

Bachelor Thesis

Human Rights across Borders?

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EU Extraterritorial Migration Governance and the EU New Pact on Migration and Asylum

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## Abstract

In the area of EU migration policy, scholars have noticed an increasing trend toward externalization of migration governance, which generally means a phenomenon in which actors like the EU, cooperate with third countries in an effort to keep migrants from entering their jurisdiction. These cooperations are happening at the expense of the (human) rights of migrants and asylum seekers which stands contrary to the EU placing human rights not only at the core of its legal acquis but also promoting them in a larger, international context. The Commission's New Pact on Migration and Asylum (2020) proposes a paradigm change in the cooperation with third countries. This thesis examines to what extent the New Pact on Migration and Asylum addresses the human rights of third-country nationals in the context of Extraterritorial Migration Governance by following a hermeneutic approach to a literature-informed analysis of the relevant policy documents. The analysis finds that while extraterritorial migration governance is not necessarily inconsistent with human rights, the examined EU cooperations do violate the EU's human rights obligations. It further can be concluded, that the New Pact does not adequately address this situation and therefore fails to provide the self-proclaimed fresh start.

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## **List of Abbreviations**

AU	African Union
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMG	Extraterritorial Migration Governance
ETOs	Extraterritorial Human Rights Obligations
EU	European Union
EUCO	European Council
EUNAVFOR MED IRINI	European Union Naval Forces Mediterranean Irini
GAMM	Global Approach to Migration and Mobility
HRBA	Human Rights-Based Approach
ICCPR	International Covenant on Civil and Political Rights
LCG	Libyan Coast Guard
MoU	Memorandum of Understanding
OHCHR	Office of the United Nations High Commissioner for Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TCN	Third-country National
UN	United Nations
UNSMIL	United Nations Support Mission in Libya

## **I. Introduction**

### **I.1 Introduction**

Migration and Asylum have long been dominant and highly contested topics on the European political agenda which was only exacerbated by the migration crisis of 2015 (Herbert & Schönhagen, 2020). Migration is a multi-level governance issue and the inflow of asylum seekers, 1,2 million in 2016 (Eurostat, 2017), posed significant political, administrative, and societal challenges that manifested from the communal up to the EU level. The emerging conflicts between member states mainly concerned the distribution of asylum seekers (Dublin III) and are 7 years later still not resolved, despite many new policies and reforms (Buonanno & Nugent, 2021). That migration indeed is “a problem with no (foreseeable) end (because the EU is located in an unstable ‘neighborhood’ characterized by political and economic instability)” (Buonanno & Nugent, 2021, p. 229) has become ever more visible, with around 3,5 million refugees arriving in the EU within the first four weeks of the Russian invasion of Ukraine (European Commission, 2022). While this current refugee inflow accentuates internal challenges of migration and what short-term consequences they might have, e.g. registration, distribution, and economic support, there is also an external dimension to migration policy that is not as visible from an internal EU perspective.

When looking at the EU migration policy of the past years, a trend toward externalization of migration and asylum policy can be observed (Rijpma, 2017; Spijkerboer, 2017), which is characterized by agreements with third countries to limit migrational flows towards the EU's external borders (Palm, 2020), such as the EU-Turkey Statement (Ineli-Ciger & Ulusoy, 2021).

With the increased externalization, there is also an increasing amount of academic literature, discussing it from legal, ethical, or political perspectives. Before the migration crisis in 2015, an EUI working paper by Rijpma and Cremona (2007) discussed the extra-territorialization of EU migration policy and its possible implications for the rule of law and its challenges to human rights. Since then, several other authors, including Moreno-Lax (2020a) and Frelick et al. (2016), focussed on the consequences the cooperation with third countries has for the human rights of third-country nationals (TCN's). Other articles have shown a focus on the question of accountability of the EU for extraterritorial executive action (e.g. Rijpma, 2017) or deal with specific EU cooperations that are examples of Extraterritorial Migration Governance (EMG) (Palm, 2020; Sereke & Mekonnen, 2019). A general observation repeatedly emerging from the academic literature is that EMG is currently happening at the expense of (human) rights of TCN's (Frelick et al., 2016; Koenig, 2017).

After all the challenges and conflicts, the new European Commission (EC) proposed a “fresh start on migration” in September 2020 (European Commission, 2020a) with the New Pact on Migration and Asylum, “New Pact”, which is also supposed to be a “change of paradigm in the cooperation with non-EU-countries” (European Commission, 2020a). Considering the

implications externalization has for the human rights of TCN's and that the respect for human rights is enshrined in the EU treaties (e.g. Art. 2 TEU), it is interesting to examine how this apparent contradiction is addressed in the New Pact.

This bachelor thesis, therefore, answers the following research question: *To what extent does the EU New Pact on Migration and Asylum address the human rights of third-country nationals in the context of EU Extraterritorial Migration Governance ?*. In the absence of scientific consensus on the terminology to describe the phenomenon, this study defines “Extraterritorial Migration Governance” as cooperations with third countries that are part of the EU's migration policy and that delegate migration control tasks to keep migrants from entering the EU's jurisdiction.

The thesis is divided into four sub-chapters which each address one of the sub-questions, that are outlined in section I.3 The sub-chapters explore which human rights obligations the EU has when cooperating with third countries, how the EU has been using EMG pre-New Pact, and to what extent these cooperations are in line with extraterritorial human rights obligations. All these insights are then considered in an informed content analysis of the New Pact.

The particular scope of the thesis as well as the theoretical lens make up the scientific relevance of this thesis as there is no other scientific work on the New Pact that has chosen this particular framework for analysis. Another unique dimension is added by considering a jurisdictional as well as a broader teleological understanding of Extraterritorial Human Rights Obligations (ETO's).

## **I.2 Theory & Concepts**

### **I.2.1 Conceptualization of Extraterritorial Migration Governance**

As is often the case in academic literature, one phenomenon is differently termed by different scholars. The core concept of this thesis has been described under the terms “Externalization of migration controls” (Frelick et al, 2016), “Extraterritorial migration control” (Gammeltoft-Hansen, 2014), or “Externalization of migration policy” (Spijkerboer, 2017), while Palm (2020) is using “Externalized Migration Governance”. While the authors differ slightly in the delimitation of the concepts themselves, they all discuss a particular form of migration policy that produces effects outside a given territory, in these cases outside the EU borders. Additionally, do these policies often have the general objective of keeping migrants and asylum seekers from reaching a state's or region's territory or jurisdiction and thereby coming under certain protection obligations. Frelick et al. (2016) define externalization of migration controls as: “Extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdiction or territories of destination countries or regions or making them legally

inadmissible without individually considering the merits of their protection claims” (p.193). A central feature of the phenomenon, described commonly by all the concepts above, is the cooperation with third countries to achieve policy objectives e.g. via bilateral agreements on readmission or support for border patrolling (Palm, 2020) as well as obligations or encouragements for the third country to interdict or even detain migrants (Spijkerboer, 2017; Frelick et al.2016).

As the differentiation of the conceptualization by different authors is nuanced and for this paper, the main essence shared by all of them simultaneously is most important, the term used in this study is “Extraterritorial Migration Governance” (EMG) which is used but not defined by Palm (2020). Using the term “Governance” captures both migration policies and controls, and leans on the concept of “External Governance” by Lavanex and Schimmelfennig (2009), which “seeks to capture the expanding scope of EU rules beyond EU borders” (p.791). “Extraterritorial” is chosen as it indicates the focus of the cooperation with third countries, referring to the IMISCOE Migration Research Hub (2022) definition of extraterritorialization which explicitly states that extraterritorialization “relates to the process of transferring or delegating tasks related to migration control to third countries”.

This thesis has as its main subject those EU cooperations with third countries that have as their objective to keep migrants from entering the EU's jurisdiction and that work via the delegation of migration control tasks to a third country.

This definition then includes border control elements, e.g. funding provided by the EU, capacity-building efforts, and the general task for the third country to stop migrants from exiting their territory. Policies and agreements addressing migrant trafficking or transnational crime, e.g. via capacity-building in law enforcement, are also included in the analysis. The actual mechanisms and actions that are at the core of the agreements and policies, e.g. capacity-building in exchange for the detention of migrants, are captured under the term extraterritorial migration controls.

While return and readmission agreements are agreements with third countries and an essential part of the EU's external migration policy, they are addressing the situation after migrants already entered the EU jurisdiction, hence don't have as their primary goal to keep migrants from entering the EU. The literal “extraterritorial” character of EU migration governance is therefore the key element to limiting the scope of this thesis, and return and readmission agreements are not taken into account.

“Third country”, as defined by the EU, means “a country that is not a member of the European Union as well as a country or territory whose citizens do not enjoy the European Union right to free movement” (European Commission, n.d.a).

## **I.2.2 The Human Rights-Based Approach**

The human-rights or simply a rights-based approach is an approach that can be applied to migration policies and governance. The human rights-based approach (HRBA) to development is a comprehensive conceptual framework that was originally adopted by UN agencies and was then conceptualized in the 2003 Common Understanding on HRBA to Development Cooperation. It is now the first principle of the UN sustainable development group and is not only a guiding principle of multiple UN agencies but is also recognized by a variety of institutions and networks outside the UN framework. The HRBA to development cooperation is essentially based on international human rights standards, above all the 1948 Universal Declaration of Human Rights, and therefore the main aim is the promotion and protection of human rights. In line with the main aim, all policies, processes, and plans regarding human development and development cooperation shall be guided by human rights standards and principles, including all cultural, economic, political, and social rights (United Nations Sustainable Development Group [UNSDG], 2022). The five fundamental principles of human rights are universality, indivisibility, equality and non-discrimination, participation, and accountability (UNSDG, 2022). Based on this HRBA, other policy areas have also formulated HRBA's. In the field of migration, the common practice is often a "management of migration approach", a neutral and depoliticized approach, that is opposed by advocates of a "rights-based approach to migration" that is based on human rights law as well as migration-specific international law (Hujo, 2019). The EU has adopted a HRBA, similar to the UN approach, that applies to all areas of EU external action (European Commission, 2021). The approach consists of a toolbox of five working principles that mirror the five main human rights principles mentioned above (European Commission, 2021).

### **I.3 Methodology**

To answer the research question: *To what extent does the EU New Pact on Migration and Asylum address the human rights of third-country nationals in the context of EU Extraterritorial Migration Governance?* this thesis follows a hermeneutical/interpretive approach. At the core of hermeneutics, which means to interpret or to "make clear", lies the notion of understanding. Understanding is thought to be inseparably intertwined with interpretation, to understand one has to interpret automatically. Important to the idea of understanding and interpretation is also the consideration of the political, cultural, and social context as well as factors such as language or experience. Hermeneutics can take the shape of multiple theories or more specific subordinate approaches and is not characterized by one singular method (Given, 2008). Interpretation as part of a hermeneutical approach is defined as the "process by which a researcher construes meaning from research findings" (Given, 2008, p. 458). To conduct an interpretation, the researcher may use theory as guidance to understand the object of interpretation better, especially regarding their context and larger theoretical framework (Given, 2008).

This thesis is using the approach by answering the sub-questions by interpreting the relevant policy and legal documents. The interpretation uses a conceptual background (see section I.2),



academic literature, and the findings from preceding chapters as starting points for interpretation and guidance to conduct a focussed interpretation.

For answering the first sub-question (1) *Which human rights obligations does the EU have when managing migration via cooperation with third countries?*, the key documents are the EU treaties, the Charter of Fundamental Rights of the European Union (CFR), and the European Convention on Human Rights (ECHR). While this thesis does not principally focus on EU legal accountability for extraterritorial human rights violations, extraterritorial jurisdiction and scope are discussed, based on Moreno-Lax and Costello (2014) and Moreno-Lax (2020b) as key literature.

The third chapter revolves around sub-question (2) *To what extent is the EU pursuing Extraterritorial Migration Governance as part of its migration policy ?*. It gives an overview of how EMG is considered in the Global Approach to Migration and Mobility (GAMM) and analyzes the use of extraterritorial migration control in two particular cooperations, the EU-Turkey Cooperation and the EU-Libya Cooperation. While many cooperations can be characterized as being part of the EU's EMG, the particular cases of cooperations were chosen as they are discussed in academic literature as two of the main EU cooperations in the area of migration and the context of EMG (e.g. Frelick et al., 2016; Rijpma, 2017). Both cooperations have been critically discussed in the past by both scholars and the media concerning shortcomings in human rights protection and violations (e.g. Koenig, 2017; Urbina, 2021), which further explains their relevance for this rights-focused thesis. The key policy documents that will be considered are the EU-Turkey Statement (European Council, 2016) and the Malta Declaration (European Council, 2017).

The fourth chapter examines the sub-question (3) *What impact does EU Extraterritorial Migration Governance currently have on the (human) rights of third-country nationals in countries of cooperation?*, and brings the dimensions considered in the preceding chapters together, by analyzing how the human rights of TCN's are impacted (pre-2020) by EMG generally and by the two selected cooperations specifically. Thereby it is analyzed which rights EMG violates from its conceptual and formal outset. Secondly, the actual practice of the cooperations is outlined and it is analyzed which human rights are violated as a direct or indirect, consequence of these cooperations. The main sources for the assessment of the human rights situations are a 2017 Amnesty International Report and a 2018 Report by the United Nations Support Mission in Libya (UNSMIL) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) outlining the situation of migrants and refugees in Libya. The possible bias of these reports is why the documents are not used directly to inform the assessment itself but to draw information on processes and actions relating to the cooperations. The analysis takes place by interpreting this information and connecting it to the insights from

the preceding chapters. Finally, a preliminary conclusion is drawn on the legitimacy and responsibility of the EU's EMG.

The last sub-question is: (4) *How does the New Pact on Migration and Asylum address Extraterritorial Migration Governance?*. The key document is the ECs New Pact (Sep.2020). This interpretation is informed by the preceding sub-chapters and the HRBA. The interpretation focuses on how EMG is, directly or indirectly, mentioned and dialectically framed in the New Pact and considers if and how human rights are simultaneously addressed.

#### **I.4 Societal Relevance**

The societal relevance of this thesis is generally given by the persistent importance of the governance area of migration and the conflicts it causes within the EU. Additionally, do the alleged human rights violations not only constitute a moral issue when thinking of the effect they have on the lives of individual migrants but also threaten the EU's role as “normative power” in the global arena. The latter issue arises due to the divergence between formal EU human rights standards and the respect for human rights as “European value” and standard on the one hand, and a migration policy that possibly contributes to human rights violations in third countries on the other, which is already being framed as “hypocritical” by some academics, NGOs and the Media (Dixon, 2015; Cusumano, 2018). This term has been recently also used regarding the gap between the EU reaction to and treatment of Ukrainian refugees and African or Asian refugees (Beattie, 2022; Traub, 2022). That the EU in its actions and policies can not hold up to the human rights standards it promotes in the wider world and inconsistently applies human rights could eventually minimize the EU's credibility and soft power when it comes to human rights (Koenig, 2017), which is why this thesis topic is not only relevant from a moral perspective but also a policy perspective. As these moral and political arguments seem to make action on the side of the EU imperative, the relevance of examining the New Pact, its proposed “paradigm change” (European Commission, 2020a) in migration governance, is given, especially as the New Pact is the main agenda-setting document currently available in the area of migration.

## **II. The EU's Extraterritorial Human Rights Obligations**

This chapter outlines the main human rights obligations the EU has when cooperating with third countries extraterritorially. The first section looks at the EU treaties and determines which EMG-related provisions exist. The CFR and the ECHR are both discussed with a special focus on their extraterritorial applicability. The existence of extraterritorial jurisdiction or applicability is one of the main questions when it comes to ETOs in a legal and regulatory sense and in the context of EMG especially, as the strategies to shift responsibility for action to third countries are “specifically intended to eclipse any jurisdictional links to the sponsoring state” (Gammeltoft-Hansen, 2022, p.156). Besides this legal and regulatory perspective on ETOs, which for this thesis is termed “jurisdictional ETOs”, there are other models that aim to expand ETOs beyond traditional notions of authority and control and the notion of “universal human rights” that expands beyond territorial and jurisdictional borders, which is considered in this chapter's conclusion. Finally, one main principle of international law, the principle of non-refoulement, is discussed.

### **II.1 The EU legal acquis**

#### **II.1.1. The Treaties**

When it comes to the EU's treaty framework, one can find multiple articles that express the EU's commitment to human rights, above all Art. 2 TEU declares the respect for human rights to be one of the EU's founding values. Art. 3 (5) TEU and Art.21 (1) TEU address the role of human rights in the context of EU external action. Art. 3 (5) TEU entails a positive obligation to advance the respect for human rights in the world, and sets out the role of the EU as a global normative power (Pech & Grogan, 2020). Art. 21 (1) TEU confirms the EU's commitment to human rights, as “principles that inspired its own creation” and the EU's commitment to principles of international law. This recognition of external human rights norms is also addressed in Art. 6 (2,3) TEU which lays down that the EU shall accede to the ECHR and that the rights guaranteed in the ECHR should also be general principles of EU law. Due to this provision, section 2 will look with more detail at the ECHR as the importance of the Convention for the EU is hereby established.

The TFEU entails a great number of provisions that are of importance for the formal assessment of the EU's EMG, as it sets out the foundation for international agreements (Art. 216 TFEU), policies on border checks, asylum and immigration (Ch. 2 TFEU), and on the EU's external action in general (Title I TFEU). One additional provision that is of interest for the assessment of the conformity of EMG with Union law is Art.7 TEU, which entails the principle of consistency that shall be established between the EU's policies and activities.

## **II.1.2 The Charter of Fundamental Rights of the European Union**

The CFR became legally binding with the 2009 Lisbon Treaty (European Commission, n.d.b) and is made up of 54 articles addressing fundamental rights and freedoms. Important for determining the extent to which the fundamental rights laid down in the Charter establish obligations for the EU in its external action, are the rules and the scope of application of the CFR. Where international conventions include a jurisdiction clause for its state actors, the Charter defines its “scope” in Art.51, which states that the CFR is “addressed to the institutions and bodies of the Union [...] and to the Member States only when they are implementing Union law”. Due to the wording of this article in combination with the case law of the Court of Justice of the European Union (CJEU), Moreno-Lax and Costello (2014) argue that the extraterritorial applicability of the CFR is a question of whether a certain action falls within the scope of EU competence and EU law. They assert that EU fundamental rights obligations from the CFR as well as from the treaties always apply when the EU acts directly, or indirectly via a member state, stating that “there cannot be ‘legal black holes’ where the EU acts, but fundamental rights are not applicable” (Moreno-Lax & Costello, 2014, p.1682). This interpretation would mean for EMG that all agreements etc. concluded by the EU would indeed fall within the scope of applicability of the CFR, as well as EU agents acting extraterritorially, while the executive action of third countries following the conclusion of such agreement would not fall under EU law and in this line of thought would not be subject to ETO’s emerging from the CFR.

General rights such as human dignity (Art.1), the right to life (Art.2) and the rights to the integrity of the person (Art.3), the prohibition of torture and inhuman or degrading treatment or punishment (Art.4) are significant in the context of cooperation between the EU and third countries. Special to the area of migration and asylum is the right to asylum which is enshrined in Art. 18 and Art. 19 (2), which incorporates the principle of non-refoulement into the Charter.

## **II.2 The European Convention on Human Rights**

As determined in section II.1.1, is the future accession of the EU to the ECHR already enshrined in the treaties and it is stated that the rights emerging from the Convention should already be considered basic principles of EU law. While the European Court of Human Rights (ECtHR) only holds indirect power over the EU via its member states, as only after the accession it can directly assess EU human rights violations, this thesis will consider the ECHR due to the role given to it by the treaties and via the obligations of the member states.

The ECHR includes a clear reference to its jurisdiction in Art. 1, stating: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention”. There are a variety of approaches, some applied by scholars, others found in case law, discussing the extraterritorial jurisdiction of the ECHR. Approaches that expand beyond the territorial scope are often able to grasp extraterritorial executive action of

a given state but are powerless when it comes to the mechanisms of EMG. This is the case, as this kind of control is specifically designed to move executive action and responsibility to the third state authorities (Gammeltoft-Hansen, 2022). Therefore, scholars have extensively worked on an expansion of “jurisdiction” for the sake of grasping exactly these situations. This study takes a more detailed look at one of these models, the “functional jurisdiction” model by Moreno-Lax which aims at expanding the ETOs of the ECHR to complex cases of EMG.

Moreno-Lax's (2020b) complex approach of functional jurisdiction is based on the understanding that jurisdiction is inseparably related to any exercise of “public powers” in the sense of establishing “situational control” (Moreno-Lax, 2020b, p.185). As it is the case for classic territorial jurisdiction, the direct contact with the rights-holders affected does thereby not determine the existence of a jurisdictional link, which makes it applicable for situations in which the third country authorities are the active parties for action. Three elements taken together then determine the exercise of public powers and thereby “functional jurisdiction”. The first element is the “impact element” which is fulfilled when there is a “causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory” (Moreno-Lax, 2020b, p.219). Then follows the second element, the “Decisive influence element”, which is given if an action is carried out by a third actor, but the state in question has so much influence over this actor that one simply can assume that it can influence its actions, e.g. in the case of a financial dependency. The last factor to establish functional jurisdiction is the “Operative Involvement Element”, which means that the state is to some extent still taking part in the operation/action, e.g. through coordination or assistance (Moreno-Lax, 2020b).

Many of the rights and freedoms established by the ECHR are similar to the ones in the CFR. The only provisions that add to the CFR as far as what could be of special relevance to the analysis are Art. 5, which in more detail outlines the conditions for lawful detainment and Art. 13, which establishes the right to an effective remedy for people whose rights from the ECHR were violated.

### **II.3 International Law and the Principle of Non-Refoulement**

This study considers the principle of non-refoulement not only because of the treaties reference to the respect for international law (Art. 21 (1) TEU), but also because it is specifically acknowledged in the treaties (Art. 78 (1) TFEU), the CFR (Art. 19 (2)), and implicitly also in the ECHR (Art.3). The principle was developed with, and is the core principle of, the 1951 UN Refugee Convention and affirms that

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on

account of his race, religion, nationality, membership of a particular social group or political opinion. (Art. 33 (1)).

In the CRF the “refugee” is then replaced by “no one” (Art. 19 (2) CFR) which broadens the scope of the principle.

The principle is often discussed in relation to its extraterritorial applicability (Gammeltoft-Hansen, 2014) as there are external border control practices that challenge the principle, especially interceptions at sea with the return to a third country or pushback operations (Goldner Lang & Nagy, 2021). The extraterritorial application of the principle in cases in which these actions are carried out by an actor's own agents has been established in the ECtHR case *Hirsi Jamaa and others vs. Italy* (2012) when it was decided that Italian authorities were in violation of the principle when they intercepted a migrant vessel in the Mediterranean and returned the migrants to Tripoli, Libya. In cases of EMG, the assessment of the violation of the principle of non-refoulement is more complicated as another state actor is involved (Gammeltoft-Hansen, 2014), which takes at least part of the executive responsibility e.g. when not the Italian Coastguard is leading the operations but rather the LCG. To such a situation applies Moreno-Lax (2020b) her model of functional jurisdiction and concludes that even in cases of EMG, jurisdiction can be established.

## **II.4 Conclusion**

When managing migration via cooperation with third countries, the EU has several human rights obligations, some establishing legal accountability while others are drawn from a broader perspective on human rights. That the EU is generally committed to the protection of human rights and the respect of international law can be assumed based on the treaties and that the EU, with the CFR, has adopted its own human rights framework while simultaneously committing to the ECHR.

As this study focuses on EMG, the extraterritorial applicability of the CFR and the ECHR play a distinct role in determining whether the EU can be held legally responsible for human rights violations that are related to its EMG. When it comes to the CFR, based on Moreno-Lax and Costello (2014), it can be concluded that the EU must respect the CFR when concluding specific agreements or when its agents act extraterritorially. It becomes more difficult regarding the consequences of EMG, which violate human rights but that are not officially provided for in the written agreements and that are a direct consequence of autonomous executive action of third-country authorities, here the general legal accountability cannot be established.

When it comes to the ECHR, one extraterritorial jurisdiction model has been discussed and it can be concluded that by using this model, legal accountability for extraterritorial action, even if the

executive power lies with third-country authorities, can in some cases be established. As it depends on a complex analysis of the case in question whether certain jurisdictional links can be established between the EU and the human rights violations, for this study, that does not focus on just one specific situation, it should be noted that there is the possibility to establish extraterritorial legal accountability for at least some elements of the cooperations.

The ETOs that the EU legally has, can be expanded by considering the notion of the universality of human rights and a teleological perspective on human rights. The universality of human rights is not only at the core of the UN Universal Declaration of Human Rights but is also mentioned in the EU's legal framework and HRBA for external action. Going back to their basic foundation, one can see the moral value and intention behind human rights ergo that all people should be free, equal and protected from inhumane treatment and discrimination (UN, n.d.). Just as “universal” then applies to all people, it can equally apply to the reach of human rights, which would create human rights obligations whenever and wherever actors affect human beings (Müller, 2022).

It is with these ideas that the EU obligations can be expanded to a broader dimension, which will be called the “universal ETO dimension”. In this dimension, the EU obligation can be triggered to respect and protect human rights when cooperating extraterritorially with third countries in the area of migration, which means e.g. taking into account the human rights standards in the partner country to assess how human rights protection can be ensured e.g. by including safeguards.

### **III. The EU's Extraterritorial Migration Governance**

To answer the second sub-question, the “overarching framework of EU external migration policy” (European Commission, 2011, p.4), the GAMM, which is one main policy documents guiding the EU's cooperations with third countries in the field of migration, is interpreted. After discussing how EMG is intended for in the overall framework of EU external migration policy, the EU-Turkey Statement and the EU-Libya Cooperation are analyzed.

The focus of the analysis is on human rights and elements of EMG such as border control tasks, law enforcement, and capacity-building, that can be related to the aim of retaining migrants in a certain country or region. It should be noted that the existence of these elements does not automatically mean a non-conformity of this cooperation with human rights obligations, but primarily establishes the use of EMG elements in EU external migration policy.

#### **III.1 The Global Approach to Migration and Mobility (GAMM)**

While there always has been an external dimension to migration policy it was with increasing globalization and the 2015 refugee crisis that a reevaluation of this policy area took place and new policy instruments, approaches, and practices were considered (Koenig, 2017).

One main document governing the area of external migration policy and thereby the cooperation with third countries in the field of migration is the GAMM, outlining the key objectives, priority areas, and instruments for partnerships with third countries. The overall objective of the GAMM is to create mutually beneficial partnerships to manage migration and mobility in a more efficient, comprehensive manner and enable stronger horizontal alignment between policy areas and between the external and internal dimensions of migration policy (European Commission, 2011, p.3, p.5). The GAMM contains four pillars/themes: legal migration and mobility (1), irregular migration and trafficking in human beings (2), international protection and asylum policy (3) and maximizing the development impact of migration and mobility (4). The GAMM also has the aim to be migrant-centered and frames the human rights of migrants and the respect for the CFR as a cross-cutting dimension (European Commission, 2011, p.6). While they are not directly defined as extraterritorial migration control instruments, approaches and instruments are mentioned in the GAMM that can guide and enable EMG. Mentioned are the need to “improve the efficiency of its external borders on the basis of common responsibility, solidarity and greater practical cooperation” (European Commission, 2011, p.5) and “operational cooperation geared towards capacity-building with its partner countries” (European Commission, 2011, p.5). Extraterritorial cooperation is justified by the need to fight human trafficking and irregular migration as part of a “broad understanding of security” (European Commission, 2011, p.15).

#### **III.2 The EU-Turkey Statement**



The EU-Turkey Statement, also known as EU-Turkey Deal, is a statement about an agreement between the European Council (EUCO) and Turkey that was adopted in March 2016 to reduce irregular migration. Among the main measures that were agreed on were a return and readmission mechanism as Turkey accepted the return of migrants not in need of international protection that were crossing from Turkey to Greece and all migrants intercepted in Turkish waters and in turn was promised that for each of those returned migrants from the Greek islands one (Syrian) migrant would be resettled to the EU. In terms of extraterritorial migration control, it was agreed that “Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU” (European Council, 2016, para.7) which contains the objective to keep migrants from even crossing the Mediterranean to the Greek Islands, as it is also inherent in the return mechanism. Interestingly enough, the Statement is framed within a migrant-centered approach, as all the above measures are justified as being unavoidable to “offer migrants an alternative to putting their lives at risk” (European Council, 2016, para.4), and to “end human suffering” (European Council, 2016, para.5). While the Statement claims to be in line with all relevant international standards in terms of migrant protection and to fully respect the principle of non-refoulement (European Council, 2016, para.5), the next chapter analyzes how the human rights of migrants are affected by this cooperation. Finally it can be said that the member state involvement with regards to this statement is very high, not only because it is a Statement of the EUCO, but especially so as the CJEU has decided that this Statement was very essentially an agreement between Turkey and the member states (Rijpma, 2017).

### **III.3 The EU-Libya Cooperation**

The EU cooperation with Libya is more multifaceted than the cooperation with Turkey, as it can hardly be broken down based on one key document, which makes it less transparent and comprehensible. The motivation on the other hand is the same, as both countries are important transit countries, Turkey being the core country on the Eastern Mediterranean Route and Libya on the Central Mediterranean Route. As for the close EU cooperation with Libya as part of the EU's external migration management, this cooperation was intensified with the “Malta Declaration” of the EUCO issued in February 2017, which at its core did two things: Endorse the existing Italian cooperation with Libya and lay down additional objectives and actions that were to be part of a direct EU cooperation with the North African country. The Italian cooperation is defined by a Memorandum of Understanding (MoU) that established a partnership that has as its aim to reduce irregular migration to Italy by securitizing Libya's borders and preventing departures with Italy's money and Libya's operational action (Palm, 2017), which is a case of extraterritorial migration control. The MoU has been criticized for its lack of reference to human rights frameworks and international protection principles (Palm, 2017). This shortcoming of the MoU is not paralleled in the Malta Declaration, where the determination to respect human rights, international law and European values is stated in the first clause (European Council, 2017, 1).

Interesting is the recognition of the unstableness of Libya on the one hand, but the justification of the cooperation on the other, as capacity-building is argued to be the best way to stabilize the country (European Council, 2017, 5). At its core, does the Declaration define support for the LCG, enhanced operational action and adequate reception capacities in Libya as priorities. Other related elements that followed the Declaration are a joint migration task force with the African Union (AU) and the UN from November 2017 that aims at protecting migrants and especially refugees from smugglers along the Libyan routes and a set of EUCO Conclusions on Migration from 28 June 2018, which again reaffirms the need to stop smugglers, support Italy in their cooperations, increase support for the Libyan Coastguard but also to ensure humane reception conditions (European Council, n.d.).

One substantial EU CSDP mission concerning Libya was Operation EUNAVFOR MED Sophia, which was launched in 2015 with the mandate to

identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers, to contribute to wider EU efforts to disrupt the business model of human smuggling [...] and prevent the further loss of life at sea (Operation Sophia, n.d).

In June 2016 the mandate was expanded by the Council with the addition of two tasks, one of them being the capacity-building and training of the LCG and navy with the main objective being the prevention of human trafficking (Council of the European Union, 2016).

Operation Sophia was replaced in March 2020 by a new CSDP mission, Operation EUNAVFOR MED IRINI, with a mandate until March 2023. The main purpose of this new mission is the effective implementation of the UN arms embargo, following the Libyan peace process (Operation Irini, n.d.). As a secondary task, the mission contributes to the capacity-building, information sharing and training of the LCG to prevent human trafficking (Council of the European Union, 2020, 4). The mission is under the scrutiny of the member states via the Political and Security Committee (PSC) and the High Representative Josep Borrell (Operation Irini, n.d.), which yet again shows the dominant involvement of the member states concerning the cooperations.

Another substantial EU mission in Libya is the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya) which was adopted with Decision 2013/233/CFSP of the Council of the European Union. The mandate of this civilian mission is to assist Libya with its security and border management via capacity-building, training and long-term development of an integrated border management concept, all in close cooperation with Libyan authorities (Council of the European Union, 2013).

In summary, the EU's cooperation with Libya aims at reducing irregular migration, tackling migrant smugglers and supporting migrants and refugees in Libya, therefore training the coast guards and improving border management. This is done with great financial support, as the EU has devoted 700 million € to Libya since 2015 (European Council, n.d.), mainly under the EU Emergency Trust Fund for Africa in Libya.

The objective behind EMG is not explicitly mentioned in the mandate e.g. is it not stated that Libya is encouraged to keep migrants from leaving their country or to intercept vessels heading to Europe in return for the EU support. Instead, the cooperation is largely framed in the context of human trafficking, which is often the case for cooperations that in practice are part of EMG (Frelick et al., 2016). That the EU-Libya Cooperation can be considered part of the EU's EMG, is therefore not directly visible when looking at the wording of the underlying formal documents, but the included measures nevertheless effectively amount to an extraterritorial control of migration.

### **III.4 Conclusion**

The extent to which the EU is pursuing EMG as part of its migration policy is difficult to grasp in its entirety, as there is no official “extraterritorialization strategy”. Instead, the elements that in combination can characterize EMG, such as capacity-building in third countries as a strategy to reduce irregular migration, are included in the GAMM. The two cooperations display elements of extraterritorial migration control, however, it becomes apparent that the cooperations are framed differently. As for the EU-Turkey Statement, it becomes clear that the Statement aims to keep migrants from entering the EU, or being returned to Turkey if successfully doing so. The EMG element is therefore easily detected in this cooperation. When it comes to the EU-Libya Cooperation the EMG aim of keeping migrants from entering the EU is not directly stated, instead it is the broad array of migration and border control measures, an essential part of the cooperation, that is characteristic of EMG. At the same time are both cooperations largely framed in an anti-human trafficking or migrant-centered narrative and the respect for human rights and international law is also stressed. How these cooperations are actually affecting human rights, is discussed in the following chapter.

## **IV. Human Rights in the EU's Extraterritorial Migration Governance**

To grasp which human rights are affected by the EU's EMG, both a formal and practical dimension is considered. In the formal dimension, it is assessed which human rights are affected by the concept of EMG and the written content of the agreements, while the practical dimension considers which human rights of migrants and refugees are affected in the practical context of EU cooperations.

As the main objective of this chapter is to analyze which rights are affected by the EU's EMG, and not to lay down a full assessment of the human rights situations in the designated partner countries, the first section conducts the formal assessment with a focus on Turkey, while the second section only assesses the human rights in the context of the EU-Libya Cooperation.

This structure was chosen, as it was found in chapter III, that the EU-Turkey Cooperation is in its wording more clear when it comes to EMG and that there is one key document for assessment, which makes it a good example for the first part of the assessment. The decision that Turkey will not be considered in section IV.2 was made with the overall objective of this chapter in mind, as the analysis would most probably not add any additional affected rights to the overall conclusion, that are not also affected by the EU-Libya Cooperation.

The last section of this chapter concludes whether EMG as a concept is generally incompatible with ETOs or if it is only the practical dimension of the EU cooperations that is related to human rights violations, or both.

### **IV.1 Formal Human Rights Compatibility of EU Extraterritorial Migration Governance**

Which human rights are affected by extraterritorial migration controls is discussed by several authors, e.g. Moreno-Lax (2020a), Brouwer (2010), and Frelick et al. (2016). As established before, extraterritorial migration controls have an objective to prevent migrants from entering destination countries/leaving transit countries (Frelick et al., 2016), which, as discussed in section III.2 is also one aim of the EU-Turkey Statement. This general goal is impacting the right to liberty and the right to leave any country, including one's own. The right to liberty is protected under Art.6 CFR and Art.5 ECHR, while the right to leave any country including one's own is contained in Art.12 of the International Covenant on Civil and Political Rights (ICCPR) and Art.2 of Protocol 4 ECHR. As Moreno-Lax (2020a) notes, this right has a universal scope and is not unique to persons under international protection. At the same time both Moreno-Lax (2020a) and Brouwer (2010) note in their discussion, that the right is not absolute and can be restricted under certain circumstances which may include grounds of security and public order, but they also mention that these limitations should be interpreted restrictively and that they must be based on legal grounds, such as necessity and proportionality. While it would go beyond the scope of this thesis to discuss if there are sufficient grounds in the case of the EU-Turkey Cooperation to

possibly account for a restriction of this particular right, the mere possibility that the cooperation is unlawfully restricting the right is noted. That a restriction of this right might be unlawful in the case of the EU-Turkey Cooperation as well as in the EU-Libya Cooperation is supported by the fact that legitimate restrictions should remain “consistent with the other rights recognized in the [...] covenant” (Art. 12(3) ICCPR, Art. 2(3) Protocol 4 ECHR). This condition entails that if the restriction on the right to leave exposes the right holders to any other possible violations of their rights, the restriction is unlawful and the right violated (for further discussion see Moreno-Lax, 2020a). While there is a more in-depth discussion of which rights are specifically affected after the migrants are held in the third country of cooperation in the next section, the question can be asked whether there are rights affected that are protected by the ICCPR and the ECHR as soon as migrants are forced to stay in a country that is knowable and generally restricting basic human and especially basic civil and political rights. This assumed, could the right to leave any country not be restricted in cooperations with Turkey or Libya, which are both categorized as “not free” in the Freedom House Index (Freedom House, n.d.).

Besides the right to leave any country including one’s own, there are additional rights that are exposed to be violated by the outline of extraterritorial migration controls if certain safeguards are not in place. Among these rights are the right to an effective remedy (Art.13 ECHR), the right to asylum (Art.18 CFR), and closely connected to it, the principle of non-refoulement. The EU-Turkey Statement explicitly mentions the right to asylum and the principle of non-refoulement (European Council, 2016, para.5), but has been criticized for violating them (Spijkerboer, 2018). Following Poon’s (2016) argument, the Statement is inconsistent with the principle of non-refoulement because of three reasons, them being that 1) Turkey is presumed as a safe-third country where refugees can apply for international protection, which is not the case, 2) Turkey is not an EU country and where some procedural safeguards are not applicable and 3) because Turkey has a poor record of Asylum procedures. While these reasons might not be automatically inherent to the concept of EMG they let one point out that when establishing such agreements, the formal recognition of certain rights in the agreements might fall short when from the beginning it is known that certain rights will not or can not be protected in the partner country.

When it comes to the formal compatibility of EMG with human rights, it can be concluded that while the concept does not violate human rights per se, the right to leave any country including its own conflicts with the general idea of EMG. In addition to that, several other rights are also affected easily e.g. if not explicitly protected and/or when it is clear that in this specific partnership, the respect for the rights can not be ensured.

## **IV.2 The practical dimension of EU cooperations**

This section analyzes what impact the cooperation of the EU may have on the rights of TCNs in ways that can not be detected just by an examination of the formal documents.

To assess the extent to which human rights are affected by the cooperation, one has to consider the situation of migrants in Libya. In 2017, Amnesty International published a report on the situation of migrants and refugees in Libya, the human rights violations committed and the EU's responsibility for these violations. The report revealed that “refugees and migrants are routinely exposed to human rights violations committed by Libyan officials and security forces and abuses at the hands of armed groups and criminal gangs” (Amnesty International, 2017, p.6). The report then also describes that, around 20 000 migrants were held in official detention centers under inhumane conditions and how this phenomenon of mass, arbitrary and long-term detention is becoming Libya's primary migration management system. In these detention centers, there are accounts of ill-treatment, such as the deprivation of food and water, torture, sexual violence, and murder (Amnesty International, 2017). Migrants have no access to legal remedies, and asylum seekers have no opportunity to apply for asylum, as Libya has no legal system to provide asylum and so far has refused to sign the 1951 Refugee Convention (Amnesty International, 2017).

Another report that describes the situation almost identically states that “migrants and refugees suffer unimaginable horrors during their transit through and stay in Libya.” (UNSMIL & OHCHR, 2018, p.4), and also describes that human rights violations not only occur in the detention centers or on Libyan soil but also during search and rescue operations in Libyan and international waters, with the UNSMIL documenting “the use of firearms, physical violence and threatening or racist language” (UNSMIL & OHCHR, 2018, p.35) and behavior by the Libyan Coast Guard (LCG) that risks boats tipping over and causes panic among the migrants. The Amnesty International Report also shows that the LCG is not only responsible for human rights violations but that LCG officials are in instances even cooperating with smuggling networks (Amnesty International, 2017).

The human rights of migrants and refugees that are systematically being violated in Libya, that are not only universal human rights but are also written down in the CFR, ECHR and international conventions, are among others the right to life, the right to liberty and security, the right to asylum, the prohibition of torture and inhumane or degrading treatment or punishment, prohibition of slavery and forced labor and the right to an effective remedy. These rights are not violated because of a lack of control of the Libyan authorities, but at the hands of the Libyan authorities directly sponsored by the European Union to extraterritorially control Europe's borders and even return migrants to Libya (Palm, 2020; Sereke & Mekonnen, 2019).

### **IV.3 Responsibility and Legitimacy in EU Extraterritorial Migration Governance**

After describing the formal compatibility of EMG with human rights and after discussing the human rights violations against migrants headed for Europe in Libya, it is discussed how these

human rights violations are morally and legally the responsibility of the EU and what implications the findings of both sections have for the general legitimacy of EMG.

The legal responsibility the EU has for human rights violations in Libya is part of a complex discussion. The main difficulty of establishing legal accountability is inherent in one of the main aims of EMG, which is to transfer operational responsibility to foreign authorities to avoid accountability (Gammeltoft-Hansen, 2022.). This can be seen when the EU is sponsoring the LCG to return migrants to Libya instead of carrying it out at the hands of their authorities, which, as it was decided in the *Hirsi* case before the ECtHR (2012), would certainly establish jurisdiction and legal responsibility for the push-backs and be a violation of the principle of non-refoulement. Nevertheless, there are models of jurisdiction that aim to expand the scope of legal responsibility for cases of extraterritorial migration control, e.g. the model of functional jurisdiction described in section II.2. While it would need a separate study to analyze in detail to what extent this model can be applied to the Libya case described above, the functional jurisdiction approach has already been applied to one dimension of the Libya cooperation, which is the return of migrants to Libya by the LCG. Moreno-Lax (2020b) analyzed the situation with a focus on Italy and found that functional jurisdiction could be established. While so far there are no precedents in case law that expand the scope of jurisdiction to hold states responsible for EMG, there is one case currently pending before the ECtHR which could change that. The case *S.S. and others vs Italy* is discussing whether Italy can be held responsible for violating the principle of non-refoulement in the case of Libya despite the lack of physical involvement in the operations of the LCG (de Leo, 2020).

While this legal dimension is complex, there is also the “universal ETO dimension” that is significant. From this perspective, it has to be noted that human rights are being violated for one in the agreements that the EU is formally entering into (section IV.1) and that other, even more grave human rights violations on migrants and refugees are taking place in a country with which the EU cooperates especially in matters of migration, and in which it, as a consequence and inherent in the aim of the cooperation, it leaves the migrants and asylum seekers without protection. In the Amnesty International (2017) report it is stated that:

EU and Italian officials cannot plausibly claim to be unaware of the grave violations being committed by some of the detention officials and LCG agents with whom they are so assiduously co-operating. Nor can they credibly claim to have insisted on key rights protection mechanisms and guarantees from their Libyan counterparts, as, in reality, they have not done so. They are, as a result, complicit in these abuses and in breach of their own human rights obligations. (p.7)

Besides condemning the EU cooperation with Libya, there is also one interesting argument here that can be objectively discussed, which is the question of protection mechanisms and

safeguards. While there might not be a possibility for direct oversight of every action, in cases where the EU is cooperating with a partner that has been known for human rights violations, it is not enough to mention in the first sentences of an agreement that human rights are to be respected. Instead, the creation of protection mechanisms or safeguards to ensure adherence should be firmly included in the cooperation.

#### **IV.4 Conclusions**

To conclude on the legitimacy of the use of extraterritorial migration controls as part of a bigger external migration policy, it can be said that while the concept of EMG is not automatically in conflict with human rights obligations, even though some are easily violated depending on the specific formal and situational context of cooperation, that the two EU cooperations examined here, are not in line with the EU's human rights obligations, at least when assessed within a moral dimension (see section II.4). While the legal dimension is a lot more complex, from a moral point of view the grave human rights violations, especially in Libya can not be brought in line with the moral human rights obligations that the EU has, also considering its role as a normative power in the international scene. The rights of TCNs are directly impacted by the use of EMG, the formal establishment of the EU-Turkey Statement and lastly by the EU-Libya Cooperation, as the EU, while not directly being responsible for the human rights violations, does cooperate with the responsible authorities while having the knowledge of past human rights violations and without establishing effective protection mechanisms as part of the cooperation.



## **V. Extraterritorial Migration Governance in the New Pact on Migration and Asylum**

This chapter is set out to answer the last sub-question by using the theoretical lens of the human rights-based approach to migration and the insights from the preceding chapters. The Commission proposed the New Pact 2020 and in the press release, the latter is described as a “fresh start on migration” (European Commission, 2020a) after the issues in the field in the past years and the conclusion that “the current system no longer works” (European Commission, 2020a, para.3). How this understanding also encompasses a new start concerning EMG will be part of the answer to this chapter's question.

While the Pact does not explicitly mention EMG, nor related concepts such as external migration control, to define if and how the practice nevertheless is considered in the Pact, two sections are closely related to EMG. The two sections that will be discussed are the section five “Reinforcing the fight against migrant smuggling” as we have seen that EMG is often framed e.g. in the GAMM but also in the agreements themselves along with an anti-smuggling objective, and section six “working with our international partners” as third-country cooperation is the central defining feature of EMG.

Instead of using their opportunity to put forward a substantial 5-year program outlining a new direction for migration and asylum policy, that would then be adopted in strategic guidelines by the EUCO (Art.68 TFEU), the New Pact was issued as a simple Communication (De Bruyker, 2020). The New Pact can therefore be described as programmatic document or political manifesto. This loose foundation makes the effectiveness of the New Pact and its proposals at least questionable, also because all other actors have to be brought on board to translate the Pact into practice. Considering the dominant position that the member states, mainly via the EUCO, have with regards to EMG, this Communication, which is not even addressed to the EUCO, seems to have limited substantial influence on EMG. All of this taken into account this New Pact is the main agenda-setting document in the area of migration and asylum and therefore relevant for EU policy, even if more so from a political and not necessarily a substantial legislative perspective.

### **V.1 Security and Counter Migrant-smuggling action in the New Pact**

While the new 2021-2025 EU action plan against migrant smuggling outlines the details of EU action with regard to this issue, the main objectives and general cornerstones of this EU action plan are also outlined in the New Pact. Generally, does this section of the New Pact highlight the need for enhanced inter-agency cooperation, address the rescue at sea, and how to detain the drivers of smuggling e.g. by strengthening the Employers Sanctions Directive. Additionally, there is a big focus on cooperation with third countries, as combatting migrant smuggling is

highlighted as a “common challenge“ (European Commission, 2020, p.16) that can only be addressed via international cooperation and for which “effective border management“ (European Commission, 2020, p.16) is needed. Targeted counter-migrant smuggling partnerships are proposed as part of broader partnerships, and will include capacity-building e.g. in law enforcement and operational capacity. As known from the analysis conducted above, it is this combination of anti-smuggling objectives, capacity-building, and general support which is likely to include EMG, e.g. the EU-Libya Cooperation is shaped in an anti-smuggling context (see section III.3).

Existing Common Security and Defense Policy operations should “continue making an important contribution“(European Commission, 2020, p.16), and here the European Union Border Assistance Mission to Libya and the Operation EUNAVFOR MED IRINI are specifically mentioned for their help in disrupting smuggling networks. This section (European Commission, 2020, p.16) constitutes one of the few specific references to elements of the EU-Libya cooperation in the whole Pact and besides all the critical points worked out in the sections above, are they only mentioned in this positive manner and with a “go on“ connotation.

When relating this chapter to the different conceptual approaches from section I.2, a “migration management approach“ can be identified instead of a human rights-based or migrant-based approach to migration. In its wording, the terms “migration management“ and “border management“ and the very frequent use of the terms “effective“ and “efficient“ (European Commission, 2020, p.16) are noticeable.

## **V.2 Third-country cooperation in the New Pact**

The section of the Pact that is concerned with the cooperation between the EU and international partners is comparatively longer than the section on the fight against migrant smuggling and is divided into six subsections that mirror the diverse interests the EU has when it comes to third-country cooperation in the field of migration. The stance taken in the introductory section is, that migration policies that work well and that are based on partnership are in the interest of all parties affected, including refugees and migrants. While EMG is again not explicitly mentioned, as third-country cooperations are the necessary factor to establish them, what is set out for them, especially with regards to the management of irregular migration, is also the foundation on which EMG is being based.

As the New Pact is supposed to be a “fresh start“ (European Commission, 2020, p.1), it is interesting to see the main new elements being proposed in the area of partnerships and with the objective of regulation of irregular migration (as this is also one objective of EMG). What is actually new, or which things should be changed, is not explicitly highlighted in the Pact. In the introductory section it is only mentioned that “under this New Pact, engagement with partner countries will be stepped up across all areas of cooperation.” (European Commission, 2020,

p.17), and that migration should be a core issue in all comprehensive partnerships, which both seem relatively unspecific and is not elaborated much further. Other things that are highlighted as being essential to international partnerships in the area of migration are, from the content and wording, actually quite similar to what is already laid down in the GAMM (see section III.1). Among other similarities do both documents highlight the need for “comprehensive, balanced and tailor-made partnerships” (European Commission, 2020, p.17; European Commission, 2011 P.5) and the need for the “mutually beneficial“ (European Commission, 2020, p.17; European Commission, 2011, p. 5) character of the cooperations.

With regards to existing cooperations, there is more of a “keep it up“- narrative visible rather than new proposals. This is the case as existing cooperations are only framed positively (e.g. European Commission, 2020, p.18 & 19) and there is not one reference to possible problems or conflicts with neither existing cooperations nor potential future ones, concerning human rights. As for the cases of cooperation examined in this study, the New Pact mentions the “positive example of the AU-EU-UN Task Force on Libya“ (European Commission, 2020, p.18) and frames the EU-Turkey Statement as “deeper engagement and dialogue with Turkey, including helping its efforts to host around 4 million refugees.“ (European Commission, 2020, p.18). While it is certainly legitimate to include positive elements of cooperations and take them as a starting point for future ones, e.g. by stating that “the EU should build on the important progress made at the regional level“ (European Commission, 2020, p.18) and mentioning “fruitful cooperations“ (European Commission, 2020, p.20), it seems at least one-sided to not address possible shortcomings of cooperations as well, that, as this study has shown so far, exist.

Human rights, or more generally the protection of individual migrants and refugees is considered in the New Pact, but only in a very general sense. The Pact mentions that “Working with its partners also helps the EU to fulfill its obligations to provide protection to those in need“ (European Commission, 2020, p.17) and that the main issue that has to be addressed is the “loss of life, first and foremost“ (European Commission, 2020, p.17). Section 6.2 on “Protecting those in need and supporting host countries“ states that “the EU's work to address emergency and humanitarian needs is based on principles of humanity, impartiality, neutrality and independence“ (European Commission, 2020, p.19). How exactly the protection of migrants and refugees should be ensured and how the use of the above-stated principles translates into practice is not mentioned, nor is there any specific reference to the fundamental rights of migrants. That the section on protecting those in need is by far the shortest of them all, therefore, seems emblematic of the lack of detail given to this issue.

As is the case with the specific cooperations with third countries, it is also with respect to human rights that there is a tendency to only consider positive examples and ignore possible shortcomings or critiques. This finding is based on section 6.2, which mentions that “The EU can build on a track record of cooperation with a wide range of partners in delivering this support.“ (European Commission, 2020, p.19). The example used is the Emergency Transit

Mechanisms to resettle people from Libya to Rwanda and Niger. This particular use of the emergency transit mechanism has been criticized, among other issues, for only actually helping a comparatively small number of people to escape the Libyan detention camps, especially because the EU is at the same time funding the LCG to return people to Libya, of which a lot more people are affected than are helped with through the emergency transit mechanism (Hayden, 2020). This argument is of special importance here, as the other side of this EU action and the reason for why the people have to be evacuated is not spoken of, which again shows how the New Pact paints a one-sided picture. This is then finally highlighted by the following sentence: “EU cooperation with partner countries in the area of migration governance will continue to ensure the protection of the rights of migrants and refugees“ (European Commission, 2020, p.20). The use of “continue to ensure“ suggests that the protection of migrant rights is effectively working, and while this has been the stated goal of the EU (see chapters II and III), there are shortcomings and room for improvement has been shown in chapter IV.

### **V.3 Conclusion**

It can be concluded that the New Pact addresses EMG not explicitly, but only indirectly, by considering framework elements of the practice such as international partnerships including concrete cooperations that have been established in this study as part of the EU's EMG. That “safeguarding fundamental rights“ (European Commission, 2020, p.1) is a policy imperative and that the new EU migration system should be “fully grounded in European values and international law“ (European Commission, 2020, p.1) is stated in the introduction and similar references are also made in the explored sections 5 and 6, but the concrete vision as to how these rights will be ensured in practice is missing. Hence, there is also no particular section or chapter on fundamental rights and/or international law in the EU migration policy in the New Pact, while their importance is highlighted formally, it is not translated into the actual proposals. That the human rights dimension is not extensively considered in the New Pact can potentially be explained by the finding that there is no acknowledgment of past or current shortcomings or issues in the New Pact. The New Pact is additionally not innovative, shown here in the example of EMG, as proposed approaches are similar to the GAMM, shortcomings in European human rights protection are not addressed and instead, the focus is still on the prevention of irregular migration (Bendel, 2021; Lang & Nagy, 2021).

## **VI. Discussion and Conclusion**

The answer to the research question *to what extent does the New Pact on Migration and Asylum address the human rights of third-country nationals in the context of Extraterritorial Migration Governance?*, is threefold: (1) the New Pact does not explicitly address EMG, (2) the New Pact only limitedly addresses human rights and (3) the New Pact neglects the violations of the human rights of TCN's with regards to EMG. The combination of these findings leads to the further conclusion that the EU Commission has missed its self-proclaimed "fresh start to migration" with regards to EMG and human rights protection.

That EMG is not explicitly addressed in the Pact was expected, as other policy documents analyzed in preceding sections also avoided the explicit mentioning of this practice. Simultaneously, the analysis showed that EMG is used by the EU as part of its larger external migration policy and that the human rights of TCNs are violated in that context. It was further shown that this is not directly related to the conceptual nature of EMG, but rather to the formal outline and practice of EU cooperations, as seen in the limited acknowledgment of human rights, which is also mirrored in finding (2). This limitation is expressed in the observation, that beyond the repeated formal commitment to human rights standards, substantial safeguards for implementation are largely absent from cooperations. That substantial safeguards, such as human rights protection mechanisms, need to be included in the context of EMG, stems from the fact that the EU has ETOs and that human rights violations are easily triggered in EMG, especially if the partner country shows shortcomings in human rights protection standards.

Circling back to finding (1), the absence of acknowledgment of EMG in the EU policy documents makes a substantial development of an EMG strategy or protection mechanisms designed for EMG less probable, as a formal strategy can only follow if the concept is established before. A conclusion of this study is, therefore, that acknowledging EMG and its risks to human rights, is a necessary step toward aligning the EU's EMG with their ETOs. That the EU not openly acknowledges its EMG as such, can also be seen in finding (3), as the New Pact does not address the human rights violations relating to the cooperations and instead portrays elements of them as best practice examples. What human rights protection mechanisms, specifically designed for EMG, could look like, constitutes an interesting topic for subsequent research.

Finally, it can be concluded that the current EMG of the EU can not be aligned with the EU as a political institution that pledged itself to the protection of universal human rights, and, stemming from the main findings above, it should be further discussed how and to what extent the EU's ETOs and EMG can be aligned. That the EU's policies are currently conflicting with their ETOs, might be also due to the fact, that there is still no common understanding of what ETOs entail, no case law on EMG cases, and that jurisdictional limitations dominate most ETO discussions. While multiple models exist to expand ETOs, this study chose a basic teleological approach to

human rights to open up the perspective toward universal ETOs, which is a dimension that should be more intensely discussed in the future.

In this line of thought there is also a lack of consensus on the definition and delimitation of the phenomenon of externalization, which is why this study constructed its own definition. Further discussing the conceptual notion of EMG is therefore another step towards grasping this trend. The phenomenon of EMG is currently situated within a complex legal and regulatory grey area, which for some authors is an inherent motivation for EMG (see section II.2.1). Considering how human rights are currently affected by EMG, and how this can reflect on the EU as normative power efforts should be made to bring ETOs from the grey area into a clearer institutional and legal context. While the New Pact, as a political manifesto, not necessarily is the appropriate instrument for substantial legislative regulations on EMG, it could have, politically and symbolically, contributed to the acknowledgment and characterization of EMG and related ETOs.

As this thesis grasped a complex concept of European Governance, naturally some elements were not considered due to the thesis's limited scope. Future research could, besides the elements mentioned above, focus on the importance of the use of soft law for EMG, as this is another element to the question of how legal accountability can be established. As both cooperations considered were only broadly outlined, a more detailed analysis of both cooperations, especially of the EU-Libya Cooperation due to its complex nature, would be interesting, especially considering the interests behind the concrete policies and policy processes.

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