these rights are being violated. Part IV explains the limits imposed by EU fundamental rights law on the external dimension of EU migration policy, and in particular, the anti-trafficking and anti-smuggling measures undertaken within this policy.

Novelty

No previous study has specifically examined the question of whether the measures aimed at preventing human smuggling and human trafficking constitute human rights law violations. While the measures that are part of the externalisation and the outsourcing of migration control to third countries are not new, the EU has since 2016 been prioritising these forms of controls by incentivising third countries to restrict movement.

There have been many studies on the issue of externalisation of border controls.[12] Externalisation is understood as taking measures that affect individuals who are far away from the EU Member States' territory and borders. Entry is thus prevented not at the point when the individual already presents himself/herself at the EU Member State border, but rather before the person has even attempted to leave a country of origin or transit, for example, by trying to board an airplane to Stockholm. The existing studies, however, focus on visas, carrier sanctions and push-backs at sea[13] and do not specifically scrutinise the anti-trafficking and the anti-smuggling measures. Focusing on these measures adds important distinctive features to this study because, while it is difficult to deny the fact that although these measures prevent movement and raise serious questions about compliance with *non-refoulement* and other human rights, they also aim to save lives and prevent exploitation.

Another distinguishing feature of this study is that it looks at the problem from the perspective of the EU Charter of Fundamental Rights, and not from the perspective of state responsibility under international law and human rights law more generally. This is important because, as opposed to the European Convention on Human Rights, the EU Charter does not contain a jurisdictional clause. In particular, Article 1 of the Convention stipulates that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms' as enshrined in the Convention. It follows that before engaging with the substantive provision of the Convention, it has to be established that the individuals affected are within the 'jurisdiction' of the specific State. This is a difficult threshold to pass, as 'jurisdiction' is more than mere affectedness and it is hard to argue that the individuals affected by the measures are under the personal control of the EU Member States or in a territory where any of these States have 'overall control'. Accordingly, the ECHR raises a strict jurisdictional requirement that limits its opposability to EU Member States.

In contrast, the EU Charter does not contain a provision similar to Article 1 of the ECHR. The application of the EU Charter is instead invoked once it is determined that EU law is applicable. This is reflected in Article 51(1) of the Charter, which stipulates that '[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*' [emphasis added].

Methodological considerations

The method employed in this study is legal-analytical, a well-established method in the field of legal science. This method aims to identify the relevant legal norms and to interpret them in accordance with the relevant rules of interpretation so that the research question can be answered. In this respect, it is important to highlight that the law might not give determinative and definitive answers to the question posed. There might be grey areas, where more than one interpretation is possible. Identification of these areas, and discussion of the issues and the implications involved, is part of the objective of this study and has a value of its own. Migration raises difficult questions about law and policy and there may be many situations in which the law, particularly human rights law, fails to provide clear answers.

It is also important to clarify from the outset that the assessment takes as its starting point the position of the individuals who are affected by the anti-smuggling and

anti-trafficking measures. Because the standards against which the anti-smuggling and anti-trafficking measures are assessed have human rights law (i.e. the EU Charter) as their source, it needs to be observed that human rights law is not value-neutral. Rather, the well-being of the individual is its starting point. This has an impact on how human rights law is interpreted. In particular, the interests of the individual are afforded an important weight when they need to be balanced against State interests. In this area of law, there is a constant tension between the migrants' interests that is reflected, on the one hand, in relevant legal standards (e.g. the right not to be sent back upon risk of ill-treatment and the right to leave any country) and, on the other hand, in the destination States' migration control interests.[14] This study engages with this tension and clarifies the relevant principles addressing it.[15] The well-being of individuals is one of these important principles.

Laws are subject to interpretation. In turn, interpretation of legal norms involves making choices, which introduces normativity.[16] The normative assumption behind human rights law is that it should be applicable to all human beings, including migrants. Yet the legislative prerogative of States cannot be ignored,[17] and the entitlement of States to control their borders is of crucial importance. In this sense, human rights law has limits regarding its possibility to make positive transformations that are favourable for migrants. However, when these limits are juxtaposed against certain values (e.g. rule of law), gaps emerge. The study will therefore end with some suggestions for changes.

The EU Charter is an expression of binding legal norms and will be the main point of reference. In light of Article 52(3) of the Charter, the provisions of the European Convention on Human Rights and the body of case law developed by ECtHR will also have a prominent role. In its extensive case law, the ECtHR has engaged with the rights of migrants in various areas, including *non-refoulement* in the context of the interception of migrants who have managed to leave Libya.[18] Relevant judgments delivered by the Court of Justice of the EU will also be crucial.[19] The methodology developed by these two courts for interpreting pertinent legal norms is also important. This methodology includes textual interpretation, purposive interpretation (i.e. interpretation in light of the purpose of the norms) and contextual interpretation (i.e. taking into consideration any other relevant legal norms).

To better understand the meaning of the relevant provisions and the judgments delivered by the above-mentioned courts, the study engages with the existing academic literature in the area of EU migration law and EU human rights law. In

this respect, the works of Gregor Noll (University of Gothenburg, Sweden), Cathryn Costello (Oxford University, UK), Steve Peers (University of Essex, UK), Violeta Moreno Lax (Queen Mary University, UK) and Maarten den Heijer (University of Amsterdam, the Netherlands), among others, will be extremely valuable.

A response to the question raised in the beginning of this study demands an extensive engagement with EU documents issued by the various EU institutions (e.g. the EU Commission, the Parliament and the Council). The analysis of these will uncover the aims pursued by the EU and the measures undertaken for their achievement. These documents will also reveal EU priorities. It is clear from these documents that fighting human smuggling and human trafficking is a priority objective in EU migration policy and in EU policy structuring the EU's relationship with third countries.

To ensure better empirical grounding, the study also refers to reports that document the conditions in countries of transit and origin. Such reports have been issued, for example, by Human Rights Watch, Amnesty International and reputable news outlets (e.g. *The Guardian*). Judgments delivered by national and international courts and studies issued by, for example, the EU Fundamental Rights Agency and the Council of Europe Commissioner for Human Rights, will also be used to facilitate the interpretation of relevant legal rules.

In summary, the methodology includes research of the relevant primary and secondary sources. This also involves an in-depth examination of the current discussions in the academic literature, and of case law of the two European courts (the ECtHR and the EU Court of Justice).

Endnotes Chaper 1.

1 *EU Cooperation with third countries in the field of migration. Study for the LIBE Committee* (European Parliament 2015) 15; European Commission, A European Agenda on Migration COM(2015)240, 13 May 2015.

2 See Conclusions from the European Council meeting, 28 June 2018, EUCO 9/18, para. 5; Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, paras. 3 and 5 ‹http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/ ›

3 A person can become a victim of human trafficking even if he/she crosses international borders regularly. Human smuggling necessarily implies irregular border crossing. See below for further clarifications as to the definitions.

4 Although any numbers and statistics in this area need to be taken with a degree of caution, brief references to some of the available estimations can be made. According to the EU Commission data, there were 20,532 *registered* victims of human trafficking in the 28 EU Member States during the 2015-2016 period. Of these, slightly more than half were non-EU citizens. *Data Collection on Trafficking in Human Beings in the EU* (Migration and Home Affairs, 2018) 13 ‹ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181204_data-collection-study.pdf›. Frontex has reported that 177 people smugglers were arrested in 2018 as part of its operations. Frontex 2018 in Brief ‹ https://frontex.europa.eu/assets/Publications/briefreport2018/files/assets/common/downloads/publication.pdf›.

5 For a collection of official evidence, see ‹http://www.borderdeaths.org/›

6 This report has a regional focus. Measures of outsourcing border controls have been undertaken in other parts of the world, e.g. the United States and Australia. See *Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US. Lessons Learned and Feasibility for the EU* (Open Society European Policy Institute 2018).

7 See EASO Asylum Trends 2018 Overview ‹https://www.easo.europa.eu/asylum-trends-overview-2018›

8 See Court of Justice Opinion 2/13 of 18 December 2014 Accession of the EU to the ECHR.

9 C Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' 6(1) *Human Rights Law Review* (2006) 87.

10 Charter of Fundamental Rights of the European Union, OJ C 83/02, 30 March 2010.

11 Article 51(1), EU Charter.

12 T Gammeltoft-Hansen and J Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' 53 *Columbia Journal of Transnational Law* (2015) 235; B Frelick, I Kysel and J Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' 4 *Journal on Migration and Human Security* (2016) 190; M den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012); B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010); T Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011); V Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Control and Refugee Rights under EU Law* (Oxford University Press, 2017).

13 This study does not engage with the law of the sea. It instead takes a more general approach, as the anti-smuggling and anti-trafficking measures have effects not only at the sea borders. For a study that addresses the law of the sea, see *Scope of the Principle of Non-refoulement in Contemporary Border Management: Evolving Areas of Law* (European Union Fundamental Rights Agency 2016).

14 For an in-depth discussion of this tension, see C Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law* (Cambridge University Press, 2012); M Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015); M Gibney, *The Ethics and Politics of Asylum. Liberal Democracy and the Responses to Refugees* (Cambridge University Press 2009).

15 See Part IV.

16 G Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 59.

17 'The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.' S.S. '*Lotus*' (France v Turkey), 1927 PCIJ (Ser. A) No.10, 18.

18 For example, *Hirsi Jamaa and Others v Italy* [GC] Application No. 27765/09, 23 February 2012.

19 For example, *X and X v Belgium*, Case C-638/16 PPU, 7 March 2017, where the issue of humanitarian visas for accessing EU territory was discussed.

Part I Uncertainties concerning the definitions of human trafficking and human smuggling

Part I presents the legal definitions of human trafficking and human smuggling and the distinctions between them. It highlights the absence of clarity surrounding these definitions and distinctions.

2. Human trafficking

The definition of human trafficking

The EU Directive 2011/36/EU on combating and preventing trafficking in human beings and protecting its victims (the EU Trafficking Directive) contains the following definition of human trafficking:

> [t]he recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

With some minor additions,[1] this definition is a reproduction of the international law definition of human trafficking that has been adopted in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (UN Trafficking Protocol)[2] and the Council of Europe Convention on Action against Trafficking in Human Beings (the CoE Trafficking Convention).[3]

As the definition suggests, for human trafficking to be constituted, three elements need to be cumulatively fulfilled: (1) an action of recruitment, transportation, transfer, harbouring or receipt; (2) by certain means (i.e. threat or use of force, etc.); and (3) for the purpose of exploitation. It is enough if just one of the actions has been performed (e.g. transportation) combined with just one of the means (e.g. deception) for the purpose of exploitation. It is also important to clarify that for human trafficking to be constituted, it is not necessary that the victim was actually exploited. It is enough if the victim has been, for example, recruited by abusing her/his position of vulnerability 'for the purpose of exploitation'. This means that rather than being a form of exploitation, the definition of human trafficking captures a process that *might* lead to exploitation.[4] Human trafficking thus refers to 'the international supply chain into exploitation.'[5]

Although human trafficking is not in itself a form of exploitation and its victims might or might not be actually exploited, it is difficult to understand the wrong that the crime reflects without understanding the meaning of the term 'exploitation'. While human trafficking is, by definition, not dependent on the existence of actual exploitation, 'for the purpose of exploitation' is a necessary element. This demands some understanding of what 'exploitation' means and, crucially, what severity threshold needs to be applied in the determination of whether an individual has been exploited or is at risk of being exploited.

Neither the EU Trafficking Directive nor other international law instruments define 'exploitation' in the context of human trafficking. The EU Trafficking Directive instead provides examples of what exploitation might mean *at the minimum*:

> Exploitation shall include, *as a minimum*, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.[6]

The term 'sexual exploitation', and the issue of whether prostitution is *per se* a form of exploitation, has been highly contested and the subject of many ideological debates.[7] This discussion need not detain us here. It suffices to observe that there is no common ground in Europe as to how the issue of prostitution should be addressed, which implies that the meaning of 'exploitation' in this context is ambiguous.

As to the other examples of exploitative practices in the definition, e.g. forced labour, slavery and practices similar to slavery, there is no doubt that these reflect severe forms of abuses against human beings.[8] However, forced labour, slavery and practices similar to slavery are only examples of what 'exploitation' might mean *at the minimum*. This implies that the actual meaning of 'exploitation' can go beyond these practices and capture other forms of practices that are less severe. An example to this effect would be breaches of national labour legislation in the event, for instance, that a worker is not paid in accordance with the minimum wage. The definition of human trafficking does not preclude the inclusion of this example as a form of exploitation.

In addition to 'exploitation', other terms within the definition have also remained ambiguous. Such terms include 'deception' and 'abuse of power or of a position of vulnerability'. The EU Trafficking Directive has clarified that 'a position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved'.[9] This has been a useful clarification. However, it has not generally resolved the problem as to how narrowly or how expansively to interpret the 'means' element of the definition of human trafficking. For example, if deception is understood to refer to deceit concerning the nature of the promised work or service in the destination country, there is no clarity as to what conditions the person has to be deceived about and how much he or she has to be deceived in order to meet the terms for this definition. Generally, there is no clear conceptual framework for the deception standard in the definition of human trafficking.[10]

In the public discourse, human trafficking is normally associated with serious harm. However, as the above clarifications expose, the definition is open to various interpretations, some of which might be generous while others are more restrictive. At the level of EU law, there has been no Court of Justice judgement regarding the definition that might offer some interpretative guidance. From the perspective of the EU Member States national criminal law, the EU Trafficking Directive establishes

only 'minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings'.[11] As a minimum rule, the definition in the EU Trafficking Directive is binding upon the national criminal law as far as its minimum elements are concerned.[12] Accordingly, the EU Trafficking Directive sets the breadth of the criminal repression by defining the minimum starting point and Member States are free to widen this breadth.[13]

The minimum starting point for criminalisation is difficult to delineate since, as mentioned above, the definition contains ambiguous terms (e.g. 'exploitation'). At the same time, the EU Member States are free to expand the meaning of the crime further. This ultimately means that the criminal legislation of different Member States might have different understandings of what human trafficking actually means. In some Member States, the crime might be interpreted more narrowly; in others, much more expansively.[14]

Accordingly, 'human trafficking' can refer to both severe forms of abuses, e.g. slavery, as well as to certain deceptive arrangements that do not manifest any comparable level of harm. As a consequence, the definition of human trafficking appears to be inoperative for undertaking a realistic assessment as to the existence of a problem of subjecting migrants to severe forms of abuses. Materially different cases might be pooled together in the same category under the heading of 'human trafficking'.[15]

This interpretative problem intimately relates to the origins of the definition of human trafficking, namely Article 3(a) of the UN Trafficking Protocol. This Protocol was adopted as part of a package consisting of the UN Convention against Transnational Organized Crime and the UN Smuggling Protocol.[16] The point of reference of this package was better cooperation in criminal matters, fight against organised crime and migration control, 'all of these intended to effectively function regardless of whether the alleged victims of human trafficking were exploited, as understood in a broad sense or, in fact, enslaved.'[17]

Leaving the realm of criminal law aside, the definition of human trafficking can also be viewed in light of the understanding that '[t]rafficking in human beings is a […] gross violation of fundamental rights'.[18] It is important to highlight, however, that human rights law has not yet offered any meaningful guidance as to the meaning of 'exploitation', 'abuse of power or position of vulnerability' and, more generally, the level of harm required to constitute human trafficking.[19] The references to human rights law are therefore not particularly useful in this respect.

In summary, there are serious challenges as to how the legal definition of human trafficking should be interpreted and what factual circumstances can be legally labelled as human trafficking. What cannot be questioned, however, is that the legal definition of human trafficking *can* encompass serious harm due to the deception, coercion and possible exploitation involved.

Measures against human trafficking under EU law

The main objective of the EU Trafficking Directive is to impose an obligation upon the EU Member States to criminalise human trafficking and to provide victims with some form of minimum assistance and protection. The EU has also put in place Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (the EU Residence Permit Directive). The main objective of the latter is the extension of residence permits when victims cooperate within criminal proceedings against traffickers.

The measures of protection, assistance, and extension of residence permits to victims are relevant once the victims are in the territory of a Member State. These measures are not of relevance in terms of prevention. When it comes to prevention, the EU Trafficking Directive simply envisions that Member States shall 'discourage and reduce the demand that fosters all forms of exploitation', conduct information and awareness-raising campaigns and train officials.

In light of the more recent extensive migration flows, it is questionable whether these prevention measures can be effective. As the EU Commission has acknowledged, 'the socio-political context has changed significantly since the [anti-trafficking] Directive and the [EU anti-trafficking] Strategy were adopted'.[20] This change has transpired due, among other things, to the 2015/2016 migration crisis. As a consequence, one of the targeted priorities as identified by the EU Commission 'for stepping up EU action to prevent trafficking in human beings' is coordination and cooperation with countries outside the EU: 'the Commission will continue to ensure that an anti-trafficking angle is systematically included in all aspects of its relations with non-EU countries and in all relevant policy areas', including development.[21]

This shift in the priorities is generally synchronous with the measures advanced by the EU after the 2015/2016 refugee crisis for responding to the migration challenges. These measures prioritise cooperation with third countries (i.e. countries of origin and transit) so that these countries prevent departures to EU territories and contain the movement of individuals. Pursuant to the EU migration strategy adopted in 2016, this containment of movement is intended to prevent human trafficking and human smuggling. This will be further explained below against the background that migration controls have always been one of the key measures undertaken by States to address human trafficking.[22] Prior to this discussion, however, the definition of human smuggling will be clarified.

Endnotes Chapter 2.

1 The definition in the EU Anti-trafficking Directive has clarified that the 'action' element of the definition includes 'the exchange or transfer of control over those persons.'

2 2237 UNTS 319, entered into force 25 December 2003.

3 CETS No.197, Warsaw, 16 May 2005.

4 V Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 292.

5 J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013) 355.

6 Article 2(3), EU Trafficking Directive.

7 V Stoyanova, *Human Trafficking and Slavery Reconsidered* 62.

8 The meanings of these terms have been also clarified by the ECtHR. See *Siliadin* v France Application No. 73316/01, 26 July 2005; C.N. *and V. v France* Application No. 67724/09, 11 October 2012.

9 Article 2(2), EU Trafficking Directive.

10 V Stoyanova, *Human Trafficking and Slavery Reconsidered* 54.

11 EU law is limited to the adoption of 'minimum rules concerning the definition of criminal offences'. See Article 83(1), The Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202/47. S Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2011) 762.

12 Article 83(1) TFEU; P Simon, 'The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic Legitimacy' 3 *New Journal of European Criminal Law* (2012) 242, 246.

13 V Stoyanova, *Human Trafficking and Slavery Reconsidered* 79-80.

14 J Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' 7 *Albany Governmental Law Review* (2014) 111; V Stoyanova, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law' 5(1) *Amsterdam Law Forum* (2013) 64.

15 V Stoyanova, *Human Trafficking and Slavery Reconsidered* 309.

16 UN Convention against Transnational Organized Crime, 2225 UNTS 206, entered into force 29 September 2003.

16 V Stoyanova, *Human Trafficking and Slavery Reconsidered* 309.

17 See paragraph 1 of the preamble of the EU Trafficking Directive. See also the preamble of the Council of Europe Trafficking Convention.

18 V Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case' 30(2) *Netherlands Quarterly of Human Rights* (2012) 163; V Stoyanova, 'Sweet Taste with Bitter Roots: Forced Labour and *Chowdury and Others v Greece*' *1 European Human Rights Law Review* (2018).

19 EU Commission Reporting on the follow-up to the EU Strategy towards the eradication of trafficking in human beings and identifying further concrete actions, COM(2017) 728 final, 4 December 2017, 2.

20 COM(2017) 728 final, 4 December 2017, 6-7.

21 See Article 11 of the UN Trafficking Protocol. See also J Hathaway, 'The Human Rights Quagmire of Human Trafficking' 49(1) *Virginia Journal of International Law* (2008) 1.

3. Human smuggling

The definition of human smuggling

To counter human smuggling, the EU has adopted the so-called Facilitators Package, which includes Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence and Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. One of the specific objectives of the Facilitators Package is to ensure the approximation of the criminal legislation in the Member States by establishing a common definition of the offence of human smuggling. The offence is defined as intentional assistance of a person, who is not a national or permanent resident of a Member State, to enter, or transit across, the territory of a Member State in breach of the laws of this State concerning entry or transit of aliens.[1]

This definition differs from the international law definition of human smuggling that is enshrined in the UN Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (UN Smuggling Protocol).[2] This Protocol defines smuggling of migrants as follows:

> 'the procurement, in order to obtain, directly or indirectly, *a financial or other material benefit*, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident' [emphasis added][3]

Notably, the EU law definition does not require an element of 'a financial or other material benefit', which implies that smuggling for humanitarian reasons might also be encompassed within the EU law definition.[4] Proof of financial or material gain is not required for holding the smuggler criminally liable. The aggravating circumstances, however, are applicable only if the offence is committed for financial gain.[5]

The exclusion of financial gain from the EU law definition of human smuggling creates the problem that the smuggling prohibition is overbroad and it can be used to suppress humanitarian assistance to asylum seekers. Yet, there is a 'humanitarian exception' under EU law that allows the EU Member States to choose not to impose sanctions on individuals who for humanitarian reasons assist others to cross the border illegally. More specifically, Article 1(2) of Directive 2002/90/EC stipulates that

> Any Member State *may* decide not to impose sanctions with regard to behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned [emphasis added].

It is important to highlight that this exception is optional, which means that Member States are allowed to ignore it.

At the time the Facilitators Package was drafted, different Member States had different positions concerning the omission of the financial gain element. Arguments in favour of omitting the element were based on practical considerations: it might be difficult to actually provide evidence to the required standard of proof that the smuggler gained financially.[6] It was thus argued that the exclusion of the element of financial gain can facilitate the investigation and the prosecution of smugglers. More specifically, the EU Commission forwarded the following arguments against the inclusion of financial gain:

> The cash intensive nature of the payment methods linked to smuggling makes it difficult to trace illicit financial flows and in turn to conduct investigations on the financial nature of the crime [... and] such difficulties [...] would disproportionately hamper the investigation and prosecution of this crime, affecting States' legitimate interest to control borders and regulate migration flows.[7]

These are all legitimate concerns as expressed by the EU Commission. At the same time, it needs to be acknowledged that the removal of the financial gain element and the labelling of any facilitation of illegal border crossing (including for humanitarian reasons) as human smuggling undermines the gravity of the offence. In particular, various activities including humanitarian aid, facilitation of border crossing for a reasonable amount of money with reasonable consideration of the migrants'

safety,[8] or facilitation of border crossing under exploitative conditions or under life-threatening conditions, can all be labelled human smuggling. The actual gravity of this offence is consequently called into question. One can question whether the anti-smuggling measures are equally well equipped to address all the various activities that can be pooled together under the label of human smuggling.

Finally, it needs to be observed that the Framework Decision 2002/946/JHA contains a saving clause enshrined in its Article 6 that reads as follows:

> This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967.

The above-quoted provision refers to provisions from the Convention relating to the status of refugees (the Refugee Convention).[9] Namely, Article 33 prohibits the return of refugees to a place where they might be ill-treated (i.e. the principle of *non-refoulement*). Article 31(1) of the Refugee Convention also deserves some clarifications and for this reason needs to be quoted in full:

> The Contracting States shall not impose penalties, *on account of their illegal entry or presence*, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1 [well-founded fear of being persecuted], enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

This provision aims at exempting refugees from penalties for their illegal entry or presence under certain conditions. It is important to highlight that Article 31 of the Refugee Convention is not aimed at those who facilitate the illegal entry of refugees, i.e. the smugglers. Therefore, it cannot be used for supporting an argument that measures against human smuggling, including criminalisation, are *per se* contrary to the Refugee Convention.[10] However, Article 31 of the Refugee Convention might have to be taken into account when assessing the compatibility of the anti-smuggling measures with human rights law.[11]

The distinction between human smuggling and human trafficking

In light of the above definitional clarifications, what lines of distinction does the law draw between human smuggling and human trafficking? These distinctions can be made along the following three lines: illegal border crossing versus legal border crossing, consent versus absence of consent, and exploitation versus absence of exploitation.

Illegal border crossing

First, human smuggling always implies illegal or unauthorised crossing of an international border. This can take different forms: transporting persons by boat until they reach the territory of the destination state, hiding persons in a lorry and crossing a land border, or providing persons with falsified passports or visas. In contrast, human trafficking can happen through legal border crossings.[12] Besides this point of distinction (i.e. legal versus illegal border crossing, where human smuggling necessarily implies illegal border crossing while human trafficking can happen through both legal and illegal border crossing), all other possible points for making a distinction are contestable. These other points are outlined and the reasons as to why they are contestable are explained below.

Consent

The migrant who is an object of smuggling consents to take part and seeks assistance from smugglers to enter into the territory of another state by paying the smugglers to organise and facilitate the journey.[13] In contrast, a person cannot consent to be trafficked. In this respect, Article 2(4) of the EU Trafficking Directive stipulates that 'the consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 [deception, coercion, abuse of power or of position of vulnerability] has been used'. This implies that the consent of a migrant, who has been deceived, to be exploited is not legally valid. However, the issue of consent cannot be resolved by simply stating that it is irrelevant when one or more of the means in the definition of human trafficking has been used. The meaning of the 'means' element, as previously discussed, is amorphous and the question of consent reappears when the meaning of this element is taken under consideration.[14]

The issue of consent remains problematic not only in relation to the definition of human trafficking. The meaning of consent can also be problematised in relation to the definition of human smuggling. Given the fact that many migrants who use smuggling services are asylum seekers fleeing their countries, and given that they likely have no alternative routes to access the territory of countries of destination, can we definitively and conclusively say that asylum seekers consent? If they have no other reasonable alternatives but to resort to smuggling services, is their consent valid?

Exploitation

People are trafficked for the purpose of 'exploitation'. In contrast, according to the definition of human smuggling, once a migrant is smuggled into the territory of the country of destination, he or she is 'free' from the smugglers. The same migrant might be exploited once in the country of destination because of abusive working conditions; however, this exploitation might not be linked with the process of his/her recruitment or transportation to the country. The absence of such a link is what distinguishes human smuggling from human trafficking. This has been very lucidly explained in a report by the UN Special Rapporteur on Violence against Women

> [...] it is the combination of coerced transport and the coerced end practice that makes trafficking a distinct violation from its component parts. Without this linkage, trafficking would be legally indistinguishable from the individual activities of smuggling and forced labour or slavery-like practices, when in fact trafficking does differ substantially from its component parts. The transport of trafficked persons is inextricably linked to the end purpose of trafficking. Recruitment and transport in the trafficking context is undertaken with the intent to subject the victim of the coerced transport to additional violations in the form of forced labour or slavery-like practices.[15]

It needs to be immediately observed, however, that migrants can enter into debt to pay for the smuggling services and in this sense, migrants can still be dependent on the smugglers even after the completion of the smuggling operation. The payment of this debt might prompt migrants to work under severely exploitative working conditions. It can be contended that these circumstances amount to human trafficking.

There might be no linkage between the smugglers who organise the migrant's entry and the employers who subsequently employ the migrant under exploitative conditions. This can make it less likely that the definition of human trafficking is fulfilled. At the same time, however, the definition might be fulfilled since actual exploitation is not a necessary requirement for human trafficking to be constituted (i.e. exploitation needs only to be the intended purpose). In addition, the smugglers might know that the migrant will have to enter into exploitative arrangements to repay the debt, which raises the question of whether mere knowledge that a person is transported 'for the purpose of exploitation' is sufficient for the crime of human trafficking to be constituted.[16] At the same time, the migrant might be deceived as to the amount of the debt, all of which might make it likely that the migrant was actually trafficked rather than simply smuggled.

Essentially, and in light of the uncertainty of the definition of human trafficking, the distinction between human smuggling and human trafficking remains equally uncertain. Finally, it also needs to be highlighted that human smuggling can be as dangerous or even more dangerous than human trafficking given the life-endangering conditions under which people might be smuggled. Equally important, the measures undertaken by the EU and the EU Member States to address human smuggling and human trafficking are in many respects identical.[17] This is particularly valid when it comes to the measures with extraterritorial effect based on cooperation with countries of origin and transit. Stricter migration control, containment of migrants and prevention of their movement are advanced as measures against both human smuggling and human trafficking.

Measures against human smuggling under EU law

The primary tool for addressing human smuggling has been criminal suppression, i.e. holding smugglers criminally responsible for having engaged in smuggling. In 2017, the EU Commission, in its examination of whether the Facilitators Package is still relevant and fit for purpose, observed that

> it could be concluded that the Facilitators Package has not significantly contributed to reducing irregular migration, particularly in the context of increasing migration inflows.[18]

The Commission added that the Package 'has had little deterrent effect'.[19] The Commission concluded that there is no need to revise the current EU anti-smuggling legislation. Instead, other measures, such as cooperation with third countries, i.e. countries of origin and transit, will be the key for addressing irregular migration.[20] EU cooperation with third countries forms part of the external dimension of the EU migration policy, to which now the study turns.

Endnotes Chapter 3.

1 Article 1(1)(a) Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence OJ L 328/17.

2 2241 UNTS 480 entered into force 28 January 2004.

3 Article 3(a), UN Smuggling Protocol.

4 Compare with Article 1(1)(b) of Directive 2002/90, which defines the offence of intentionally assisting *for financial gain* a third-country national to 'reside within' a Member State in breach of its national laws on residence.

5 Such aggravating circumstances are when smuggling was committed as an activity of a criminal organisation and when it was committed while endangering the lives of the persons who are the subject of the offence. See Article 1(3) Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence OJ L 328/1.

6 Draft Framework Decision on the Strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence (2000) Council Doc. 10859/00, p 3.

7 European Commission, REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: The Facilitators Package, SWD (2017) 117 final, 9.

8 See, for example, E Aloya and E Cusumano, 'Morally Evaluating Human Smuggling: The Case of Migration to Europe' (2018) *Critical Review of International Social and Political Philosophy* 1, who argue that under certain circumstances human smuggling is morally permissible.

9 189 UNTS 150.

10 C Costello, Article 31 of the 1951 Convention Relating to the Status of Refugees (UNHCR Legal and Protection Policy Research Series PPLA/2017/01) 41.

11 An example to this effect is the judgment of the Canadian Supreme Court in R v *Appulonappa*, 2015 SCC 59 [2015] 3 SCR 754.

12 Human trafficking can also happen within the territory of a single state. See V Stoyanova, *Human Trafficking and Slavery Reconsidered* 41.

13 See Human Trafficking and Smuggling in the Migration Context: Challenges and Lessons, Delmi Policy Brief 2018:7 ‹http://www.delmi.se/en/publications-seminars#!/en/policy-brief-20187 ›

14 V Stoyanova, *Human Trafficking and Slavery Reconsidered* 54. The United Nations Office on Drugs and Crime (UNODC) has concluded that '[c]onsent remains a troubled, complex and unresolved aspect of international law and policy around trafficking'. See *The Role of 'Consent' in the Trafficking in Persons Protocol*, UNODC Working Paper (2014) 34.

15 *Trafficking in Women, Women's Migration and Violence against Women*, UN Doc. E/CN.4/2000/68, 29 February 2000, para. 16.

16 For a discussion of the different approaches to the mental element of the crime see V Stoyanova, *Human Trafficking and Slavery Reconsidered* 43.

17 These measures are not identical when it comes to protection and assistance. EU Member States have adopted specific obligations to identify, assist and protect victims of trafficking, including by allowing them to remain in their territory. See V Stoyanova, *Human Trafficking and Slavery Reconsidered* 74-181.

18 Commission Staff Working Document REFIT Evaluation, SWD(2017) 117 final, 22 March 2017, 18-19.

19 Ibid, 19.

20 Ibid, 35.

4. Conclusion to Part I

The existing legal definitions of human smuggling and human trafficking can and have been interpreted in an overly expansive way. For instance, humanitarian assistance can be legally labelled as human smuggling, and there is no clarity as to the severity threshold for determining whether a migrant has been deceived for the purpose of 'exploitation'. This raises questions as to what phenomena, more specifically, the EU and the EU Member States are attempting to prevent and 'fight'. This, in turn, raises doubts as to whether the 'fight' against human trafficking and human smuggling is in fact aimed at preventing exploitation of individuals and preventing loss of life. It seems instead that this 'fight', while cloaked in humanitarian justifications, may rather be waged in service of the EU's interests to prevent departures and arrivals.

Part II Suppression of movement

Refugee flight is increasingly suppressed, both in refugees' regions of origin and further afield, with the EU and its Member States as key actors in the global suppression of mobility. This suppression happens through measures of non-arrival (also known as *non-entrée* measures).[1] Through the enactment of these measures, asylum seekers are not permitted to arrive at countries of destination and thus cannot access the territory of potential countries of asylum.[2] Not having access to territory implies that asylum seekers cannot assert their rights *vis-á-vis* these countries of desired destination. Movement is suppressed, because from the perspective of countries of destination, including the EU, it is more efficient to prevent irregular movement and entry than to detect migrants who have already entered irregularly and then to return them (if they have no right to stay because, for example, their applications for international protection have been rejected). This strategy, however, is likely to increase attempts to enter through unofficial channels, such as human smuggling.[3]

Two generations of *non-entrée* measures can be distinguished.[4] The first generation includes the following modes – visa controls, carrier sanctions and interdictions at high seas. More recently, the EU and its Member States have started to apply a wide range of new cooperation-based measures that have been part of the external dimension of the EU migration policy. While the first generation will be reviewed in Section 5, the new generation of cooperation-based measures will be detailed in Section 6.

5. Suppression of movement: the traditional measures

Starting with the visa controls, all refugee-producing countries are on the so-called black visa list.[5] This means that for a national of any of these countries to travel to any EU Member State, he or she needs to be in a possession of a visa. Nationals of certain states are also required to have an airport transit visa merely for staying in an airport to switch between flights.[6] For a visa to be granted, certain conditions need to be met.[7] It is not likely that asylum seekers meet these conditions.

According to Article 25(1)(a) of the Visa Code, Member States shall issue a visa with limited territorial validity even if the usual criteria for obtaining a visa are not met, for *inter alia* humanitarian reasons or because of international obligations. The Court of Justice of the EU has clarified that the issuance of a humanitarian visa for the purpose of requesting asylum does not fall within the scope of EU law.[8] Accordingly, the EU Member States are not obliged *under EU law* to grant humanitarian visas for the purposes of seeking asylum. As the Court of Justice reasoned, a finding to the contrary would enable third-country nationals to request asylum from outside of the EU, which is precluded by the EU asylum legislation.[9]

It is contestable whether EU Member States might have an obligation to issue a humanitarian visa under the ECHR.[10] This concrete issue has not yet been adjudicated before the ECtHR.[11] However, scholars have argued that visa requirements under EU law are at odds with international asylum law and that these requirements 'must be waived if they inhibit single individuals from reaching territories where they can find protection'.[12]

Visas would not serve the purpose of preventing arrivals if they were not combined with carrier sanctions.[13] The latter implies that carriers (e.g. airline carriers) are at risk of being sanctioned if they transport a person who does not have the necessary travel documents for entry into the destination state, including a valid visa. As a consequence, carrier personnel are obliged to check migrants' documenta-

tion at the point of embarkation and to deny boarding to migrants who are not in possession of the required documents.[14] This task is often delegated to private security firms.[15] Carrier sanctions 'incentivize carriers to err on the side of caution, and refuse entry to anyone who may not have his or her documentation in order, thereby barring many would-be asylum seekers from travel'.[16] Carrier sanctions make it impossible for asylum seekers to travel though legal and safe channels, which fosters the demand for human smuggling.[17] If there were no carrier sanctions, asylum seekers might still be able to board airplanes and ferries to reach countries of destination and then apply for asylum. Human rights considerations in the carrier sanctions regime are absent and no specific regulations for undocumented passengers in need of protection have been introduced.[18]

Interdicting migrants on the high sea on their way to countries of destination is another type of *non-entrée* measure. As opposed to the first two measures (i.e. visas and carrier sanction) that have not been unequivocally declared contrary to human rights law, this third type of measure has been declared by the European Court of Human Rights to be contrary to the right to *non-refoulement*, as implied in Article 3 of the European Convention on Human Rights, and to the right to effective remedy, as protected by Article 13 of the same Convention. This happened in *Hirsi Jamaa and Others v Italy,*[19] a judgment that concerned Somali and Eritrean nationals who left Libya by boats bound for Italy. They were intercepted by the Italian coastguard and police, transferred onto Italian military ships and returned to Tripoli. The migrants were not given the possibility to apply for asylum and 'the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country'.[20]

With *Hirsi Jamaa and Others v Italy*, it has become clear that EU Member States have comprehensive obligations to asylum seekers once they come into physical contact with them. This creates a tension with the EU Member States' interest in reducing the number of arrivals. The EU and the EU Member States have found the following way to resolve this tension: increased cooperation with countries of origin and transit so that these countries prevent departures in the first place and the EU Member States do not have any physical contact with the migrants whose movement is contained. The following section will describe these cooperation-based measures that suppress movement.

Endnotes Chapter 5.

1 This term was first used in J Hathaway, 'The Emerging Politics of *Non-Entrée*' 91 *Refugees* (1992) 40.

2 T Gammeltoft-Hansen and J Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' 53 *Columbia Journal of Transnational Law* (2015) 235, 241.

3 S Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2016) 470.

4 This distinction is based on T Gammeltoft-Hansen and J Hathaway '*Non-Refoulement* in a World of Cooperative Deterrence' 53 *Columbia Journal of Transnational Law* (2015) 235, 243; see also M Giuffré and V Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

5 Third countries whose nationals are under the obligation to obtain a visa to visit the Schengen area are listed in Regulation 539/2001 of the Council of 15 March 2001.

6 S Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2016) 198.

7 The rules governing the issuance of visas are listed in Regulation 810/2009 of 13 July 2009 establishing the Community Visa Code.

8 *X and X* C-638/16 PPU Court of Justice, Judgment 7 March 2017.

9 *X and X* C-638/16 para. 49.

10 For arguments in favour of this proposition, see G Noll, *Negotiating Asylum* (Martinus Nijhoff Publishers 2000); M den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012); V Moreno Lax, *Accessing Asylum in Europe: Extraterritorial Border Control and Refugee Rights under EU Law* (Oxford University Press 2017).

11 See the pending case of *M.N. and Others v Belgium*, Application No. 3599/18.

12 G Noll, *Negotiating Asylum* (Martinus Nijhoff Publishers 2000) 596.

13 D Bigo and E Guild, 'Policing at a Distance: Schengen Visa Policies' in D Bigo and E Guild (eds) *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) 234.

14 E Feller, 'Carrier Sanctions and International Law' 1 *International Journal of Refugee Law* (1989) 48; T Rodenhäuser, 'Another Brick in the Wall: Carrier Sanction and the Privatization of Immigration Control' 2(26) *International Journal of Refugee Law* (2014) 223; T Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' 19(3) *European Journal of Migration and Law* (2017) 307; S Scholten, *The Privatization of Immigration Control through Carrier Sanctions* (Brill 2015).

15 T Gammeltoft-Hansen, 'Private Law Enforcement and Control' in T Gammeltoft-Hansen et al. (eds) *The Rights of Others: Essays in Honour of Jens Vedsted-Hansen* (Djof Publishing 2013) 517.

16 C Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' 30(4) *International Journal of Refugee Law* (2018) referring also to T Kritzman-Amir, 'Privatisation and Delegation of State Authority in Asylum Systems' 5 *Law and Ethics of Human Rights* (2011) 193, 203.

17 Carrier Sanctions Directive 2001/51 of 28 June 2001 OJ L 187-45. Article 4(2) of this directive stipulates that the obligation to impose penalties on carriers is 'without prejudice to Member States' obligations in cases where a third-country national seeks international protection'. However, there are no procedures to make this safeguard effective. S Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2016) 471.

18 G Noll and J Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies' in F Alston (eds) *The EU and Human Rights* (Oxford University Press 1999) 359, 384.

19 Hirsi Jamaa and Others v Italy, Application No. 27765/09, 23 February 2012.

20 Hirsi Jamaa and Others v Italy, para. 131.

6. Suppression of movement: the cooperation-based measures

Since 2016 the EU and the EU Member States have vehemently begun to apply more sophisticated forms of migration control that are based on contacts with countries of origin and transit.[1] More specifically, the EU and the EU Member States have enlisted countries of origin and transit to apply exit and departure controls.[2] This has been part of the external dimension of the EU migration policy,[3] which has taken various forms: assisting countries of origin and transit to apply stricter border controls,[4] including pull-backs of migrants;[5] supporting and training, for example, the Libyan coast guards and navy;[6] and providing border control equipment and intelligence to countries of origin and transit.[7] The demand to contain movement normally comes as part of a larger package of financial forms of assistance and other incentives, including development aid.[8] The external dimension of the EU migration policy can thus be conceived as a set of measures based on cooperation with third countries and aimed at containing irregular migration flows to the EU.

In light of the EU policy documents, the primary objective of these measures of external controls is framed as saving lives and preventing migrants' embarkation on hazardous journeys. The measures are thus presented as addressing humanitarian concerns.[9] These humanitarian objectives are framed as combating human trafficking and human smuggling.[10] For example, in relation to Niger, the EU Commission has clarified that a financial contribution of EUR 50 million 'aims at enhancing the state capacities in the sectors of security, counter smuggling, and include addressing trafficking in human beings'.[11] In relation to Nigeria, the Commission observes that

> Nigeria remains the main non-EU country of origin for victims of trafficking in human beings […]. EUR 10 million have been allocated through the European Development Fund and the EU Trust Fund for Africa to a project addressing trafficking in human beings and smuggling of migrants.[12]

Egypt has been supported by the EU 'on migration governance and the prevention of irregular migration, trafficking in human beings and smuggling of migrants, as well as in the field of migrants' rights and protection'.[13]

The EUNAVFOR Operation Sophia is also framed as an anti-smuggling operation,[14] as well as an operation that aims at 'complementary training and capacity building of the Libyan Coast Guard'.[15] The EU Commission has concluded in its Progress Report on the Partnership Framework with third countries under the European Agenda on Migration that '[e]nhancing domestic border control as well as anti-smuggling and migration management capabilities in countries of origin and transit contributes to dismantling smugglers networks, reducing outflows and enhancing security and stability.'[16] The EU Commission has also explicitly stated that '[t]ackling smuggling is a core part of the Partnership Framework approach'.[17]

It follows from the above that the objective of preventing human smuggling and human trafficking is part of the broader agenda of imposing restrictions in furtherance of EU Member States' immigration control interests (i.e. preventing arrivals). The practical effect of these restrictions is containment of people within certain countries (e.g. Libya that 'remains by far the largest embarkation point and transit country'[18]), where there are massive and well-documented human rights violations, including unlawful detention and slavery, and where there is no capacity for examining asylum claims and protecting refugees. Libya, for example, is not even a State Party to the 1951 Geneva Convention relating to the Status of Refugees.

There are three factors of crucial importance that characterise these cooperation-based measures: extraterritoriality, involvement of many actors, and informality. Each of these factors will be explained below.

Extraterritoriality

First, the cooperation-based measures are executed beyond the borders of the EU Member States. Equally as important, the EU and the EU Member States have no direct contact with the people who are affected by these measures. As a consequence, these measures have been labelled 'contactless controls'.[19] This means that there is no direct physical contact between the affected individuals, on the one hand, and the authorities and the agents of the EU Member States, on the other.

The absence of contact and the extraterritoriality of the measures raise many challenging questions from the perspective of human rights law. In particular, they raise the question of whether EU Member States have any human rights obligations to individuals who are located beyond their borders and who are *not* in direct contact with Member States authorities, but are simply affected by the measures that are part of EU external policies. These challenges will be more concretely addressed in Part III.

Here, it is important to clarify the distinction between the two ways in which Member States and the EU can possibly violate the human rights of persons outside their territory. The first way is by extraterritorial conduct of Member States' agents. An example to this effect can transpire when EU immigration officers are stationed in a third country. Another example might emerge if the EU actualises its plan to establish a physical presence in Libya.[20] Extraterritorial conduct of Member States' agents is not the focus of this study. The focus is rather on the second way in which Member States and the EU can violate the human rights of persons outside their territory. This second way is the adoption of policies that have extraterritorial effects. The adoption of these policies is purely domestic conduct, but these policies affect individuals who are not located in the EU.[21]

Involvement of many actors

The external dimension of the EU migration policies triggers challenging legal questions, not only due to the fact that the affected individuals are beyond the borders of the EU Member States, but also due to the involvement of various actors. This produces a legal web that might be difficult to disentangle. More specifically, the external dimension of EU migration policies is characterised by a multiplicity of actors (e.g. the EU, EU Member States, EU agencies and third countries) whose specific roles are difficult to decipher. This difficulty has two aspects that need to be distinguished. The first concerns the overlapping of actions by both the EU and the EU Member States in this field, which raises the question as to the division of competences between these two actors. The second aspect concerns the overlapping of actions undertaken by the EU and the Member States, on the one hand, and the cooperating third states, on the other. The latter presents a separate set of legal difficulties. These two aspects will be explained below.

Overlapping of actions undertaken by both the EU and the EU Member States

As opposed to the EU Member States, the EU as an organisation has limited competences, i.e. only such competences as are attributed to it. This implies that legally, the EU is allowed to take actions only if these actions are within the competences conferred upon the EU by the EU Treaties, and only if these actions have a legal basis as indicated in the Treaties.[22] Migration and asylum policies are part of the Area of Freedom, Security and Justice (AFSJ), a field in which the EU and its Member States have shared competences.[23] This means that both the EU and the Member States may legislate and adopt legally binding acts in the area of migration and asylum.[24]

However, the cooperation-based measures with third countries are not adopted based on EU competence in the Area of Freedom, Security and Justice. The cooperation with third countries in the area of migration instead implies EU external relations competence, of which the EU Common Foreign and Security Policy forms part. As a consequence, migration control is externalised in both the physical sense (the physical location of the control is not even close to the EU territory), but 'also in an EU policy-making sense as the moves to control migration shift from the internal policy-making sphere to the external, foreign-policy making sphere, where the Council (and hence the Member States) remain largely in control'.[25] In this sense, the fields of EU external relations law and EU migration law have been brought together.

Here, it needs to be clarified that the only external relations competence explicitly transferred to the EU in the migration field relates to the entering into of readmission agreements with third countries.[26] Besides the field of readmission, the EU Treaties do not provide explicitly that the EU has the competence to act externally in the field of migration.

Yet resorting to the doctrine of implied external competence, as also codified in Article 216(1) TFEU (Treaty on the Functioning of the European Union), is possible.[27] The application of this doctrine requires an assessment as to whether external action by the EU (e.g. the EU entering into an international agreement) facilities the achievement of the objectives of internal competence transferred to the Union. In the field of migration, it can be relatively easily assessed that such facilitation takes

place. In particular, partnership and cooperation with third countries serves the objective of managing inflows of people into the EU. Overall, Article 216(1) TFEU also allows for extensive flexibility concerning when the EU has competence to enter into agreements with third countries.

At the end of the day, the division of competences between the EU and the EU Member States in the area of the Common Foreign and Security Policy is unclear.[28] Similarly, the distinction between whether measures are taken within the Common Foreign and Security Policy or within the Area of Freedom, Security and Justice, of which migration explicitly forms part, is also unclear. The Common Foreign and Security Policy has been used for regulating migration matters,[29] while the field of migration is in principle within the Area of Freedom, Security and Justice. Migration has its legal basis within the internal sphere of EU law and is not based on the foreign policy provisions of the Treaties. However, migration has been increasingly externally focused.[30] The absence of clear legal boundaries between the two areas (i.e. Common Foreign and Security Policy and Area of Freedom, Security and Justice) is detrimental to legal certainty.[31] A related problem is the uncertainty as to the legal basis of the actions. In sum, the overlapping nature of national competences, EU competences, and competences shared between the EU Member States and the EU, and how these competences can be legally framed, creates confusion.

At the same time, in practice, many EU cooperation instruments with third countries in the field of migration include the participation of both the EU and its Member States.[32] An example to this effect is the Mobility Partnership signed in March 2014 between Tunisia, on the one hand, and the EU and 10 EU Member States, on the other.[33] In parallel with the EU, the Member States also undertake individual measures and develop external actions in relation to migration at a bilateral level with third countries.[34] Some of these actions might be reproduced by the EU.

The ultimate problem is the uncertainty concerning the legal basis for these measures. If there is no clarity as to the legal basis, there is also ambiguity as to which actor (i.e. the EU or the EU Member States) has undertaken the measure. From a human rights law perspective and from the perspective of the EU Charter, this ambiguity creates problems. In particular, it makes it difficult to answer the question: against which actor can human rights claims be raised? The response to this question, in turn, is crucial as to the scope of applicability of the EU Charter, an issue that the study will address in detail in Section 9.

This ambiguity also creates procedural problems since, in principle, the EU Court of Justice does not have competence over the Common Foreign and Security Policy.[35] It might be thus precluded from assessing whether the measures taken within this policy field are compatible with the EU Charter.[36] This study does not engage with procedural questions, however, so this issue will not be explored further.

To recap, when various actors are involved, difficulties arise in identifying the concrete actor (i.e. the EU or the EU Member States) against whom human rights law claims can be raised. Despite these difficulties, an independent and separate assessment can be made as to the conduct of each actor, i.e. the EU and its bodies and the EU Member States. Positive obligations can be very useful here in separating the conduct of each actor in light of this actor's competences.[37] Part IV will further clarify the importance of positive obligations for ensuring the rights protected by the EU Charter.

Overlapping of actions undertaken by the EU/EU Member States and the third countries

The external dimension of EU migration policy and its ultimate objective of preventing movement towards the EU cannot be successful without the involvement of countries of origin and transit. The measures of prevention of movement and containment of migrants are not executed directly by the EU or the EU Member States, but rather are executed by the countries of transit and origin. It is, for example, the Libyan border control guards that might intercept people who have boarded a boat destined to cross the Mediterranean Sea and then might pull back the boat. It is the authorities of Niger who might confiscate vehicles that might be used for the transportation of people to Libya.[38] These measures of interception, confiscation and pulling back are instigated by the EU and the EU Member States, and the latter might have paid for them or provided the necessary equipment and machinery (e.g. boats for the Libyan border guards and vehicles for the Nigerien border guards). It is, however, the third countries that practically undertake these measures on their own territory. This reveals the cooperative framework.

As clarified above, the unclear division of responsibility between the Member States and the EU (including the EU agencies such as Frontex) is a problem on its own. However, this problem is amplified when third-country authorities also become involved. The involvement of third countries in the containment of movement adds an

additional layer of complexity to the already unclear division of responsibility in the area of migration control between the EU and the Member States.[39] The involvement of many actors makes it difficult to establish which actor contributed to inflicting harm upon individuals. In sum, these cooperative arrangements make it difficult to understand how to allocate any responsibility for harm that might amount to human rights law violations.

Without any doubt, countries of origin and transit have human rights law obligations to all individuals within their jurisdictions. These countries are likely not bound by the European human rights law protection system (i.e. the EU Charter and the ECHR); however, they are bound by, for example, the International Covenant on Civil and Political Rights.[40] Irrespective of any involvement of the EU and the EU Member States in terms of funds, equipment and support, countries of origin and transit remain bound by their human rights law commitments. They are therefore relevant addressees of human rights law claims that can be raised by the affected individuals. For example, the prevention of departures of boats from the Libyan coast that is presented as an anti-smuggling measure constitutes a breach of the right to leave any country as enshrined in Article 12(2) of the International Covenant on Civil and Political Rights. The latter provision demands an assessment of whether such a breach can be justified.[41]

Two problems emerge if countries of origin and transit were to be approached as the addresses of human rights law claims. First, there might be little likelihood in practical terms that these countries are capable of compliance with human rights law; in some of them there is little of a state system based on the rule of law. Second, it is ultimately the interests of the EU and the EU Member States that dictate the measures of containment. It is the EU and its Member States that exercise powers and influence that seriously affect individuals located beyond their borders.

Ultimately, the involvement of countries of origin and transit cannot absolve the EU and the EU Member States from any obligations that they might have under human rights law, including positive obligations. Similarly to what was suggested at the end of the previous section, the conduct of the EU and the EU Member States can be independently reviewed in light of their positive obligations to prevent other States from inflicting harm in violation of human rights law. Part IV of this study will clarify the role of positive obligations in this context. Before this, however, one more feature of the cooperation-based measures needs to be explained; namely, informality.

Informality

Besides extraterritoriality and involvement of many actors, there is a third factor that characterises the cooperation-based measures aimed at combatting human trafficking and human smuggling. This factor is informality, understood as avoidance of formal procedures and absence of a concrete legal basis for the adoption of the measures of containment.

It needs initially to be acknowledged that some aspects of the external dimension of the migration control measures have been based on legally binding instruments, including specific EU legislation.[42] An example to this effect is EUNAVFOR Operation Sophia.[43] This operation, a Common Security and Defence Policy mission, was established through the Common Foreign and Security Policy of the EU Council.

However, the external dimension of EU migration policy has largely been shaped by instruments with an unclear legal basis and unclear legal value.[44] These are informal policy arrangements.[45] The 'agreements' arranged by the EU and the EU Member States with countries of origin and transit are difficult to legally characterise since they are not always international agreements or treaties in the traditional sense. Such arrangements are not opened, negotiated and ultimately entered into in accordance with the procedure in Article 218 of the TFEU for international agreements'.[46] Examples to this effect are mobility partnerships, action plans, memoranda of understanding,[47] migration dialogues, common agendas on migration and mobility, *non-papers*,[48] and '*joint communiqué*'.[49] These can be characterised as 'quasi-legal or *sui generis* soft policy tools which are, in a majority of cases, non-legally binding for the parties involved and whose legal effects remain dubious.'[50]

Further examples can be provided in relation to the operation of Frontex. Frontex can enter into working arrangements on the management of operational cooperation with the authorities of third countries.[51] Frontex can also send liaison officers to third countries and can initiate technical assistance in those counties.[52] On the other hand, the EU Member States may also enter into bilateral agreements with third countries that include Frontex officials.[53] In light of this, Frontex has become an active foreign affairs actor by engaging in cooperation with third countries by, for example, entering into working agreements with them.

Besides informality, there are additional complications. Any assessment of the EU's and the EU Member States' external cooperation in the field of migration is further

hampered by the lack of available relevant information.[54] There is little available information as to the existing arrangements and the conditions therein. In relation to Frontex, for example, a study for the EU Parliament reported that there was a scarcity of information regarding the agency's actions, especially as concerns those of an operational nature.[55]

The most prominent example of such a soft-law, non-legally binding instrument veiled with uncertainty is the EU-Turkey Statement of 18 March 2016.[56] The arrangement between the EU and Turkey has been a mix of both: EU Member States acting at the European Council in its capacity as an EU institution, and separately, EU Member States acting as Heads of States and Governments and in this capacity meeting within the European Council. This exposes the involvement of various actors. Within this arrangement, the parties agreed upon the return, including forceful return, of all migrants arriving on the Greek islands from Turkey as of 20 March 2016. The agreement was reached without complying with the requirements under the Treaty on the Functioning of the EU for the entering into of agreements. No formal decision authorising the opening of negotiations was taken, as Article 218(2) TFEU actually requires. The EU Parliament has not approved the arrangement, as Articles 294(2) and 218(6) TFEU require. No possibility to consult the Court of Justice as to the compliance of the agreement with EU law (see Article 218(10) TFEU) has been offered.

Asylum seekers who arrived on the Greek islands after the entry into force of the agreement filed an application to the General Court of the EU (i.e. the court of first instance in cases directed against EU institutions). They asked for annulment of the agreement because, as mentioned, the procedure for entering into an agreement was not met under EU law, and because Turkey is not a safe country to which they could be returned.[57] The General Court of the EU concluded that it had no competence to hear the case since the EU-Turkey agreement did not involve the EU as such, but merely the Member States. As this court reasoned, these States concluded that the agreement was in their capacity not as EU Member States, but rather simply as sovereign states. It followed that the agreement could not be tested against the human rights law standards of the EU Charter. This judgment has been appealed before the EU Court of Justice and the latter's response will be very important for shaping EU responses to migration.[58]

To recap, the cooperation-based measures of migration control feature informal arrangements with third countries. As Part III of the study will show, this informality

creates challenges as to the possibility of reviewing the measures against human rights law standards.

Endnotes Chapter 6.

1 Such policies have been applied before. However, they have become particularly prominent since 2015. See P Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' 55 *Common Market Law Review* (2018) 157, 158. See also C Boswell, 'The External Dimension of EU Migration and Asylum Policy' 79(3) *International Affairs* (2003) 619.

2 Establishing a New Partnership Framework with Third Countries COM(2016) 385 final, 7 June 2016.

3 Malta Declaration 3 February 2017.

4 Progress Report on the Partnership Framework with Third Countries COM(2017) 471, 6.

5 The term 'pull-back' means prevention of departure. See N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' 27(3) *European Journal of International Law* (2016) 591.

6 Progress Report on the European Agenda on Migration COM(2017) 669 8; Communication on Establishing a New Partnership Framework with Third Countries COM(2016) 385, 15. As concerns the training in Libya, see ‹https://eeas.europa.eu/headquarters/headquarters-homepage/19518/operation-sophia-package-2-libyan-navy-coast-guard-and-libyan-navy-training-launched-today_en ›

7 Article 1, Italy-Libya Memorandum Agreement.

8 N El Qadim, 'The Funding Instruments of the EU's Negotiation on External Migration Policy. Incentives for Cooperation' in S Carrera et al. *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill Publishing 2019) 341.

9 B Frelick, M Kysel and J Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' *Journal of Migration and Human Security* (2016) 193; A Geddes and L Lixi, 'New Actors and New Understanding of European Union External Migration Governance?' in S Carrera et al. *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill Publishing 2019) 60, 69.

10 See Progress Report on the European Agenda on Migration COM(2017) 669 final, 11; 'Breaking the business model of smugglers remains a priority', Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy COM(2017) 820, 7.

11 Fifth Report on the Partnership Framework with third countries under the European Agenda on Migration COM(2017) 471 final, 3.

12 COM(2017) 471 final, 4.

13 COM(2017) 471 final, 9.

14 Council Decision 2015/778 of 18 May on the EU military operation in the Southern Central Mediterranean (EUNAVFOR MED).

15 COM(2017) 471 final, 12.

16 COM(2017) 471 final, 14.

17 Progress Report on the European Agenda on Migration COM(2017) 669 final, 11; 'Breaking the business model of smugglers remains a priority', Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy COM(2017) 820, 7.

18 Addressing the Refugee Crisis in Europe: the Role of EU External Action JOIN(2015) 40, 3; Migration on the Central Mediterranean Route. Managing Flows, Saving Lives JOIN(2017) 4, 2.

19 M Giuffré and V Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows', in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019).

20 See COM(2017) 669, 910.

21 For the distinction between these two ways, see L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effect' 25(4) *European Journal of International Law* (2014) 1071.

22 P Craig and G de Burka, *EU Law* (Oxford University Press 2015) 322.

23 According to Article 4(2)(j) TFEU, shared competence between the Union and the Member States applies to the area of freedom, security and justice, of which immigration and asylum policies are part.

24 Article 2(2) TFEU.

25 P Cardwell, *EU External Relations and Systems of Governance* (Routledge 2009) 170.

26 Article 79(3) TFEU.

27 M Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process' in A Dashwoord and M Maresceau (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge University Press 2008) 34.

28 P Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' 55 *Common Market Law Review* (2018) 157.

29 G Butler, 'Forcing the Law to Overlap? EU Foreign Policy and Other EU External Relations in Times of Crisis' in E Kuzelewska et al. (eds) *Irregular Migration as a Challenge to Democracy* (Intersentia 2018).

30 PJ Cardwell, 'Rethinking the Law and New Governance in the EU: The Case of Migration Management' (2016) *European Law Review* 362, 368.

31 L Lonardo, 'Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the EU' 14 *European Constitutional Law Review* (2018) 584, 598.

32 *EU Cooperation with third countries in the field of migration. Study for the LIBE Committee* (European Parliament 2015) 10.

33 *Ibid* 95.

34 *EU Cooperation with third countries in the field of migration. Study for the LIBE Committee* (European Parliament 2015) 64.

35 There are two exceptions. See Article 275 TFEU.

36 G Butler, 'Legal Responses to the European Union's Migration Crisis' 19(2) *San Diego International Law Journal* (2018) 277, 290.

37 This has been the approach followed by the ECtHR in cases involving multiple States that have together contributed to harms sustained by individuals. M den Heijer, 'Shared Responsibility before the European Court of Human Rights' 60(3) *Netherlands International Law Review* (2013) 411, 416.

38 'African Migration "a Trickle" Thanks to Trafficking Ban Across the Sahara', BBC 11 January 2019 ‹https://www.bbc.com/news/world-africa-46802548 ›

39 J J Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory' 2(2) *European Papers* (2017) 571, 587.

40 See Article 2(1), International Covenant on Civil and Political Rights, 999 U.N.T.S. 171.

41 For circumstances in which the right to leave can be restricted, see Article 12(3) of the International Covenant on Civil and Political Rights.

42 *EU Cooperation with third countries in the field of migration. Study for the LIBE Committee* (European Parliament 2015) 35.

43 Council Decision 2015/778 of 18 May 2015 on the EU Military Operation in the Southern Central Mediterranean (EUNOVFOR Med) [2015] OJ L 122/31. The relevant current legal basis is Regulation 2016/1624 of 14 September 2016 on the European Border and Coast Guard.

44 G Butler, 'Forcing the Law to Overlap? EU Foreign Policy and Other EU External Relations in Times of Crisis' in E Kuzelewska et al. (eds) *Irregular Migration as a Challenge to Democracy* (Intersentia 2018) 51, 61.

45 *EU Cooperation with third countries in the field of migration. Study for the LIBE Committee* (European Parliament 2015) 10.

46 G Butler, 'Legal Responses to the European Union's Migration Crisis' 19(2) *San Diego International Law Journal* (2018) 277, 288.

47 JJ Rijpma and M Cremona, The Extra-Territorialisation of EU Migration Policies and the Rule of Law, EUI Working Paper Series No.1 (2007).

48 Non-paper: Options on Developing Cooperation with Egypt in Migration Matters, European External Action Service (2016).

49 See for example, Government of the Netherlands, Koenders Concludes Migrant Return Agreement with Mali for EU, 11 December 2016 ‹https://www.government.nl/latest/news/2016/12/11/koenders-concludes-migrant-return-agreement-with-mali-for-eu ›

50 *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies. Frontex, Europol and the European Asylum Support Office* (EU Parliament Study 2011) 101.

51 Article 54(2) Regulation 2016/1624 of 14 September 2016 on the European Border and Coast Guard (EU Border Guard Regulation).

52 Article 54(9) and Article 55, EU Border Guard Regulation.

53 Article 54(10) and Article 55, EU Border Guard Regulation.

54 *EU Cooperation with third countries in the field of migration. Study for the LIBE Committee* (European Parliament 2015) 11.

55 *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies. Frontex, Europol and the European Asylum Support Office* (EU Parliament Study 2011) 8 and 64.

56 Case T-192/16 *NF v European Council*, Case T-193/16 *NG v European Council*, 28 February 2017.

57 The text of the judgment does not specifically indicate the reasons upon which the applicants sought an annulment. See T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Internationalization of Migration Policy before the EU Court of Justice' 31(2) *Journal of Refugee Studies* (2018) 216, 222.

58 Case C-208/17 P *NF and Others v European Council*, 13 September 2018.

7. Conclusion to Part II

The multi-level structure of the EU actions against human smuggling and human trafficking, and their informality, makes it difficult to hold the EU or its Member States responsible for possible harm inflicted upon individuals. This difficulty is exacerbated in the external field due to the involvement of non-EU actors (i.e. countries of origin and transit) and the fact that those affected are generally non-EU citizens who are outside EU territory.

Part III Thresholds for applying human rights law

Thus far, the study has identified the nature of the anti-smuggling and the anti-trafficking measures. It has clarified that these measures have extraterritorial effects, i.e. that the measures have effects on individuals located beyond the territory of the EU Member States, and that they are undertaken by various actors based on informal arrangements. The impact of these measures remains to be clarified: How do they negatively affect these individuals? How can this impact be framed in human rights law terms? More specifically, which interests protected by specific human rights law provisions are negatively affected? Which human rights norms are relevant in light of the impact of the measures on individuals?

Prior to engagement with these substantive questions, however, there are two preliminary issues that need to be addressed. These are initial threshold issues that concern the applicability of the European Convention on Human Rights and the EU Charter. These issues are intimately related with the problems of extraterritoriality, involvement of many actors, and informality. In particular, if the affected individuals are not within the 'jurisdiction' of the EU Member States in the sense of Article 1 of the ECHR, these Member States have no obligations towards these individuals under the ECHR. The ECHR thus cannot be invoked as a source of binding law.

In relation to the EU Charter, if the EU Member States do not implement EU law when they undertake the anti-smuggling and anti-trafficking measures described in Part II of this study, the EU Charter is not applicable. As a consequence, these measures cannot be reviewed against the standards of the Charter. If the EU institutions and bodies act beyond their competences to conclude arrangements, the applicability of the EU Charter might also be in doubt.

Part III of the study will discuss these initial threshold questions. In this discussion, the factors explained in Part II (extraterritoriality, involvement of many actors, and informality) will play a crucial role. Part IV of the study will then proceed to examine two rights from the EU Charter that are arguably infringed upon by the anti-smuggling and anti-trafficking measures, i.e. the right to life and the right to asylum.

8. The limits of jurisdiction under the European Convention on Human Rights

Article 1 of the European Convention on Human Rights stipulates that

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 1 of the ECHR is intended to define the group of individuals who can claim their human rights against the States that are parties to the Convention.[1] Normally, these individuals are within the territory of the State Parties. This means that it is the State on whose territory the individuals are located that holds human rights obligations corresponding to these individuals' rights. In *Bankovic and Others v Belgium and Others*, the ECtHR clarified that 'the jurisdictional competence of a State is primarily territorial'. In *Bankovic*, the ECtHR rejected the applicants' submission since it was 'tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention'.[2] It follows that the fact that certain measures undertaken by the EU Member States affect individuals located outside these States' territory, does not necessary mean that these individuals can invoke the ECHR.

After the delivery of the *Bankovic* judgment, the Court has introduced some important nuances to the effect that individuals not located in the territory of a State Party to the ECHR can still be considered to be within the jurisdiction of this State for the purposes of Article 1 of the ECHR. The most important judgment to this effect is *Al-Skeini and Other v the United Kingdom,*[3] where the Court introduced two alternative models of extraterritorial jurisdiction.[4] First, the special model is applicable when a State has effective overall control over an area or territory.[5] It can easily be conclud-

ed that this model is not relevant for present purposes: the EU Member States have not established any control over the territories of countries of origin and transit, which could potentially bring the individuals located in these territories within the EU Member States' jurisdiction in the sense of Article 1 of the ECHR.

The second model is the personal model of jurisdiction. Within this model, jurisdiction in the sense of Article 1 ECHR is understood as the exercise of authority or control by State agents over an individual or a group of individuals.[6] The legal standards applicable within this model have remained unclear.[7] This has left many questions open as to under what circumstances individuals located abroad are within the control of the State.

Still, it appears that the Court in its reasoning in *Al Skeini* has introduced three alternatives (sub-models) within the personal model. First, extraterritorial jurisdiction can be triggered in relation to 'acts of diplomatic and consular agents'. This is not helpful for the present purposes since the measures discussed in Part II are not acts of EU Member States' diplomatic and consular agents. Second, extraterritorial jurisdiction can be triggered when a State Party to the ECHR exercises 'physical power and control' over persons located beyond its borders. It is difficult, however, to engage this alternative since the anti-smuggling and anti-trafficking measures (e.g. sharing of intelligence, equipment) as outlined in Part II of this study do not imply any physical contact between agents of countries of destination and the affected individuals. As mentioned in Part II, these measures have for this reason been labelled 'contactless controls.'

The last alternative suggested by the Court in *Al Skeini* is exercise of 'public powers'. It might be possible to argue that the EU Member States, by undertaking the measures outlined in Part II 'Suppression of movement', exercise 'public powers' over the affected individuals who are located beyond these States' territories. Yet the existing ECtHR case law in this area and the concrete requirements for triggering the 'public powers' sub-model of jurisdiction do not vehemently speak in favour of the applicability of this sub-model to the anti-smuggling and anti-trafficking measures.[8] Still, developments in this direction cannot be excluded; further judgments by the Court will be needed to refine the interpretation of the 'public powers' sub-model.

Here, it also needs to be mentioned that in light of the general uncertainty surrounding the jurisdictional threshold under Article 1 of the ECHR, many authors have tried to reconstruct the judgments of the Court and to propose alternative and

less-stringent models.[9] It is beyond the scope of this study to engage in these academic debates.

The most important conclusion that can be drawn in relation to the ECHR is that the applicability of this human rights law instrument is not triggered by simple affectedness. The jurisdiction threshold in the sense of Article 1 of the ECHR is not triggered by the mere fact that EU Member States undertake measures that might adversely affect individuals located outside these States' territories.[10] As a consequence, it is unclear whether the anti-smuggling and anti-trafficking measures can be reviewed against the standards of the ECHR. The reason is that if the affected individuals are not within the jurisdiction of the EU Member States that instigate these measures, the ECHR is not applicable.

Endnotes Chapter 8.

1 M den Heijer and R Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in L Malcom (ed) *Global Justice, State Duties* (Cambridge University Press 2013)153, 154.

2 *Bankovic and Others v Belgium and Others* (Decision) [GC] Application No. 52207/99, 12 December 2001, para. 75.

3 *Al-Skeini and Others v United Kingdom* [GC] Application No. 55721/07, 7 July 2011.

4 M Milanovic, 'Jurisdiction and Responsibility. Trends in the Jurisprudence of the Strasbourg Court' in A van Aaken and I Motoc (eds) *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 97, 98.

5 *Al-Skeini and Others v United Kingdom,* paras. 138-9.

6 *Al-Skeini and Others v United Kingdom,* paras. 133-7.

7 M Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' 23 *European Journal of International Law* (2012) 121.

8 V Stoyanova, 'The Right to Leave any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' *International Journal of Refugee Law* (forthcoming). See also S Besson 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 25 *Leiden Journal of International Law* (2012) 857.

9 M Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011); V Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press 2017).

10 S Besson 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 25 *Leiden Journal of International Law* (2012) 857, 873.

9. Extraterritorial applicability of the EU Charter of Fundamental Rights

As opposed to the ECHR, which limits the scope of individuals who can claim their human rights to those individuals who are present in the States' territory or who are under the contracting States' effective control, similar limitations do not exist under the EU Charter. The EU Charter does not contain a provision similar to Article 1 of the ECHR and does not refer to the concept of 'jurisdiction' as used in the ECHR. From the perspective of the EU fundamental rights law, then, the starting point is that the EU Charter applies extraterritorially.

Invoking the protection of the Charter is instead dependent on other criteria, which can be found in Article 51:

> 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
>
> 2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined by the Treaties [emphasis added].

In light of the above-quoted provision, two aspects need to be distinguished. The first aspect concerns the application of the Charter to the EU institutions and bodies. This implies a review of the legality of their actions against the guarantees en-

shrined in the Charter, which prompts two questions. First, what constraints does the Charter impose on the actions of the EU institutions and bodies in the area of migration control? Second, what demands (in terms of positive obligations) does the Charter impose on the EU institutions and bodies? At this point, it needs to be clarified that 'the institutions and bodies of the Union' means 'all authorities set up by the Treaties or by secondary legislations'.[1] Frontex is an example of such a body.

The second aspect that needs to be distinguished in regard to Article 51 of the Charter concerns its application to the EU Member States. This implies asking the questions: 'What constraints does the Charter impose on the Member States' actions in the area of migration control?' and 'What demands (in terms of positive obligations) does the Charter impose on the EU Member States?' These two aspects are addressed below.

Applicability of the EU Charter to the EU institutions/bodies

Article 51(1) of the Charter clarifies that the Charter is addressed to the institutions and the bodies of the EU. They are bound by the Charter irrespective of where they act, where their decisions might have effects and where the affected individuals might be located. Since there are no territorial limitations imposed by the EU Charter, the institutions and the bodies of the EU are bound by the Charter even if their actions have effects outside of the EU. Moreover, the institutions and the bodies of the EU are bound by the Charter even if they act outside the EU legal framework.[2] Where the EU exercises its powers, 'it owes human rights obligations to persons affected by such exercise of power, irrespective of the location of those persons'.[3] As Moreno-Lax and Costello have observed, 'EU fundamental rights obligations simply track all EU activities.'[4]

The applicability of the Charter to the EU bodies and institutions when they act outside the EU legal framework needs some further clarification. This issue brings us back to the question of EU competence. As clarified in Part II above, the EU has no general competence; it only has attributed competence. Legally, the EU can act only within its competences. When the EU acts within its competences, the Charter is applicable. However, situations can also be imagined in which the EU acts outside the EU legal framework and beyond the competences conferred upon it by this legal

framework (i.e. the EU Treaties). Given the difficulties in understanding the precise contours of the EU competences, such situations can be imagined. In addition, the EU institutions and bodies can be tasked with activities by the Member States, outside the framework of the EU legal order.[5] The issue that arises, then, is whether the Charter is applicable to these activities.

An argument can be made that the EU Charter is still applicable even if the EU acts beyond its competence. This argument implies that the EU bodies and institutions have obligations under the Charter by the mere fact that they *in practice* act (even if it is questionable whether the EU bodies and institutions are legally allowed to undertake these acts since these acts are beyond their competences). A different interpretation could lead to 'legal black holes': the EU acts, but without the application of guarantees under the EU Charter.[6] Such 'black holes' will not be compatible with one of the fundamental values upon which the EU is founded, namely fundamental rights.[7]

A textual interpretation is also helpful here. The words 'only when they [the EU Member States] are implementing Union law' in Article 51(1) of the Charter, apply solely to the EU Member States, not to the EU institutions. This would mean that 'the EU institutions would be bound by the Charter whether they are implementing Union law or not'.[8]

The discussion as to whether the Charter applies to the EU institutions and bodies when they act outside the EU legal framework is important because they might act under intergovernmental agreements and not under the mandate of the Treaties. This discussion is also important because of the nature of the agreements concluded with third countries in the area of migration control. As explained in the section "Informality", these agreements are of an informal nature (e.g. memoranda of understanding). The question that emerges, then, is that if these agreements are not binding legal documents, how could they be reviewed under the Charter?

Ledra Advertising is a relevant judgment delivered by the Court of Justice that might help in answering the question. The subject matter of the judgment is not related to migration control. However, the issue as to whether the Charter applies to EU institutions and bodies when they act outside the EU legal framework was specifically addressed. Very importantly, the Court of Justice in this judgment left no doubt that the Charter does apply:

> Whilst the Member States do not implement EU law in the context of the ESM Treaty [Memorandum of Understanding on Specific Economic Policy Conditionality concluded between the Republic of Cyprus and the European Stability Mechanism], so that the Charter is not addressed to them in that context [...], *on the other hand the Charter is addressed to the EU institutions*, including, as the Advocate General has noted in point 85 of his Opinion, *when they act outside the EU legal framework*. Moreover, [...] the Commission is bound [...] to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter [emphasis added].[9]

The Court of Justice then continued to examine whether 'the Commission contributed to a sufficiently serious breach of the applicants' right to property, within the meaning of Article 17(1) of the Charter, in the context of the adoption of the Memorandum of Understanding'.[10] In this examination, the Court of Justice noted that the memorandum pursued a legitimate objective and the measures envisioned by the memorandum did not constitute a disproportionate interference with the right to property. Consequently, no substantive violation of the right to property as protected by the Charter was found.[11]

It follows that any act, including negotiations and the entering into agreements, produced by an EU institution or body must comply with the Charter. The reason is that in contrast to the Member States, which are bound by the Charter only when implementing EU law, the EU institutions and bodies must respect fundamental rights regardless of the specific legal framework or context in which they operate: '[i]nformal acts are also encompassed as long as they are products of EU institutions and have legal effects'.[12]

At this point, Article 51(2) of the EU Charter needs to be considered. It says that '[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'.[13] This means that the interpretation of the Charter cannot lead to the conferral of new competences upon the EU. This delimits the obligations that the EU institutions and bodies might have under the Charter to ensure the rights protected therein. These obligations cannot be interpreted as expansively as to extend the competences of the EU institutions and bodies. The Explanatory Note to Article 51 of the Charter confirms this understanding: '[...] an obligation, pursuant to the second sentence of paragraph 1 [of

Article 51 of the Charter], for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers'.

In sum, although the Charter is applicable to the EU institutions and bodies even when they act outside the EU framework, their obligations to ensure the Charter rights are limited. This limitation corresponds to the limited competence of the EU institutions and bodies. This was nicely clarified by Advocate General Wahl in his Opinion in *Ledra Advertising*. He observed that while the EU institutions must scrupulously observe the EU Charter 'even when acting outside the EU framework',

> I do not agree with the appellants that that obligation is so extensive that it may be considered that an obligation as to the result is imposed on the Commission to avert any possible conflict or tension between the provisions of an act adopted by other entities and any EU rule which may be applicable to the situation. At most, I could conceive that an obligation might exist for the Commission to deploy *its best endeavours to prevent such a conflict arising* [emphasis added].[14]

It follows that the EU institutions have obligations to ensure compliance (i.e. positive obligations) with the Charter that are limited by their competences. Such obligations could be, for example, to refrain from participating in agreements that might lead to violations of the Charter or influencing the content of such agreements so that better protection of fundamental rights can be ensured. These could be framed as positive obligations.

Applicability of the EU Charter to EU Member States

Article 51(1) of the EU Charter clarifies that the Charter is addressed to the Member States, but 'only when they are implementing Union law'. The applicability of the Charter to the Member States is subject to a clear limitation; namely, the EU Charter is triggered and its standards are relevant for reviewing the Member States' actions only if the Member States are 'implementing Union law' with these actions. The EU Charter thus tracks all Member States' actions that implement EU law,[15] but does not 'create "free-standing" fundamental rights.'[16] Rather, these rights are tied to the field of application of EU law. This means that '[t]here must be a provision or a

principle of Union primary or secondary law not contained in the Charter which is directly relevant to the case'.[17]

This limitation is of a very different nature in comparison with the limitation imposed by Article 1 of the ECHR. The limitation has nothing to do with territoriality and 'effective control' over territory or over persons, as under the ECHR.[18] The limitation is instead about the scope of EU law.[19] The key question for triggering the application of the Charter, then, is the following: are the EU Member States implementing EU law with the measures that affect individuals located in third countries? The only threshold requirement that triggers the application of the rights enshrined in the EU Charter is whether EU law applies in the particular circumstances.[20]

In general, any review of the Member States' actions in light of the Charter raises difficult questions because it is not always clear when the Member States are acting within the scope of application of EU law. In *Åkerberg Fransson*, the Court of Justice of the EU clarified that 'fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations'.[21] It added that '[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'.[22] The Charter thus follows the application of EU law.[23] The judgment in *Åkerberg Fransson* also clarified that even though national measures might not be adopted specifically to implement EU law, if they are designed at least in part to implement EU law, this brings the measures within the scope of application of EU law for the purposes of the Charter. Some connection 'in part' between the situation and the EU law thus seems to be sufficient to trigger the application of the Charter.[24]

In light of the above analysis, the following question needs to be addressed: Do the measures described in Part II 'Suppression of movement' have a connection to EU law, which might enable their review against the standards of the EU Charter? It is possible to establish a link between the measures of visa requirements, carrier sanctions and pushbacks, on the one hand, and EU law on the other. More specifically, when an application for a Schengen visa is lodged, the EU Visa Code arguably applies, which means that EU law applies and the application of the Charter might be triggered.[25] There is also specific EU law applicable to maritime border surveillance operations,[26] which might also trigger the application of the Charter. The existence of such links between EU law and the *non-entrée* measures of visas, carrier sanctions and pushbacks might enable the application of the Charter.

The answer to this question, however, might be more contentious in relation to the cooperation-based measures described in Section 6. These measures might be outside any legal framework, which means that when EU Member States make arrangements with third countries to contain movement, these arrangements are not in implementation of EU law.

However, considering that these measures are presented as anti-smuggling and anti-trafficking measures, it also needs to be considered that there is specific EU law in these subject matters. Article 79(2) of the Treaty on the Functioning of the EU says that the EU Parliament and the Council shall adopt measures in the areas of 'illegal immigration and unauthorised residence' and 'combating trafficking in persons'. Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims was not adopted based on Article 79(2) of the TFEU, but rather as a measure for strengthening judicial cooperation in criminal matters. Yet the Directive does mention that actions 'should be pursued in third countries of origin and transfer of victims'.[27] This could set into motion the application of the Charter to the EU Member States.

Endnotes Chapter 9.

1 Explanatory Note to Article 51 of the Charter. See Article 6 TEU on the interpretative authority of the Explanatory Note.

2 Court of Justice Judgment 20 September 2016, Joint Cases C-8/15 P and C-10-15 P, *Ledra Advertising* [GC], para. 67.

3 C Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' 20 *International Community Law Review* (20181) 374, 380.

4 V Moreno Lax and 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 and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1658, 1658.

5 S Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' 9 *European Constitutional Law Review* (2013) 37.

6 V Moreno Lax and 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 and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1658,1682.

7 Article 21(1), Treaty on the EU.

8 S Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' 9 *European Constitutional Law Review* (2013) 37, 52.

9 Court of Justice Judgment 20 September 2016, Joint Cases C-8/15 P and C-10-15 P, *Ledra Advertising* [GC], para. 67.

10 *Ledra Advertising*, para. 68.

11 *Ledra Advertising*, paras. 71-75.

12 A Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights' 54 *Common Market Law Review* (2017) 991, 1010.

13 Article 6(1) TEU: 'The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.'

14 Advocate General Wahl Opinion in *Ledra Advertising,* para. 70.

15 V Moreno Lax and 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 and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1658, 1658.

16 Koen Lenaerts and A Gutierrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers, T Hervey, J Kenner and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1592

17 A Rosas, 'The applicability of the EU Charter to Fundamental Rights at National Level' *European Yearbook of Human Rights* (2013) 97, 105.

18 This interpretation can be textually reinforced by Article 52(3) of the EU Charter, which provides that the Charter is not prevented from 'providing more extensive protection' than the ECHR.

19 'The real issue is therefore not the [...] scope of the *Charter*, but the [...] scope of *EU law*.' S Peers, 'Immigration, Asylum and the EU Charter of Fundamental Rights' in E Guild and Minderhoud (eds) *The First Decade of EU Migration and Asylum Law* (Brill 2012) 437, 449 (emphasis in the original).

20 V Moreno Lax and 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 and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1658, 1658.

21 Åkerberg Fransson, para. 19.

22 Åkerberg Fransson, para. 21.

23 P Craig and de Burca, *EU Law* (Oxford University Press 2015) 416.

24 V Moreno-Lax, *Accessing Asylum in Europe* 291.

25 V Moreno Lax, *Accessing Asylum in Europe* 310. In *X and X v Belgium* C-638/16 PPU, the EU Court of Justice rejected this argument. It held that 'an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code [the Visa Code] [...] with a view to lodging [...] an application for international protection' does not fall within the scope of EU law, but solely within the scope of national law. It follows that the rejection of such a visa cannot be reviewed against the standards of the EU Charter.

26 V Moreno Lax *Accessing Asylum in Europe* 325.

27 Recital 2 of the Preamble of the Directive.

10. Conclusion to Part III

Section 8 of this study identified extraterritoriality (i.e. that the individuals affected by the anti-smuggling and anti-trafficking measures are located beyond the EU Member States' borders) as an obstacle to holding the EU and its Member States responsible for any human rights law violations that these measures might cause. Section 9 highlighted that the EU Charter of Fundamental Rights can partially resolve these difficulties. The Charter applies to the EU institutions and bodies even when they act outside the EU legal framework, which means that any informal arrangements that they make with third countries can be scrutinised against the standards of the EU Charter. When these arrangements affect individuals located outside EU territory, the EU Charter can still be invoked since it does not contain a territorial or jurisdictional limitation.

The EU Charter of Fundamental Rights applies to the EU Member States only in relation to their actions in implementation of EU law. The question as to when EU Member States actually implement EU law is fraught with difficulties, which creates uncertainty. Leaving this general problem aside, it needs to be considered that when EU Member States make anti-smuggling and anti-trafficking arrangements with third countries to contain the movement of individuals, these arrangements are of an informal nature. This gives a basis for the argument that they are not in implementation of EU law. However, it might be also possible to argue that since there is specific EU law in the area of human smuggling and trafficking, some measures might be considered as being in implementation of EU law. If they are, these measures can be reviewed against the standards of the Charter.

Part IV The right to life and the right to asylum

Having clarified that the application of the Charter might be triggered in relation to the EU bodies' and institutions' involvement in the anti-smuggling and anti-trafficking measures and that the application of the Charter might be also triggered in relation to the EU Member States' involvement, a final set of questions remains to be addressed. Which of the interests protected by the rights enshrined in the Charter do these measures adversely affect? In other words, which human rights norms enshrined in the Charter are relevant in light of the negative impact of the measures on individuals? Even if certain individual interests are negatively affected, are the anti-smuggling and anti-trafficking measures still justifiable? If they are, they might not lead to violations of human rights law despite their harmful impact.

These are the questions at the core of Part IV of this study. In light of the negative impact that the anti-smuggling and anti-trafficking measures have on migrants located in countries of origin and transit, this study identifies two rights protected by the EU Charter as pertinent. These are the right to life (Article 2 of the EU Charter) and the right to asylum (Article 18 of the EU Charter). This is without prejudice to other rights that might be also relevant.

Prior to engaging with each of these rights, a general clarification as to the approach to their interpretation is due. This concerns the role of Article 52(3) of the EU Charter. This provision stipulates that

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], the meaning and the scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 52(3) of the EU Charter ensures a consistency between the interpretation of the rights enshrined in the EU Charter and interpretation of the rights enshrined in ECHR.[1] This explains why, in the analysis that follows, references will be made to judgments delivered by the ECtHR. These judgments are important sources that provide insights as to the meaning of the rights protection by the ECHR and respectively by the EU Charter, and the obligations that correspond to these rights.

11. The right to life: Article 2 of the EU Charter

Many people die while attempting to reach the territories of the EU Member States. These deaths are arguably a consequence of the migration control measures undertaken by countries of destination; if there were legal channels to reach these countries, migrants would not undertake dangerous journeys. In light of this connection, this section will analyse whether, and if so how, these deaths might be in violation of the right to life.

Article 2 of the EU Charter stipulates that 'Everyone has the right to life'. Article 2 of the ECHR stipulates that 'Everyone's right to life shall be protected by law'. The ECtHR has consistently held that Article 2 of the ECHR triggers two types of obligations: negative and positive obligations. By virtue of the operation of Article 52(3) of the EU Charter, Article 2 of the Charter also triggers these two types of obligations. It follows that the EU Charter imposes positive obligations on the EU and its bodies and on the EU Member States to ensure the right to life.[2]

Negative obligations demand that the State refrains from taking measures that infringe on human rights. For example, negative obligations might be breached when an EU Member State's border guards mistreat a migrant and this leads to his/her death. In contrast, positive obligations imply that the State has to take proactive measures to ensure the right to life. Positive obligations are triggered in circumstances when a third party (this could be another State not bound by the ECHR or the Charter, or it could be a private actor such as a smuggler) takes measures that infringe the interests protected by the right. Under these circumstances, the EU Member States or the EU institutions and bodies might be under the positive obligation to *prevent* such infringements by taking protective measures.

Since the EU and the Member States do not take actions that directly kill migrants, but rather it is migrants themselves who embark on dangerous and life-threatening journeys, this section will analyse how migrants' deaths relate to the EU's and the EU Member States' positive obligation to protect the right to life. This implies asking the question of whether the EU and the EU Member States are in violation of human rights law for having failed to take proactive measures to prevent the deaths.

The analysis begins with relevant clarifications as to the circumstances under which this positive obligation is triggered. Clarifications are also provided as to the content of the obligation: what more specifically might this positive obligation require the EU and the EU Member States to do?. These clarifications will be offered in light of the case law of the European Court of Human Rights under Article 2 (the right to life) of the ECHR. The analysis concludes with reflections on how the scope and the content of the positive obligation might be affected by the limited competences of the EU.

Positive obligation to prevent loss of life in the context of any activity

The right to life implies not only an obligation upon States to refrain from arbitrarily killing individuals, but also a positive obligation to take measures to ensure this right. More specifically, the ECtHR has formulated in its case law a positive obligation upon the State to adopt effective regulatory frameworks to prevent loss of life. This positive obligation applies to circumstances that present some general structural risks to the population at large, and where the State is aware or should have been aware of these potentially deadly risks.[3] To this effect, the ECtHR has used the following formulation:

> This positive obligation entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life [...]. This obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake.[4]

The specific content of this positive obligation depends on the particular circumstances in which the risk to life arises. For example, this positive obligation has been found to have been breached in circumstances where individuals have lost their lives due to natural hazards (e.g. mudslides)[5] or industrial activities because the State had not taken preventive protective measures.[6]

Although the positive obligation to protect life applies to all possible circumstances, no unreasonable expectations can be raised against the State in relation to its capacity to protect life. As the ECtHR has clarified, no 'impossible or disproportionate

burden' can be imposed on the State authorities. Consideration is thus due to the choices that these authorities need to make in terms of priorities and resources.[7] Below, the implications of the requirement of not imposing a disproportionate and unreasonable burden on the State will be further considered.

The foreseeability of the risk also plays an important role.[8] The more foreseeable the risk to life is, the more can be expected from the State in terms of taking measures to prevent loss of life.[9] In relation to migrants who lose their lives while trying to reach destination states, there is little doubt that the EU and the EU Member States are aware of the risks to life and, in this sense, the requirement for foreseeability of the risk can be easily fulfilled.

The positive obligation of adopting effective regulatory frameworks to prevent loss of life serves general preventive functions. The Court has observed that 'what is at issue is the obligation to afford general protection to society'.[10] There is no requirement that there is a real and immediate risk for an identifiable individual or identifiable group of individuals.[11] This is important as migrants who lose their lives while being smuggled are not likely to be identifiable in advance.[12]

Application of this positive obligation to the situation of migrants affected by the anti-smuggling and anti-trafficking measures

Empirical uncertainty

The application of the positive obligation of adopting effective regulatory frameworks to prevent loss of life needs to start with the following acknowledgement: there is a certain level of empirical uncertainty concerning the actual reasons as to why people die while being smuggled or trafficked. An argument can be made that if movement across borders were not irregularised by countries of destination, migrants would not resort to smuggling in the first place. Migrants would instead use regular and safe migration channels. An additional argument can also be made to the effect that the anti-smuggling and anti-trafficking measures undertaken by countries of destination make irregular travel even more dangerous (e.g. smugglers

use more dangerous routes or choose to depart in bad weather conditions), which increases the risk to life.[13]

The EU policy documents, however, provide a different picture. In particular, the assumption underlying these documents is that the anti-smuggling and the anti-trafficking measures *discourage* and *prevent* people from migrating through irregular channels.[14] This arguably leads to less people using smuggling, which arguably decreases the risk to life since less people are likely to die while, for example, crossing the sea.

In sum, there are two explanations. According to the first one, more anti-smuggling and anti-trafficking measures and more border controls in general lead to more deaths and higher risk to life. According to the second one, as reflected in the EU policy documents, more border controls and more robust anti-smuggling and anti-trafficking measures lead to fewer deaths and fewer risks.

The first explanation appears to be empirically correct since it seems self-evident that if there were legal routes, it would be less likely that people would risk their lives to reach countries of destination. Normatively, however, the leverage of this explanation is limited since human rights law has to accommodate States' migration control interests. The right to life thus cannot trigger a positive obligation of generally dismantling borders. Any positive obligation in this context has to somehow accommodate States' migration control interests. For this reason, the positive obligation has to be more limited in its scope. This will be further explained below.

As to the second explanation, the one reflected in the EU policy documents, it is difficult to substantiate it with concrete empirical studies that can conclusively prove the assumed causal connections. This is also an important point to which the study will return below.

Positive obligations in the context of self-induced risks and unlawful activities

The assessment as to whether it is reasonable to expect the destination States to protect migrants' lives, might be influenced by two other initial considerations. First, migrants themselves knowingly engage in life-endangering activities (e.g. smuggling by unseaworthy boats), which might give a basis for the argument that the situations within which life is lost are not entirely within the control of countries of destination. Rather, migrants themselves create risks for their lives. Second,

migrants expose themselves to risk when they engage in unlawful activities (i.e. unauthorised border crossings).

In relation to the first consideration, it is important to highlight that the ECtHR's case law under Article 2 is clear to the effect that even if a person himself/herself creates a risk for his/her life (e.g. suicide,[15] choosing to reside in a dangerous place[16]), States still have a positive obligation to prevent loss of life. The contribution of the person to the creation of the risk might be a relevant factor in the overall assessment of whether it was reasonable for the State to take protective measures, but this contribution cannot negate the existence of a positive obligation to prevent loss of life. What is, however, specific about migrants who might lose their lives in the context of migration control is that they take risks to defy States' migration control prerogatives. In other words, migrants take risks to break the law.

This situation seems similar to that which transpired in the case of *Öneryildiz v Turkey* involving an explosion at a rubbish tip, as a result of which many people lost their lives. Their relatives argued before the ECtHR that Turkey failed to take measures to prevent this loss of life and was therefore in breach of Article 2 of the ECHR. In its defence, Turkey argued that the affected individuals 'knowingly chose to break the law and live in the vicinity of the rubbish tip'.[17] The Court observed that it was, in fact, the Turkish authorities that had a consistent policy to encourage people to reside in the proximity of the dangerous rubbish tip by not applying the relevant town-planning regulations. In other words, the Turkish authorities remained passive in the face of unlawful actions.[18] This passivity by the State was used in the Court's reasoning to find Turkey in violation of Article 2 of the ECHR.

If the same reasoning is applied to the migration context, it needs to be highlighted that countries of destination have not remained passive in the face of unlawful actions that breach their immigration legislation. Rather, the contrary is true. They have made it very clear that they do not tolerate these actions. The EU and the EU Member States have also conducted information and awareness-raising campaigns to warn individuals of the dangers associated with human smuggling.

The question that arises, then, is whether destination States should have a positive obligation to prevent loss of life in relation to activities aimed at circumventing legitimate immigration legislation. The answer must be in the affirmative since the Court has said the positive obligation to protect life applies 'in the context of any activity'. This must then also include illegal activities by the victim. After all, States are under the obligation to ensure the right to life of criminals or suspected criminals in the

course of efforts to apprehend them or to prevent their criminal activities.[19] This analogy should not be understood to the effect that the activities in which migrants engage (i.e. using the services of human smugglers) are in any way comparable to those of criminals.[20] Rather, the analogy is utilised to emphasise the point that States are under the positive obligation to protect the right to life even when the affected individuals engage in unlawful activities.

The immigration control interests of States, however, emerge as a relevant consideration in the determination as to what *reasonable* measures might be expected from States to protect the right to life.

The test of reasonableness

The ECtHR has consistently reiterated that 'the positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities'.[21] The scope of positive obligations cannot therefore be unreasonable. When the ECtHR refers to reasonableness in the context of positive obligations, it has in mind public interests – including public policy consideration, budgetary concerns and the rights of others – as factors that might compete with the interests of the individuals in need of protection.[22]

It follows that any protective measures to ensure the right to life have to be reasonable. This means that the protective measures cannot impose disproportionate burden on the destination States. In light of this reasonableness standard, it is questionable whether states' positive obligations corresponding to the right to life can be so far reaching as to demand from destination states that they *completely* abandon their immigration control prerogatives.

States' migration control interests will likely play a role in the assessment whether any measures alternative to the one currently adopted by the EU are reasonable and proportionate. Any alternative measures (e.g. opening legal migration channels so that people do not have to use smuggling), might undermine destination states' entitlement to control their borders.

Perhaps it is possible to find alternative measures that do not imply complete dismantling of destination states' immigration control prerogatives. More specifically, an argument can be made that the anti-smuggling and anti-trafficking measures need to be tailored to the specific situation of asylum-seekers who have the right to seek asylum.[23] Asylum seekers might face the stark choice between risking their

lives by using smuggling services or risking their lives (or risking other severe forms of abuses) by remaining in countries of origin or transit.[24] It is questionable, however, whether asylum seekers have the right to seek asylum in a country of their choice that might correspond to a positive obligation upon this specific country to ensure that its immigration control measures prevent loss of life.

An asylum seeker, however, might be in a situation where, practically speaking, there is only one destination country that can be approached for asylum and that country might have to undertake measures to ensure the life of this person. This was precisely the situation depicted by the Advocate General Mengozzi in his Opinion to the *X and X v Belgium* case.[25] The case was about a family from Aleppo, Syria, that applied for a humanitarian visa at the Belgium consulate in Beirut, Lebanon. Advocate General Mengozzi observed:

> Frankly, what alternative did the applicants in the main proceedings have? Stay in Syria? Out of question. Put themselves at the mercy of unscrupulous smugglers, risking their lives in doing so, in order to attempt to reach Italy or Greece? Intolerable. Resign themselves to becoming illegal refugees in Lebanon, with no prospect for international protection, even running the risk of being returned to Syria? Unacceptable.[26]

Mengozzi added that offering a legal access route to international protection 'makes it possible, at least partially, to prevent persons seeking such protection, including in particular women and children, being snatched and exploited by criminal networks smuggling and trafficking migrants'.[27]

In sum, the existence of a legal route (e.g. the possibility of applying for a humanitarian visa) might be an alternative measure that has a real prospect of ensuring the right to life. At the same time, this measure might accommodate destination States' migration control concerns because these states will determine who will be offered this option and under what circumstances. In this sense, it might be a reasonable measure that strikes a fair balance between the competing interests.

Choice of means to fulfil positive obligations and the assessment of alternative measures

The objective of ensuring the right to life can be attained through different means and measures. In this respect, the ECtHR has consistently observed that

> As to the choice of particular measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation.[28]

It follows that states have at their disposal different possible means/measures to ensure the right to life.[29] The margin of appreciation left to States concerning how to fulfil the positive obligation gives a certain leeway to States. This might undermine the argument that States have to abandon their current border control measures and opt for other alternative measures (e.g. opening legal migration channels so that people do not have to use smuggling, or intensification of search and rescue operations).

However, whichever choices States make in terms of measures for ensuring the right to life, these measures of protection have to be effective. The ECtHR has referred to the standard of 'real prospect'.[30] This means that for States to comply with their positive obligation, the chosen measures must have a real prospect of preventing risks to life. At this point, the problem of empirical uncertainty re-emerges. In this respect, the following available information is relevant. The Commission has reported that

> While the number of deaths in the Mediterranean has continued to decrease since 2016, with the efforts of the EU, Member States and other partners, the smugglers' business models continue to mean that sea crossings claim lives. Nearly 2 300 died in 2018 compared to over 3 100 in 2017, and over 220 people lost their lives to date in 2019 [6 March 2019].[31]

It is difficult to know, however, the reasons for the reported decrease. The decrease might be due to the effectiveness of the anti-smuggling and anti-trafficking measures undertaken in cooperation with countries of origin and transit. It might be also due to the decrease in the number of people attempting to make the journey, which might also mean that more people are contained in countries like Libya, where the conditions might be equally risky.

An alternative way of assessing the available data is also possible. The data might be looked at not in terms of absolute numbers, but in terms of death rates per number of people attempting the journey or arriving in Europe. UNHCR has reported that this death rate has sharply increased. For example, in 2015 one death was reported

for every 269 arrivals, in 2016 one death for every 71 arrivals, in 2017 one death for every 55 arrivals and in 2018 one death for every 51 arrivals.[32] This means that the risk of dying for every migrant who attempts the journey might have increased. Looked from this perspective, the measures chosen by the EU to protect life are not effective.

Although States can choose from among various measures that have a real prospect to ensure the right to life, it is expected that the State will assess alternative measures and the prospects that each measure holds. In *Budayeva v Russia*, the Court observed that the State is expected to come forward and assert whether it had envisioned 'other solutions to ensure the safety' of the population.[33] Accordingly, the burden here was placed on the State (i.e. Russia) to show what other possible measures it had taken. In *Kolyadenko and Others v Russia*, the onus was placed on the State to explain how any protective measures undertaken were relevant and efficient in alleviating the harm sustained by the applicant.[34] It follows thus that States are expected to identify different protective measures and to assess their effectiveness.

This assessment can be hampered by epistemic uncertainty. This implies that it might not be possible to empirically prove (e.g. with reference to concrete date and scientific studies) which protective measure might be more effective. In relation to this problem, the ECtHR has stated that

> Except in cases of manifest arbitrariness or error, it is not its function to call into question the findings of fact made by the domestic authorities. This is particularly true in relation to scientific expert assessments, which by definition call for specific and detailed knowledge of the subject.[35]

However, the problem of epistemic uncertainty cannot result in a blind belief that the measures undertaken by the State are effective and sufficient. Although the ECtHR might not be in a position to assess alternatives due to scientific and epistemic uncertainties, it can still assess whether the decision-making body at national level has considered alternatives against the background of the existing scientific studies.[36]

When this is applied to the migration context, it means that for the EU and the Member States to comply with their positive obligation to ensure the right to life, they need to initiate studies to assess the effectiveness of their current policies and

to investigate whether alternative measures might offer reasonable alternatives to the current policies.

An additional nuance can be also added here. The graver the consequences from not extending protection and, accordingly, the more seriously persons are affected, the more empirical information will have to be submitted that extension of protection will be too burdensome for destination States' interests (i.e. too burdensome in the sense of too detrimental to destination States' migration control interests).[37] In addition, any empirical evidence substantiating an argument advanced by the State that a particular means of protection is ineffective, unreasonable or too burdensome will have to be more reliable.

When these principles are applied to the loss of life in the context of migration control, the following emerges. The individuals are affected in a very severe way, i.e. they risk losing their lives. This implies that States have to submit much more reliable evidence to support the position that the current measures of departure prevention and containment are effective for ensuring the right to life. States will also have to put forward more reliable information that any alternative measures (e.g. opening legal channels and offering humanitarian visas) will be too burdensome and unreasonable.

Positive obligations upon EU institutions/ bodies in light of their limited competences

The imposition of any positive obligations upon the EU institutions and bodies requires special consideration. This is due to their limited competences. More specifically, a difficulty that might transpire is how to reconcile the imposition of positive obligations upon the EU and its bodies with the principle of attributed competence.[38] Preventing breaches of human rights may require the EU to take actions that go beyond its existing competence.[39] In other words, positive obligations might require new actions, while at the same time the EU might not have a legal basis and accordingly a competence to undertake such actions.

Article 51 of the EU Charter and Article 6(1) of the TEU are clear to the effect that the EU Charter does not extend the competences of the EU as defined in the Treaties. This means that positive obligations that might be required for the EU bodies to

ensure the rights enshrined in the Charter cannot be so expansive as to go beyond the EU competences. It follows that the EU Charter imposes positive obligations on the EU and its bodies only within the limits of their competences.[40] In other words, for a positive obligation to arise under the EU Charter, this obligation needs to be based on a specific competence conferred upon the EU and EU bodies.

An example of how this can be done emerges from the *Ledra Advertising* judgment, where an action was brought against the EU Commission and the European Central Bank for their role played in the process of the adoption of a memorandum of understanding concluded between Cyprus and the European Stability Mechanism. This memorandum arguably breached the right to property as protected by the EU Charter. The Court of Justice clarified that the Commission contributed to a breach of Union law, 'by including unlawful paragraphs in the memorandum of understanding, or by failing to prevent that'.[41] The Court of Justice held that the Commission is under an obligation to 'ensure that [...] a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter.'[42] It added that the Commission should 'refrain from signing a memorandum of understanding whose consistency with EU law it doubts'.[43] To establish these positive obligations of the Commission, the Court of Justice relied on the Commission's supervisory duties under Article 17(1) of the Treaty on the Functions of the EU.[44] It follows that Union bodies have to ensure fundamental rights whenever they have a supervisory obligation.[45]

In light of the previous clarifications, what positive obligations might EU bodies and institutions have to ensure the right to life? Frontex can be taken as an example to respond to this question. Frontex is required to protect individuals to the extent that it can do so within the competences that have been conferred upon it. Regulation 2016/1624 on the European Border and Coast Guard provides that Frontex has the duty to monitor fundamental rights[46] and that it has the duty to 'draw up, further develop and implement a fundamental rights strategy including an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency'.[47] The positive obligation of initiating studies to assess the effectiveness of the current anti-smuggling and anti-trafficking measures and of investigating whether alternative measures might offer reasonable alternatives, can easily fit within the Frontex's competence to monitor the respect for fundamental rights in all its activities.

Conclusion

According to the EU policy documents, '[s]aving lives of people in distress at sea is *a primary* goal of EU action in relation to managing the EU external borders [emphasis added]'.[48] The chosen means for achieving this objective is taking measures against human smuggling and human trafficking. However, it has remained empirically questionable whether the chosen means actually ensure the right to life of the affected migrants. Various reports have pointed out that the anti-smuggling and anti-trafficking measures in fact lead to higher death rates and increase the risks for migrants. The effectiveness of the chosen means is therefore in doubt and alternative means need to be considered. In light of EU Member States' prerogative to control their borders, these alternative means cannot be as far reaching as to require the dismantling of border controls. Any alternative means will have to accommodate States' migration control interests. A possible alternative means in this respect might be offering a safe route to those who might be in need of international protection.

Equally important, for the EU and its Member States to comply with their positive obligation to ensure the right to life, they need to initiate studies to assess to what extent the current anti-smuggling and anti-trafficking measures effectively ensure the right to life and to what extent any alternative measures (e.g. legal routes to entry) might be too burdensome or unreasonable.

Endnotes Chapter 11.

1 Explanation to Article 52 in the Explanations relating to the Charter of Fundamental Rights.

2 M Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018) 277.

3 Öneryildiz v Turkey [GC] Application No. 48939/99, 30 November 2004, para. 89; *Budayeva and Others v Russia,* Application Numbers 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, paras. 128-9.

4 *Budayeva and Others v Russia,* paras. 129-130.

5 *Budayeva and Others v Russia.*

6 Öneryildiz v Turkey [GC] Application No. 48939/99, 30 November 2004.

7 *Budayeva and Others v Russia,* para. 135.

8 See generally, V Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' *Leiden Journal of International Law* (forthcoming).

9 V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' 18 *Human Rights Law Review* (2018) 309, 315.

10 *Mastromatteo v Italy* [GC] Application 37703/97, 24 October 2002, para. 69.

11 *Mastromatteo v Italy*, para. 39; V Stoyanova, 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the European Convention on Human Rights' *International Journal of Human Rights* (forthcoming).

12 Circumstances can be imagined in which a group of migrants could be identifiable in advance as being at risk. For example, when this group has already managed to depart from the Libyan coast in an unseaworthy boat.

13 Europe's deadly migration strategy. Officials knew EU military operation made Mediterranean crossing more dangerous ‹https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/ ›

14 Communication from the Commission Progress Report on the Implementation of the European Agenda on Migration COM(2019) 126 final, 6 March 2019, page 12.

15 *Keenan v United Kingdom*, Application No. 27229/95, Judgment of 3 April 2001, para. 96.

16 See, for example, Öneryildiz v Turkey, a case involving individuals who resided close to a garbage collection point.

17 Öneryildiz v Turkey, para. 103.

18 Öneryildiz v Turkey, paras. 104-106.

19 *McCann and Others v the United Kingdom* [GC] Application No. 18984/91, 27 September 1995.

20 Article 5 of the UN Smuggling Protocol says that 'Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article6 of this Protocol [the conduct of human smuggling].'

21 *O'Keeffe v Ireland* [GC] Application No. 35810/09, 28 January 2014, para. 144.

22 V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR' 18 *Human Rights Law Review* (2018) 309, 228.

23 Article 18, EU Charter.

24 The EU Commission itself has acknowledged 'the appalling conditions faced by many migrants and refugees' in Libya, COM(2019) 126 final, 6 March 2019, page 6.

25 Case C-638/16 PPU, *X and X v Belgium,* Opinion of AG Mengozzi of 7 February 2017, paras. 157 and 173. The Court of Justice did not rule on the issue since it found the case to be outside the scope of European law and thus the Charter was found to be not applicable. See Section 9.

26 Opinion of AG Mengozzi in *X and X v Belgium*, para. 157.

27 Opinion of AG Mengozzi in *X and X v Belgium*, para. 173.

28 *Budayeva and Others v Russia*, para. 134. Öneryildiz v Turkey, para. 107; *Kolaydenko and Others v Russia*, Application No. 17423/05, 28 February 2012, para. 160; *Cevrioglu v Turkey*, Application 69546/12, 4 October 2016, para. 55; *Fadeyeva v Russia*, Application No. 55723/00, 9 June 2005, para. 96.

29 V Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' 87(3) *Nordic Journal of International Law* (2018) 344.

30 V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR' 18 *Human Rights Law Review* (2018) 309.

31 Communication from the Commission Progress Report on the Implementation of the European Agenda on Migration COM(2019) 126 final, 6 March 2019, 4.

32 Desperate Journeys. Refugees and Migrants Arriving in Europe and at Europe's Border January–December 2018 (UNHCR 2019) ‹https://data2.unhcr.org/en/documents/download/67712#_gl=1*ot4x7a*_ga*MTA3ODU2MzQ2OC4xNDkyNjc5MDMw*_gid*NjU5OTQwMjE1LjE1NTIoNjE4ODE›

33 *Budayeva and Others v Russia*, para.156.

34 *Kolyadenko and Others v Russia,* para. 167.

35 *Lopes De Sousa Fernandes v Portugal,* Application No. 56080/13, 15 December 2015, para. 109.

36 See, for example, the approach in *Wenner v Germnay*, Application No. 62303/13, 1 September 2016, paras. 58 and 62.

37 R Alexy, 'The Weight Formula' in J Stelmach, B Bartoszek and W Zaluski (eds), *Studies in the Philosophy of Law: Frontiers of the Economic Analysis of Law* (2007) 25; J Rivers, 'Proportionality and Variable Intensity of Review' 36 *Cambridge Law Journal* (2006) 174, 205; see also J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill 2009) 191.

38 M Fink *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018) 278.

39 M Beijer, *The Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017) 112, 179-220.

40 M Fink *Frontex and Human Rights* 278.

41 C-8/15 P and C-10/15 *Ledra Advertising v Commission and ECB*, 20 September 2016, paras. 63-68.

42 *Ledra Advertising* para. 67.

43 *Ledra Advertising* paras. 59, 67.

44 *Ledra Advertising* paras. 59, 67

45 M Fink Frontex and Human Rights 284-288.

46 Article 22(3)(b), Regulation 2016/1624 on the European Border and Coast Guard of 14 September 2016.

47 Article 34(1), Regulation 2016/1624.

48 COM(2019) 126 final, 6 March 2019, 12.

12. The right to asylum: Article 18 of the EU Charter

Besides the right to life, the measures against human smuggling and human trafficking implicate the right to asylum, as enshrined in Article 18 of the EU Charter:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 25 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union.

No binding human rights treaty with a global scope (such as the International Covenant on Civil and Political Rights or the UN Convention against Torture) enshrines a right to asylum. Neither does the ECHR. The EU Charter is therefore specific in this respect.

The right to asylum triggers two issues that will be reviewed below. First, the content of the right needs to be clarified and the question of how the anti-smuggling and anti-trafficking measures negatively affect this content needs to be addressed. Second, an answer is also needed to the question of whether, and if so under what conditions, the right to asylum can be limited.

The definitional scope of the right to asylum as including the right to leave to seek asylum

The first question regarding Article 18 of the EU Charter to be clarified concerns the *content* of the right to asylum. The right includes, as a minimum, protection from *refoulement*.[1] This means the right to asylum includes, at least, a right not to be sent to a place where there is a real risk that one might be subjected to ill-treatment.[2] This

is an expression of the principle of *non-refoulement* that is also enshrined in Article 19(2) of the Charter: 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. According to the Explanations to the Charter, Article 19(2) of the Charter 'incorporates the relevant case law from the European Court of Human Rights regarding Article 3 of the ECHR.' Article 3 of the ECHR stipulates that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment' and has been a basis for a substantial body of case law by the ECtHR in application of the principle of *non-refoulement*.

The right to asylum, however, cannot be limited to protection from *refoulement*. This right must have some additional independent substance and meaning different from protection from *refoulement*. In principle, each provision of the Charter, including Article 18, must have its own independent substance; otherwise, it would be rendered redundant.

The starting point for clarifying this additional substance of the right to asylum is Article 14(1) of the Universal Declaration of Human Rights, which stipulates that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' The right to seek asylum is of particular relevance here since it implies that an individual should have the possibility to leave a country so that he or she can seek asylum.[3] This is important since, as already mentioned in Part II above, the effects of the cooperation-based measures is containment of people in countries of origin and transit and preventing these people from leaving these countries.

Here, it should be mentioned that while the right to leave any country is enshrined in the ECHR,[4] it is absent from the EU Charter.[5] However, it can be argued that the Charter implicitly protects the right to leave as an indispensable part of the right to asylum.[6]

It needs to be also acknowledged that the right to asylum might include other elements besides leaving and *non-refoulement*. These elements might include ensuring the possibility to make an asylum claim, ensuring the possibility to arrive at a point to make such a claim, admitting the person to the territory of a country for making an asylum claim or allowing the person to remain in this territory.[7] There is a huge likelihood that *non-refoulement* cannot practically be ensured if asylum seekers cannot make asylum claims and if such claims are not assessed by the responsible authorities in the country of destination.[8] These other elements that

might be implied in the right to asylum will not be further considered here. Rather, the analysis will focus on leaving as an element of the right to asylum since this element is powerfully affected by the anti-smuggling and anti-trafficking measures.

Permissible limitations on the right to leave

Even if Article 18 of the Charter is applicable and it is determined that the cooperation-based measures infringe the right to asylum by preventing people from leaving countries of origin and transit, this is still not enough for concluding that the EU and the EU Member States have violated the Charter. In light of Article 52(1) of the Charter, most of the rights in the Charter can be subject to limitations. More specifically, Article 52(1) of the Charter stipulates that

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The question that emerges, then, is whether the right to asylum can be subject to limitations. If it can, are the requirements embodied in Article 52(1) of the Charter fulfilled so that these limitations can be assessed as permissible?

References to other instruments might be helpful to initially engage with the question of whether the right to asylum can be limited. For example, Article 14(2) of the UDHR allows one particular limitation to the effect that the right to seek asylum 'may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'. The Refugee Convention allows for a similar limitation.[9] In contrast, the protection against *non-refoulement* under Article 3 ECHR is of an absolute nature and thus cannot be subject to limitations.[10]

As already suggested, however, the right to asylum has other elements apart from *non-refoulement*. Such an element is the right to leave any country to seek asylum. The right to leave any country can be subject to permissible limitations.[11] It follows,

then, that the right to leave to seek asylum might be similarly subject to limitations.

It could, however, be objected that the right to leave to seek asylum, as protected by Article 18 of the Charter, cannot be subject to the same limitations as the right to leave for *whatever other reason*.[12] In this sense, the right to leave to seek asylum is of a more special nature than the right to leave more generally. Because of this specificity, the right to leave to seek asylum is arguably absolute and thus not subject to any limitations. Here, the argument is that because of the close interaction between the right to leave to seek asylum and *non-refoulement*, the right to leave to seek asylum is transformed into an absolute right.[13] If it is an absolute right, states would be prohibited from limiting this right under any circumstances.

The absolute nature of the right to leave to seek asylum has not been tested before a court. Neither has the Court of Justice or the ECtHR delivered a ruling to this effect. Perhaps the most relevant judgment in this context is *Regina v Immigration Officer at Prague Airport and Another,* where the House of Lords in the United Kingdom ruled that the Refugee Convention does not address the issue of how refuges leave countries of origin and come within the jurisdiction of countries of destination.[14] This ruling, however, was limited to the Refugee Convention and might not have wider implications.

Without prejudice to the possibility for developments in favour of the acknowledgment of the absolute nature of the right to leave to seek asylum, the subsequent analysis will proceed under the understanding that the right to leave to seek asylum can be limited. It is important then to focus on when any limitations upon this right are acceptable and thus in accordance with human rights law. The assessment of these limitations will be influenced by the consideration that the purpose of leaving is seeking asylum.

Any limitations upon the right have to comply with certain requirements. To this effect, Article 2(3) of Protocol 4 to the European Convention on Human Rights (ECHR) stipulates that:

> No restrictions shall be placed on the exercise of these rights [including the right to leave any country] other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The requirements imposed by the ECHR so that any limitations on the right to leave are in compliance with human rights law are similar to those expressed in the previously quoted Article 52(1) of the Charter. These conditions can be summarised as legality, pursuance of legitimate objectives, and proportionality.

Legality

Article 52(1) of the EU Charter stipulates that any limitation of rights has to be 'provided for by law'. In the context of the ECHR, this same criterion (formulated as 'in accordance with the law') has been interpreted to the effect that laws that envision limitations of rights must afford adequate legal protection and the legal certainty necessary to prevent arbitrary interferences by public authorities. In particular, the ECtHR has held that

> [...] it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that ... [the national legislation] must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.[15]

It follows that any measure that limits rights has to be based on legislation that is 'sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations'.[16]

It is relatively easy to conclude that the anti-smuggling and anti-trafficking measures discussed in Part II do not meet the requirement of legality. In light of the informal nature of the measures, as discussed in section 6, they are not based on precise legal provisions.

If measures undertaken by States that limit human rights do not meet the requirement of legality, these measures can be declared outright to be in violation of human rights law. For the sake of completeness, however, this study will also assess whether the measures pursue legitimate objectives, and whether the measures are necessary and proportionate in light of their negative impact on individuals.

What legitimate objectives do the measures pursue?

Immigration control, including prevention of the arrival of migrants, can be considered as a legitimate objective that countries of destination pursue when they take

measures to limit the right to leave. In this sense, immigration control can be considered as an objective of 'general interest recognised by the Union' in the sense of Article 52(1) of the Charter. The achievement of this objective might require taking measures that restrict human rights, including the right to leave any country to seek asylum.

In the EU Commission's policy documents, the objective of saving lives of people is presented as 'a primary goal of EU action in relation to managing the EU external borders'.[17] This objective that can also be assessed as legitimate and will be therefore considered below.

The EU policy documents also refer to the objective of 'fighting smuggling networks' and fighting human trafficking.[18] In light of the clarifications in Section 3 of this study that the concept of human smuggling is used in an overbroad way, it can be assumed that this objective is subsumed by the objective of preventing arrivals.

In addition, it needs to be considered that smuggling as a service is driven by demand, and for any measure to be assessed as suitable, it will have to address the demand (i.e. the demand for clandestine movement). This demand is linked with the root causes of the migration flows, i.e. conflict and instability in countries of origin, economic inequality, lack of security, the demographics in these countries (e.g. overpopulation), weak levels of democracy and natural disasters; all of these can be considered as push factors that will continue to create migration pressures.[19]

As to the objective of countering human trafficking, namely deceptive movement 'for the purpose of exploitation',[20] no information has been made available that those who organise migrants' journeys do so 'for the purpose of exploitation.' In general, those who embark on the dangerous journeys do so willingly.

Are the measures necessary for achieving the objectives?

Any measures that limit human rights have to be necessary. A measure is necessary when the State could not have undertaken another measure that is more protective to the right to leave and at least as effective for the achievement of the objective of immigration control as the measure already undertaken.[21] At this point, it needs to be admitted that it might be difficult to propose a measure that achieves the objective of preventing arrivals that is as effective as the measure of preventing

departures. For example, after the establishment of cooperation with Libya, which involved preventing departures and pulling back to Libya those migrants intercepted by the Libyan coastal guards in the extended Libyan Search and Rescue Region in the Mediterranean Sea, the number of people departing from Libya and arriving to Italy substantially decreased.[22]

At the same time, the number of arrivals in Spain through the so-called Western Mediterranean/Atlantic route increased.[23] Therefore, it appears questionable whether the measures achieve the objective; even if they do, it appears to be with limited effectiveness. This is important because it means that any alternative measures have to have a similarly low degree of effectiveness as concerns achieving the objective of preventing arrivals. Such alternative measures (e.g. opening legal channels for entering the EU to apply for asylum) will guarantee the right to leave and, at the same time, might lead to the same number of people entering the EU as under the current measures.

As to the objective of preventing loss of life, it is relatively easy to propose alternative measures that guarantee the right to leave and at the same time more effectively save lives. Opening legal channels for entering the EU to apply for asylum easily comes to mind as such an alternative measure.

It follows that the measures might not meet the test of necessity, which would make them contrary to human rights law. For the sake of completeness, however, the next section will enquire into the final stage of the assessment: whether limitations upon the right to leave to seek asylum are permissible. This final stage implies direct balancing of the competing interests: the interests of the affected individual whose departure is prevented against the destination States' interests to control borders.

Are the measures proportionate?

If it is accepted that the measures of departure prevention are necessary to achieve the objective of migration control, the final question that needs to be asked is the following: Are these measures proportionate in light of the importance of the individual interests affected? The test of proportionality requires that the conflicting interests (those of the affected individuals and those of the countries of destination to prevent arrivals) be balanced against each other. To do this balancing, the importance of the individuals' interests and the importance of the EU Member States' interests need to be clarified.

The importance of the affected individuals' interests

The importance of the individuals' interests can be clearly discerned: the affected individuals want to leave countries with endemic human rights law violations (e.g. Libya). Many of these individuals are asylum seekers and, as Moreno-Lax has argued,

> '[…] the aggregate *right to leave to seek asylum* entails a stricter limit on State discretion than the right to leave operating alone. Public order considerations will play a lesser role, if any at all, when constraining the right to leave of potential refugees, as the underlying motives of flight (and related obligations of *non-refoulement*) must be taken into account [emphasis in the original].[24]

In this context, UNHCR has reported that

> An estimated third of people who arrived in Europe via the Central Mediterranean route in 2018 were potentially in need of international protection, along with approximately half of people who arrived via the Eastern Mediterranean sea route, and around ten percent of those who arrived in Spain via the Western Mediterranean route.[25]

It also needs to be highlighted that the cooperation-based measures of migration control do not differentiate between asylum seekers and other migrants. Rather, these measures are applied indiscriminately. An extra weight in favour of the affected individuals' interests is added by the fact that the Refugee Convention acknowledges that asylum seekers can use illegal means to enter countries of destinations, for which they should not be punished.[26]

The proportionality of any limitation could also be dependent on the possibilities that the affected individuals have to access alternative countries of asylum (countries different from the EU Member States). Such possibilities, however, are very limited (practically or formally it might be difficult to access to protection procedures in other countries and possibilities for resettlement are equally restricted). These possibilities need to be assessed in light of the fact that other countries are not likely to offer protection comparable to the protection that individuals expect to find in the EU Member States.[27]

The importance of the EU Member States' interests

The EU Member States' interests are to preserve the integrity of their borders and to limit the number of arriving migrants. These interests can be linked with the protection and the preservation of the rights of the individuals who are citizens or residents of the EU. The EU Member States' right to exercise immigration control can be explained as follows:

> The effectiveness of the state as a guarantor of rights and freedoms presupposes the idea of a bounded community. Thus, immigration control is a means to secure not only the interests, but also the human rights of citizens and denizens. Therefore, the term 'immigration control' contains a cluster of individual rights, which would run the risk of being infringed if the state entrusted with ensuring them were weakened.[28]

The balancing between the interests of the affected migrants and the EU Member States' interests is a very complex exercise for various reasons. First, if the measures of containment were dismantled, there is little certainty as to the number of migrants who will attempt to enter into the EU Member States, apply for asylum and be successfully recognised as in need of protection. Second, if the measures of containment were dismantled, there is little clarity as to which groups of citizens and denizens in the EU Member States might be negatively affected, and what these effects might be over the short and long terms.

Similarly to what was suggested in Section 11 in the context of the right to life, this unpredictability cannot lead to tipping the balance entirely in favour of the destination States' interests. Without dismantling their migration control apparatus, these States could take measures that accommodate their interests and the affected individuals' interests in a balanced way. Offering legal channels for leaving in search of asylum or offering resettlement possibilities could be examples of such accommodating measures.

Conclusion

Since the effects of the anti-smuggling and anti-trafficking measures are containment of people in countries of origin and transit and preventing people from leaving, these measures interfere with the right to asylum. An integral element of this right is the right to leave to seek asylum.

Section 12 of the study examined whether this interference with the right to seek asylum is permissible. To be permissible, the measures that interfere with the right have to be 'provided by law'. In light of the informal nature of the arrangements that form the basis for the undertaken measures, this requirement does not seem to have been met. The measures can thus be declared contrary to human rights law, based solely on the failure to meet the 'provided by law' requirement.

To be permissible, the measures that interfere with the right have to also pursue legitimate objectives. It can be accepted that preserving the integrity of EU Member State borders by preventing arrivals is a legitimate objective. The objective of saving lives can also be accepted as legitimate.

It can, however, be questioned whether the chosen measures for achieving these objectives are necessary. There seem to be alternative measures that, in practice, might lead to the same number of people entering the EU yet at the same time better guarantee the right to leave to seek asylum. An example of such an alternative is offering legal and safe channels for exiting countries of origin and transit so that individuals can apply for asylum in EU Member States.

Endnotes Chapter 12.

1 M den Heijer, 'Right to Asylum' in S Peers, T Hervey, J Kenner and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 519, 522 and 531.

2 M Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' 27(3) *Refugee Survey Quarterly* (2008) 33. The Court of Justice has not provided a clear answer as to the content of the right to asylum. For example, in Case C-528/11 *Xuheyr Freyeh Halaf* [2012] OJ C 133, 30 May 2013, the Court of Justice insisted that there is no need to answer the question as to the content of the right to asylum.

3 'In order to "seek" asylum, a refugee must be able to present himself before the appropriate authorities of the country of refuge; by definition, this requirement presupposes that he must be able to leave his own country', H Hannum, *The Right to Leave and Return in International Law* (Martinus Nijhoff Publishing1987) 50. The right to seek asylum necessarily implies a right to leave. V Moreno-Lax, *Accessing Asylum in Europe* 348.

4 Article 2(2) Protocol 4, ECHR.

5 Article 45 of the Charter, which enshrines the right to freedom of movement and of residence, is limited to EU citizens.

6 An argument can be also made that the right to leave any country forms part of the general principles of EU law. The Court of Justice has not delivered a specific judgment to this effect. However, more generally the Court of Justice has confirmed that even if a right is not listed in the EU Charter, it might still be protected purely as part of the general principles of EU law. S Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2016) 95.

7 M Gil-Bazo, 'Asylum as a General Principle of International Law' 27(1) *International Journal of Refugee Law* (2015) 3.

8 M Giuffre, 'Access to Asylum at Sea? *Non-refoulement* and a Comprehensive Approach to Extraterritorial Human Rights Obligations' in V Moreno Lax and Papastavridis (eds) *Boat Refugees and Migrants at Sea* (Brill 2016) 248; V Moreno-Lax *Accessing Asylum in Europe* 379.

9 Article 33(2) of the Refugee Convention.

10 *Saadi v Italy* [GC] Application No. 37201/06, 28 February 2008.

11 Article 2(3) Protocol 4, ECHR.

12 V Moreno-Lax, *Accessing Asylum in Europe* 354 and 391. M den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012)156-7.

13 V Moreno-Lax, *Accessing Asylum in Europe* 391-2.

14 *Regina v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004; J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005).

15 *Amuur v France*, Application No. 19776/92, 25 June 1996, paras. 50 and 53.

16 *Georg Dörr and Ibrahim Ünal*, Case C-136/03, 2 June 2005, para. 52.

17 COM(2019) 126 final, 6 March 2019, 12.

18 COM(2019) 126 final, 6 March 2019, 10.

19 *EU Cooperation with third countries in the field of migration. Study for the LIBE Committee* (European Parliament 2015) 16.

20 V Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 43.

21 E Brems and L Lavrysen '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' 15 *Human Rights Law Review* (2015) 139; G Gerards 'How to Improve the Necessity Test of the European Court of Human Rights' 11(2) *International Journal of Constitutional Law* (2013) 466; J Christoffersen *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill 2009) 114; M Kumm 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' 3(2) *International Journal of Constitutional Law* (2004) 574, 580.

22 UNHCR has reported that the number of arrivals to Italy decreased by 80% in 2018 in comparison with 2017. Desperate Journeys. Refugees and Migrants Arriving in Europe and at Europe's Border January–December 2018 (UNHCR 2019) 7; COM(2019) 126 final, 6 March 2019, 3.

23 Desperate Journeys. Refugees and Migrants Arriving in Europe and at Europe's Border January–December 2018 (UNHCR 2019) 7; COM(2019) 126 final, 6 March 2019, 3.

24 V Moreno-Lax, *Accessing Asylum in Europe* 349.

25 Desperate Journeys. Refugees and Migrants Arriving in Europe and at Europe's Border January–December 2018 (UNHCR 2019) 9.

26 Article 31, Refugee Convention.

27 V Moreno-Lax, *Accessing Asylum in Europe* 360.

28 G Noll, *Negotiation Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000) 489-490.

Part V Conclusions and recommendations

Summary of conclusions

This study scrutinised the compatibility of the anti-trafficking and anti-smuggling measures with the EU Charter of Fundamental Rights. The findings can be structured along the following conclusions.

1. The existing legal definitions of human smuggling and human trafficking can and have been interpreted in an overly expansive way (e.g. humanitarian assistance can be legally labelled as human smuggling; there is no clarity as to the severity threshold for determining whether a migrant has been deceived for the purpose of 'exploitation'). This raises questions as to what phenomena, more specifically, the EU and the EU Member States are attempting to prevent and 'fight'. This, in turn, raises serious doubts as to whether the 'fight' against human trafficking and human smuggling is in fact aimed at preventing exploitation of individuals and preventing loss of life. It seems instead that this 'fight', while cloaked in humanitarian justifications, may rather be waged in service of the EU's interests to prevent departures and arrivals.

2. The multi-level structure of the EU actions against human smuggling and human trafficking, and their informality, makes it difficult to hold the EU or its Member States responsible for possible harm inflicted upon individuals. This difficulty is exacerbated in the external field due to the involvement of non-EU actors (i.e. countries of origin and transit) and the fact that those affected are generally non-EU citizens who are outside EU territory.

3. The EU Charter of Fundamental Rights can partially resolve these difficulties. The

Charter applies to the EU institutions and bodies even when they act outside the EU legal framework, which means that any informal arrangements with third countries can be scrutinised against the standards of the EU Charter. When these arrangements affect individuals located outside the EU territory, the EU Charter can still be invoked since it does not contain a territorial or jurisdictional limitation.

4. The EU Charter of Fundamental Rights applies to the EU Member States only in relation to their actions in implementation of EU law. The question as to when EU Member States actually implement EU law is fraught with difficulties, which creates uncertainty and grey areas. Leaving this general problem aside, it needs to be considered that when EU Member States make anti-smuggling and anti-trafficking arrangements with third countries to contain the movement of individuals, these arrangements are of an informal nature. This gives a basis for the argument that they are not in implementation of EU law. However, it might also be possible to argue that since there is specific EU law in the area of human smuggling and trafficking, some measures might be considered as being in implementation of EU law. If they are, these measures can be reviewed against the standards of the Charter.

5. The study identified two rights from the EU Charter that are potentially at stake due to the measures of external border control performed by the EU and its Member States aimed at preventing human smuggling and human trafficking. These are the right to life and the right to asylum. The study highlighted the substantive legal obstacles that exist for testing whether the harm caused by the measures can be legally defined as a violation of these two rights. There might be also procedural obstacles (e.g. the conditions for triggering a procedure before the Court of Justice) that have not been covered by the study and remain to be fully explored. The examination of the substantive legal obstacles is of importance since if the anti-trafficking and anti-smuggling measures are not tested against human rights law standards, then we are bound to follow the accepted rhetoric that border controls are in the interest of those being contained.

6. As to the right to life, it has remained empirically questionable whether the chosen means (i.e. anti-smuggling and anti-trafficking measures) actually ensure the right to life of the affected migrants. Various reports have pointed out that the anti-smuggling and anti-trafficking measures in fact lead to more deaths and increase the risks for migrants. Therefore, the effectiveness of the chosen means is in doubt and alternative means need to be considered. In light of the prerogative of

EU Member States to control their borders, these alternative means cannot be as far reaching as to demand the dismantling of border controls. Any alternative means will have to accommodate States' migration control interests. A possible alternative means in this respect might be offering a safe route to those who might be in need of international protection.

Equally important, for the EU and its Member States to comply with their positive obligation to ensure the right to life, they need to initiate studies to assess to what extent the current anti-smuggling and anti-trafficking measures effectively ensure the right to life and to what extent any alternative measures (e.g. legal routes to entry) might be too burdensome or unreasonable.

7. Since the effects of the anti-smuggling and anti-trafficking measures are containment of people in countries of origin and transit and preventing people from leaving, these measures interfere with the right to asylum. An integral element of this right is the right to leave to seek asylum.

To be permissible, the measures that interfere with the right have to be 'provided by law'. In light of the informal nature of the arrangements that form the basis for the undertaken measures, this requirement does not seem to have been met. The measures can thus be declared contrary to human rights law, based solely on the failure to meet the 'provided by law' requirement.

To be permissible, the measures that interfere with the right have to also pursue legitimate objectives. It can be accepted that preserving the integrity of EU Member State borders by preventing arrivals is a legitimate objective. The objective of saving lives can also be accepted as legitimate.

It can be, however, questioned whether the chosen measures for achieving these objectives are necessary. There seems to be alternative measures that, in practice, might lead to the same number of people entering the EU yet at the same time better guarantee the right to leave to seek asylum. An example of such an alternative is offering legal and safe channels for exiting countries of origin and transit so that individuals can apply for asylum in EU Member States.

Policy Recommendations

1. Better understanding of the definitions (Part I)

The legal definitions of human smuggling and human trafficking are ambiguous and have been interpreted in an overly expansive way, which has led to little understanding as to the nature of the phenomenon that the EU and the EU Member States try to address. This understanding needs to be improved for any measures against human trafficking and human smuggling to be effective. Improved understanding also implies that 'human smuggling' and 'human trafficking' should not be constantly rhetorically invoked to justify migration control policies.

2. Reconsidering the definitions so that they reflect severe forms of harm (Part I)

In light of the overly expansive way in which human trafficking and human smuggling are interpreted, a reconsideration is necessary as to the type, nature and severity of harm and wrong that these crimes are meant to reflect. Such a reconsideration should, for example, imply questioning the inclusion of humanitarian assistance within the definition scope of human smuggling.

3. Undertaking complementary measures for ensuring asylum seekers' rights (Part IV)

For the EU and its Member States to truly deliver on their claim that saving lives is a primary goal of the EU actions in relation to the management of the EU external borders, the measures of containing migrants in countries of origin and transit will have to be complemented with other measures. These other measures can ensure safe routes for accessing the EU territory. Any alternative measures (e.g. creating safe and legal channels for existing countries of origin and transit) might lead to the same number of people actually entering the territory of the EU Member States. This possibility needs to be the subject of further study.

4. Strengthening of hard law (Part IV)

Cooperation with third countries in the field of migration should evolve towards greater recourse to hard law, rather than soft law and informal arrangements. This

will ensure that the EU and its Member States' actions in this area can be tested against human rights law standards.

5. Undertaking empirically grounded studies (Part IV)

The EU and its Member States should ensure empirically grounded studies that can demonstrate that the current anti-smuggling and anti-trafficking measures are actually effective for achieving the claimed objectives (i.e. saving lives and preventing arrivals). The EU and its Member States should also ensure empirically grounded studies that can demonstrate whether any alternatives to currently predominating measures would be too burdensome and unreasonable.

Selected Bibliography

International treaties

Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* 22 April 1954

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR

Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* 27 January 1980

United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex I,

U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* 29 September 2003

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001), *entered into force*. 25 December 2003

Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* 28 January 2004

Council of Europe treaties

Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No.005), *entered into force* 3 September 1953

Convention on Action against Trafficking in Human Beings, (ETS No. 197), *entered into force* 1 February 2008

EU legal instruments

Regulation 2016/1624 of 14 September 2016 on the European Border and Coast Guard

Council Decision 2015/778 of 18 May 2015 on the EU military operation in the Southern Central Mediterranean (EUNAVFOR MED)

Directive 2011/36/EU of 5 April 2011 on Preventing and Combating Trafficking in Human

Beings and Protecting its Victims

The Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon,

OJ C 306/1, 17 December 2007, *entered into force* 1 December 2009

The Charter of Fundamental Rights of the European Union, OJ C 364/1, 18 December 2000, entered into force 1 December 2009

Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-country Nationals who are Victims of Trafficking in Human Beings or Who have been the Subject of an Action to Facilitate Illegal Immigration, who Cooperate with the Competent Authorities

Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence OJ L 328/1

Council Directive 2002/90 of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence

Council Directive 2001/51 of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985

Judgments by the Permanent Court of International Justice

S.S. 'Lotus' (France v Turkey), 1927 PCIJ (Ser. A) No.10

Decisions and Judgments by the European Court of Human Rights

Al-Skeini and Others v United Kingdom [GC] Application No. 55721/07, 7 July 2011

Amuur v France, Application No. 19776/92, 25 June 1996

Bankovic and Others v Belgium and Others (Decision) [GC] Application No. 52207/99, 12 December 2001

Budayeva and Others v Russia, Applications No.15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008

Cevrioglu v Turkey, Application No. 69546/12, 4 October 2016

C.N. and V. v France Application No. 67724/09, 11 October 2012

Fadeyeva v Russia, Application No. 55723/00, 9 June 2005

Hirsi Jamaa and Others v Italy [GC] Application No. 27765/09, 23 February 2012

Keenan v United Kingdom, Application No. 27229/95, 3 April 2001

Kolaydenko and Others v Russia, Application No. 17423/05, 28 February 2012

Lopes De Sousa Fernandes v Portugal, Application No. 56080/13, 15 December 2015

Mastromatteo v Italy [GC] Application 37703/97, 24 October 2002

McCann and Others v the United Kingdom [GC] Application No. 18984/91, 27 September 1995

M.N. and Others v Belgium, Application No. 3599/18 (pending)

O'Keeffe v Ireland [GC] Application No. 35810/09, 28 January 2014

Saadi v Italy [GC] Application No. 37201/06, 28 February 2008

Siliadin v France Application No. 73316/01, 26 July 2005

Wenner v Germany, Application No. 62303/13, 1 September 2016

Öneryildiz v Turkey [GC] Application No. 48939/99, 30 November 2004

Judgments by the European Court of Justice

Opinion 2/13 of 18 December 2014 Accession of the EU to the ECHR

Georg Dörr and Ibrahim Ünal, Case C-136/03, 2 June 2005

Ledra Advertising, Joint Cases C-8/15 P and C-10-15 P, 20 September 2016

NF v European Council, Case T-192/16, *NG v European Council,* Case T-193/16, 28 February 2017

X and X v Belgium, Case C-638/16 PPU, 7 March 2017

Zuheyr Frayeh Halaf, Case C-528/11, 30 May 2013

Åkerberg Fransson, Case C-617/10, 26 February 2013

Judgments by national courts

Canadian Supreme Court

R v Appulonappa, 2015 SCC 59 [2015] 3 SCR 754

House of Lords

Regina v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others, [2004] UKHL 55

Books

Allain J, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013)

Beijer M, *The Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017)

Cardwell P, *EU External Relations and Systems of Governance* (Routledge 2009)

Christoffersen J, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill 2009)

Craig P and G de Burka, *EU Law* (Oxford University Press 2015)

Fink M, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018)

Gammeltoft-Hansen T, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011)

Hathaway J, *The Rights of Refugees under International Law* (Cambridge University Press 2005)

den Heijer M, *Europe and Extraterritorial Asylum* (Hart Publishing 2012)

Hannum H, *The Right to Leave and Return in International Law* (Martinus Nijhoff 1987)

Milanovic M, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011)

Moreno-Lax V, *Accessing Asylum in Europe: Extraterritorial Border Control and Refugee Rights under EU Law* (Oxford University Press 2017)

Noll G, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000)

Peers S, *EU Justice and Home Affairs Law* (Oxford University Press 2011)

Ryan B and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010)

Scholten S, *The Privatization of Immigration Control through Carrier Sanctions* (Brill 2015)

Stoyanova V, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017)

Articles and Book Chapters

Allain J, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' 7 Albany Governmental Law Review (2014) 111

R Alexy R, 'The Weight Formula' in J Stelmach, B Bartoszek and W Zaluski (eds), *Studies in the Philosophy of Law: Frontiers of the Economic Analysis of Law* (2007) 25

Aloya E and E Cusumano, 'Morally Evaluating Human Smuggling: The Case of Migration to Europe' (2018) *Critical Review of International Social and Political Philosophy* 1

Baird T, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' 19(3) *European Journal of Migration and Law* (2017) 307

Bartels L, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effect' 25(4) *European Journal of International Law* (2014) 1071

Besson S, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 25 *Leiden Journal of International Law* (2012) 857

Bigo D and E Guild, 'Policing at Distance: Schengen Visa Policies' in D Bigo and E Guild (eds) *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) 234

Boswell C, 'The External Dimension of the EU Migration and Asylum Policy' 79(3) *International Affairs* (2003) 619

Brems E and L Lavrysen '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' 15 *Human Rights Law Review* (2015) 139

Butler G, 'Forcing the Law to Overlap? EU Foreign Policy and Other EU External Relations in Times of Crisis' in E Kuzelewska et al. (eds) *Irregular Migration as a Challenge to Democracy* (Intersentia 2018)

Butler G, 'Legal Responses to the European Union's Migration Crisis' 19(2) *San Diego International Law Journal* (2018) 277

Cardwell P, 'Rethinking the Law and New Governance in the EU: The Case of Migration Management' (2016) *European Law Review* 362

Costello C, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' 6(1) *Human Rights Law Review* (2006) 87

Costello C, Article 31 of the 1951 Convention Relating to the Status of Refugees (UNHCR Legal and Protection Policy Research Series PPLA/2017/01)

Costello C, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' *International Journal of Refugee Law* (2019)

El Qadim N, 'The Funding Instruments of the EU's Negotiation on External Migration Policy. Incentives for Cooperation' in S Carrera et al. *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill 2019) 341

Feller E, 'Carrier Sanctions and International Law' (1989) 1 *International Journal of Refugee Law* 48

Frelick B, I Kysel and J Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 *Journal on Migration and Human Security* 190

Gammeltoft-Hansen T and J Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235

Gammeltoft-Hansen T, 'Private Law Enforcement and Control' in T Gammeltoft-Hansen et al. (eds) *The Rights of Others: Essays in Honour of Jens Vedsted-Hansen* (Djoef Publishing 2013) 517

Garcia Andrade P, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' 55 *Common Market Law Review* (2018) 157

Geddes A and L Lixi, 'New Actors and New Understanding of European Union External Migration Governance?' in S Carrera et al. *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill 2019) 60

Gerards G, 'How to Improve the Necessity Test of the European Court of Human Rights' 11(2) *International Journal of Constitution Law* (2013) 466

Gil-Bazo M, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) *Refugee Survey Quarterly* 33

Gil-Bazo M, 'Asylum as a General Principle of International Law' 27(1) *International Journal of Refugee Law* (2015) 3

Giuffré M and V Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019)

Giuffre M, 'Access to Asylum at Sea? *Non-refoulement* and a Comprehensive Approach to Extraterritorial Human Rights Obligations' in V Moreno Lax and

Papastavridis (eds) *Boat Refugees and Migrants at Sea* (Brill 2016) 248

Hathaway J, 'The Emerging Politics of *Non-Entrée*' 91 *Refugees* (1992) 40

den Heijer M, 'Shared Responsibility before the European Court of Human Rights' 60(3) *Netherlands International Law Review* (2013) 411

den Heijer M and R Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in L Malcom (ed) *Global Justice, State Duties* (Cambridge University Pres 2013)153

den Heijer M, 'Right to Asylum' in S Peers, T Hervey, J Kenner and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 519

Kritzman-Amir T, 'Privatisation and Delegation of State Authority in Asylum Systems' 5 *Law and Ethics of Human Rights* (2011) 193

Lenaerts K and A Gutierrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers, T Hervey, J Kenner and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1592

Kumm 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' 3(2) *International Journal of Constitutional Law* (2004) 574

Lonardo L, 'Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the EU' 14 *European Constitutional Law Review* (2018) 584

Markard N, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' 27(3) *European Journal of International Law* (2016) 591

Milanovic M, 'Jurisdiction and Responsibility. Trends in the Jurisprudence of the Strasbourg Court' in A van Aaken and I Motoc (eds) *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 97

Moreno Lax V and 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 and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1658

Noll G and J Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies' in F Alston (eds) *The EU and Human Rights* (Oxford University Press 1999) 359

Peers S, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' 9 *European Constitutional Law Review* (2013) 37

Peers S, 'Immigration, Asylum and the EU Charter of Fundamental Rights' in E Guild and Minderhoud (eds) The First Decade of EU Migration and Asylum Law (Brill 2012) 437

Poulou A, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights' (2017) 54 *Common Market Law Review* 991

Rijpma J, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory' 2(2) *European Papers* (2017) 571

Rijpma J and M Cremona, The Extra-Territorialisation of EU Migration Policies and the Rule of Law, EUI Working Paper Series No.1 (2007)

Rivers, 'Proportionality and Variable Intensity of Review' 36 *Cambridge Law Journal* (2006) 174

Rodenhäuser T, 'Another Brick in the Wall: Carrier Sanction and the Privatization of Immigration Control' 2(26) *International Journal of Refugee Law* (2014) 223

Rosas A, 'The Applicability of the EU Charter to Fundamental Rights at National Level' (2013) *European Yearbook of Human Rights* 97

Ryngaert C, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' 20 *International Community Law Review* (20181) 374

Simon P, 'The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic Legitimacy'3(2012) *New Journal of European Criminal Law* 242

Spejkerboer T, 'Bifurcation of People, Bifurcation of Law: Internationalization of Migration Policy before the EU Court of Justice' 31(2) *Journal of Refugee Studies* 216

Stoyanova V, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law' 5(1) *Amsterdam Law Forum* (2013) 64

Stoyanova V, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case' 30(2) *Netherlands Quarterly of Human Rights* (2012) 163

Stoyanova V, 'Sweet Taste with Bitter Roots: Forced Labour and *Chowdury and Others v Greece*' 1 *European Human Rights Law Review* (2018)

Stoyanova V, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' 18 *Human Rights Law Review* (2018) 309

Stoyanova V, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) *Nordic Journal of International Law* 87(3) 344

Stoyanova V, 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the European Convention on Human Rights' *International Journal of Human Rights* (forthcoming)

Stoyanova V, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' *Leiden Journal of International Law* (forthcoming).

Documents issued by EU Institutions

Conclusions from the European Council meeting, 28 June 2018, EUCO 9/18

EU Commission Reporting on the follow-up to the EU Strategy towards the eradication of trafficking in human beings and identifying further concrete actions, COM(2017) 728 final, 4 December 2017

Progress Report on the European Agenda on Migration COM(2017) 669 final, 15 November 2017

Progress Report on the Partnership Framework with Third Countries COM(2017) 471, 6 August 2017

European Commission, REFIT Evaluation of the EU legal framework against facilitation of unauthorized entry, transit and residence: The Facilitators Package, SWD (2017) 117 final

Communication on Establishing a New Partnership Framework with Third Countries COM(2016) 385 final, 7 June 2016

European Commission, A European Agenda on Migration COM(2015) 240, 13 May 2015

Reports

Desperate Journeys. Refugees and Migrants Arriving in Europe and at Europe's Border January–December 2018 (UNHCR 2019)

Offshoring Asylum and Migration in Australia, Spain, Tunisia and the USA. Lessons Learned and Feasibility for the EU (Open Society European Policy Institute 2018)

Scope of the Principle of *Non-refoulement* in Contemporary Border Management: Evolving Areas of Law (European Agency for Fundamental Rights 2016)

EU Cooperation with third countries in the field of migration. Study for the LIBE Committee (EU Parliament Study 2015)

Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies. Frontex, Europol and the European Asylum Support Office (EU Parliament Study 2011)

List of previous publications

Rapport och Policy Brief 2014:1, *Radikala högerpartier och attityder till invandring i Europa*, av Mikael Hjerm och Andrea Bohman.

Rapport och Policy Brief 2015:1, *Internationell migration och remitteringar i Etiopien*, av Lisa Andersson.

Kunskapsöversikt 2015:2, *Politiska remitteringar*, av Emma Lundgren Jörum och Åsa Lundgren.

Kunskapsöversikt 2015:3, *Integrationspolitik och arbetsmarknad*, av Patrick Joyce.

Kunskapsöversikt 2015:4, *Migration och företagens internationalisering*, av Andreas Hatzigeorgiou och Magnus Lodefalk.

Rapport och Policy Brief 2015:5, *Svenskt medborgarskap: reglering och förändring i ett skandinaviskt perspektiv*, av Mikael Spång.

Rapport och Policy Brief 2015:6, *Vem blir medborgare och vad händer sen? Naturalisering i Danmark, Norge och Sverige*, av Pieter Bevelander, Jonas Helgertz, Bernt Bratsberg och Anna Tegunimataka.

Kunskapsöversikt 2015:7, *Kategoriernas dilemman*, av Per Strömblad och Gunnar Myrberg.

Rapport och Policy Brief 2015:8, *Valet och Vägen: Syriska flyktingar i Sverige*, av Emma Jörum Lundgren.

Rapport och Policy Brief 2015:9, *Arbetskraftsinvandring efter 2008 års reform*, av Catharina Calleman (red.) och Petra Herzfeld Olsson (red.).

Kunskapsöversikt 2016:1, *Alla tiders migration!*, av Dick Harrison.

Rapport och Policy Brief 2016:2, *Invandringens arbetsmarknadseffekter*, av Mattias Engdahl.

Rapport och Policy Brief 2016:3, *Irreguljär migration och Europas gränskontroller*, av Ruben Andersson.

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Rapport och Policy Brief 2016:6, *Invandring, mediebilder och radikala högerpopulistiska partier i Norden*, av Anders Hellström och Anna-Lena Lodenius.

Kunskapsöversikt 2016:7, *Invandring och företagande*, av Martin Klinthäll, Craig Mitchell, Tobias Schölin, Zoran Slavnić och Susanne Urban.

Rapport och Policy Brief 2016:8, *Invandringens effekter på Sveriges ekonomiska utveckling*, av Bo Malmberg, Thomas Wimark, Jani Turunen och Linn Axelsson.

Kunskapsöversikt 2017:1, *De invandringskritiska partiernas politiska inflytande i Europa*, av Maria Tyrberg och Carl Dahlström.

Kunskapsöversikt 2017:2, *Hatbrott med främlingsfientliga och rasistiska motiv* av Berit Wigerfelt och Anders S Wigerfelt.

Avhandlingsnytt 2017:3, *Vägen till arbete. Utrikes föddas möte med den svenska arbetsmarknaden,* André Asplund, Caroline Tovatt och Sara Thalberg (redaktörer).

Policy Brief 2016:4, *Integration och tillit – långsiktiga konsekvenser av den stora invandringen till Norg*e. Denna Policy Brief sammanfattar NOU 2017:2 om *”Integrasion og tillit – Langsiktige konsekvenser av høj invandring”*.

Kunskapsöversikt: 2017:5, *Invandringens historia – från ”folkhemmet” till dagens Sverige* av Mikael Byström och Pär Frohnert.

Rapport och Policy Brief 2017:6, *Invandring i medierna – Hur rapporterade svenska tidningar åren 2010-2015?* av Jesper Strömbäck, Felicia Andersson och Evelina Nedlund.

Rapport och Policy Brief 2017:7, *Valdeltagande och representation – Om invandring och politisk integration i Sverige*. Pieter Bevelander och Mikael Spång (red.).

Rapport och Policy Brief 2017:8, *Responsibility Sharing for Refugees in the Middle East and North Africa: Perspectives from Policymakers, Stakeholders, Refugees and Internally Displaced Persons*. Susan F. Martin, Rochelle Davis, Grace Benton & Zoya Waliany.

Rapport och Policy Brief 2017:9, *Reforming the Common European Asylum System: Responsibility-sharing and the harmonisation of asylum outcomes* Bernd Parusel and Jan Schneider.

Rapport och Policy Brief 2017:10, *A Fair Share: Refugees and Responsibility-Sharing* Alexander Betts, Cathryn Costello and Natascha Zaun.

Rapport och Policy Brief 2018:1, *Somali Diaspora Groups in Sweden – Engagement in Development and Relief Work in the Horn of Africa*, Nauja Kleist.

Rapport och Policy Brief 2018:2, *Akademiskt utbyte och internationell migration – En studie av stipendiater inom Svenska institutets Visbyprogram 1997-2015,* Andreas Åkerlund, Astrid Collsiöö och Mikael Börjesson.

Rapport och Policy Brief 2018:3, *Ensamkommande barns och ungas väg in i det svenska samhället*, Eskil Wadensjö och Aycan Çelikaksoy.

Rapport och Policy Brief 2018:4, *Attityder till invandring – en analys av förändringar och medieeffekter i Sverige 2014–2016,* Jesper Strömbäck och Nora Theorin.

Rapport och Policy Brief 2018:5, *Familj, medborgarskap, migration – Sveriges politik för anhöriginvandring i ett jämförande perspektiv*, Karin Borevi.

Avhandlingsnytt 2018:6, *Barn och migration*, Mehek Muftee, Lisa Ottosson, Gunilla Jarkman Björn, Anna Åhlund, Eva Skowronski och Michael Lindblad.

Policy Brief 2018:7, *Människohandel och människosmuggling i den irreguljära migrationen*, Ryszard Piotrowicz.

Rapport 2018:8, *Asylsökandes möte med Sverige*, Peter Esaiasson och Jacob Sohlberg.

Policy Brief 2018:9, *How Citizenship Laws Differ: A Global Comparison***,** Rainer Bauböck, Iseult Honohan and Maarten Vink.

Policy Brief 2019:1, ”Bridging the Gaps”, Martin Ruhs, Kristof Tamas och Joakim Palme.

Rapport och Policy Brief 2019:2, *Smuggling, informella nätverk och diasporans engagemang*, Tekalign Ayalew Mengiste & Erik Olsson.

Rapport och Policy Brief 2019:3, *Thai berry pickers in Sweden*, Charlotta Hedberg, Linn Axelsson and Manolo Abella.

Rapport och Policy Brief 2019:4, *Internationella studenter i Sverige*, André Bryntesson & Mikael Börjesson.

Research overview 2019:5, *Migration and development – The role for development aid*, Robert E.B. Lucas.

Policy Brief 2019:6, *Back to basics – Literacy proficiency, immigration and labour market outcomes in Sweden,* Jon Pareliussen.

Policy Brief 2019:7, *Ålder vid invandring och arbetsmarknadsintegration – det svenska exemplet,* Torun Österberg.

Policy Brief 2019:8, *Barn med posttraumatisk stress – utvärdering av en gruppintervention för ensamkommande flyktingbarn med symptom på posttraumatisk stress,* Anna Sarkadi.

Policy Brief 2019:9, *Suicidalt beteende och vård – skillnader mellan flyktingar, andra migranter och personer födda i Sverige,* Emma Björkenstam, Ridwanul Amin, Ellenor Mittendorfer-Rutz.

Policy Brief 2019:10, *Fri rörlighet för arbetstagare i EU och dess effekter på statsfinanserna,* Rafael Ahlskog, Lutz Gschwind, Pär Nyman, Joakim Palme, Martin Ruhs och Marcus Österman.

Rapport och Policy Brief 2020:1, *De som inte får stanna – Att implementera återvändandepolitik*, Henrik Malm Lindberg.

Rapport och Policy Brief 2020:2, *Legal migration for work and training – Mobility options to Sweden for those not in need of protection,* Bernd Parusel.

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The 'fight' against human smuggling and human trafficking has been one of the priority objectives of the EU Member States in their efforts to decrease the number of migrants arriving in their territory. This Delmi report examines the compatibility of the EU measures against human smuggling and human trafficking with the EU Charter of Fundamental Rights. Could the anti-smuggling and anti-trafficking measures at the same time also constitute human rights law violations? Could the EU and its Member States violate human rights law with the anti-smuggling and anti-trafficking measures? In an attempt to answer these questions, the study examines the legal challenges related to the applicability of the EU Charter of Fundamental Rights to the anti-smuggling and anti-trafficking measures undertaken by the EU and its Member States.

The report is written by Vladislava Stoyanova, Associate Professor at the Department of Law, Lund University.

The Migration Studies Delegation is an independent committee that initiates studies and supplies research results as a basis for future migration policy decisions and to contribute to public debate.

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