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SWP Research Paper

Annegret Bendiek and Raphael Bossong

Shifting Boundaries of the EU's Foreign and Security Policy

A Challenge to the Rule of Law

Stiftung Wissenschaft und Politik
German Institute for
International and Security Affairs

SWP Research Paper 12
September 2019, Berlin

- Europe's foreign and security policy needs to become more effective. To this end, the executive autonomy of European governments should be maximised, and legal constraints from EU law minimised — this view is only seemingly plausible. Only an EU foreign and security policy anchored in the rule of law based on the EU treaties is realistic and sustainable.
- The EU is under pressure to meet human rights standards on the one hand, and demands to limit migration on the other. Three trends are evident: First, the EU is making new arrangements with third countries to control migration; second, it is using CFSP/CSDP missions to secure borders; third, the EU agencies Frontex and Europol are increasingly operating in the EU neighbourhood.
- Current trends in EU foreign and security policy pose a challenge to the protection of fundamental rights. For example, CSDP missions such as the EU operation "Sophia" in the Mediterranean are largely exempt from judicial review by the Court of Justice of the European Union.
- Lawsuits have already been filed with the European Court of Human Rights and the International Criminal Court against Italy and the EU for aiding and abetting human rights violations in Libya. Anyone who does not respect international law also threatens the rule of law at home. This also applies to the EU.
- The EU should resume the process of formal accession to the European Convention on Human Rights. The legal limits and performance of the EU's foreign and security policy would be made clearer. The German Council Presidency in 2020 should place the rule of law at the heart of European foreign and security policy.

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Shifting Boundaries of the EU's Foreign and Security Policy. A Challenge to the Rule of Law

In its southern neighbourhood, the European Union (EU) faces a difficult tension: between the claim to the universal validity of human rights and compliance with the rule of law on the one hand, and the increasingly powerful domestic demand to limit migration on the other. The EU is pursuing three approaches. First, it is striking new arrangements with third countries in order to secure European borders and facilitate the repatriation of irregular migrants. Second, it is increasingly aligning Common Security and Defence Policy (CSDP) missions with the internal security of the EU. Third, the EU is using Frontex and Europol in the European neighbourhood with the intention of projecting border security and crisis management mechanisms to third countries.

These shifting boundaries in foreign and security policy present the EU with the difficult task of having to combine national, European, and international human rights standards with the opposing political objective of a restrictive refugee and migration policy. This conflict represents a serious challenge for the EU legal community: Article 21 of the Treaty on European Union (TEU) obliges the Union to promote the rule of law and the universal validity of human rights in its external action. The EU has an international legal personality and is bound to these objectives by the Charter of Fundamental Rights. In contrast, there are strong political incentives to relocate migration control to EU third countries, and thus circumvent European legal requirements. Security policymakers justify the success of informal agreements such as the so-called EU-Turkey deal with the protection of the EU's external borders. However, the EU has neither the emergency powers nor the executive freedoms to protect public order that could justify extrajudicial action.

This tensions between legal requirements and political interests are currently culminating in the allegation that the detention of persons seeking protection in Libya violates relevant obligations under the European Convention on Human Rights (ECHR), the Geneva Convention, and the Charter of Fundamental Rights of the European Union. Non-govern-

mental organisations (NGOs) filed a corresponding complaint before the European Court of Human Rights (ECtHR) in spring 2018. The aim was to clarify who is legally responsible for the actions of the Libyan Coast Guard, which is supported by Italy and the EU. A condemnation of Italy would raise serious doubts about the legality of the EU's foreign and security policy. In June 2019, renowned experts in international law lodged a preliminary case with the International Criminal Court (ICC) against persons responsible in the EU. The allegations concern the EU's responsibility for crimes against humanity in the context of its migration policy in the southern Mediterranean.

Against this background, the question arises as to whether, and how, the foreign and security policy actions of the EU meet the criteria of the rule of law. Does the current foreign and security policy on migration control contradict the applicable European legal requirements? What role does judicial oversight play in European foreign and security policy, especially where internal and external security intertwine? Could the EU' accession to the ECHR possibly limit the executive empowerment of governments and strengthen the EU as a community based on the rule of law?

In principle, the Court of Justice of the European Union (CJEU) can review the legality of all actions taken by EU institutions. This control function of the CJEU has been extended over the last 10 years to the EU's foreign and security policy. Internal security is subject to more extensive obligations that arise from the Charter of Fundamental Rights of the European Union. However, the CJEU lacks the competence to control the political core of the Common Foreign and Security Policy (CFSP) and the exercise of sovereignty by member states in this area. In addition to the CJEU, the ECtHR can examine European external actions.

This study makes the following recommendations:

1) As authoritarianism and protectionism are on the rise worldwide, the EU is increasingly expected to put democracy, human rights, and the rule of law at the heart of its policies. The rule of law of European policy, both internally and externally, is a priority of the Finnish Council Presidency in 2019 and should also be a priority for the German Council Presidency in 2020.
2) Contemporary European foreign and security policy aims for a stronger link between internal and external security. For a policy that is compatible with principles of the European Community and anchored in the rule of law, the following is necessary: a move away from pragmatic informal agreements, a return to official EU agreements with third countries, and clearly regulated external actions by EU agencies in third countries. In any case, the CFSP and all CSDP missions should be in line with the evolving case law of the ECtHR.
3) In refugee and migration policy, European policy must continuously weigh up questions of reasons of state with human rights considerations and constitutional standards. With Article 6 (2) TEU, the EU committed itself to accede to the ECHR, which should clarify this balancing process. This accession process should be resumed — despite the objections raised by the CJEU in 2014 with regard to the CFSP's special status under competence law.
4) At first glance, anchoring the EU's foreign and security policy more firmly to the rule of law seems to contradict the Union's ability to act decisively on this international stage. The fight against terrorism and the EU's enlargement policy show, however, that constitutional standards and the control of EU actions by the CJEU and ECtHR are perfectly compatible with an effective foreign policy. Courts and specific supervision and complaint mechanisms are indispensable for the effective protection of fundamental rights.
5) A central task of the European Parliament (EP) and the national parliaments is the oversight of executive powers and to tie them to a legal framework as much as possible. For contemporary European foreign and security policy, this is all the more pressing in view of the fact that the German Parliament does not have to approve foreign police missions, whereas the EP has even fewer information rights. Parliamentary scrutiny over European foreign and security policy is inadequate — hence, judicial oversight by the CJEU or the ECtHR is all the more important.

Internal Security in the EU's External Action

The EU's foreign and security policy differs fundamentally from national foreign and security policy. The conventional foreign policy identity of the EU as a "normative transformation power" *sui generis* has become obsolete; in June 2016 it was redefined as "resilience" in the Global Strategy on Foreign and Security Policy of the EU (EUGS). Since then, the protection of citizens has been the primary goal, politically formulated by Jean-Claude Juncker and Emmanuel Macron in the vision "l'Europe qui protège" ("A Europe That Protects"). What results from this in practice, for example securing borders? Some European politicians believe that the EU should overcome its existing legal order of competences and act with as much sovereignty as possible in order to protect the Union. At the same time, member state governments are not prepared to grant the EU the necessary executive powers and supranational competences. This dilemma between high expectations of the EU and its lack of capabilities as a security provider is not new.

In the European Security Strategy of 2003, the EU referred to the inextricable link between internal and external security in the context of organised crime, international terrorism, and regional conflicts: "In the age of globalisation, distant threats can be just as much a cause for concern as closer ones. [...] The first line of defence will often be abroad."[1] As in the European Security Strategy, the 2010[2] EU Internal Security Strategy set itself the goal of overcoming institutional barriers between different EU institutions and agencies. However, the Lisbon Treaty, which came into force at the end of 2009, maintained the fundamental separation of the CFSP from other EU policy areas, whereas the "third pillar" of police cooperation and internal security policy was formally dissolved. Full integration of internal and external security policies could not be achieved. Yet, the Lisbon Treaty reaffirms the claim to a coherent[3] and integrated foreign and security policy by creating institutional bridges within the CFSP: the European External Action Service and the "double hat" role of the High Representative of the Union for Foreign and Security Policy. In this personal union, the High Representative and Vice-President of the Commission should establish a link between the external actions of the Commission and those of the Council.

In May 2014, the Council of Foreign Ministers decided on a "comprehensive approach to European foreign and security policy".[4] A joint approach by EU institutions and member states should enable its operationalisation. Joint situation analyses involving EU delegations, early warning systems, conflict prevention, mediation, and human rights policy should be interlinked. The claim is that security and development can effectively reinforce each other. Finally, the EUGS of 2016 called for a closer link between internal and external security, since "our security at home entails a parallel interest in peace in our neighbouring and border regions".[5]

1 European Council, *European Security Strategy. A Secure Europe in a Better World* (Brussels, 12 December 2003), 6, https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf (accessed 22 August 2019).

2 European Council, *Internal Security Strategy for the European Union – Towards a European Security Model* (Brussels, March 2010), https://www.consilium.europa.eu/media/30753/qc3010313enc.pdf (accessed 22 August 2019).

3 Article 21 (3) TEU.

4 Council of the European Union, *Council Conclusions on the EU's Comprehensive Approach*, Brussels, 12 May 2014, 1, https://www.consilium.europa.eu/media/28344/142552.pdf (accessed 27 May 2019).

5 European External Action Service, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy* (Brussels, June 2016), 14, https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf (accessed 27 May 2019).

Since the refugee crisis of 2015, this integrated foreign and security policy has taken a questionable direction.[6] The practice of a foreign and security policy that seeks to transcend the boundaries between internal and external security is manifestly at odds with the demands of the rule of law and the treaty objectives of the CFSP/CSDP. Firstly, this policy is accompanied by an informalisation of bilateral relations between the EU and third countries, as the case of the EU-Turkey deal shows; secondly, EU internal security agencies such as Europol and Frontex act both internationally and executively; and thirdly, CSDP missions are deployed for the purposes of European border and migration control, as in the case of the EU operation "Sophia" in the southern Mediterranean.

Informalisation of EU External Relations

Informal cooperation between individual EU states and countries of origin and transit has been the norm for decades when it comes to migration control.[7] For example, many Maghreb states work bilaterally with France, Spain, and Italy because of their economic and historical ties. These mostly legally non-binding agreements do not have to be justified to a critical public. Another approach is to establish binding agreements under EU law, which as a rule must be approved by the EP. Since the entry into force of the Amsterdam Treaty in 1999, the control of irregular migration has become an explicit EU competence.[8] Between 2004 and 2014, the Union signed agreements with a total of 17 third countries on the readmission of illegal immigrants.[9]

Since the refugee crisis of 2015, the EU has made informal arrangements to deport more people.

However, this approach changed with the onset of the refugee crisis. Negotiations on further readmission agreements with Morocco, Algeria, and Belarus have been on hold since 2015. Instead, the EU primarily uses informal agreements to increase the number of both voluntary and involuntary returns.[10] For example, at the Valletta Summit on Migration Control in November 2015, the EU reached agreement with numerous African states on developing further "practical arrangements" for repatriation.[11] Depending on the third country, they are referred to as "Good Practice", "Joint Migration Declaration", or "Joint Ways Forward". Third countries receive financial compensation from European governments for such informal agreements. Meanwhile, the EU is losing room for manoeuvre in negotiations due to the proliferation of informal arrangements at the bilateral and multilateral levels.[12]

In particular, the so-called EU-Turkey deal of 2016 represents a fundamentally different approach by EU heads of state and government. Under the agreement, Turkey committed itself to the readmission of irregular migrants and refugees who landed on Greek islands. In exchange, the EU promised €6 billion to supply Syrian refugees in Turkey, a controlled takeover of vulnerable refugees from Turkey for each returned refugee from Greece, and further steps towards visa liberalisation. To this day, this mutual arrangement functions only to a limited extent.[13]

6 Tobias Pietz, "Nicht Migration, sondern Krisen managen: Wie Deutschland die zivile GSVP stärken könnte" [Managing Crises Rather Than Migration: How Germany Could Strengthen the Civil CSDP], *Peacelab (Blog)*, 12 June 2018, https://peacelab.blog/2018/06/nicht-migration-sondern-krisen-managen-wie-deutschland-die-zivile-gsvp-staerken-koennte (accessed 27 May 2019).

7 Jean-Pierre Cassarino, *Readmission Policy in the European Union. Study for the Committee on Civil Liberties, Justice and Home Affairs* (Brussels, 2010), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425632/IPOL-LIBE_ET(2010)425632_EN.pdf (accessed 27 May 2019).

8 In the Treaty of Lisbon, this competence was consolidated in Article 79 (3) TFEU.

9 Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cabo Verde, Georgia, Hong Kong, Macau, Montenegro, Northern Macedonia, Pakistan, Republic of Moldova, Russian Federation, Serbia, Sri Lanka, Turkey, Ukraine.

10 Jean-Pierre Cassarino, "Informalizing EU Readmission Policy", in *The Routledge Handbook of Justice and Home Affairs Research*, ed. Ariadna Ripoll Servent et al. (Abingdon, New York, NY: Routledge, 2017), 83–98.

11 Council of the European Union, *Valletta Summit on Migration, 11–12 November 2015. Action Plan* (Brussels, 2015), 17, https://www.consilium.europa.eu/media/21839/action_plan_en.pdf (accessed 27 May 2019).

12 Anne Koch, Annette Weber and Isabelle Werenfels, eds., *Profiteers of Migration. Authoritarian States in Africa and European Migration Management*, SWP Research Paper 4/2018 (Berlin: Stiftung Wissenschaft und Politik, July 2018), https://www.swp-berlin.org/en/publication/profiteers-of-migration/ (accessed 22 August 2019).

13 Marie Walter-Franke, *Two Years into the EU-Turkey 'Deal': Impact and Challenges of a Turbulent Partnership* (Berlin: Jacques

De facto, the EU mainly provides financial aid while Turkey primarily secures its borders. Mutual obligations to take over irregular migrants and persons seeking protection are hardly being met by either side. Nor is there any prospect of relief for the overcrowded reception camps on Greek islands.

Irrespective of this highly controversial practice, EU representatives and numerous capitals continue to stress that the EU-Turkey deal has been a successful model for migration control.[14] The fact that no other comparable arrangements have been agreed with third countries to date is not due to a lack of financial offers from Europe, but to the political resistance of (North) African states: They do not want to set up extraterritorial camps for third-country nationals in their countries.[15] Rather, all Mediterranean states are pushing for legal migration routes to the EU for their citizens. However, the EU Trust Fund for Africa and the recent proposals to restructure the EU's new multiannual financial framework 2021—2027 aim to provide the most flexible financial support possible to those third countries that meet the EU's interests in managing migration. Although the informalisation of European foreign policy takes place outside EU decision-making procedures, it is to be funded from the EU budget, as in the case of the EU-Turkey deal.[16]

Delors Institute, 15 March 2018), https://www.delorsinstitut.de/2015/wp-content/uploads/2018/03/20180315_Two-years-into-the-EU-Turkey-Deal_Walter-Franke.pdf (accessed 27 May 2019). In July 2019, Turkey also declared that it no longer considered itself bound by the mutual takeover agreement of protection seekers due to new EU sanctions imposed in the course of a gas dispute off Cyprus. See Euroefe, "Turkey Suspends Deal with the EU on Migrant Readmission", *Euractiv* (Brussels), 24 July 2019, https://www.euractiv.com/section/global-europe/news/turkey-suspends-deal-with-the-eu-on-migrant-readmission/ (accessed 2 August 2019).

14 European Commission, *A Europe That Protects Our Borders and Delivers on a Comprehensive Migration Policy* (Brussels, May 2019), https://ec.europa.eu/commission/sites/beta-political/files/euco-sibiu-migration.pdf (accessed 27 May 2019).

15 Daniel Boffey, "African Union Seeks to Kill EU Plan to Process Migrants in Africa. Exclusive: Leaked Paper Shows Determination to Dissuade Coastal States from Cooperating", *The Guardian*, 24 February 2019, https://www.theguardian.com/world/2019/feb/24/african-union-seeks-to-kill-eu-plan-to-process-migrants-in-africa (accessed 27 May 2019).

16 European Commission, *The EU Facility for Refugees in Turkey. Factsheet* (Brussels, July 2019), https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf (accessed 2 August 2019).

External Action by EU Agencies for Internal Security

The EU agencies for law enforcement cooperation (Europol) and border and coast guard cooperation (Frontex) should support neighbouring countries of the EU to conduct migration controls and security measures. Since 2015, both agencies have been significantly strengthened for this purpose.

Europol was given a new legal basis in 2016[17] in order to process more sensitive data. A new antiterrorism centre has been set up to improve the flow of information both inside and outside the Union. Cooperation agreements with several North African countries on the exchange of personal data have been under negotiation since then. A European Migrant Smuggling Centre has also been established. The Joint Operational Team Mare brings together information relevant to criminal law from countries of origin and transit, the United States, EU member states, Frontex, and Interpol.

Frontex has experienced the greatest growth in response to the refugee crisis. In November 2014, the Frontex sea mission "Triton" replaced the Italian rescue mission "Mare Nostrum". However, the Frontex ships do not patrol in Libyan waters, but only off the coast of Italy. There they monitor the borders and are supposed to take action against tugs. In the Eastern Mediterranean, "Operation Poseidon Sea" has been running simultaneously for several years, also under the leadership of Frontex. The mission aims to prevent irregular immigration and cross-border crime from the west coast of Turkey and Egypt to Greece and Italy. In 2015 and 2016, however, controls failed: Borders could not be secured and the identity of irregular migrants could not be properly recorded. To this day, cohesion in the EU and the Schengen zone remains under severe stress.

Against this background, Frontex was given a new legal mandate in 2016 to support border security in the member states.[18] More border officials and technical assets technology should be available as operational reserves, and a so-called vulnerability assess-

17 Europol, "Europol's New Regulation. Today, on 1 May 2017, Europol's New Regulation Enters into Force and Takes Effect in all EU Member States" (The Hague, 1 May 2017), https://www.Europol.europa.eu/newsroom/news/Europols-new-regulation (accessed 27 May 2019).

18 European Union, *Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard* (Brussels, 14 September 2016).

ment of the EU's external borders has been introduced. Frontex has also been authorised to carry out executive missions in states bordering directly on the EU, such as operational checks on persons and repatriations.

For 2021–2027 the funds for the protection of the external borders are to be quadrupled: from €320 million to about €1.3 billion per year.

In April 2019, EU institutions agreed to further strengthen Frontex in view of the continuing tensions in the EU's common asylum policy. This latest reform is expected to come into force at the end of 2019. In the multiannual financial framework 2021—2027, the budget of Frontex should increase from €320 million to about €1.3 billion per year and, among other things, finance a massive increase in personnel to 10,000 border guards.[19] The previous spatial restrictions of executive missions to bordering states is to be lifted. Frontex forces could thus in the future take action against irregular migration in African countries of origin and transit. Since the mid-2000s, Frontex has established a wide range of international cooperation and sent liaison officers under so-called administrative agreements[20] to contribute to maritime surveillance, hazard analysis, and training in third countries.

A further interface between EU missions to third countries and the external action of Frontex and Europol has been established through the CSDP.[21] In July 2018, a pilot project for the joint fight against crime was activated: the so-called Crime Information Cell within the CSDP mission European Union Naval Force — Mediterranean (EUNAVFOR MED), referred to as operation "Sophia".[22] Frontex and Europol liaison officers were sent to a mission command ship to deepen the exchange of information between the police and the military. Intelligence, for example from the inter-agency pilot project "Airborne Maritime Surveillance", should be made available to both the Frontex mission "Triton" and the military operation "Sophia". The partial suspension of operation "Sophia" in March 2019 brings the first Crime Information Cell into question. Nevertheless, there is a growing overlap between the tasks of EU internal security agencies and CSDP-mandated missions throughout EU security policy. Who is responsible for the equipment and objectives of integrated EU missions abroad has yet to be clarified.[23]

Internal Security and Border Security in the CFSP/CSDP

Migration control is not legally one of the tasks of the CFSP/CSDP. With the increasing virulence of the refugee problem, however, it has moved into the remit of EU missions and operations. The CFSP/CSDP is currently faced with the challenge of reconciling the EU's security interests with the requirements in the countries of operation, namely to resolve conflicts and reform the security sector.

The EU currently has 10 civilian missions with around 2,500 troops in 10 different countries in the enlarged neighbourhood, as well as six military operations with approximately 2,400 soldiers in the Balkans, the southern Mediterranean, the Central African Republic, the Gulf of Aden, Somalia, and Mali.[24] Already the first CSDP operations in the West-

19 European Parliament, "European Border and Coast Guard: 10,000-strong Standing Corps by 2027" (Brussels, 17 April 2019), http://www.europarl.europa.eu/news/en/press-room/20190410IPR37530/european-border-and-coast-guard-10-000-strong-standing-corps-by-2027 (accessed 27 May 2019).

20 Currently Frontex has concluded administrative agreements with 18 third countries: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Cabo Verde, Georgia, Canada, Kosovo, Montenegro, Nigeria, Northern Macedonia, Republic of Moldova, Russian Federation, Serbia, Turkey, Ukraine, United States.

21 Council of the European Union, *Enhancing the Response to Migrant Smuggling Networks: A Comprehensive and Operational Set of Measures. 15250/18* (Brussels, 6 December 2018), http://data.consilium.europa.eu/doc/document/ST-15250-2018-INIT/en/pdf (accessed 27 May 2019).

22 EUNAVFOR Med/Frontex/Europol, *The Crime Information Cell – "Pilot Project" Bridging Internal and External Security of EU* (Rome, 5 July 2018), https://www.operationsophia.eu/wp-content/uploads/2018/07/Crime-Information-Cell-activation-5-July-20178.pdf (accessed 27 May 2019).

23 Roderick Parkes, *Healthy Boundaries. Remedies for Europe's Cross-border Disorder*, Chaillot Paper 152 (Paris: European Union Institute for Security Studies, May 2019), https://www.iss.europa.eu/sites/default/files/EUISSFiles/CP_152_Borders.pdf (accessed 22 May 2019).

24 European External Action Service, *Military and Civilian Missions and Operations* (Brussels, 5 March 2019), https://eeas.europa.eu/headquarters/headquarters-homepage/430/military-and-civilian-missions-and-operations_en (accessed 27 May 2019).

ern Balkans served the internal security of the EU. For example, EULEX Kosovo is not only the largest civilian mission to reform the police and judicial system, but it has also been given an executive mandate to prosecute war crimes and other serious crimes. On the military side, the EUNAVFOR "Atalanta" mission to contain piracy in the Horn of Africa has been regarded as a successful operation at the interface between internal and external security. In addition to securing sea routes, the EU operation supports the transfer of pirates to civilian law enforcement on the ground. In Article 43 (TEU), the Treaty of Lisbon designates the fight against terrorism as a further task of the CSDP, in addition to conflict prevention, crisis management, and peacekeeping. The CSDP presence in the Sahel zone, which has been strengthened since 2012, was initially aimed at establishing the corresponding capacities of security authorities.[25]

In line with the integrated foreign and security policy, the EU has promoted further initiatives to "train and equip" security forces from third countries. These include the armed forces as well as civil engagement in the areas of police, border protection, and the rule of law.[26] In November 2014 the Foreign Affairs Council decided to launch such initiatives in Mali, the Horn of Africa, and the African Union. The results are not very convincing.[27] For example in Mali, in view of the crisis situation and the size of the country, it is doubtful that up to 10 advisers are sufficient to effectively combat organised crime and Islamist terrorism. This criticism of a lack of impact also applies to the civilian CSDP mission EUCAP Sahel Niger, which has been operating since 2012.[28]

The CSDP mission in Mali was expanded to include border security as a result of the migration crisis. Due to the increasing transit migration to Libya, the Council of Foreign Ministers decided in the summer of 2017, for the first time, on an EU stabilisation action[29] in Mali pursuant to Article 28 TEU. The so-called stabilisation team has since complemented the EU delegation in Mali and the civilian and military CSDP missions deployed there (EUCAP Sahel Mali and EUTM Mali). The EU should also cooperate with international actors present in the region, such as the United Nations (UN) Mission in Mali (MINUSMA).[30]

The EU Border Assistance Mission in Libya (EUBAM Libya), initiated in 2013, was intended to support the Libyan government in internal security and border surveillance on land, in the air, and at sea. However, the security situation in Libya meant that the mission first had to be established in Tripoli and then moved to Tunis in 2014. According to the German government, the focus of the work to date has been on "identifying relevant international and Libyan partners on the ground and gradually establishing links and cooperating with the Libyan security authorities and actors under the Libyan unity government".[31] Since 2017, the Dutch gendarmerie has engaged with Libyan authorities and trained 128 officials in the detection of counterfeit Schengen visas. Although EUBAM Libya was criticised for lacking effectiveness, the mandate was extended at the end of 2018 and an

25 Elodie Sellier, "Small Steps towards a Comprehensive Approach after Lisbon: The Common Foreign and Security Policy and the Fight against Terrorism", *New Journal of European Criminal Law* 9, no. 1 (2018): 109–37. Since 2014, however, the EU under the leadership of France has been providing financial support to the so-called G5 task force of African Sahel states, which is to carry out highly controversial military attacks against terrorist groups. See Moda Dieng, "The Multi-National Joint Task Force and the G5 Sahel Joint Force: The Limits of Military Capacity-building Efforts", *Contemporary Security Policy* (2019) (online first), doi: 10.1080/13523260.2019.1602692.

26 Martina Fischer, "Besser nicht ertüchtigen als falsche Freunde stärken" [Better Not Train Than Strengthen False Friends], *Peacelab (Blog)*, 14 May 2018, https://peacelab.blog/2018/05/besser-nicht-ertuechtigen-als-falsche-freunde-staerken (accessed 27 May 2019).

27 European Parliament, *Annual Report on the Implementation of the Common Foreign and Security Policy (2018/2097(INI))* (Strasbourg: Committee on Foreign Affairs, 26 November 2018), http://www.europarl.europa.eu/doceo/document/A-8-2018-0392_EN.html (accessed 23 August 2019).

28 Wissenschaftlicher Dienst of the German Bundestag, *Die europäische Sicherheitsarchitektur im Wandel* [The European Security Architecture in Transition], Documentation WD 2 – 3000 – 022/17 (Berlin, 2017), 13.

29 These missions may be deployed through the High Representative for the Common Foreign and Security Policy within the CFSP procedures with the sole written consent of the member states.

30 Council of the European Union, "Mali: European Union Supports the Stabilisation in the Central Regions of Mopti and Segou", Press Release (Brussels, 4 August 2017), https://www.consilium.europa.eu/en/press/press-releases/2017/08/04/mali-regions-mopti-segou/ (accessed 23 August 2019).

31 German Bundestag, *Bericht über das deutsche Engagement beim Einsatz von Polizistinnen und Polizisten in internationalen Polizeimissionen 2017* [Report on German Involvement in the Deployment of Police Officers in International Police Missions 2017], Bundestagsdrucksache 19/6540 (Berlin, 13 December 2018), 12.

office of the mission was moved back to Tripoli. The mission is the so-called capacity-building of Libyan security forces in the areas of law enforcement, police, border management, combating irregular migration, human trafficking, terrorism, and organised crime. To this end, its personnel — currently consisting of 38 military and police forces from EU member states — will be increased.[32] This can also be seen as technical preparation for a major CSDP operation in Libya, which has not yet been politically decided.

Operation "Sophia": The rescue at sea was not the goal in the beginning – in practice it was different. The result is a dispute within the EU.

One mission in particular has grown out of the refugee crisis: the military CSDP operation "Sophia". This mission was deployed at short notice in 2015 to relieve Italy's coast guard and combat smuggling networks in the central Mediterranean. The initial aim was to provide a pan-European response to the Italian rescue mission "Mare Nostrum", which had just been discontinued. It was only rudimentarily replaced by the new Frontex mission "Triton", which navigates exclusively in Italian coastal waters. The mandated tasks of operation "Sophia" were the identification, capture, and disposal of boats used for human trafficking. Sea rescue as required by international (maritime) law was not the primary mission objective of operation "Sophia", but in 2016 and 2017 the mission became heavily involved in this activity on an operational level.[33] This led to sharp clashes between Italy and other EU states, which refused to systematically distribute refugees who were rescued on the high seas among them. The political dispute escalated and negatively impacted on EU foreign and security policy in the southern Mediterranean. Discussions on a sustainable mechanism for burden-sharing, that is, a distribution of refugees among EU member states, fell by the wayside. In September 2016, the Political and Security Committee decided to entrust operation "Sophia" with two new tasks. Since then, it has contributed to the capacity-building of the Libyan Coast Guard and prevented the illegal transport of weapons in the operational area.[34] In sum, both the mandate and the operational evolution of "Sophia" were highly controversial, even before the suspension of the maritime component in June 2018. At the same time, their commander was instructed not to deploy any more ships in the Mediterranean. This effectively suspended rescue at sea. Since March 2019, Sophia has been officially limited to surveillance from air, while its mandate is subject to review and renewal every six month.

32 Reply on question 18 in: German Bundestag, Deutscher Bundestag, *Planungen für "Ausschiffungszentren" in Drittstaaten* [Plans for "Disembarkation Centres" in Third Countries], Bundestagsdrucksache 19/5307 (Berlin, 26 October 2018), 9.

33 Marianne Riddervold, "A Humanitarian Mission in Line with Human Rights? Assessing Sophia, the EU's Naval Response to the Migration Crisis", *European Security* 27, no. 2 (2018): 158–74.

34 According to Resolution 1970 (2011) of the UN Security Council and subsequent resolutions, in particular Resolution 2292 (2016) on the arms embargo against Libya, Operation "Sophia" officially received a mandate to maintain international peace and security. Therefore, military assets may also be used outside international waters in Libyan territory within the framework of this operation.

The Incomplete Supervisory Role of the Court of Justice of the European Union

The informalisation of agreements with third countries, the international role of EU agencies for internal security, and the use of CSDP missions for migration control pose considerable challenges for the EU as a community of law. In principle, the CJEU in Luxembourg has a primary mandate to review the decisions of all EU institutions in accordance with Union law.[35] Whether a measure can be attributed to external action or to the internal policies of the EU makes no difference from a rule of law perspective.

The work of the Court of Justice of the European Union is essentially about shaping a European legal community.

The core of the work of the CJEU is the shaping of the European legal community.[36] In particular, the standards of the Charter of Fundamental Rights must be respected in all respects since the entry into force of the Lisbon Treaty at the end of 2009.[37] After a transitional period up to 2014, EU internal security policy — including its agencies — has also come under the supervision of the CJEU. However, the supervisory role of the CJEU does not extend to operational security or investigatory measures taken by national authorities.[38]

A further restriction in primary law exists: According to Article 24 (1) TEU, the CJEU remains excluded from the intergovernmental CFSP and CSDP. The EU's foreign and security policy maintains a traditional core area of executive control by the member states. At the same time, there are provisions that contain this particular policy area.[39] According to Article 40 TEU, the CJEU must pay particular attention to the delimitation of the CFSP as a substantive policy. This is intended to prevent an extension of the intergovernmental decision-making regime to communitarised EU policy areas. Furthermore, natural and legal persons affected by EU external sanctions have the right to a fair trial and to a remedy. Both can be checked by the CJEU.[40]

Overall, the CJEU has extended its oversight role of EU security policy. Yet the CJEU cannot keep pace with all the recent developments in integrated EU external action. European governments intend to extend their executive power in foreign policy as far as possible. Thus, the three trends of informalisation of agreements with third countries, the international role of EU agencies for internal security, and the use of CSDP missions for migration control pose a problem for an EU foreign and security policy anchored in the rule of law. There is a continuing conflict of objectives between executive self-empowerment through informal governance on the one hand, and its lack of legitimacy when avoiding the EU's Community method on the other.

35 Article 19 (1) TEU; Article 263 TFEU.

36 Armin von Bogdandy, "Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace", *European Constitutional Law Review* 14, no. 4 (2018): 675—99.

37 Gráinne de Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice As a Human Rights Adjudicator?", *Maastricht Journal of European and Comparative Law* 20, no. 2 (2013): 168—84.

38 Article 276 TFEU.

39 Graham Butler, "The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy", *European Constitutional Law Review* 13, no. 4 (2017): 673—703.

40 Decisions pursuant to Article 215 (2) TFEU.

International Agreements on Internal Security and Border Control

The CJEU has repeatedly annulled EU international agreements on sensitive security issues. The best-known case is the EU-US Passenger Name Record (PNR) agreement, for which the EP already sued the Council in 2006 for an appropriate legal basis and the related co-decision procedure.[41] Similarly, the CJEU rejected the validity of the PNR agreement between the EU and Canada in 2017. The provisions on mandatory data retention did not correspond to a strict interpretation of the necessity and proportionality of averting terrorist threats.[42] As early as 2015, the CJEU had decided on the transfer of commercially collected data to the United States:[43] The right to privacy, the protection of personal data, and the guarantee of an effective remedy under the Charter of Fundamental Rights should be guaranteed extraterritorially.[44]

EU-Turkey deal: The CJEU has rejected a complaint by three asylum seekers on formal grounds. It has declared the case to be out of its jurisdiction.

With regard to the externalisation of EU migration and border controls to third countries, it is not yet possible to speak of a comparably ambitious role for the CJEU in the protection of fundamental rights.[45] The CJEU's reluctance is particularly evident in the classification of the EU-Turkey deal of 2016. The CJEU rejected a complaint lodged by three asylum seekers against this agreement on purely formal grounds.[46] The applicants argued for the annulment of the EU-Turkey deal because the return of refugees to Turkey would be accompanied by violations of fundamental rights. Furthermore, the applicants argued that such an international agreement should have been based on Articles 78 and 218 of the Treaty on the Functioning of the European Union (TFEU). This would have entailed the involvement of all EU institutions and would have allowed for a further review of the procedure, in accordance with existing EU legislation on the right to asylum and the requirement of non-refoulement. In contrast, the CJEU relied on a narrow interpretation of its own jurisdiction and supported the interpretation of the EU member states: The agreement with Turkey had not been adopted collectively by the European Council and was ultimately only an agreement between the individual governments and Turkey — therefore, it was not legally binding for the EU. Accordingly, the CJEU did not consider itself legally competent to review the agreement.[47]

41 ECJ, Parliament v. Council, 30 May 2006, C-317/04, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-317/04 (accessed 2 August 2019); ECJ, Parliament v. Commission, C-318/04, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-318/04 (accessed 2 August 2019).

42 Christopher Kuner, "A. Court of Justice International Agreements, Data Protection, and EU Fundamental Rights on the International Stage. Opinion 1/15, *EU-Canada PNR*", *Common Market Law Review* 55, no. 3 (2018): 857—82.

43 This is according to the so-called Safe Harbor Agreement, which should oblige US companies to comply with data protection rules. Following its rejection by the CJEU, which did not provide for sufficient control rights for data subjects and data protection authorities, Safe Harbor was replaced by the Privacy Shield Agreement. The latter agreement is also threatened with a negative assessment by the CJEU. See Jennifer Baker, "EU High Court Hearings to Determine Future of Privacy Shield, SCCs", *The Privacy Advisor* (Portsmouth, NH), 25 June 2019, https://iapp.org/news/a/eu-high-court-hearings-to-determine-future-of-privacy-shield-standard-contractual-clauses/ (accessed 2 August 2019).

44 Tuomas Ojanen, "Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter", *European Constitutional Law Review* 12, no. 2 (2016): 318—29.

45 This is noteworthy because the CJEU has taken a number of often controversial decisions on the intra-European interpretation of the Common European Asylum System. This applies, for example, to intra-European bans on deportation under the rules of the Dublin regime because of the risk of inhumane treatment. For an overview, see Daniel Thym, "EuGH-Judikatur zum Migrationsrecht aus der Vogelperspektive (Teil 1)" [EuGH Judicature on Migration Law from a Bird's Eye View, Part 1], *Zeitschrift für Ausländerrecht und Ausländerpolitik* 39, no. 1 (2019): 1—7; Daniel Thym, "EuGH-Judikatur zum Migrationsrecht aus der Vogelperspektive (Teil 2)" [EuGH Judicature on Migration Law from a Bird's Eye View, Part 2], *Zeitschrift für Ausländerrecht und Ausländerpolitik* 39, no. 2 (2019): 66—70.

46 Roman Lehner, "The EU-Turkey-'Deal': Legal Challenges and Pitfalls", *International Migration* 57, no. 2 (2019): 176—85.

47 The CJEU confirmed this argumentation in a rejection of an appeal by the applications. See ECJ, Appeal — Article 181 of the Rules of Procedure of the Court of Justice — EU-Turkey Statement of the European Council of 18 March 2016 — Application for Annulment. Joined Cases C-208/17 P to C-210/17 P, 12 September 2018, http://curia.europa.eu/juris/document/document.jsf?text=&docid=205744&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=406469 (accessed 2 August 2019).

However, this assessment was predominantly rejected by legal scholars,[48] since the CJEU could well establish a competence under Union law, according to Article 4 (3) TEU and Article 3 (2) TFEU. These provisions prohibit member states from concluding agreements with third countries that derogate from EU law.[49] The return of irregular migrants is regulated by an EU directive, which member states must take into account in their external relations. In addition, a specific readmission agreement between the EU and Turkey has existed since 2014. The 2016 arrangement between Ankara and the member states for the readmission of "certain" applicants for protection should therefore have been covered by the existing readmission agreement — or at least should have been examined by the CJEU on the basis of the relevant EU instruments.

One-third of the money for Turkey comes from the EU budget, that is €2 billion out of a total of €6 billion.

The EP's involvement in the adoption of the more recent agreement with Turkey would also have been appropriate when looking at its substantive budgetary implications. After all, it was only after considerable financial assurances on the part of the EU that the so-called deal was made possible, that is, €2 billion out of a total of €6 billion would be financed directly from the EU budget, and thus administered by the EU Commission.[50] The argument that this is a non-binding international arrangement is therefore highly questionable.

The following example is comparable to the Turkey decision: At the height of the refugee crisis, the CJEU avoided a debate on the extraterritorial scope of European fundamental rights, in this case protection from torture and persecution.[51] Specifically, a Syrian family filed a lawsuit against the Belgian government, which had rejected its application for a short-term visa on the grounds that a subsequent asylum application, and thus a long-term stay, were foreseeable. In order to comply with the Charter of Fundamental Rights of the European Union, the Advocate General of the CJEU considered it necessary to issue humanitarian visas as an alternative. In contrast, the CJEU stated that the EU was not legally competent to issue long-term residence permits and dismissed the lawsuit.

Legal scholars increasingly share the view that the CJEU is reluctant to confront the member states when it comes to international migration policy. Because of this reserved role of the CJEU, the EU institutions and member states can currently refrain from legally binding EU agreements on migration control with third countries. Nevertheless, the EU's political claim of upholding the rule of law still exists. For example, the Joint Way Forward deal for the coordination of return transfers to Afghanistan is accompanied by a commitment to comply with the relevant international law, the Geneva Convention, and the Charter of Fundamental Rights of the European Union.[52] According to the EU Commission, however, the document is not a binding agreement and not justiciable.[53] It remains to be seen whether the CJEU will accept this informalisation of EU external relations in the future.

48 Paula G. Andrade, "The Duty of Cooperation in the External Dimension of the EU Migration Policy", in *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, ed. Sergio Carrera (Leiden, 2018), 299—325; Thomas Spijkerboer, "Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice", *Journal of Refugee Studies* 31, no. 2 (2018): 216—39.

49 See the so-called ERTA doctrine on the exclusive international competences of the Union derived from it, if it has adopted a corresponding internal legal regulation: ECJ, Commission v. Council, 31 March 1971, C-22/70, http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=22/70 (accessed 7 August 2019). See also Merijn Chamon, "Implied Exclusive Powers in the ECJ's [European Court of Justice's] Post-Lisbon Jurisprudence. The Continued Development of the *ERTA* Doctrine", *Common Market Law Review* 55, no. 4 (2018): 1101—41.

50 See on the structure of financing European Commission, *The EU Facility for Refugees in Turkey. Factsheet* (see note 16).

51 Malu Beijer, "The Limited Scope for Accepting Positive Obligations under EU Law: The Case of Humanitarian Visas for Refugees", *Review of European Administrative Law* 11, no. 1 (2018): 37—48.

52 European External Action Service, *Joint Way Forward on Migration Issues between Afghanistan and the EU* (Kabul, 2 October 2016), https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf (accessed 27 May 2019).

53 European External Action Service, Joint Way Forward on Migration Issues between Afghanistan and the EU (Kabul, 2 October 2016), https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issu es.pdf (accessed 27 May 2019). Scientific Research Service of the German Bundestag, questions on asylum and refugee protection against Afghan nationals, status WD 3 — 3000 — 235/16 (Berlin, 2016).

International and Executive Tasks of Frontex and Europol

When EU agencies for internal security act on an international level, the challenge is to ensure that cooperation with third countries on security issues is flexible on the one hand, and integrated into European law on the other. Pursuant to Article 263 TFEU, the CJEU monitors in principle all acts with legal effects vis-à-vis third parties[54] that are issued by "other EU bodies". This includes EU agencies.[55] Two legal considerations are of particular importance for the international role of Europol and Frontex. First, according to the CJEU's so-called Meroni Doctrine, EU agencies may exercise delegated competences derived from EU law only with a narrow margin of discretion. The extent to which this restriction applies to administrative arrangements or memorandums of understanding between agencies and third countries is debatable. Second, for Frontex the question arises as to whether the agency is directly liable in international operations with executive tasks.

Europol has in the past been able to conclude autonomous cooperation agreements with "trustworthy" third countries.[56] The EP successfully challenged this approach before the CJEU.[57] The new Europol Regulation of 2017 addresses at least the exchange of personal data with third countries. It must be agreed through the regular procedure for EU international agreements (Article 218 TFEU), and all institutions must be involved. This arrangement is relevant, for example, to the current negotiations with the Maghreb countries, Jordan, and Israel. As Europol is bound by strict data protection requirements in its new legal basis, complementary legal supervision by the CJEU can be carried out. Therefore, the international activities of EU security agencies are already being regularly subject to close legal scrutiny.

Frontex has concluded administrative agreements with many third countries. Their legal status is controversial.

For more than 10 years, Frontex has concluded a growing number of administrative agreements with third countries in which only the EU Commission has been involved as negotiator. It is contested whether these agreements can legitimate the extent of Frontex's international cooperation on border security.[58] In concrete terms, this involves equipment assistance, training, or the ongoing exchange of information and findings on migration control with numerous third countries. Moreover, Frontex administrative agreements do not refer uniformly to the applicable standards for refugee protection.[59] Judicial supervision by the CJEU is therefore not ensured. However, the EP challenged some international practices of Frontex before the CJEU and obtained an independent EU legal basis for Frontex maritime surveillance operations.[60] The resulting EU Regulation of 2014, for example, explicitly affirms the principle of non-refoulement of persons seeking protection.[61] The general

54 The condition is that direct concern must be demonstrated in order to establish the admissibility of an individual claim before the CJEU.

55 The accountability of EU agencies is also ensured through administrative procedures, such as member states' representatives on the Management Board, the European Ombudsman, the European Data Protection Supervisor, or the Frontex Human Rights Commissioner. See Mariana Gkliati, "The New European Border and Coast Guard: Do Increased Powers Come with Enhanced Accountability?", *EU Law Analysis* (Blog), 17 April 2019, http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html (accessed 27 May 2019).

56 Florin Coman-Kund, "Europol's International Cooperation between 'Past Present' and 'Present Future': Reshaping the External Dimension of EU Police Cooperation", *Europe and the World: A Law Review* 2, no. 1 (2018): 1—37.

57 CJEU, Parliament v. Council, 10 September 2015, C-363/14, http://curia.europa.eu/juris/liste.jsf?num=C-363/14&language=EN (accessed 7 August 2019).

58 Florin Coman-Kund, *European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, Frontex and Europol*, *Routledge Research in EU Law* (Abingdon and New York, NY: Routledge, 2018), chapter 5; Melanie Fink, "Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'", *Utrecht Journal of International and European Law* 28, no. 75 (2012): 20—35.

59 Chris Jones, Frontex: Cooperation with Non-EU states, Statewatch Briefing 309 (London, March 2017), http://statewatch.org/analyses/no-309-frontex-third-countries-agreements.pdf (accessed 28 May 2019).

60 ECJ, Parliament v. Council, 5 September 2012, C-355/10, http://curia.europa.eu/juris/liste.jsf?num=C-355/10&language=EN (accessed 2 August 2019).

61 European Union, *Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the*

Frontex Regulation of 2016 confirms this commitment with regard to all international cooperation arrangements.[62] It should therefore be possible for the CJEU to review any potential exchange of information between Frontex and Libya.[63] For example, it would be particularly sensitive if Frontex were to transmit operational maritime surveillance data to Libyan forces, with the result that refugees would be returned to camps where they are threatened with serious ill-treatment.[64]

In principle, EU member states are responsible for ensuring internal security and public order[65] and can usually only be assisted by EU agencies. As a result, only seconded officials from the member states are currently able to carry out executive tasks in Frontex missions. In the event of unlawful treatment of persons seeking protection, the EU state in command may be held responsible.[66] In addition, officials seconded to Frontex missions are supervised by their home state.[67]

By 2027, Frontex is expected to build up an operational reserve of 10,000 border guards, consisting of EU officials and member states' forces.

The recent reform of the Frontex Regulation[68] that was politically agreed in April 2019 poses a new challenge: an increasingly autonomous operational reserve of 10,000 border guards is to be created by 2027, consisting only in part of seconded forces of the member states. Rather, Frontex is to recruit its own officials. These EU border guards would, together with national officials, carry out executive tasks such as checks on persons.[69] It is therefore logical that Frontex should be directly liable for any damage that may result from the actions of its own officials.[70] Already today, Frontex missions assume executive tasks in border security in the Western Balkans.[71] In the future, such missions could be deployed on the African continent.[72] The status agreements of Frontex missions are based on the model of the CSDP with extensive local immunity from prosecution. Nevertheless, the CJEU could be responsible for investigating the conduct of Frontex officials in actions for damages brought by third-country nationals. This may concern specific security measures such as the proportionality of controls on persons or compliance with the principle of non-refoulement. The executive action of EU agencies should be clearly regulated and predictable for external actors.

Management of Operational Cooperation at the External Borders of the Member States of the European Union, (Brussels, 15 May 2014), preamble, paragraphs. 5, 12 – 16.

62 European Union, *Regulation (EU) 2016/1624* (see note 18), preamble, paragraph 46.

63 In the framework of the so-called Seahorse network. See Markus Sehl, "Libyen als Türsteher für Flüchtlingsboote im Mittelmeer?" [Libya as a Doorman for Refugee Boats in the Mediterranean?], *LTO.de – Legal Tribune Online – Aktuelles aus Recht und Justiz* (Cologne, 6 December 2018), https://www.lto.de/recht/hintergruende/h/seepferdchen-mittelmeer-ueberwachung-grenze-libyen-europa-eurosur-eu/ (accessed 28 May 2019).

64 This accusation is already made in an application before the International Criminal Court in The Hague. See the explanations in chapter 3, page 26ff.

65 Article 4 (2) TEU, Article 72 TFEU.

66 For this purpose, the respective national law would first be applied and, after exhaustion of all legal means of recourse, also decided on the basis of the European Convention on Human Rights. See Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR [European Convention on Human Rights] and EU Public Liability Law* (Oxford: Oxford University Press, 2018).

67 A total liability of Frontex currently arises only in the hypothetical event that EU deployment plans would systematically violate fundamental rights and this would be demonstrable. The complaints system set up with the Frontex internal human rights commissioner does not provide for any concrete legal consequences.

68 European Parliament, *European Parliament Legislative Resolution of 17 April 2019 on the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and Repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council (COM(2018)0631 – C8-0406/2018 – 2018/0330A(COD))* (Strasbourg, 17 April 2019), http://www.europarl.europa.eu/doceo/document/TA-8-2019-0415_EN.html?redirect (accessed 23 August 2019).

69 Ibid., Articles 56, 83.

70 Ibid., Articles 85, 86, 96, and 96a.

71 Albania has been involved in such activities since the spring of 2019, while expansion is planned in northern Macedonia, Bosnia and Herzegovina, and Serbia. See "Frontex Gets Ready to Deploy to the Balkans", *Statewatch News* (London), 9 May 2019, http://statewatch.org/news/2019/may/eu-frontex-balkans.htm (accessed 28 May 2019).

72 However, the deployment of such missions should be made dependent on the Commission's assessment of the human rights situation in the country concerned.

Executive Freedom and Individual Legal Protection in the CFSP

The CJEU has actively fought to obtain a role in the CFSP. With regard to decisions on EU sanctions, the Lisbon Treaty has given the CJEU the competence to ensure compliance with formal legal guarantees for affected individuals. However, the core area of executive responsibility of the member states for political decisions or the deployment of CSDP missions remains exempt from judicial scrutiny. This also applies to international operations with mixed objectives for the internal and external security of the EU.

This partial supervision of the CFSP by the CJEU is the result of many years of negotiation. In 2008, the CJEU issued a judgement that initially called the EU's claim for an integrated foreign and security policy into question.[73] The Council of Ministers had authorized financial support for the Economic Community of West African States through a CFSP decision to limit the proliferation of small arms. According to the CJEU's ruling, this grant had disregarded the EU Commission's Community competences in development policy.

Shortly afterwards, in 2009, the Lisbon Treaty stipulated that the CJEU could review the demarcation between the CFSP and the CSDP and other EU policy areas (Article 40 TEU). This defused the fundamental conflict over the danger of an extension of the intergovernmental regime of the CFSP to communitarised EU policy areas. This guarantee made the CJEU much more flexible towards the political interests of the member states.

For example, the CJEU decided in 2014 and 2016 in two consecutive proceedings that the EU's commitment to combat piracy in the Horn of Africa could be solely based on the provisions of the CFSP and the CSDP. This applies even if the CSDP missions' activities include the arrest and transfer of individuals to African states, which would initiate further legal proceedings for acts of piracy.[74] A legal basis for criminal law cooperation (Area of Freedom, Security and Justice, Title V TFEU) is not necessary for this type of external action of the EU.[75] More generally: The CJEU assumes that the CSDP can serve as the legal "centre of gravity". Further measures can be linked to this centre of gravity for the EU's international security missions. It is, hence, legitimate to embed instruments for internal security within the legal framework of the CFSP/CSDP.

However, a review of the actual conduct of CSDP missions does not fall within the competence of the CJEU. The forces involved are only indirectly responsible, namely through the jurisdiction and fundamental rights compliance of the posting EU member states. Some jurists consider this to be problematic[76] because the agreements of the respective CSDP missions provide for immunity from local jurisdiction in addition to there being only limited possibilities for administrative complaints.[77] In this respect, the EU's handling of its missions is no different than the UN's handling of its own.

73 Steven Blockmans and Martina Spernbauer, "Legal Obstacles to Comprehensive EU External Security Action", *European Foreign Affairs Review* 18, no. 4 (2013): 7—24.

74 ECJ, Parliament v. Council, 24 June 2014, C-658/11, http://curia.europa.eu/juris/liste.jsf?language=en&num=c-658/11 (accessed 2 August 2019); ECJ, Parliament v. Council, 14 June 2016, C-263/14, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-263/14 (accessed 2 August 2019); Peter van Elsuwege, "Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius)", *Common Market Law Review* 52, no. 5 (2015): 1379—98; Efthymios Papastavridis, "EUNAVFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?", *International & Comparative Law Quarterly* 64, no. 3 (2015): 533—68.

75 This line of argument of the CJEU remains contested by legal scholars. See Mauro Gatti, "Conflict of Legal Bases and the Internal-External Security Nexus: AFSJ [Area of Freedom, Security and Justice] versus CFSP [Common Foreign and Security Policy]", in *Constitutional Issues of EU External Relations Law*, ed. Eleftheria Neframi and Mauro Gatti, Luxemburger Juristische Studien, vol. 16, first edition (Baden-Baden: Nomos, 2018), 89—110.

76 Stian Ø. Johansen, "Accountability Mechanisms for Human Rights Violations by CSDP [Common Security and Defence Policy] Missions: Available and Sufficient?", *International & Comparative Law Quarterly* 66, no. 1 (2017): 181—207; Joni Heliskoski, "Responsibility and Liability for CSDP Operations", in *Research Handbook on the EU's Common Foreign and Security Policy*, ed. Steven Blockmans et al., Research Handbooks in European Law (Cheltenham and Northampton, MA, 2018), 132—53.

77 The CJEU has spoken law on administrative and financial issues of EU missions abroad (CSDP). The court declared itself responsible for the review of the awarding of contracts by the Head of Mission of EULEX Kosovo and, in a personnel dispute, for a transfer to the CSDP mission in Bosnia and Herzegovina.

In sanctions policy, the CJEU has reaffirmed the autonomy of the EU legal order.

EU sanctions policy is an example of how higher constitutional and legal requirements for EU foreign policy can give it greater international weight. As far as sanctions policy is concerned, the CJEU has reinforced the autonomy of the EU legal order and the fundamental right to a legal remedy and a fair trial.[78] Since the mid-2000s, the EU has imposed sanctions under the CFSP to combat international terrorism. According to several CJEU judgments in 2008 and 2013 on the Kadi and Al Barakaat cases,[79] there must be public justification for the sanctions decision so as to allow for a legal review.[80] In a second decision on this case in 2013, the CJEU confirmed that minimum standards for legal recourse are necessary — this decision even prompted changes in the UN sanctions regime.[81]

The Lisbon Treaty already consolidated the CJEU's position in 2009: Article 275 TFEU allows the CJEU to examine the legality of decisions on restrictive measures against natural or legal persons in the CFSP area. This judicial competence underscores the EU's foreign policy capacity to act on sanctions policy.[82]

In 2017, in the wake of the Rosneft case, the CJEU confirmed that it could review national legislation implementing EU sanctions in a comparable way.[83] The Union's fundamental decision to sanction Russia for its actions in the Crimea, however, remains outside the control of the judiciary and is the political responsibility of the CFSP.

As part of the increasing political focus on border security, so-called targeted EU sanctions (smart sanctions) against human trafficking are becoming more attractive. This development could trigger further judicial reviews of procedural safeguards and remedies for affected individuals. In June 2018, for the first time, the EU sanctioned six Libyan citizens for their involvement in human trafficking, pursuant to a UN decision.[84] At the initiative of the Netherlands, the introduction of Qualified Majority Decisions has been under discussion since the end of 2018 in order to make it easier to decide on individual sanctions for human rights violations in the future.[85]

78 Allan Rosas, "EU Sanctions, Security Concerns and Judicial Control", in *Constitutional Issues of EU External Relations Law*, ed. Neframi and Gatti (see note 75), 307–18; Graham Butler, "Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law", *Columbia Journal of European Law* 24, no. 3 (2018): 637–76.

79 ECJ, Kadi and Al Barakaat International Foundation v. Council and Commission, 3 September 2008, C-402/05 P, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-402/05 (accessed 7 August 2019); ECJ, Al Barakaat International Foundation v. Council and Commission, C-415/05 P, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-415/05% 20P (accessed 7 August 2019); ECJ, Revision Commission and Others v. Kadi, 18 July 2013, C-584/10 P, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-584/10% 20P (accessed 7 August 2019).

80 The possibility of a challenge must also be provided where confidential or proprietary information justifies the sanction decision. See Alice Riccardi, "Revisiting the Role of the EU Judiciary As the Stronghold for the Protection of Human Rights While Countering Terrorism", *Global Jurist* 18, no. 2 (2018) (online only), doi: 10.1515/gj-2018-0019.

81 Accordingly, data subjects can lodge complaints with an ombudsperson; furthermore, the entire decision-making process on sanctions has been structured more clearly. See Devika Hovell, "*Kadi:* King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power between the UN Security Council and Courts", *The Modern Law Review* 79, no. 1 (2016): 147–66; Carmen-Cristina Cîrlig, *Counter-Terrorist Sanctions Regimes. Legal Framework and Challenges at UN and EU Levels*, Briefing (Brussels: European Parliamentary Research Service, October 2016), http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589864/EPRS_BRI(2016)589864_EN.pdf (accessed 2 August 2019).

82 Guy Harpaz, "Common Foreign and Security Policy, Counter-Terrorism Measures and Judicial Review: *Hamas* and *LTTE* [Liberation Tigers of Tamil Eelam]", *Common Market Law Review* 55, no. 6 (2018): 1917–40.

83 Under the regular preliminary procedure by national courts. See Sara Poli, "The Common Foreign Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law", *Common Market Law Review* 54, no. 6 (2017): 1799–1834.

84 Council of the European Union, "Fight against Human Trafficking in Libya: EU Sanctions Six Human Traffickers and Smugglers in Line with UN Decision", Press Release (Brussels, 14 June 2018), https://www.consilium.europa.eu/en/press/press-releases/2018/06/14/fight-against-human-trafficking-in-libya-eu-sanctions-six-human-traffickers-and-smugglers-in-line-with-un-decision/ (accessed 27 May 2019).

85 Christina Eckes, "EU Sanctions Regime Cannot Be an 'EU Magnitsky Act'", *EuObserver*, 24 May 2019, https://euobserver.com/opinion/144968 (accessed 27 May 2019); *European Parliament Resolution of 14 March 2019 on a European Human Rights Violations Sanctions Regime (2019/2580(RSP))* (Strasbourg, 14 March 2019), http://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html?redirect (accessed 27 May 2019).

International Jurisdiction and EU External Action

The CJEU's oversight role of the EU's external action has been significantly strengthened in recent years. Nevertheless, there is no clear legal responsibility for operational measures in the CFSP/CSDP, while the external role of EU agencies for internal security continues to grow. The coherence of EU external action and the European legal order is under pressure. The CJEU is reluctant to challenge controversial policies of the member states, as in the case of the informal EU-Turkey deal. The judicial review and scrutiny of EU foreign and security policy cannot be done through EU law alone.

The European Court of Human Rights can examine all actions of the contracting states to determine whether fundamental rights are being observed.

For human rights violations in the southern Mediterranean, the European Court of Human Rights in Strasbourg or the ICC in The Hague could hold individual member states and the EU accountable. The ECtHR can exercise far-reaching control over fundamental rights vis-à-vis the contracting states, provided that national legal remedies have been exhausted. The following norms have to be respected in border and migration control:

1. the prohibition of inhumane treatment,[86]
2. the right to personal freedom,[87]
3. the protection against the undue rejection of persons seeking protection (non-refoulement),[88]
4. the right to an effective remedy.[89]

These and other human rights obligations of the European Convention on Human Rights are also enshrined in the Charter of Fundamental Rights of the European Union and are therefore binding on the EU institutions.[90] The ECtHR, on the other hand, regularly criticises the maltreatment of persons seeking protection at the EU's external borders or in border areas. The rejection of irregular migrants is not allowed without having examined any potential individual claims for asylum and protection.[91]

The EU itself has not yet acceded to the ECHR and is currently not empowered to ensure the implementation of such judgments by the contracting states.

The ECtHR therefore remains responsible for independent judicial control over European security authorities. In addition, the extraterritorial application of the ECHR has recently become a challenge for

86 Article 3 ECHR and Article 4 Charter of Fundamental Rights of the European Union.

87 Article 5 ECHR and Article 6 Charter of Fundamental Rights of the European Union.

88 Article 3 ECHR; Charter of Fundamental Rights of the European Union Article 19 and the further-reaching right to asylum set out in Article 18.

89 Article 13 ECHR and Article 47 Charter of Fundamental Rights of the European Union.

90 See Article 52 (3) Charter of Fundamental Rights of the European Union. The content coverage with the ECHR justifies the so-called Bosphorus assumption of the ECHR, according to which government action under EU legal obligations can generally be regarded as complying with fundamental rights. See Nikolaos Lavranos, "Das So-Lange-Prinzip im Verhältnis von ECHR und EuGH — Anmerkung zum Urteil des ECHR v. 30.06.2005, Rs. 45036/98" [The So-Lange Principle in the Relationship between ECHR and CJEU — Comment on the ECtHR Decision of 30.06.2005, Case 45036/98], *EuR Europarecht* 41, no. 1 (2006): 79—92.

91 For example ECtHR, M. A. and Others v. Lithuania, 11 December 2018, Application No. 59793/17, http://hudoc.echr.coe.int/eng?i=001-188267 (accessed 8 August 2019); ECtHR, N. D. and N. T. v. Spain, 3 October 2017, Application Nos. 8675/15 and 8697/15, http://hudoc.echr.coe.int/eng?i=001-177683 (accessed 8 August 2019); The Hungarian Helsinki Committee, *European Court of Human Rights Orders Hungarian Government to Give Food to Detained Migrants in Eighth Emergency Case*, Budapest, 19 March 2019, https://www.helsinki.hu/en/echr_eighth_interim_measure_denial_of_food/ (accessed 27 May 2019).

European foreign and security policy. In 2012, the ECtHR issued a ruling in a case against Italy that is decisive for externalised practices of migration control: the so-called Hirsi ruling, which prohibits European authorities from directly refusing refugees at sea.[92] In May 2018, another case was brought against Italy for its support of the Libyan Coast Guard.[93] A condemnation of Italy would also directly question the EU's credibility and co-responsibility in Libya. The accusation of direct responsibility for crimes against humanity in the EU's border security policy was also brought before the ICC in June 2019. If the prosecutor were to open an official investigation before the ICC, individual criminal liability of government officials in the EU would be conceivable for the first time.

The Extraterritorial Expansion of the European Convention on Human Rights

The CJEU bases its jurisdiction on the competences set out in the EU treaties, which can vary across policy areas. This explains the CFSP's special regime, for example. The jurisdiction of the ECtHR, on the other hand, is not subject to any sector-specific restrictions. The ECtHR has general jurisdiction, provided that all other remedies have been exhausted to bring an action for infringement of a fundamental right. For the admissibility of a claim before the ECtHR, however, the territorial scope of application of the ECHR to its contracting states must also be established.[94] Over time, the ECtHR has extended the validity of the ECHR to extraterritorial constellations in numerous judgments.[95] In the early 2000s, the ECtHR still refused to apply the ECHR directly to the behaviour of European states in the military conflicts in the Balkans.[96] This changed in the course of the fight against international terrorism. For example, in 2011 the United Kingdom was held responsible for the deaths of arrested Iraqi citizens, as it was acting as an occupying power with full responsibility for ensuring public safety in Basra.[97]

The ECtHR decided in further cases under which circumstances "effective" control could trigger the extraterritorial applicability of the ECHR vis-à-vis its contracting states. For example, the ECtHR interpreted the interception of a foreign ship on the high seas by the French military as a comparable situation of sovereign power — consequently, France was called to account.[98]

Hirsi ruling: Italy should not have sent irregular migrants back to Libya without examining their claims for asylum.

In the Hirsi case, the ECtHR ruled in 2012 that all relevant fundamental rights of the ECHR should be guaranteed to ship occupants, even if a ship is only temporarily taken over by officials of a contracting state.[99] This also applies to the right to asylum. Italy should not have immediately returned irregular migrants to Libya without first examining their individual asylum applications. This obligation applies above all because effective humanitarian protection does not exist in Libya and these persons are threatened with inhumane treatment. The ECtHR defined in this precedent the extraterritorial validity of the principle of non-refoulement of persons seeking protection and the prohibition of collective expulsions.[100]

92 ECtHR, Hirsi Jamaa and Others v. Italy, 23 February 2012, Application No. 27765/09, http://hudoc.echr.coe.int/eng?i=001-109231 (accessed 8 August 2019).

93 European Council on Refugees and Exiles, *Case against Italy before the European Court of Human Rights Will Raise Issue of Cooperation with Libyan Coast Guard* (Brussels, 18 May 2018), https://www.ecre.org/case-against-italy-before-the-european-court-of-human-rights-will-raise-issue-of-cooperation-with-libyan-coast-guard/ (accessed 27 May 2019).

94 The CJEU, on the other hand, is less territorial and derives an extraterritorial application of EU law for functional or dogmatic reasons.

95 ECtHR, *Extra-territorial Jurisdiction of States Parties to the European Convention on Human Rights. Factsheet* (Strasbourg, July 2018), https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf (accessed 27 May 2019).

96 ECtHR, Banković and Others v. Belgium & 16 Other Contracting States, 12 December 2001, Application No. 52207/99, http://hudoc.echr.coe.int/eng?i=001-22099 (accessed 8 August 2019).

97 ECtHR, Al-Skeini and Others v. the United Kingdom, 7 July 2011, Application No. 55721/07, http://hudoc.echr.coe.int/eng?i=001-105606 (accessed 8 August 2019).

98 ECtHR, Medvedyev and Others v. France, 29 March 2010, Application No. 3394/03, http://hudoc.echr.coe.int/eng?i=001-97979 (accessed 8 August 2019).

99 Maarten den Heijer, "Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case", *International Journal of Refugee Law* 25, no. 2 (2013): 265—90.

100 ECHR, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights. Prohibition of Collective Expulsions of*

Extended Responsibility: Italy As a Litmus Test

The current question is: Can compliance with the requirement of non-refoulement be demanded even if a) no forces from ECHR contracting states are directly or physically involved — as, for example, in the takeover of a foreign ship — and/or b) no clear effective control by ECHR contracting states can be demonstrated?[101] In May 2018, a complaint was filed with the ECtHR to review this constellation of extraterritorial applicability of the ECHR with regard to more indirect support for actions by Libyan forces.[102] This specific case concerns a tragic rescue operation in which several people drowned and private NGOs such as Sea-Watch and the Libyan Coast Guard were present. Although Italian military personnel were not directly involved in the confrontation at sea, they allegedly gave instructions to the Libyan Coast Guard from a military helicopter circling overhead. Legally, therefore, a "situational effective control" could be given.[103] Furthermore, the Libyan Coast Guard is only operational due to material and tactical support from Italy. This can facilitate the attribution of legal responsibility to Italy. The judgement will largely depend on whether the ECtHR falls back on the provisions of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) of the International Law Commission (ILC) of 2001.[104] In some cases, the ECtHR has used this elaboration of international state responsibility as a basis for its legal argumentation *(opinio juris)*.[105]

On this basis, many jurists argue that[106] Italy should be held liable for its support of the Libyan Coast Guard. In general, according to Article 16 (alternatively Article 17) and Article 41 of the ARSIWA, the principle applies: A state may not indirectly allow a third state to do what it is legally prohibited from doing itself. Italy is bound by the following standards: Compliance with the right to leave a country; universal prohibition of torture; provisions of international maritime law. If Libyan forces regularly violate these norms, Italy is not legally authorised to support them. However, it must be shown that the aiding and abetting of a breach of law in a third country was actually intended or was a clearly foreseeable consequence of the aid provided. In the case of Italian and European support for Libyan security forces, this may well be the case.[107]

Aliens (Strasbourg, 30 April 2019), https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf (accessed 27 May 2019). This decision diverges from the US Supreme Court, which only applies the principle of non-refoulement to US territories itself.

101 Annick Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks. Is *Hirsi 2.0* in the Making in Strasbourg?", *European Journal of Migration and Law* 20, no. 4 (2018): 396—426.

102 Sea-Watch, "Legal Action against Italy over Its Coordination of Libyan Coast Guard Pull-Backs Resulting in Migrant Deaths and Abuse" (Berlin, 8 May 2018), https://sea-watch.org/en/legal-action-against-italy-over-its-coordination-of-libyan-coast-guard/ (accessed 27 May 2019).

103 Charles Heller, Lorenzo Pezzani, Itamar Mann, Violeta Moreno-Lax and Eyal Weizman, "Opinion: 'It's an Act of Murder': How Europe Outsources Suffering as Migrants Drown", *New York Times*, 26 December 2018, https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html (accessed 27 May 2019).

104 International Law Commission, *Responsibility of States for Internationally Wrongful Acts. Annex to General Assembly Resolution 56/83 of 12 December 2001*, 2005, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed 7 August 2019).

105 Helen Keller and Reto Walther, "Evasion of the International Law of State Responsibility? The ECtHR's [European Court of Human Rights] Jurisprudence on Positive and Preventive Obligations under Article 3", *The International Journal of Human Rights* (2019; online first), doi: 10.1080/13642987.2019.1600508; Violeta Moreno-Lax and Martin Lemberg-Pedersen, "Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization", *Questions of International Law, Zoom-in* 56 (2019): 5—33, http://www.qil-qdi.org/wp-content/uploads/2019/03/02_Externalizing-migration-control_MORENO-LEMBERG_FIN-mod.pdf (accessed 20 May 2019).

106 Giuseppe Pascale, "Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?", *Questions of International Law, Zoom-in* 56 (2019): 35—58, http://www.qil-qdi.org/wp-content/uploads/2019/03/03_Externalizing-migration-control_PASCALE_FIN_mod.pdf (accessed 20 May 2019); Marina Mancini, "Italy's New Migration Control Policy: Stemming the Flow of Migrants From Libya without Regard for Their Human Rights", *The Italian Yearbook of International Law Online* 27, no. 1 (2018): 259—81; Adel-Naim Reyhani, Carlos Gomez del Tronco, and Matthias Nikolaus Mayer, *Challenging the Externalised Obstruction of Asylum — The Application of the Right to Asylum to EU Cooperation with Libyan Coast Guards*, SSRN 3361889 (28 March 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361889 (accessed 21 May 2019).

107 Patrick Wintour, "UN Accuses Libyan Linked to EU-Funded Coastguard of People Trafficking. Libyans Associated with Italy's Deal to Reduce Migration Also among Six Placed

The Libyan authorities are dependent on external aid – so is Europe indirectly responsible for human rights violations?

The Libyan Coast Guard is dependent on external support, such as the supply of patrol boats. These boats are directly involved in picking up people in the Mediterranean. They are often transferred to camps or prisons where they face serious human rights violations. The scope of Italian aid to Libyan forces is set out in a memorandum of understanding from 2017,[108] which may facilitate evidence of intentional action and aid to human rights abuses.[109] According to the memorandum of understanding, Italy provides extensive equipment and training assistance that is co-financed by the EU[110] and exchanges operational information with the Libyan Coast Guard.[111] In sum, the Libyan Coast Guard can only act with the help of Italy and the EU to the extent it has done since 2018. Even if this European assistance can also contribute to sea rescues, it is to be expected that those seeking protection will suffer ill-treatment after their repatriation.

If the ECtHR condemns Italy, the question is unavoidable as to whether the EU has also violated the ban on inhumane treatment and the principle of non-refoulement (Articles 3 and 5 of the ECHR). The Articles on the Responsibility of International Organizations (ARIO)[112] of the ILC of 2011 are largely analogous to the ARSIWA of 2001 on extended state responsibility. In the case of ARIO, the ILC has paid particular attention to the role of the EU.[113] In particular, Articles 14 and 58 of ARIO, which prohibit aiding or abetting illegal activities, could apply to the case of EU support to Libya. Accordingly, the CSDP operation "Sophia" and the mission EUBAM Libya as well as financial assistance from the EU could have abetted fundamental rights violations, especially where Libyan Coast Guard forces are trained and empowered. If the EU were to be declared jointly liable, this would set a precedent of high relevance for the entire EU foreign and security policy.[114]

The Risk of an Investigation by the International Criminal Court

In June 2019, two experts in international law elaborated on the accusation of a pan-European responsibility for serious human rights violations in Libya on another legal basis, namely the Rome Statute of the ICC.[115] The authors refer to critical statements by

under Sanctions", *The Guardian*, 8 June 2018, https://www.theguardian.com/world/2018/jun/08/un-accuses-libyan-linked-to-eu-funded-coastguard-of-people-trafficking (accessed 27 May 2019).

108 Italian Government/Libyan Government of National Accord, *Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic* (Rome, 2 February 2017), https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf (accessed 2 August 2019).

109 Giulia Ciliberto, "Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?", *The Italian Law Journal* 4, no. 2 (2018): 489–530.

110 European Parliament, *Answer given by Mr Hahn on behalf of the European Commission as of May 2019 on the question of Sabine Lösing (GUE/NGL) about the "Maritime surveillance technology in Libya" as of 16 January 2019. E-000190/2019* (Strasbourg, 20 May 2019), http://www.europarl.europa.eu/doceo/document/E-8-2019-000190-ASW_EN.html (accessed 28 May 2019).

111 See MoU between Italy and Libya Amnesty International, *Libya's Dark Web of Collusion. Abuses against Europe-Bound Refugees and Migrants* (London, 2017), 43ff., https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF (accessed 2 July 2019).

112 International Law Commission, *Draft Articles on the Responsibility of International Organizations. Submitted to the General Assembly as a Part of the Commission's Report Covering the Work of That Session (A/66/10, para. 87)* (2011), http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (accessed 2 July 2019).

113 Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control* (Cambridge: Cambridge University Press, 2016).

114 Kirsten Leube, "Can the EU Be Held Accountable for Financing Development Projects That Violate Human Rights?", *Georgetown Journal of International Law* 48, no. 4 (2017): 1243–274.

115 They have submitted their reasons to the ICC in a more than 200-page document. See Omer Shatz and Juan Branco, *EU Migration Policies in the Central Mediterranean and Libya (2014–2019). Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute* (The Hague, 2019), https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf (accessed 8 July 2019). The two-year preparation of the statement of claim and the long work experience of one of the main claimants in the prosecutor's office at the International Criminal Court (see https://en.wikipedia.org/wiki/Juan_

a prosecutor at the ICC on the situation of migrants in Libya and to the direct request by two UN Special Rapporteurs to initiate proceedings in The Hague.[116] In order to promote this process, the international lawyers are trying to demonstrate, using publicly available sources, that the EU is pursuing a systematic policy of deterrence on the central Mediterranean route and is consciously accepting an increased risk of death for those seeking protection. In addition, in numerous individual cases, Italian authorities and European officials had passed on information to the Libyan Coast Guard to pick up boats carrying refugees.[117]

Decision-makers must answer personally to the International Criminal Court.

As in the ECHR, the assumption of "effective control" over Libyan forces and waters is the basis of ICC jurisdiction.[118] Furthermore, failure to provide assistance in the event of serious human rights violations or crimes against humanity pursuant to Articles 6 to 8 of the Rome Statute could result in criminal penalties.[119] Whereas states have to answer to the ECtHR, decision-makers would have a personal responsibility before the ICC. This also applies to cases of substantial aiding and abetting of criminal offences by third parties.[120]

The EU has committed itself to cooperation with the ICC and counts as an independent legal entity.[121] No proceedings for crimes against humanity in Libya have so far been brought forward in the national courts. The supplementary competence of the ICC could thus come into play, according to the two experts in international law. The intervention of this court would even be imperative, since the alleged crimes are to have been committed systematically over several years and the seriousness of the offences to be sufficient.[122] Moreover, the legitimacy of the ICC would be undermined if prominent European actors were not investigated for political reasons and expediency.[123]

The application of the legal provisions of an "attack" and of a "violent expulsion", according to Article 7 of the Rome Statute, requires a plausibility check in the present case.[124] Yet, it is undisputed that irregular migrants in Libya regularly become victims of crimes against humanity and that these are committed with the knowledge of the EU.[125] An examination of European migration policy by the ICC's prosecutors appears, hence, possible and would force the EU to clarify its position on externalised migration controls.

The Difficult Relationship between the EU and the ECtHR

It may take several years for the ECtHR, and possibly the ICC, to conclusively assess the allegations about what is happening in Libya. An active policy to consolidate the constitutional dimension of European foreign and security policy is already necessary in advance.

The EU should resume its accession to the ECHR in order to strengthen the legitimacy of European foreign and security policy on a structural level. The EU Commission announced this step in July 2019 in a communication on the rule of law in Europe.[126] Accession to the ECHR would make it possible to draw the constitutional boundaries of EU foreign and security policy more clearly. Questionable EU practices concerning border security measures in third countries and the unresolved responsibility for sea rescues could be reviewed along the core European legal requirements for the protection of human rights. The CJEU's lack of supervisory competence over the CFSP

Branco [accessed 30 July 2019]) explain the level of detail provided.

116 Ibid., 10ff. There is also the openly formulated UN Security Council Resolution 1970 of 2011, which calls on the International Criminal Court to investigate Libya (see page 107ff.), although this resolution was originally aimed at the legacy of the Ghaddafi regime.

117 Ibid., 193ff. and 221ff.

118 Ibid., 111ff.

119 Ibid., 135ff.

120 Ibid., 208ff.

121 By Article 87 (6) of the Rome Statute. See also Council of the European Union, *Council Decision of 10 April 2006 Concerning the Conclusion of the Agreement between the International Criminal Court and the European Union on Cooperation and Assistance. OJ L 115 of 28/04/2006*, Brussels, 28 April 2006.

122 Shatz and Branco, *EU Migration Policies* (see note 115), 119ff.

123 Ibid., 121.

124 Ibid., 151ff.

125 Ibid., 171ff.

126 European Commission, *Strengthening the Rule of Law within the Union. A Blueprint for Action. COM(2019) 343 final* (Brussels, 17 July 2019), 7, https://ec.europa.eu/info/sites/info/files/7_en_act_part1.pdf (accessed 5 August 2019).

and the CSDP could be reliably taken over by ECtHR. Accordingly, the controversial EU operation "Sophia" could be assessed in a new light and reformed, whereas the operational support for the Libyan Coast Guard would in all likelihood be ruled out under current circumstances.

For formal accession of the EU to the ECHR, as provided for in Article 6 (2) TEU, intra-European legal conflicts must be resolved. From the dogmatic point of view of the CJEU, the overarching supervisory role of the ECtHR in the protection of human rights is problematic. In general, the CJEU underlines its constitutional and normative autonomy in order to underpin the independent standing of the EU legal order both within Europe and internationally.[127] The CJEU stresses its formal harmonisation function, that is, that all its decisions are based on the supremacy of European law and are applicable to all member states. This does not apply to the ECtHR with its case-specific judgements. From this perspective of the CJEU, EU accession to the ECHR is therefore excluded as long as the CJEU itself cannot exercise full jurisdiction over the CFSP/CSDP.[128] This is one of the reasons why the CJEU rejected an already formulated agreement on EU accession to the ECHR in 2014.[129]

The erroneous conclusion that EU accession to the ECHR is therefore blocked can be rejected not only for political but also for legal reasons.[130] It is difficult, for example, to use the so-called Foto-Frost doctrine[131] for the CFSP/CSDP, according to which, for reasons of consistency of the European legal framework, the CJEU alone may judge the legality of Union acts. On the contrary, national courts, in cooperation with the CJEU, could ensure a sufficiently uniform protection of fundamental rights for the CFSP/CSDP.[132] The reason for this is that the CFSP/CSDP do not issue directly legally binding EU regulations and directives, but primarily political decisions. The CJEU case law on sanctions —especially in the Rosneft case — shows that such cooperation is a viable way forward.[133] In this case, individual legal review was granted through national courts. The well-known reservations of the CJEU could therefore be dispelled by a future EU accession agreement to the ECHR[134] being structured differently from the first one, which was rejected. The extraterritorial application of the ECHR and the associated overcoming of the special status of the CFSP/CSDP could largely close the gaps in fundamental rights control under EU law.

The EU relies on multilateralism in its external action. It is the central principle and legitimation.

If the EU's accession to the ECHR were categorically rejected, the political credibility and effectiveness of the EU's foreign and security policy would be severely damaged. The EU itself is essentially the result of a multilateral negotiation process and is committed to

127 Daniel Halberstam, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", *German Law Journal* 16, no. 1 (2015): 105—46.

128 If such an extension of competence of the CJEU would be possible by a reform of the EU Treaties, the CJEU would replace the ECHR.

129 Paloma Plaza Garcia, "Accession of the EU to the ECHR. Issues Raised with Regard to EU Acts on CFSP Matters", *ERA Forum* 16, no. 4 (2015): 481—94. Apart from the lack of full jurisdiction over the CFSP/CSDP, other open questions prevent the EU from joining the ECHR from the CJEU's point of view. They concern trust in the constitutional institutions of various EU countries and the principle of mutual recognition, which is relevant to the EU's internal security policy.

130 Johan Callewaert, "Do We Still Need Article 6 (2) TEU [Treaty on European Union]? Considerations on the Absence of EU Accession to the ECHR and Its Consequences", *Common Market Law Review* 55, no. 6 (2018): 1685—1716; Martin Kuijer, "The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession", *The International Journal of Human Rights* (2018): 1—13 (online first), doi: 10.1080/13642987.2018.1535433; Przemysław Tacik, "After the Dust Has Settled: How to Construct the New Accession Agreement after Opinion 2/13 of the CJEU [Court of Justice of the European Union]", *German Law Journal* 18, no. 4 (2017): 919—68.

131 In Foto-Frost v. Hauptzollamt Lübeck-Ost, the CJEU made it clear in 1987 that national courts were not allowed to judge on the invalidity of acts of the European Community themselves, but that such decisions must necessarily lead to a referral to the CJEU. See ECJ, Foto-Frost v. Hauptzollamt Lübeck-Ost, 22 October 1987, C-314/85, http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=314/85&td=ALL (accessed 7 August 2019).

132 José M. Cortés-Martín, "The Long Walk to Strasbourg: About the Insufficient Judicial Protection in Some Areas of the Common Foreign and Security Policy before the European Union's Accession to the ECHR", *The Law & Practice of International Courts and Tribunals* 17, no. 2 (2018): 393—414.

133 Sara Poli, "The Common Foreign Security Policy after Rosneft" (see note 83).

134 European Commission, *Strengthening the Rule of Law* (see note 126).

this guiding principle in its external action. This promise to act multilaterally legitimises the Union's action precisely in contrast to the classical power politics of individual states. If the EU were to disregard its own treaty obligations for the comprehensive protection of fundamental rights, it and its member states would sow doubts as to whether they are still willing to strengthen multilateralism and international law. The EU as an international actor and supranational organisation *sui generis* legitimises itself through its CFSP and its CSDP: Both take place beyond classical member state foreign and security policy on the one hand, and NATO as an alliance of collective defence on the other. Inter-institutional complementarity in foreign, security, and defence policy is based on the avoidance of double structures — and this is what makes an effective European security policy possible in the first place.

Conclusions and Recommendations

Western states such as the United States and Australia weaken multilateralism and the validity of international law by withdrawing from international conventions and agreements, in particular on refugee protection. When large democracies call existing international legal principles into question, it becomes all the more difficult to promote duties of due diligence globally or even to counter a further dissolution of international law. Here the EU can make a constructive contribution, despite the criticism of its questionable practices of externalised border security. The role of the CJEU, the ECtHR, and the national courts in Europe has changed; in principle, their importance for a European foreign and security policy based on the rule of law has noticeably increased in recent years. At the latest with the adoption of the Lisbon Treaty, a strong legalisation of EU external relations was established. Examples are the creation of an international legal personality for the EU and the general applicability of the Charter of Fundamental Rights to Union action.

Integration into the EU legal framework and control by the CJEU need not necessarily weaken the enforcement of European security interests. In a number of judgments, the CJEU has shown a balance between the protection of individual fundamental rights on the one hand, and the necessary security measures of the EU on the other. This is primarily evident in the case of individual sanctions. Here the EU has successfully introduced a controversial but nevertheless sound procedure to combat the financing of terrorism. The EU anti-piracy missions have illustrated how internal and external security objectives can be legally anchored and linked within the framework of the CSDP. An effective EU refugee and migration policy begins with externalised migration control in countries of origin and transit — and ends where legal migration routes to the EU are opened. Currently, there is a political demand to treat sea rescue as an essential part of European refugee and migration policy again. Ethically, this would be necessary, but it presupposes the willingness of Europeans to share the burden. In contrast, the question of the appropriate legal basis in the EU treaties to underpin such an effort is secondary.

EU agencies for internal security are likely to cooperate even more closely with third countries or regional organisations in the future. With regard to Frontex operations, many aspects of legal responsibility still need to be clarified — especially when EU border guards are deployed for sovereign tasks. Nevertheless, there is no question that the Charter of Fundamental Rights is binding in principle and that secondary EU law on the protection of refugees is valid also in international contexts. Pushing border security measures beyond the EU and fighting human trafficking on an international level does not necessarily have to fall within the scope of classical foreign policy, with the associated political and military room for manoeuvre. Conversely, the controversy on the direction of the EU operation “Sophia” shows that CSDP missions, which are based on specific mandates with few connections to the rest of the EU’s legal framework, have trouble striking a balance between the protection of human rights and operational border security measures. In any case, it should be borne in mind that specific measures taken in the course of a CSDP missions can only be controlled very indirectly through the national courts of those member states that send officers.

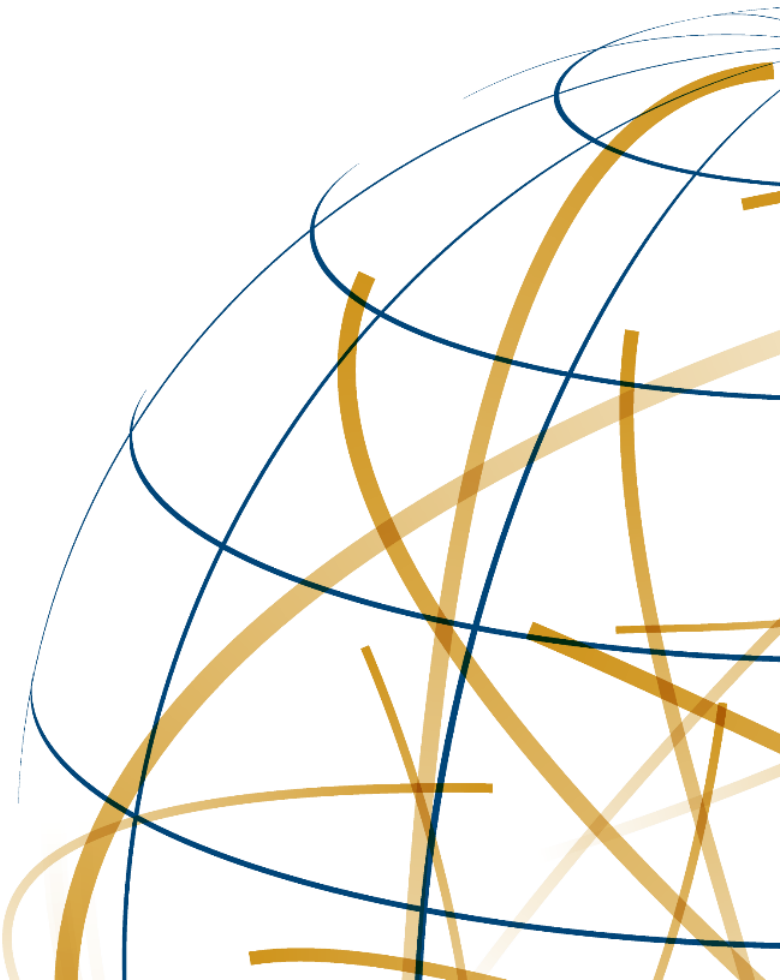
Moreover, the EU and the CJEU do not yet have the legal competence or the ambition to clarify the legal grey zones that have emerged due to the increasing links between internal and external security. Although the CJEU has shown itself to be very ambitious in its judgments on data protection, including with extraterritorial effects, it has declared itself to be not competent with regard to the EU-Turkey deal and humanitarian visas. It remains open whether the CJEU can and will limit the informalisation of Euro-

pean agreements with third countries for border and migration control purposes.

In contrast, the ECtHR determines the scope of its jurisdiction primarily through territoriality and is not bound by any specific legal form or state action. For example, the ECtHR has condemned many informal border control practices at the EU's external borders, such as the "pushbacks" and "hot returns", i.e. immediate rejection, of persons seeking protection in border areas. Moreover, the ECtHR extends its case law and applicability of the ECHR to situations where a contracting state exercises "effective control" beyond its territory. According to the groundbreaking Hirsi ruling, the direct involvement of the authorities of European member states in border management practices has so far been crucial in extraterritorial order to prosecute human rights violations or violations of international refugee law.

Whether the ECtHR will condemn Italian support for the Libyan Coast Guard by resorting to an extended interpretation of state responsibility remains to be seen. This would set a far-reaching precedent for the legitimacy of European security cooperation with third countries. The EU is also being threatened with an investigation before the ICC, which would be accompanied by a legal assessment of the EU's refugee and migration policy in the central Mediterranean and Libya. At the level of its founding treaties, the EU is committed to international law and respect for democracy, human rights, and the rule of law. If there are reasonable doubts as to whether the EU may sidestep its own constitutional principles, one needs to recall the principle of equality before the law as well as the EU's voluntary commitment to the Rome Statute.

The overriding political interest in effective migration control has led to highly problematic legal shifts in European foreign and security policy. The rule of law dimension of the EU's external action should therefore receive more attention than before. In concrete terms, the EU could resume the process of formal accession to the ECHR and thus deepen the constitutional foundations of European foreign and security policy. This would empower the EU to counter the continuing erosion of the multilateral legal order, but also the erosion of the rule of law within its own borders. Germany should place the rule of law at the heart of its 2020 EU Council Presidency. The controversial introduction of Qualified Majority Decisions in the CFSP must be accompanied by the strengthening the EU as a community of law.

Abbreviations

ARIO	Articles on the Responsibility of International Organizations
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CSDP	Common Security and Defence Policy
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
CJEU	European Court of Justice
EP	European Parliament
EU	European Union
EUBAM Libya	EU Border Assistance Mission in Libya
EUCAP Sahel Mali	EU Capacity Building Mission in Mali
EUCAP Sahel Niger	EU Capacity Building Mission in Niger
EUGS	Global Strategy on Foreign and Security Policy of the EU
EULEX Kosovo	European Union Rule of Law Mission in Kosovo
EUNAVFOR Atalanta	European Union Naval Force — Somalia
EUNAVFOR MED	European Union Naval Force — Mediterranean
Europol	European Union Agency for Law Enforcement Cooperation
EUTM Mali	European Union Training Mission Mali
Frontex	European Border and Coast Guard Agency
ICC	International Criminal Court
ILC	International Law Commission
MINUSMA	Multidimensional Integrated Stabilisation Mission of the United Nations in Mali
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
PNR	Passenger Name Record
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations