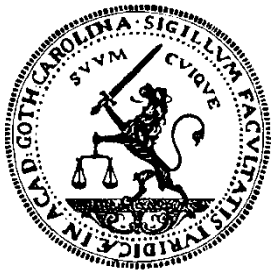

FACULTY OF LAW

LUND UNIVERSITY

Klara Lundqvist

"Team Europe is back in Tunis" – a study on ECHR applicability *ratione personae* to EU support for Tunisian border and migration management

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Summary

After the well-known spike in migrants crossing the Mediterranean in 2015-2016, the EU has intensified its cooperation with third states on the field of migration. Although there are numerous examples where such policies have been criticised as incompatible with the principle of *non-refoulement* and for not respecting migrants' human rights, there are no CJEU rulings concerning their compliance with EU law. This is partly explained by a trend of informality in EU external actions on the field of migration. This informality is manifested through cooperation arrangements with third states being established in soft law instruments and in disregard of EU procedures for adopting binding international agreements. For various reasons, such practices keeps arrangements out of reach for CJEU scrutiny.

2023 has marked a new spike in crossings over the Mediterranean, this time with a majority of departures from Tunisia. In response to this, the European Commission decided by means of an Action Plan (the Action Plan) in June 2023 to increase EU financial and technical support for Tunisian border and migration management. In July 2023, the Commission signed a Memorandum of Understanding with Tunisia (the MoU) including the same measures. The EU decision to intensify cooperation with Tunisia on the field of migration was taken at a time when numerous reports had brought attention to a deteriorating human rights situation for migrants present in Tunisia. More specifically, xenophobic rhetoric from the country's president had provoked abuses by Tunisian authorities directed towards sub-Saharan nationals. Due to this, the commissioner for human rights of the European Council, amongst others, have raised warnings about human rights impact of the EU cooperation with Tunisia on border and migration management.

The EU is not a party to the ECHR, although accession to the Convention is foreseen in Article 6(2) of the TEU. This means that applicability of the ECHR and its additional protocols *ratione personae* to measures by the EU depend on the attributability of such measures to EU member states. In this essay, I examine the question of ECHR applicability *ratione personae* to the EU measure of providing financial and technical support for Tunisian border and migration management. The analysis is based on the two Commission acts mentioned above, namely the Action Plan and the MoU. I employ a legal dogmatic method, applying international public law to the examined EU acts.

The content of international public law on the matter of state attributability of international organisations' measures to their member states is determined by means of Article 1 of the ECHR as well as Article 61 of ARIO. Article 1 of the ECHR defines the applicability *ratione personae* of the Convention and Article 61 of ARIO concerns the circumvention of international obligations of a state member of an international organization. I use ECtHR practice and doctrine as secondary means for the determination of law.

In this essay, I reach the following conclusions. According to Article 61 of ARIO, the ECHR and its additional protocols is most likely not applicable *ratione personae* to the EU measure of providing financial and technical support for Tunisian border management. This is because EU member states have not *caused* the EU to adopt the Action Plan or the MoU. According to ECtHR practice, states may incur responsibility for measures of international organisation without state involvement in adoption procedures of said measures. This situation arises when states fail to ensure compliance with ECHR obligations within the framework of an international organisation. In view of manifest deficiencies in the protection of ECHR rights surrounding the Action Plan and the MoU, I argue that these acts should be attributable to EU member states based on such principles.

In the last chapter of this essay, I make some concluding remarks concerning ECHR applicability to EU soft law instruments on the field of migration. The findings of this essay illustrate why EU accession to the Convention should be made a priority. In the meantime, I argue that ECHR applicability *ratione personae* could and *should* be established to informal EU measures due to the role of the ECHR as a "'constitutional instrument of European public order' in the field of human rights".[1]

[1] See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Air-ways) v. Ireland,* para. 156

Sammanfattning

Efter den välkända ökningen i migration över Medelhavet under 2015–2016 har EU intensifierat sitt samarbete med tredje stater i frågor som rör migration. Trots att sådant samarbete ofta kritiserats som inkompatibelt med principen om *non-refoulement* och för att inte respektera migranters mänskliga rättigheter så finns det inga avgöranden från EU-domstolen rörande dess kompatibilitet med EU-rätten. Detta kan delvis sägas bero på en trend där samarbeten med tredje stater etableras genom icke-bindande överenskommelser och utan att iaktta EU-fördragens regler om ingående av internationella avtal. Sådana praktiker försvårar judiciell kontroll av EU-samarbeten med tredje stater eftersom de svårligen kan underställas legalitetsprövning i EU-domstolen.

Under 2023 har migrationen över Medelhavet på nytt nått höga nivåer och den här gången reser de flesta från eller via Tunisien. Som reaktion mot den ökade migrationen beslutade EU-kommissionen i juni 2023 genom en handlingsplan att öka EU:s finansiella och tekniska stöd till Tunisiens gräns- och migrationshantering. I juli 2023 tecknades ett *Memorandum of Understanding* (MoU) mellan Kommissionen och Tunisien där samma typ av stöd inkluderats. Beslutet att intensifiera samarbetet med Tunisien i frågor som rör migration fattades samtidigt som flera rapporter pekade mot ett försämrat läge för migranters mänskliga rättigheter i Tunisien. Mer specifikt så hade främlingsfientliga uttalanden från landets president lett att tunisiska myndigheter begått övergrepp mot migranter med ursprung i Afrika söder om Sahara. På grund av detta varnade bland andra Europarådets kommissionär för mänskliga rättigheter för att EU:s stöd till tunisisk gräns- och migrationshantering riskerade att få negativ inverkan på migranters mänskliga rättigheter.

Trots att tillträde till den Europeiska Konventionen om skydd för de Mänskliga Rättigheterna (EKMR) står inskrivet i Fördraget om den Europeiska Unionen (FEU) är EU fortfarande inte part till konventionen. Det betyder att EKMR:s applicerbarhet *ratione personae* på EU-akter är beroende av ifall sådana akter kan attribueras till EU:s medlemsstater. I den här uppsatsen undersöker jag frågan om EKMR:s applicerbarhet *ratione personae* på EU:s financiella och tekniska stöd till tunisisk gräns- och migrationshantering. Analysen baseras på de två akterna från Kommissionen som presenterats ovan, alltså handlingsplanen och MoU:n. Jag använder en rättsdogmatisk metod, vilket betyder att jag applicerar folkrättsliga normer på de två akterna. För att fastställa gällande rätt i frågan om staters ansvar för internationella organisationers agerande baseras analysen på artikel 1 i EKMR och artikel 61 i *articles on the responsibility of international organizations* (ARIO). Artikel 1 i EKMR definierar konventionens applicerbarhet *ratione personae* och artikel 61 i ARIO behandlar situationen när stater kringgår sina internationella förpliktelser genom att få en internationell organisation att agera på ett vis som

är inkompatibelt med dessa. Jag använder Europadomstolens praxis och doktrin som sekundära medel för fastställande av gällande rätt.

I uppsatsen kommer jag till följande slutsatser. EKMR och dess tilläggsprotokoll är troligen inte applicerbara *ratione personae* på EU:s finansiella och tekniska stöd till tunisisk gräns- och migrationshantering enligt artikel 61 i ARIO. Detta beror på att EU:s medlemsstater inte agerat på ett sätt som fått EU att anta handlingsplanen och MoU:n. Enligt Europadomstolens praxis kan stater hållas ansvariga för internationella organisationers beslut utan inblandning i antagningsprocessen av besluten i fråga. Sådant ansvar uppkommer när stater misslyckats med att garantera skydd för EKMR-rättigheter i det interna regelverket i en internationell organisation. Jag argumenterar för att EU:s skydd för sådana rättigheter i kontexten av handlingsplanen och MoU:n är behäftat med påtagliga brister. På grund av detta kan de två akterna attribueras till EU:s medlemsstater baserat på principen ovan.

I uppsatsens sista kapitel gör jag några slutliga observationer angående EKMR:s applicerbarhet på icke-bindande EU-akter som rör frågor om migration. Uppsatsens slutsatser pekar först och främst mot varför EU:s anslutning till EKMR bör göras till en prioriterad fråga. Jag menar dock att innan så sker så kan och *borde* Konventionen anses applicerbar på informella EU-akter till följd av dess karaktär av ett”’ konstitutionellt instrument för europeisk allmän ordning’ på området för mänskliga rättigheter.”[2]

[2] Se See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Air-ways) mot Irland*, para. 156

Preface

My interest in EU relations to Tunisia started during my internship at the Swedish Embassy in Tunis in the spring semester of 2023. I am grateful for all insights and experiences from my four months in Tunisia. Writing this essay has been challenging as my prior knowledge of its subject was from a diplomatic rather than a juridical perspective. I want to thank my supervisor, Ulf Linderfalk, for guidance and encouragement throughout my work with this master's thesis.

Klara Lundqvist, Paris, 30 December 2023

Abbreviations

ARIO	Articles on the Responsibility of International Organizations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
ILC	International Law Commission
TEU	Treaty of the European Union
TEUF	Treaty on the Functioning of the European Union
ICJ Statute	Statute of the International Court of Justice

1 Introduction

This essay deals with the issue of ECHR applicability to the EU measure of providing financial and technical support for Tunisian border and migration management. In this chapter, I introduce this subject and why it is important to study. Firstly, I describe some trends in EU cooperation with third states on the field of migration in broader terms. I then describe the EU's response to recently increased migration from Tunisia as manifested in two acts adopted by the European Commission. Lastly, I present the purpose, research questions and method of the essay.

1.1 Background

1.1.1 EU cooperation with third states on the field of migration

After the spike in migration towards Europe in 2015-2016, the EU and its member states have intensified their cooperation with third states on the field of migration. Materially, such cooperation includes readmission agreements as well as deals on reinforcement of border and migration management in states of origin and transit. Despite large criticism concerning human rights impact of such cooperation there are no CJEU rulings on the matter, arguably due to a trend of informalisation in EU external actions on the field of migration.

1.1.1.1 Human rights concerns

As mentioned above, EU cooperation with third states on the field of migration has often been criticised as having negative human rights impacts. Such criticism is generally based on the principle of *non-refoulement*, as EU policy is aimed at preventing migrants to reach or stay in Europe. Arguably, a consequence of such policies is that migrants are often kept from leaving states where they risk being subjected to ill-treatment. In the following I give three examples of EU cooperation with third states on the field of migration that have entailed concerns about EU respect for the principle of *non-refoulement* and migrants' human rights.

Firstly, the most well-known example of EU cooperation with third states on the field of migration is the *EU/Turkey Joint Statement* from 2016 (the EU/Turkey Statement or the Statement) according to which migrants arriving in Greece from Turkey were to be reallocated to Turkey.[3] In exchange, Turkey was promised accelerated procedures for its future adherence to the EU as well as facilitated visa procedures for Turkish citizens travelling to the EU. The Statement was criticized for not respecting the principle of *non-refoulement* and for depriving migrants effective remedies to seek asylum, as

[3] European Council (2016)

Turkey was found to send migrants back to Afghanistan, Syria and Iraq without reviewing their applications for asylum.[4]

A second example of EU cooperation with third states on the field of migration is the EU/Afghanistan declaration on a *Joint Way Forward on migration issues* (the Joint Way Forward Declaration) concerning readmissions of Afghan nationals from the EU to Afghanistan.[5] The Joint Way Forward Declaration was signed during a time when security in Afghanistan was deteriorating. According to NGO reports, people who were returned to Afghanistan in accordance with the Joint Way Forward Declaration were subjected to persecution, injured or killed in the ongoing armed conflict.[6]

A third example is a Memorandum of Understanding between Italy and Libya from 2017 (the Italy/Libya MoU).[7] The Italy/Libya MoU was adopted after the ECtHR ruled in *Hirsi Jamaa and Others v. Italy (Hirsi Jamaa)* that pushbacks by Italian coast guard towards Libya constituted a violation of the principle of *non-refoulement*, which is included in Article 3 of the ECHR.[8] According to the Italy/Libya MoU, Libyan authorities receive funding, training of personnel and technical support for border control, coast guard and reception centres for clandestine migrants. [9] In this way, Italian policies prevent migrants from arriving from Libya in Italy but without effectuating pushbacks at sea which were ruled unlawful in *Hirsi Jamaa*. The EU is not a party to the Italy/Libya MoU, but actions under it receive EU funding.[10] In its final report, the UN Independent Fact-Finding Mission on Libya levelled criticism at the EU as well as its member states for actions under the Italy/Libya MoU, stating that

> …the Mission found that crimes against humanity were committed against migrants in places of detention under the actual or nominal control of Libya's Directorate for Combating Illegal Migration, the Libyan Coast Guard and the Stability Support Apparatus. These entities received technical, logistical and monetary support from the European Union and its member States for, inter alia, the interception and return of migrants.[11]

In a pending case before the ECtHR, the Court is to rule on Italian responsibility for human rights abuses by Libyan Coast guard acting within the framework of the Italy/Libya MoU.[12] The outcome of this case will be of great

[4] See for example Amnesty International (2015) and Amnesty International (2016)
[5] European Union External Action (2016)
[6] Amnesty International (2017)
[7] Odysseus Network (2017)
[8] *Hirsi Jamaa and Others v. Italy*, para. 123
[9] Odysseus Network (2017), Article 2
[10] *Ibid*, Article 4
[11] United Nations Human Rights Council (2023), para. 4
[12] *S.S. and Others v. Italy*

importance for the question of lawfulness of EU practices on pushbacks at sea which altered due to the *Hirsi Jamaa* judgement.

1.1.1.2 Informality of EU external actions

Parallel to the general trend of intensifying cooperation with third states on the field of migration, there is a trend of *informality* of such cooperation. By *informality*, I refer to the fact that arrangements with third states are established in soft law instruments, rather than treaties binding on the Union. With the term *soft law*, I refer to a common definition of the notion being "non-binding instruments capable of displaying a normative force of some kind".[13] Important for the notion of *informality* is also that instruments are adopted in unconventional manners which makes it difficult to designate their legal nature.

As illustrated by the examples above, arrangements with third states on the field of migration are often named Statements, Declarations, Memoranda of Understanding or Partnerships. As a common point, they are all adopted in disregard of the EU treaties' procedures for adopting legally binding international agreements. Such practices work to the detriment of institutional balance within the EU as agreements are often adopted by one single EU institution, in all cases being either the Council or the Commission. It also poses a threat to democratic debate concerning the content of arrangements as there is little or no transparency in negotiations with third states and the European Parliament is usually excluded from the adoption procedure. Thirdly, such unconventional manners of adopting policies obstruct judicial scrutiny of their content as referral to the CJEU depend on EU institutions' and member states' insight in proposed agreements.[14] Ultimately, this poses a threat to the rule of law in the EU, as arrangements are adopted without any guarantee that they are compatible with EU primary law. As described above, these informal EU arrangements with third states on the field of migration is often questionable from a human rights perspective. Based on this, it has been argued that the EU deliberately make use of soft law instruments on the field of migration to avoid CJEU scrutiny and possible risks of preclusion of proposed arrangements.[15]

To give an example of how informality in EU external actions on the field of migration affects the rule of law within the Union, the above-mentioned EU/Turkey Statement is illustrative. The Statement was concluded between European heads of states and governments, the President of the European Council, the President of the European Commission and the Turkish Prime minister Recep Tayyip Erdoğan. It was published as a press release on the official website of the European Council and hence conceived as an agreement between the state of Turkey and the European Council. However, when

[13] Molinari (2022), p. 16
[14] *Ibid*, p. 26
[15] Santos Vara, Juan (2019), p. 33

three asylum seekers, at the time situated in Greece, brought action for annulment of the Statement before the CJEU, the Court found that European heads of states and governments agreeing on the Statement with Turkey had not acted in capacity of the European Council, but as representatives of EU member states. Consequently, the EU was not a party to the Statement and the CJEU lacked jurisdiction to rule on its annulment.[16]

The CJEU decision on the EU/Turkey Statement brings light to the judicial ambiguity brought by informality in EU external actions on the field of migration. Firstly, had the Statement been adopted in accordance with TEUF proceedings for adopting international agreements, there would be no questions concerning its attributability to the EU. Secondly, such proceedings include the possibility for member states and EU institutions to refer proposed agreements to the CJEU who may preclude the adoption of measures that are not compatible with primary EU law.[17] This means that ideally, the question of annulment posterior to the adoption of an agreement should not arise.

Unlike arrangements (allegedly) concluded by the European Council, the question of EU attributability does not arise concerning arrangements adopted by the Commission, as commissioners exclusively represent the Union. However, this does not necessarily mean that non-binding instruments adopted by the Commission are admissible for CJEU scrutiny. Firstly, the Court's jurisdiction for the annulment of EU acts is limited to acts *intended to produce legal effects vis-à-vis* third parties.[18] The CJEU has not yet dealt with how this requisite applies to soft law instruments on the field of migration.[19] Secondly, actions for annulment must be brought before the CJEU within two months from the publication of a contested measure. Such action may be brought by an EU member state, an EU institution or a natural or legal person directly affected by the measure.[20] Amongst EU institutions and member states, there is a prevailing consensus relating to EU policies on the area of migration. This may explain why none of them have brought action for annulment of informal agreements on this area. When it comes to individuals, it may firstly be complicated to prove that one is directly affected by a certain measure. Secondly, migrants are a vulnerable group that may not have the adequate knowledge and means to bring a case before the CJEU.

[16] *NF v. European Council, NG v. European Council* and *NM v. European Council*

[17] Consolidated version of the Treaty on the Functioning of the European Union, 2008/C 115/01, (hereinafter TEUF) Article 218(11)

[18] *Ibid*, Article 263, para. 1

[19] Santos Vara, Juan (2019), p. 35

[20] TEUF Article 263, para. 2, 4 and 6

1.1.2 Tunisia: Increased migration and human rights concerns

The year of 2023 marked a new spike in migrants crossing the Mediterranean to reach European shores. As formerly most migrants departed from Turkey and Libya, most now depart from Tunisia.[21] There are different factors explaining this shift. Firstly, the above-mentioned EU cooperation with Turkey and Libya may have managed to decrease the number of migrants taking migration paths through those states. Secondly, Tunisia is currently dealing with a major financial crisis, making life difficult both for Tunisians and foreigners in Tunisia. Thirdly, a xenophobic turn in Tunisian politics directed towards sub-Saharans has led to many migrants already presents in Tunisia choosing to leave the country.[22]

The majority of migrants travelling on the Central Mediterranean Route between Tunisia and Italy are of sub-Saharan origin. In the first half of 2023, most had origins in west African states such as Burkina Faso and the Ivory Coast, while the number of Sudanese migrants increased during the summer and autumn.[23] As mentioned above, a xenophobic turn in Tunisian politics has influenced many sab-Saharan migrants presents in Tunisia to leave the country. According to several reports, Tunisian authorities such as the police, military and coast guard have subjected sub-Saharan migrants to serious human rights violations. An event that drew international attention in July 2023 was that migrants had been transferred and left in a militarised desert area on the border between Tunisia and Libya where many of them died due to extreme heat and lack of water.[24] Except for this, reports points towards arbitrary arrests and detentions, physical ill-treatment, and cases of torture. [25] It may be added to the above that Tunisia lacks a functioning system for reviewing applications for asylum which means that practically, the state have poor possibilities to provide refugees with rightful international protection.[26]

1.1.3 The MoU and the Action Plan

The EU response to increased migration from Tunisia has been to intensify cooperation with Tunisia on the field of migration. This has been done mainly through financial and technical support aimed at strengthening Tunisian

[21] UNHCR (2023), *Italy Sea arrivals dashboard, May 2023* and UNHCR (2023), *Italy Sea arrivals dashboard, October 2023*

[22] European Parliament Think Tank (2023), p. 1 and The Economist (2023)

[23] UNHCR (2023) *Italy Sea arrivals dashboard, May 2023* and UNHCR (2023), *Sea arrivals dashboard, October 2023*

[24] Human Rights Watch (2023), *Letter from Human Rights Watch to AU and ECOWAS Commissions Regarding Tunisia Migrants Rights Abuses*

[25] Human Rights Watch (2023) *Tunisia: No Safe Haven for Black African Migrants, Regugees - Security Forces Abuse Migrants; EU Should Suspend Migration Control Support* and Denaro, Giuffré and Raach (2022), p. 592-594

[26] United Nations Human Rights Office of the High Commissioner (2023) and Denaro, Giuffré and Raach (2022), p. 589-592

border and migration management, similar to the cooperation model established in the Italy/Libya MoU. This measure has been established in two EU acts, both attributable to the European Commission. Firstly, the Commission decided through the *Annual Action Plan 2023 of the Multi-Country Migration Programme for the Southern Neighbourhood* (the Action Plan) to increase EU budget for support of Tunisian border and migration management.[27] Secondly, the Commission agreed with Tunisia on a Memorandum of Understanding (the EU/Tunisia MoU or the MoU) establishing a "strategic partnership" between the parties on a number of issues, including migration.[28]

1.1.3.1 The EU/Tunisia MoU

As is further illustrated in section 3.2. of this essay, the EU/Tunisia MoU fits perfectly into the above-described trend of informality in EU external actions on the field of migration. Firstly, the MoU was adopted in disregard of EU internal regulations for the adoption of binding international agreements and secondly, it is considered as a non-binding instrument according to internal EU law. As such, there was never any opportunity for an EU member state or institution to refer the MoU to the CJEU before its adoption and no action for its annulment was brought before the Court within the two months' time limit from its publication.

As indicated in the title of this section, the perception of the EU/Tunisia MoU is polemic. By European leaders such as the President of the European Commission and certain heads of states and governments, the MoU is portrayed as a success and a blueprint for future partnerships with other neighbouring states.[29] In her State of the Union Speech 13 September 2023, Ursula von der Leyen stated that

> We have signed a partnership with Tunisia that brings mutual benefits beyond migration – from energy and education, to skills and security. *And we now want to work on similar agreements with other countries*.[30]

The European Council, on its side, underlined "the importance of strengthening and developing similar strategic partnerships between the European Union and partners in the region."[31]. These statements goes in line with provisions of the *New Pact on Migration and Asylum* (the New Pact) which the European parliament and the European Council agreed on in December 2023

[27] European Commission (2023), *Commission implementing decision of 26.6.2023 on the financing of the Annual Action Plan 2023 of the Multi-Country Migration Programme for the Southern Neighbourhood* (hereinafter the Action Plan)

[28] European Commission (2023), *Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia* (hereinafter the EU/Tunisia MoU)

[29] See for example France 24 (2023)

[30] European Commission (2023), *2023 State of the Union Address by President von der Leyen*

[31] European Council (2023), conclusion no. 37

and which foresees migratory policies including the development of "tailor-made partnerships" with third states on border and migration management.[32] This means that arrangements with neighbouring countries similar to the EU/Tunisia MoU are to be expected and according to several sources, negotiations on the subject are already being held with Egypt.[33]

Although depicted as a success and a blueprint for future partnerships by EU leaders, the EU/Tunisia MoU has also received criticism for its possible human rights implications. As a baseline for the criticism towards the intensified cooperation between the EU and Tunisia lies the above-described reports on violations of migrants' rights by Tunisian authorities. As an example, short after the MoU was announced on 16 July 2023, Amnesty International published an article where a representative of the organisation claims that the agreement "makes the EU complicit in abuses against asylum seekers, refugees and migrants".[34] Not only NGOs has brought attention to human rights impacts of the MoU but the Commissioner for Human Rights of the European Council expressed her concerns about its effects stating that

> Failure to establish clear and concrete safeguards in migration co-operation activities will only add to the worrying trend of human rights being sacrificed to European states' attempts to externalise their responsibilities.[35]

Furthermore, the European Ombudsman has opened an inquiry concerning maladministration in the context of the MoU relating to, amongst other things, prior evaluation of human rights impact and the possibility of funding suspension if human rights are not respected.[36]

1.1.3.2 The Action Plan

As mentioned above, the Action Plan is an implementing decision by the Commission increasing the EU budget for support to Tunisian border and migration management. The Action Plan is closely tied to the MoU as it makes out the financial foundation for measures on the field of migration included in the MoU. As a budgetary decision, it is not an example of informalisation in EU external action but is adopted in full respect of EU internal regulations. Naturally, agreements with third parties, such as the EU/Turkey Statement or the EU/Tunisia MoU draw more attention than the budgetary decisions that lie behind them. However, in the context of the EU/Turkey Statement, it has

[32] European Commission (2022), *Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions on a New Pact on Migration and Asylum*, p. 2 and European Commission (2023), *What is the New Pact on Migration and Asylum of the EU?*

[33] O'Carroll (2023), *EU looks to Egypt partnership to tackle people-smuggling networks* and Dubois and Foy (2023)

[34] Amnesty International (2023) *EU/Tunisia: Agreement on migration 'makes EU complicit' in abuses against asylum seekers, refugees and migrants*

[35] Commissioner for human rights of the European Council (2023)

[36] European Ombudsman (2023)

been argued that an alternative strategy to establish EU responsibility for measures of the Statement could have been to contest EU decisions on fundings of such measures.[37] Although there are great differences in circumstances surrounding the EU/Turkey Statement and the EU/Tunisia MoU, it is a general truth that while arrangements with third states may be adopted through soft law instruments, implementation of such policies must be decided through formal financing decisions. Having stated this, I find it important to include the Action Plan in this essay to examine all possible strategies for establishment of responsibility for measures of the MoU.

1.1.4 Framing the problem: ECHR applicability *ratione personae* to EU measures

As explained above, due to the trend of informalisation in EU external actions on the field of migration, the protection of human rights offered by the CJEU on this area is limited. This raises the question to what extent the ECtHR could provide such protection in its place. According to the TEU, the European Union shall accede to the ECHR.[38] However, such accession has yet to be realised, meaning that the ECHR is not applicable *ratione personae* to measures attributable only to the EU. On the other hand, all EU member states are parties to the ECHR, meaning that when measures of the EU are attributable to ECHR contracting states in their capacity of EU member states, the ECHR may be *applicable ratione personae* to such measures. In international public law, principles relating to attributability of measures of international organisations to their member states have been suggested in the ILC *Articles on the responsibility of international organizations* (ARIO). The ECtHR has also developed practice concerning similar matters, allowing the ECtHR to establish its jurisdiction on measures of the EU and other international organisations.

1.2 Purpose

The purpose of this essay is to clarify if the EU measure of providing financial and technical support for Tunisian border and migration management is attributable to EU member states and thus within the scope of application *ratione personae* of the ECHR and its additional protocols.

[37] Schotel (2022), p. 87 and 92

[38] Consolidated version of the Treaty on European Union, C 202/3 (hereinafter TEU), Article 6(2) and Protocol no (8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the protection of human rights and fundamental freedoms, JEU 2012 C 326/1

1.3 Research questions

The main research question of this essay is: Are the ECHR and its additional protocols applicable *ratione personae* to the EU measure of providing financial and technical support for Tunisian border and migration management?

To answer the main research question of the essay I will first answer the following sub-questions:

- Are the ECHR and its additional protocols applicable *ratione personae* to the Action Plan?

- Are the ECHR and its additional protocols applicable *ratione personae* to the EU/Tunisia MoU?

1.4 Delimitations

ECHR applicability may be divided into four pillars, applicability *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*.[39] This essay deals exclusively with the issue of ECHR applicability *ratione personae* to the examined EU measures. The question of *ratione temporis* poses no issues to the subject of this essay, as the studied EU acts were concluded lon after EU member states acceded to the ECHR. However, the essay leaves out the questions of ECHR applicability *ratione materiae* and *ratione loci*. These questions would be of great importance if a case based on the Action Plan or the MoU would reach the ECtHR. However, as my work with this essay progressed, the implementation of measures in the Action Plan and the MoU have proven to be complicated. Thus, it is not yet certain how and to what extent the EU will be implied in Tunisian border and migration management.[40] For this reason, conclusions about ECHR applicability *ratione loci* and *ratione materiae* to the two EU instruments would be premature. In addition to this, a focus on the question of applicability *ratione personae* is beneficial for the study of future arrangements with third states that may have the same structure but other material content.

1.5 Method and material

The purpose and research questions of this essay calls for the use of a legal dogmatic method, meaning that the content of relevant sources of law is interpreted and applied to a specific case. When applying a legal dogmatic method in international public law, it is common to take Article 38 of the ICJ Statute as a starting point, as it provides a generally accepted list of means of

[39] Registry of the European Court of Human Rights (2023), p. 59-74
[40] European Council on Refugees and Exiles (2023)

determination of international public law.[41] The Article lists conventions, customary international law and general principles of law as primary means for the determination of law and judicial decisions and doctrine as secondary means for such determination.[42] In this thesis, I apply the legal dogmatic method in such a conventional way, interpreting Article 1 of the ECHR and international customary law by means of judicial decisions and doctrine.

As explained in the background, principles concerning attributability of international organisations' measure to their member states are found both in ECtHR practice and in Article 61 of ARIO.[43] The international public law defining ECHR applicability *ratione personae* is Article 1 of the ECHR which reads "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The Article does not define contracting states' responsibility for measures of international organisations which means that ECtHR practice is of great importance to interpret the Article in light of such issues. On the other hand, said practice is far from fully developed on all matters concerning state attributability of international organisations' measures. To fill out voids, but also to give more weight to provisions in ECtHR practice, I will refer to Article 61 of ARIO, concerning circumvention of international obligations of a state member of an international organization.

ARIO is an ILC project on principles that reflect and develop international customary law on the responsibility of international organisations.[44] The Articles have been commended by the UN General Assembly in numerous resolutions, encouraging states and international organisations to take note of their provisions.[45] As such, there are grounds to consider ARIO provisions as primary means for determination of rules of international law. The ARIO provision I focus on in this essay is Article 61, as it concerns states' circumvention of international obligations by causing an international organisation to take certain measures. There are other provisions of ARIO part 5 that could be relevant to the subject of this essay (such as Article 60 concerning coercion). The reason my focus lies on Article 61 is that the *Hirsi Jamaa* judgement makes up a solid basis for the argument that EU member states aim to circumvent ECHR obligations by causing the EU to take actions that are deemed unlawful when taken by ECHR contracting states. It should be noted that earlier ARIO drafts points towards inconsistencies in the ILC's reasoning

[41] Statute of the International Court of Justice, 18 April 1946, UNTS 993, Article 38

[42] Rose (2022), p. 16

[43] International Law Commission (2011). Note that the Articles were published as "*Draft* articles on the responsibility of international organizations". As they have been recognised by the UN General Assembly (see below), I refer to the Articles as "Articles on the responsibility of international organizations."

[44] *Ibid*, General commentary no. (5)

[45] General Assembly resolution 66/100, *Responsibility of international organizations*, RES/66/100 of 9 December 2011, General Assembly resolution 69/126 *Responsibility of international organizations*, RES/69/126 of 10 December 2014 and General Assembly resolution 72/122 *Responsibility of international organisations*, RES/72/122 of 18 December 2017

concerning certain principles. Some doctrine also claims Article 61 of ARIO fails to provide satisfactory solutions to the issues it addresses. With these points in mind, I find it motivated in some passages of this essay to refer to sources that propose other interpretations of international customary law than Article 61 of ARIO. For a better understanding of the Article itself as well as its interconnections with ECtHR practice, I mainly refer to the ILC commentaries on the Articles.

Except for primary means of determination of law, the material used in this essay is doctrine, official publications as well as other literature. Legal doctrine is used as secondary means of determination of international law, i.e. to interpret Article 1 of the ECHR in light of ECtHR practice as well as Article 61 of ARIO. Official publications are used to describe the process of adoption, content and legal nature of the Action Plan and the MoU. In some sections, I refer to newspaper articles and reports from NGOs. This material is used exclusively as sources of events that took place and to refer to opinions and criticism expressed in the material.

2 State responsibility for measures of international organizations

Having established that the method of this essay is to apply Article 61 of ARIO and ECtHR practice on two EU measures, I first need to establish the relevant content of these two entities. More specifically, In this chapter, I cover provisions of Article 61 of ARIO and ECtHR practice concerning state attributability of international organisations' measures. After a brief introduction, I first elaborate on the content of Article 61 of ARIO and then the content of ECtHR practice. Lastly, I propose a method based on these presentations on how to solve issues relating to the attributability of international organisations' measures to their member states.

2.1 Introduction

To begin with, all ARIO provisions are optional which means that diverging rules within an international organisation have primacy over the provisions of ARIO.[46] Theoretically this means that should Article 61 of ARIO and ECtHR practice be incompatible, such a conflict is solved by ECtHR practice being treated as a *lex specialis* situation. However, Article 61 of ARIO is to some extent based on ECtHR practice, and as I will argue, largely compatible with its provisions.

The ILC describes the matter of state responsibility for international organisations' measures as composed by three material and one subjective requisite.[47] To simplify comparison between Article 61 of ARIO and ECtHR practice, the latter may also be described as composed by these four requisites. Two of these four requisites do not relate specifically to the question of attributability of measures to states and are thus outside the scope of this essay. To give a comprehensive picture of the issue of state responsibility for measures of international organisations, I briefly present all four requisites in this introduction before developing further on two of them.

The first of the four requisites for a state to incur responsibility for a measure of an international organisation relates to character of the measure. More precisely, the measure must *materially* be of the character that if taken by the member state, it would have constituted a breach of the state's international obligations.[48] Related to the subject of this essay, this requisite concerns

[46] ARIO, Article 64

[47] International Law Commission (2011), commentary no (2) and (6–8) to ARIO Article 61

[48] *Ibid*, commentary no (8) to ARIO Article 61

ECHR applicability *ratione materiae* and *ratione loci*. As stated in the delimitations, these questions are not treated in this essay.[49]

The second requisite is that the international organisation in question have competence on the field where an international obligation of its member state(s) has been breached. The ILC states that "the obligation may specifically relate to that area or be more general, as in the case of obligations under treaties for the protection of human rights."[50] Also this requisite relates to the character of the measure and not specifically to the question of state attributability. Additionally, as the subject of this essay concerns human rights' obligations, this requisite may be considered as met concerning the examined EU actions.

Thirdly, for a state to incur responsibility for a measure of an international organisation, the main rule is that the state must in some way have been involved in procedures leading to the adoption of the measure. According to Article 61 of ARIO, the state must have *caused* the action of the international organisation. In ECtHR practice, the requirement for state involvement is less clearly defined and under specific circumstances states may incur responsibility for international organisations' measures without any state action. This third requisite relates directly to the question of attributability of international organisations' measures to their member states. The requisite of state involvement is treated in this chapter's sections 2.2.1. and 2.3.1.

Lastly, the fourth requisite relates to a subjective element in a state's conduct. According to Article 61 of ARIO, a state invoke responsibility for measures of an international organisation only when is has acted with an *intention to avoid compliance* with an international obligation. In other words, the state must have deliberately tried to take advantage of the separate legal personality of an international organisation with the purpose to avoid state responsibility. In ECtHR practice, there is no requirement for such an intention. Instead, the attributability of international organisations measures' to their member states rely on the states' fulfilment of an obligation to ascertain protection for ECHR rights within international organisations. This fourth requisite is treated in this chapter's sections 2.2.2. and 2.3.2.

2.2 State attributability according to Article 61 of ARIO

Article 61 of ARIO concerns the circumvention of international obligations of a state member of an international organization, and reads as follows:

[49] See section 1.4
[50] *Ibid*, Commentary no. (6) to ARIO Article 61

> 1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
>
> 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

The Article is analogous to Article 17 of ARIO, which concerns the inverse situation as the one covered by Article 61, namely the responsibility of international organisations for measures of their member states.[51] As explained above, Article 61 of ARIO includes two requisites relating to state attributability of international organisations' measures. The first requisite is that the state has *caused* the measure in question, and the second is that the state has acted with an *intention to avoid compliance with an international obligation*. The two requisites are explained in the following.

2.2.1 Causing an act of an international organisation

It is stated explicitly in Article 61 of ARIO that the Article covers situations when a state has *caused* an act of an international organisation. According to ILC commentaries to the Article, this means that "there has to be a significant link between the conduct of the circumventing member State and that of the international organization". [52] The commentaries do not further elaborate what sort of causality that needs to be manifested by this significant link. The ILC Commentary to Article 17 of ARIO frames the issue which is addressed by the Article as follows:

> The fact that an international organization is a subject of international law distinct from its members opens up the possibility for the organization to try to influence its members in order to achieve through them a result that the organization could not lawfully achieve directly, and thus circumvent one of its international obligations. As was noted by the delegation of Austria during the debate in the Sixth Committee, "an international organization should not be allowed to escape responsibility by 'outsourcing' its actors".[53]

The phrasing "try to influence", implies that the level of control exercised by the international organisation on its member states does not, in this context, have to be absolute for the international organisation to incur responsibility

[51] International Law Commission (2011), Commentary no. (1) to Article 61 of ARIO
[52] *Ibid*, Commentary no. (7) to ARIO Article 61
[53] International Law Commission (2011), Commentary no. (1) to ARIO Article 17

for actions of its member states. As to the phrasing of Article 61, earlier drafts of the Article used the word "prompts" instead of "causes." The change "prompts" to "causes" has been interpreted as the ILC lowering the demand of control exercised by states on an international organisation according to the Article.[54] Based on the fact that the Article does not exclude state conduct in compliance with the internal rules of international organisations as a base for state responsibility, it has been argued that unanimous decisions by states members of an international organisation resulting in a certain act of the organisation, *could* meet the condition of states having *caused* an act of the international organisation.[55] Such an interpretation would be preferable due to the fact that in many cases it is practically impossible for one single state member of an international organisation to cause an act of that organisation without the support of other member states.[56]

Furthermore, the ILC commentaries refer to some ECtHR case law stating that

> The jurisprudence of the European Court of Human Rights provides a few examples of *dicta* affirming the possibility of States being held responsible when they fail to ensure compliance with their obligations under the European Convention on Human Rights in a field where they have attributed competence to an international organization.[57]

The quote implies that states may incur responsibility for measures of international organisations in certain situations without having caused said measure. This situation, however, is not covered by Article 61 of ARIO, as the Article demands causality between state action and a measure of an international organisation. However, the ILC reference to this ECtHR case law shows that the possibility for state responsibility without such causality is not *contrary* to Article 61 of ARIO, but *parallel* to situations covered by the Article.[58] I will get back to this parallel possibility for state attributability of international organisations' measures in section 2.3.1.2.

2.2.2 Intention to avoid compliance

According to ILC commentaries, the requirement of an intention to avoid compliance with an international obligation is found in the notion of *circumvention*.[59] The commentary to Article 61 refers to commentaries to Article 17, which defines the required intention as

[54] Barros (2017), p. 190
[55] Barros (2017), p. 189
[56] Kujpjer (2010), p. 17
[57] International Law Commission, commentary no (3) to ARIO Article 61
[58] Ryngaert (2011), p. 1015
[59] International Law Commission (2011), commentary no (2) to ARIO Article 61

> an intention to… take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation. The evidence of such an intention will depend on the circumstances.[60]

To set the limits for when states may be considered to have had said intention, it is said that there has been no such intention when actions of an international organisation "has to be regarded as the unintended result of the member State's conduct". On the other side of the scale, there may have been such an intention also in situations that do not amount to states having *abused their rights.*[61] An example where the principle of *abuse of rights* may be applicable in this context is if an international organisation is set up with the purpose of having breaches of its member states' international obligations attributable to the separate legal personality of the international organisation.[62] In this situation, these states would have acted with an intention to avoid compliance with their international obligations, which would make measures of the international organisation attributable to its member states. As stated by the ILC, however, state conduct does not have to be that malicious for them to incur responsibility for measures of international organisations. Instead, the responsibility standard set forth by the Article has been interpreted as a sort of *due diligence* responsibility "not to take advantage of an organization's competence in order to avoid [the state's] own obligations".[63] The ILC reference to the principle of *abuse of rights* has also been interpreted as signifying that the notion of circumvention would be the opposite of acting in *good faith*. In other words, states are expected to act in a manner that they believe would not result in international organisations taking measures that are contrary to their own international obligations.[64]

It should be noted that in earlier drafts of commentaries to the Article, the ILC explicitly stated that there was no requirement of an intention to avoid compliance with international obligations for states to incur responsibility according to the Article.[65] The swift change in the ILC's approach to this issue illustrates that this is a matter where the content of international public law is debated. Accordingly, the ILC's choice to include the requirement for a certain intention in the Article has been questioned from several points of view. Firstly, this requirement is said to narrow down the scope of Article 61 of ARIO so that it fails to cover all situations that should be targeted. In this perspective, the purpose of the Article should be to invoke member states' responsibility "when they fail to ensure compliance with their international law obligations".[66] To this end, it has been noted that "below conscious

[60] *Ibid,* Commentary no (4) to ARIO Article 17
[61] *Ibid,* Commentary no (2) to ARIO Article 61
[62] Buchannan and Ryngaert (2011), p. 144
[63] *Ibid*
[64] Barros (2017), p. 188
[65] International Law Commission (2009), p. 162
[66] Barros (2017), p.190

circumvention of obligations there is a vast and important space in which responsibility can and should arise for a member State."[67] This space is not covered by Article 61 of ARIO but as mentioned above, ECtHR practice points towards a possibility for state attributability of international organisations' measures in situations that are not covered by the Article.

Secondly, the inclusion of a subjective element in the form of a certain intention on the part of a state in Article 61 of ARIO has been criticised for creating incoherence in international law on state responsibility. In ARSIWA, state responsibility is based on the concept of *wrongfulness*, which is based on objective criteria for determining state responsibility. The inclusion of a subjective element in Article 61 of ARIO thus creates fragmentation in international public law which is supposed to be overcome by the work of the ILC.[68]

2.3 State attributability according to ECtHR practice

In similarity with Article 61 of ARIO, attributability of international organisations' measures to member states according to ECtHR practice may be described as based on two requisites. Firstly, there is a requirement for state involvement, which applies differently when contesting a *specific measure* of an international organisation or the *internal regulations* of an international organisation. Secondly, state attributability of an international organisation's measures depends on what the Court refers to as the *Bosphorus presumption*.[69] The presumption defines to what extent ECHR contracting states are obliged to ensure observance of ECHR rights within the framework of international organisations. In the following, I first describe the requirement for state involvement and how it applies in the two situations described above. Secondly, I elaborate on the origins and applicability of the *Bosphorus* presumption.

2.3.1 Requirement for state involvement

Whereas Article 61 of ARIO demands that a state has *caused* a measure of an international organisation for the measure to be attributable to that state, ECtHR practice is less clear as to what type of state involvement is acquired for state attributability of a measure. When an application to the ECtHR is directed towards a *specific measure* of an international organisation there seems, however, to be a requirement for causality between state conduct and the adoption of said measure. [70] On the other hand, I mentioned above that the ILC commentaries to Article 61 of ARIO recognises a possibility in ECtHR

[67] Yee (2013), p. 332
[68] D'Aspremont (2012), p. 17-18 and p. 24-25
[69] See for example *Avotiņš v. Latvia*, p. 43
[70] Ryngaert (2011), p. 1005

practice for state attributability of measures of international organisations that have not been caused by the state in question.[71] This possibility arises when states fail to ensure compliance with ECHR obligations in a field where they have attributed competence to an international organization. In such situations, state responsibility may arise when an ECtHR application is directed towards the *internal regulations* of an international organisation. The logic in this is that as the responsibility of a state is based on deficiencies in the internal regulations of an international organisation, there is no requirement for state involvement in procedures leading to a specific measure. In the following, I explain what type of state involvement is required for state attributability of international organisations' measures according to ECtHR practice. Firstly, when such attributability is based on a specific measure of an international organisation. Secondly, when such attributability is based on deficiencies in the internal regulations of an international organisation.

2.3.1.1 Contesting a specific measure

As stated above, when an ECtHR application is directed towards a specific measure of an international organisation, the contested measure may be attributable to an ECHR contracting state when there has been state involvement in proceedings leading to the adoption of the measure. This was established in the cases *Boivin v. 34 Member States of the European Council (Boivin)* and *Cooperative Producentenorganisatie van de Nederlandse Kokkelvisserij u.a. v. The Netherlands (Kokkelvisserij).* The *Boivin* case concerned an employment dispute between the European Organisation for the Safety of Air Navigation (Eurocontrol) and one of its employees. The employee has been appointed a certain position within Eurocontrol, but the appointment was later drawn back and the position was given to another person. The offended employee contested Eurocontrol's employment procedure in the International Labour Organisation's Administrative Tribunal (ILOAT), which was the only tribunal competent to settle internal Eurocontrol employment disputes. The ILOAT found that there had been no flaws in Eurocontrol's recruitment process.[72] The employee then applied to the ECtHR, claiming *inter alia* that his rights according to Article 6 (The right to a fair trial) and Article 13 (The right to an effective remedy) of the ECHR had not been respected during the ILOAT dispute settlement process.[73] The ECtHR found that the applicant's complaints were directed towards the ILOAT's decision and stated the following:

> The Court would point out that the impugned decision thus emanated from an international tribunal outside the jurisdiction of the respondent States, in the context of a labour dispute that lay entirely within the internal legal order of Eurocontrol, an international organisation that has a legal personality separate from that

[71] See section 2.2.1.
[72] *Boivin*, p. 1-2
[73] *Ibid*, p. 3

> of its member States. *At no time did France or Belgium intervene directly or indirectly in the dispute, and no action or omission of those States or their authorities can be considered to engage their responsibility under the Convention.*[74]

In other words, the ECHR was not applicable *ratione personae* on the contested decision because the defendant states had not been involved "directly or indirectly" in the dispute. Consequently, the application was declared inadmissible.[75]

The subsequent *Kokkelvisserij* case concerned a domestic conflict before the Netherlands' Administrative Jurisdiction Division of the Council of State (the Administrative Jurisdiction Division) about cockle fishing in the Wadden Sea. A permission for such fishing had been granted to an association (the association) but then contested by a society for environmental protection. As the dispute concerned interpretation of the Habitats Directive, the Administrative Jurisdiction Division posed questions for preliminary rulings to the CJEU. [76] As a part of oral proceedings before the CJEU, an Advocate General delivered an advisory opinion on the concerned issues. After this, the oral proceedings were closed. The association applied for a re-opening of the oral proceedings in order to respond to the opinion of the Advocate General, but the application was dismissed.[77] The association then applied to the ECtHR claiming that its right to adversarial proceedings according to Article 6 of the ECHR had been violated by the CJEU's decision denying it an opportunity to respond to the opinion of the Advocate General.[78]

The ECtHR found that the situation in *Kokkelvisserij* differed from the situation in *Boivin*, as the association's complaint was "based on an intervention by the ECJ which had been actively sought by a domestic court in proceedings pending before it."[79] and that "It cannot therefore be said that the respondent party was in no way involved."[80] Differently from its findings in *Boivin*, the Court thus concluded that the requirement for state involvement had been met. Comments on the *Kokkelvisserij* case has been that the threshold for the Court to find that there has been relevant state involvement in a measure of an international organisation "may not be very high". Moreover, the Court's findings in Kokkelvisserij are scarcely aligned with the ARIO requirement of an intention on the part of the state concerned to avoid compliance with

[74] *Ibid.*, p. 6, my italicizing (the application was judged inadmissible in regards to the 32 states others than France and Belgium as the application towards them was filed too late, see *Boivin*, p. 3)

[75] *Ibid*, p. 6–7

[76] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

[77] *Kokkelvisserij*, p. 2–7

[78] *Ibid*, p. 16

[79] *Ibid*, p. 18

[80] *Ibid*

international obligations.[81] Most likely, the Administrative Jurisdiction Division had no way to foresee that proceedings before the CJEU would include the issue of an opportunity to respond to the opinion of the Advocate General. However, as will be described in detail later in this chapter, ECtHR practice does not include the same demand as Article 61 of ARIO for a specific intention on the part of the concerned state.[82] It should be noted that in *Kokkelvisserij*, the Court stresses the fact that the respondent state was *in some way involved* rather than the question of *causality* between such involvement and the contested CJEU decision. On the other hand, it seems to acknowledge that there was a certain causality of that kind, stating that the complaint was "based on an intervention by the ECJ which had been actively sought by a domestic court in proceedings pending before it".

To further develop on the question of causality, it serves to refer an early decision of The European Commission of Human Rights, namely *Hess v. United Kingdom* (*Hess*).[83] The *Hess* case concerned the detention and solitary confinement of Rudolf Hess, who was Hitler's former private secretary. In the late 60's, he was the sole remaining prisoner in the Spandau prison which was administered by the four allied victors of World War II. According to an agreement on the administration of Spandau prison, Hess' release was conditioned by an unanimous decision by all four states. Hess' wife filed an application against the United Kingdom claiming that the state was responsible for violations of her and her husband's rights according to the ECHR. However, the European Commission of Human Rights found that Hess was not under the United Kingdom's jurisdiction according to Article 1 of the Convention as "the joint authority cannot be divided into four separate jurisdictions".[84] Although the *Hess* case is of long standing, it is cited in an Admissibility Guide published by the Registry of the ECtHR in 2022.[85] The Registry thus, does not consider the *Hess* decision as obsolete. In the Admissibility Guide, the Registry draws from *Hess* that "[t]he mere fact that a State exercises the right to vote in an inter-State entity is not sufficient for the persons affected by the decisions of that entity to be deemed to fall within the jurisdiction of that State for the purposes of Article 1 of the Convention".[86] In other words, *Hess* is an indication that in ECtHR practice, unanimous voting by member states in an international organisation does not amount to the type of state involvement required for a measure to be attributable to an ECHR contracting state. This contrasts to certain wordings in the *Boivin* and *Kokkelvisserij* decisions such as "in no way involved" and "at no stage did France or Belgium intervene directly or indirectly" as these could be interpreted as the relevant

[81] Ryngaert (2011), p. 1004

[82] See section 2.3.2.

[83] The European Commission of Human Rights was a body connected to the ECtHR, charged with deciding on the admissibility of applications to the Court.

[84] *Hess v. United Kingdom*, p. 74

[85] Registry of the European Court of Human Rights (2022)

[86] *Ibid*, p. 36

state involvement sought by the Court is not of any specific character.[87] However, *Hess* sheds light to *Boivin* and *Kokkelvisserij* as it shows that not just *any* state involvement in proceedings leading to a measure of an international organisation is sufficient for attributing the measure to the concerned states. Such a standpoint of the Court is reasonable as the opposite would imply that state involvement of any kind, such as for example a non-party intervention, could make out a basis for attributing responsibility for an international organisation's decision to the intervening state.

Having stated the above, I argue that the state activity sought by the Court in *Boivin* and *Kokkelvisserij* was a state action that in some way had a link of causality to the contested measure. The Court clearly distinguishes between situations when the concerned state could possibly have prevented the international organisation from adopting a certain measure and situations where this was beyond the powers of one state. In *Boivin*, the respondent states had no possibility to change the outcome of the ILOAT decision and in *Hess*, the respondent state's influence was restricted by the other three states' rights to veto. In both these cases, the application was declared inadmissible due to non-applicability of the ECHR *ratione personae*. In *Kokkelvisserij*, on the other hand, the Administrative Jurisdictions Division *could* have refrained from inciting proceedings before the CJEU. This would necessarily have led to the contested decision not being adopted as the question of an opportunity to respond to the opinion of a CJEU Advocate General would not have arisen. An interpretation of ECtHR findings in the above-mentioned cases including a demand for *causality* is not just reasonable as it excludes cases of insignificant state interference, but it also approaches ECtHR practice to Article 61 of ARIO.

2.3.1.2 Contesting the internal regulations of an international organisation

As mentioned above, the ILC commentary to Article 61 of ARIO recognises a possibility for state attribution of international organisations' measures to their member states that is *parallel* to situations covered by the Article. This parallel possibility concerns situations when states "fail to ensure compliance with their obligations under [the ECHR] in a field where they have attributed competence to an international organization".[88] In such situations, there is no requirement of causality between state action and the measure of an international organisation. Moreover, there is no requirement for state involvement in the procedures leading to a contested measure of an international organisation at all. This was established in the case *Gasparini v. Italy and Belgium (Gasparini)* which concerned a dispute over a NATO decision to increase NATO employees' monthly pensions contributions. This decision was

[87] See full quotes above

[88] International Law Commission (2011), commentary no (3) to ARIO Article 61, see section 2.2.1.

contested by one employee before NATO's internal dispute settlement mechanism, the CROTAN, which decided not to annul the contested decision.[89] The offended employee then applied to the ECtHR claiming that his right to an equitable process according to Article 6 of the ECHR had been violated, mainly because the CROTAN hearings were not held in public.[90] Although circumstances of the case were similar to those in *Boivin*, the Court distinguished between the two cases. The Court claimed that, in difference to *Boivin*, the ECtHR application in *Gasparini* was directed towards *intrinsic characteristics of an international organisation's dispute settlement body* instead of towards a *specific decision* of such a dispute settlement body. In other words, the Court interpreted the applicant's complaints in *Gasparini* as being directed towards deficiencies in upholding ECHR rights of the CROTAN internal regulations, rather than the specific CROTAN decision directed towards him. The Court referred to these deficiencies as a *structural lacuna* in the international organisation's internal regulations for protecting fundamental rights.[91] The Court expressed that state attributability of such *structural lacunas* would be based on the following obligation:

> States members of international organisations are under the obligation, on the time when transferring some of its sovereignty to an international organisation, to make sure that the rights guaranteed by the Convention receive by that organisation an "equivalent protection" as the protection assured by the mechanism of the Convention.[92]

By this statement, the Court transferred the relevant state action from involvement in proceedings leading to the adoption of a specific measure (as in *Kokkelvisserij*), to a state activity of assuring ECHR compliance of the internal regulations of international organisations. It has been argued that one should not put too much emphasis on the temporal dimension of the Court's statement in *Gasparini*.[93] By this I mean that the evaluation of human rights protection within an international organisation is not to be done *exclusively* at the time when a state enters an international organisation. This has been expressed by the ECtHR in another case stating that "any such finding of equivalence [in human rights' protection] could not be final and would be susceptible to review in the light of any relevant change in fundamental rights

[89] *Gasparini*, p. 1-2. (CROTAN is an abbreviation of *Cour de Recours d'OTAN,* which translates as *NATO's Appeals Board.* The *Gasparini* decision is only available in French.)

[90] *Gasparini*, p. 4

[91] *Ibid, p. 7*

[92] *Ibid*, p. 6, my translation from the French original text: « les Etats membres ont l'obligation, au moment où ils transfèrent une partie de leurs pouvoirs souverains à une organisation internationale à laquelle ils adhèrent, de veiller à ce que les droits garantis par la Convention reçoivent au sein de cette organisation une « protection équivalente » à celle assurée par le mécanisme de la Convention »

[93] Ryngaert (2011), p. 1014

protection."[94] Furthermore, the defendant states in *Gasparini* joined NATO before the CROTAN was set up, which means that evaluation of CROTAN compliance with the ECHR would necessarily have to be done after their NATO accession. Based on the above, it has been argued that the obligation incumbent on ECHR contracting states according to *Gasparini* is to continuously monitor the internal safeguards for upholding ECHR rights within the activities of international organisations.[95]

2.3.2 The *Bosphorus* presumption

I recall that ECtHR practice on state attributability of international organisations' measures differs from Article 61 of ARIO in that it does not include a demand for a certain intention on the part of the concerned states. Instead, such attributability depends on the applicability of what has been referred to as "the *Bosphorus* presumption."[96] This presumption is an assumption that states do not incur responsibility for measures of international organisations when said organisation offers protection for ECHR rights that is at least equivalent to such protection offered by the Convention. The presumption may be rebutted in situations when the protection for Conventional rights have been manifestly deficient. The *Bosphorus* presumption was first presented in the case *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland (Bosphorus).* Originally, the presumption served as a means to relieve states from ECtHR scrutiny in situations of conflicting obligations stemming respectively from the ECHR and EU membership. The applicability of the presumption has later been extended to include questions concerning states' responsibility for measures of international organisations. In the following, I first explain the origins of the *Bosphorus* presumption and then how it applies in the context of attributing measures of international organisations to their member states.

2.3.2.1 Origins of the presumption

The *Bosphorus* case concerned a seizure of an aircraft in Ireland. The aircraft belonged to a Yugoslavian enterprise but had been leased to a Turkish charter company. At the time, a UN sanctions regime towards Yugoslavia had been implemented in the EU through a regulation and was thus directly binding on EU member states. The decision of Irish authorities to seize the aircraft had its legal basis in this EU regulation.[97] After contesting the seizure in domestic Irish courts and in the CJEU, the Turkish charter company applied to the ECtHR, claiming that its right according to Article 1 of Protocol 1 of the ECHR,

[94] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland (Bosphorus)*, para. 155

[95] Ryngaert (2011), p. 1014

[96] See for example *Avotiņš v. Latvia*, p. 43

[97] *Bosphorus*, para. 11-24

(The right of natural and legal persons to peaceful enjoyment of possessions), had been violated.[98]

Clearly, the circumstances in *Bosphorus* designated a situation where the measure of seizing an aircraft was attributable to the state of Ireland. As such, the ECHR and its additional protocols were applicable *ratione personae* to the contested measure. As stated above, however, the *Bosphorus* presumption was originally developed to absolve ECHR contracting states from ECtHR scrutiny in situations of conflicting obligations. The question that is treated in *Bosphorus* was thus if Ireland could be relieved from responsibility for its alleged ECHR violation due to the fact that it was obliged by an EU regulation to seize the aircraft. In later case law, the Court has clarified that a purpose of the *Bosphorus* presumption is to ensure that ECHR contracting states do not find themselves with a dilemma when they are obliged due to membership in an international organisation to take certain measures that could be a matter of scrutiny in the ECtHR.[99]

It may seem counterintuitive that the ECtHR would be minded with such dilemmas of ECHR contracting states. Instead, the Court could have righteously claimed that states remain responsible for their conventional commitment also when their conduct is necessary in view of other international obligations. To explain its concerns with such dilemmas, the Court referred to an earlier case, *Waite and Kennedy v. Germany (Waite and Kennedy).* In *Waite and Kennedy*, the Court recognised that when states transfer certain competence and jurisdiction to international organisations, this may have implications for the protection of human rights. However, such transfer is justified due to the increasing importance of cooperation in international organisations. On the other hand, implications for the protection of human rights may only be accepted when it is proportionate to the aim of strengthening international cooperation.[100] To this end, the Court stated the following:

> …establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, *the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and objective of the Convention*; the guarantees of the Convention could be limited or excluded at will, thereby

[98] *Ibid*, para. 3
[99] *Michaud v. France (Michaud)*, para. 104
[100] *Waite and Kennedy*, para 61-63 and para. 67

> depriving it of its peremptory character and undermining the practical and effective nature of its safeguards.[101]

In other words, it cannot be accepted that ECHR contracting states avoid their obligation according to Article 1 of the Convention to guarantee Conventional rights to everyone in their jurisdiction, simply by transferring parts of their jurisdiction to an international organisation. As to the question of proportionality the Court found the following. If an ECHR contracting state has transferred some of its sovereignty to an international organisation that offers protection of fundamental rights that is at least *equivalent* to such protection provided by the Convention, state action taken in compliance with obligations that stem from membership of that organisation may be justified. By the term *equivalent* the Court means *comparable*, and not *identical*, as a demand of *identical* protection for fundamental rights "could run counter to the interest of international cooperation pursued."[102] Based on these findings, the Court created the *Bosphorus* presumption:

> *If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention* when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such *presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.* In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[103]

The presumption presented above consists of three elements. The first one is the establishment that a certain international organisation provides protection of fundamental rights that is at least *equivalent* to the protection offered by the Convention (the principle of equivalent protection). The second is the assumption that when states act in accordance with obligations flowing from their membership of such an organisation, there has been no breach of conventional obligations. The third element of the presumption is the possibility for its rebuttal, which comes in to play when the protection of fundamental rights has been *manifestly deficient*.

In *Bosphorus*, the Court established that the principle of equal protection applies to the EU. To reach this conclusion, the Court examined both the material and processual human rights protection offered by the EU. The Court paid certain attention to the fact that the CJEU has recognised ECHR rights as general principles of EU law. That the same principles substantially

[101] *Ibid*, para. 67 and *Bosphorus*, para. 154, my italicizing
[102] *Bosphorus*, para. 155
[103] *Ibid*, para. 156, my italicizing

influenced the content of the EU Charter was also found essential. Furthermore, the Court underlined that the CJEU plays an important role in upholding fundamental rights within the union. The ECtHR admitted that the limited possibilities for individual recourse to the CJEU is a flaw to EU human rights protection but found that CJEU surveillance of EU institutions and member states offers an important *indirect* protection to the rights of individuals. In this way, the protection of fundamental rights in the EU was found to be *equivalent,* although not *identical,* to said protection provided by the ECHR. Consequently, as the state of Ireland had acted in compliance with an EU regulation when seizing the aircraft, the presumption was that it had not breached its conventional obligations.[104]

To treat the matter of possible rebuttal of the presumption, the Court briefly resumed the proceedings leading up to Ireland seizing the aircraft, which included a CJEU preliminary ruling on the matter. The Court then stated that it "consider[ed] it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights", leading to the conclusion that the *Bosphorus* presumption had not been rebutted. This being the case, the Court concluded that there had been no violation of Article 1 of Protocol 1 of the ECHR.[105] In this way, the Court declared a non-violation without material scrutiny of the actions of the defendant state. I recall that it did so in the objective to facilitate international cooperation in international organisations and relieve states from conflicting obligations stemming from the ECHR and EU membership. To be clear, the Court by the application of the *Bosphorus* presumption relieved the state of Ireland from a possible situation where it was obliged by an EU regulation to seize the aircraft but this same action would have constituted a breach of an ECHR obligation. With this in mind, the Court has later stated that one of the purposes of the Bosphorus presumption is to "reduce the intensity of its supervisory role".[106] The possibility for rebuttal of the presumption sets up the outmost limits to how much the ECtHR may reduce said supervisory role, notably in situations when "the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights".[107]

So far in ECtHR case law, the Bosphorus presumption has only been considered as rebutted once, and never in a case concerning measures of the EU. The case when the presumption was found to be rebutted concerned a Swiss decision to freeze assets of a former Iraqi secret service official based on UN sanctions directed towards the regime of Saddam Hussein. The Court found that the system put forth by the UN resolution governing the sanctions did not

[104] *Ibid*, para. 159–165
[105] *Ibid*, para. 166–167
[106] *Michaud*, para. 104
[107] *Bosphorus*, para. 156, see full quote above

offer safeguards for a fair trial correspondent to the requirements of Article 6 of the ECHR. In addition to this, Swiss Courts had denied the applicant a possibility to appeal the decision to freeze his assets. The ECtHR found that the *Bosphorus* presumption had been rebutted as "the procedural shortcomings in the sanctions regime could not be regarded as compensated for by domestic human rights protection mechanisms."[108] In other words, what is decisive for the rebuttal of the *Bosphorus* presumption is the actual consequences of an international organisations' measures for an individual. If the Swiss Court had compensated for the shortcomings in the UN sanctions regime, the presumption would not have been rebutted.

2.3.2.2 The presumption and measures of international organisations

As presented in the section above, the *Bosphorus* case concerned implementation of an EU regulation in an EU member state. As mentioned, the applicability of the *Bosphorus* presumption has later been extended to cover the attributability of international organisations' measures to their member states. In the section concerning state action, I described the *Kokkelvisserij* case, in which the applicant contested a CJEU decision to dismiss a request for reopening of oral proceedings.[109] In *Kokkelvisserij*, the criterion of state involvement was found to have been met, but the case was declared inadmissible due to the applicability of the *Bosphorus* presumption. To reach this conclusion, the Court stated that

> …[the] presumption applies not only to actions taken by a Contracting Party but also to the procedures followed within such an international organisation and hence to the procedures of the ECJ.[110]

In other words, the presumption is that EU decisions are not attributable to EU member states, because the EU is considered to offer equivalent protection of Conventional rights as the protection offered by the conventional system. As described above, the presumption would be rebutted if, in a specific case, the protection of fundamental rights would be found to have been *manifestly deficient*. Reviewing the criterion of *manifest deficiency* in *Kokkelvisserij*, the Court examined regulations governing the possibility for reopening of oral proceedings and how they were applied by the CJEU in the specific case. The Court recalled that in other cases it had recognised a right to respond to the opinion of an Advocate General as included in the right to adversarial proceedings according to Article 6 of the Convention.[111] It found, however,

[108] *Al-Dulimi v. Switzerland (Al-Dulimi)*, para. 83

[109] See section 2.3.1.1.

[110] *Kokkelvisserij*, p. 20. By "such an international organisation", the Court refers to an international organisation to which the principle of equivalent protection applies.

[111] *Ibid*, p. 19-20

that a denial of said right did not constitute a *manifest* deficiency in CJEU protection of fundamental rights. Due to this, the Court concluded that the *Bosphorus* presumption had not been rebutted and the application was declared inadmissible as the ECHR was not applicable *ratione personae* to the contested CJEU decision.[112] Just like the *Bosphorus* case, the Court's assessment in *Kokkelvisserij* illustrates the purposes that lie behind the *Bosphorus* presumption. The application of the *Bosphorus* presumption facilitates cooperation in international organisations as it reduces the ECtHR's supervisory role concerning measures connected to such cooperation. By this I mean that if the contested CJEU decision would have been judged attributable to the state of the Netherlands and as a breach of Article 6 of the ECHR, this would have hampered EU member states' possibility to request CJEU preliminary rulings. The great difference between the *Bosphorus* and *Kokkelvisserij* cases is, however, that in *Bosphorus* the presumption allowed the Court to conclude that an action clearly attributable to Ireland did not constitute a violation of Constitutional obligations. In *Kokkelvisserij*, the Court instead pointed towards a possibility that decisions of an EU institution could be attributable to EU member states.

2.3.2.3 The presumption and internal regulations of international organisations

As quoted above, the Court found in *Gasparini* that

> States members of international organisations are under the obligation, on the time when transferring some of its sovereignty to an international organisation, to make sure that the rights guaranteed by the Convention receive by that organisation an "equivalent protection" as the protection assured by the mechanism of the Convention.[113]

Based on this, the Court concluded that when an ECHR application is directed towards *structural lacunas* in the internal regulations of an international organisation, there is no requirement for state involvement in procedures leading to the adoption of a specific measure. In *Gasparini*, the Court stated that state responsibility for such *structural lacunas* may arise in two situations. Firstly, it may arise when it has not been established "or even alleged" that the principle of equivalent protection applies to the international organisation in question. Secondly, it may arise when it has been established that said principle applies to the organisation, but it has been revealed subsequently that there is a *manifest deficiency* to the protection of Conventional rights within the internal regulations of an international organisation.[114] This statement is

[112] *Ibid*, p. 21
[113] *Gasparini*, p. 6, see the french original text in footnote 92
[114] *Ibid*, p. 6–7

clearly a rephrasing of the *Bosphorus* presumption but applied directly to internal regulations of an international organisation. In other words, it must first be established based on the principle of equivalent protection that the *Bosphorus* presumption is applicable. Secondly, the presumption may be rebutted if there is an area of the internal regulations of an international organisation where the protection of fundamental rights is *manifestly deficient*. What differs in the application of the *Bosphorus* presumption in these cases is thus that the rebuttal of the presumption depends on deficiencies in internal regulations of an international organisation rather than circumstances of a particular case. To determine whether or not the presumption has been rebutted in the *Gasparini* case, the Court found that is must examine if the defendant states could, *in good fait*, have estimated that the CROTAN regulations were not in flagrant contradiction with the ECHR. The Court answered that question affirmatively, concluding that the *Bosphorus* presumption had not been rebutted but was applicable to the case. Accordingly, the case was declared inadmissible.[115]

2.4 How to solve issues of state attributability of international organisations' measures

In this section, I conclude the findings of this chapter, proposing a model for solving issues relating to the attributability of international organisations' measures to their member states. This model is mainly based on ECtHR practice but as far as possible aligned with Article 61 of ARIO. The model proposed is a two-step procedure. First, it must be examined if a state has *caused* a measure of an international organisation. Secondly, state attributability of an international organisation's measures depend on what I choose to call *responsibility standards*, which differ depending on whether the state has caused a contested measure or not.

2.4.1 The first step: Causality

The first step in examining if a measure of an international organisation is attributable to one of its member states is to determine if the state has *caused* the measure in question. As explained above, state attributability according to Article 61 of ARIO is undoubtedly dependent on such causality. In ECtHR practice, the character of significant state involvement is less clearly defined but I argue that it includes a similar demand for causality between state conduct and the measure in question. This conclusion is based on comparison between the Court's assessments in the cases *Boivin*, *Kokkelvisserij* and *Hess*. Such comparison points towards a difference between cases when a state could have hindered an international organisation's adoption of a measure and cases when it could not. It has been argued that unanimous decisions of

[115] *Ibid*, p. 6–10

states members of an international organisation *could* amount to the demand of causality according to Article 61 of ARIO. In ECtHR practice, however, the *Hess* decision shows that measures of international organisations are not attributable to their member states in such situations. This is because in such situations, one state could not have obstructed the adoption of a certain measure, but this would have demanded coordinated action from several member states.

When a state has not caused a measure of an international organisation, the measure cannot be attributable to the state based on Article 61 of ARIO. However, in ECtHR practice, the Court's statements in *Gasparini* shows that there is a possibility for state attribution of international organisations' measures without a demand for causality. In these cases, state responsibility is based on *structural lacunas* in the internal regulations of an international organisation. The existence of such *structural lacunas* imply that states have failed to make sure that conventional rights receive sufficient protection within an international organisation. I recall that this possibility presented by the ECtHR in *Gasparini* is not contrary but *parallel* to provisions in Article 61 of ARIO.

2.4.2 The second step: Responsibility standards

The second step in determining whether a measure of an international organisation is attributable to its member states is to examine if the actions or omissions of the states in question meet certain responsibility standards. As stated above, these differ depending on whether the state has caused a contested measure or not.

2.4.2.1 When there is causality

If concluded in the first step that a state has caused the measure of an international organisation, the measure is attributable to the state according to Article 61 of ARIO based on a *subjective* requisite. More precisely, it is demanded that states have acted with the intention to avoid compliance with an international obligation. This requisite has been criticised as excluding numerous situations where state responsibility should arise due to states' failure to ensure compliance with international obligations. It has also been said to create incoherence in international law as it sets up a responsibility standard that differs from the ARSIWA concept of wrongfulness. The subjective requisite has also been interpreted as an expression of the principle of *good faith*. As such, the demand for a certain intention may be seen as defining a sort of *due diligence* responsibility for states not to make use of the separate legal personality of an international organisation to take measures that are contrary to their international obligations.

According to ECtHR practice, the standard for invoking state responsibility is instead based on the *Bosphorus* presumption to which a state's intention is irrelevant. Instead, the presumption is focused on the actual protection of

ECHR rights offered by the international organisation in question. In this way, the application of the *Bosphorus* presumption may include the type of situations that Article 61 of ARIO has been criticised to exclude. It also lies closer to the ARSIWA concept of wrongfulness as it puts emphasis on material compliance with international obligations rather than subjective elements in a state's conduct.

According to the *Bosphorus* presumption, measures of international organisations may be attributable to their member states in two cases. *Either* when the principle of equivalent protection does not apply to an international organisation *or* if the protection of ECHR rights in an individual case has been manifestly deficient. In this way, also the *Bosphorus* presumption may be said to define a sort of *due diligence* responsibility. By this I mean that the presumption demands a certain prudence from states not to engage in proceedings within international organisations that may result in measures contrary to the ECHR. This idea of a *due diligence* responsibility standard approaches ECtHR practice to Article 61 of ARIO in accordance with the above.

2.4.2.2 When there is no causality

As repeatedly stated above, state attributability of measures of international organisations is only possible based on Article 61 of ARIO when states have *caused* the measures in question. However, the ILC has recognised the parallel possibility for state attributability in ECtHR practice based on principles set forth in *Gasparini*. This parallel possibility occurs when states have failed to ensure compliance with ECHR obligations on a field where they have conferred certain competences to an international organisation.

State attributability of international organisations' measures in such situations according to ECtHR practice is similar to the situation when a state has caused a certain measure. Such attributability is based on the *Bosphorus* presumption and arises in two situations. Firstly, if the principle of equivalent protection does not apply to the international organisation in question. Secondly, when said principle does apply but the protection of conventional rights on a specific area of the organisation's internal regulations is *manifestly deficient*. In the first situation, the Bosphorus presumption is not applicable to measures of the international organisation at all. The second situation is what the Court refers to as a *structural lacuna,* where the *Bosphorus* presumption is rebutted in relation to an international organisation to which it normally applies. In this sense, the *Gasparini* case extends the *due diligence* responsibility described above. By this I mean that if it follows from *Kokkelvisserij* that states should refrain from *engaging in proceedings* within international organisations that may result in actions contrary to the ECHR, it follows from Gasparini that states should refrain from *taking part in international organisations whose internal regulations do not suffiently protect conventional rights*. As explained above, an interpretation of the *Bosphorus* presumption as establishing a *due diligence* responsibility standard aligns it with Article 61 of ARIO,

which has been interpreted in the same way. It may also be noted that in *Gasparini*, the Court refers to the principle of *good faith* for the rebuttal of the *Bosphorus* presumption. The principle of *good faith*, as opposed to *abuse of rights*, has been said to be included in the notion of *circumvention* according to Article 61 of ARIO. The ECtHR reference to the same principle in *Gasparini* further aligns the Court's practice with the Article.

3 EU financial and technical support for Tunisian border and migration management

In chapter two, I described the principles set out in Article 61 of ARIO and ECtHR practice concerning attributability of international organisations' measures to their member states. Lastly, I proposed a model for solving such issues, which is based on both these entities. Having established the content of international public law, the next step of this essay is to describe the EU acts studied in the essay. As described in the background, the EU measure of providing financial and technical support for Tunisian border and migration management in 2023 has been established in two acts. The first one is the Action Plan that was adopted by the Commission and concerns financing of actions on the field of migration in the EU's Southern Neighbourhood, which includes Tunisia.[116] The second act is the EU/Tunisia MoU establishing a "strategic partnership" between the EU and Tunisia on multiple issues, including migration (the MoU). In this chapter, I describe the content and the manner in which the Action Plan and the MoU were adopted, as well as guarantees for upholding ECHR rights surrounding the two instruments. The objective is to give a factual basis for applying the model proposed in chapter two to the EU measure of providing financial and technical support for Tunisian border and migration management.

3.1 The Action Plan

As mentioned in the introduction, EU/Tunisian migration cooperation did not start in 2023. The Action Plan is the 2023 annual implementing decision of the *Multi-Country Migration Programme for the Southern Neighbourhood* (the Migration Programme) which presents the EU strategy for migration cooperation with North African countries during the period of 2021-2027.[117] The Migration Programme, in its turn, is based on the *Regulation establishing the Neighbourhood, Development and International Cooperation Instrument* (the NDICI regulation). The NDICI regulation sets out the general framework and budget for EU external action and international cooperation during the same time period.[118] Materially, the Action Plan aims at "strengthening migration and asylum governance and management" in multiple North African

[116] See Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009, (hereinafter the NDICI regulation), Article 4 and Annex I

[117] See European Commission (2022) *Multiannual Multi-Country Migration Programme for the Southern Neighbourhood for 2021-2027(MIP)* (hereinafter the Migration Programme), introduction and the Action Plan, Article (3)

[118] The NDICI regulation, Preamble (1)

countries, including Tunisia.[119] In the following I explain the content of the Action Plan, its adoption procedure, the significance of it contributing to "Team Europe Initiatives" and lastly the framework for upholding ECHR rights in the context of the Action Plan.

3.1.1 Content

As the Action Plan is an annual implementation of the Migration Programme, its content relates to objectives set out in the Migration Programme. Two such objectives are to "support safe and human rights-based migration governance" and to "increase voluntary returns from North Africa and sustainable reintegration of irregular migrants in North Africa and countries of origin".[120] To achieve these goals, the Action Plan is said to "strengthen partner countries' ability to manage migration, their borders and their search and rescue operations" and to "support partner countries in managing migration flows while respecting the rights of migrants and other vulnerable people". Tunisia and Egypt are pointed out as prioritised partner countries concerning these actions.[121] An Action Document annexed to the Action Plan (the Annex) sets out the budget for the Action Plan.[122] According to the Annex, EUR 105 000 is allocated to support for border and migration management in Tunisia and Egypt.[123] Both Ursula von der Leyen and Olivier Várhelyi have referred to the same sum as designated exclusively for Tunisia but in a broader purpose than uniquely border and migration management.[124] When announcing the implementation of measures in the Action Plan and the MoU in September 2023, the Commission referred both to the Action Plan and to funding decisions adopted in 2022 that had yet to be implemented.[125] With this in mind, it is difficult to say exactly what amount have been foreseen by the Commission in the purpose of Tunisian border and migration management. Most important for this essay is to note that *some* EU funding has been adopted for this purpose.

3.1.2 Adoption

In accordance with the NDICI regulation, the Commission adopted the Action Plan by means of implementing decision. [126] Such implementing decisions are adopted through a procedure where they must be approved by a committee

[119] The Action Plan, Article (3)

[120] *Ibid*, Article (4)

[121] *Ibid*, Articles (5), (6) and (7)

[122] European Commission (2023), *Action Document to support countries in the Southern Neighbourhood for the management of migration flows for 2023*

[123] *Ibid*, p. 16 and the Action Plan, Article 5

[124] See for example European Parliament (2023), *Answer given by Mr Várhelyi on behalf of the European Commission (12.10.2023)* and European Commission (2023), *European Commission President Ursula von der LEYEN together with the Italian Prime Minister and the Prime Minister of The Netherlands Mark RUTTE in Tunisia*, minute 7:00

[125] European Commission (2023), *Midday press briefing of 22/09/2023*, minute 26:55

[126] The NDICI regulation, Article 23(1-2) and Article 25(1)

consisting of representatives from EU member states. This committee procedure is governed by the *Regulation laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers* (the Control regulation).[127] According to the Control regulation, an implementing decision cannot be adopted if rejected by the committee and the Commission may only exceptionally refrain from adopting a decision that has been endorsed by the committee.[128] The *Neighbourhood, Development and International Cooperation Instrument Committee* delivered its opinion on the Action Plan on 15 June 2023. All 27 member states voted in favour of adopting the Action Plan.[129] Accordingly, the Commission adopted the Action Plan and its Annex on 26 June 2023.[130]

3.1.3 Team Europe Initiatives

The Annex connects the Action Plan to two "Team Europe Initiatives" concerning migration in regions including Tunisia.[131] According to the European Commission, Team Europe Initiatives "focus on identifying critical priorities that constrain development in a given country or region". Through the Team Europe Initiatives, EU policies are implemented by joining EU and member states' resources to reach common objectives.[132] In other words, Team Europe Initiatives is a label put on collaboration between the EU and its member states, and it is mostly used in the context of external actions. Although the "Team Europe approach" was developed in response to challenges posed by the Covid-19 pandemic, it has already become a fundamental part of EU development and international cooperation policies, notably under the NDICI regulation.[133]

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[127] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (hereinafter the Control regulation), see the NDICI regulation, Article 45(2)

[128] The Control regulation, Articles 3 and 5

[129] European Commission (2023), Comitology Register, *OVERALL VOTING RESULT ON A FORMAL OPINION Related to draft implementing acts submitted under Regulation (EU) No 182/2011 and measures under the regulatory procedure with scrutiny under Decision 1999/468/EC*

[130] European Commission (2023), *Commission implementing decision of 26.6.2023 on the financing of the Annual Action Plan 2023 of the Multi-Country Migration Programme for the Southern Neighbourhood* and European Commission (2023), *Action Document to support countries in the Southern Neighbourhood for the management of migration flows for 2023*

[131] The Team Europe Initiatives (TEIs) linked to the Action Plan are the TEI for a Comprehensive Migration Approach in the Maghreb, Sahel and West African countries in the Atlantic /Western Mediterranean Route (AWMED) and the TEI for a Comprehensive Migration Approach in the Central Mediterranean Route (Central Med), see European Commission (2023), *Action Document to support countries in the Southern Neighbourhood for the management of migration flows for 2023*, p. 1

[132] European Commission (2023), *Team Europe Initiatives*

[133] *Ibid*

In the case of the Action Plan, the Team Europe Initiatives are said to offer a framework for member states to contribute to common objectives on the area of migration, either through co-financing of EU projects or through parallel projects pursuing the same objectives.[134] How the Team Europe Initiatives will materialise in connection to the Action Plan is not defined. It is even mentioned in the Annex that they might not materialise, in which case EU actions in the Action Plan would still be carried out.[135] Team Europe Initiatives are a new phenomenon and still poorly monitored. This contributes to difficulties evaluating to what extent they form a basis for state involvement in the context of the Action Plan.[136] What can be noted, however, is that EU action under the Action Plan is in no way *dependent* on state contribution in a Team Europe format.

3.1.4 Protection for ECHR rights

3.1.4.1 Human rights safeguards

The Action Plan and its Annex includes several references to human rights. For example, it is stated that "[the] Action will strive to ensure full respect of the human rights of refugees, asylum seekers and migrants, including the non-refoulement principle…"[137] In this purpose, one foreseen action is to "provide human rights capacity building to state actors, not only in relation to the use of the equipment to be provided, but more widely as a core component of rights-based border management."[138] The Annex also includes a brief risk assessment where it there is said to be a medium risk that "Interception/rescue of migrants lead to human rights abuses." As a measure to mitigate this risk, it is stated that "The implementing partners will have wide access to migrants across the country and are therefore in a unique position to efficiently monitor the action."[139] In other words, the EU strategy to assure human rights in the context of the Action Plan is to rely on partners, such as Tunisian authorities, to manage their actions in accordance with human rights' law.

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[134] European Commission (2023) *Action Document to support countries in the Southern Neighbourhood for the management of migration flows for 2023*, p. 1. Currently the following EU member states are said to contribute to the two Team Europe Initiatives linked to the Action Plan: Austria, Belgium, Denmark, Finland, France, Germany, Italy, Malta, Spain and The Netherlands (as well as Switzerland),

[135] European Commission (2023) *Action Document to support countries in the Southern Neighbourhood for the management of migration flows for 2023*, p. 1

[136] In 2022, the European Parliament requested reports from the Commission concerning, amongst other things, state involvement in Team Europe Initiatives. So far, no such report has been published, see Gavas, Mikaela and Pleeck (2023). The EU offers a "Team Europe Initiative and Joint Programming Tracker" but the Team Europe Initiatives referred to in the Action Plan are not presented in the tracker. See European Union, *Team Europe Initiative and Joint Programming Tracker*

[137] European Commission (2023) *Action Document to support countries in the Southern Neighbourhood for the management of migration flows for 2023*, p. 11

[138] *Ibid*

[139] *Ibid*, p. 13

According to the NDICI regulation, the Commission may amend implementing decisions if necessary due to immediate threats to human rights. However, the Action Plan nor its annex includes provisions on such amendments should such threats arise connected to the Action Plan. Amendments according to the NDICI regulation are subjected to the same committee procedure as described above for adopting the Action Plan.[140]

3.1.4.2 Possible CJEU scrutiny

Firstly, control of the Commission's implementing powers is exercised by EU member states rather than the CJEU. Such control is governed by the Control regulation, for example through the committee procedure explained above. According to the Control regulation, a committee opinion rejecting a proposed implementing decision may be appealed, although not to the CJEU but to an appeal committee. The appeal committee may deliver a positive or a negative opinion on the original proposal or adopt in with amendments.[141] However, when the ordinary committee delivers a positive opinion on an implementing decision, there is no possibility to appeal the committee opinion, but the Commission *shall* adopt the suggested implementing decision.[142] This means that as all EU member states voted in favour of the Action Plan, the decision to adopt it was final.

When it comes to judicial scrutiny of the Action Plan by the CJEU, it could have been brought before the CJEU in action for annulment in accordance with Article 263 TEUF under condition that it was found to create legal effects *vis-à-vis* third parties.[143] Such an action for annulment could, to exemplify, have concerned the Action Plan's compliance with the EU Charter. However, as the Action Plan includes implementing measures, only EU institutions and member states would have been competent to bring action against it.[144] Given that the Action Plan was authored by the EU Commission and all EU member states voted in its favour, the sole remaining actors that could have contested it was the European Council and the European Parliament. I refer to possibilities to bring action for annulment of the Action Plan *in the past tense*, as the prescribed limitation period for such action is two months from the date of publication of the contested action. [145] Concerning the Action Plan, this time limit was passed in August 2023 without any authorised actor having brought action for its annulment before the CJEU.[146]

[140] The NDICI regulation, Article 25(4) and Article 45(4) and the Control regulation, Article 5

[141] The Control regulation, Article 6

[142] *Ibid*, Article 5(2-3)

[143] TEUF Article 263, para. 1

[144] *Ibid*, para. 2 and 4

[145] *Ibid*, para. 6

[146] The Action Plan was adopted on 26 June 2023

3.2 The Memorandum of Understanding

As described in the background, the MoU is an instrument that was adopted jointly by the EU and Tunisia in July 2023 and establishes a "strategic partnership" between the two parties. The MoU concerns several subjects, including migration. On this area, the MoU is closely linked to the Action Plan as it anchors measures under the Action Plan in cooperation with Tunisia. In the following, I describe the procedure of adopting the MoU, its content and the significance of it being concluded in a "Team Europe format". Lastly, I describe the framework for upholding ECHR rights in connection to the MoU.

3.2.1 Adoption

That the EU was to work with Tunisia on a "strategic partnership package" was first announced by Ursula von der Leyen at a press conference in Tunis on 11 June 2023.[147] According to the President of the European Commission, this strategic partnership package was to be aimed at strengthening cooperation between the two parties on some specified areas, including migration.[148] In connection to the press conference, the areas covered by the upcoming strategic partnership were listed in a Joint Statement (the Joint Statement) published at the Commission's official website.[149] The following areas of cooperation areas were listed: *Strengthening economic and trade ties, A sustainable and competitive energy partnership, Migration*, and *People-to-people contacts*. The Joint Statement, also designated the Tunisian Minister of Foreign Affairs, Migration and Tunisians Abroad Mounir Ben Rjiba and the European Commissioner for Neighbourhood and Enlargement Olivér Várhelyi to work out a Memorandum of Understanding (the MoU). The MoU was to be endorsed by the two parties before the end of June.[150] In conclusions from its meeting on 29-30 June 2023 the European Council *welcomed* the work on an MoU with Tunisia that had been accomplished so far.[151] However, the Council never formally endorsed the final version of the MoU before its adoption. On 16 July 2023, a second press conference was held in Tunis, following the signing of the MoU by Mounir Ben Rjiba and Olivér Várhelyi.[152] Except for the presentation at the press conference in Tunis, the MoU was

[147] European Commission (2023), *Visit of Ursula von der Leyen, President of the European Commission, to Tunisia: press declarations with Giorgia Meloni, Italian Prime Minister, and Mark Rutte, Dutch Prime Minister*

[148] *Ibid*

[149] European Commission (2023) *Statement, The European Union and Tunisia agreed to work together on a comprehensive partnership package Tunis*, 11 June 2023

[150] *Ibid*, para. 8

[151] European Council (2023), conclusion no. 37

[152] European Commission (2023), *European Commission President Ursula von der LEYEN together with the Italian Prime Minister and the Prime Minister of The Netherlands Mark RUTTE in Tunisia*

communicated by publication the same day as a press release on the Commission's website.[153]

According to German Foreign Ministry sources that were leaked to *Die Zeit*, several EU heads of states has expressed criticism towards the Commission for signing the MoU without official Council approval.[154] The EU's "foreign minister", Joseph Borell, later addressed a letter to commissioner Olivér Várhelyi expressing concerns about the Commission's "unilateral action on the conclusion of [the MoU]"[155] According to Borell, EU member states' discontent with the MoU concerned both its material content and the fact that the Commission concluded it without formal consent of the European Council.[156]

3.2.2 Content

The MoU is structured in five pillars, which mainly correspond to the cooperation areas presented in the Joint Statement. The five pillars are the following: *Macro-economic stability, Economy and trade, Green energy transition, People-to-people contacts* and *Migration and mobility*. The first three pillars concern EU budgetary support to Tunisia, strengthened trade relations on some areas such as digital transition and air transport as well as investments in Tunisian renewable energy. The fourth pillar, *People-to-people contacts*, concern EU promises to facilitate legal migration for Tunisians to the EU, for example by harmonising practices on issuing Schengen short-stay visas.[157]

Lastly, under the *Migration and mobility* pillar, the parties state their intention to "develop a holistic approach to migration".[158] In this objective, they agree on the necessity of supporting development in disadvantaged areas of Tunisia as a means to prevent irregular migration. Except for combatting irregular migration, they underline the importance of developing possibilities for legal migration.[159] Most importantly for the subject of this essay, the MoU states the following:

> The European Union shall endeavour to provide sufficient additional financial support, in particular for the provision of

[153] European Commission (2023), *Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia* (the EU/Tunisia MoU)

[154] Grillmeier, Musharbash and Mühling (2023)

[155] O'Caroll (2023) *EU states expressed 'incomprehension' at Tunisia migration pact, says Borrell.* The correct title of joseph Borell is *High Representative of the European Union for Foreign Affairs and Security Policy*

[156] *Ibid.*

[157] European Commission (2023), *Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia*

[158] *Ibid*, fifth pillar, para. 1

[159] *Ibid*

equipment, training and technical support necessary to further improve the management of Tunisia's borders.[160]

Furthermore, the EU engages to support the identification and return of irregular migrants from Tunisia to their countries of origin and to launch a "Talent partnership", aimed at facilitating Tunisian labour mobility in the EU.[161]

3.2.3 Team Europe format

At both the press conferences in Tunis, the President of the Commission was accompanied by Italian Prime Minister Georgia Meloni and the Prime Minister of the Netherlands, Mark Rutte. At the first occasion, on 11 June 2023, Ursula von der Leyen opened her speech with the words "Good afternoon, we are here as team Europe".[162] At the second press conference in Tunis, on 16 July 2023, she started with the words "Team Europe is back in Tunis".[163] Unlike the Action Plan, there is no reference in the MoU to Team Europe Initiatives. However, as illustrated by the quotes above, the Team Europe concept played a role in the conclusion of the MoU.

After the conclusion of the MoU, Members of the European Parliament questioned Olivér Várhelyi on the significance of including two Prime Ministers in events surrounding the adoption of the MoU. To this, the commissioner answered that "The involvement of the Prime Ministers of Member States in such event is done in a 'Team Europe format', i.e., a coordinated approach effectively drawing on the full range of EU and Member States' instruments and resources, in support of partnerships with third countries and regions."[164] This description of the Team Europe format is identical to the description of Team Europe Initiatives published on the Commission's web site.[165] As such, it corresponds to the Team Europe concept linked to the Action Plan.[166]

Although Italy and the Netherlands are not parties to the MoU, the Team Europe format of the MoU forms a framework for their prime ministers to portray themselves as creators of the agreement. To exemplify, Georgia Meloni has on several occasions stressed the importance of Italian diplomatic work to bring about the MoU. Firstly, she said that such diplomatic work was key in organising initial high-level meeting in Tunis concerning the development

[160] *Ibid*, fifth pillar, para. 6

[161] *Ibid*, fifth pillar, para. 7 and 10

[162] European Commission (2023), *Visit of Ursula von der Leyen, President of the European Commission, to Tunisia: press declarations with Giorgia Meloni, Italian Prime Minister, and Mark Rutte, Dutch Prime Minister*

[163] European Commission (2023), *European Commission President Ursula von der LEYEN together with the Italian Prime Minister and the Prime Minister of The Netherlands Mark RUTTE in Tunisia*

[164] European Parliament (2023), *Answer given by Mr Várhelyi on behalf of the European Commission (20.9.2023)*

[165] European Commission (2023), *Team Europe Initiatives*

[166] See section 3.1.3.

of a partnership between the EU and Tunisia.[167] After the signing of the MoU, she stated that ”the Italian diplomatic mission has worked with the utmost commitment to achieve this result.”[168] Without any insight in the process leading up to the conclusion of the MoU, it does not seem unlikely that Italian diplomatic ties to Tunisia may have played an important role in connecting European and Tunisian leaders. This is clearly an example of how the EU can benefit from member states' resources, which in this case has been labelled as part of a "Team Europe format". Mark Rutte mainly related to the MoU as a foundation to strengthen bilateral trade relations between the Netherlands and Tunisia, especially on some areas such as green energy and water management that are included in the MoU. .[169] In this sense, the Team Europe format also forms a framework for EU member states to draw on EU relations with third states to develop their own relationship to the same states.

It has been noted that there may be accountability issues linked to the "Team Europe format" of the MoU, as Meloni and Rutte take credit for its development but formally neither Italy nor the Netherlands are parties to it.[170] It is, for instance, not apparent to what extent Italian diplomatic efforts to bring about the MoU may have significance for the question of state attributability of the MoU.

3.2.4 Protection for ECHR rights

3.2.4.1 Human rights safeguards

The approach to migration in the MoU is said to be based on respect for human rights.[171] On the other hand, it has been questioned for omitting concrete measures on how this approach is to be achieved. The commissioner for human rights of the Council of Europe stated the following:

> Comprehensive human rights safeguards must be an integral part of any migration co-operation activity between Council of Europe member states and third countries, including Tunisia. Such safeguards should ensure that support does not result, directly or indirectly, in human rights violations at the hands of those third countries. The recently reported serious human rights violations

[167] European Commission (2023), *Visit of Ursula von der Leyen, President of the European Commission, to Tunisia: press declarations with Giorgia Meloni, Italian Prime Minister, and Mark Rutte, Dutch Prime Minister*, minute 7:00

[168] European Commission (2023), *European Commission President Ursula von der LEYEN together with the Italian Prime Minister and the Prime Minister of The Netherlands Mark RUTTE in Tunisia - Press statement (in English and Italian) by Giorgia MELONI, Italian Prime Minister*, minute 1:20

[169] *Ibid*, minute 1:00

[170] Pinjenburg (2023)

[171] European Commission (2023), *Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia*, fifth pillar, para. 4

> against refugees and migrants in Tunisia only make the inclusion of such safeguards more pressing.[172]

Given this background, she called on EU member states to press for clarification of what human rights safeguards that would be put in place in the context on the MoU. She further specified that such safeguards should at least include certain elements such as "the publication of a comprehensive human rights risk assessment" and "the ability to suspend any activities found to be negatively impacting on the human rights of refugees, asylum seekers and migrants."[173]

Also the European Ombudsman has opened an inquiry concerning human rights safeguards included in cooperation on the field of migration with Tunisia. The inquiry is directed towards the EU Commission and includes the following questions:

> Did the Commission carry out a human rights impact assessment (HRIA) of the MoU before its conclusion and consider possible measures to mitigate risks of human rights violations, notably in the context of the envisaged 'Migration and mobility' actions? If yes, could the Commission make this impact assessment public, along with the mitigating measures? If not, please set out the rationale for this.[174]

Except for these questions on prior evaluation of human rights impact of the MoU, the Ombudsman posed the following questions concerning possible suspension of fundings:

> How does the Commission plan to ensure that actions undertaken by Tunisia under the Migration and mobility pillar of the MoU and financed using EU funds will comply with the applicable human rights standards? Has the Commission defined criteria for the potential suspension of funds due to non-respect for human rights?[175]

The European Commission has not yet published a response to the Ombudsman's inquiry.[176] Commissioner Olivér Várhelyi has answered to similar questions as the ones presented above that were posed by Members of the European Parliament. The response given by the commissioner was that the respect for human rights is enshrined in an association agreement between the EU and Tunisia. Dialogue between the two parties within the framework of said agreement is foreseen at the end of 2023, where all matters relating to

[172] Commissioner for human rights of the European Council (2023)
[173] *Ibid*
[174] European Ombudsman (2023)
[175] *Ibid.*
[176] Noted 18 December 2023

the MoU will be discussed, including its human rights' impact.[177] So far, no meetings concerning such dialogue has been announced, possibly due to failure in implementing the MoU with Tunisia.[178]

In conclusion, both the commissioner for human rights of the Council of Europe and the European Ombudsman have requested a comprehensive risk assessment concerning human rights implications of the MoU as well as clarification of conditions for suspension of MoU fundings. So far, the Commission has not presented substantial responses to any of these requests.

3.2.4.2 Possible CJEU scrutiny

In the background, I presented the MoU as an example of soft-law instruments in EU external actions on the field of migration. As significative for such soft-law instruments, I mentioned that they are adopted in disregard of TEUF provisions for EU international agreements and are labelled non-binding in EU internal law.[179] As will be explained in the following, the MoU fits in to this description. Certainly, compliance with EU internal regulations does not determine if the EU is bound by an agreement according to international public law.[180] This means that theoretically, the MoU could be binding on the EU even though it is non-binding according to EU law. In this essay, however, the question of the legal nature of the MoU is not crucial. What is important is to note that the disregard of TEUF Article 218 have implications for the possibilities for CJEU scrutiny of the MoU.

The rules on how the EU adopts *binding* international agreements are set out in TEUF Article 218. According to this Article, only the Council may appoint competence to someone in the purpose of negotiating a treaty. A proposed draft must then be presented to and accepted by the European Parliament and finally signed by the Council. At any stage of this process, a member state or an EU institution may request that the suggested treaty is brought before the CJEU for review *à priori* of its compatibility with EU regulations. Should the suggested treaty be found incompatible with EU primary or secondary law, the treaty cannot be adopted without necessary amendments.[181] From the above description of the adoption process of the MoU, it is apparent that these provisions in TEUF Article 218 have not been followed. Firstly, Olivér Várhelyi was appointed to negotiate the MoU by the President of the

[177] European Parliament (2023), *Answer given by Mr Várhelyi on behalf of the European Commission (20.9.2023)*

[178] Noted 18 December 2023, see for example European Council on Refugees and Exiles (2023)

[179] See section 1.1.1.2.

[180] Which have been recognized by the CJEU, see for example the joint cases C-317/04 and C-318/04, para. 73

[181] TEUF, Article 218(11)

Commission, and not by the European Council.[182] Secondly, the Council never endorsed the MoU in its final version.[183] According to Olivér Várhelyi, committees of the European Parliament were informed about the ongoing work on the MoU, but like the Council, the Parliament never formally endorsed the MoU before its adoption. Concerning the legal nature of the MoU, the commissioner defined it as a non-binding instrument. [184] Consequently, there has been no possibility for CJEU scrutiny of the MoU *à priori*, as EU institutions and member states were never presented a final draft of the agreement before its conclusion.

As mentioned above, both EU member states and Joseph Borell have expressed concerns about the Commission's decision to conclude the MoU without consent from the European Council. Such conserns may be based on an opinion that the MoU should have been adopted following the procedures set out in Article 218 of TEUF. It could also be based on the fact that the Commission, according to CJEU practice, is not entitled to sign neither binding *nor non-binding* agreements without Council approval.[185] This is to say, that the Commission may have acted outside its competence when signing the MoU without prior Council endorsement.

The MoU is an action attributable to the Commission and as such it could have been brought before the CJEU in action for annulment, under the circumstances that it produces legal effects *vis-à-vis* third parties. As the MoU is a non-binding instrument in EU internal law, it is not certain that it produces legal effects in the meaning of Article 263 of TEUF. On the other hand, it seems likely that it does, given prior CJEU practice on the matter.[186] The discontent expressed by Joseph Borell on the Commission's unilateral adoption of the MoU may have formed a basis for EU member states to claim that the Commission had acted *ultra vires* when concluding the MoU. However, no EU member state of institution have brought action against the MoU with this argument. As the MoU does not include implementing measures, natural and legal persons could have contested the MoU. [187] Also such an action could have concerned the competence issue addressed above or material deficiencies in human rights protection included in the MoU. However, the two months' time limit to bring action for annulment of the MoU were passed in

[182] European Commission (2023), *Statement, The European Union and Tunisia agreed to work together on a comprehensive partnership* and European Parliament (2023), *Answer given by Mr Várhelyi on behalf of the European Commission (20.9.2023)*

[183] European Council (2023), conclusion no. 37

[184] European Parliament (2023), *Answer given by Mr Várhelyi on behalf of the European Commission (20.9.2023)*

[185] See C-660/13, para. 38 and Garcia Andrade (2016) p. 123

[186] See for example C 60/81, para. 9

[187] TEUF Article 263, para. 1

September 2023.[188] No action for its annulment was brought before the CJEU within the prescribed period.

[188] *Ibid*, para. 4 and 6. The MoU was adopted 16 July 2023

4 ECHR applicability *ratione personae* to the EU measure of providing financial and technical support for Tunisian border and migration management

In chapter two of this essay, I established a model for solving issues relating to the attributability of international organisations' measures to their member states. In chapter three, I described the two acts in which the EU measure of providing financial and technical support for Tunisian border and migration management is established. I described the Action Plan and the MoU in terms of their content and adoption as well as the framework for safeguards of human rights surrounding the two instruments. In this chapter, I answer this essay's research questions by applying the model proposed in chapter two to the Action Plan and the MoU. I treat the research questions in in consecutive order, starting with the sub-questions concerning ECHR applicability *ratione personae* respectively to the Action Plan and the MoU. Based on the answers to those questions, I finally answer the main research question of this essay: Are the ECHR and its additional protocols applicable *ratione personae* to the EU measure of providing financial and technical support for Tunisian border and migration management?

4.1 ECHR applicability *ratione personae* to the Action Plan

The model I suggested in chapter two includes two steps for solving issues on state attributability international organisations' measures. The first step is to determine if a state has caused a measure of an international organisation. The second step concerns responsibility standards and applies differently depending on whether or not the state has caused a measure or not.

4.1.1 Causality

The Commission's adoption of the Action Plan was preceded by a committee procedure. This committee procedure undoubtedly constituted *some* state involvement in the passing of the Action Plan as committee approval was a prerequisite for the adoption of the Action Plan. As presented above, all 27 EU member states represented in the committee decided to endorse the Action Plan. The state involvement manifested through this procedure is comparable to the situation in *Hess*, where the United Kingdom exercised decisive power over the administration of Spandau prison together with three other States. In *Hess*, the ECtHR concluded that jurisdiction in the meaning of Article 1 of the ECHR cannot be divided between several states. Consequently, Rudolf

Hess was not under the jurisdiction of the United Kingdom and the ECHR was not applicable *ratione personae.* As I have argued above, the *Hess* decision sheds light to *Kokkelvisserij* and *Boivin* in the sense that it shows that the state involvement sought by the Court in these cases was not just *any* state involvement. Instead, the significant state involvement has a link of causality to the adopted measure in the sense that a state could have stopped a contested measure by an international organisation by acting differently.

When it comes to the Action Plan, a decision of one EU member state not to endorse the Action Plan would not have affected the outcome of the committee procedure. This means that the link of causality in this situation is weaker than the corresponding link in *Kokkelvisserij*, where the contested measure could have been avoided if the respondent state had refrained from demanding CJEU preliminary rulings. Considering this comparison combined with the similarities to the situation in *Hess*, the conclusion should be that no EU member states *caused* the EU to adopt the Action Plan.

Another factor that may constitute a link of causality between EU states conduct and measures in the Action Plan are the "Team Europe Initiatives" linked to it. These form a framework for the EU and its member states to collaborate on issues where they share priorities and political objectives. If member states' contributions to the activities under the Action Plan were a necessity for the realisation of such activities, is could have been argued that member states caused EU measures under the Action Plan. However, it is explicitly stated in the Action Plan that EU actions according to the Action Plan will be carried out with or without contribution in a Team Europe format from EU member states. This means that there is no link of causality between possible member state action in Team Europe Initiatives and EU action according to the Action Plan.

Considering all of the above, the conclusion must be that there is no link of causality between EU member states conduct and the EU adoption or implementation of the Action Plan. What this means is that possible applicability of the ECHR and its additional protocols *ratione personae* to the Action Plan must be based on the principles established by the ECtHR in *Gasparini.* In *Gasparini*, the Court transferred the relevant state involvement from specific proceedings concerning a contested measure to a continuous obligation of ensuring human rights' protection provided by an international organisation. In such situations, state responsibility is based on the non-fulfilment of this obligation. Article 61 of ARIO does not cover the possibility for state attributability in such situations. However, attributability of international organisations' measures to their member states based on principles set out in *Gasparni* is not *contrary* but *parallel* to the situations covered by the Article.

4.1.2 The *Bosphorus* presumption

It has been established in a series of cases, starting with *Bosphorus*, that the principle of equivalent protection and thus the *Bosphorus* presumption applies to the EU. This means that presumably, measures of the EU are not attributable to its member states as the protection of fundamental rights offered by the EU is considered *equivalent* to that offered by the conventional system. The presumption may be rebutted due to the existence of a *structural lacuna* in the internal regulations of the EU, meaning an area where the protection of conventional rights is *manifestly deficient*.

When it comes to the regulations assuring the respect for ECHR rights in the context of the Action Plan, the following has been noted. Firstly, the Action Plan includes a risk assessment stating that there is a "medium risk" that interceptions of migrants at sea lead to human rights abuses. The EU strategy to mitigate this risk is to rely on implementing partners to manage actions in accordance with human rights law. The Action Plan does not include provisions on suspension of financial and technical support for Tunisian border and migration management in the case of negative human rights impact. There has been no CJEU review of the Action Plan's compliance with EU primary law, neither *à priori* nor *à posteriori*. Only EU institutions and member states had the possibility to bring action for annulment of the Action Plan.

I recall that the ECtHR puts emphasis on the CJEU's significance for upholding conventional rights within the EU. It considers the limited possibilities for individual recourse to the CJEU as a flaw in the EU machinery for upholding conventional rights. This is considered as compensated by the important indirect protection of such rights exercised by the CJEU through the procedure of preliminary rulings. However, it is unlikely that matters relating to the Action Plan would reach the CJEU in this way as migrants affected by the Action Plan would likely be situated outside of EU territory. This means that the remaining somewhat realistic possibility to react to negative human rights impact of the Action Plan is the Commission's possibility to amend it according to the NDICI regulation.

A conclusion to draw from the above is that the EU seems to lack judicial mechanisms safeguarding human rights compliance of actions according to the Action Plan. The CJEU has not been given any chance to review the content of the instrument and the effects of its implementation are unlikely to reach the Court. The remaining possibility for reaction to negative human rights impact of the Action Plan is in the hands of the actor that adopted it. Although ECtHR practice is far from fully developed on the matter of rebuttal of the Bosphorus presumption, it seems likely that the protection for fundamental rights offered by the EU in this case would be considered as *manifestly insufficient*. If this is the case, the *Bosphorus* presumption would be rebutted due to the existence of a *structural lacuna* in EU internal regulations. In other

words, the Action Plan would be attributable to EU member states, which is to say that the ECHR and its additional protocols are applicable *ratione personae* to the Action Plan.

4.2 ECHR applicability *ratione personae* to the MoU

In this section, I apply the same model as above to the EU/Tunisia MoU in order to conclude if the ECHR and its additional protocols are applicable *ratione* personae to the MoU.

4.2.1 Causality

As described above, the MoU was adopted by the European Commission with the continuous support and presence of the Italian and Dutch prime ministers in events linked to the adoption process. This inclusion of the two prime ministers was framed as being part of a "Team Europe format" and possibly played an important role in the development of the MoU. Especially Italian diplomatic efforts to arrange meetings between European and Tunisian leaders may have been crucial for the conclusion of an agreement. However, it is impossible to make a liable assessment of the causal bonds between Italian and Dutch involvement in in negotiations on the MoU and its final adoption. Most significantly, it is impossible to say that the Commission would not have concluded the MoU if Italy or the Netherlands had refrained from certain actions. This approaches the state involvement in the adoption process of the MoU to the situation in *Boivin*, where the Court's conclusion was that "no action or omission of [the respondent states] or their authorities can be considered to engage their responsibility under the Convention".[189] Consequently, Italy or the Netherlands cannot be said to have *caused* the EU to adopt the MoU.

In similarity to my conclusions concerning the Action Plan, possible state attributability of the MoU must be based on the principles presented by the Court in *Gasparini*. In other words, it must be examined if the safeguards for fundamental rights surrounding the MoU constitutes a *structural lacuna* in EU internal regulations.

4.2.2 The *Bosphorus* presumption

Before reviewing if the (absence of) safeguards for fundamental rights surrounding the MoU constitutes a *structural lacuna* in EU internal regulations, another issue must be addressed. This issue is that the Commission may have acted outside its competence when deciding to conclude the MoU with Tunisia without formal authorisation from the European Council. This calls for an

[189] *Boivin*, p. 6

argument that the MoU was in fact not adopted *in accordance with EU internal regulations*. This fact might be a factor affecting the possibility to attribute the MoU to EU member states. What I mean is that if the Commission acted outside its competence, deficiencies in human rights protection surrounding the MoU might not be an example of a *structural lacuna* in EU internal regulations but of the Commission acting *ultra vires*. Attributing the MoU to Eu member states under such circumstances may seem unfair as they have little chance to prevent the Commission from such behaviour. On the other hand, the Commission's fault would have been to bypass the European Council. This clearly sparks discontent within the Union and may influence negatively on the institutional balance in the EU. However, approval of an instrument of the European Council is not a factor considered by the ECtHR as significant for EU protection of ECHR rights.

What the ECtHR *does* consider significant for the applicability of the *Bosphorus* presumption to the EU is the protection of ECHR rights offered by the CJEU. As the MoU was concluded in disregard of EU regulations for the adoption of binding international agreements, there was never any possibility for CJEU review *à priori* of its compatibility with the EU Charter. Differently to the Action Plan, there were no restrictions in individuals' right to bring action for annulment of the MoU before the CJEU. However, they would have had to prove their legal standing in relation to the MoU. This would have been challenging since there was no implementation of the MoU during the two months' time limit to bring action for its annulment.[190] In any case, no such action was brought against the MoU, which means that the remaining possibility for CJEU scrutiny of the instrument would be by means of preliminary rulings. As with the Action Plan, this seems unlikely given that migrants affected by its provisions would be situated in Tunisia or on international water.

In addition to the lack of CJEU scrutiny of the MoU, both the commissioner for human rights of the Council of Europe and the European Ombudsman have requested clarifications concerning human rights protection in the context of the MoU. Firstly, they have both declared the necessity of a comprehensive assessment of possible human rights risks of activities in the MoU. Secondly, they have demanded that the Commission present conditions for the retraction of EU fundings to Tunisian border and migration management in case of negative human rights impact. So far, no such evaluations or conditions have been presented.

Given all of the above, and especially the bypassing of the CJEU scrutiny of the MoU both *à priori* and *à posteriori*, it is possible that the ECtHR would consider the *Bosphorus* presumption as rebutted due to *manifest deficiencies* in EU regulations concerning the protection of conventional rights. This being the case, the MoU would be attributable to EU member states and the ECHR

[190] See for example European Council on Refugees and Exiles (2023)

and its additional protocols would be applicable *ratione personae* to the EU/Tunisia MoU.

4.3 Conclusion

In the two above sections, I have answered the two sub-questions of this essay, concerning the ECHR and its additional protocols' applicability *ratione personae* to the Action Plan and the MoU. To sum up my conclusions, such applicability would have to be based on the principles presented by the ECtHR in *Gasparini*, as EU member states have not *caused* the EU to adopt any of the two acts.

I mentioned in the background that one reason to include the Action Plan in this essay was the idea that judicial responsibility is easier to establish based on formal budgetary decisions than informal soft law instruments. In other words, the hypothesis was that it would be easier to attribute the Action Plan to EU member states than the EU/Tunisia MoU. Above I have argued that the Action Plan and the MoU could both be attributable to EU member states due to *manifest deficiencies* in human rights protection surrounding the two instruments. In comparison, however, it should be more successful arguing that EU member states have a responsibility for the Action Plan than the MoU. This is due to the fact that the Action Plan was adopted fully in line with EU internal regulations and with full insight of EU member states in its content. The MoU, on the other hand, was adopted in disregard of EU internal regulations on how to adopt binding international agreements. Possibly, the Commission even acted *ultra vires* by adopting the MoU without Council authorisation.

Given these findings, the answer to this essay's main research question is that the ECHR and its additional protocols are likely applicable to the EU measure of providing financial and technical support for Tunisian border management. Additionally, such applicability is more likely to be based on the Action Plan than the MoU, illustrating that informality in EU external actions on the field of migration does have an impact on state responsibility for such measures.

5 Concluding remarks

In chapter four of this essay, I answered the research questions of this essay. Having fulfilled the purpose of the essay, it is interesting to note what new insights this have brought to the issues presented in the introduction chapter. In this last chapter, I first briefly recall different aspects that drew me to examine this essay's subject. I then make some propositions as to what measures the EU could take to fill out the void in judicial scrutiny of the Union's external actions. Finally, I make some points as to why the ECtHR could and *should* establish its jurisdiction to informal EU acts on the field of migration.

5.1 Recalling the introduction chapter

In the first chapter of this essay, I presented a trend of informality in EU external actions on the field of migration. This trend is manifested through the use of soft law instruments in EU cooperation with third states. Such instruments have in common that they are adopted in disregard of EU regulations for concluding international agreements and are considered as non-binding according to EU internal law. A consequence of this practice are diminished possibilities for CJEU review of EU external actions on the field of migration. This is mainly because the possibility for legality review *à priori* of proposed arrangements is bypassed. The possibilities for such review *à posteriori* is also obstructed by factors such as attributing arrangements to an EU institution, the legal effects-requisite and the demand for a legal standing.

In the introduction chapter I also described the EU/Tunisia MoU as an example of this trend of informality in EU external actions on the field of migration. The MoU was adopted by the EU Commission in disregard of EU regulations for adopting international agreements and is labelled as non-binding in EU internal law. There was no CJEU scrutiny of the MoU, neither before its adoption nor after it. I also described the Action Plan as a formal basis for the Commission to adopt the MoU. As a hypothesis, I mentioned that ECHR applicability may be easier to establish based on formal budgetary decisions than informal soft law arrangements. What drew me to examine the subject of this essay was that despite large criticism towards EU cooperation with Tunisia on border and migration management, EU leaders portray the MoU as a blueprint for future partnerships with other neighbouring third states. In similarity to other arrangements with third states on the field of migration, criticism against the MoU concerns its possible negative human rights impact. In view of this, the purpose of this essay was to clarify if the ECHR and its additional protocols may be applicable *ratione personae* to the EU measure of providing financial and technical support for Tunisian border and migration management.

5.2 Proposals for EU action

To begin with, the conclusions of this essay illustrate that establishing ECHR applicability *ratione personae* to EU measures on the field of migration is in no way evident. Either an EU member state must have caused a measure of the union or attributability would have to be based on principles presented in *Gasparini*. The first option is unlikely in an organisation where most decisions are based on consensus or majoritarian vote. The second option is unpredictable as it has never been applied to an actual case. In conclusion, the possibilities for ECHR applicability *ratione personae* to measures of the EU remain uncertain.

One rather obvious solution to the issue of ECHR applicability to EU measures would be to accelerate the process of EU accession to the Convention. Such accession is foreseen in the TEU and negotiations on the matter have been held continuously since 2010. Issues in the accession process are related to the specific characteristics of the EU as an international organisation, mostly in regards to how jurisdiction would be divided between the ECtHR and the CJEU.[191] Progress in the negotiations on such matters was announced in March 2023, implying that EU accession to the ECHR in a near future is not impossible.[192]

There are certainly advantages of EU accession to the ECHR related to coherence between the two entities of law. However, my motivation to examine ECHR applicability *ratione personae* to EU measures was not that EU law is *materially* incoherent with the Convention. To the contrary, as was recognised by the ECtHR in *Bosphorus*, the EU Charter which is considered EU primary law, is substantially based on the ECHR. The motivation to examine ECHR applicability *ratione personae* to the MoU and the Action Plan was, instead, the lack of CJEU scrutiny of these acts. As have become apparent in this essay, the ECtHR has developed an approach to the EU considering that when a measure has been reviewed by the CJEU, ECtHR review of the same measure is usually redundant. This means that if agreements with third states on the field of migration were regularly referred to the CJEU, their compatibility with the EU Charter and thus the ECHR would be guaranteed. This being the case, ECHR applicability to the same agreements would be unnecessary. The power to implement such practices is with the EU member states and institutions and to some extent, the tools are already there. For instance, the criticism from member states and Joseph Borell concerning the MoU could have made a valid argument for its annulment as the Commission may have acted *ultra vires*. When it comes to other agreements, such as the EU/Turkey Statement, clarity from EU heads of states and governments as to in what capacity they have acted may be demanded.

[191] Ritleng (2012)
[192] Delegation of the European Union to the Council of Europe (2023)

On the other hand, CJEU jurisdiction on informal EU arrangements with third states is not certain. To clarify CJEU jurisdiction on matters relating to EU external actions on the field of migration, some changes in EU internal law could be beneficial. Firstly, the EU and its member states have shared competence on the *area of freedom, security and justice* as well as the *areas of development cooperation and humanitarian aid*.[193] A clear division of competences on these areas would prevent confusion such as in the case of the EU/Turkey Statement. Secondly, further guidance as to the meaning of the legal effects-requisite on the field of migration would be beneficial. Furthermore, the possibility for individual recourse to the CJEU could be improved, especially by extending the two months' time limit to bring action for annulment before the CJEU.

5.3 Some final observations on ECHR applicability *ratione personae* to EU migration policies

In the section above, I suggested some solutions to fill out the void in judicial scrutiny of EU external actions on the field of migration. Firstly, the EU could accede to the ECHR and secondly, some changes in EU internal law would increase possibilities for CJEU scrutiny of informal measures. As long as such steps are not taken, informality in EU external actions will continue to work to the detriment of the rule of law within the Union. As long as the EU is not a party to the ECHR, its applicability *ratione personae* to EU measures depends on the attributability of such measures to EU member states. To this end, I would argue that findings in this essay points towards that the ECHR and its additional protocols could and *should* be applicable *ratione personae* to informal EU measures on the field of migration.

Firstly, in *Bosphorus*, the Court stated that its rationale for establishing jurisdiction relating to measures of international organisations is the "Convention's role as a 'constitutional instrument of European public order' in the field of human rights".[194] The reference to the Convention as a "constitutional instrument" implies that it is of fundamental value and should be given primacy over other obligations binding on states. The Court stated that this role of the Convention *outweighs* the interest of cooperation within international organisations, illustrating that states' obligations flowing i.e. from EU membership are of inferior value as ECHR obligations. In *Bosphorus*, the constitutional character of the Convention forms an argument to consider the *Bosphorus* presumption rebutted when the protection of ECHR rights within the EU is manifestly deficient. This is to say that the Conventions' peremptory character gives that it must prevail on all fields where European states exercise jurisdiction, also when jurisdiction has been transferred to an international organisation. In other words, if the separate legal personality of the EU

[193] TEUF, Article 4(2)(j) and Article 4(4)
[194] *Bosphorus*, para. 156

creates a barrier for ECHR applicability to measures of the EU, this barrier is pierces when the Union's protection for conventional rights reaches a certain level of insufficiency.

Secondly, ECHR applicability *ratione personae* to measures of the EU is generally based on a principle of mutual respect between the ECtHR and the EU. This is manifested firstly by the EU adopting the EU Charter which was inspired by the ECHR. In response, the ECtHR has recognised the EU's protection for fundamental rights as *equivalent* to that offered by the Convention. The significance of this mutual respect is that when compatibility of a measure with the EU Charter has been guaranteed, corresponding compatibility with the ECHR may be assumed. Compatibility of EU measures with the EU Charter is guaranteed by the CJEU, which is why the ECtHR underlines the importance of this institution. The above forms the baseline for the ECtHR decisions not to establish jurisdiction in cases such as *Bosphorus* and *Kokkelvisserij*. In these cases, the contested measures had been taken or reviewed by the CJEU, making ECtHR scrutiny redundant. In this sense, ECHR applicability *ratione personae* to measures of the EU is based on an idea of *complementarity* between the two European courts. This idea of complementarity is clearly illustrated in ECtHR case law concerning applicability of the *Bosphorus* presumption to cases concerning EU member states' implementation of EU law. For example, the case *Michaud v. France (Michaud)* concerned implementation of an EU directive, where provisions of said directive were claimed to be contrary to the ECHR. The ECtHR concluded that the *Bosphorus* presumption did not apply, mainly because the national Court had declined the applicant's demand for a request of preliminary rulings.[195] Reversely, if the CJEU had ruled (by means of preliminary rulings) on the matter, ECtHR rulings on the same issues would not have been necessary.

As described in the first chapter of this essay and illustrated by both the Action Plan and the MoU, EU external actions on the field of migration are generally adopted and implemented out of reach for the CJEU. This means that the observance of the EU Charter, and thus the ECHR, is not guaranteed on this specific field. In the essay, I have referred to such blank spots in EU protection for fundamental rights as *structural lacunas*, as this is the notion employed by the ECtHR in *Gasparini*. According to the idea of complementarity, the general logic is that when measures have not been reviewed by the CJEU, the ECtHR may establish its jurisdiction *instead of* the CJEU. The ECtHR, of course, would not explicitly found its jurisdiction on such replacement, but on the rebuttal of the *Bosphorus* presumption attributing EU measures to EU member states.

Lastly, it should be considered that most of the ECtHR case law referred to in this essay relate to provisions that ECHR contracting states may, under certain circumstances, derogate from. To exemplify, *Bosphorus* concerned

[195] *Michaud*, para. 115

the entitlement to peaceful enjoyment of possessions and *Kokkelvisserij* as well as *Gasparini* concerned *the right to a fair trial*.[196] When it comes to EU cooperation with third states on border and migration management, the conventional rights at risk are of superior gravity such as *the prohibition of torture and inhuman or degrading treatment or punishment* or the *right to life*.[197] The Convention does not permit derogation from these rights under any circumstances. I recall that the *Bosphorus* presumption was created based on findings in *Waite and Kennedy*, that the interest of cooperation in international organisations form a legitimate aim for states to derogate from ECHR obligations. However, there are no legitimate aims for derogation from the ECHR rights at stake in the context of EU external action on the field of migration.

To sum up, the ECHR is considered a constitutional instrument that must prevail on all areas where European states exercise jurisdiction. This may be achieved by the CJEU guaranteeing EU measures' compatibility with the EU Charter, which is considered largely correspondent to the ECHR. To the contrary, when EU measures are held out of reach for the CJEU, the idea of complementarity gives that the ECHR should be applicable *ratione personae* to said measures. This should especially be the case when the ECHR rights at risk are of absolute value. In this way, the issue of the CJEU being bypassed due to informality in EU external actions on the field of migration is part of the solution to the issue addressed by this essay. When one of the two European courts cannot establish its jurisdiction, the other may take its place.

[196] ECHR, Article 6 and Additional Protocol No 1 to the ECHR, Article 1
[197] ECHR, Articles 2, 3 and 11(3)

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