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External Migration Control Measures and Ill-Treatment of  
Migrant Women

On the Responsibility of the EU and the Member States Under the  
EU-Charter

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# Summary

Through the external dimension of the EU migration policy, the EU and its member states have increasingly employed externalization measures as a means of stemming the irregular migration flows that reach the external borders of the Union. The measures are characterized by domestic conduct with extraterritorial effect leading to increased migration control in the third countries targeted by these measures. Inevitably, the increase of migration control in third countries have an impact on the irregular migrants who origin from or transit through these countries, which in some cases may constitute human rights abuses. In light of this, this thesis examines whether positive obligations imposed by the EU-Charter are invocable against the EU or member states when conducting externalization measures which infringes on fundamental rights.

The contextual framework for the discussion of this thesis is the impact of externalization measures in third countries on migrating women's right not to be subjected to ill-treatment. Within this, the thesis explores the possibilities of holding the EU or member states accountable for human rights violations in third countries as a result of migration control. The purpose is specifically to ascertain liability under the EU-Charter by employing a doctrinal legal research method to establish the scope of application of the instrument as well as the material scope of its prohibition on ill-treatment.

The thesis starts with providing an overview of the framework governing EU externalization measures and its implementation, along with an examination of the impact migration control has on the right not to be subjected to ill-treatment for migrating women. Having considered this, it finds that the scope of applicability of the EU-Charter is not limited by the extraterritoriality of the measures but may very well cover externalization measures such as the ones observed. However, this depends greatly on who the relevant actor of a measure is, as only EU bodies are bound by the instrument when conducting informal measures. Having found that definitional threshold of Article 4 of the Charter can be satisfied, the thesis examines the positive obligations pertaining to the Article and their potential application to externalization measures. It finds that to establish failure in fulfilling positive obligations, one is required to consider the *knowledge* about the risk of harm, the *proximity* of the conduct and the harm and the *reasonableness* of the measures considering equitable alternatives. Such potential reasonable alternative measures would be of particular interest for future research as the existence of such is a deciding factor in establishing whether externalization measures are in conformity with the provisions of the Charter.

# Sammanfattning

Genom den externa dimensionen av EUs migrations policy har EU och medlemsstaterna alltmer börjat använda sig av externaliseringsåtgärder som ett sätt att få till bukt på de irreguljära migrationsströmmar som når unionens externa gränser. Åtgärderna är karaktäriserade av inhemska handlingar med extraterritoriella effekter vilka leder till ökad migrationskontroll i de tredjeländerna som åtgärderna riktas mot. Oundvikligen så påverkas även de irreguljära migranterna som befinner sig i dessa tredjeländer av den ökade migrationskontrollen, i vissa fall till en sådan grad att det utgör övergrepp mot deras mänskliga rättigheter. Med hänsyn till detta undersöker denna uppsats huruvida de positiva skyldigheterna som är förelagda av EU-stadgan är åberopbara mot EU eller medlemsstater när de vidtar externaliseringsåtgärder som kränker fundamentala rättigheter.

Det kontextuella ramverket för diskussionen av denna uppsats är påverkan av externaliseringsåtgärder i tredje länder på kvinnliga migranternas rätt att inte bli utsatta för omänsklig eller förnedrande behandling. Inom detta ramverk utforskar uppsatsen möjligheterna att hålla EU eller medlemsstater ansvariga för överträdelser av mänskliga rättigheter i tredjeländer som en följd av migrationskontroll. Specifikt sett, är syftet med uppsatsen att fastställa ansvar under EU-stadgan genom att använda sig av en rättsdogmatisk forskningsmetod för att fastställa tillämpningsområdet av instrumentet, samt omfattningen av dess förbud mot omänsklig eller förnedrande behandling.

Uppsatsen börjar med en översikt över det ramverk som styr EUs externaliseringsåtgärder och deras implementering, tillsammans med en granskning av den påverkan migrationskontroll har på kvinnliga migranternas rätt att inte bli utsatt för omänsklig eller förnedrande behandling. Med detta i åtanke finner uppsatsen vidare att EU-stadgans tillämpningsområde inte är begränsat av extraterritorialiteten hos åtgärderna, utan bör mycket väl kunna omfatta de externaliseringsåtgärder som har observerats. Detta beror emellertid i stort på vem den relevanta riktande aktören av en åtgärd är, eftersom endast EU-organ är bundna av instrumentet i de fall åtgärderna tas informellt. Efter att vidare ha funnit att definitionströskeln av Artikel 4 EU-stadgan kan nås undersöker uppsatsen de positiva skyldigheter tillhörande artikeln och deras potentiella tillämpning på externaliseringsåtgärder. För att fastställa en underlåtenhet att uppfylla de positiva skyldigheterna finner uppsatsen att det är nödvändigt att överväga *kunskapen* om risken för skada, *adekvat kausalitet* mellan handling och skada samt åtgärdens *rimlighet* i betraktande av likvärdiga alternativ. Sådana potentiella alternativa åtgärder skulle vara av särskilt intresse för framtida forskning, eftersom förekomsten av dessa, som samtidigt är rimliga, är en avgörande faktor för att fastställa huruvida externaliseringsåtgärder överensstämmer med EU-stadgans bestämmelser.

# Preface

Nu har snart sex år gått sedan jag först flyttade till Lund och med inlämnandet av denna uppsats avslutas nu detta fantastiska kapitel av mitt liv.

Jag vill tacka alla mina vänner och Carl Johan för att ni vill ha mig i ert liv och tack till Mamma, Clara och Anna för ert stöd.

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*Stockholm, maj 2022*

# Abbreviations

AFSJ	Area of Freedom, Security and Justice
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CSDP	Common Security and Defence Policy
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Agenda	European Agenda on Migration
EU-Charter	Charter of Fundamental Rights of the European Union
EUBAM Libya	European Union Border Assistance Mission in Libya
GAMM	Global Approach to Migration and Mobility
GC	Grand Chamber
ICC	International Criminal Court
IHRL	International Human Rights Law
MoU	Memorandum of Understanding
MPF	Migration Partnership Framework
MS	Member State
TFEU	Treaty on the Functioning of the European Union
The Charter	Charter of Fundamental Rights of the European Union
The New Pact	New Pact on Migration and Asylum
The Union	European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

# 1 Introduction

All throughout history, people have left their homes in search of protection or new possibilities, giving rise to increased economic, cultural, and social development.<sup>1</sup> Thus, while some aspects of international migration may give rise to logistical and administrative challenges, human mobility has always been a continuous process, implying that all migration does not necessarily need to be associated with terms of ‘threat’ or ‘crisis’ as it often is. Today’s current global estimate observes that there are 281 million migrants in the world, or 3.6 per cent of the global population,<sup>2</sup> a drastic increase from 75 million recorded in 1965.<sup>3</sup> A vast majority of these migrants move through safe and regular pathways for purposes such as work, family, or studies. However, 25 million of these are refugees or asylum-seekers, who have left their homes in search of protection elsewhere.<sup>4</sup> Additionally, an estimated 84 million persons are forcibly displaced, either internally or internationally.<sup>5</sup> After a decline in numbers of recorded number of irregular migrants as a result of more stringent border control due to the COVID-19 pandemic, both of these numbers are at an increase again.<sup>6</sup> In part due to the conspicuous escalation following the Russian invasion of Ukraine after which the number of displaced persons has reached a historical record-high.<sup>7</sup>

Increasingly strict and obstructive migration laws, policies and practices have pushed a growing number of migrants outside of official immigration procedures and administrations, rendering them dependent on irregular pathways to reach their destinations.<sup>8</sup> While the states’ principal instrument at their disposal for controlling migration is their territorial border,<sup>9</sup> they

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<sup>1</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment’ (February 26 2018) A/HRC/37/50.

<sup>2</sup> United Nations Department of Economic and Social Affairs (UN DESA), ‘International Migration 2020 Highlights’ (2021) ST/ESA/SER.A/452.

<sup>3</sup> Castles, Stephen & Miller, Mark, *The Age of Migration. International Population Movements in the Modern World* (Palgrave Macmillan 2003) p. 4.

<sup>4</sup> UNHCR, ‘Mid-Year Trends Report 2021’ (2021) p. 1.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* p. 2.

<sup>7</sup> UN News Service, ‘UNHCR: A record 100 million people forcibly displaced worldwide’ (23 May 2022) <https://news.un.org/en/story/2022/05/1118772> (Accessed 25 May 2022).

<sup>8</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment’ (February 26 2018) A/HRC/37/50, pp. 3-4

<sup>9</sup> The power of the states to prevent foreigners from entering their territories is inherent to their sovereignty, *see for example Abdulaziz, Cabales and Balkandali v United Kingdom* Nos. 9214/80, 9473/81 & 9474/81 (ECtHR 28 May 1985) para. 67.

have nonetheless proven to be notoriously porous.<sup>10</sup> No matter the obstacles which states raise in order to physically prevent irregular border crossing, such as fences and walls, irregular migrants still manage to get through.<sup>11</sup> Having recognized that merely controlling ones territorial border is not sufficient in preventing irregular migration, states have been increasingly reliant on the strengthening or inauguration of practices of repression and deterrence to stem the irregular migration flows.<sup>12</sup> Practices include, as observed by the *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, criminalization and detention of irregular migrants, separation of family members, inadequate reception conditions and medical care, the denial or excessively prolonged status determination procedures, and, more and more, the externalization of border and migration controls.<sup>13</sup>

In Europe, and specifically within the European Union (EU, the Union), externalization of migration control is now a widespread practice and various strategies have been implemented in an attempt to externalize border controls. These include visa requirements, carrier sanctions, interceptions at high seas, ‘safe third country’ procedures, and, most notably, cooperation with third countries on migration control.<sup>14</sup> These practices are often associated with a declared aim of saving human lives and countering international, cross-border crimes such as trafficking and human smuggling.<sup>15</sup> Nonetheless, the result is often the prevention of irregular migrants reaching the external borders of the Union.<sup>16</sup>

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<sup>10</sup> den Heijer, Martin, ‘Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control’ in Bernard Ryan & Valsamis Mitsilegas (eds), *Extraterritorial Migration Control Legal Challenges* (Martinus Nijhoff Publishers 2010) p. 169.

<sup>11</sup> Carling, Jørgen ‘Migration Control and Migrant Fatalities at the Spanish-African Borders,’ *International Migration Review*, Vol. 41 (2007).

<sup>12</sup> Ligouri, Anna, *Migration Law and the Externalization of Border Controls* (Routledge 2019) p. 1.

<sup>13</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment’ (February 26 2018) A/HRC/37/50, p. 4.

<sup>14</sup> Ligouri, Anna, *Migration Law and the Externalization of Border Controls* (Routledge 2019) p. 1.

<sup>15</sup> See for example Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility’ (Communication) [2011] COM(2011) 743; Commission, ‘Communication From the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration’ (Communication) [2016] COM(2016) 385; Commission, ‘Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee of the Regions on a New Pact on Migration and Asylum’ (Communication) [2020] COM(2020) 609.

<sup>16</sup> Ligouri, Anna, *Migration Law and the Externalization of Border Controls* (Routledge 2019) p. 1.



In light of these developments, an increased attention towards the strategic importance of the external dimension of the EU migration policy has been paid, specifically in regard to cooperation on migration control between the EU, member states (MS) and third countries.<sup>17</sup> Third country cooperation under this policy framework more often than not takes the form of informal agreements in which third countries agree to increase their domestic migration control in exchange for trade with or aid from the EU. Through the external dimension of EU migration policy, migration control in the immediate vicinity of the external borders of the Union have now been supplemented with measures targeted at migrants who have yet to reach said border.<sup>18</sup> Thus, the practical borders of the Union are essentially externalized, and with it, responsibility for migration control, and the international obligations it entails, is seemingly shifted from the EU and MS, to the third countries with which they cooperate.<sup>19</sup>

The process of externalizing migration control is not unproblematic, however. As borders are not only the tools with which states can refuse entry, they normally also demarcate what jurisdiction one person is under, and thus whom may owe them international obligations according to their fundamental rights.<sup>20</sup> Thus, when one can experience a foreign border while within the territorial jurisdiction of another country, this risks creating ‘legal black holes’, where no state can be held accountable for potential human rights violations.<sup>21</sup> This is particularly worrisome considering the proliferation of agreements made between the EU, MS and third countries with questionable human rights records,<sup>22</sup> which are now delegated “to effect migration control on behalf of the developed world”.<sup>23</sup> As the *Special Rapporteur* has reported, the decrease of legal pathways for migration, and the increase of migration control in third countries as a result of the

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<sup>17</sup> García Andrade, Paula et al, ‘EU Cooperation with Third Countries in the Field of Migration’ (*LIBE Committee*, 2015).

<sup>18</sup> den Heijer, Martin, ‘Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control’ in Bernard Ryan & Valsamis Mitsilegas (eds), *Extraterritorial Migration Control Legal Challenges* (Martinus Nijhoff Publishers 2010) p. 170.

<sup>19</sup> More on the shifting of borders generally, *see* Kesby, Alison, ‘The Shifting and Multiple Border and International Law’, *Oxford Journal of Legal Studies*, Vol. 27 (2007).

<sup>20</sup> den Heijer, Martin, ‘Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control’ in Bernard Ryan & Valsamis Mitsilegas (eds), *Extraterritorial Migration Control Legal Challenges* (Martinus Nijhoff Publishers 2010) p. 170.

<sup>21</sup> Wilde, Ralph, ‘Legal ‘Black Hole’?: Extraterritorial State Action and International Treaty Law on Civil and Political Rights’, *Michigan Journal of International Law*, Vol. 26, No. 3 (2005) p. 739.

<sup>22</sup> Amnesty International, *Amnesty International Report 2021/22: The State of the World’s Human Rights*, (Amnesty International 2022).

<sup>23</sup> Gammeltoft-Hansen, Thomas & Hathaway, James, ‘Non-Refoulement in a World of Cooperative Deterrence’, *Columbia Journal of Transnational Law* (2015) p. 243.

externalization measures of destination states, has led to an escalating prevalence of human right abuses of irregular migrants along their journeys.<sup>24</sup> In this context, migrating women has been recognized as particularly vulnerable.<sup>25</sup>

Considering the above, this thesis attempts to not only garner an understanding of what impact EU externalization measures have on migrating women's rights in third countries, but also to identify means to rectify these potential 'legal black holes' by analysing the possibilities of holding EU or MS accountable for potential human rights violations.

## 1.1 Purpose and Research Question

Through the implementation of the external dimension of the EU migration policy, the EU and MS are able to outsource their border functions to cooperating third countries. This prevents irregular migrants from reaching the external borders of the Union by increasing migration control in crucial origin and transit states. For the EU, this is framed both as a question of internal security and stability as well as a question of the protection of irregular migrants. However, another, more problematic aspect of the cooperation is that it is questionable whether the EU and the MS can be held responsible for the harm that the measures cause. As irregular migrants are kept from the external borders of the Union, so are seemingly also the responsibility for fulfilment of the fundamental rights which these migrants inhibit kept from the EU and MS. Considering the particular vulnerabilities of migrating women, this aspect raises some serious human rights concerns.

As migration control increases in third countries, as a result of the EU externalization measures, migrants are increasingly put in contexts in which they may be subjected to human right infringements. Here in lies the legal complexities, while externalization increases migration control in third countries, which is associated with a risk of being subjected to human rights violations for migrants, it is third countries and private individuals who exert the physical control over said migrants which may lead to abuse. Thus, while the infringements of rights might have never occurred if not for these

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<sup>24</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, p. 4.

<sup>25</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, pp. 9-10.

externalization measures, the question of whether EU bodies and MS could be held responsible is still unclear.

Under International Human Rights Law (IHRL), responsibility for human rights infringements is contingent upon the respondent's state exercise of jurisdiction *vis-à-vis* those claiming human rights violations. The jurisdiction of international human rights treaties, such as the European Convention on Human Rights (ECHR), which is reliant on a notion on factual 'control', have substantially limited the application of these instruments for issues of extraterritorial harm.<sup>26</sup> The Charter of Fundamental Rights of the European Union (EU-Charter, the Charter), on the other hand, may be helpful in establishing responsibility for extraterritorial harm as the instrument is relieved of a jurisdictional clause which may otherwise further complicate its extraterritorial jurisdiction.

In light of the above, the purpose of the thesis is to examine what impact externalization measures have on the fundamental rights of migrants in third countries, with particular focus on the rights of migrating women, and whether the EU or MS could be held responsible for impugned fundamental rights infringements under the Charter.

Thus, the thesis aims to answer the following research question:

*Does EU externalization measures amount to violations of fundamental rights guaranteed by the Charter for which the EU or MS could be held responsible?*

In order to answer the question above, the following sub-questions will be addressed:

*What is the policy framework supporting EU externalization measures, how is it implemented in practice and how does it relate to increased migration control in third countries? (Chapter 2)*

*What impact does increased migration control have on the rights of migrants in general, and on migrating women in particular? (Chapter 3)*

*What is the scope of applicability of the Charter and what is the material scope of Article 4? (Chapter 4)*

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<sup>26</sup> For different variations of the control test used by international judicial bodies to establish jurisdiction *see for example*, for the ECHR, see *Al-Skeini and Others v United Kingdom* [GC] No. 55721/07 (ECtHR 7 July 2011), §§130–150. For the International Covenant on Civil and Political Rights, see HRC, 'General Comment no. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add 1326, §10.

For further contextualization of the research question, the thesis will draw on the prohibition of inhuman or degrading treatment guaranteed by Article 4 of the Charter, and more specifically the potential violation by EU or MS of the positive obligations pertaining to this prohibition, particularly in relation to migrating women in third countries.

## **1.2 Delimitations**

The aim of the thesis is neither to exhaustively cover all externalization measures which the EU and MS engage with nor the full framework and practices of the external dimension of the EU migration policy. Rather, Chapter 2 of the thesis only attempts to provide a general overview of the policy framework which governs the EU's and MS' externalization measures in relation to migration control. While formalized measures of externalized border controls, such as visa requirements and carrier sanctions, also contribute to increased migration control in third countries, these measures will not be analysed comprehensively. Rather, the focus of this thesis is on the informalized agreements of cooperation between the EU, MS and third countries. Additionally, while there are numerous examples of cooperation between the EU, MS and third countries on migration control, only three specific cases will be presented as a way of contextualizing the implementation of the policy framework.

Whereas migration control might be considered to produce infringements on multiple human rights, this thesis only evaluates the impact which migration control has on the interests protected by the right not to be subjected to inhuman or degrading treatment. Thus, the prohibition on torture closely associated with the prohibition on inhuman or degrading treatment will not be examined in this thesis. The discussion of the thesis does not relate to any specific individual claim, but rather aims at assessing how a specific group of individuals might suffer treatment contrary to the prohibition of ill-treatment. While migrants' rights in general, and the rights of multiple other vulnerable groups, may be impacted by migration control, this thesis will give particular focus on the relation between migration control and the ill-treatment of migrating women. Additionally, as it is the extraterritorial reach and applicability of the Charter as well as the material scope of Article 4 of the Charter which the thesis analyses, only the impact of migration control in third countries on migrating women in third countries will be examined.

The prohibition of ill-treatment can be observed in numerous international human rights treaties as well as in customary international law, however, for the purpose of this thesis, only the prohibition of inhuman or degrading treatment guaranteed by Article 4 of the Charter will be examined.

Nonetheless, this does not preclude the use of case law from other IHRL regimes, particularly case law of the European Court of Human Rights (ECtHR), when it serves to clarify the substantial scope of the Charter. Additionally, the prohibition of *refoulement*, which is closely connected to the prohibition of ill-treatment, will not be considered in this thesis. The principle of *non-refoulement* applies to situations of removal or transfer of persons. This thesis, however, aims at examining the legal responsibilities that the EU and MS have under the Charter towards migrating women in third countries which have not yet reached the external borders of the EU. Nor have they come in physical contact with EU authorities, hence the irrelevance of the principle of *non-refoulement* for the purpose of this thesis.

Considering its purpose, the focus of the thesis will be on the extraterritorial applicability of the Charter and the material scope of Article 4. Specifically, as only domestic conduct with extraterritorial effect will be examined, special regard will be given to the positive obligations pertaining to Article 4, as breaches of the negative obligation to respect the prohibition would be debatable. Nonetheless, while the present analysis limits its contextual considerations to Article 4, similar arguments could be made in regard to other fundamental rights infringements as a result of externalization measures, provided that the infringements *prima facie* meet the material scope of the provisions.

Finally, legal responsibility for potential human rights violations in regard to migration control in third countries might be claimed against multiple actors beyond the EU and MS. Additionally, domestic criminal law might also facilitate legal accountability against the individual actors which exert violence against migrating women in third countries. However, for the purpose of this thesis, the issue of attributing a legal responsibility of the EU and MS for potential human rights violations is the focus, thus, only the application of the Charter, which is part of EU-law and thus only binding for the EU and MS, will be analysed.

### **1.3 Method and Material**

This thesis intends to establish the extent to which the EU-Charter can be applied to extraterritorial activities by the EU relating to migration control in third countries within the context of the prohibition of inhuman or degrading treatment enshrined in Article 4 of the Charter. For this purpose, a legal doctrinal method will be adopted. The legal doctrinal research method aims to provide a “systematic exposition of the principles, rules and

concepts”<sup>27</sup> governing a particular legal field to analyse the relationship between these and solve uncertainties or gaps within the existing law. Thus, this thesis will analytically examine the conventional sources of international law to determine the established law in question.<sup>28</sup> The principal primary source<sup>29</sup> used in this study is the EU-Charter, as the thesis directly pertains to the applicability of the Charter in the given context. Article 52(3) of the Charter stipulates that ‘[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention’. Accordingly, seeing that the conditions of Article 52(3) are fulfilled, the ECHR will be used for guidance on the interpretation of the substantial provisions of the Charter. For further inquiry of the applicability of the Charter and the substantial provisions, case law from both the Court of Justice of the European Union (CJEU) and the ECtHR will be analysed. Lastly, contributions from legal scholars will be extensively used to inform an understanding of the law and strengthen the analysis.

As for the contextualization of the thesis, empirical data provided by non-governmental organisations as well as the contributions of, primarily, scholars of law and political science will be used to provide a general understanding both of the policy framework which governs the external dimension of the EU migration policy and the relation between migration control and ill-treatment of migrating women. Additionally, material published by EU institutions will be used to further this understanding.

## 1.4 Previous Research

The field of extraterritorial migration control has attracted considerable attention by legal scholars. For an extensive overview on the legal challenges posed by the contemporary phenomenon of extraterritorial migration control, *Extraterritorial Immigration Control: Legal Challenges*, by Ryan & Mitsilegas (eds) provides a considerable contribution.<sup>30</sup> Additionally, the legal challenges of extraterritorial migration control from the perspective of human rights have also been previously examined such as

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<sup>27</sup> Smits, Jan, ‘What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research’ in Rob Van Gestel et al (eds), *Rethinking Legal Scholarship – A Transatlantic Dialogue* (Cambridge University Press 2017) p. 210.

<sup>28</sup> Hutchinson, Terry, ‘Doctrinal research: Researching the jury’ in Dawn Watkins & Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) pp. 9–10.

<sup>29</sup> Article 38 of the Statute of the International Court of Justice (ICJ) sets out the traditional sources of international law. Primary sources include international conventions, customary international law and international principles and secondary sources introduces legal doctrine and case law.

<sup>30</sup> Ryan, Bernard & Mitsilegas, Valsamis (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010).

in *Access to Asylum* by Gammeltoft-Hansen which explores responsibility under IHRL.<sup>31</sup> More specifically, the compatibility of EU externalization measures with the right to asylum, the right to life and the principle of *non-refoulement* has been examined in a number of different scholarly contributions.<sup>32</sup> In these contributions, the impact of extraterritorial migration control is examined from the perspective of the rights guaranteed by the ECHR. An exception to this is *The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling* by Stoyanova, who specifically engages with the positive obligations pertaining to the right to life under the EU-Charter. This thesis' engagement with the right not to be subjected to ill-treatment, a right generally considered to be of fundamental importance,<sup>33</sup> as guaranteed by the EU-Charter, therefore provides a new perspective on the impact of externalization measures on human rights. Additionally, while scholars have described the vulnerabilities of migrating women in the perspective of migration control and ill-treatment,<sup>34</sup> this thesis' contribution lies in its application of the positive obligations pertaining to Article 4 of the Charter to this context.

## 1.5 Terminology

The term *migrant(s)* is used broadly to include any person who is outside of their country of citizenship or, in the case of stateless migrants, their country of habitual residence. This term encompasses those who are displaced by conflict, natural disaster or other causes, and is used without distinction regarding their potential acquirement of a legal categorization such as 'refugee' or 'asylum-seeker'. For the context of this thesis, the irregular nature of said migrants is implied, but *irregular migrant(s)* will

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<sup>31</sup> Gammeltoft-Hansen, Thomas, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011).

<sup>32</sup> On the right to asylum see Frelick, Bill et al, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants', *Journal on Migration and Human Security*, Vol. 4, No. 4 (2016); Moreno-Lax, Violeta, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP Oxford 2017). On the right to life see Spijkerboer, Thomas 'Wasted Lives: Borders and the Right to Life of People Crossing Them', *Nordic Journal of International Law*, Vol. 86, No. 1 (2017). On the prohibition of *non-refoulement* see Gammeltoft-Hansen, Thomas & Hathaway, James, 'Non-Refoulement in a World of Cooperative Deterrence', *Columbia Journal of Transnational Law* (2015).

<sup>33</sup> Lock, Tobias, 'Charter of Fundamental Rights of the European Union' in Manuel Kellerbauer et al (eds), *Commentary on The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) p. 2105.

<sup>34</sup> Pickering, Sharon, *Women, Borders, and Violence* (Springer-Verlag New York Inc. 2014); Smith, Alyna et al, 'Migrant Women's Health Issues: Addressing Barriers to Access to Health Care for Migrant Women with Irregular Status' *Entre Nous*, No. 85 (2016); Gerard, Alison & Pickering, Sharon, 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU', *Journal of Refugee Studies*, Vol. 27, No. 3 (2013).

occasionally be used when specifically referring to that group. The term *irregular migrant* which could more accurately be described as "migrants in irregular situations", includes all migrants failing to comply with the regular domestic immigration legislation of their current transit or destination State, including asylum-seekers.

*Migration Control* refers generally to states' methods to regulate border laws and practices with the aim of preventing irregular migrants from entering the legal jurisdictions or territories of said states or certain regions.

*Third country* refers to a country that is not a member of the European Union.

*Externalization* refers to conduct by the EU and MS with extraterritorial effects. Thus, *externalization measures* refer to EU laws and policies within the external dimension of the EU migration policy framework which have an impact on the territory of third countries.

The term *ill-treatment* is used throughout this thesis to refer generally to treatment which infringes on the interests of the prohibition of inhuman or degrading treatment. This term is used without prejudice of the treatment's fulfilment of any legal definitional threshold, such as the one observed in Article 4 of the Charter.

While the term *EU-body* most often refers specifically to the number of bodies with specialized tasks in helping the EU in addition to the institutions,<sup>35</sup> this thesis will use the term in a broader sense. Thus, the term will refer generally to all EU institutions, bodies, interinstitutional services, or decentralized agencies who may or may not engage in externalization measures. This way, the term can be used to examine the potential ascertaining of legal responsibility against the EU in general, without a detailed examination of each of the multitude of EU authorities.

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<sup>35</sup> Official Website of the European Union, 'Types of Institutions and Bodies', [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies\\_en](https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en) (Accessed 14 May 2022).



## 1.6 Disposition

Following this introduction, *Chapter Two* provides a general overview of the external dimension of the EU migration policy by examining the policy framework from 2014 and onward, and its implementation through three key cases. Throughout the chapter, the relation between the externalization measures observed and migration control in third countries will be acknowledged to demonstrate the correlation between externalization measures and increased migration control in third countries.

*Chapter Three* examines the impact of migration control on the risk of being subjected to ill-treatment for migrants by recognizing two specific contexts in which this interaction is apparent; in migration-related detention and on the precarious pathways for migration migrants are forced to resort to. Subsequently, this interaction will be specifically examined in the context of migrating women by acknowledging their particular vulnerability and the risks that entails. The chapter ends with a reflection on the correlation between migration control and the ill-treatment of migrating women.

*Chapter Four* concerns the applicability of the Charter to externalization measures considering the observations made in previous chapters. The chapter begins by examining the scope of applicability of the Charter and specifically its potential application to the externalization measures described in *Chapter Two*. The chapter continues by establishing the material scope of Article 4 of the Charter, paying particular attention to the positive obligations pertaining to the provision. Finally, the attempts to apply the provisions of Article 4 of the Charter to externalization measures by examining whether the harm described in *Chapter Three* meets the definitional threshold of the provision as well as whether any violations of positive obligations pertaining to the prohibition could be claimed against the EU or MS.

The final chapter, *Chapter Five*, summarizes the findings made in the previous chapters and answers the thesis' research question. As a conclusion, the chapter put forth suggestions for important future research.

## 2 External Dimension of the EU Migration Policy

The foundations of the current EU border policies can be traced back to the Schengen agreement in 1985 which allowed for a gradual opening of borders of the participating members and a robust border control at the external borders.<sup>36</sup> Since then, issues of migration have been increasingly treated as a security concern for the Union and the securitization of migration control have developed with each large new influx of migrants trying to reach the EU.<sup>37</sup> However, when discussing EU migration policy, one needs to look beyond the territorial borders of the EU. While the concept of externalizing migration control is not new within the European debate, the increasing number of agreements, made between the EU, MS and third countries, and their form, is.<sup>38</sup> These agreements systematically outsource border functions to cooperating third countries, increasing their migration control which risk exposing migrants to human rights infringements,<sup>39</sup> an issue which will be further examined in Chapter 3.

The primary goal of these externalization practices is to decrease the number of irregular migrants which reach the external borders of the Union. By pre-emptively stopping irregular migrants before their journey brings them to European territory, the EU believes it more readily can secure the integrity of its borders and outsource some of its international obligations onto third countries. It does this mainly by different partnerships with third countries, where an emphasis is made on ‘return’ (deportations) and ‘prevention’ (border security and control).<sup>40</sup> For the purpose of this thesis, only the latter will be discussed, as the former mainly pertains to the prohibition of *refoulement* in relation to Article 4 of the Charter, which is beyond the scope of this thesis.

These externalization practices have the effect of increasing migration control in the neighbouring countries of the EU and other third countries,

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<sup>36</sup> European Union, ‘Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Schengen Agreement’ [1985] OJ L 239.

<sup>37</sup> Akkerman, Mark, *Expanding the Fortress* (Transnational Institute 2018) p. 12.

<sup>38</sup> Ligouri, Anna, *Migration Law and the Externalization of Border Controls* (Routledge 2019) p. 51.

<sup>39</sup> Gätjen, Amelie & Fritz, Pauline, ‘Where are Europe’s Borders? The EU Border Externalisation Policies Discussed’ (*Polis180*, 3 June 2021) <https://polis180.org/polisblog/2021/06/03/where-are-europes-borders-the-eu-border-externalisation-policies-discussed/> (Accessed 9 May 2022).

<sup>40</sup> Akkerman, Mark, *Expanding the Fortress* (Transnational Institute 2018) p. 12.

affecting a large population of the irregular migrants intending to reach the EU.<sup>41</sup> This chapter aims at elaborating on the policy framework encompassing the system of externalization, how it functions in practice through case study examples, and its relation to migration control to inform an analysis on the correlation between externalization measures and increased migration control in third countries.

## 2.1 Policy Framework

While the intensity and scope of the externalization measures by the EU has increased significantly since the ‘refugee crisis’ in 2015, the current policies can be traced back all the way to the early 1990’s.<sup>42</sup> Since then, the EU and its MS has made migration a central part of its agenda. This has expanded the pressure which the EU has put on neighbouring third countries to cooperate on issues of migration and security.<sup>43</sup> For third countries, cooperation with the EU on migration control is often a necessary condition in order to enable both EU trade as well as aid, and many subsidies are earmarked towards increased migration and border control.<sup>44</sup> However, for the purpose of this thesis, our analysis will commence with the adoption of the *Global Approach to Migration and Mobility (GAMM)*<sup>45</sup> in 2011, as before this, cooperation was framed around emphasis on return and readmission of forcibly displaced persons. With GAMM, the EU expanded cooperations to also include ambitions to support border security and control in third countries, thus directly decreasing the number of legal and safe pathways for migration available for migrants seeking to reach the EU’s external borders. Additionally, cooperation under GAMM, which later developments in the area has mimicked, was framed, not only around international agreements, but also around informalized deals which are excluded from political and

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<sup>41</sup> Gätjen, Amelie & Fritz, Pauline, ‘Where are Europe’s Borders? The EU Border Bexternalisation Policies Discussed’ (*Polis180*, 3 June 2021) <https://polis180.org/polisblog/2021/06/03/where-are-europes-borders-the-eu-border-externalisation-policies-discussed/>. (Accessed 13 May 2022).

<sup>42</sup> Papagianni, Georgia, ‘Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy’, *European Journal of Migration and Law*, Vol. 15 (2013) pp. 283-299.

<sup>43</sup> Ligouri, Anna, *Migration Law and the Externalization of Border Controls* (Routledge 2019) p. 52.

<sup>44</sup> Carrera, Sergio et al, ‘EU External Migration Policies a Preliminary Mapping of the Instruments, the Actors and their Priorities’ (*EURANET project*, 2015) <https://cris.maastrichtuniversity.nl/en/publications/eu-external-migration-policies-a-preliminary-mapping-of-the-instr> (Accessed 10 May 2022).

<sup>45</sup> Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility’ (Communication) [2011] COM(2011) 743.

judicial control.<sup>46</sup> From that point, these efforts have increased and developed through numerous different agreements and policy frameworks adopted by the EU.

## 2.1.1 Global Approach to Migration and Mobility

The *Global Approach to Migration and Mobility* (GAMM) was conducted as the overarching framework of the external dimension of the EU's migration policy.<sup>47</sup> It was adopted with the hopes of creating a more systematic, consistent, and strategic policy framework for the EU's relations with neighboring third countries. Drafted in 2011 in the aftermath of the Arab Spring as a response to European fears of increased migration flows into the Union, it was unique, in the context of previous similar agreements, in how it framed irregular migration as a security concern.<sup>48</sup> According to the framework, this security concern is best prevented and reduced through EU cooperation with third countries to stop migrants from reaching the territorial borders of the EU as well as enabling the return of deportees.<sup>49</sup> The implementation of the GAMM focused initially on activities in Africa and the Mediterranean, recognized as the main regions of origin and transit of irregular migrants to the EU. Activities included agreements with third countries which anchored the notion of a 'more for more' approach through 'mobility packages'. These packages were a new form of circular migration for high skilled migrants which advanced visa facilitation of third country nationals in return for, and in relation to, their increased cooperation on border control.<sup>50</sup> Thus, the focus of the framework is the fight against irregular migration on the premise that 'without well-functioning border controls, lower levels of irregular migration and an effective return policy, it will not be possible for the EU to offer more opportunities for legal

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<sup>46</sup> Ligouri, Anna, *Migration Law and the Externalization of Border Controls* (Routledge 2019) p. 54.

<sup>47</sup> Its current status is unclear but succeeding policy frameworks seem to have replaced GAMM as of now. See for example Carrera, Sergio et al, 'EU External Migration Policies a Preliminary Mapping of the Instruments, the Actors and their Priorities' (*EURANET project*, 2015) <https://cris.maastrichtuniversity.nl/en/publications/eu-external-migration-policies-a-preliminary-mapping-of-the-instr> (Accessed 2 May 2022) p. 43.

<sup>48</sup> Carrera, Sergio et al, 'EU External Migration Policies a Preliminary Mapping of the Instruments, the Actors and their Priorities' (*EURANET project*, 2015) <https://cris.maastrichtuniversity.nl/en/publications/eu-external-migration-policies-a-preliminary-mapping-of-the-instr> (Accessed 2 May 2022) p. 15.

<sup>49</sup> Moreno-Lax, Violeta, 'EU External Migration Policy and the Protection of Human Rights' (*EEAS*, 2020), pp. 21-22

<sup>50</sup> Carrera, Sergio et al, 'EU External Migration Policies a Preliminary Mapping of the Instruments, the Actors and their Priorities' (*EURANET project*, 2015) <https://cris.maastrichtuniversity.nl/en/publications/eu-external-migration-policies-a-preliminary-mapping-of-the-instr> (Accessed 2 May 2022) p. 17; Martin, Marie, 'The Global Approach to Migration and Mobility: the state of play' (*Statewatch*, February 2013).

migration’.<sup>51</sup> However, no mention is made of the forcibly displaced persons who, in absence of legal pathways, must rely on irregular channels to reach the EU, and the increased risks which this puts them through.<sup>52</sup>

The framework is said to have a migrant-centered approach with human rights occupying a central part of the GAMM,<sup>53</sup> however, no adequate structure for evaluation of implementation of the framework is provided for.<sup>54</sup> The Special Rapporteur on the Human Rights of Migrants criticized the direction of the EU migration policy already in 2012, claiming that the focus on border control in third countries fails to recognize the need to facilitate regular migration channels for, for example, forcibly displaced persons.<sup>55</sup>

Another important aspect of GAMM is the proclaimed ‘flexibility’ of its implementation tools. This flexible nature, framed as one of the advantages with the framework,<sup>56</sup> has been argued as having “deep repercussions from the perspective of the rights of migrants and legal, democratic and judicial accountability”.<sup>57</sup> Particularly concerning, the informal agreements resulting from this flexibility hinders adequate monitoring of the human rights effects this kind of cooperation has.<sup>58</sup> Consequently, GAMM solidified the practice of externalizing the border functions of the EU through informalized cooperation between EU, its MS and third countries, with the goal of increasing migration control in the neighboring area of the EU.

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<sup>51</sup> Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility’ (Communication) [2011] COM(2011) 743, p. 5.

<sup>52</sup> Moreno-Lax, Violeta, ‘EU External Migration Policy and the Protection of Human Rights’ (*EEAS*, 2020) p. 22; Guild, Elspeth et al, ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (*CEPS*, 2015).

<sup>53</sup> Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility’ (Communication) [2011] COM(2011) 743, p. 6.

<sup>54</sup> García Andrade, Paula et al, ‘EU Cooperation With Third Countries in the Field of Migration’ (*LIBE Committee*, 2015) p. 80.

<sup>55</sup> UN News Service, ‘EU should see beyond border control regarding Tunisia migrants – UN expert’ (12 June 2012) <https://news.un.org/en/story/2012/06/412962-eu-should-see-beyond-border-control-regarding-tunisia-migrants-un-expert> (Accessed 13 May 2022).

<sup>56</sup> Commission, ‘Report on the implementation of the Global Approach to Migration and Mobility 2012-2013’ (Communication) [2014] COM(2014) 96, p.20

<sup>57</sup> Carrera, Sergio et al, ‘EU External Migration Policies a Preliminary Mapping of the Instruments, the Actors and their Priorities’ (*EURANET project*, 2015) <<https://cris.maastrichtuniversity.nl/en/publications/eu-external-migration-policies-a-preliminary-mapping-of-the-instr>> (Accessed 16 May 2022) p. 18.

<sup>58</sup> García Andrade, Paula et al, ‘EU Cooperation With Third Countries in the Field of Migration’ (*LIBE Committee*, 2015) p. 15.

## 2.1.2 EU Agenda on Migration and the Migration Partnership Framework

*The EU Agenda on Migration* (EU Agenda) was drafted in 2015 as a response to that year's 'refugee crisis'.<sup>59</sup> As such, it is focused on short and medium-term measures to address what was perceived as the greatest challenges of the situation. Interesting to note is that the EU Agenda makes essentially no references to GAMM, and thus seemingly worked to replace the previous framework.<sup>60</sup> It identifies four pillars to better manage migration; reduce incentives for irregular migration, saving lives and securing external borders, completing a strong common asylum policy, and developing a new policy on legal migration.<sup>61</sup> Efforts are geared across these four pillars toward containing unauthorized movement, enhancing border control and supporting third countries in developing solutions to better enforce their borders.<sup>62</sup> The policy agenda also cements migration as a specific component of the Common Security and Defense Policy (CSDP), which previously had mainly been considered under the Area of Freedom, Security and Justice.<sup>63</sup> While third country nationals' rights are mentioned, they are only referenced in relation to return procedures and asylum. Additionally, the fundamental rights which are mentioned as guiding principles of the EU's approach are only referenced for actions within MS and the potential extra-territorial applicability of these rights when cooperating with third countries goes unnoticed.<sup>64</sup>

The implementation mechanism for the external dimension of the agenda is the *Migration Partnership Framework* (MPF). It positions migration at the

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<sup>59</sup> The use of the term 'crisis' has been criticized as an deliberate strategy which enables the use of draconian measures in an attempt to stem migration flows to the EU, see Davitti, Daria, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'', *The European Journal of International Law*, Vol. 29, No. 4 (2019).

<sup>60</sup> Carrera, Sergio et al, 'EU External Migration Policies a Preliminary Mapping of the Instruments, the Actors and their Priorities' (*EURANET project*, 2015) <<https://cris.maastrichtuniversity.nl/en/publications/eu-external-migration-policies-a-preliminary-mapping-of-the-instr>> (Accessed 16 May 2022) p. 43.

<sup>61</sup> Willermain, Fabian, 'The European Agenda on Migration, One Year On. The EU Response to the Crisis Has Produced Some Results, but Will Hardly Pass Another Solidarity Test' (*IEMed Mediterranean Yearbook*, 2016) <https://www.iemed.org/publication/the-european-agenda-on-migration-one-year-on-the-eu-response-to-the-crisis-has-produced-some-results-but-will-hardly-pass-another-solidarity-test/> (Accessed 19 May 2022).

<sup>62</sup> Commission, 'Report on the implementation of the Global Approach to Migration and Mobility 2012-2013' (Communication) [2014] COM(2014) 96, p. 11.

<sup>63</sup> Carrera, Sergio et al, 'EU External Migration Policies a Preliminary Mapping of the Instruments, the Actors and their Priorities' (*EURANET project*, 2015) <<https://cris.maastrichtuniversity.nl/en/publications/eu-external-migration-policies-a-preliminary-mapping-of-the-instr>> (Accessed 16 May 2022) p. 42.

<sup>64</sup> Moreno-Lax, Violeta, 'EU External Migration Policy and the Protection of Human Rights' (*EEAS*, 2020) p. 22.

top of the priorities of the EU's external policy. It focuses on using a mix of positive and negative incentives towards third countries to secure cooperation and the interests of the EU in regard to migration control.<sup>65</sup> The MPF promotes assistance for capacity building on migration management in third countries including financial assistance as well as targeted support on sectors such as security and border management.<sup>66</sup> Additionally, the EU and its MS also make "cooperation on development conditional on third countries' effective implementation of exit controls to prevent departures to Europe and halt new arrivals on their own territory".<sup>67</sup> Through the MPF, the EU stresses its interests of keeping irregular migrants out of its territorial borders and sending deportees back as well as the need for rewards and consequences to ensure third country partner compliance in this area.<sup>68</sup>

The MPFs were initially planned to be designed as 'compacts' – documents which clearly established commitments made through agreements between MS and third countries. However, this was determined as too impractical of a solution and MPF instead turned to involve a mix of political, aid and security engagement by the EU and its MS adapted to the specific contexts of the partner countries.<sup>69</sup> Thus, the MPF work as a general, informal pledge to increase political and financial engagement on migration through pre-existing channels with third countries.<sup>70</sup> Activities have ranged from high-level political dialogue between parties and deployment of migration liaison officers in EU delegations in partnered third countries to substantial funding on migration as well as increased security support in partnered third

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<sup>65</sup> Commission, 'Communication From the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration' (Communication) [2016] COM(2016) 385.

<sup>66</sup> Moreno-Lax, Violeta, 'EU External Migration Policy and the Protection of Human Rights' (EEAS, 2020) p. 23.

<sup>67</sup> Giuffré, Mariagiulia, & Moreno-Lax, Violeta, 'The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for migratory flows' in Satvinder Singh Juss (eds), *Research Handbook on International Refugee Law* (Elgar 2017) p. 86.

<sup>68</sup> Castillejo, Clare, *The EU Migration Partnership Framework Time for a Rethink?* (German Development Institute 2017) p. 6; Davitti, Daria & La Chimia, Annamaria, 'A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control', *Irish Yearbook of International Law*, Vol. 10 (2015) p. 12.

<sup>69</sup> Poli, Sara, 'The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems', *European Papers*, Vol. 5, No. 1 (2020) pp. 74-75

<sup>70</sup> Castillejo, Clare, *The EU Migration Partnership Framework Time for a Rethink?* (German Development Institute 2017) p. 6.

countries by EU MS.<sup>71</sup> However, the MPF remain informal in character, thus hindering the capacities for legal and political accountability.<sup>72</sup>

The EU Agenda on Migration and the following implementation through the MPF established external migration control as the heart of the EU foreign policy. It standardized the practice of informal agreements between the EU, its MS and third countries where negative and positive incentives were to be used to ensure compliance in cooperation to prevent irregular migrants from reaching the territorial borders of the EU.<sup>73</sup>

### 2.1.3 New Pact on Migration

In 2020, the European Commission presented the *New Pact on Migration and Asylum* (the New Pact).<sup>74</sup> The new system has been described as a three-story house, where the two top floors consist of a shared burden and solidarity in relation to immigration between MS and the management of the EU's external borders. The ground floor, and thus the area which the other areas rely on for stability, is the external dimension of migration policies, namely the formal and informal relationships and agreements with third countries of origin and transit of irregular migrants.<sup>75</sup> The New Pact would supposedly constitute a true, comprehensive system to replace the previous ones which had led to the European humanitarian failures of Moria, Calais and the Canary Islands.<sup>76</sup> Moreover, the New Pact continues to stress the responsibilities of countries of origin and transit and their role in reducing the amount of irregular migrants that reach the territorial borders of the EU.<sup>77</sup> However, the European Commission has failed to reach any political

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<sup>71</sup> Castillejo, Clare, *The EU Migration Partnership Framework Time for a Rethink?* (German Development Institute 2017) p. 7.

<sup>72</sup> Poli, Sara, 'The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems', *European Papers*, Vol. 5, No. 1 (2020) p. 75; Giuffr , Mariagiulia, *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020); Moreno-Lax, Violeta, 'EU External Migration Policy and the Protection of Human Rights' (*EEAS*, 2020) p. 23.

<sup>73</sup> Poli, Sara, 'The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems', *European Papers*, Vol. 5, No. 1 (2020) p. 76.

<sup>74</sup> Commission, 'Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee of the Regions on a New Pact on Migration and Asylum' (Communication) [2020] COM(2020) 609.

<sup>75</sup> Hein, Christopher, 'Old wine in new bottles? Monitoring the debate on the New EU Pact on Migration and Asylum' (*Heinrich B ll Stiftung*, 16 June 2021) <https://eu.boell.org/en/2021/06/16/old-wine-new-bottles-monitoring-debate-new-eu-pact-migration-and-asylum> (Accessed 20 March 2022).

<sup>76</sup> Ibid.; arter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga', *European Journal of Legal Studies*, Vol. 12, No. 2 (2020) p. III.

<sup>77</sup> Commission, 'Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee of the Regions on a New Pact on Migration and Asylum' (Communication) [2020] COM(2020) 609.



agreements and the New Pact has thus, to this day, failed to gain progress in any negotiations on the legislative elements of the pact.<sup>78</sup>

When it comes to cooperation with third countries, the New Pact mainly reiterates many of the already existing policies previously described in this chapter. However, the New Pact aims to achieve some developments also in this area such as promoting the recently amended Visa Code<sup>79</sup> which further facilitate the employment of visa policies to apply pressure on cooperation on migration control.<sup>80</sup> EU funding will also be crucial in order to achieve the goal of strengthening migration control in partnered third countries. These funds would be focused on supporting capacity building actions in areas of border management and search and rescue operations, among others.<sup>81</sup> While these suggestions for the external dimension of the EU's migration policy are in line with the pre-existing system, some aspects within the New Pact might point towards a more structured approach to cooperation with third countries, thus strengthening the agreements made.<sup>82</sup> Additionally, references in the New Pact of '*Counter-Smuggling Partnerships*'<sup>83</sup> with third countries may indicate the implementation of more formal cooperation instruments compared to the current ones based on informal agreements between third countries and MS.<sup>84</sup> However, as many

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<sup>78</sup> Hein, Christopher, 'Looking for pact-makers: the debate on the deadlocked EU Migration and Asylum Pact' (*Heinrich Böll Stiftung*, 12 November 2021) <https://eu.boell.org/en/2021/11/12/looking-pact-makers-debate-deadlocked-eu-migration-and-asylum-pact> (Accessed 20 March 2022).

<sup>79</sup> 'Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code)' [2019] OJ L 188.

<sup>80</sup> Thym, Daniel, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum' (*EU Migration and Asylum Law and Policy*, 28 September 2020) <https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/> (Accessed 22 March 2022) (Accessed 20 March 2022).

<sup>81</sup> García Andrade, Paula, 'EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?' (*EU Migration and Asylum Law and Policy*, 8 December 2020) <https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/> (Accessed 22 March 2022).

<sup>82</sup> *Ibid.*

<sup>83</sup> Luyten, Katrien, 'Understanding EU action against migrant smuggling' (European Parliamentary Research Service, 2021) p. 11.

<sup>84</sup> García Andrade, Paula, 'EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?' (*EU Migration and Asylum Law and Policy*, 8 December 2020) <https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/> (Accessed 22 March 2022).

have argued,<sup>85</sup> the New Pact is seemingly less of a fresh start and more of a refurbishing of previous methods.<sup>86</sup>

While the practical implications of the New Pact have yet to be seen, it demonstrates the continued effort by the EU to strengthen migration control in third countries in order to prevent irregular migrants from reaching its external borders. Previously, this has been accomplished through informal agreements between MS and third countries, where cooperation has been a condition for continued trade, aid and visa facilitation. While the New Pact in some regards might point to a shift to formal agreements between the EU and third countries, it predominantly relies on the previous systems in its implementation of the external dimension of the EU migration policy.

## 2.2 Case Studies

As the previous section observed, the external dimension of the EU migration policy has increasingly focused on informal cooperation between the EU, MS and third countries in the neighbouring area. In practice, naturally, a similar development can be observed. While the EU and MS cooperate with numerous countries along its geographical periphery, this section will highlight three specific cases which aptly demonstrates how these policies are adapted into practice. We can once again observe an inclination towards informalized agreements in which third countries are strongly incentivised to increase their migration control through conditional trade and aid with the EU and MS. As a result, irregular migrants are prevented from reaching the external borders of the Union and are increasingly confined to detention or forced on precarious pathways for migration.

### 2.2.1 EU-Turkey Deal

The EU-Turkey deal of 2016 is one of the most significant agreements made between the EU, its MS and third countries regarding border externalization of the EU.<sup>87</sup> The deal functioned as a precursor to the closely followed MPF which is widely considered to be inspired by the deal, institutionalizing the

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<sup>85</sup> See for example Thym, Daniel (ed), 'Special Collection on the 'New' Migration and Asylum Pact' (*EU Immigration and Asylum Law and Policy*) <https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/> (Accessed 9 May 2022).

<sup>86</sup> Karageorgiou, Eleni, 'The New Pact on Migration and Asylum: why Pragmatism Cannot Engender Solidarity', *Nordic Journal of European Law*, Vol. 2 (2020).

<sup>87</sup> Giuffr , Mariagiulia, & Moreno-Lax, Violeta, 'The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for migratory flows' in Satvinder Singh Juss (eds), *Research Handbook on International Refugee Law* (Elgar 2017) p. 87.

cooperation model which the EU-Turkey deal set up.<sup>88</sup> The agreement took the form of a press statement intended not to produce legally binding effects. It did, however, contain specific commitments which the parties agreed to adhere to. These included increased border security in Turkey and the readmission and sheltering of Syrian refugees in Turkey. In exchange, the EU granted Turkey €6 billion, promised to resettle Syrian refugees from Turkey, facilitate visa liberalisation for Turkish nationals, strengthen the capacities of the Turkish Coast Guard as well as increase cooperation between Turkey and Frontex.<sup>89</sup>

The agreement has been deemed successful by both parties as it has allegedly worked to reduce the amount of irregular migrants which reach the external borders of the EU, while providing Turkey with funding which have enabled them to build walls on their borders with Syria, Iran, and Iraq.<sup>90</sup> However, analysis has failed to identify any causal relationship between measures taken under the deal and the effective decline of irregular migration flows, which questions the potency of the deal to produce discernible effects for the EU.<sup>91</sup> Through the EU-Turkey deal, Turkey has been incentivised to strengthen their migration control, which has led to an increase in the abuses faced by irregular migrants in the country. Numerous reports have presented evidence for an increase of ill-treatment in detention and during border crossings.<sup>92</sup> Additionally, many refugees in Turkey are subjected to deplorable conditions and arbitrary detention.<sup>93</sup> For irregularly migrating women in Turkey, these risks are exacerbated as they experience

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<sup>88</sup> Bauloz, Celine, 'The EU Migration Partnership Framework: an External Solution to the Crisis?' (*EU Migration and Asylum Law and Policy*, 31 January 2017) <<https://eumigrationlawblog.eu/the-eu-migration-partnership-framework-an-external-solution-to-the-crisis/>> (Accessed 2 April 2022).

<sup>89</sup> Commission, 'EU-Turkey joint action plan, fact sheet' (Press release) [2015] MEMO/15/5860.

<sup>90</sup> Commission, 'Delivering on migration and border management: Commission reports on progress made under the European Agenda on Migration' (Press release) [2016] IP/16/4281.

<sup>91</sup> Bauloz, Celine, 'The EU Migration Partnership Framework: an External Solution to the Crisis?' (*EU Migration and Asylum Law and Policy*, 31 January 2017) <<https://eumigrationlawblog.eu/the-eu-migration-partnership-framework-an-external-solution-to-the-crisis/>> (Accessed 2 April 2022).

<sup>92</sup> Freedman, Jane, 'Engendering security at the borders of Europe: Women migrants and the Mediterranean 'crisis'', *Journal of Refugee Studies* Vol. 29, No. 4 (2016); Eisinberg, Andrea, 'The plight of female refugees in Turkey remains largely ignored' (*Huffington Post*, 24 May 2016) <[https://www.huffpost.com/entry/the-plight-of-female-refu\\_1\\_b\\_10106018](https://www.huffpost.com/entry/the-plight-of-female-refu_1_b_10106018)> (Accessed 1 April 2022); Stoter, Brenda, 'Syrian women refugees humiliated, exploited in Turkey' (*Al-Monitor*, 12 March 2014) <<https://www.al-monitor.com/originals/2014/03/syria-refugees-women-exploitation-harassment.html>> (Accessed 30 March 2022).

<sup>93</sup> Ulusoy, Orçun & Battjes, Hemme, 'Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement' (*VU Migration Law Series*, October 2017).

an increased risk of violence and abuse by the police and military they come in contact with as well as in detention and in refugee camps.<sup>94</sup>

While the legal nature of the EU-Turkey Deal appears to be very much informal, it is apparent that it has had discernible effects on migration control in both Turkey as well as on the external borders of the EU. However, the exact legal repercussions of the deal have yet to be determined judicially. In *NF, NG and NM v. the European Council*, the legality of the deal was challenged, and the CJEU had the opportunity to determine the nature of the deal and thus if it could be a subject for judicial review. The Court, however, dismissed the case on the ground that the EU itself was not a party to the deal, and thus failed to provide any guidance to the nature of the deal.<sup>95</sup> Thus, the question remains whether the deal solely constitutes an informal political agreement between Turkey and the MS or an international agreement between Turkey and the EU itself.

## 2.2.2 Libya

Libya has long remained the centre of EU border externalization efforts, despite the country's increasingly dire situation after the fall of the Gaddafi regime in 2011. Since then, the country has been marked by civil war and general violence with several rivaling governments and paramilitary militias. The country has a long history of cooperation with the EU on issues of migration control, and specifically with its former colonizer Italy.<sup>96</sup> In 2013, this cooperation led to the formation of the European Union Integrated Border Assistance Management in Libya (EUBAM Libya) as part of the CSDP missions funded by the European Commission.<sup>97</sup> The overall mandate of the mission was originally based on 'border management' but was later extended to include capacity building for Libyan authorities in the area of border security and migration.<sup>98</sup> The role of the EUBAM is solely to advise, mentor and train, not to carry out any executive function.<sup>99</sup>

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<sup>94</sup> Freedman, Jane, 'Engendering security at the borders of Europe: Women migrants and the Mediterranean 'crisis'', *Journal of Refugee Studies* Vol. 29, No. 4 (2016).

<sup>95</sup> *NF, NG and NM v the European Council*, T-192/16, T-193/16 & T-257/16, ECLI:EU:C:2018:705.

<sup>96</sup> Moreno-Lax, Violeta, 'EU External Migration Policy and the Protection of Human Rights' (EEAS, 2020) p. 44.

<sup>97</sup> EUBAM [https://eeas.europa.eu/csdp-missions-operations/eubamlibya\\_en](https://eeas.europa.eu/csdp-missions-operations/eubamlibya_en) (Accessed 2 May 2022).

<sup>98</sup> 'EUBAM Libya: mission extended, budget approved' [2016] EC Press Release <http://www.consilium.europa.eu/en/press/press-releases/2016/08/04-eubam-libya-mission-extended/> (Accessed 2 May 2022); *See also* Giuffr , Mariagiulia, & Moreno-Lax, Violeta, 'The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for migratory flows' in Satvinder Singh Juss (eds), *Research Handbook on International Refugee Law* (Elgar 2017) p. 90.

<sup>99</sup> 'Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya)' [2013] OJ L 138/15.

However, leaked internal documents reveal that the real goal of the EUBAM Libya is to strengthen Libya's border and naval coast guard, which are both paramilitary parts of the Ministry of Defence.<sup>100</sup>

As previously mentioned, Italy has a long history of cooperation with Libya on questions of migration control. Many EU institutions and MS have allocated large sums of money to fund the capacity building of one of the Libyan governments to intercept boats leaving Libya for Europe with irregular migrants and subsequently detain those intercepted.<sup>101</sup> However, Italy has taken a firm lead in providing material and technical assistance to Libyan authorities through different agreements between the two states, most prominently demonstrated through the 2017 Memorandum of Understanding (MoU) between the two countries.<sup>102</sup> The MoU included commitments by Italy to fund detention centres in Libya as well as completing their border control system.<sup>103</sup> Through these agreements conditional nature, demanding collaboration on migration control in return for development aid, Libya is greatly incentivised to enter in to them.<sup>104</sup> The agreement between Libya and Italy was the inspiration for a similar agreement between Malta and Libya in 2019.<sup>105</sup> These cooperations between the EU, its MS and Libya has led to an increase in the number of migrants and asylum seekers detained in Libya as well as a decrease in the available safe pathways for migration for forcibly displace persons depending on Libya as a country of transit.<sup>106</sup> Thus, cooperation on migration control between the EU and Libya has a direct correlation with an increased risk of inhuman or degrading treatment for affected migrants in Libya. The increase of violence that irregular migrants in Libya face, and specifically migrating women, due to these effects are indirectly enabled by the EU and its MS through the funding and empowering of perpetrating authorities.

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<sup>100</sup> Rettman, Andrew, 'EU 'civilian' mission training paramilitaries in Libya' (*EUobserver*, 18 November 2013) <<https://euobserver.com/investigations/122134>> (Accessed 15 April 2022).

<sup>101</sup> Human Rights Watch, 'No Escape from Hell EU Policies Contribute to Abuse of Migrants in Libya' (21 January 2019) <<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>> (Accessed 1 April 2022).

<sup>102</sup> Maccanico, Yasha, 'Italy renews Memorandum with Libya, as evidence of a secret Malta-Libya deal surfaces' (*Statewatch*, March 2020).

<sup>103</sup> Articles 1-2 of the MoU; *See also* Moreno-Lax, Violeta, 'EU External Migration Policy and the Protection of Human Rights' (*EEAS*, 2020) p. 44.

<sup>104</sup> Davitti, Daria & La Chimia, Annamaria, 'A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control', *Irish Yearbook of International Law*, Vol. 10 (2015) p. 18.

<sup>105</sup> Statewatch, 'Malta-Libya MoU' (28 May 2020)

<<https://www.statewatch.org/news/2020/jun/malta-libya-mou-immigration.pdf>> (Accessed 20 May 2022).

<sup>106</sup> Human Rights Watch, 'No Escape from Hell EU Policies Contribute to Abuse of Migrants in Libya' (21 January 2019) <<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>> (Accessed 1 April 2022).

## 2.2.3 Niger

Niger has also been one of the key interests for EU border externalization efforts. Since even before GAMM, Niger has been identified as an important transit country where regulation and control of migration flows is of dire importance for the EU.<sup>107</sup> Through the EU Agenda on Migration and the subsequent European Trust Fund for Africa, cooperation on migration control between the EU and Niger intensified. For example, the mandate of the civilian capacity building mission of the EUCAP Sahel Niger, another CSDP mission,<sup>108</sup> was expanded to include the reduction of irregular migrants crossing the borders of Niger.<sup>109</sup> EU efforts have been focused on the capacity building of the Nigerien Internal Security Forces to strengthen migration control in the area through significant funding, training, and the supplying of border security equipment.<sup>110</sup> Additionally, due to increasing pressure from the EU, the Parliament of Niger criminalized the practice of human smuggling in the country. EU pressure on Niger has worked remarkably well due to the country's reliance on EU development funds, which are conditional on the increased cooperation on migration control, for a significant part of its budget.<sup>111</sup>

In 2017, a Joint Declaration was signed by multiple EU and West African parties, committing to enhance cooperation to counter irregular migration at all stages of the journey.<sup>112</sup> Focus of the Declaration is on the combatting of human smuggling, reducing irregular migration to the EU and protect migrants against human rights violations.<sup>113</sup> However, no explicit mention of the rights which such cooperation might impact is made. A follow-up

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<sup>107</sup> Komlavi Hahonou, Eric & Rye Olsen, Gorm, 'Niger – Europe's border guard? Limits to the externalization of the European Union's migration policy', *Journal of European Integration*, Vol. 43, No. 7 (2021) p. 880.

<sup>108</sup> 'Council Decision 2014/482/CFSP of 22 July 2014 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger)' [2014] OJ L 217/31. *See also* EUCAP Sahel Niger, 'About' <[https://eeas.europa.eu/csdp-missions-operations/eucap-sahel-niger\\_en](https://eeas.europa.eu/csdp-missions-operations/eucap-sahel-niger_en)>.

<sup>109</sup> 'Council Decision 2014/482/CFSP of 22 July 2014 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger)' [2014] OJ L 217/31.

<sup>110</sup> Komlavi Hahonou, Eric & Rye Olsen, Gorm, 'Niger – Europe's border guard? Limits to the externalization of the European Union's migration policy', *Journal of European Integration*, Vol. 43, No. 7 (2021).

<sup>111</sup> European External Action Service, 'Niger Action and Progress under the Migration Partnership Framework June 2016 – June 2017' <https://www.statewatch.org/media/documents/news/2017/jun/eu-com-partnership-framework-4th-report-niger.pdf> (Accessed 3 May 2022).

<sup>112</sup> Commission, 'Rencontre à Paris sur la migration: Déclaration conjointe 'Relever le défi de la migration et de l'asile' (Press release) [2017].

<sup>113</sup> Moreno-Lax, Violeta, 'EU External Migration Policy and the Protection of Human Rights' (*EEAS*, 2020) p. 53.

declaration including the majority of the West African countries and regional bodies was signed in Niamey in 2018.<sup>114</sup>

The relations between the EU and Niger have evidently led to an increase in migration control in Niger. For the EU, this has been lauded as an example of how cooperation with third countries can successfully decrease the number of irregular migrants which reach the EU.<sup>115</sup> However, as the borders of Niger close, migrants intended to reach the EU and reliant on transit through Niger are put in even more perilous situations, forced on precarious routes or to pay exorbitant amounts of money to reach their destinations.<sup>116</sup>

### **2.3 Concluding remarks – The proliferation of informalized cooperation with third countries.**

The external dimension of the EU migration policies has since the adoption of the GAMM framework been marked by a focus on cooperation with third countries on migration control through informalized agreements. These agreements often work as a condition for third countries to enable aid from and trade with the EU and its MS. Additionally, the subsidies cooperating third countries receive from the EU and MS are many times earmarked towards the further development of migration control. While the informal nature of the agreements works to exempt them from judicial and political accountability, they contain specific commitments from the parties having discernible effects on the level of migration control in cooperating third countries. Commitments guaranteed by the EU and MS include provision of financial, technical, and technological support as well as personnel and their training. In return, third country parties commit to increase their migration control with the aim of preventing irregular migrants from reaching the external borders of the EU. While the protection of human rights of migrants are in some cases specifically mentioned as an interest of importance in relation to the agreements, no instruments monitoring or evaluating the implementation of the agreements and the affect of the human rights of migrants are put in place.

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<sup>114</sup> Commission, 'Rencontre à Niamey sur la migration - Déclaration conjointe suivant la réunion de coordination de la lutte contre le trafic illicite de migrants et la traite des êtres humains' (Press release) [2018].

<sup>115</sup> Bøås, Morten, 'EU migration management in the Sahel: unintended consequences on the ground in Niger?', *Third World Quarterly*, Vol. 42, No. 1 (2021).

<sup>116</sup> McCormick, Ty, 'Highway through hell' (*Foreign Policy*, 4 October 2017).

The three cases observed in this chapter aptly demonstrate the most common characteristics of contemporary EU externalization measures. Agreements of cooperation are often informalized, potentially leaving them out of reach of judicial accountability as neither the actors nor the scope of the agreements are clear. Additionally, as the mandate of missions are seemingly flexible, reviewed and changed in conjunction with the change of circumstances or priorities, further challenges in discerning both relevant actors and the scope of the missions appear. Consequently, when abuses which infringe on the interests of human rights are revealed in relation to externalization measures and the increased migration control in third countries which they promote, these characteristics puts up serious challenges in resolving questions of applicability. Specifically, when examining abuses infringing on the interests guaranteed by the Charter, uncertainty regarding actors and mandate infer implications in the determination of whether measures are within the scope of application of the Charter. Additionally, also when engaging in the material scope of specific provisions of the Charter, and their positive obligations, the same characteristics may posit difficulties. These challenges will be further elaborated on and analysed in Chapter 4.

However, before any engagement of the Charter is due, we must first determine what, if any, fundamental rights interests that increased migration control may infringe on. This chapter has attempted to demonstrate the correlation between EU externalization measures and increased migration control in third countries. Subsequently, the next chapter will attempt to demonstrate the correlation between migration control and the risk of ill-treatment, specifically in relation to migrating women.



### 3 Women, Migration Control and Ill-Treatment

As externalization measures promotes increased migration control, it results in the removal of legal and safe pathways for migration and migrants are forced to seek precarious pathways for migration through irregular channels. While all migrants face risk of abuse, irregular migrants are at an increased risk of fundamental rights abuses due to the nature of their movement which exposes them more frequently to dangerous and hazardous situations.<sup>117</sup> One such prominent abuse which irregular migrants face is being subjected to ill-treatment in the form of physical, mental, and sexual abuse.<sup>118</sup> This ill-treatment can occur either as an indirect result of migration control which forces migrants on to more dangerous pathways and exposes them to smugglers and traffickers, or as a direct result of migration control through contact with migration-related detention. Thus, such abuses can be executed by both state and non-state actors and through many different modes.<sup>119</sup> Already marginalized groups face these abuses in exacerbated ways when enacting in irregular migration due to their often vulnerable situation. One such group, is migrating women.<sup>120</sup> This chapter aims to illuminate the relationship between, for the thesis, relevant aspects of migration control and the exposure to ill-treatment as well as the specific vulnerabilities of migrating women when engaging in irregular migration. For this thesis, two specific contexts in which irregular migrants risk ill-treatment due to increased migration control has been identified, migration-related detention and when forced on precarious pathways for migration. We begin by examining the relation between these contexts and ill-treatment of migrants. Subsequently, an analysis of the specific risk of harm that migrating women face within these contexts will be due. Thus, we will garner an understanding of the relationship between migration control and ill-treatment, and how this relationship takes form in relation to migrating women.

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<sup>117</sup> World Organization Against Torture, 'The Torture Roads. The Cycle of Abuse against People on the Move in Africa' (15 December 2021) p. 17.

<sup>118</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, pp. 6-11.

<sup>119</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, p. 4.

<sup>120</sup> Pickering, Sharon, *Women, Borders, and Violence* (Springer-Verlag New York Inc. 2014).

### 3.1 Migration-Related Ill-treatment

While the vast majority of the world's 258 million migrants move through legal and safe pathways, increasingly restrictive migration laws, policies and practices have forced a growing number of migrants on to irregular modes of migration. Irregular migration operates outside of official immigration and admission procedures and is therefore marked by corruption, violence, abuse and a lack of transparency and oversight. The violations which irregular migrants face also includes an escalating prevalence of ill-treatment, performed by both state and non-state actors.<sup>121</sup> While the definitional threshold of inhuman or degrading treatment under the EU-Charter will be examined more closely in chapter 4, a general definition of ill-treatment is required for context. *Gil-Bazo* combines the United Nations (UN) and the International Criminal Court (ICC) definitions considering the ordinary meaning of these terms to observe the following definitions:

“- *Inhuman treatment or punishment* is the infliction of severe pain or suffering when at least one of the qualifying criteria of torture (intention, purpose or powerlessness of the victim) is missing.  
- *Degrading treatment or punishment* is the infliction of pain or suffering in a particularly humiliating manner.”<sup>122</sup>

With this general definition within international human rights law of ill-treatment, a closer examination of how migration control encourages ill-treatment of migrants is due. While migrants may be subjected to ill-treatment in many different contexts, for the purpose of this thesis, two particular contexts have been identified. Migration-related detention is one aspect of migration control where migrants are at risk of ill-treatment due to either the conditions of detention or by abuse from guards or fellow detainees.<sup>123</sup> The removal of safe and legal pathways for migration, as a result of increased migration control, may also put migrants in situations where they are subjected to ill-treatment. When seeking out precarious pathways for migration, migrants encounter both human smugglers and traffickers, where they are at risk of abuse.<sup>124</sup>

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<sup>121</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, p. 6.

<sup>122</sup> Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 76.

<sup>123</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, p. 6; Filges, Trine, et al, 'The Impact of Detention on the Health of Asylum Seekers: A Systematic Review', *Research on Social Work Practice*, Vol. 28, No. 4 (2018).

<sup>124</sup> Gerard, Alison & Pickering, Sharon, 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU', *Journal of Refugee Studies*, Vol. 27, No. 3 (2013).

### 3.1.1 Migration-related detention

Migration-related detention is a direct result of increased migration control. It is used for the confinement of irregular migrants as well as a means of deterrence against migration. Additionally, increased migration control may also alter the conditions of migration-related detention, e.g., leading to increased detention times, overcrowding and the decrease of health and sanitation standards.<sup>125</sup> Thus, migration control not only increases the prevalence of migration-related detention but may also deteriorate their conditions. As will be shown below, this interaction between migration control and migration-related detention increases the prevalence of ill-treatment. Additionally, while these observations are made generally, they can also be applied specifically to the context of increased migration control in third countries, thus proving valuable for the purpose of this thesis.

Migration-related detention come in two main modes, administrative detention which aims at ensuring that an administrative decision (such as deportation) can be carried out and criminal detention, a punitive measure for a criminal offence. While administrative detention can be legal, criminal detention as a response to irregular migration is often viewed as much more problematic within international law.<sup>126</sup> However, both modes of detention may impose a risk of being subjected to inhuman or degrading treatment or torture for the detainees due to the vulnerable position they possess, and the practices often used in detention by state officials and private guards.

All instances of detention involve the placement of persons in private or custodial settings from which they are not permitted to leave.<sup>127</sup> While this setting can range from prisons, detention centres, shelters and closed refugee camps to offshore facilities, international zones at airports and territorial borders, they all qualify as detention, or deprivation of liberty, by the inability to freely leave for the affected migrants.<sup>128</sup> In the context of IHRL, and specifically the ECHR, the possibility to leave cannot solely be a theoretical possibility. *Amuur v. France*, revolved around the defendant's theoretical possibility to leave an airport transit zone by flying to another country while being denied immigration in the current one. The Court ruled

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<sup>125</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, pp. 6-9.

<sup>126</sup> UNHCR, 'Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) p. 19.

<sup>127</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, p. 6.

<sup>128</sup> UNHCR, 'Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) §§5-7.

that this theoretical possibility was not enough to exempt the situation from being qualified as a form of detention.<sup>129</sup> In *Ilias and Ahmed v. Hungary*, however, dealing with the issue of asylum-seekers held in facilities at the Hungarian-Serbian land-border, the Court found that the situation did not qualify as detention, since the applicants were free to leave the premises and return to Serbia.<sup>130</sup> Thus, the precedent of *Amuur v. France* seems limited to the context of airport transit zones, and may not be analogously applicable to cases regarding other types of state borders. While the third countries relevant to the purpose of this thesis are not bound by the ECHR, these considerations can prove valuable in the next Chapter were the material scope of Article 4 of the Charter will be examined.<sup>131</sup>

While international law requires detention of migrants to be of a certain humane standard<sup>132</sup>, practice has proven that the conditions under which migrants are held during detention are often the opposite.<sup>133</sup> Poor physical and hygienic conditions together with overcrowding and negligence and abuse by state officials, private guards and fellow detainees, all may contribute in subjecting detainees to inhuman or degrading treatment during their detention.<sup>134</sup> The prolonged use of solitary confinement of detainees is frequently used during detention all over the world and has been internationally recognized as a form of ill-treatment.<sup>135</sup> Failure to provide adequate medical care for detainees is yet another common practice which migrants are subjected to under detention which could constitute a form of ill-treatment. Additionally, poor conditions and overcrowding leaves detainees at an increased risk of being targets of violence and sexual abuse amounting to ill-treatment both by other detainees as well as by the state officials or private guards which oversee the detention.<sup>136</sup> In some instances,

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<sup>129</sup> *Amuur v France* No. 19776/92 (ECtHR 25 June 1996).

<sup>130</sup> *Ilias and Ahmed v Hungary* [GC] No. 47287/15 (ECtHR 21 November 2019).

<sup>131</sup> Article 52(3) of the Charter dictates the conformity between identical provisions in the Charter and the ECHR.

<sup>132</sup> Human Rights Committee (HRC), ‘General comment no. 35, Article 9 (Liberty and security of person)’ (December 16, 2014) CCPR/C/GC/35, §18.

<sup>133</sup> Amnesty International, *The Human Rights Risks of External Migration Policies* (Amnesty International 2017).

<sup>134</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment’ (February 26 2018) A/HRC/37/50, p. 6.

<sup>135</sup> The Center for Victims of Torture, ‘Immigration Detention may Constitute Torture & Ill-Treatment’, <https://www.cvt.org/EndDetention2> (Accessed 22 Feb 2022).

<sup>136</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment’ (February 26 2018) A/HRC/37/50, p. 7; The Center for Victims of Torture, ‘Immigration Detention may Constitute Torture & Ill-Treatment’, <https://www.cvt.org/EndDetention2> (Accessed 22 Feb 2022).

detention guards have been known to subject detainees to extreme physical abuse leaving detainees with lifelong physical injuries.<sup>137</sup>

Arbitrary detention is yet another condition of migration-related detention which may lead to ill-treatment of detainees. Arbitrary detention itself is prohibited by international law,<sup>138</sup> and it has been recognized as increasing the risk for migrants to be subjected to ill-treatment.<sup>139</sup> The emotional distress that arbitrary detention cause may work cumulative with other factors during detention such as prolonged or indefinite confinement and lack of information regarding the detainees legal rights, or detention incommunicado<sup>140</sup>, to create a situation where the treatment of detainees could constitute ill-treatment.<sup>141</sup> Thus, arbitrary detention implies a lower threshold for other factors, such as poor physical conditions, in order to amount to ill-treatment, than if the detention would have been legitimate under procedural regulations.

### 3.1.2 Precarious Pathways for Migration

Migrants are also exposed to ill-treatment due to the necessity to traverse precarious pathways for migration when legal and safe pathways are eradicated. While all pathways may involve risk of ill-treatment, these pathways are characterized by the increased need to circumvent different forms of migration control to reach one's destination. This forces irregular migrants to choose more dangerous routes or modes of transportation in their quest for migration. While this might lead irregular migrants to traverse areas which are environmentally hazardous, such as deserts and oceans, it primarily pressures migrants to rely on smuggling and trafficking networks to reach their destination. Human smuggling does not necessarily need to be nefarious, and an important distinction should be made between the practice and trafficking, as the latter is contingent on the exploitation of vulnerable people while smuggling is not.<sup>142</sup> However, increased migration control could be argued to increase the dangers associated with irregular

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<sup>137</sup> UN Office of the High Commissioner for Human Rights (OHCHR), "Detained and Dehumanised" - Report on Human Rights Abuses Against Migrants in Libya' (13 December 2016) p. 17.

<sup>138</sup> UNHCR, 'Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) §§18-20.

<sup>139</sup> *F.J. et al v. Australia*, CCPR, No. 2233/2013, 22 March 2016, §10.6; *M.M.M. et al v. Australia*, CCPR, No. 2136/2012, 28 October 2013, §10.7.

<sup>140</sup> Incommunicado detention is generally understood as a situation of detention in which an individual is denied access to family members, an attorney, or an independent physician.

<sup>141</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, p. 9.

<sup>142</sup> Hathaway, James, 'The Human Rights Quagmire of Human Trafficking.' Virginia Journal of International Law, Vol. 49, No. 1 (2008) p. 5.

travel such as smuggling as observed by *Stoyanova*.<sup>143</sup> As such, unlike migration-related detention, which is often a direct result of migration control, the risks associated with the use of precarious pathways for migration are an indirect result of migration control. However, it still has a discernible effect on the abuses which irregular migrants face.<sup>144</sup>

When forced to find precarious pathways for migration, irregular migrants increasingly seek, or get sought out by, the services of smuggling and trafficking networks that work in all regions of the world where migration occurs. Migrants who are in contact with these networks are often subjected to grave infringements of their human rights, including inhuman or degrading treatment.<sup>145</sup> The perpetrators of these abuses can be both state officials and unaffiliated private persons working for criminal operations.<sup>146</sup> The state's involvement with these practices can range from the acquiescence of border officials to smuggling and trafficking activities to the explicit collusion between criminals and officials through various monetary deals in which border officials might commit to refuse border crossing for migrants unaffiliated with any smuggling scheme.<sup>147</sup> Thus, migration control not only increases the prevalence of smuggling and trafficking networks indirectly, but the actors of border controls may additionally contribute to the activities and abuse of the networks directly.

Trafficking is one of the greatest risks for unaccompanied migrating children and women, however also men in vulnerable positions are at risk. Trafficking victims are subjected to forced labour, sexual abuse and other physical violence and exploitation. Victims are sometimes deliberately held under torture-like conditions in order to extort them or their families of large sums of money. Additionally, many victims become targets of forced organ removal, which later are sold at the global black market.<sup>148</sup>

The risk for migrants of being subjected to ill-treatment associated with smuggling may also heighten with increasingly rigorous migration control as it forces smugglers to make use of more treacherous routes and conduct when ferrying the migrants.<sup>149</sup> Smugglers may be dissuaded from investing in adequately safe vessels for transportation, due to the risk of its destruction

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<sup>143</sup> Stoyanova, Vladislava, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling', *German Law Journal*, Vol. 21 (2020) p. 450.

<sup>144</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50.

<sup>145</sup> *Ibid.* p. 10.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.* pp. 10-11.

<sup>149</sup> Stoyanova, Vladislava, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling', *German Law Journal*, Vol. 21 (2020) p. 450.

by guards.<sup>150</sup> The journeys of smugglers are also pushed to be made during unsuitable conditions or over more dangerous pathways in order to evade increased border surveillance.<sup>151</sup> Additionally, as the risks associated with increased migration control enhances for smugglers, they are able to increase the cost of their services, leaving migrants unable to afford these prices at an exacerbated vulnerable position.<sup>152</sup>

## 3.2 Specific Vulnerabilities of Migrating Women

As reaffirmed by, for example, the New York Declaration for Refugees and Migrants, migrating women are particularly vulnerable to exposure to all sort of violence, including inhuman or degrading treatment, during their migrating journeys.<sup>153</sup> While all migrants are exposed to ill-treatment as a result of increased migration control, it is important to determine how migration-related ill-treatment affects women in particular to understand how migration policies and practices impact women's experiences of migration. Through this, you allow for legal norms to be applied accurately and effectively to people within a jurisdiction, thus allowing international human rights law to reach its full potential in its application for migrating women.<sup>154</sup> Additionally, the highlighting of migrating women's specific vulnerabilities in relation to migration control will be helpful for the legal analysis in Chapter 4, as this is an important factor in determining the fulfilment of the definitional scope of Article 4. Subsequently, the two previously described contexts in which migrants risk ill-treatment, migration-related detention and on precarious pathways for migration, will be examined from the perspective of female migrants.

### 3.2.1 Women and Migration-Related Detention

Migrating women in detention face risk of being subjected to ill-treatment in many different modes. As numerous reports and records have shown, one of

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<sup>150</sup> Cuttitta, Paolo, et al, 'Various Actors: The Border Death Regime' in Paolo Cuttitta & Tamara Last (eds), *Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality* (Amsterdam University Press 2019) p. 45.

<sup>151</sup> Grant, Stefanie, 'Recording and Identifying European Frontier Deaths', *European Journal of Migration and Law*, Vol. 13 (2011) p. 39.

<sup>152</sup> Hathaway, James, 'The Human Rights Quagmire of Human Trafficking.' *Virginia Journal of International Law*, Vol. 49, No. 1 (2008) p. 33.

<sup>153</sup> UN General Assembly, 'New York Declaration for Refugees and Migrants' (13 September 2016) A/71/L.1.

<sup>154</sup> de Beco, Gauthier, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law', *Human Rights Law Review* Vol. 17 (2017).

the biggest risks for women in detention is sexual violence.<sup>155</sup> Women in detention are often raped and abused by male guards, who can be both private and state-owned. These violations would many times not be restricted to a single occurrence for the women, but a multitude of occurrences during their experience of detention.<sup>156</sup> Additionally, women not only risk being subjected to sexual and physical violence by guards in migration-related detention, but also by fellow detainees. The risk of such occurrences is elevated by the conditions of the detention setting, such as overcrowding, absence of gender separation and inadequate oversight.<sup>157</sup>

The settings of detention themselves are also often not suited to respond to the specific health needs of women. This leaves women in migration-related detention more susceptible to gender-specific sexual and reproductive health concerns.<sup>158</sup> Such absence of gender-specific health care could constitute a form of inhuman or degrading treatment of women in migration-related detention.<sup>159</sup> While such abuse does not involve direct physical or sexual violence against women, it leaves women in particular susceptible to ill-treatment.

Another way in which the vulnerabilities of women manifest itself during migration-related detention is through arbitrary detention. While all migrants who are arbitrarily detained may suffer to conditions amounting to ill-treatment, people of particularly vulnerable groups, such as women, are affected in exacerbated ways. The longer a situation of arbitrary detention and deplorable conditions lasts, the more profound will the suffering of detainees be. Thus, the threshold for inhuman or degrading treatment can be reached very rapidly, and sometimes instantly, for women during arbitrary

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<sup>155</sup> UN Office of the High Commissioner for Human Rights (OHCHR), "Detained and Dehumanised" - Report on Human Rights Abuses Against Migrants in Libya' (13 December 2016); Hourani, Jeanine et al, 'Structural and Symbolic Violence Exacerbates the Risks and Consequences of Sexual and Gender-Based Violence for Forced Migrant Women' (*Front. Hum. Dyn.*, 18 October 2021) <<https://www.frontiersin.org/articles/10.3389/fhumd.2021.769611/full>> (Accessed 03 Mar 2022); Gerard, Alison & Pickering, Sharon, 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU', *Journal of Refugee Studies*, Vol. 27, No. 3 (2013); Pickering, Sharon, *Women, Borders, and Violence* (Springer-Verlag New York Inc. 2014).

<sup>156</sup> UN Office of the High Commissioner for Human Rights (OHCHR), "Detained and Dehumanised" - Report on Human Rights Abuses Against Migrants in Libya' (13 December 2016) pp. 21-22.

<sup>157</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading treatment or Punishment' (February 26 2018) A/HRC/37/50, p. 7; UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) A/HRC/31/57, p. 9.

<sup>158</sup> Smith, Alyna et al, 'Migrant Women's Health Issues: Addressing Barriers to Access to Health Care for Migrant Women with Irregular Status' *Entre Nous*, No. 85 (2016).

<sup>159</sup> UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) A/HRC/31/57.



detention as the cumulative negative effect of their experience of migration-related detention often is exacerbated due to their gender.<sup>160</sup>

### 3.2.2 Smuggling and Trafficking of Migrant Women

As migrants are forced to seek out precarious pathways to reach their destinations due to the increase of migration control which has limited the potential for legal migration, they are put at an increased risk of being subjected to ill-treatment. This risk is exacerbated for migrating women, as their position as a vulnerable group elevates the risk of being subjected to violence during these precarious pathways for migration. One study concerning irregular migrants who had travelled along the Mediterranean route from Northern Africa to Italy estimated that 90% of all girls and women had been raped during their journeys.<sup>161</sup> Additionally, women are exposed to the risk of falling victim to trafficking and being subjected to violence when making use of smuggling networks.<sup>162</sup> Thus, increased migration control which forces migrants on to precarious paths has an exacerbated effect on the risk of being subjected to ill-treatment for migrating women.

As access to regular pathways are limited, migrating women are often forced to rely on smugglers to reach their destination states. This creates a dependency, constructed as a result of increasingly stringent migration laws, between migrating women and smugglers. Within this unequal power balance, women are at an increased risk of being subjected to sexual and physical violence. Smugglers are able to take exorbitant fees for their monopolized services, which when unable to be paid for, often results in debt bondage increasing migrating women's risk of forced labour and sexual exploitation.<sup>163</sup> In other instances, women are forced to pay for the smugglers services with sexual favours.<sup>164</sup> Studies have shown that smugglers are responsible for 90% of all sexual and physical violence that

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<sup>160</sup> UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) A/HRC/31/57, p. 9.

<sup>161</sup> Women's Refugee Commission, 'More Than One Million Pains': Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy' (WRC, 2019).

<sup>162</sup> von Hase, Inkeri et al, 'From Evidence to Action: Tackling Gender-Based Violence Against Migrant Women and Girls' (*UN Women*, 2021).

<sup>163</sup> Danish Institute for International Studies, 'No Place for Me Here': The Challenges For Ethiopian Male Return Migrants' (2020).

<sup>164</sup> von Hase, Inkeri et al, 'From Evidence to Action: Tackling Gender-Based Violence Against Migrant Women and Girls' (*UN Women*, 2021); Hourani, Jeanine et al, 'Structural and Symbolic Violence Exacerbates the Risks and Consequences of Sexual and Gender-Based Violence for Forced Migrant Women' (*Front. Hum. Dyn.*, 18 October 2021) <https://www.frontiersin.org/articles/10.3389/fhumd.2021.769611/full> (Accessed 04 Mar 2022).

women are subjected to during certain irregular routes.<sup>165</sup> Additionally, women are more exposed to the strenuous conditions of the actual journey as they, for example, are given unfavoured positions in vehicles as a result of the structural inequalities which plays a role in producing their vulnerabilities.<sup>166</sup>

One of the greatest risks for migrants is to fall victims of trafficking, and this risk is particularly prominent for migrating women. While trafficking can occur at any stage of migration, its prevalence is often increased by the same causes that increases the prevalence of smuggling.<sup>167</sup> Consequently, risk of falling victim to trafficking is not always contingent on elevated migration control, however, many modes of migration control increase the prevalence of trafficking.<sup>168</sup> While women experience a high risk of falling victim to trafficking, they also face gendered abuse while being victims of trafficking. Different forms of sexual abuse are very prevalent for migrant women, especially when travelling alone.<sup>169</sup> Additionally, irregular migrant women who fall victim of trafficking may not report their exploitation due to fear of detention or deportation by state officials, which further demonstrates the linkage between migration control and the increased risk of abuse migrating women face in relation to trafficking.<sup>170</sup>

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<sup>165</sup> UNHCR, “’On this journey, no one cares if you live or die’”: Abuse, protection, and justice along routes between East and West Africa and Africa’s Mediterranean coast’ (2020).

<sup>166</sup> Gerard, Alison & Pickering, Sharon, ‘Gender, Securitization and Transit: Refugee Women and the Journey to the EU’, *Journal of Refugee Studies*, Vol. 27, No. 3 (2013) pp. 338–359.

<sup>167</sup> Frelick, Bill et al, ‘The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants’, *Journal on Migration and Human Security*, Vol. 4, No. 4 (2016).

<sup>168</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (5 January 2016) A/HRC/31/57.

<sup>169</sup> *Ibid.* p. 10.

<sup>170</sup> von Hase, Inkeri et al, ‘From Evidence to Action: Tackling Gender-Based Violence Against Migrant Women and Girls’ (*UN Women*, 2021).

### **3.3 Concluding remarks - The Interaction Between Migration Control and the Prevalence of Ill-Treatment of Migrant Women**

The implications migration control has on migrants and their risk of being subjected to ill-treatment presented in this chapter forms the basis for the analysis of the applicability of Article 4 of the Charter on externalization measures. The impact of migration-related detention and the precarious routes that migrants are forced on have been specifically analysed as they are recognized as results of increased migration control in third countries. Migration control relies on the use of migration-related detention to deter and detain migrants in order to keep them from reaching their intended destinations. Additionally, with the removal of legal and safe pathways for migration due to more stringent migration control, migrants are forced on precarious pathways to reach their destinations. This increases the demand for the services of smugglers and the prevalence of trafficking and promotes more hazardous modes of transportation. Both migration-related detention and the trafficking and smuggling of migrants have been argued as being particularly hazardous situations for migrants due to the increased risk of being subjected to ill-treatment. Thus, this chapter have attempted to demonstrate a correlation between increased migration control and the risk of being subjected to ill-treatment.

Further, this chapter has argued that migrating women are at a particular vulnerable position which exacerbates their risk of being subjected to ill-treatment. In the context of migration-related detention, women are often subjected to sexual and physical violence by guards and fellow detainees, as well as often being denied adequate health care. Similarly, migrating women are at risk of being victims of trafficking and where they experience physical or sexual exploitation and often lack resources to leave the cycle of abuse. Women are also at a risk of ill-treatment in the context of smuggling as smugglers, border guards and fellow migrants subject them to sexual and physical abuse. Additionally, they are often put in precarious situations during the journey in which they may experience harm such as burn marks from sitting too close to boat engines. Thus, increased migration control has a discernible negative effect on the experience of migrating women and their risk of being subjected to ill-treatment. By highlighting the particular risks which migrating women face, a more informed legal analysis is enabled, where legal provisions can be adequately applied. Finally, as the previous chapter ventured to

demonstrate a correlation between externalization measures and increased migration control in third countries, this chapter has attempted to demonstrate the linkage between increased migration control and the prevalence of ill-treatment of migrating women. Both of these linkages will be important in the legal analysis of the scope of application of the Charter on externalization measures as well as the material scope of Article 4 of the Charter.

## 4 The EU-Charter

The findings made in the previous chapters demonstrate the correlation between the externalization of EU borders and the risk of being subjected to ill-treatment for irregularly migrating women in third countries. The external dimension of the EU migration policy intensifies migration control in cooperating third countries, which in turn promotes migration-related detention as well as removing safe and legal pathways for migration, forcing irregular migrants on to precarious pathways for migration where they are exposed to different forms of abuse. However, although the correlation between externalization measures and increased migration control may be observed, the question for this thesis remains whether these measures fall within the scope of application of the Charter, enabling review of legal accountability, and if so, whether the measures are in compliance with the rights guaranteed under Article 4 of the Charter.

When the fundamental rights of irregularly migrating women in third countries are infringed on, potentially as a result of a destination state's externalization efforts, complicated legal questions arise. First of all, the measures are conducted domestically, with extraterritorial effect. Thus, it is third countries and private individuals in said countries which are the ones in physical contact with, and conducting the abuse of, potential victims, not EU bodies or MS. Secondly, neither the legal nature of the measures nor the relevant actor of the measure is always apparent. Uncertainties regarding EU competencies and the informalization of bi- and multilateral agreements within the area of migration control frustrates the ability to determine applicability of the Charter.

In general, it is prohibited under international law for states to directly support the internationally wrongful acts of another state.<sup>171</sup> This means that EU-institutions or MS pursuing border externalization strategies are at least responsible for rights violations in and by third countries when they exert control over said acts. Additionally, externalization may, directly or indirectly, trigger other human rights violations than those guaranteed by the Charter.<sup>172</sup> Regardless of status or location, migrants may have a range of fundamental rights which externalization-promoted migration control might

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<sup>171</sup> International Law Commission Report (ILC), A/56/10 (August 2001).

<sup>172</sup> Frelick, Bill et al, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants', *Journal on Migration and Human Security*, Vol. 4, No. 4 (2016) p. 197.

implicate.<sup>173</sup> While irregularly migrating women may be covered by such rights either pertaining to their status as migrants or asylum-seekers or through other specific bodies of law aimed at protecting particularly vulnerable groups, this thesis will only analyse the protection provided for by Article 4 of the Charter.

This chapter aims to first determine the scope of application of the Charter and whether it could be applied to any of the externalization practices of the EU or its MS. Secondly, this chapter will examine the definitional threshold of Article 4 of the Charter and if the harm observed in Chapter 3 fulfils that. Subsequently, we will attempt to apply Article 4 of the Charter, and specifically the positive obligations pertaining to the prohibition of inhuman or degrading treatment, on these externalization practices to determine whether or not violations which could infer judicial accountability has occurred.

## 4.1 Scope of Application

To establish whether the Charter is applicable for measures enacted as part of the external dimension of the EU migration policy, we must first determine the scope of application of the Charter. Article 51(1) is the central provision of the Charter in that it defines the scope of application of the instrument. While the Article establishes the Charter's application to all Union bodies in all situations, the scope of application is limited in relation to MS to only apply when implementing Union law.

Article 51(1) specifically binds the 'institutions, bodies, offices and agencies of the Union' to the Charter without limitations, meaning that all bodies of the Union are bound by the instrument whether acting within or outside of Union law.<sup>174</sup> MS on the other hand are only bound by the Charter 'when they are implementing Union law', meaning that the application of the Charter in relation to MS is conditional on the requirement of 'implementing Union law'. In *Fransson*, the Court clarified the meaning of 'implementation' within Article 51(1), declaring that the Charter applies whenever member states 'act within the scope of Union law'.<sup>175</sup> This includes both when MS implement EU obligations as well as derogate from

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<sup>173</sup> Kassoti, Eva, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga', *European Journal of Legal Studies*, Vol. 12, No. 2 (2020) p. 124.

<sup>174</sup> *Ledra Advertising Ltd et al v European Commission and European Central Bank*, C-8/15 P, C-9 /15P & C-10/15P, EU:C:2016:701, §67.

<sup>175</sup> *Åkerberg Fransson*, C- 617/ 10, EU:C:2013:105, §19; Hancox, Emily, 'The Meaning of 'Implementing' EU Law Under Article 51(1) of the Charter: Åkerberg Fransson', *Common Market Law Review*, Vol. 50 (2013).

EU legal requirements.<sup>176</sup> This interpretation of the meaning of ‘implementation’ established in *Fransson* is broad, confirming that there are no areas of EU law where the Charter is not applicable and no areas of the domestic laws of the MS which are immune to Charter review.<sup>177</sup> Thus, where a MS is found to be acting within the scope of EU law it is obligated to comply to the rights guaranteed by the Charter.<sup>178</sup>

In contrast to many other human rights instruments the Charter does not contain any clause defining its territorial scope.<sup>179</sup> While Articles 52 TEU and 355 TFEU may resemble territorial demarcations on EU law, they merely articulate the territory of the contracting parties to which the EU *acquis* apply.<sup>180</sup> Additionally, the Charter further lacks a jurisdictional clause such as the one found in Article 1 of the ECHR, where the application of rights protected by the Convention is contingent on the exercise of some factual power, authority or control over a territory or people.<sup>181</sup> Jurisdiction, in the context of human rights law, constitutes a threshold criterion which must be met by a state or body in relation to an individual in order for the obligations pertaining to a human rights treaty to arise.<sup>182</sup> The existence of neither a jurisdictional nor a territorial clause in the Charter has led to differentiated views on the application of the Charter. Moreno-Lax and Costello have argued that the lack of jurisdictional clause implies that the obligations derived from the Charter should track all EU activities, including the actions of MS when implementing EU law.<sup>183</sup> In

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<sup>176</sup> Moreno-Lax, Violeta & Costello, Cathryn, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Factivity, the Effectiveness Model’ in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos Verlagsgesellschaft 2014) p. 1680.

<sup>177</sup> Rosas, Allan, ‘When is the EU Charter of Fundamental Rights Applicable at National Level?’, *Jurisprudence*, Vol. 19, No. 4 (2012) p. 1278.

<sup>178</sup> Lock, Tobias, ‘Charter of Fundamental Rights of the European Union’ in Manuel Kellerbauer et al (eds), *Commentary on The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) p. 2243.

<sup>179</sup> Kassoti, Eva, ‘The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga’, *European Journal of Legal Studies*, Vol. 12, No. 2 (2020) p. 122.

<sup>180</sup> Moreno-Lax, Violeta & Costello, Cathryn, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Factivity, the Effectiveness Model’ in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos Verlagsgesellschaft 2014) p. 1664.

<sup>181</sup> See for example *Al-Skeini and Others v United Kingdom* [GC] No. 55721/07 (ECtHR 7 July 2011) §§138-150 *Hirsi Jamaa and Others v Italy* No 27765 (ECtHR 23 February 2012) §§70-75.

<sup>182</sup> Kassoti, Eva, ‘The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga’, *European Journal of Legal Studies*, Vol. 12, No. 2 (2020) p. 124.

<sup>183</sup> Moreno-Lax, Violeta & Costello, Cathryn, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Factivity, the Effectiveness Model’ in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos Verlagsgesellschaft 2014) p. 1658.

contrast, others, such as Advocate General Wathael in his Opinion on the *Front Polisario* case<sup>184</sup>, have argued for the transposing of the jurisdictional clause in Article 1 of the ECHR to the application of the Charter supported by the provisions found in Article 52(3) of the Charter.<sup>185</sup> While there might be reason to argue that the view of *Moreno-Lax and Costello* should prevail when examining the meaning of Article 51(1) and 52(3), these diverging views still serves to demonstrate the uncertainty regarding the scope of application of the Charter, specifically when it comes to its extraterritorial reach.<sup>186</sup>

#### **4.1.1 Application of the EU-Charter in Relation to Externalization Measures**

In order to allow an informed substantive analysis of the positive obligations pertaining to Article 4 of the Charter, we must first establish that the scope of applicability of the Charter cover the externalization measures taken as part of the external dimension of the EU migration policy. These measures are characterized by a multiplicity of actors who engage in domestic conduct with extraterritorial effects through informal agreements and policy arrangements with uncertain legal status. Thus, the nature of the externalization measures raises challenges in regard to the question of the applicability of the Charter. First of all, the applicability of the Charter on not only measures conducted extraterritorially, but also on measures with merely extraterritorial effect without physical contact between acting authorities and affected individuals must be determined. Secondly, the specific actors must be identified to establish whether its EU bodies or MS against whom human rights claims can be raised, as this has a crucial impact on the applicability of the Charter. Finally, the challenges pertaining to applicability in relation to the specific actors identified will be analysed, where causation and the informal character of externalization measures posits a considerable challenge in the determination of applicability of the Charter.

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<sup>184</sup> *Front Polisario v Council*, C-104/16 P, ECLI:EU:C:2016:973.

<sup>185</sup> Opinion of Advocate General Wathael in case C-104/16 P; Article 52(3) of the Charter ensures the necessary consistency between the Charter and the ECHR by stipulating that in so far as the rights in the Charter coincide with rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those ensured by the ECHR.

<sup>186</sup> For a critique on the view of Advocate General Wathael see Kassoti, Eva, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga', *European Journal of Legal Studies*, Vol. 12, No. 2 (2020). Regarding the uncertainty of the extraterritorial scope of application of the Charter, see also Stoyanova, Vladislava, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling', *German Law Journal*, Vol. 21 (2020) p. 441; Bartels, Lorand, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *The European Journal of International Law*, Vol. 25, No. 4 (2015) p. 1075.



#### 4.1.1.1 Extraterritorial Application of the EU-Charter

The measures enacted under the external dimension of the EU migration policy are characterised by their unique nature of domestic conduct which has extraterritorial effect. The agreements made between the EU or its MS and third countries *inter alia* accommodate the provision of financial support and technical equipment by the former parts in exchange for increased migration control by the latter part. While such agreements are certainly external in their targeting, they are conducted domestically while producing extraterritorial effect. In other words, the measures lack any element of physical contact between the individuals potentially affected by the measures and the acting authorities.<sup>187</sup> Thus, in order to determine whether the Charter could apply to such measures, we must establish the territorial scope of the Charter to confirm its potential extraterritorial application.

As mentioned in Section 4.1, in contrast to the ECHR, the Charter lacks a clause defining its territorial scope of application. According to *Moreno-Lax and Costello*, this would entail that Article 51(1), which defines the scope of application of the Charter, could be informative in determining the territorial scope of the instrument. The Article, and accordingly the Charter, ‘seems to reflect a general understanding that EU fundamental rights obligations simply track EU activities, whether they take place within or without territorial boundaries.’<sup>188</sup> Accordingly, in relation to measures taken by EU bodies themselves, the Charter should always be applicable, while in relation to MS, one must determine whether the measures have been taken within the scope of EU law. Thus, the lack of a clause defining the territorial scope of application of the Charter implies that the territoriality of a specific action is immaterial to the application of the Charter.<sup>189</sup> This would further suggest that in the context of conduct with extraterritorial effect, territorial considerations are immaterial in determining the applicability of the Charter.<sup>190</sup> Instead, the important observation to make is whether a particular situation is governed by EU law, as the applicability of the

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<sup>187</sup> Bartels, Lorand, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’, *The European Journal of International Law*, Vol. 25, No. 4 (2015).

<sup>186</sup> Moreno-Lax, Violeta & Costello, Cathryn, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Factivity, the Effectiveness Model’ in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos Verlagsgesellschaft 2014) p. 1662.

<sup>189</sup> Kube, Vivian, *EU Human Rights, International Investment Law and Participation: Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection* (Springer 2019) p. 38.

<sup>190</sup> Kassoti, Eva, ‘The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga’, *European Journal of Legal Studies*, Vol. 12, No. 2 (2020) pp.140-141.

Charter would then follow, as informed by Article 51(1).<sup>191</sup> Still, another contrasting argument should be noted; that due to the equivalence of meaning and scope of the rights within the Charter and the ECHR considering Article 52(3) of the Charter, a transposition of the jurisdictional clause in Article 1 ECHR would be allowed.<sup>192</sup> This would naturally have implications on the general extraterritorial applicability of the Charter. However, as *Kassoti* observed, this argument seemingly lacks textual support and additionally may only be relevant regarding extraterritorial conduct, and not domestic conduct with extraterritorial effect.<sup>193</sup>

CJEU case law further supports the view of *Moreno-Lax & Costello*. In the *Mugraby* case, the applicant claimed damages from the EU for a failure to adopt appropriate measures against Lebanon under a human rights clause of the EU-Lebanon Association Agreements following fundamental rights violations by Lebanon.<sup>194</sup> While the claim failed on the merits, the significance of the case in relation to the extraterritorial applicability of the Charter stems from the lack of questioning by the Court of the assumption that the EU could be responsible for violations occurring in a third country, by a third party of a third country individual's fundamental rights.<sup>195</sup> Similarly, in *Zaoui*, the extraterritorial applicability of the Charter was not presented as an issue of importance in the case.<sup>196</sup> The applicants sought compensation for the loss of a family member as a result of bombings by the Hamas and argued that the EU was responsible due to their funding of education in Palestinian territories which had supposedly provoked the attack through the negative sentiments that it had incited.<sup>197</sup> Neither this claim succeeded, as the applicants failed to demonstrate causality between the EU policies and the damages, but the Court did not question whether the

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<sup>191</sup> Moreno-Lax, Violeta & Costello, Cathryn, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Factivity, the Effectiveness Model' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos Verlagsgesellschaft 2014) p. 1682.

<sup>192</sup> Opinion of Advocate General Wathelet in case C-104/16 P.

<sup>193</sup> Kassoti, Eva, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga', *European Journal of Legal Studies*, Vol. 12, No. 2 (2020) p. 140.

<sup>194</sup> *Mugraby v Council*, C-581/11 P, ECLI:EU:C:2012:466.

<sup>195</sup> Bartels, Lorand, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *The European Journal of International Law*, Vol. 25, No. 4 (2015) p. 1076; Kassoti, Eva, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga', *European Journal of Legal Studies*, Vol. 12, No. 2 (2020) p. 137; Kube, Vivian, *EU Human Rights, International Investment Law and Participation: Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection* (Springer 2019) p. 35.

<sup>196</sup> Bartels, Lorand, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *The European Journal of International Law*, Vol. 25, No. 4 (2015) p. 1076.

<sup>197</sup> *Zaoui*, C-288/03 P, ECLI:EU:C:2004:633.

EU could be responsible for such violation, if causation could be proven.<sup>198</sup> Lastly, the previously mentioned *Front Polisario* case further serves to support the insignificance of territorial considerations when determining the scope of application of the Charter.<sup>199</sup> The national liberalisation movement representing the Sahrawi people, Front Polisario, brought a claim against the Council requesting the annulment of the Council decision<sup>200</sup> adopting a 2010 trade agreement between the EU and Morocco, in so far as the agreement extended to the territory of Western Sahara.<sup>201</sup> The General Court ruled in favour of the applicant as the agreement was recognized as having an impact on the territory and the people of Western Sahara, thus, obligating the Council to ensure that the agreement did not entail any infringements of fundamental rights on the affected people, which it failed to do.<sup>202</sup> While the European Court of Justice (ECJ) later denied the standing of the applicants, referring to the scope of the agreement in question, which was not intended to cover the territory of Western Sahara<sup>203</sup>, the extraterritorial application of the Charter by the General Court remained uncontested.<sup>204</sup> Thus, the view of the General Court; that once actions by Union bodies entail infringements of fundamental rights in third countries, extraterritorial obligations are triggered, seem to further attest to the extraterritorial application of the Charter.

The question of the extraterritorial application of the Charter may still be surrounded by ambiguity<sup>205</sup>, but as this chapter has illustrated, both a textual analysis of Article 51(1) and the existing case law seem to support the notion that territoriality is immaterial to the scope of application of the Charter. What matters is whether a situation is covered by an EU competence, such as actions by Union bodies or the implementation of EU

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<sup>198</sup> Bartels, Lorand, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *The European Journal of International Law*, Vol. 25, No. 4 (2015) p. 1076.

<sup>199</sup> *Front Polisario v Council*, T-512/12, ECLI:EU:T:2015:953; *Front Polisario v Council*, C-104/16 P, ECLI:EU:C:2016:973.

<sup>200</sup> 'Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part' [2012] OJ L 241/2.

<sup>201</sup> *Front Polisario v Council*, T-512/12, ECLI:EU:T:2015:953.

<sup>202</sup> *Front Polisario v Council*, T-512/12, ECLI:EU:T:2015:953, §§228, 241, 247.

<sup>203</sup> *Front Polisario v Council*, C-104/16 P, ECLI:EU:C:2016:973, §§81-115.

<sup>204</sup> Kassoti, Eva, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga', *European Journal of Legal Studies*, Vol. 12, No. 2 (2020) p.136.

<sup>205</sup> Bartels, Lorand, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *The European Journal of International Law*, Vol. 25, No. 4 (2015) p. 1075.

law by MS. However, the extraterritorial character of the measures may still have practical effects on the activation and scope of the substantive rights catalogued in the Charter, an issue which will be analysed in section 4.2 in relation to Article 4. While this thesis acknowledges the continued ambiguities concerning the extraterritorial reach of the Charter, it does not attempt to solve this uncertainty. Instead, drawing on the view purported by *Moreno-Lax and Costello*, that the scope of application of the Charter transcends territorial limitations, we find that when determining the applicability of the Charter on externalisation measures by the EU, we must conclude who the relevant actor is in each present case to subsequently establish whether said measures are covered by EU law or not. Only then can we determine if the measures fall within the scope of the Charter with the potential of giving rise to fundamental rights obligations.

#### **4.1.1.2 Against Which Actor Can EU Fundamental Right Claims Be Raised?**

The measures taken as part of the external dimension of the EU migration policy are characterized by the multiplicity of actors which are involved in the different processes.<sup>206</sup> Since the applicability of the Charter, to a great deal, differs depending on whom the actor of a specific measure is, this multiplicity may posit challenges if the relevant actor remains unclear. While it is beyond the scope of this thesis to determine specific actors for specific measures, it is important to analyse the division of responsibilities and competences between the EU and the MS within the external dimension of the EU migration policy. By applying this analysis on the framework and practices observed in Chapter 2, it is possible to infer whether the actors are EU bodies or MS. This would ascertain against whom potential fundamental rights claims could be raised which, in the next chapters, is crucial in informing which measures that are within the scope of application of the Charter, and which that are not.

The EU as an organization has limited competences, meaning it is only legally allowed to take actions to which competence has been conferred to it by the Treaties.<sup>207</sup> In the context of externalization measures, the competences of EU bodies are reliant on under which domain said measures are adopted. Migration policies are part of the Area of Freedom, Security and Justice (AFSJ) and Article 4(2)(j) of Treaty of the Functioning of the European Union (TFEU) qualifies this area as a field of shared

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<sup>206</sup> Stoyanova, Vladislava, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling', *German Law Journal*, Vol. 21 (2020) pp. 441-443.

<sup>207</sup> Craig, Paul, & de Búrca, Gráinne, *EU Law Text, Cases, and Materials* (5th ed, Oxford University Press 2011) p. 73.

competences.<sup>208</sup> Additionally, while the only explicit external competence conferred to the EU within the area of migration found in primary sources is the readmission of irregular migrants<sup>209</sup>, the EU still maintain external competences in additional domains of migration through the implied external competences codified in Article 216(1) TFEU.<sup>210</sup> The employment of this competence requires an assessment of whether external actions facilitate the achievement of the objective of the internal competences transferred to the EU.<sup>211</sup> In this context, the question would be whether cooperation between with third countries promoting their migration control facilitate the internal migration challenges of the EU. As these international agreements work to mitigate the migration flows reaching EU borders, application of implied external competence should be conspicuous in the present case, especially considering the broad flexibility allowed when applying Article 216(1) in relation to international agreements.<sup>212</sup>

However, many of the cooperation-based measures observed in Chapter 2 are not adopted as part of the AFSJ, but rather as part of the EU Common Foreign and Security Policy (CFSP).<sup>213</sup> Both the EUBAM Libya and the EUCAP Sahel Niger missions are CSDP<sup>214</sup> missions with an explicit aim at managing migration flows to the EU. Interrelationships like these blurs the boundaries between the two domains.<sup>215</sup> In the context of human rights law and the Charter, this creates challenges when it comes to determining the relevant actors of measures as the division of competences between the EU and the MS within the CFSP is characterized by uncertainty.<sup>216</sup> As a result, the distribution of external competences remains uncertain, leaving the

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<sup>208</sup> ‘Consolidated Version of the Treaty on the Functioning of the European Union’ (TFEU) [2012] OJ C 326/47.

<sup>209</sup> Art 79(3) TFEU.

<sup>210</sup> Garcia Andrade, Paula, ‘EU External Competences on Migration: Which Role for Mixed Agreements?’, in Sergio Carrerra et al (eds), *Constitutionalising the External Dimensions of EU migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Guarantees* (Elgar 2019) pp. 40-41.

<sup>211</sup> Stoyanova, Vladislava, ‘The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling’, *German Law Journal*, Vol. 21 (2020) p. 442.

<sup>212</sup> *Ibid.* p. 442; Garcia Andrade, Paula, ‘EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally’, *Common Market Law Review*, Vol. 55 (2018) p. 163.

<sup>213</sup> Cardwell, Paul, *EU External Relations Law and Policy in the Post-Lisbon Era* (Springer 2012).

<sup>214</sup> The CSDP is an integral part of the CFSP. *See* Title V (‘General Provisions on the Union’s External Action and Specific Provisions on the Common Foreign and Security Policy (CFSP)’ of the Treaty on European Union (TEU).

<sup>215</sup> Garcia Andrade, Paula, ‘EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally’, *Common Market Law Review*, Vol. 55 (2018) p. 182.

<sup>216</sup> *Ibid.* pp. 182-185; Butler, Graham, ‘Forcing the Law to Overlap? EU Foreign Policy and Other EU External Relations in Times of Crisis’ in Elzbieta Kuzelewska et al (eds), *Irregular Migration as a Challenge to Democracy* (Intersentia 2018) p. 61.

question of responsibility ambiguous which in turn creates uncertainty when it comes to the legal nature of externalization measures.

In conclusion, who the actors, against which claims of human rights violations might be raised, are in relation to externalization measures is in many instances rather unclear. This posits significant challenges when examining the application of the Charter, as its application is, many times, dependent on whether it is an EU body or a MS who has enacted the measure. Naturally, this also posits serious challenges in determining potential breaches of positive fundamental rights obligations and subsequently ascertaining responsibility for said obligations. While this thesis importantly acknowledges this ambiguity, to solve it, would be beyond its reach.

#### **4.1.1.3 Additional Challenges to Applicability – Causation and Informality**

Depending on who is identified as the relevant actor for specific measures, various additional challenges to the application of the Charter arise. The first challenge relates to the question of causation. Whether the EU, its bodies or the MS are found as actors, the extraterritorial nature of the measures still posits challenges unrelated to the question of the extraterritorial application of the Charter. All measures observed in Chapter 2 rely on the active participation and involvement of third countries. Additionally, it is third countries, and not EU or MS, who are in physical contact with the individuals whose fundamental rights may be violated. As responsibilities are divided among several actors, EU bodies, MS and third countries, it exacerbates the difficulties in discerning the relevant actor against whom fundamental right claims can be raised.<sup>217</sup> Additionally, it also raises challenges to the analysis of the substantive rights, as it encumbers the process of establishing proximity between EU or MS conduct and potential harm, an issue which will be considered further in section 4.2.

The second challenge pertains to the preference of basing measures within the external dimension of the EU migration policy on informal instruments and agreements.<sup>218</sup> Statements, deals, compacts, MPFs, and joint declarations are all legally non-binding measures albeit with legal commitments attached to them, the EU-Turkey deal serving as a concrete

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<sup>217</sup> Rijpma, Jorrit, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory', *European Papers*, Vol. 2, No. 2 (2017) p. 572.

<sup>218</sup> Vara, Juan, 'Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU' in Sergio Carrera et al (eds), *Constitutionalising the External Dimensions of EU migration Policies in Times of Crisis: Legality, Rule of Law and fundamental Rights Guarantees* (Elgar 2019).

example to this.<sup>219</sup> If one considers the argument presented in relation to the extraterritorial application of the Charter, that EU bodies are bound by the responsibilities of the Charter regardless of whether they act within their competences or not, that would leave the informal nature of the measures taken immaterial to the question of applicability, in so far the EU is identified as the relevant actor. Thus, even when adopting measures with unclear legal character, the EU must respect the responsibilities found in the Charter, when they have legal effects.<sup>220</sup> However, in the case that MS are found to be the relevant actors for externalization measures, the issue of informality reveals additional challenges to the applicability of the Charter.

As stipulated in Article 51(1) of the Charter, MS are only bound by the responsibilities of the Charter when implementing EU law. As previously mentioned, the Court has clarified that the Charter applies to MS when they ‘act within the scope of Union law’.<sup>221</sup> This suggests that the legal nature of measures taken by MS is consequential to whether they are bound by the obligations pertaining to the Charter as there need to be a provision or principle of secondary or primary law which directly pertains to the measure at hand.<sup>222</sup> Thus, informal measures, such as the ones observed in Chapter 2, would fall outside the scope of the Charter when implemented by MS. The case of *Fransson* does suggest that EU fundamental rights applies to national law even when partially connected to EU law<sup>223</sup>, however, externalization measures taken by MS still does not appear to fall under any legal *acquis*, including national law. Thus, if MS adopt externalization measures without any discernible legal character, they are ostensibly exempt from the responsibilities relating to the Charter. This view appears to be indirectly supported by the Courts conclusion in *NF, NG and NM v. the European Council*. As mentioned, the Court did not go into the substance of the case as it claimed it lacked jurisdiction as the MS, and not EU, was

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<sup>219</sup> Carrera, Serigo et al (eds), *Constitutionalising the External Dimensions of EU migration Policies in Times of Crisis: Legality, Rule of Law and fundamental Rights Guarantees* (Edward Elgar Publishing Limited (2019) p. 11 Moreno-Lax, Violeta, ‘EU External Migration Policy and the Protection of Human Rights’ (*EEAS*, 2020) p. 25.

<sup>220</sup> Poulou, Anastasia, ‘Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights’, *Common Market Law Review*, Vol. 54 (2017) p. 1009.

<sup>221</sup> Moreno-Lax, Violeta & Costello, Cathryn, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Factivity, the Effectiveness Model’ in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos Verlagsgesellschaft 2014) p. 1680.

<sup>222</sup> Rosas, Allan, ‘When is the EU Charter of Fundamental Rights Applicable at National Level?’, *Jurisprudence*, Vol. 19, No. 4 (2012) p. 1277.

<sup>223</sup> *Åkerberg Fransson*, C- 617/ 10, EU:C:2013:105 §24; Hancox, Emily, ‘The Meaning of ‘Implementing’ EU Law Under Article 51(1) of the Charter: *Åkerberg Fransson*’, *Common Market Law Review*, Vol. 50 (2013) p. 1411-1432

found to be the adoptees of the agreement.<sup>224</sup> While this finding in itself has been object for review,<sup>225</sup> it is notable that the Court did not consider its possible jurisdiction on ruling on the agreement even with the MS as parties. An argument could be made that MS must be considered as acting within the scope of EU law when adopting measures such as those reiterated in the EU-Turkey deal, and thus subject for judicial review under the Charter.<sup>226</sup> However, as the Court did not delve further into this issue, this question remains unclear.

Through these observations, it is apparent that the application of the Charter to measures taken as part of the external dimension of EU migration policy is, in large, conditional on who the actor of a specific measure is. As the responsibilities of the Charter follow where EU law apply, EU bodies are obligated to comply with EU fundamental rights regardless of the legal nature of their externalisation measures. MS on the other hand, may be exempt from responsibilities in regard to externalization measures through the informalisation of said measures. Whether the Charter applies to this context is consequently a deeply complex question, one which answer is yet to be fully solved. If we assume, however, that the Charter may be applicable to, at least, some of the measures observed in Chapter 2, we must now consider the substantive rights stipulated in Article 4 of the Charter and whether the obligations pertaining to these rights may be engaged by these measures.

## **4.2 Article 4 - The Prohibition of Inhuman or Degrading Treatment**

Arriving at the conclusion that the Charter may be applicable to externalization measures, we can now turn our attention to the substantive rights due for examination within the scope of this thesis. Article 4 of the Charter stipulates that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment', a wording identical to the one found in Article 3 ECHR. Par the provision found in Article 52(3) of the Charter, the meaning and scope of the right not to be subjected to torture or to inhuman or degrading treatment or punishment guaranteed by the Charter

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<sup>224</sup> Freier, Louisa, et al, 'Challenging the legality of externalisation in Oceania, Europe and South America: an impossible task?', *Forced Migration Review*, Vol. 68 (2021) pp. 24-25.

<sup>225</sup> *See for example* Rijpma, Jorrit, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory', *European Papers*, Vol. 2, No. 2 (2017); Freier, Louisa, et al, 'Challenging the legality of externalisation in Oceania, Europe and South America: an impossible task?', *Forced Migration Review*, Vol. 68 (2021) pp. 24-25.

<sup>226</sup> Rijpma, Jorrit, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory', *European Papers*, Vol. 2, No. 2 (2017) p. 595.



must therefore mirror that found in Article 3 ECHR. However, this does not prevent Union law from providing a more extensive protection than that of the ECHR.<sup>227</sup> While the provision noticeably includes the prohibition of torture, the scope of this thesis only covers a substantive analysis of the article in so far it pertains to the prohibition of inhuman or degrading treatment. While each of these elements refer to measures of varying intensity and severity, they are all prohibited in the same absolute terms, which renders this differentiation inconsequential in practice.<sup>228</sup> Thus, case law and doctrine pertaining to the prohibition on torture will generally be useful also for the analysis of the prohibition on inhuman or degrading treatment.

As the scope and application of the rights found in Article 4 of the Charter should mimic those found in Article 3 ECHR, relevant case law from the ECtHR appears as a valuable source in the interpretation of the rights. Additionally, Article 3 ECHR is in turn modelled after the same prohibition found in Article 5 Universal Declaration of Human Rights (UDHR), which form the basis of several other provisions pertaining to this prohibition.<sup>229</sup> The ECtHR has in its jurisprudence frequently referred to these international treaties<sup>230</sup>, and as such, they too can provide guidance for the interpretation of the terms found in Article 4 of the Charter. This allows for a conclusion on the definition of the different forms of ill-treatment and what obligations the provision give rise to against states and EU bodies.<sup>231</sup> The prohibition of inhuman or degrading treatment is absolute, meaning that no derogation is permitted under any circumstances.<sup>232</sup> Regarding the definitional scope of the prohibition, ill-treatment must meet a certain level of severity in order to fall within the scope of Article 3 ECHR.<sup>233</sup> For an ill-treatment to be considered inhuman it must reach a threshold of *severe pain or suffering*, either physical or mental, while degrading ill-treatment requires a lower threshold of pain or suffering in order to be activated.<sup>234</sup> This level is however relative, and a consideration of the circumstances must be made on

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<sup>227</sup> Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 75.

<sup>228</sup> Lock, Tobias, 'Charter of Fundamental Rights of the European Union' in Manuel Kellerbauer et al (eds), *Commentary on The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) p. 2205.

<sup>229</sup> See Art. 7 CCPR, Art. 1 CAT and Art. 7(2)(e) ICC Statute

<sup>230</sup> *The Greek Case* Nos. 3321/67, 3322/67, 3323/67 & 3344/67 (EComHR 31 May 1968); Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 75.

<sup>231</sup> Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 67.

<sup>232</sup> *Aranyosi and Căldăraru*, C- 404/15 & C- 659/15, EU:C:2016:198, §85.

<sup>233</sup> *Ireland v UK* No. 5310/71 (ECtHR 18 January 1978) §162; *Soering v UK* No. 14038/88 (ECtHR 07 July 1989) §100.

<sup>234</sup> Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 76.

a case by case basis, where the vulnerabilities of the victim, including age or gender, is of relevance.<sup>235</sup>

The negative formulation of the provision in Article 4 of the Charter explicitly emphasizes the negative obligation to respect this right, i.e., the obligation by states and EU bodies to refrain from directly acting in ways which would engage the rights guaranteed by the prohibition. However, all human rights, including the right not to be subjected to inhuman or degrading treatment, likewise create corresponding positive obligations to fulfil said rights.<sup>236</sup> In the context of externalization measures, positive obligations are key in identifying potential violations by the EU or the MS. While it is the EU and MS who may carry fundamental rights obligations against affected migrants in third countries, it is third states or private parties who engage in measures that risk infringing on the protected interests these rights. Positive obligations then become paramount in examining the potential violation of the Charter by the EU or MS as they omit to take adequate measures to ensure the fulfilment of the prohibition of inhuman or degrading treatment.

## 4.2.1 Positive Obligations

Due to the absolute nature of Article 3 ECHR, every time there is established abuses which fall within the definitional scope of the article, positive obligations are triggered.<sup>237</sup> The ECtHR has developed numerous categories of positive obligations pertaining to the prohibition of inhuman or degrading treatment.<sup>238</sup> These, non-exhaustively, include the obligation to enact and enforce proper legislation,<sup>239</sup> train personnel and provide procedural safeguards,<sup>240</sup> and to allocate redress and remedies for victims of ill-treatment.<sup>241</sup> Additionally, it is not only the conduct of public officials in violation of these rights which the EU and the MS are responsible for preventing, also conduct of private individuals may trigger the positive

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<sup>235</sup> *Ireland v UK* No. 5310/71 (ECtHR 18 January 1978) §162; *Soering v UK* No. 14038/88 (ECtHR 07 July 1989) §100.

<sup>236</sup> Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 83.

<sup>237</sup> Stoyanova, Vladislava, *Human Trafficking and Slavery Reconsidered Conceptual Limits and States' Positive Obligations in European Law*, (Cambridge University Press 2017) pp. 324-325.

<sup>238</sup> Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 84.

<sup>239</sup> *MC v Bulgaria* No. 39272/98 (ECtHR 4 December 2003); *A v UK* No. 100/1997/884/1096 (ECtHR 23 September 1998).

<sup>240</sup> *Raninen v Finland* No. 20972/92 (ECtHR 16 December 1997); *Nevmerzhitsky v Ukraine* No. 54825/00 (ECtHR 5 April 2005).

<sup>241</sup> *Assanidze v Georgia* No. 71503/01 (ECtHR 8 April 2004).

obligations of Article 4 of the Charter.<sup>242</sup> While both EU bodies and MS are bound by the positive obligations pertaining to the Charter, the measures enacted to fulfil them will have different aims as a result of the division of competences between the two actors. While the previously mentioned obligations developed by the ECtHR have been directed to the responsibilities of the states, the EU should primarily aim at ensuring that there are no legal or accountability gaps regarding violations of the absolute prohibition on ill-treatment by EU bodies or MS when implementing EU law.<sup>243</sup> This implies a responsibility of the EU to act on situations where violations of this right occurs without the possibility of claiming any state's responsibility.<sup>244</sup>

These positive obligations work to connect omissions by the state or the EU with abuses of ill-treatment at a general level. However, to apply these obligations, one need to examine the particular case and specify the obligations relating to the specific context.<sup>245</sup> Neither the states nor the EU can be omnipotent, thus, they are not responsible for all abuses within their jurisdiction that infringe on the interests protected by the Charter as this would impose an excessive burden on the states or the EU.<sup>246</sup> Instead, responsibility for positive obligations under the Charter requires certain conditions to be fulfilled in order to be engaged.<sup>247</sup> These include requirements of *knowledge*, *proximity* and *reasonableness* which accordingly must be satisfied for an omission to trigger responsibility for harm under the Charter.

The *knowledge* requirement implies that responsibility under the Charter for positive obligations can only arise when the state or the EU knew or ought to have known about the risk of harm.<sup>248</sup> This knowledge can either derive from an objectively foreseeable risk of harm or from a proactive approach by the states or the EU themselves through adequate measures in foreseeing

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<sup>242</sup> *A v UK* No. 100/1997/884/1096 (ECtHR 23 September 1998) §22; *M.P. and Others v Bulgaria* No. 22457/08 (ECtHR 15 November 2011).

<sup>243</sup> Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 84.

<sup>244</sup> *Ibid.* p. 84.

<sup>245</sup> Stoyanova, Vladislava, *Human Trafficking and Slavery Reconsidered Conceptual Limits and States' Positive Obligations in European Law*, (Cambridge University Press 2017) p. 325.

<sup>246</sup> *O'Keefe v Ireland [GC]* No. 35810/09 (ECtHR 28 January 2014) §144.

<sup>247</sup> Stoyanova, Vladislava, *Human Trafficking and Slavery Reconsidered Conceptual Limits and States' Positive Obligations in European Law*, (Cambridge University Press 2017) p. 319.

<sup>248</sup> *Ctr. for Legal Res. on Behalf of Valentin Câmpeanu v Romania [GC]* No. 47848/08 (ECtHR July 17 2014); *Osman v United Kingdom [GC]* No. 23452/94 (ECtHR 28 October 1998) §116.

the risks.<sup>249</sup> In *E. and Others*, the Court stressed the requirement of a proactive approach by the authorities in a case regarding the abuse of four siblings by their stepfather. The Court found a violation of Article 3 by the authorities due to their lack of investigation, communication, and cooperation between relevant actors, thus failing their duty to protect from ill-treatment.<sup>250</sup>

*Proximity* is required to some degree between the state or EU omission and the harm suffered.<sup>251</sup> This entails that there is a need for correlation between the specific harm and the conduct of the state or EU.<sup>252</sup> While *knowledge* considerations typically involve the determination of the existence of any positive obligation pertaining to the particular case, *proximity* considerations instead attempt to connect the failure to comply with a found positive obligation to a particular harm.<sup>253</sup> In the previously mentioned *E. and Others*, the Court endorsed a flexible version of the proximity test, rejecting a ‘but for’ test which would imply that but for the omission by the state the harm would not have happened. Instead, an omission to take available measures which could have had a tangible prospect in mitigating the harm is satisfactory for engaging responsibility of the state.<sup>254</sup> This flexibility by the Court indicates the necessity of normative considerations when examining what omissions that constitute causes of harm.<sup>255</sup>

To establish what measures that are expected of states and the EU to protect against acts of ill-treatment, the Court has repeated that there need to be a consideration of *reasonableness*.<sup>256</sup> This consideration works as a function of the *knowledge* and *proximity* considerations. Consequently, close proximity between the omission and harm, of which the state or the EU had extensive knowledge about, would indicate a greater need for intervention by the state or EU, in turn broadening which measures that fall within the

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<sup>249</sup> Stoyanova, Vladislava, ‘Fault, Knowledge and Risk Within the Framework of Positive Obligations Under the European Convention on Human Rights’, *Leiden Journal of International Law*, Vol. 33 (2020) p. 606.

<sup>250</sup> *E. and Others v the United Kingdom* No. 33218/96 (ECtHR 26 November 2002) §§96, 97, 100.

<sup>251</sup> Lavrysen, Laurens, *Human Rights in a Positive State* (Intersentia 2016) p. 137.

<sup>252</sup> Stoyanova, Vladislava, *Human Trafficking and Slavery Reconsidered Conceptual Limits and States’ Positive Obligations in European Law*, (Cambridge University Press 2017) p. 326.

<sup>253</sup> Lavrysen, Laurens, *Human Rights in a Positive State* (Intersentia 2016) p. 138.

<sup>254</sup> *E. and Others v the United Kingdom* No. 33218/96 (ECtHR 26 November 2002) §99.

<sup>255</sup> Stoyanova, Vladislava, ‘The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling’, *German Law Journal*, Vol. 21 (2020) pp. 448-449; Lavrysen, Laurens, *Human Rights in a Positive State* (Intersentia 2016) pp. 139-140.

<sup>256</sup> *Budayeva and Others v Russia* Nos. 15339/02, 21166/02, 20058/02, 11673/02 & 15343/02 (ECtHR 20 March 2008) §135; *Söderman v Sweden* [GC] No. 5786/08 (ECtHR 12 November 2013) §81.

scope of reasonableness.<sup>257</sup> Through the requirement of reasonableness, states and the EU are relieved of impossible or disproportionate burdens as a result of their positive fundamental rights obligations.<sup>258</sup> Instead, this allows for a consideration of competing interests which may limit the extent to which states or the EU owe positive obligations in relation to the prohibition of inhuman or degrading treatment.<sup>259</sup>

In the context of externalization measures and Article 4 of the Charter, the positive obligations pertaining to the prohibition of ill-treatment, and their scope, is paramount in ascribing responsibility for potential harm. Once abuses which infringes on the rights protected by the Charter have been established, positive obligations are engaged. Subsequently, an analysis of the *knowledge* that the state or the EU had or ought to have of the risk for harm combined with the level of *proximity* between the omission of the state or the EU and the harm, allows for a deduction of which proactive measures, that are within the limits of *reasonableness*, that the state or the EU should have taken, to which failure to do so would result in a violation of fundamental rights.

## 4.2.2 Application of Article 4 on Externalization Measures

Taking the plausible application of the Charter on externalization measures in general as a starting point, the next step is to examine the application of the substantive rights found in Article 4 of the Charter relating to the prohibition of inhuman or degrading treatment on said measures. First, we need to determine whether the definitional threshold of the provision is met in relation to the abuses which migrating women in third countries are subjected to in the context of migration control. Secondly, if the definitional threshold is met, an examination of what positive obligations that states, or the EU, might be held responsible for is due. Accordingly, we will consider both what general positive obligations that externalization measures might give rise to, and how to apply these obligations within the particular context, paying attention to challenges relating to the requirements of *knowledge*, *proximity* and *reasonableness*.

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<sup>257</sup> Stoyanova, Vladislava, *Human Trafficking and Slavery Reconsidered Conceptual Limits and States' Positive Obligations in European Law*, (Cambridge University Press 2017) p. 325.

<sup>258</sup> *Budayeva and Others v Russia* Nos. 15339/02, 21166/02, 20058/02, 11673/02 & 15343/02 (ECtHR 20 March 2008) §135

<sup>259</sup> Stoyanova, Vladislava, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling', *German Law Journal*, Vol. 21 (2020) pp. 447-448.

### 4.2.2.1 The Definitional Threshold and Migration Control

As previously observed, in order for the obligations stipulated in Article 4 of the Charter to be activated, a minimum threshold of pain or suffering must be met. In the context of migration control and its relation to ill-treatment of migrating women in third countries, we must examine whether this ill-treatment could reach the definitional threshold of inhuman or degrading treatment, thus triggering the rights and obligations guaranteed by the provision. Chapter 3 revealed two particular contexts in which migration control in third countries, promoted by EU externalization measures, puts migrating women in third countries at risk of being subjected to ill-treatment: in *migration-related detention* and on *precarious pathways for migration*. Consequently, we need to consider the abuses observed in these contexts against the definitional threshold of Article 4 of the Charter.

In the case law of the ECtHR, conditions of detention have several times been recognized as amounting to inhuman or degrading treatment.<sup>260</sup> It is the cumulative conditions of detention and violation of human rights, such as overcrowding,<sup>261</sup> prolonged deprivation of liberty, arbitrary detention, lack of adequate medical care,<sup>262</sup> which may reach the level of suffering infringing on the right to not be subjected to inhuman or degrading treatment.<sup>263</sup> The Court has specifically stressed the significance of lack of medical treatment<sup>264</sup>, detention incommunicado<sup>265</sup> and the vulnerability of certain groups.<sup>266</sup> The specific vulnerability of women in the context of migration-related detention has been highlighted by the European Committee for the Prevention of Torture and Inhuman or Degrading

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<sup>260</sup> *Kudla v Poland* No. 30210/96 (ECtHR 26 October 2000) §94; *Kalashnikov v Russia* No. 47095/99 (ECtHR 15 September 2002); *Yankov v Bulgaria* No 1509/05 (ECtHR 22 April 2003); *McGlinchey and Others v UK* No. 50390/99 (ECtHR 29 April 2003); *Poltoratskij v Ukraine* No 38812/97 (ECtHR 29 April 2003); *Iorgov v Bulgaria* No. 40653/98 (ECtHR 11 March 2004); *Nevmerzhitsky v Ukraine* No. 54825/00 (ECtHR 5 April 2005); *Alver v Estonia* No. 64812/01 (ECtHR 8 November 2005); *Kadikis v Latvia* No. 62393/00 (ECtHR, 4 May 2006); *MSS v Belgium and Greece* No. 30696/09 (ECtHR 21 January 2011).

<sup>261</sup> *Orchowski v Poland* No. 17885/04 (ECtHR 22 October 2009); *MSS v Belgium and Greece* No. 30696/09 (ECtHR 21 January 2011).

<sup>262</sup> *Mouisel v France* No. 67263/01 (ECtHR 14 November 2002).

<sup>263</sup> Gil-Bazo, Maria-Teresa, 'Article 4' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 79.

<sup>264</sup> *Denis Vasilyev v Russia* No. 32704/04 (ECtHR 17 December 2009); *Rokosz v Poland* No. 15952/09 (ECtHR 27 July 2010); *Logvinenko v Ukraine* No. 13448/07 (ECtHR 14 October 2010).

<sup>265</sup> *Aksoy v Turkey* No. 100/1995/606/694 (ECtHR 18 December 1996); *Kurt v Turkey* No. 15/1997/799/1002 (ECtHR 25 May 1998); *Lyanova and Aliyeva v Russia* Nos. 12713/02 & 28440/03 (ECtHR 2 October 2008).

<sup>266</sup> *Herczegfalvy v Austria* No. 10553/83 (ECtHR 24 September 1992); *Price v UK* No. 33394/96 (ECtHR 10 July 2001); *Matencio v France* No. 58749/00 (ECtHR 15 January 2004).

Treatment or Punishment (CPT) standards<sup>267</sup> and ECtHR case law.<sup>268</sup> Accordingly, certain deplorable conditions of detention may amount to inhuman or degrading treatment when taking in to account the specific needs of women.<sup>269</sup>

Considering the observations made in Chapter 3, in the context of migration-related detention in third countries, migrating women are often subjected to sexual and physical violence and harassment, facing overcrowding and deprivation of health care and hygiene facilities while exposed to arbitrary detention, prolonged deprivation of liberty and in some cases detention incommunicado. Examining these conditions cumulatively while recognizing the specific vulnerabilities of women, it is apparent that the conditions of migration-related detention which migrating women in third countries are subjected to, many times reach the definitional threshold of Article 4 of the Charter, amounting to inhuman or degrading treatment.

In the context of the precarious pathways for migration which migrating women are forced on due to lack of legal pathways as a result of increased migration control, risk of ill-treatment has been specifically identified when in contact with human smuggling and trafficking. The protection against inhuman or degrading treatment is recognized as a key right in the context of smuggling according to the UN Smuggling Protocol,<sup>270</sup> to which the EU is a signatory,<sup>271</sup> which indicate the relevance of the right in the context of human smuggling. As observed in Chapter 3, women are often subjected to physical, mental, and sexual violence when engaging in the services of smugglers. Considering the specific circumstances, such as the power-imbalance between the women and the smugglers and the perilous settings in which human smuggling takes place and taking in to account the specific vulnerabilities of women, the definitional threshold of Article 4 may in some cases be satisfied.

As for ill-treatment in relation to trafficking, this prohibition is already protected through Article 5 of the Charter. Thus, Article 3 of the Charter would only be engaged in circumstances where the definitional threshold of

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<sup>267</sup> CPT (2011) p.90; The ECtHR has increasingly relied on report of the CPT in their judgments, *see for example Tekin Yildiz v Turkey* No. 22913 (ECtHR 10 November 2005); *Alver v Estonia* No. 64812/01 (ECtHR 8 November 2005); *MSS v Belgium and Greece* No. 30696/09 (ECtHR 21 January 2011).

<sup>268</sup> *Filiz Uyan v Turkey* No. 7446/03 (ECtHR 8 January 2009).

<sup>269</sup> Ktistakis, Yannis, 'Protecting Migrants Under the European Convention on Human Rights and the European Social Charter' (*Council of Europe Publishing*, 2013) p. 42.

<sup>270</sup> UN, 'Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime' (15 November 2000).

<sup>271</sup> *See* 'Council Decisions 2006/616/EC and 2006/617/EC of July 24 2006' [2006] OJ L 262.

Article 5 is too demanding for a particular situation, but where the harm experienced can be captured by the concept of inhuman or degrading treatment.<sup>272</sup> However, unlike ill-treatment in the context of detention, the question of ill-treatment in the context of smuggling or trafficking of migrants in relation to Article 4 of the Charter has not been afforded equally as much attention. Consequently, the question whether the ill-treatment observed in Chapter 3, in relation to smuggling and trafficking, reaches the definitional threshold of Article 4, thus amounting to inhuman or degrading treatment, or not, is not as evident.

#### **4.2.2.2 Positive Obligations in the Context of Externalization Measures – Challenges and Opportunities**

Having found that the ill-treatment suffered by migrant women in third countries in the context of migration control may in some instances meet the required definitional threshold under Article 4 of the Charter, it is necessary to apply the positive obligations pertaining to the provision to the externalization measures that were found to promote said migration control. First, an examination of what positive duties that may be engaged within the specific context, and how they relate to both the EU and MS needed for the analysis. Secondly, the requirements of *knowledge*, *proximity* and *reasonableness* will be analysed to determine whether EU or state responsibility could be raised for omissions amounting to infringements on the fundamental rights secured by Article 4 of the Charter.

As mentioned in section 4.2.1, a number of positive obligations pertaining to Article 4 of the Charter has been recognized through ECtHR case law, particularly, considering the context of this thesis, the duty to protect from ill-treatment.<sup>273</sup> This obligation requires states to take proactive measures to ensure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment.<sup>274</sup> The specific content of this obligation is dependent on the particular circumstances of the case, and is thus hard to establish on a general basis.<sup>275</sup> This duty, naturally, has only been attributed

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<sup>272</sup> Stoyanova, Vladislava, *Human Trafficking and Slavery Reconsidered Conceptual Limits and States' Positive Obligations in European Law*, (Cambridge University Press 2017) p. 277; *C.N. and V. v France* No. 67724/09 (ECtHR 11 October 2012).

<sup>273</sup> While the duties to investigate, enact and enforce legislation, provide procedural safeguards and to grant redress all could be considered in the context of externalization measures and migration control, the duty to protect will be given particular focus.

<sup>274</sup> APT/CEJIL, *Torture in International Law: a Guide to Jurisprudence* (APT/CEJIL 2008) p. 63.

<sup>275</sup> On the unpredictability of the Courts reasoning in relation to positive obligations, see *Dissenting Opinion of Judge Kalaydjieva in Söderman v Sweden* [GC] No. 5786/08, Merits and Just Satisfaction, (ECtHR12 November 2013).



to state parties, as states are the only parties to the ECHR.<sup>276</sup> While the EU and its bodies must also take positive measures to fulfil the prohibition of ill-treatment, an argument could be made that these measures should primarily aim at rectifying legal and accountability gaps where no state responsibility could be raised for violations of Article 4 rights.<sup>277</sup> However, this should not imply that this would be the only instance in which omission give rise to positive obligations for EU bodies.

To examine whether MS or the EU are obligated to take such positive measures in relation to their externalization policies and practices, it must be determined that they knew or ought to have known about the risk of harm associated with migration control. In the context of both migration-related detention and the smuggling and trafficking of migrants, there is no doubt that the EU and MS are aware of the risk of being subjected to inhuman or degrading treatment. Accordingly, the *knowledge* requirement is evidently fulfilled. Thus, the existence of a positive obligation to protect individuals from ill-treatment is found in relation to externalization measures. Subsequently, whether MS or the EU should be held responsible for this obligation is determined on the *proximity* as well as an analysis of the *reasonableness* criteria.

The *proximity* requirement calls for serious engagement in the context of externalization measures. As the involvement of the EU and the MS regarding the performance of the externalization measures increasing migration control is often times indirect, it may diminish the proximity between the conduct of EU and MS and the harm. In *Tugar v Italy*, a case concerning an Iraqi man who was injured stepping on a mine in Iraq of Italian origin, the Court seemed to imply a need for an ‘immediate relationship’ between the omission and the harm.<sup>278</sup> Keeping in mind some peculiarities of the case and that it revolved around positive obligations pertaining to the right to life, it might indicate challenges in determining adequate proximity between omission and harm.<sup>279</sup> The provision of equipment, training, personnel and financial aid to third countries in exchange for increased migration control might be hard to link to the harm suffered by migrating women in migration-related detention or through smuggling and trafficking.

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<sup>276</sup> A v UK No. 100/1997/884/1096 (ECtHR 23 September 1998); *Z and Others v UK* No. 29392/95 (ECtHR 31 May 2001); *Keenan v UK* No. 27229/95 (ECtHR 3 April 2001); *D v UK* No. 30240/96 (ECtHR 2 May 1997).

<sup>277</sup> Gil-Bazo, Maria-Teresa, ‘Article 4’ in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (2<sup>nd</sup> ed, Bloomsbury Publishing 2021) p. 84.

<sup>278</sup> *Tugar v Italy* No 22869/93 (EComHR 18 October 1995).

<sup>279</sup> Stoyanova, Vladislava, ‘The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling’, *German Law Journal*, Vol. 21 (2020) pp. 451-452.

If both the requirements of *knowledge* and *proximity* are found to have been fulfilled, the test of *reasonableness* informs what proactive steps that would be reasonable to satisfy the positive obligation. Competing interests here come in to play, public interest being one such which the ECtHR has considered in relation to positive obligations.<sup>280</sup> Externalization measures aim at preventing irregular migrants from reaching the external borders of the EU. While this itself would not be a protected interest, it could be argued to promote the interests to preserve the rights of others, such as citizens of the Union, as well as internal security of the region. As observed by *Stoyanova* the test of reasonableness implies an evaluation of whether there are ‘reasonable alternatives’ which are more protective of the rights of migrating women in third countries while still attentive to the interests of the EU and the MS.<sup>281</sup> Additionally, as previously observed, what alternatives are deemed reasonable is closely intertwined with the knowledge and proximity requirements. If the particular circumstances reveal that MS or the EU have or ought to have extensive knowledge of the risk of harm, and that there is close proximity between the omission to protect and the harm, more intervention by the state is called for, thus increasing what measures would be considered reasonable.<sup>282</sup> Accordingly, the question of whether violations of positive obligations could be claimed is dependent on the finding of alternative measures and the assessment of their reasonableness.<sup>283</sup>

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<sup>280</sup> Stoyanova, Vladislava, ‘Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights’, *Human Rights Law Review*, Vol. 18 (2018) p. 338.

<sup>281</sup> Stoyanova, Vladislava, ‘The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling’, *German Law Journal*, Vol. 21 (2020) p. 454.

<sup>282</sup> Stoyanova, Vladislava, *Human Trafficking and Slavery Reconsidered Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) p. 325.

<sup>283</sup> Such an examination, however, is beyond the reach of this thesis.

## 5 Conclusion

As externalization measures, such as cooperation on migration control with third countries, are increasingly relied on by the EU to prevent irregular migration flows from reaching the external borders of the union, one needs to examine how this impacts the enjoyment of human rights for affected migrants in third countries. In this context, another question arises, namely, what legal responsibility does the EU or MS have for potential human rights infringements as a result of externalization measures? Accordingly, this thesis has examined whether EU externalization measures amount to violations of fundamental rights guaranteed by the Charter for which the EU or MS could be held responsible for.

In answering the research question, the thesis first turned to the external dimension of EU migration policy, the policy framework governing the implementation of EU externalization measures. It found that cooperation between the EU, MS and third countries on issues of migration control has become an increasingly relied on practice. The agreements under these circumstances are often informal in nature. This informalization renders the actors and the scope of the agreements ambiguous, which, as we have seen, poses serious legal challenges when it comes to ascertaining responsibility for potential fundamental rights violations. Additionally, under these agreements, third states are enacting increasingly pervasive migration laws, policies and practices, through the support of EU or MS partners which supply the former states with technical, technological and financial provisions. As these agreements are produced as conditions for EU trade and aid, third countries are greatly incentivised to concede to them. Thus, through EU externalization measures such as cooperation with third states, migration control in said states is intensified.

Having recognized the correlation between externalization measures and increased migration control in third countries, the thesis continues with examining the impact migration control has on migrants and their subjection to ill-treatment. The thesis observed two specific contexts in which the relation between migration control and ill-treatment of migrants is apparent; in migration-related detention and on the precarious pathways for migration migrants are forced on. It recognized how both of these contexts were constructs of migration control in which migrants risk being subjected to ill-treatment, both by third country authorities and private individuals. Additionally, the specific vulnerabilities of migrating women in these contexts were examined, finding that this vulnerability may contribute to the

subjection of gender-specific violence, thus increasing the risk of ill-treatment.

By identifying also, the correlation between migration control and ill-treatment of migrants, the thesis argued that there was a connection between EU externalization measures and the prevalence of ill-treatment of female migrants in third countries. However, to determine whether legal responsibility could be ascertained under the Charter for impugned human rights infringements, the thesis continued by examining the scope of application of the Charter within the context of the observed externalization measures. The research found that the extraterritoriality of the harm, or the fact that affected migrants were located outside of Union territory, did not necessarily prevent the application of the Charter. Rather, the scope of application of the instrument follows EU law, meaning that EU bodies must always act in accordance with the rights guaranteed by the Charter, while the instrument can only be invoked against MS when they are implementing EU law. As the externalization measures observed in Chapter 2 are based on informal agreements with third countries, this is an important finding, as this might preclude legal accountability under the Charter in cases where MS is found to be the actor.

With this in mind, the thesis delved into the question of identifying who the actors of externalization measures are in a general sense. It found that due to the uncertain division of competencies and the consolidation of multiple areas of law within the external dimension of EU migration policy, there is serious challenges in determining whether EU bodies are relevant parties, and thus subject for judicial accountability, for externalization measures. Nonetheless, with further examination of specific cases, arguments could be made finding either the EU, MS or both parties to be under the obligations stipulated by the Charter when conducting externalization measures. Accordingly, while the circumstances generate some ambiguity, the Charter, and its potential extraterritorial scope of application, may serve to be a valuable tool in ascertaining responsibility for fundamental right infringements as a result of EU externalization measures.

Having determined the potential application of the Charter on externalization measures, the thesis considered the substantive provisions stipulated in the instrument, specifically Article 4 and the prohibition of inhuman or degrading treatment. Subsequently, the thesis established that the harm experienced by migrating women in third countries associated with increased migration control would possibly amount to the definitional threshold set out by the provision. Continuing, the positive obligations which are generated from the prohibition of inhuman or degrading treatment were given particular attention having recognized their relevance for the

context, considering that the harm resulting from externalization measures is carried out, not by EU bodies or MS, but by third country officials and private individuals. It was found that in order to establish the failure of the EU or MS in fulfilling their positive obligations, one is required to consider their *knowledge* about the risk of ill-treatment, the *proximity* of their conduct and the harm and the *reasonableness* of externalization measures taking into account the preserved interests and alternative measures.

In light of the above, a conclusion can be made seeing that while the informal nature of third country agreements and the extraterritorial effect of externalization measures posits serious legal challenges, neither the EU nor MS are exempt from judicial accountability for impugned fundamental right infringements, nonetheless, still acknowledging that each case must be examined on an *ad hoc* basis. Thus, while other human rights instruments might be limited in their ability to ascertain responsibility for externalization measures, the Charter presents itself as a valuable alternative, specifically owing to its lack of jurisdictional clause akin to e.g., Article 1 ECHR. Consequently, neither the EU nor MS are free to ‘outsource’ their legal responsibility for the fulfilment of human rights through the use of externalization measures but are still bound by their positive obligations owing to the Charter. Furthermore, this thesis refrains from affirmatively answering whether specific EU externalization measures amount to violations of fundamental rights, however, it attempts to draw general conclusions as to which factors influence the answer to this question. Further examination of potential alternative measures which would also secure the interests of contemporary externalization measures, may, however, allow for a conclusion regarding whether specific measures comply with fundamental rights guaranteed by the Charter.

Expanding on this, recognizing the harm which migration control in third countries inflict on migrants in general, and migrating women in particular, it is apparent that there is a need for mechanisms ensuring the ascertaining of legal responsibility for the use of harmful externalization measures, not only in the European region, but around the world. Consequently, and acknowledging that externalization measures are no longer a novelty but a widespread practice, one must challenge the traditional notions on jurisdiction within IHRL. While the EU-Charter is not limited by the concept of ‘control’ to activate its jurisdiction, many other IHRL instruments appear to be. For the purpose of future research, it would be interesting to assess what possibilities exist for invoking legal responsibility against other externalization actors, such as the United States or Australia, where documented human right infringements in relation to migration control

is plentiful.<sup>284</sup> Additionally, while this thesis refrain from examining the political and economic interests of externalization measures, a future interdisciplinary examination on these aspects could further illuminate the cause and harm of the practice.

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<sup>284</sup> Freier, Louisa, et al, 'Challenging the legality of externalisation in Oceania, Europe and South America: an impossible task?', *Forced Migration Review*, Vol. 68 (2021); Frelick, Bill et al, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants', *Journal on Migration and Human Security*, Vol. 4, No. 4 (2016).

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