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Inequalities Unveiled in EU External Migration Policy

Exploring the Impact of Informalisation on Judicial Accountability

Chloé Brière, Université libre de Bruxelles

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Abstract

Over recent years, the EU has increasingly relied on informal agreements and soft-law mechanisms with third countries to manage migration, focusing on preventing migrants from reaching EU territory or facilitating their return if they fail to secure legal residence in the EU.

The measures in place present several challenges. They raise new barriers regarding the existence of connecting factors to the jurisdiction of an EU Member State and question the possible extraterritorial application of EU standards. They also blur the authorship of new informal arrangements, which contain language and have effects similar to formal readmission agreements, without being adopted in compliance with the EU treaties.

This paper examines how these measures dilute judicial accountability, making it harder for migrants to challenge decisions that affect their rights, and creating unequal access to remedies. Analysing the case law of the European Court of Human Rights, and the Court of Justice of the EU, it pinpoints the uncertainties and weaknesses of the current avenues for judicial accountability, highlighting notably the differences in judicial control between the Italy-Albania Protocol and the EU-Turkey deal. It argues in favour of stronger legal frameworks and judicial oversight and takes stock of the avenues discussed in literature to remedy such a lack of judicial accountability.

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Introduction

Governing migration has always been a long desire of States, and they have consistently sought to ensure that they can control who enters their territory and expel those who have not obtained a right to reside. The elaboration of legal norms and instruments partially diminished their margin of manoeuvre, imposing to treat persons on the move, as holders of rights, who are allowed to rely on these international standards, either to apply for international protection or to challenge their expulsion due to the risks of human rights violations. Access to justice and the possibility to seek a judicial review of decisions about their status and residence has always been central to ensuring the reality of these rights and their respect by national authorities.

Over the last ten years, the situation has been evolving at national, European, and international levels, with the emergence of new trends in migration policies that impact the capacity of migrants to secure the judicial control of their rights. The securitization of migration, or the perception of persons on the move as security threats, has allowed the development and deployment of new measures, seeking to block their entry into European territory, and/or facilitate their return to non-EU countries. The adoption in May 2024 of the New Pact on Migration and Asylum was for instance marked by the introduction of "seamless" procedures, under which screening, border asylum procedures and border return procedures can be deployed at the EU's external borders, allowing in specific cases for an expedited examination of an asylum request, and shorter timeframes to activate legal remedies (Tsourdi, 2024). Similarly, the proposal presented in March 2025 for a Regulation on returns (COM (2025) 101 final) contains provisions on remedies, but their substance is far from ambitious, allowing for instance the Member States to exclude the provision of legal assistance and representation in certain circumstances (Article 25 (5)), or the possibility of lodging an appeal that does have an automatic suspensive effect (Article 28). The proposal also links, for the first time, return and readmission, and it embeds the latter as part of the return process, with new provisions on cooperation with third countries with whom there is an agreement or arrangement in place. In this context, the possibility for third-country nationals to obtain access to legal remedies, and in particular the judicial review of decisions taken about their status, such as the non-recognition as asylum seekers, or as beneficiaries of one of the regimes of legal migration provided for in EU or national law; or the decision to return them to a third country, becomes increasingly difficult.

Such a difficulty is further amplified by the externalisation of the EU's migration policy, marked by increased cooperation with third countries in "retaining" nationals of other countries (preventing them from reaching the territory of EU Member States) or

accepting back those who did not obtain a right of residence in the EU. To achieve these objectives, the EU institutions and the Member States first relied on a combination of diplomatic tools (bilateral, regional and global dialogues, accompanied by broad political instruments, labelled as declarations, dialogues, processes) and legally binding agreements (such as readmission agreements signed by the EU that allow Member States to develop afterwards bilateral agreements) and/or unilateral regimes (such as the inclusion of a country on the list of countries benefiting under the EU Visa Code of a visa-liberalization regime). However, faced with the burdensome and politically sensitive procedure for the conclusion of formal agreements, and the preferences formulated by third countries, the EU institutions and the Member States tend to prefer the mobilisation of soft-law instruments - a move not limited to migration matters (Ott, 2020) - that are combined with the allocation of EU and national funding to third countries (*financialisation*), and/or the delegation of certain competences to EU agencies (*agentification*). The academic literature has been very much developed on this issue, with scholars stressing how this new approach can be labelled as a preference for informality (Cardwell and Dickson, 2023; Cassarino, 2018), or strategic informalisation (Moreno Lax, 2023). Concretely, it means that the EU develops its cooperation with third countries through the reliance on bilateral soft instruments that receive different names, and constitute "objects that are not legally defined", which are sometimes closely intertwined with similar soft mechanisms involving a variety of global actors (United Nations, regional organisations like the EU or the African Union, ad hoc regional platforms, tripartite configurations, etc.), participating in the evolution of global migration governance (Brière, 2025). The diversity and plethora of mechanisms can be best encapsulated by the length of more than 100 pages of the Commission's document summarising the "State of play of external cooperation in the field of migration policy" (Commission, 2024).

This approach and its increasing deployment have generated intense debates and analysis, with many commentators stressing how they undermine respect for the constitutional requirements enshrined in the EU treaties (Moreno-Law, 2023), as well as the rule of law, legal certainty and legal review (Ott, 2020). Building on the extensive existing literature, the present paper will focus on how the informalisation of the EU's cooperation with third countries impacts the access to justice to migrants and refugees, referring to their possibility to have access to a mechanism of judicial accountability to obtain the protection of their rights.

This capacity to have access to a judge enables individuals to obtain the protection of their rights and activate the judicial accountability of EU institutions and Member States. It may participate in remedying the lack of judicial oversight of the EU's external

migration policy and measures, caused notably by the choice made by privileged applicants, such as the European Parliament, not to challenge such informal arrangements even though they disrespect its prerogatives in the field of external migration (Fernando-Gonzalo, 2023). Such judicial accountability is furthermore integrated into a broader trend of strategic litigation across policy fields and levels of governance, in which the attempt to seek redress before an independent and impartial judge is envisaged as the key technique to ensure that violations of fundamental rights or disrespect for international and/or European obligations are accurately legally defined and be remedied.

This paper seeks to highlight the challenges caused to the protection of the rights of migrants and refugees by the EU's externalisation of its migration policy, and the choice made to have recourse to informal arrangements, leading to unequal access to remedies. It starts by stressing the importance of a connecting factor to activate the protection foreseen under EU or ECHR law and discusses how externalisation and informalisation tend to dilute accountability. It then tackles avenues envisaged in the literature to remedy this lack of judicial accountability and offers in conclusion perspectives for further research.

Section 1 – The elusive connecting factor to the jurisdiction of an EU Member State

Migrants and refugees who have seen their rights violated and seek a remedy face several challenges. Some challenges are linked to their vulnerable situation, and the difficulties in collecting information and evidence of such violations, as well as in accessing legal representation and advice in a new country. Other challenges are linked to the legal framework applicable and the strict territoriality approach pursued by the European courts in defining the scope of the application of fundamental rights. Litigants seeking a remedy to the alleged violations of their rights must demonstrate the existence of a connecting factor. The latter serves to demonstrate that their situation falls within the scope of EU or ECHR law and may thus allow them to rely on the rights and guarantees provided in these frameworks.

The easiest scenario applies in situations in which they have reached the territory of the EU and find themselves within the jurisdiction of a Member State. This requirement of a connecting factor has been interpreted broadly and may for instance apply in the context of border procedures or illegal pushbacks. Its presence has several consequences that are key for their right to access to justice: 1) They can benefit from the full range of procedures and remedies foreseen in national legislation, adopted in

the implementation of EU standards, and/or subject to EU standards. 2) Their legal situation presents a link with EU law, and Member States fall within the scope of application of the Charter, as they are implementing EU Law (Article 51 Charter). It allows litigants to rely on Charter-based rights, in particular the right to access justice foreseen in Article 47 Charter. 3) National judges may examine the compatibility of the national law and/or practice with the rights enshrined in the Charter, and they may – if they consider it necessary – form requests for preliminary rulings before the Court of Justice, to seek guidance on their interpretation of national law, and the examination of its compatibility with EU standards. Alternatively, even if the CJEU declines to have jurisdiction, the Member States acting outside the scope of EU law, remain bound by the European Convention on Human Rights, and another legal avenue, namely a request before the European Court of Human Rights, remains available.

Such access to national courts, and incidentally to the CJEU and the ECHR, participates in defining the exact scope of the migrants' rights to access justice. While courts may push for a broader interpretation of certain concepts enshrined in international treaties and favour the protection of the rights of migrants and refugees,[i] scholars have demonstrated how the jurisprudence of both supranational courts may be ambivalent, at times in favour of migrants' rights, at other siding with more restrictive measures (Mouzourakis and Costello, 2022; Wafner, Desmond and Kraler, 2024). This ambivalence also exists regarding the Courts' judgments on the right to access justice. As a way of example, the CJEU has rendered judgments protecting such right, declaring contrary to EU law national legislation that lays down a period of three days, including public holidays and non-working days, for lodging an appeal against a decision rejecting as manifestly unfounded an application for international protection, mobilizing Article 47 of the Charter to interpret the Directive 2013/32/EU (CJEU, 2023). The Court has also examined the nature of the organs before which the persons concerned may challenge decisions and/or amendments in an earlier return decision. It has for instance considered that an action brought before an administrative authority whose decisions are not amenable to judicial review and which does not meet the conditions of independence derived from Article 47 of the Charter is incompatible with EU law, and the national court dealing with an action contesting the legality, under EU law, of the return decision consisting in such an amendment of the country of destination must establish its jurisdiction (CJEU, 2020, § 137). The case law of the Court also sometimes drawn some limits to the exercise of such right, and the Court has notably considered that the right to a judicial remedy against a refusal decision is granted to the unaccompanied minor who applies for international protection, but not to the relative of that minor (CJEU, 2022).

The ECtHR has also developed an extensive case law on the question of the right of access to justice, including in the context of border operations and pushbacks. The ECtHR has developed clear standards based on Article 13, combined for instance with Articles 3 and 4, requiring States to ensure that individuals have an effective remedy, in practice as well as in law, at the domestic level (ECHR, Guide Immigration, 2022). The question remains under scrutiny, and the object of cases before the Court, for instance in the framework of two requests brought against Greece for the *refoulement* of migrants to Turkey, allegedly endangering their rights under Articles 2 and 3 ECHR, and without granting them access to an effective remedy. While one case has been declared inadmissible due to a lack of evidence to substantiate the allegations made (ECHR, G.R.J. v. Greece, 2025), the Court recognised in the other case a violation of several rights, including the right to an effective remedy, as the national legal system did not provide an effective remedy (ECHR, A.R.E v. Greece, 2025).

These brief examples serve to highlight how access to justice is essential for the protection of the rights of migrants and refugees, especially in circumstances in which the existence of a connecting factor is difficult to ascertain. The capacity to launch a legal action is key, at the very least to obtain an answer as to whether their situation falls within or outside the scope of application of European standards.

Section 2 – The challenges to judicial accountability

The choice of the EU and its Member States to engage in the externalisation of their migration policy, and to opt for informal arrangements to that end, are problematic for several reasons. The recourse to informal migration arrangements is not only problematic from the perspective of EU Constitutional Law, raising questions regarding the respect for institutional balance, the requirements regarding EU external action or the competences defined in the EU treaties (shared competences treated as parallel competences – Ott, 2020). They are also problematic as they lead to differences in the possibility for migrants to obtain the protection of their rights. Those who manage to have access to the territory of the EU fall within the jurisdiction of national and European judges (CJEU and ECtHR), and they can claim a connecting factor to the guarantees existing under EU and ECHR law.

In contrast, those who might be sent back to a third country based on such informal migration arrangements face challenges in obtaining the admissibility of their claims before national or European judges. They can have access to a judge in their home country or the country they are sent back but they cannot necessarily benefit from similar judicial accountability mechanisms, and an equivalent standard of protection of

their rights is often not guaranteed.

Such difficulties are amplified by two challenges that we will briefly discuss below: the restrictive interpretation given to the extraterritorial scope of application of European standards; and the ambiguity of the authorship of informal arrangements.

First challenge: the question of the extraterritorial application of standards

The choice of the EU institutions and the Member States to externalise the management of migration flows, while reducing legal pathways to access the EU's territory, clearly restricts the possibility for migrants and refugees to exercise their right to access justice. As they remain outside the jurisdiction of EU Member States, or European States, they cannot trigger the competence of national courts nor the possibility to rely on standards and procedures before the Court of Justice of the EU or the European Court of Human Rights.

The question has been raised whether European instruments, such as the EU Charter or the ECHR, could have extraterritorial application, and cover situations of migrants and refugees in third countries. An attempt has been made to test such a claim through the case of the Belgian humanitarian visas (Halleskov, 2023). The case concerned a Syrian family, living in Syria, who applied for a humanitarian visa at the Belgian embassy in Lebanon, invoking the motivation to leave Syria and apply for asylum in Belgium due to a risk of violation of their rights (notably protection against torture and ill-treatment). Their applications were rejected because the family intended to stay more than 90 days in Belgium, thus exceeding the 90-day validity of a short-stay visa, and the Belgian authorities considered that their situation was outside the scope of Article 3 ECHR, or Article 4 of the Charter, as the family was not within the "jurisdiction" of the Belgian State. In the appeal of that decision before the *Conseil du contentieux des étrangers,* the court brought a request for a preliminary ruling seeking further guidance on the matter. The question of the scope of application of EU law, and its potential extraterritorial application is the question that matters most to our analysis, and we shall thus focus on this aspect. The Court considered that the Belgian authorities misrepresented the case as a question of short-term visa. In its view, the case concerned the conditions under which Member States may issue long-term visas and residence permits to third-country nationals on humanitarian grounds, a matter falling solely within the scope of national law, and the situation was thus not governed by EU law. The Court incidentally noted that another conclusion *"would mean that Member States are required, based on the Visa Code, de facto to allow third-country nationals to submit applications for international protection to the representations of Member*

States that are within the territory of a third country" (CJEU, 2017, *X and X*). This judgment, contrasting with the Opinion of AG Mengozzi, results in a narrow interpretation of the scope of EU law, which can be contested (Mouzourakis and Costello, 2022).

Such a restrictive interpretation of the scope of application of guarantees has been mirrored in the judgment rendered by the European Court of Human Rights, in March 2020, on the same case (ECtHR, 2020). The Strasbourg court also considered that the applicants are not placed under the Belgian State's "jurisdiction", as they are not under the control of the Belgian authorities (§ 118) and the fact that they brought proceedings at a domestic level is "*not sufficient to trigger, unilaterally, an extraterritorial jurisdictional link between the applicants and Belgium within the meaning of Article 1 of the Convention"* (§ 121 – 125). Such interpretation has been also criticized, notably by scholars and stakeholders, considering that such a restrictive interpretation of a state's jurisdiction expels from humanity refugees and persons seeking international protection (Reyhani, 2020). More generally, these cases are shedding light onto another crucial theoretical question: the notion of jurisdiction and the reliance on this concept in many human rights treaties as the triggering factor for the obligations binding their states' parties. Such an approach "limits accountability for actions "abroad", but explains, at least in part, why migration control has been de-territorialized" (Costello and Mann, 2020), and makes it almost impossible for migrants and refugees that are blocked in third countries to rely on the legal remedies foreseen in ECHR and EU Law.

New cases have been brought before the ECHR, testing the concept of jurisdiction in the context of maritime operations undertaken by a Libyan coastguard boat, in a zone in which were at proximity a humanitarian boat and a French boat, which were all liaising with the Italian Coordination Center based in Rome (ECHR, 2018). The question of jurisdiction is the first one raised in the application presented before the Court, the parties (and the scholar supporting them) arguing in favour of a new "functional approach" to jurisdiction, that would "entail a series of elements characteristic of public powers that are exercised by the Italian State – both territorially and extra-territorially; both directly and through the intermediation of the of the LYCG—that taken together generate overall effective control" (Moreno-Lax, 2020), hence activating the jurisdictional link that triggers the applicability of human rights obligations. As of March 2025, this application is still pending and would be particularly interesting to follow, especially considering that among the EU Member States, Italy has been a country particularly keen on promoting the externalization of migration control.

The country signed bilateral agreements with Libya, which may play a role as a triggering factor in the pending application, and its operations in the Mediterranean are closely intertwined with other initiatives in which the EU is participating. The country also signed in November 2023 a Protocol with Albania "under which Italy will pay for the construction of two centres in Albania to receive migrants rescued by the Italian navy and who wish to apply for asylum in Italy". This is the first time that an EU country has entrusted its asylum procedures to a country that is not yet part of the EU, and it constitutes a qualitative shift in the EU's migration policy and raises several questions regarding its compatibility with EU law and the right to an effective remedy. The Protocol does however retain specificities that allow for the judicial control of its operation. In a nutshell, the Protocol provides that migrants intercepted outside the territorial sea of Italy and other EU member states, to whom the accelerated procedure reserved for persons coming from countries designated as safe countries of origin may apply, can be transferred to Albania. They are detained in the centres established therein, each specialised in one aspect of the asylum procedure (screening, asylum border procedure, and return procedure), while their asylum claim is processed by Italy, applying Italian law, including EU law, which defines the concept of safe countries of origin (Peers, 2025). In other terms, while the text restricts physical access to the Italian territory, it does fully outsource the treatment of asylum claims. Italy indeed retains partial jurisdiction to process these claims, and responsibility for relocating beneficiaries of international protection and returning those who do not qualify for asylum (De Leo and Celoria, 2024). This can constitute the connecting element triggering the application of guarantees foreseen under EU and ECHR law, and it is evidenced by the numerous proceedings initiated before Italian courts by migrants who have been transferred to Albania (and since then returned to Italy) under this Protocol, and the requests for preliminary rulings brought before the CJEU by Italian judges (Peers, 2025). As of March 2025, two of these requests are being fast-track (CJEU, case C-758/24 and case C-759/24), due to the serious uncertainties affecting fundamental questions of national constitutional law and Union law these cases raised, and the hearing took place in February 2025. The guidance of the CJEU on the matter is particularly anticipated. Even though the Italy-Albania Protocol is for the time being an isolated example, there is support across EU Member States for the generalisation of such arrangements. This is notably evidenced by the publication on 15 May 2024 of a letter signed by 15 EU countries inviting the European Commission to envisage "new solutions to address irregular migration to Europe" (Joint Letter, 2024).

Importantly, the Italy-Albania Protocol raises a question as to whether the Protocol suffices to establish a connection with EU law and allow the CJEU the compatibility with EU law of the national designation of a safe country of origin. In many other situations,

the EU and its Member States tend to favour informal arrangements with their partners, which gives rise to other issues and challenges.

Second challenge: The uncertainty of authorship of informal arrangements and its instrumentalization by courts to dismiss complaints

The decision of the EU and its member states to opt for informal arrangements raises several legal questions and undermines the possibility for migrants and refugees to have access to justice. The EU possesses a clear competence to conclude readmission agreements with third countries, and the Treaties provide for a specific procedure for their adoption, involving notably the European Parliament. Such texts and their implementation may be subject to judicial review, and migrants and refugees to be returned to a third country on the basis of such text can question its compatibility with EU primary and the interpretation of its provisions.

The choice of opting for informal arrangements is problematic, because as illustrated in the box below, these arrangements often substitute legally binding readmission agreements while having very similar effects on the return of migrants and refugees to the country concerned.

Box – How do such informal arrangements substitute formal readmission agreements?

Informal migration arrangements rely on language very similar to readmission agreements, but without being adopted in compliance with the EU treaties and without being subject to judicial review.

Example nº 1 – Joint Way Forward between the EU and Afghanistan (as stressed in Ott, 2020)

Part I – Scope of cooperation

1. The EU and the Government of Afghanistan intend to cooperate closely in order to organize the dignified, safe and orderly return of Afghan nationals to Afghanistan who do not fulfil the conditions to stay in the EU.

2. In line with its obligations under international law, Afghanistan reaffirms its commitment to readmit its citizens who entered into the EU or are staying on the EU territory irregularly, after due consideration of each individual case by Member States.

3. Afghan nationals who are found to have no legal basis to remain in an EU Member State, whose protection needs or compelling humanitarian reasons, if any, have been considered in accordance with the applicable legislation and who have received an enforceable decision to leave that Member State, can choose to return voluntarily.

Afghan nationals who choose not to comply with such a decision on a voluntary basis will be returned to Afghanistan, once administrative and judicial procedures with suspensive effects have been exhausted.

Example nº 2 – Memorandum of Understanding between the EU and Tunisia
Both Parties agree to further support the return and readmission from the EU of Tunisian nationals in an irregular situation, in accordance with international law, whilst respecting their dignity and acquired rights, and commit to work together towards their socio-economic reintegration in Tunisia, in particular by supporting the creation of economically viable projects for the benefit of local development and job creation. The EU will support and facilitate the implementation of this Memorandum of Understanding also in bilateral contexts with the Member States with regard to returns and readmissions.
The two Parties also agree to support the return of irregular migrants in Tunisia to their countries of origin in accordance with international law, whilst respecting their dignity.

The possibility for migrants and refugees to challenge these instruments before a judge is thus of crucial importance, as they may very directly impact their personal situation. However, such legal action may be complicated to undertake, simply because the authorship of the text, as well as its legal nature, are purposedly left unclear. This means that individuals might face engaging in long judicial proceedings without a clear idea of whether their legal action is admissible.

It is interesting to go back to the EU -Turkey deal and its lack of judicial review by the CJEU. This example illustrates an attempt at litigating individual decisions adopted based on an informal arrangement, and the difficulties encountered by the applicants to obtain the admissibility of their complaint. The core of the legal question at stake lies in the authorship of the "deal" or "statement", and goes for all other informal migration arrangements: who is the author of the text? To whom can authorship be attributed? And thus which court might have jurisdiction to review its legality?

The text of the EU Turkey takes the form of a statement issued as a press release published on the website of the Council after a meeting on 18 March 2016 between the EU and Turkish leaders (Council, 2016). The Statement foresees a series of measures, such as the return to Turkey of migrants who do not apply for asylum or whose application has been found unfounded or inadmissible, and the return to Turkey to all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016. In exchange, the EU would participate in a resettlement program focusing on Syrian refugees, the visa liberalisation roadmap would be accelerated, and the Turkish

authorities would continue to receive money through the Facility for Refugees in Turkey. This Statement does not intervene in a legal and political vacuum, as the EU and Turkey had already negotiated and adopted a series of bilateral agreements (Ott, 2020, 596), including notably a readmission agreement signed in 2014, and the Statement issued in March 2016 was preceded by previous statements and declarations authored by the EU institutions, including the European Commission (Hillary, 2021, 131).

Nevertheless, the Statement is the document with the most direct consequences for individuals as it foresees their return to Turkey. For that reason, it was invoked in the context of proceedings brought by three asylum seekers who had entered Greece from Turkey shortly before or after 18 March 2016 (Cases NF, NG & NM, 2017). The applicants brought separate actions for annulment before the Tribunal, seeking to obtain the annulation of the "agreement between the European Council and Turkey dated of 18 March 2016". The Tribunal reviewed and answered these actions in separate orders, but they are drafted in very close terms. The actions were all dismissed for lack of jurisdiction on the ground that the Statement "cannot be regarded as a measure adopted by the European Council" or another EU institution, body, office or agency (Order in NF, para. 70). The Tribunal added that "*even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister. (and ….) the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States"*. The applicants brought subsequent appeals before the Court of Justice of the EU (Joined Cases *NF, NG and NM*, 2018). Once more their actions were dismissed, the Court invoking their incoherence (para. 16), and the absence of any legal argument to demonstrate how the General Court allegedly erred in law (para. 21). For the Court, the "*appellants merely express their disagreement with the General Court's assessment of the facts, while requesting that those facts be assessed again, without claiming or establishing that the General Court's assessment of the facts is manifestly inaccurate, which is inadmissible in an appeal*" (para. 29).

The orders rendered by the EU courts have been heavily commented on and criticised. Some labelled them as the illustration of "judicial passivism" as the courts avoided ruling on the substance of the cases for political reasons (Gatti, 2023). Many others tried to demonstrate that the exclusion of the EU's authorship was questionable and potentially incompatible with previous assessments of the Court (Gatti, 2023, 865),[ii] or the rules of international law and the subsequent practice of both EU Institutions and

Turkish authorities (Ott, 2020, 597; Kassoti and Carrozzini, 241 – 245). The ambiguity and legal difficulty reside in the respective roles played by the EU Member States and the EU institutions in the negotiations of such a "deal": Is the participation of the presidents of the European Council and the European Commission in the meeting of 18 March 2016 sufficient to attribute authorship to the EU? Is it necessary to look more broadly at the meetings and documents that preceded that meeting to trace the active role played by the Commission in the negotiations? The answers to these questions are crucial, as they may activate or deactivate the jurisdiction of the CJEU, and the possibility to obtain a judicial review of individual decisions with EU law standards.

The Tribunal chose with regard to the EU-Turkey deal to exclude the authorship of the EU, but its judgment does not provide a final answer to the question raised by such deals. It does not for instance clarify the respective competences of the EU and its Member States. Indeed, as reported in the literature, informal migration arrangements are rarely undertaken in isolation from other actions, conducted either by the EU in the scope of its external competences, or by the Member States acting in concertation with the EU and/or on their own.[iii] Such confusion is further amplified by the recurrent use in the recent years of the "Team Europe" approach in migration, through which the actions of the EU Institutions and (some) Member States are presented under the same umbrella (Strik and Robbesom, 2024). This complex situation also raises the question of the compatibility of Member States' actions in an area often covered by EU competences, and the potential infringement of their duty of loyal cooperation. Some authors have in that regard further reflected on the nature of the EU's competence in the external aspects of its migration policy. Andrea Ott questions for instance whether the EU may acquire - like in other fields of shared competence - an exclusive external competence when a topic is covered by EU law, or whether its actions complemented by national actions intervene in a new field of parallel competences (Ott, 2020). Other authors have stressed that the competence acquired by the EU in border management, asylum and return should have prevented Member States from acting independently to conclude an international agreement outside any EU institution and venue. Even if an EU exclusive external competence in these fields would be found not to exist, then at least the EU-Turkey Statement should have been concluded as a 'mixed agreement', i.e., covering member state and EU competences (Carrera, den Hertog and Stefan, 2017).

Beyond the question of the authorship of the EU-Turkey deal, the broader question remains on how to identify the authors of the informal migration arrangements. These questions have led some authors to propose new avenues for defining authorship. We can for instance refer to the concept of "pseudo-authorship" coined by Hillary in an

attempt to establish that "the EU is *de facto* author of the deal, but the Member States (as pseudo-authors) are regarded by the General Court as the actual actors". In her view, the EU's pseudo-authorship may be sufficient for the EU and national courts to exercise a judicial review of such migration deals (Hillary, 2021, 150).

Beyond the theoretical implications of the authorship, this discussion is far from being benign or minor from the migrants' perspective. The authorship of the instrument attributed either to the EU, to the EU and its Member States, or to the Member States alone, impacts the competence and jurisdiction of courts to review the legality of these texts and the norms mobilised for such review. If the text is considered a purely national endeavour, the courts must examine its compatibility with constitutional requirements and obligations stemming from the national constitution and the ECHR. However, if the text is qualified as an EU instrument, or an instrument partially falling within the scope of EU law, the courts must examine its compatibility with guarantees enshrined in EU law. Such a judicial review proves its added value in different aspects. Judges would provide answers on the validity of the procedure of "concluding" informal soft law arrangements, instead of binding international treaties, which are subject to democratic control and strict adoption procedures. Most importantly for the individuals returned (or likely to be returned) to third countries in the implementation of such arrangements, the judges would also be able to assess whether these instruments guarantee the respect of their fundamental rights, the most essential ones (right to life, prohibition of torture) being often at risk in case of return to a third country (either because of the conditions in that country, or because the authorities may eventually send them back to their country of origin). In definitive, the uncertainty regarding the authorship of the informal migration deals leaves migrants in a difficult position, as they cannot identify clearly which legal avenue and arguments are the best suited to challenge a decision. This issue is problematic in a field in which strict deadlines apply for launching judicial action. The risk of choosing the wrong legal avenue may end up in proceedings concluding with a declaration of inadmissibility, while other legal avenues may be barred, thus undermining the migrants' possibility to access justice.

Section 3 – Avenues to remedy the lack of judicial accountability

The implications of the challenges faced by migrants and refugees to access justice as a result of externalisation and informalisation of migration are severe. Scholars, NGOs, and lawyers have thus long reflected on other ways to ensure that there is one way or another a possibility to ensure that individuals whose rights have been violated (or are at risk of being violated) have access to remedies, especially in a context in which such violations take place through "contactless forms of migration deterrence" (Raimondo,

2023). The existence of such violations, ranging from the disrespect of procedural guarantees in the process of examination of asylum requests, or demands for international protection, to the exposure of torture, bad treatments and even death, is sadly well-documented. The lack of legal pathways places the persons willing to migrate for protection or economic reasons in a vulnerable position. They may fall under the control of criminal groups, abusing the search for smuggling services to place migrants in dangerous and exploitative situations. Migrants may also along their migratory route encounter authorities that do not respect their rights, either by placing them in detention camps outside any legal framework, torturing them, or denying them access to basic commodities. Such situations have raised concerns and strong condemnations, expressed by political actors at all levels of governance, even leading to the adoption of sanctions by the UN Security Council against traffickers and smugglers based in Libya.

The first avenue to be explored consists in seeking the accountability of the actors identified as the authors of formal or informal arrangements. Attempts are being made to establish such connecting factors, and thus ensure that the States do not escape their human rights obligations. New legal actions before national courts are complementing the already-tested legal avenues. As a way of example, three NGOs (Amnesty International Netherlands, Boat Refugee Foundation and Defence for Children), undertook legal action against the Dutch State for adopting and implementing the EU-Turkey deal. They invoke its liability for violations of the fundamental rights of persons who, because of the deal, were and are forced to stay in reception camps on the Greek Islands in conditions that do not meet the minimum standards applicable under Union law (Joint press release, 2024). Such an action is particularly interesting. It builds upon the finding of the Tribunal's case law, considering that Member States are the authors of the EU-Turkey deal, and seeks to activate the State's responsibility in concluding such agreement. Should the case be declared admissible, and should the national judge decide to bring a request for a preliminary ruling before the CJEU, it could be an occasion to invite the CJEU to clarify the question of the authorship of such an agreement or to reflect on the liability of Member States under EU law.

In addition to actions challenging the responsibility of Member States before domestic courts, the academic literature has dissected different alternative avenues that may close the accountability gap and ensure that migrants whose rights have been violated may have access to a remedy.

Facing the restrictive interpretation that the CJEU and the ECHR gave of their

jurisdiction, and the resulting exclusion of violations occurring outside the EU's territory, scholars have examined how United Nations Treaty Bodies can serve as an alternative, acting as "soft courts", even they do necessarily always follow a more progressive interpretation than the CJEU or the ECHR, qualified as "hard courts" (Çah, Costello and Cunningham, 2020). Focussing on the violations occurring in the Central Mediterranean route, and mapping the strategic litigations initiated, Pijnenburg and van der Pas have notably shown how NGOs collaborating brought complaints to the UN Human Rights Committee, the UN Committee against Torture, or the UN Committee on the Elimination of Discrimination against Women, in an attempt to explore all available legal avenues (Pijnenburg and van der Pas, 2022). They note that while such a strategy may help in securing more progressive rulings, that can then be used in other litigations (such as the pending request before the ECtHR in S.S. v Italy), it also comes with some risks (Baumgärtel, 2018). Other scholars have addressed the mobilisation of new rights, such as the right to leave (McDonnel, 2024), or the activation of Article 4 ECHR prohibiting human trafficking as a way to hold States accountable for their involvement (Tammome, 2024).

Other avenues have been explored in attempting to mobilise international criminal law and the competence of the International Criminal Court through the qualification of the events taking place in the Mediterranean as crimes against humanity. Two complaints have been brought to the office of the prosecutor: one targeting EU officials, EU member States officials, Libyan networks and agents (2019), and the other targeting only 19 alleged Libyan perpetrators (2021) (presented in Pijnenburg and van der Pas, 2022). However, despite the media attention generated by these complaints, no investigation regarding specifically the situation of migrants and refugees in Libya has been opened. Instead, investigations are taking place within the mandate given to the ICC in 2011 to investigate the commission of international crimes in the context of the civil war that erupted after the fall of the Khadafi regime. In such context, the accountability efforts concern violence and crimes committed against Libyan civilians, as well as violence and crimes committed against migrants. Once more the procedures and mechanisms intertwine, as the ICC prosecutor joined the Joint Investigation Team, set up between national authorities from Italy, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and Spain, and supported by Europol (Press release, 2022), and the international investigations are complemented by those undertaken at national level. In that regard, a key and sensitive question lies in the possible complicity of the EU and its Member States in the commission of such crimes, as they cooperate with, and provide financial support and technical equipment to the Libyan authorities (Raimondo, 2023).

These options and avenues are combined with additional initiatives, that include among others: the mobilisation of mechanisms of administrative accountability (such as the European Ombudsman), reflections on the responsibility of intergovernmental organisations such as the European Union in complex situations of shared responsibility, the potential extraterritorial scope of the EU Charter of fundamental rights, or the tracking of EU funding granted to third partners, as a part of a broader trend of governance through funding. Yet they face similar obstacles: declarations of inadmissibility, adverse rulings, and refusals to initiate investigations due to a lack of competences or means.

Conclusion

The difficult question that remains is how to ensure that migrants and refugees may benefit from the full protection of their rights and access to justice when they are blocked outside Europe, and the EU and its Member States are keen to develop and promote contactless management of migration flows, leaving third countries dealing with them in their territories. Accountability mechanisms may be available in these countries, be it domestic courts, some of the ECHR or regional courts, or other international forums, but they may not offer a sufficient degree of protection, and further amplify violations of fundamental rights by denying access to remedies.

The perspective is quite pessimistic, and the cases currently pending before European Courts may not be sufficient to change the case law and even less the practice and political priorities of the Member States. Further restrictive migration measures are being envisaged, as third countries have started to mobilise and instrumentalise migration flows. This move, turning vulnerable migrants into strategic tools, and leaving them in horrific living conditions, does not undermine the willingness of the EU to externalise migration control, and limit as much as possible access to its territory. On the contrary, it prompted the adoption of emergency measures, reflecting "the natural continuation and intensification of a securitisation trend that characterises the EU migration policy of the last four decades" (Gkliati, 2023). More recently, the Finnish proposed pushback legislation, explicitly allowing pushbacks at the border with Russia and recognising its conflicts with the country's human rights obligations, further demonstrates that the protection of migrants' and refugees' rights is far from a priority (Sormunen, 2024).

How to then contribute to the discussions and participate in bridging such an accountability gap? One possibility would be to make more visible arrangements and *ad hoc* cooperation mechanisms that are set up with the contribution of the EU and/or

its Member States, as the externalisation of migration and its informalisation are not solely the result of arrangements between the EU, its Member States and third countries, but also involve other international organisations (UN-affiliated and others) and/or private actors. Such complexity participates in making the avenues and forums to apply international legal frameworks more diluted and less accessible, especially for migrants. Channels for accountability become less clear and may depend on the nature and distinct features of various cooperation practices (Nicolosi, 2024).

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[i] See for instance CJEU, Judgment of the Court (Grand Chamber) of 16 January 2024, Case C-621/12, in which the Court interpreted the notion of "membership of a particular group", one of the criteria for the qualification for refugee status, as including women victims of domestic violence and facing the threat of "honour killing".

[ii] For Gatti, the case law of the court on the matter is ambiguous. "Three criteria seem relevant for the assessment of the authorship of an act: (i) the distribution of competences; (ii) the content of the act; and (iii) the context in which it was adopted. It is unclear, however, whether all three criteria should be applied in every case, and what weight they should have. » (European Development Fund case – reliance on competence and content // Bangladesh Aid hinted at content and context, and Sharpston case focused on content only).

[iii] See for example the Memorandum of Understanding between Libya and Italy, or the Agreement between Italy and Albania.