

# Borders of Violence

The EU's Undeclared War  
on Refugees

mEUterei Authors' Collective



ASSOZIATION A

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on Refugees**

mEUterei Authors' Collective

Translation: Helen Ferguson

**ASSOZIATION A**

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*Our gratitude goes to all activist and solidarity-based movements that support people on the move and fight against the brutal isolationist “Fortress Europe” regime.*

## About the “meuterei” Authors’ Collective

*“Borders of Violence” has been produced jointly by “meUtereï”, a collective of experts involved for years in campaigning against the European border regime. meUtereï brings together activists, people assisting with crossing borders, lawyers, academics studying migration, and political scientists. Team members include Marlene Auer, Eliza Fröhlich, Natalie Gruber, Hela Kanakane, Lea Reisner, and Julia Winkler. They are active in various organisations and political groups: Alarm Phone, borderline-europe, Border Violence Monitoring Network, Iuventa-Crew, Joosor, and Safe Passage Foundation.*

*The collective is currently made up predominantly of white cis women. We feel that naming this positioning is relevant from the perspective of a critique of power. We are part of the societies that have led to the construction of Fortress Europe and maintain it. We are aware of our privileges and can engage in frank criticism of the existing capitalist, racist and (neo-)colonial systems of power without having to fear significant disadvantages, threats or worse. While writing this book, we have attempted – with help from friends involved in anti-racism activism too – to reflect on these privileges and to heighten our awareness of these in our perspectives and use of language. As a fundamental consequence of these privileges, we consider that we have a particular responsibility to criticise and combat Fortress Europe wherever possible.*

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# Contents

<b>Borders of Violence</b>	<b>7</b>
The EU's Undeclared War Against People On the Move	
<b>How to Build a Fortress</b>	<b>9</b>
Walls Not Bridges – From the Founding of the EU to the Present Day	<b>13</b>
Frontex – EU Gatekeeper	<b>21</b>
<b>Europe's External Borders – Systematic Isolationism and Violence</b>	<b>28</b>
<b>The Central Mediterranean</b>	<b>31</b>
Libya	<b>33</b>
Tunisia	<b>45</b>
Frontex in the Central Mediterranean	<b>56</b>
"I Leave You to Die in the Water"	<b>62</b>
<b>The Western Mediterranean and the Canary Islands</b>	<b>64</b>
The Western Mediterranean Route	<b>67</b>
Jumping the Fence – the Exclaves of Ceuta and Melilla	<b>69</b>
The Canary Islands – Dream or Nightmare Destination	<b>76</b>
Frontex in the Western Mediterranean and the Atlantic	<b>80</b>
"‘There's a Baby On Board!’ – They Did Nothing at All"	<b>82</b>
<b>The Eastern Mediterranean</b>	<b>85</b>
Cyprus	<b>85</b>
Greece	<b>88</b>
<i>The EU-Turkey Agreement</i>	<b>91</b>
<i>Violence at the Greek Borders</i>	<b>96</b>
<i>Welcome to Europe – (Administrative) Violence Instead of Rights</i>	<b>104</b>
<i>"Got More Money?"</i>	<b>110</b>
<b>The Balkans and Eastern EU</b>	<b>112</b>
2015 and Beyond – Waves of European Violence	<b>116</b>
Human Rights Violations in the Name of "Secure Borders"	<b>124</b>
Frontex in the Balkans	<b>133</b>
No Protection, No Future – Degrading Conditions as a Form of Violence	<b>135</b>
Routes to and through Poland, Latvia and Lithuania	<b>141</b>
<b>European Borders Far from the EU</b>	<b>145</b>
Where and How Borders Can Travel Further than People	<b>145</b>
Niger – Europe's Deadly Frontiers in the Sahara	<b>149</b>

<b>The Criminalisation of People on the Move</b>	<b>158</b>
Mobility as a Crime	159
Systematic Disenfranchisement and Oppression	166
Criminalising Migration	176
<b>Criminalisation of Solidarity</b>	<b>178</b>
The “Facilitators Package”: A Legal Framework for Broad-brush Criminalisation	183
Public Smear Campaigns	186
Bureaucratic Obstacles	189
Intimidation by Police and Security Forces	191
Prosecutions and Convictions	194
Drastic Impact on Fundamental Rights and Human Rights	201
<b>Injustice Framed as Justice: Asylum Procedures in the EU</b>	<b>205</b>
No Access to Asylum Procedures	206
No Access to Free Legal Advice and Information	207
Flawed Procedures	212
Degrading Reception Conditions	214
Arbitrary Grants of Protection and Procedural Design	215
Asylum As an Empty Promise	218
<b>Good Prospects? Panorama of Violence</b>	<b>221</b>
“Anything Might Happen! You Could Even Die”	221
What Path Should We Take? And Who Should Come Along?	226
<b>Responsibility in the Face of History – A New Pact for Europe</b>	<b>232</b>
Epilogue: Donatella Di Cesare	
<b>Appendix</b>	<b>238</b>
List of Abbreviations	238
Endnotes	241

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**“Fleeing your home  
means being rendered  
speechless, excluded  
from participating in life,  
no longer being a human  
being.”**

Parwana Amiri

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# Borders of Violence

## The EU's Undeclared War Against People On the Move

9th May is Europe Day – the day on which the European Union (EU) celebrates itself and its achievements under the motto “United in diversity”. In the year that marks the tenth anniversary of the Nobel Peace Prize awarded to the European Union, *Borders of Violence* dares to take a look at who the EU means by this diversity and who it explicitly does not include, as well as considering how it intends to reconcile its proclaimed values with applicable law. Last but not least, the EU received the Nobel Peace Prize in 2012 for its “successful struggle for peace and reconciliation and for democracy and human rights”.<sup>1</sup> The Universal Declaration of Human Rights (UDHR) accords an equal measure of dignity and rights to every human being, who should “act towards one another in a spirit of brotherhood”. This assumes tangible form inter alia in Article 14, which is dedicated to people fleeing: “*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*”

Everyone? In Europe, that seems to mean “a few of those who have made it across the border despite all our efforts”. Forgetting history, the walls of Fortress Europe are constantly raised higher and higher, the isolation is growing increasingly brutal, and people fleeing face almost insurmountable bureaucratic and physical hurdles when they seek to claim their right to asylum. The Nobel Peace Prize is misused as a clean bill of health to allege, flying in the face of all the facts, that the EU upholds humane policies and the rule of law. Human rights violations along the EU's internal and external borders are committed on a daily basis, which is general knowledge and deliberate policy. The EU's noble values and proclaimed goals, such as the inviolability of human dignity, the protection of human rights, freedom and the rule of law, turn out to be a pure farce in the light of a policy of sealing borders, aiming not to protect people fleeing but to protect the EU from people fleeing.



This book draws up a critical inventory of European border violence and traces the various facets and mechanisms of an isolationist “Fortress Europe” approach. The text does not claim to be exhaustive in this endeavour. Likewise, *Borders of Violence* does not have scope to illuminate in detail the suffering triggered by an isolationist “Fortress Europe” approach for people fleeing their homes and all its ramifications. This concerns both the reasons for their flight and the consequences of being pushed away by Europe. Those affected should have a chance to be heard out directly and to speak out with their own voice. These pages will provide no answer to the question of what it means for a society to move towards a degenerated value system. We cannot and do not want to spare our readers the challenge of pondering whether we perhaps lose our own rights too when we deny others their rights. A broad debate about who should be held accountable and how for these human rights crimes – in legal terms too – is just as urgently needed as clear demands to pursue a different border policy.

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# How to Build a Fortress

**People fleeing their homes** and migratory movements are nothing new in human history, but have always been a civilisational necessity. Various different terms are used in official contexts to classify the type of movement and grant or deny people different rights. A distinction is drawn between migrants, refugees and asylum-seekers:

“Migrant” is a generic term not clearly defined under international law and describes people who move away from their place of habitual residence for a short or longer period of time, whether within a country or across an international border – regardless of the reasons for migration, whether voluntary or involuntary, and regardless of the type of migration. This includes, for example, labour migrants, but also what are dubbed “irregular migrants” (people who have neither a regular visa nor a legal residence status to enter or stay in a country). The way in which people from the Global North who assert their freedom to live and work wherever they want are called “expats”, while the term “migrant” is reserved for people from the Global South, is just one small indication of the structural racism involved in these attributions. There is no basis in international law for the distinction between refugees and migrants that is often drawn in political discourse. Instead, refugees can be described as a specific subgroup of migrants.

According to the Geneva Convention, a “refugee” is either a person who, owing to a well-founded fear of being persecuted for reasons of origin, religion, nationality, political opinion or membership of a particular social group, is outside the country where they hold nationality and is unable or, owing to such well-founded fear, unwilling to avail himself or herself of the protection offered in that country. The definition also covers stateless persons who are outside the country of their previous habitual residence because of the aforementioned well-founded fear and

who are unable or, because of such well-founded fear, unwilling to return there.

An “asylum-seeker” is a person seeking safety from persecution and serious harm in a country other than their home country and awaiting a decision on their claim for refugee status under applicable international and national laws and regulations.<sup>2</sup>

However, European border and asylum policy does not affect only officially recognised refugees and asylum-seekers. It is precisely people who are denied protection status under international law who become victims of a system of rejection and violence. In this book, the term “refugee” is therefore only used when it refers to people seeking protection with a recognised status or is used in publications quoted from, statistics, etc. Considering refugee movements and border mechanisms with reference to the actual situation in which people live and not to formal official decisions, terms such as “people fleeing their homes”, “people/person on the move”, “people seeking protection”, “migrants” or “people who have fled their homes” includes all those affected.

Furthermore, it should be noted that even though this text often refers to UN organisations and resolutions adopted by them, such as the Geneva Convention, there is explicit and well-founded criticism of these institutions, which are still predominantly *white to* this day, as they represent the interests of the Global North far more clearly than those of the Global South. Ever since they were founded, UN organisations have been involved in colonial and neo-colonial relations grounded in domination and the associated crimes, and to this day have not adopted a critical approach to their history.<sup>3</sup> In recent decades, UNHCR (*United Nations High Commissioner for Refugees*) and the *International Organisation for Migration* (IOM), as UN partner organisations, have demonstrated conspicuous support for the European approach to protecting people on the move rather than siding with people seeking protection.

Given its post-war origins, the Refugee Convention, adopted in 1951, with its definition of a refugee, guarantees only incomplete protection against many of today’s threats. The Refugee Convention thus forms a fatal bottleneck when “substantiating” the need for protection. On the one hand, one point of criticism is that the valid reasons for fleeing one’s home that are stipulated in the Convention disregard numerous risks. Due to the strict categorisation of cases that constitute a well-founded

fear, all presupposing individual persecution for specific reasons (such as ethnicity, religion, political convictions, sexual orientation or gender identity), people facing wars and indiscriminate terror do not fall into this category – nor do victims of poison gas, nuclear weapons or other weapons of mass destruction. The category of refugees also excludes people who have lost their livelihoods due to ecological crises like floods, droughts and other effects of the climate catastrophe. People displaced by environmental destruction, commodities trade and land theft are also not refugees in the sense of the Refugee Convention (unless they are persecuted, for example, as environmental activists).

On the other hand, requirements to demonstrate a specific threat often constitute a difficult obstacle for people seeking protection. In order to obtain refugee status, a “well-founded fear of persecution” must be proven. The Refugee Convention thus only offers protection to people who can show that they are in immediate fear for life and limb, but not to people who have already left their country of origin before crossing that risk threshold. Although in theory asylum-seekers are not obliged to wait until a feared threat has materialised, in practice it is often difficult or impossible to demonstrate a “well-founded fear”.

In order to close at least the first gap (the requirement of individual persecution) in the Refugee Convention, “international protection” was expanded at the European level through Directive 2011/95/EU to include “subsidiary protection”. Subsidiary protection is granted to people who do not meet the requirements for refugee status under the Refugee Convention, but who are nevertheless threatened with “serious harm” in their country of origin (e.g. torture or arbitrary violence in an armed conflict) and who cannot claim protection in their country of origin. Subsidiary protection is therefore particularly appropriate for people fleeing war. When an “application for international protection” (also known as an “asylum application”) is made, initially potential recognition as a refugee (asylum) is examined and subsequently potential scope to grant subsidiary protection. The fundamental idea of Directive 2004/83/EC is that people who claim subsidiary protection will be placed on an equal footing with those covered by the Refugee Convention.<sup>4</sup> However, public perception often views subsidiary protection status as inferior and doubts the need for protection of those with this limited status, while subsidiary protection may also lead to tangible discrimination against

those with this status. For example, the periods between obligatory reviews to extend or revoke this status are significantly shorter. In particular, the right to family reunification is severely restricted (which may force relatives left behind to take dangerous illegalised routes to escape).

It is strikingly apparent that EU Member States use the weaker subsidiary protection as a concept to deny protection and prefer granting this status rather than full refugee status. In January 2015, for example, almost 99 per cent of all Syrians in Germany were granted full refugee status and only 1 per cent received subsidiary protection status. In September of the same year, suddenly only 27 per cent of Syrian applicants were considered refugees and 71 per cent were granted subsidiary protection.<sup>5</sup> The right to family reunification for people with subsidiary protection status, which had already been curtailed, was completely suspended in Germany for two years in March 2016 as part of the Asylum Package II.

These restrictive criteria are absolutely unrealistic in view of the number of people on the move worldwide. Official UNHCR figures underline that today more people are fleeing their homes than ever before.<sup>6</sup> In 2020, another sad record was broken with 82.4 million people (42 per cent of them young people and children) fleeing war, conflict and persecution worldwide. The number of people on the move their homes worldwide has doubled in the last ten years alone. Although some in Europe may mutter about refugee crises, floods and waves, most of those who flee their homes do not come to Europe. By far the majority of these people fleeing (48 million) are internally displaced persons – people on the move within their own country. At the end of 2020, 86 per cent of people fleeing their homes lived in low- and middle-income countries in the Global South. Turkey, Colombia and Pakistan hosted the highest number of people on the move. 22 per cent of people living in Lebanon are people who have fled their homes (official registration of refugees in Lebanon has been suspended since 2015), while the proportion of refugees in the EU is a staggering 0.6 per cent of the total population. According to the European Commission, 416,600 people applied for asylum for the first time in the EU in 2020, representing approximately 0.09 per cent of the total EU population.<sup>7</sup>

## **Walls Not Bridges — From the Founding of the EU to the Present Day**

Walls and fences at national borders within Europe have been dismantled since the late 1980s. For some years now, however, they have enjoyed renewed popularity again – at the EU’s external borders. This construction of Fortress Europe is based on developments spanning decades.

Asylum and border policy have also increasingly been discussed as a European issue since the 1957 Treaty of Rome, which established the European Economic Community (EEC) as well as the European Atomic Energy Community (Euratom) along with agreements on common institutional structures in Europe. In April 1965, it was decided that the EEC, Euratom and the European Coal and Steel Community (ECSC), the latter founded in 1952, should be merged to form the European Community (EC). The Schengen Agreement of 1985 is considered the starting point for establishment of an orchestrated multi-state border regime. The agreement constituted a common European external border and, in return, gradually relaxed and ultimately discontinued controls at internal borders. To make that possible, entry controls were to be carried out at external borders. Today, both EU Member States and non-EU Member States such as Iceland, Norway or Switzerland are members of the Schengen Area. Then, as now, European freedom of movement was achieved at the expense of the freedom of movement of all “others”. Visa regulations, combating “cross-border crime” as well as measures to regulate certain forms of entry and categorise these as illegal were standardised throughout the EU to ensure that Member States without external borders would not be dependent on the migration policy and border security measures implemented by Member States on the EU’s periphery. Even though border management remained the responsibility of the individual Member States, the declared goal was significantly enhanced cooperation.

With the Single European Act of 1986, an international treaty was concluded between the Member States on European cooperation in foreign policy, paving the way from the EC to the EU. In 1992, the Maastricht Treaty established the EU as a superordinate grouping for the European Communities with a common foreign and security policy and cooperation on justice and home affairs. For the first time, asylum and border policy were treated as “matters of common interest” for the EU. As decisions on these issues initially had to be taken unanimously, decision-making sovereignty remained with the Member States.

The Amsterdam Treaty, which came into force in 1999, put an end to this decision-making sovereignty. Since that point, asylum and border policy have been regulated at the EU level. However, individual Member States were enabled, via an “opt-out” provision to implement the changes only partially (Ireland, Great Britain) or not at all (Denmark). At the 1999 Tampere European Council in Finland, a five-year action programme for cooperation between the EU Member States on justice and home affairs policy was adopted. The programme laid down political guidelines as well as specific requirements on establishing a Europe-wide “area of freedom, security and justice” with asylum and migration policy as key components.<sup>8</sup> Both the Amsterdam Treaty and the Tampere Programme identified the Refugee Convention and its principle of non-refoulement as important pillars of EU asylum policy. The principle of non-refoulement prohibits the extradition, expulsion or return of a person to another country if he or she is threatened with torture, inhuman and degrading treatment or other human rights violations. This principle can be derived from various sources in international law, such as the Refugee Convention, the UN Convention against Torture, and customary international law. Initial praise for the Tampere Programme by many human rights and refugee organisations subsequently turned into harsh criticism of the guidelines ultimately adopted.

People on the move their homes were increasingly equated with crime and terrorism. That development was reinforced by the 11th September 2001 attacks in New York, along with the attacks in Madrid (2004) and London (2005). It gradually became clear that protecting people on the move was not a priority for European border policy, at the latest when the European Commission took stock of the Tampere Agreement in 2004, subsequently adopting the Hague Programme and setting the course for 2005-2010. With buzzwords “return”, “deterrence” and “combat” on the one hand, combined on the other with measures like data retention, cross-linking of databases, the creation of Frontex (see below) and expanded responsibilities for the EU’s own law enforcement agency Europol, the regime at the external borders were further reinforced, increasingly sealing the borders. The “fight against asylum abuse” was formulated as a central guideline for a common European asylum system.<sup>9</sup> The multi-annual Stockholm Programme adopted in 2010 further advanced this police, military and intelligence cooperation. Guidelines

continued to focus on the fight against and the illegalisation of people fleeing and of migration. To this end, EU police agencies were expanded and new technical surveillance measures implemented. From the outset, this increasingly militarised system of law enforcement, security agencies, databases, information systems and paramilitary organisations lacked control mechanisms and accountability.<sup>10</sup> On the contrary, through this programme, the EU further entrenched its willingness to commit human rights violations at its internal and external borders and significantly restricted the rights of people on the move.

Responding to increased numbers of people fleeing into Europe, in 2015 the European Commission presented the European Agenda on Migration, which formulated the strategic canon of migration policy between 2015 and 2020.<sup>11</sup> This agenda also insisted on presenting migration as a threat and developing an isolationist “Fortress Europe” approach, comprising deterrence, deportation and expulsion of people on the move.

In 2020, the European Commission presented a reform proposal: The “New Asylum and Migration Package” includes a revised recast of the Common European Asylum System (CEAS), which, however, does not give rise to any improvements for people in need of protection. The “proposals for improvement” contained in the package are embedded in considerably more restrictive provisions on mechanisms to close borders. These include “pre-classification” of people seeking protection at the European Union’s external borders in what are known as screening procedures (sometimes carried out by European intelligence services), accelerated border procedures and the idea of “deportation sponsorships”, which, with perverted language, seek to present intensified deportations by states unwilling to accept asylum-seekers as an act of solidarity.

The Common European Asylum System (CEAS), which has been in the pipeline since 1999, is intended to ensure minimum standards for implementation of asylum procedures and accommodation and care of asylum-seekers in EU Member States. The CEAS is based on three directives (Qualification Directive, Reception Directive, Asylum Procedures Directive) and two regulations (Eurodac Regulation on comparison of fingerprints of asylum-seekers and the Dublin Regulation). With a view to boosting cooperation between Member States and to ensure coherent implementation of the CEAS, the *European Asylum Support Office* (EASO) was established by EU Regulation No. 439/2010 in 2010. In addition, EASO



publishes reports for asylum authorities on the most common countries of origin of people seeking protection (*Country of Origin Information Reports*; COI reports).

To date, implementation of the CEAS has not been at all uniform, with sometimes enormous differences between Member States. There are marked differences in both the treatment of asylum-seekers, and in recognition rates. Recognition practice within the EU resembles a lottery that takes decisions on people's lives. In 2015, for example, average recognition of Iraqi asylum-seekers across the EU was 54 per cent. While only 3 per cent were recognised in Greece, 93 per cent were recognised in Italy.<sup>12</sup> In 2020, Belgium granted protection status to 23 per cent of Venezuelan asylum-seekers, while in Spain the figure was 98 per cent.<sup>13</sup> Although EASO's remit is to support uniform implementation of the CEAS, the reality is quite different, as the following chapters will show.

The Dublin Convention came into force in 1997. This treaty under international law regulates which EU Member State is responsible for conducting an asylum procedure and applies not only in the EU but also in Iceland, Norway, Liechtenstein and Switzerland. Formally, the agreement is still in force, but was replaced by the Dublin II Regulation in 2003. The Dublin III Regulation currently applied has been in force since 2014. A new version presented by the European Commission was approved by the European Parliament in 2017 as the Dublin IV Regulation, but has not yet been adopted by the Council of Ministers.

The basic idea underpinning the Dublin Convention is that the first EU Member State that a person seeking protection enters is responsible for him or her. Clear responsibility rules should prevent people seeking protection from travelling from one European Member State to another and Member States from shifting responsibility to other Member States (thus creating what have been dubbed “*refugees in orbit*”). A central component of the anti-migration argumentation was to avoid “asylum shopping” (sic!) by means of the Dublin provisions.<sup>14</sup> That ugly neologism suggests that people seeking protection apply for asylum in several countries in the hope of obtaining better asylum conditions and/or higher welfare benefits. In fact, the Dublin Regulation ends up meaning that states with an external EU border are responsible for handling the bulk of asylum applications due to the basic criterion of responsibility of the country in which people first enter the EU. This shifts the responsibility for pro-

tection of people fleeing to the Member States on the periphery of the EU. The ensuing extremely unequal distribution of asylum procedures within the EU, combined with a deliberately dysfunctional reception procedure (e.g. regarding accommodation or the ban on working during the first nine months of the asylum procedure), mean that border states try to prevent people on the move from crossing their borders in the first place. If people fleeing do make it into an EU border state, they are often threatened with such bad treatment that they move on to other EU Member States, where attempts are subsequently made to deport them back to the first country as rapidly as possible. This mechanism leads to miserable and sometimes life-threatening living conditions for people on the move.

Stipulating responsibility for the asylum procedure at the national level generally also means that asylum-seekers are not allowed to leave the first EU Member State they enter until their asylum procedure has been completed, as they lack the necessary travel documents. One possible consequence of leaving the country is that ongoing asylum procedures will simply be discontinued. An asylum application in another EU Member State will be automatically rejected as inadmissible and people seeking protection will be threatened with imprisonment to “secure” their “forced transfer” (deportation) to the first country of entry, which is responsible for handling their case.

On paper, the Dublin Regulation contains provisions to protect family unity. However, administrative hurdles, such as the very narrow definition of family, short application deadlines and the fact that it is often impossible to furnish proof of family ties, all too often undermine protection of the family.

These mechanisms, coupled with completely inadequate implementation of the provisions by the Member States, result in asylum-seekers being denied access to their family members and social networks in other European countries or even denied access to those EU Member States whose language they speak. This not only has serious consequences for the lives of those affected, but is also diametrically opposed to the idea of protection and participation. Although most European citizens enjoy the freedoms and simplifications provided by the Schengen Agreement, the Dublin Regulation prevents asylum-seekers from applying for asylum in an EU Member State of their choice, thus severely restricting their free-

dom of movement. Not coincidentally, this leads to people fleeing being stuck in EU Member States with particularly low recognition rates, while they are not allowed to enter other Member States where they would certainly be granted international protection.

Possibilities for people on the move to exercise their right to asylum are more than limited in the EU. First of all, they must be within the EU to be able to apply. It is not possible to apply for asylum in e.g. European embassies. Special humanitarian visas, for example asylum visas that could be issued in embassies in third countries, do not exist either. Tourist visas are virtually inaccessible for people from most countries of origin who are seeking protection, either because there are no appointments at the embassies or, in war zones, often no embassies at all, because fees are too high and the procedures too lengthy, or because the stated purpose of entry (“tourism”), is considered implausible. This means that visa applications fail either due to formal or financial requirements or because people want to stay in Europe for the long term and apply for asylum.

In theory, people can reach Europe either by air, land or sea. In practice, EU Directive 2001/51/EC ensures that airlines (or any “carrier”) assumes responsibility for border controls that are already conducted outside the EU. If an airline transports passengers without valid documents, it must bear the costs of repatriation and will face onerous fines (up to 500,000 Euro for repeat offenders). As a result, airline employees reject everyone without valid documents, without taking into account potential cases of people who would very well be entitled to protection as refugees under international law. As a result, conventional air travel to reach the EU is almost entirely denied to people seeking protection.

Air tickets would not only be cheaper and faster, but also safer than arriving by land or sea. Often people are on the road for years (e.g. across the continent in Africa) before they even make it to the EU’s external borders, only to find that they are denied entry.

UNHCR’s international resettlement programme aims to remedy this problem by transferring “refugees in need of special protection from their [non-European] country of first reception to a safe country”.<sup>15</sup> In this context, UNHCR selects refugees according to their “special protection needs” and leaves the final decision on admission to each host country. There is no obligation for states to participate in this programme and

the number of places offered is also determined at the discretion of the host countries. The global demand for resettlement places is far from being met. In 2019, 29 countries worldwide provided reception places.<sup>16</sup> UNHCR figures indicate that 1.4 million refugees needed resettlement in the same period, while only 63,696 people received a reception place – less than five per cent of the stated need (at least on paper, because not all the places promised are actually made available in the end). If the places are computed as a percentage of all 26 million officially recognised refugees who were in third countries in 2019, places were available for just 0.24 per cent.<sup>17</sup> In 2020, when the coronavirus pandemic spread, only 20 states provided reception places and the number of resettlement places fell to its lowest level in 20 years. Not even 1.6 per cent of the needs stated by UNHCR were met. This corresponds to 0.09 percent of officially recognised refugees in third countries and 0.03 percent of forcibly displaced people worldwide.<sup>18</sup>

The number of actual “resettlements” is so low that the resettlement programme must be seen primarily as window-dressing for a restrictive migration policy. While the chances of getting a place in the programme are vanishingly small, it offers states legitimacy to detain people in third countries and still present themselves as “generous”. In addition to the glaring lack of places, being classed as a “refugee in need of special protection” also proves to be a highly selective matter and categorically excludes most people on the move. However, the right to asylum is not an act of mercy that only applies to “particularly vulnerable” persons, but a human right for everyone. Furthermore, the struggle to obtain a resettlement place is reminiscent of competition to identify the greatest suffering that entails people fleeing first being forced to earn their human right to apply for asylum. Meanwhile, there is no transparent and comprehensive examination of the allocation procedures in the third countries. Instead, UNHCR is confronted with serious allegations of corruption against staff members who demand huge sums for allocation of places.<sup>19</sup>

*Resettlement* should not be confused with *relocation*. Relocation programmes are about resettlement of people in need of protection within the EU to relieve the burden on Member States at the EU’s external borders. These programmes have varying scopes, conditions and durations. One point that they do have in common, however, is that they are only accessible to people already in the EU. Relocation programmes are char-

acterised by scant transparency, a lack of access to legal advice or any say for those affected, along with a dearth of translators, as well as arbitrary procedures, including what are known as *pre-screenings* to “pre-classify” refugees and the involvement of the intelligence services in selecting programme participants. Research suggests that in Germany, for example, asylum-seekers who cannot claim grounds for asylum in that country are deliberately selected and thus end up in the deportation system. By adopting this strategy, Berlin maintains the pretence of being interested in relieving the burden on Member States at the external borders and in the welfare of those seeking protection, without genuinely fulfilling either of its objectives.<sup>20</sup>

Founded in 1951, the International Organisation for Migration (IOM) prides itself on being “the leading intergovernmental organisation in the field of migration”. With around 9,000 staff in 470 offices worldwide and an annual budget of roughly 1.3 billion Euro, the IOM oversees what are known as “migration projects”.<sup>21</sup> Although the IOM officially became an “affiliated organisation” of the United Nations in 2016 – i.e. an intergovernmental organisation associated with the UN, but still acting independently and bound by its own statutes (unlike UNHCR, for example) – it should by no means be understood as a human rights organisation, but rather as an international service provider for states in the field of “migration control”. The IOM’s 174 (democratic and also non-democratic) Member States decide on expenditure of project-linked funds and thus on the lion’s share of the budget. Priority is given to projects aimed at repatriating people on the move (e.g. to Afghanistan or Iraq). In Germany, the IOM provides forms during “return counselling” in which people seeking protection are supposed to declare the “voluntary nature” of their return and state that they renounce all claims under residence law. “Voluntary” usually means nothing other than that anyone who does not agree to leave without resistance faces financial sanctions, detention and deportation. In this context, there is neither an internal nor external mechanism to assess whether decisions to return are made voluntarily and in accordance with international law. The IOM does not investigate whether asylum-seekers have gone through a full and fair asylum procedure, thus opening the door to illegal deportations. In addition, the IOM does not consider systematic follow-up of people after their return as part of its remit.

Other focal points are projects that prevent access to asylum and lead to unlawful refoulements. In Jordan, for example, people from Somalia and Sudan were repatriated within 72 hours of their arrival through an IOM programme, without any scrutiny of whether they were at risk of persecution in their country of origin.<sup>22</sup> The IOM also operates detention centres, such as the notorious Australian *Nauru Detention Centre* on the Pacific island of the same name. As an organ for controlling and combating movements of people fleeing, the IOM is guided by economic rather than humanitarian principles.

Solutions that meet the needs or rights of people forced to leave their homes do not exist at either the global or the European level. The absence of safe and legal entry routes forces people onto dangerous and all too often deadly overland and sea routes, where they are increasingly dependent on help to escape and thus also run the risk of falling into the clutches of unscrupulous smuggling networks. The right to asylum degenerates into hollow platitudes about purported moral superiority, as people seeking protection are continually prevented from applying for asylum.

## **Frontex – EU Gatekeeper**

Since the 1980s and 1990s, migration has increasingly been perceived as a security problem rather than being viewed primarily from the perspective of immigration policy, let alone from the premise of offering protection to people fleeing. These developments led to increasingly interwoven police cooperation between European states and were accompanied by the emergence of various EU institutions and information systems: the *European Police Office* [now referred to as the *European Union Agency for Law Enforcement*] (Europol) (1999), the Schengen Information System (SIS) (2001), the *Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration* (CIREFI) (1992) and the *External Borders Practitioners' Common Unit* (2003). In the course of this harmonisation and strengthening of the border regime, the *European Border and Coast Guard Agency*, *Frontex* (an acronym derived from *frontières extérieures* in French) was created in 2004 by European Council Regulation 2007/2004. The aim was to “improve the coordination of operational cooperation between Member States in the field of external border management”.

The agency began its operations in 2005 with 70 employees and a budget of about six million Euro. Since then, the border management agency's financial and human resources have mushroomed at a dizzying rate, while the agency's initially limited remit, powers and areas of activity have also been substantially expanded.<sup>23</sup> The coordinating and supporting role that Frontex was initially intended to provide to EU Member States seeking to protect their borders rapidly evolved into an operational focus on border surveillance, repatriation of illegalised migrants and combating criminal activities.

As early as 2007, EU Directive 863/2007 made the first changes to Frontex's remit, authorising the Agency to deploy *Rapid Border Intervention Teams* (RABITs) to EU Member States facing high numbers of illegalised border crossings from third countries. Introduction of the EBGs (*European Border Guard Teams*) in 2011, in which border guards were placed under the agency's direct authority, constituted a further step towards operational executive functions. EU Member States are now expected to provide a "permanent corps" of at least 1,500 officers for the EBGs, ready for deployment at short notice. The teams can engage in a range of activities: Frontex joint operations, rapid response operations, as well as return operations – including immediate repatriation.

Frontex operations originally relied on funds provided at the request of European countries (both EU and non-EU). In 2011, Frontex was given the authority to lease and charter various means for its operations independently from private companies.<sup>24</sup> The main objective was to enable Frontex to fill funding gaps created by insufficient contributions from EU Member States that could lead to unwanted border crossings in Europe. As a result, Frontex not only expanded its control and surveillance function at the borders, but at the same time found a means to evade oversight and scrutiny by the EU and its Member States.

With the establishment of the *European Border Surveillance System* (Eurosur) in 2013, Frontex gained a new tool for border control. The surveillance and data collection system uses drones, reconnaissance equipment, offshore sensors, high-resolution cameras and satellite search systems to monitor illegalised immigration into EU Member States and "improve [EU Member States'] situational awareness and reaction capability" at external borders. That means that Eurosur's remit does not encompass protection or save lives, but merely monitoring. In this con-

text, the agency collects data in an area that extends far beyond the EU's borders.<sup>25</sup>

Frontex's increasingly repressive character is also reflected in its cooperation with the European police agency Europol. After the initial agreements between the agencies in 2008, a revised deal was signed in 2015. Flying in the face of objections from data protection experts, the information and data collected by Frontex was henceforth to be made available to Europol in order to fight crime.

In 2016, the agency was renamed the *European Border and Coast Guard Agency*, although the name Frontex remained in use. In EU Regulation 2016/1624, the fight against and prevention of "crime with a cross-border dimension" was explicitly mentioned for the first time among the objectives of the revised remit and the monitoring portfolio was supplemented. The agency's competences and executive functions concerning returns as well as search-and-rescue operations at sea were also significantly expanded under the new Regulation. Its increasingly regulatory, supervisory and operational role empowered the European Border Agency as a law enforcement body, while at the same time the budget available kept on rising. In 2018, around 700 people worked at Frontex and its financial resources had grown to 320 million Euro. Further amendments to its remit in 2019 continued this development. As a result, the agency's powers and areas of activity were once again expanded, inter alia for implementation of return measures, and its human and financial resources were increased.<sup>26</sup> Furthermore, as a result of EU Regulation 2019/1896, the agency was now able not only to lease a wide variety of equipment and vehicles, but to purchase these outright.

One of the most remarkable innovations concerned the geographical expansion of operations. The European border management agency now had a remit to carry out operational activities, including executive missions, in third countries *without* a direct border with a Member State and to open what are dubbed Antenna Offices in non-EU Member States. This extends intelligence and law enforcement operations by Frontex within a vast self-proclaimed "pre-border zone". This expanded range has been introduced although neither the EU nor Frontex are entitled to exercise state sovereignty over territories outside the EU. That makes it almost impossible to determine the legal status of its operations and, when appropriate, to prosecute European border officials. Analysis and



exchange of data with non-EU Member States constitutes a further component of this geopolitical expansion of European border surveillance. Frontex has entered into cooperation agreements with the authorities in 18 countries outside the EU: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, North Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, Russia, Serbia, Turkey, Ukraine and the USA.<sup>27</sup>

While Frontex's original remit included only six tasks, it now has over 30. Its budget has risen to 1.3 billion Euro a year (2021-2027), thus setting the course for progressive militarisation of European borders in future. In addition, a permanent corps of 10,000 border guards is to be deployed by 2027, about one-third of which may be recruited by the agency. With a view to ensuring that Frontex is no longer dependent on provision of equipment by the Member States, the agency is to be provided with funds to purchase its own equipment.<sup>28</sup>

Frontex is at the centre of border control operations in Europe, yet there is de facto hardly any accountability for the EU agency, despite the drastic increase in its powers. That is an unacceptable state of affairs, especially as it operates predominantly in sensitive areas involving human rights, where the agency is not dealing with criminals, but with people in need of protection. The EU agency acts without an independent supervisory body. The current EU parliamentary control mechanisms can confidently be said to be entirely ineffectual. The ombudspersons, for example, cannot issue legally binding judgements or even order penalties, but can only make non-binding recommendations. While allegations of human rights violations by Frontex are mounting and an overwhelming burden of proof exists, for example, for involvement in unlawful pushbacks,<sup>29</sup> it is also virtually impossible to hold the agency legally responsible. Since the breaches of law are committed in the midst of a confusion of responsibilities between national and European levels, it becomes significantly more difficult to initiate court proceedings. It is hard to bring a lawsuit before a national court as national border officials hide behind the EU agency's supervisory position and instructions. Unlawful actions by EU agencies cannot be brought before the European Court of Human Rights (ECHR), because the EU, unlike the individual Member States, has not signed the European Convention on Human Rights (ECHR). Individual complaints are admissible before the Court of

Justice of the European Union (ECJ)), i.e. affected individuals cannot bring cases before the ECJ themselves. This legal vacuum is not an oversight, but an important component of European isolationist and anti-migration policies, which gives Frontex carte blanche in terms of human rights.

It therefore comes as no surprise that Frontex head Leggeri feels untouchable and blithely makes false statements to the European Parliament concerning accusations against Frontex.<sup>30</sup> When Inmaculada Arnáez, then Frontex Fundamental Rights Officer, was to be joined by 40 more staff in 2019, Leggeri summarily dismissed Arnáez (without being legally authorised to do so).<sup>31</sup> Frontex only hired a new fundamental rights officer and filled half of the required 40 posts of fundamental rights observers in June 2021.<sup>32</sup> Leggeri admitted openly that filling these posts was “not a priority” for him.<sup>33</sup> Meanwhile, the European Court of Auditors complained that the agency was not even able to provide a complete and up-to-date picture of the situation at the EU’s external borders. Other points on the Court’s list of shortcomings included a lack of reporting on the effectiveness and costs of operations, along with insufficient information for decision-makers.<sup>34</sup> The bottom line, however, was that complaints were mainly about inadequate border security, rather than about Frontex’s unfettered, institutionalised control over the borders. The EU’s anti-fraud agency OLAF (acronym for *Office européen de lutte antifraude* in French) is now investigating Frontex, inter alia for mismanagement and harassment.

What happens at the European Union’s external borders is determined by this limited parliamentary and legal scope for oversight, a lack of transparency, Frontex’s fundamental refusal to deal with problems (such as unsatisfactory handling of requests to inspect documents and requests for information), at best rudimentary legal protection for people on the move, a lively dialogue with the arms lobby, as well as the agency’s law enforcement focus.<sup>35</sup> As a result, the EU is deliberately and willfully keeping its borders tightly closed with Frontex as gatekeeper, with human rights violations as its *modus operandi*.

The global COVID-19 pandemic has de facto suspended the already eroded right to asylum in the EU and the borders are even more hermetically sealed than before. UNHCR’s resettlement programme has virtually ceased to operate. Meanwhile, millions of people fleeing all around the world are living in makeshift camps under disastrous hygienic con-

ditions in cramped spaces. While European Commission President von der Leyen circulates videos on deep-clean hand-washing and calls for European solidarity in the coronavirus crisis, while a large number of people on the move (also within the EU) have no access to running water, the pandemic is another pretext for isolation and at the same time a significant catalyst for people to flee their homes. With or without a global pandemic, the EU and its Member States are going to great lengths to seal Europe off from people seeking protection. Deliberate denial of safe and legal entry routes and the brutally calculated hurdles incorporated into asylum policy systematically deprive people who have fled their homes of their rights, while also inevitably resulting in deaths at the borders. It therefore comes as no surprise that the EU has the deadliest border in the world.<sup>36</sup>

With around 450 million inhabitants, the EU is the world's second-largest economy, notching up 22.8 percent of global economic output, yet is said to be plunged into a "crisis" by a small fraction of the global total of people on the move. Meanwhile, it is not only outspoken right-wing populists, nationalists and anti-human rights activists like Hungarian Prime Minister Viktor Orbán who are fuelling the debate with racist resentments against people seeking refuge. Many government politicians in the EU want to stand out as tough border guards. The President of the European Commission, Ursula von der Leyen, praised Greece as a "shield of Europe" at the very moment when the right to asylum was officially suspended there. Reckless Eurocentric invocation of the alleged security threat and supposedly hard-earned prosperity fuels nationalism, xenophobia and hatred within Europe.

Unlawful pushbacks and other human rights crimes are the order of the day at Europe's external borders, sound cannons are supposed to prevent people from even getting close to border crossings, and migrants are killed at borders by shots fired by European security forces – yet there is no great outcry from society and politicians.<sup>37</sup> The shrill admonition "We can't take them all in!" seems downright ridiculous in view of the number of people seeking protection who actually come to Europe. And what would be the consequence if the figure were higher? Should our response involve even more violations of the law and even more deaths? The question of accommodation for people fleeing and geographical allocation across the EU must not be allowed to undermine the fundamen-

tal responsibility to take in people seeking refuge. Anything else would mean officially burying the much-vaunted European canon of values together with the relevant legislation law.

The EU operates a border-sealing regime that is as complex as it is perfidious. Fortress Europe does more than simply leaving people destitute and repelling them at its walls: Fortress Europe kills. Daily human rights violations are by no means accidental or simply unfortunate, they are systemic and systematic, and condone deaths. Considering how to deal with people seeking refuge and with migration is not just a question of morality, mercy or even benevolence – it is a question of rights. Quo vadis, Europe? To Luxembourg? Strasbourg? Or even to The Hague?

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# Europe's External Borders – Systematic Isolationism and Violence

**The external borders** of the European Union and the Schengen Area comprise almost 7,720 kilometres of land and 42,670 kilometres of sea borders. While there is little migration along much of the border, due to their geographical location (such as the land along borders of the Atlantic coast), other border sections are important nodes on the routes of people seeking protection. The West African route leads by sea from countries on the West African coast to the Canary Islands. In the western Mediterranean, people travel from Morocco or Algeria to Spain. The sea route from Tunisia or Libya to Malta and Italy is known as the Central Mediterranean route. The Eastern Mediterranean route leads by land or sea from Turkey to Greece. From Greece and Bulgaria via North Macedonia or Albania and Montenegro, people fleeing reach Serbia and Bosnia & Herzegovina. What is known as the Balkan route leads to Croatia, Hungary and Romania, and its hallmark is that people often have to make even more attempts to cross the border; this route in particular is therefore not straightforward, but often leads people on the move to various countries in the region. Less used routes are, for example, the Adriatic route, which runs by sea from Greece and Albania to Italy, or the land route from Russia to Norway and Finland via the Polar route. The Central Eastern European route takes people via Ukraine to Romania, Slovakia, Hungary or Poland, and the north-eastern European route from Belarus to Poland, Latvia or Lithuania.

For people seeking protection in Europe, these stages en route to the EU come at the end of what is mostly a long journey that may span many countries and years. Currently, Spain, Malta, Italy and Greece are the most common countries of first entry into the EU. However, many people do not necessarily want to stay in these countries and move elsewhere if at all possible.

Flight routes and the frequency with which they are used change constantly, as do the reasons why people flee their homes. Obstruction of such movements, either by individual Member States or as a large-scale EU project, has a huge influence on the means and routes people on the move must adopt to arrive in Europe, and above all an enormous impact on the numbers who are traumatised, injured and or die while seeking refuge. The EU's isolationism not only claims lives at its immediate borders, but also leads to people suffocating in lorries, freezing to death on trains or drowning in the Mediterranean on their way to Europe. In all likelihood, the number of dead and missing in the deserts along the route to the Mediterranean is even higher than the number of people who have died or are missing at sea.

In Europe, people fear and complain about alleged "hordes of young men" coming across the borders. However, even if twice as many men as women applied for asylum in the EU in 2020,<sup>38</sup> the total number of asylum-seekers in the EU remains low overall, just as women, children and old people have just as much reason to flee. Worldwide, just as many women as men are fleeing their homes. It is not the need for protection that determines who ultimately arrives in the EU. As women often assume responsibility and take direct charge of caring for younger and weaker relatives, escape routes along which they may become victims of human rights violations, human traffickers and sexualised violence are particularly sensitive issues for them.<sup>39</sup> Due to consistent sealing of borders and the resulting risks, all too often expensive smugglers have to be paid, which women can rarely afford. It therefore comes as no surprise that women tend to seek refuge within their countries of origin or are simply stuck somewhere on a flight route. Claiming that it is mainly young men who seek protection in Europe denies the fate of millions of women in need of protection. For LGBTQIA+, too, the path is often much more difficult, as they usually need to keep their sexual orientation or gender identity secret at all costs to avoid becoming victims of queerphobic or sexualised violence.

The EU largely abandoned its human rights obligations towards people on the move with the introduction of the Schengen Area, which involved opening up internal borders and keeping external borders tightly closed, and instead adopted a rigid defensive mentality. When the number of

people fleeing increased significantly globally in the early 2010s and war and crises increasingly unfurled at the gates of Europe (overthrow of dictatorial regimes in North Africa and subsequent instability, conflicts in the Near and Middle East, etc.), the EU once again tightened the reins of its border regime. Since then, Europe's external borders have been relentlessly, even neurotically, reinforced, barricaded and militarised. In the last ten years alone, according to the European Commission, 3,936,935 people have been turned away at European borders.<sup>40</sup> Border deaths, victims of pushbacks and pullbacks or other types of unlawful rejections are not even counted in these official statistics.

Meanwhile, within the EU, racist police controls and dragnets along the internal borders are in full swing. The intelligence services are being used to monitor people on the move and those helping them in order to prevent onward travel within Europe. People keen to reach the United Kingdom (UK) to be reunited with their families or to settle in an English-speaking country must also cross the dangerous sea border between France and England by water or travel through the heavily guarded Euro-tunnel. What is known as the Calais Jungle – an unofficial camp where people on the move organise themselves for the onward journey to England across the English Channel (as in other French coastal towns) – first emerged in 2009.<sup>41</sup> Since 2016, the temporary camps have been repeatedly evicted, personal belongings destroyed, and people's hopes quenched with water cannons.<sup>42</sup> At this inner-European border, as elsewhere, denying safe and legal travel routes leads to devastating living conditions for tens of thousands of people fleeing, as well as to numerous deaths and missing persons. At this border, too, people are forced to risk their lives on unseaworthy junk boats. Hundreds of people have died trying to cross the Eurotunnel on goods trains or hidden under trucks.<sup>43</sup> The situation has worsened since Brexit although Ireland and the UK were never part of the Schengen Area and what are known as advance border controls took place on the European mainland side of the Channel, i.e. controls on exit rather than on entry, to make migration more difficult. On 24th November 2021 alone, at least 27 people drowned trying to cross the world's busiest shipping lane. Both the British Home Office and the French President came up with a knee-jerk response to this politicised catastrophe, with calls to "fight smugglers" and attempts to blame each other.<sup>44</sup> There was however no mention of how more stringent "border

security measures” in both countries force people on the move to take greater risks. Activists and surviving relatives of the victims are now seeking legal action against British and French authorities involved in coordinating and carrying out the search-and-rescue operation. They allege that the officials’ actions and omissions violated the European Convention on Human Rights and contributed to the loss of life.<sup>45</sup>

Elsewhere, the EU funds hundreds of detention camps outside its borders, where people fleeing are held without legal grounds and without access to an asylum procedure, often in atrocious conditions. Worldwide travel restrictions due to the COVID-19 pandemic, as well as progressive externalisation of European borders through agreements with undemocratic regimes that generate high numbers of people do not simply make it even more tricky and life-threatening to seek protection elsewhere; these factors also lead to outsourcing and thus obscure the border violence exercised by the EU. Fortress Europe confronts people on the move with ever higher hurdles, walls and a shocking level of systematic brutality. The European border protection agency Frontex is the central symbol and instrument of this isolationist “Fortress Europe” policy, which stigmatises people seeking protection as a threat to European security and treats them accordingly.

## The Central Mediterranean

The Mediterranean is one of the busiest water bodies in the world. However, profitable freighters and champagne-laden yachts are not the only seafarers on this stretch of water separating Europe and Africa; thousands and thousands of people in search of protection also set sail across it. The Central Mediterranean route is an intersection of numerous escape routes that converge in Tunisia and, above all, Libya, and forms one of the most frequently used escape routes to Europe. People fleeing from various regions have already made a long and dangerous journey by the time they reach the shores of North Africa. People from all over Africa, but also from the Middle East and South (East) Asia, take this high-risk route, where they run the risk of arbitrary detention, kidnapping, sexual abuse and physical violence by human traffickers, armed gangs, state security forces, police, immigration authorities, and border guards. People who cross the desolate wastes of the Sahara also face dehydration and hunger, and in many cases death in the desert.



Since air travel is out of the question for most people on the move because they are denied visas, they have to take the often deadly sea route for the last part of their journey to Europe. They hope to reach Malta (about 300 kilometres off Libya) or the Italian islands of Lampedusa (about 75 kilometres off Tunisia and 400 kilometres off Libya) or even Sicily (about 430 kilometres off Libya). The unseaworthy, mostly hopelessly overcrowded junk boats, with no adequate navigation equipment, without enough fuel and without water, are by definition in distress from the moment they set sail. There is immediate danger not only to the boat but to the lives of those on board. The obligation to rescue at sea is laid down in the *International Convention for the Safety of Life at Sea* (SOLAS) and the Salvage Convention. The principle of rescue at sea is also part of customary international law. The duty to rescue people in distress at sea applies to all ships and captains, regardless of their flag and regardless of whether the ship is operated privately or by the state. The same applies *mutatis mutandis* to states. They are obliged to ensure that people in distress at sea are assisted – either by carrying out their own rescue operations or by instructing the captains of private and state-owned ships to do so.<sup>46</sup> Coastal states in particular must provide appropriate means for rescuing shipwrecked persons within their SAR area.

No other body of water is as seamlessly monitored as the Mediterranean, yet boats sink and people drown there almost every day. The Mediterranean – Europe's external border – is the deadliest border in the world. 69 percent of people on the move who die in the Mediterranean are following the Central Mediterranean route.<sup>47</sup> More than 23,150 fatalities and missing persons have been recorded there by the IOM since 2014, with the number of unreported cases significantly higher.<sup>48</sup> Since the EU knowingly and willingly accepts these deaths or causes them to happen in the first place, this is not a humanitarian issue but a political catastrophe.

Between 2008 and 2013, between 4,500 and 64,300 people seeking refuge crossed the Central Mediterranean to Europe each year, soaring to over 170,000 in 2014, when border controls in Libya and Tunisia largely vanished. In 2016, the route recorded a peak of over 181,000 people fleeing. The biggest drivers for this development were the WANA uprisings and revolts that began in 2010 in the Middle East and North Africa, in countries such as Syria, Tunisia, Egypt, Libya, Bahrain and Yemen, often

lumped together in the Global North under the Orientalist term “Arab Spring”. Other causes were the massive violence and human rights violations in Afghanistan, Iraq and Eritrea. Since 2017, the number of people arriving in Europe via the Mediterranean has been steadily decreasing, in contrast to the number of people forced to leave their homes.<sup>49</sup> This reduction in illegalised arrivals is unfortunately not due to the establishment of safe and legal entry routes or even the eradication of the causes why people flee. Instead, the EU reacted to the increasing volume of people fleeing their homes in the 2010s by hermetically sealing its borders and moving those borders forwards. Border guards’ defensive actions were shifted to the high seas, while state-organised rescue at sea was discontinued. Numbers dropped rapidly in 2017 to just under 119,000 successful crossings, to a large extent due to the EU funding, equipping and commissioning Libyan and also Tunisian border authorities and militias. The sharpest drop to date was recorded in 2018, when footfall on the Central Mediterranean route fell by 80 per cent, with 23,485 people making it to the EU via this route, the lowest number since 2012. It was also the year when, for the first time, significantly more boats departed from Tunisia than from Libya.<sup>50</sup> In the following years, 14,000 and 35,600 people seeking protection made their way to Europe via the Central Mediterranean route. Reducing the number of people reaching Europe in no way diminishes the number of people fleeing nor their plight, especially as only actual arrivals in Europe are counted here, not thwarted attempts, pullbacks and deaths.

### Libya

The externalisation of European borders is not a new phenomenon. Italy in particular has played an important role in this process since the late 1990s. Several formal and informal agreements with North African states, in particular Libya (under the colonial rule of fascist Italy from 1934 to 1943 and was administered by the victorious powers of the Second World War until gaining independence in 1951), have ensured that movements of people fleeing across the Central Mediterranean are controlled, thus minimising arrivals on EU territory. Over the years, bilateral cooperation deepened, with a Memorandum of Understanding signed between Italy and Libya in 2000 and an agreement in 2003, the contents of which remained partly secret.<sup>51</sup> The aim of the cooperation was never

to increase protection of people fleeing, but always to disperse and shake off responsibility and accountability concerning efforts to combat their movements. In addition, Italy launched *Operation Constant Vigilance*, a military surveillance programme directed against people on the move, in 2004. Since then, Italian naval vessels have been in constant operation in the Strait of Sicily, together with reconnaissance aircraft, to curb illegalised movements of people fleeing.

Another Italian-Libyan agreement, from December 2007, underpinned by the “Friendship Treaty” signed in 2008, included provision of six patrol boats to Libyan counterparts and intensified police cooperation and information exchanges between the two countries.<sup>52</sup> Development of infrastructure for containment of people fleeing was to be co-financed by Italy and the EU. Libya was paid more than five billion Euro and the shattered country was obliged to control its own borders more closely and prevent the departure of boats carrying people on the move or at least to intercept them in its territorial waters, i.e. within the 12-mile zone, and tow them back to Libya.<sup>53</sup> Joint patrols by Libyan and European border officials to intercept boats, which were formally recorded for the first time, were a milestone in the process of sealing Europe's borders tightly shut. The number of boats arriving in Italy dropped significantly as a result. In 2009, a bilateral repatriation agreement was concluded between Italy and Libya.

The EU also participated directly in blocking movements of people seeking protection, signing a “migration cooperation agenda” with Libya in October 2010 that consolidated the remit to keep people on the move away from EU borders. Even then it was common knowledge that in Libya (the only North African country not party to the Geneva Refugee Convention) people fleeing are subject to extortion, slavery, forced labour, torture and ill-treatment, gender-based violence, arbitrary detention and killing, but that did not bother Brussels. To this day, the EU ensures that people seeking protection in a country without an established asylum, legal or administrative system to protect refugees are detained or expelled through what are known *chain pushbacks*. While Libyan border guards carry out pullbacks on behalf of the EU,<sup>54</sup> their European counterparts use the agreements and arrangements to carry out pushbacks and deport people on the move from international waters back to Libya before they can reach European maritime borders.<sup>55</sup>

In 2007, a legal opinion from the ECCHR (*European Center for Constitutional and Human Rights*) had already made clear that refugee and human rights are also binding for border guards beyond coastal waters, i.e. outside EU Member States' territorial waters. People fleeing who are found on the high seas therefore have the right to apply for asylum in the EU and may not be deported.<sup>56</sup> In 2012, the Grand Chamber of the European Court of Human Rights (ECtHR) ruled on this issue. In *Hirsi Jamaa and Others v. Italy*, Italy was convicted of returning a group of Eritrean and Somali citizens rescued by the Italian coast guard in 2009 to Tripoli on an Italian warship. They were forced ashore there and handed over to the Libyan authorities.<sup>57</sup> This procedure had been explicitly justified by the Italian Foreign Minister in 2009 on the basis of the repatriation agreement with Libya. However, the Hirsi ruling reaffirmed that the European Convention on Human Rights (ECHR) also applies outside the territory of the contracting states, provided that the state in question has "effective control" over the situation. Repatriating people rescued to Libya without giving them an opportunity to apply for asylum was therefore unlawful. EU Member States are bound by the applicable fundamental and human rights, despite and precisely because of increasing externalisation of their border controls.<sup>58</sup> The Court condemned the procedure as a form of unlawful collective expulsion, devoid of individual examination as to whether protection should be granted and in which those concerned had no access to translators and legal advice. The Court has pointed out on several occasions that Italian officials lack competence to make judgements on the need for protection. In order to be able to fulfil the minimum procedural standards resulting from the principle of non-refoulement pursuant to the Geneva Refugee Convention (GRC), operations of the European military and coast guards, as well as Frontex, must take people on the move to the closest European port rather than to their port of departure.<sup>59</sup>

The situation was unparalleled in its absurdity – in the very year in which the EU was awarded the Nobel Peace Prize, it had to be reminded by its highest legal authority that interceptions cannot be deemed rescue missions and that pushbacks are unlawful under international law. Although the unlawful practice continued nonetheless, the EU sought alternatives. However, the Hirsi ruling did not lead to cessation of operations that violate human rights, instead sparking political and opera-

tional manoeuvres to circumvent the judgement. Since the Hirsi ruling prohibits EU Member States from returning people directly to Libya, measures were developed to continue the abductions without direct European contact with people fleeing their homes. To this end, cooperation with Libya was expanded, increasing cutbacks of European state-organised maritime rescue missions were introduced, and militarisation of the maritime borders was extended. With the fall of Gaddafi and the war in Libya in 2011, the EU could no longer rely on Libya alone to control its borders and decided to develop new methods of sealing its borders.

In 2013, the *EU Border Assistance Mission to Libya* (EUBAM Libya) was launched. With the help of EUBAM, the Libyan authorities were to be supported in developing a broader border control strategy. The cooperation policy was designed unilaterally by the EU. The agenda included plans for training measures by Frontex and the military mission Eunavfor Med (*European Union Naval Force Mediterranean*) for the so-called *Libyan Coast Guard* (scLYCG). The “Seahorse Mediterranean” project was set up in 2013 to further involve North African coast guards in European border management. The project is not an EU institution, but a multilateral network of EU Member States bordering the Mediterranean (namely Malta, Italy, Greece, Cyprus, France, Spain and Portugal). Nevertheless, Seahorse Mediterranean is linked to the Eurosur system. Furthermore, 141 scLYCG staff were trained under the aegis of Seahorse Mediterranean up to 2019. The European Commission stated that the project was launched with a budget of 5.5 million Euro.

In contrast, the Italian military-humanitarian operation *Mare Nostrum*, which rescued over 150,000 people in distress at sea between 2014 and 2015, was terminated after only one year because Italy alone was responsible for the operation's financing and logistics. There was no response from any EU Member State or from the European Commission to Italy's request for financial participation and for rescued people to be relocated. *Mare Nostrum* was replaced by Frontex's Operation Triton (see below), which shifted the focus of *Search and Rescue* (SAR) to border control and effectively ended state-run rescue at sea in the Mediterranean. Operation Triton's area of operations shifted northwards, as this made rescue missions less likely. In addition, the area of operation was enlarged and fewer resources were made available. As a consequence, civil society initiatives began towards the end of 2014 to organise SAR

operations in the Mediterranean to fill the gap left by the demise of Mare Nostrum.

EU Council Decision 2015/778/CFSP launched the military programme Eunavfor Med in summer 2015 (the operation was later hypocritically renamed Operation Sophia – after a Somali child born on board a frigate of the same name after one of the rare rescue operations by Eunavfor Med units). Again, the primary mission was to stop refugee movements originating from the Libyan coast. UN Security Council Resolution 2240(2015) established the legal basis for the operation and authorised Member States to take “all measures commensurate to the specific circumstances” to “disrupt the organised criminal enterprises” operating off Libya. Under the guise of combating smuggling networks, Operation Sophia was from now on to support Operation Triton in preventing people from fleeing to Europe. The slogan “saving lives by reducing crossings” displayed the utmost hypocrisy, as this goal could have been achieved solely through legal and safe entry routes.

In 2016, Operation Sophia’s mandate was expanded to include explicit support and training for the scLYCG.<sup>60</sup> The EU thus no longer only provided the bulk of the funding, but also the training and, at least in part, coordination of systematic interception of people fleeing. Between 2016 and the first half of 2021, over 80,000 migrants were intercepted at sea by the scLYCG, according to official figures, although the number of unreported cases is likely to be much higher.<sup>61</sup> Meanwhile, information about the scLYCG is sparse. As recently as 2019, the European Commission was unable to provide information on how many scLYCG vessels, aircraft or personnel were deployed. Links to various militias and warlords in the civil war-torn country, on the other hand, are well documented.<sup>62</sup> If people on the move are intercepted by the scLYCG, they are taken to detention camps run by militias, where conditions are catastrophic and cruel. The scLYCG releases others in return for extortionate payments.<sup>63</sup> Commander Abd al-Rahman Milad, also known as Bija, formerly head of the coast guard in Zawiya, was arrested for human trafficking and smuggling. He had participated in many official meetings with the Italian Ministry of Interior and Justice and was accused of crimes against humanity in a UN security report.<sup>64</sup> Bija was released from Libyan custody in April 2021. It has been reported that the militias in Zawiya had threatened to cut the power supply to a refinery. The smuggling networks that have

existed in Libya for years could never have developed to this extent without the support of the state and the militias. They all profit from the multi-billion dollar business of people-smuggling. Fortress Europe hopes to profit politically in the process, but above all makes itself vulnerable to blackmail and further destabilises Libya by financially supporting violent militias.

As a result of the EU-Turkey agreement in March 2016, more people again tried to reach Europe via the Central Mediterranean route. The number of people fleeing arriving in Malta and Italy rose. European institutions and governments, however, were not willing to deal with the people seeking protection in a spirit of solidarity or at least to grant them the most basic fundamental rights, instead introducing further restrictive measures at the EU's external borders.

The military vessels deployed in Operation Sophia occasionally found themselves having to rescue people on the move as they were stationed in the southern Mediterranean, although their role remained minor in contrast to other SAR protagonists.<sup>65</sup> While more than 44,000 people fleeing were reported to have been rescued off the Libyan coasts during Operation Sophia, there is no information on where they were brought ashore. Since the operation's leadership did not want to be accused of being a pull factor,<sup>66</sup> Member States were only too happy to go along with populist demands from right-wing European governments for rescue at sea to be suspended: the presence of naval units was gradually reduced to avoid contact with boats carrying people on the move in the first place. As a result, no vessels from EU agencies or programmes have been deployed in the Central Mediterranean with an explicit mandate to rescue shipwrecked people.

In the context of a *Memorandum of Understanding* (MoU) between Italy and Libya from 2017, European border security was to be strengthened once again and cooperation with the scLYCG expanded within the framework of Operation Sophia.<sup>67</sup> The MoU focused on controlling Libya's borders and preventing people fleeing from leaving for Europe. Despite the devastating situation in Libya, which even the EU had to acknowledge, Italy pledged, inter alia, to provide technical and organisational support to the scLYCG and the Libyan Ministry of the Interior, as well as to finance

detention camps. Despite numerous reports and evidence of atrocities in the camps, which led to an investigation by the International Criminal Court (ICC),<sup>68</sup> the EU supported the MoU and contributed significantly to its funding. Malta welcomed the MoU with particular zeal, assuring Italy of its support through the *Malta Declaration* aimed at “preventing departures and managing returns”.<sup>69</sup>

Between April and May 2017, Italy provided four more patrol vessels to the Libyan Navy and the scLYCG.<sup>70</sup> With the help of EU funds, Italian authorities established a Libyan National Coordination Centre and the so-called *Joint Rescue Coordination Centre* (scJRCC) in Tripoli and trained Libyan staff working in the centres. As part of the Italian “Mare Sicuro” military operation, an Italian military vessel docked in the port of Tripoli to promote cooperation with the Libyan navy and the scLYCG and to train their staff.<sup>71</sup> These measures paved the way for the declaration of a Libyan SAR (*Search and Rescue*) zone in June 2017. With such a Libyan SAR zone, rescue operations in international waters off Libya no longer had to be coordinated through the *Italian Maritime Rescue Coordination Center* (ITMRCC). Italy and the EU once again shed direct responsibility for human rights violations committed on the ground by the personnel they had paid and trained along the EU’s external borders. A legal opinion from the German Bundestag’s research unit also disapproved of Libya’s high-handed declaration of the SAR zone and specified that Libya should not impede rescue at sea by civilian ships (in accordance with international law) despite certain local control rights.<sup>72</sup> However, through the new scJRCC, the Libyan authorities accorded themselves the right to issue instructions to civilian vessels to return people on the move to Libya people fleeing that they had rescued within a vast area extending far beyond Libyan territorial waters. The rules and regulations of the Libyan SAR zone also included a clause declaring that SAR NGOs had to stay away from maritime emergencies unless otherwise ordered by the competent authorities. From this point on, captains had to make a choice: either they followed the official instructions from Libya and allowed people to drown or brought them back to Libya – thus violating their duty to rescue at sea – or they disregarded these instructions, adhered to their higher-ranking legal duty to rescue at sea and brought people to a safe port in Europe. The Italian and EU authorities who helped to initiate the Libyan SAR zone proclamation did not comment on this moral and legal dilemma they had created.



Since the scJRCC Tripoli did not objectively fulfil the requirements of the SAR agreement and thus could not be considered operational, oversight of the Libyan SAR zone continued to be mostly de facto in the hands of the Maritime Rescue Coordination Centre in Rome.<sup>73</sup> However, this did not prevent the Italian government then in power, with Conte, Salvini and Di Maio, from having all those seeking protection that were rescued in the Libyan SAR zone returned to Libya – even ships flying the Italian flag were ordered to do these *pushbacks by proxy*. This was manifestly illegal, as became apparent at the latest in October 2021, when the captain of the merchant ship “Asso 28” received a prison sentence for doing precisely this.<sup>74</sup>

SAR NGOs also report that the European Maritime Rescue Coordination Centres in Rome and Malta increasingly refer to the competence of the provisional scJRCC and refuse to support and coordinate rescues. This reference to the Libyan authority is highly problematic for civilian protagonists, as they often depend on support from their flag states to act legally if the scLYCG issues instructions that violate international law. In the case of civilian rescue at sea, however, EU Member States go to great lengths to make rescue work more difficult. Civilian rescue at sea has thus been deliberately pushed into a legal minefield with extremely limited options for action. Meanwhile, the Libyan scJRCC often cannot be reached on any of the telephone numbers provided, and when it is, it cannot communicate in English, as is required under the SAR Convention and would be expected of an authority operating internationally. Journalists reported that the scJRCC does not exist and that the scLYCG receives information about boats in distress from a poorly equipped command centre at a military base in Tripoli.<sup>75</sup> In other cases, incoming distress calls are simply not answered or rescue teams on standby are not allowed to operate. The scJRCC's delayed and inadequate communication and failure to coordinate rescue operations endanger the lives of many people and result in widespread human rights abuses committed against refugees in Libya and at sea. For example, in the EU-funded operation, a rubber dinghy with 126 people may sink because the MRCC in Rome does not view the call as being within its remit, while the Libyan militias do not take rescue people on Fridays because it is a day of rest.<sup>76</sup>

Since December 2021, an Italian naval vessel has again been moored off the port of Tripoli to act as a maritime rescue coordination centre for

the scLYCG from there. The EU finances the 15-million-Euro undertaking of “migration control through cooperation” – a cooperation with militias that makes the work of civilian rescue at sea more and more dangerous and has no other goal than violent interception of people fleeing, who are returned to a country where war is raging.<sup>77</sup>

In July 2017, the Italian Ministry of Interior was awarded funding for the EU project “*Support to Integrated Border and Migration Management in Libya*” (SIBML). In order to “strengthen the operational capacity of the Libyan Coast Guard” for “maritime surveillance and rescue”, the project was allocated 46.3 million Euro.<sup>78</sup> About 42 million Euro of this sum came from the *EU Trust Fund for Africa* (EUTF), which the EU likes to label as “development aid”, although it is simply another anti-migration tool. A little later, Italy required those involved in civilian rescue at sea to sign a *Code of Conduct* (CoC) put forward by Interior Minister Marco Minniti, intended to further hinder the work of SAR NGOs.<sup>79</sup> By making the obligation to rescue for NGOs subject to unfulfillable conditions, the CoC was a clear rejection by the Italian government not only of the law of the sea, but also of the principle of non-refoulement pursuant to international refugee law and the right to life pursuant to international human rights law. The final paragraph of the CoC stated that Italy had the right to close its ports to SAR NGOs if they did not sign the Code of Conduct. Once again, the Italian government underlined its efforts to minimise arrivals of people rescued at sea. The CoC joined the many other orders and agreements that attempted to override international law. At the same time, a coordinated smear campaign was launched by leading European politicians. The Austrian Foreign Minister at the time, Sebastian Kurz, called for an end to the “NGO madness”, the German Interior Minister de Maiziere repeated the unsubstantiated accusations that NGOs were “switching off their transponders and sending light signals”, and Salvini (then still in opposition) was already calling, loudly and unabashed, for confiscation of NGO ships.<sup>80</sup>

Italian-European cooperation with the scLYCG and the scJRCC actually led to a reduction in arrivals in Italy (from 144,000 in 2017 to 46,000 in 2018). Above all, however, these figures mean that more people on the move were stuck in Libyan camps or forced back there, and the risk of dying at sea increased dramatically.<sup>81</sup> However, as the EU still found the

arrival figures too high, it was decided in 2018 to allocate another 15 million Euro to the scLYCG, this time fully covered by the EUTF.<sup>82</sup>

In summer 2018, the Italian government began its “closed ports” policy, denying ships carrying rescued people access to ports and thus a place of safety. This left ships waiting at sea for days or even weeks without receiving instructions on where to dock. This affected not only SAR NGO ships, but also merchant vessels as well as Italian Coast Guard, US and Irish Navy vessels. A little later, a secret deal between Malta and Libya was uncovered whereby the Maltese armed forces were also to cooperate with the scLYCG to intercept boats carrying people fleeing beyond the Maltese SAR zone.<sup>83</sup> When, in the same month, Italy renewed the MoU with Libya and provided the scLYCG with ten more fast patrol vessels, against all the objections of the Council of Europe’s Commissioner for Human Rights, the Hirsi ruling seemed to have been completely forgotten.<sup>84</sup> Pushbacks directly carried out by European border guards and pullbacks to Libya supported by them are still common today, as is the practice of delaying rescues by Libyan and European authorities.

In March 2020, the European Council took the decision to launch a new Eunavfor Med operation called “Irinì” to replace Operation Sophia. To minimise the likelihood of encountering boats in distress, European military vessels were now to be deployed “at least 100 kilometres off the Libyan coast, where rescue operations are less likely to be conducted”. While the primary mandate of the mission was said to be implementation of the UN arms embargo against Libya, Irinì was also supposed to contribute, in the spirit of Operation Sophia, “to capacity building and training of the Libyan coast guard and navy”.<sup>85</sup> To that end, an agreement was concluded in January 2021 between the military operation and Frontex on exchange of information and training of Libyan border guard personnel. Support for pullbacks by the scLYCG also remains part of the programme.<sup>86</sup> Questions from Members of the European Parliament show that Irinì transmitted information about ships in distress to Libya at least eight times in the period from March to July 2020.<sup>87</sup>

As the Italian and European presence in the Mediterranean has been scaled down, Malta has again been called upon more frequently to coordinate rescue operations or respond to requests from rescue ships and provide a safe place for disembarkation. Malta’s extensive SAR zone,

which lies north of the Libyan coast, includes large areas of the Central Mediterranean route. To evade responsibility for rescue, the Maltese government implemented a number of tried and tested, albeit illegal, measures. These include pushbacks from the Maltese SAR zone, assisting pullbacks, diverting boats with people fleeing to the Italian SAR zone, denying a port to vessels with rescued people on board, delaying, denying and even preventing rescue operations, and arbitrarily detaining people seeking protection at sea. As an additional means of flight containment, Malta has been paying private vessels to conduct pullbacks. In April 2020, for example, a group of 59 people were taken back to Libya on a private fishing boat specially chartered by Malta, after having been rescued days earlier in the Maltese SAR zone. The position of the boat in distress was known long before they were rescued. The authorities in Malta as well as in Italy and Libya had been repeatedly alerted to the boat's situation. In addition, the vessel in distress was spotted by a Frontex aircraft. None of the authorities reacted. When the hired fisherman finally reached the boat, five people were already dead and another seven were missing at sea. The Maltese authorities confirmed in an official statement that they had coordinated the operation.<sup>88</sup> The captain of the fishing boat admitted that the pullback in the Maltese mission was not an isolated incident.<sup>89</sup>

Emulating the Italian model, Malta concluded its own MoU with Libya in 2020 with specific agreements on cooperation in intercepting people fleeing and returning them to Libya. Coordination centres are to be set up in Tripoli and Valletta to implement the plans. Analogous to Italy, Malta also committed to “fully fund these two centres” and to ask the EU for financial support.<sup>90</sup> The 2017 Italian-Libyan MoU was renewed after three years without the promised improvements for the situation of people on the move in Libya.<sup>91</sup> Despite pronounced criticism of the lack of legality and the agreement's impact, Italy continues to support the scLYCG. In parallel, the UNCHR published a statement that clearly emphasised that Libya should not be considered a “safe third country”.<sup>92</sup> In order to keep responsibility as much at arm's length as possible, Malta has to date not ratified the 2004 amendments to the SOLAS Convention and the SAR Convention, which assign primary responsibility for providing a safe port to people rescued at sea to the state that coordinates the rescue operation.

Since 2020, the coronavirus pandemic has also been invoked as a reason to raise defences against migration. On 7th April 2020, the Italian state declared for the first time in its history that ports in Italy were not “safe places” to disembark people on the move due to the COVID-19 pandemic. Only two days later, Malta followed suit, with the infamous claim that this was in the interest of people fleeing. Moreover, the Maltese authorities claimed that it was impossible for them to take part in coordinated rescue operations within the Maltese SAR zone, as all the resources of the Maltese Armed Forces had to be used to combat the health emergency.<sup>93</sup>

It would be grossly negligent to see this isolationist “Fortress Europe” approach adopted by Malta’s and Italy’s ports as an exceptional measure in extraordinary times – they are the cynical continuation of Europe’s merciless policy of an isolationist and deterrence-oriented “Fortress Europe”. In the same month, the Italian Ministry of the Interior awarded a shipping company contract worth over 1.6 million Euro for a further six ships to be made available to the scLYCG.<sup>94</sup> In the EUTF, a separate “North Africa funding window” was established with a budget of 91.3 million Euro. The focus is on supporting “integrated border and migration management” in Libya, which translates into once again strengthening the operational capacities of the Libyan authorities for maritime and border surveillance.<sup>95</sup>

To date, more than €455 million has flowed from EU coffers into Libya’s “border and migration management”, four and a half times as much as into economic development, health, good governance, civil society, youth and education, demining, mediation and stabilisation activities combined.<sup>96</sup> The EU’s involvement in implementation of the MoU between Italy and Libya through training, financial support, provision of equipment and public legitimacy is striking. Several international bodies, including the UN Security Council, have denounced violent behaviour by the scLYCG, such as firing of shots, threats against NGO ships and use of lethal force against migrants.<sup>97</sup> The administrative court in Trapani, Sicily, declared the MoU unconstitutional and incompatible with international human rights and maritime law obligations. The court also explicitly rejected the position that Libya can be considered a “safe haven” for people on the move.<sup>98</sup> The UN Human Rights Committee condemned the MoU’s practices of refoulement and leaving survivors of shipwrecks at sea as incompatible with the duty to protect life at sea. The organised

pullbacks have also been deplored by the ECHR and the UN Committee against Torture and form the basis for a request for authorisation of an investigation by the International Criminal Court (ICC).<sup>99</sup>

Meanwhile, the EU is trying to buy its way out of responsibility and absolve itself of any guilt. Obligations arising from maritime and international law are being deliberately circumvented by means of shady tricks. An EU-funded strategy to keep borders in Libya tightly closed prevents people from fleeing and outsources human rights crimes to the scLYCG and militias. At the same time, the response from the European side to movements of people seeking protection entails the involvement of police authorities and the military, such as Frontex and Eunavfor Med units rather than state-organised maritime rescue teams. As a result, thousands of people are systematically denied their right to asylum and instead are stuck in detention in Libyan torture prisons or drown in the Mediterranean. There are still no specific monitoring or evaluation mechanisms to oversee EU involvement in implementation of Malta's and Italy's MoUs and their compatibility with applicable legislation, let alone mechanisms to impose penalties for breaches of the law.

Since October 2021, increasingly organised groups of people seeking protection have been protesting regularly outside the UNHCR office in Tripoli. They call, *inter alia*, for the right to safe onward travel to countries where they will not be subjected to daily human rights abuses, an end to EU funding of the scLYCG, closure of detention camps in Libya, and criminal prosecution of people currently or previously involved in violence in Libya against people fleeing. The demonstrations are often violently ended by militias and “security agencies”.<sup>100</sup>

### Tunisia

With 1,300 kilometres of coastline that at some points is only 140 kilometres from European shores, cooperation with Tunisia as a partner for externalisation of European “border security” is an obvious policy decision. Italy, in particular, has played an important role in this process for decades and, through a variety of formal and informal agreements with various Tunisian governments, has ensured that migratory movements across the Central Mediterranean are controlled in order to keep the number of arrivals on EU territory low – an endeavour that the EU is happy to see and support.

When tighter control of external borders became an increasingly common European endeavour in the 1990s, cooperation with Tunisia initially played a subordinate role. However, as Italy maintained good relations with the dictatorship, a bilateral cooperation agreement on border security was signed as early as 1998 and Italy provided financial support for detention centres for refugees in Tunisia.<sup>101</sup> In 2003, an agreement was signed to strengthen police cooperation between Tunisia and Italy and to train Tunisian border guards to control the maritime borders in order to close the European borders upstream. In return, Italy increased the entry quotas for Tunisian citizens to Italy. In the wake of the agreement, the government of the dictator Ben Ali enacted Law No. 2004-06, which criminalised all acts of assistance to escape and illegalised leaving Tunisia for the majority of people. These measures, which European governments were meant to understand as concessions, constituted a welcome further means of pressure against the local populace in their own country for the authoritarian regime.

In the early 2000s, Tunisia increasingly became a destination and transit country for sub-Saharan refugees. In response to steadily increasing numbers of people on the move, including Tunisians, another bilateral agreement was signed in 2009 that provided for accelerated readmission procedures to their home country for Tunisians who came to Italy in an illegalised manner.<sup>102</sup> At the same time, the Tunisian government undertook to take back third-country nationals who had entered Italian territory from the Tunisian coast. Italy, for its part, provided financing to set up camps in Tunisia. In 2008-2010 alone, the European Court of Human Rights (ECtHR) ruled three times against deportations of Tunisians ordered by the Italian state. According to the ECtHR, Italy violated the prohibition of torture and other cruel, inhuman or degrading treatment during the deportations.<sup>103</sup> The practice has not changed since.

With the fall of the dictatorship in 2011, Tunisia once again became a destination for people on the move and thus a border policy problem for Europe. Less stringent border controls due to the fall of the regime and the outbreak of the Libyan war led to a rapid influx of people seeking protection in Tunisia or seeking to move from there to Europe. In just six months, one million people (including 200,000 non-Libyans) fled Libya to Tunisia.<sup>104</sup> Under pressure from the EU, the government set up several camps in south-eastern Tunisia on the border with Libya to

gather together people fleeing and keep them away from EU borders. Some of these camps, such as the notorious Camp Choucha, were set up in the middle of the desert, where extreme climatic conditions (very cold nights and frequent sandstorms) prevail, and had no access to electricity and drinking water. As in the other camps, hygiene and living conditions were unsustainable. Although Camp Choucha was closed in 2013, other camps still exist. People seeking refuge who end up here have no access to legal counselling and are confronted with massive corruption by Tunisian authorities and their staff in the camps.<sup>105</sup> People seeking protection, mainly from sub-Saharan countries, who are intercepted in Tunisia or at sea are held in detention centres run without a legal framework until they are deported. Since the Tunisian state lacks the funds for collective deportations, the government levies fines for non-Tunisians who stay illegally in the country, to be paid by the people seeking protection (as well as the flight ticket to leave the country). They must therefore “buy their way out” of detention and “deport themselves”. If they are unable to pay, the migrants are threatened with deportation without forewarning into the desert – mostly to Libya or Algeria.<sup>106</sup> This practice is legitimised by a criminalisation law from the dictatorship era that has never been abolished.

In the first quarter of 2011 alone, around 22,000 people fleeing from Tunisia landed on the Italian island of Lampedusa. Without further ado, Italy declared a humanitarian state of emergency and called on the Tunisian government to stop migratory movements and agree to increased deportations from Italy. Meanwhile, Italy issued temporary residence permits to Tunisians who had arrived between January and the beginning of April. Since these papers allowed them to move freely within the Schengen Area, other EU Member States (especially France, which feared an influx of French Tunisians) went on the barricades.<sup>107</sup> France and Denmark suspended the Schengen Agreement and closed their national borders, while no other EU country wanted to participate in reception of people seeking protection. Extension of the Tunisian-Italian deportation deal was now intended to ensure that people on the move could not leave Tunisia in the first place. To help restrict the right to leave Tunisia, the Italian government gave the Tunisian border authorities two patrol boats and a hundred off-road vehicles.<sup>108</sup> An Italian proposal to send bor-



der guards from Italy to patrol the Tunisian coasts was rejected. Meanwhile, Tunisians who arrived in Italy after April 2011 were deported again within a few days or weeks. Some were accommodated on ships docked in the port of Palermo, where they had to sleep on the floor and wait for hours for access to sanitary facilities. They claimed to have been insulted there by security forces and to have received no information about their residence status or the reasons why they had been detained. After several days, they were presented to the Tunisian consulate for identification and then flown back to Tunisia under the facilitated conditions of the 2011 Italian-Tunisian agreement. In *Khalifia and Others v. Italy*, the ECtHR condemned these deprivations of liberty as arbitrary and ruled that Article 5(2) and (4) of the European Convention on Human Rights had been violated.<sup>109</sup> Cecilia Malmström, on the other hand, then EU Commissioner for Home Affairs, welcomed these repatriations that violated international law.<sup>110</sup>

One point that has often been overlooked in this context (and is still ignored) is that Tunisia had no national asylum law guaranteeing asylum-seekers' fundamental rights, neither before nor after the revolution. Although work on an asylum bill has been underway since 2011 at the insistence of Tunisian civil society, implementation seems a remote prospect. Drafting of the constitutional obligations is co-financed by the EU and implemented by UNHCR.<sup>111</sup> The EU's wishes thus incorporated reflect the still potent European colonial vision, while also holding up the drafting process as they conflict with (socio-)political reality and Tunisian concerns, for example not to be instrumentalised as a "disembarkation platform". Tunisian human rights activists also criticise the failure to include the civilian population in political processes and decisions.<sup>112</sup>

Until a national asylum law is adopted and implemented in Tunisia, border externalisation entails EU-induced suspension of human rights obligations towards people on the move. At the same time, asylum law based on the EU's wishes will not prevent persecution of LGBTQIA+ in Tunisia nor unlawful pushbacks to Libya. EU initiation of "cooperation" with Tunisia serves to discharge its own obligations towards people seeking protection from or in Tunisia. Although the 2011 deal is not a formal agreement, but a verbal agreement that is kept under lock and key and exempt from parliamentary scrutiny, it still serves as the legal basis for collective deportations from Italy today. The Office of the United Nations

High Commissioner for Human Rights ruled that human rights concerns and issues were largely disregarded by the Italian government in official and non-official agreements.<sup>113</sup> No consequences were drawn from this judgement either. Instead, the Italian government provided twelve more patrol boats to the Tunisian authorities in subsequent years. Informal agreements on forced returns were expanded and intensified.<sup>114</sup>

Besides Italy, other EU Member States are also involved in Tunisia's border protection regime. In 2015, Berlin supported Tunis to the tune of 100 million Euro for training border guards, procurement of technical equipment, establishment of a German police liaison office in Tunis, and sealing off the land border with Libya. This was followed in 2016 by further training missions, along with provision of speedboats, a document examination laboratory, and border security equipment. The German Federal Police carried out 14 basic and advanced training measures for the Tunisian National Guard, the Border Police and the Coast Guard (*Maritime National Guard*).<sup>115</sup>

Both the EU per se and its Member States are exerting steadily increasing pressure on the Tunisian state. In 2013, Tunisia was recruited for the European border surveillance project "Seahorse Mediterranean" and cooperation between authorities in criminal prosecution and border surveillance was extended. Through a 2014 agreement, the EU took advantage of the North African state's economic dependence. A readmission agreement was concluded, with the misleadingly titled "mobility partnership", although it aims to limit mobility, and deportations to Tunisia were once again facilitated. Another central point was strengthening of Tunisian border protection to combat migration. To that end, EU Member States provided equipment to control sea and land borders, as well as delivering financial and technical support to expand border controls. In return, the EU promised visa facilitation for privileged Tunisian groups, such as students, university teachers, researchers, etc.<sup>116</sup> In 2015, the EU, with the support of the IOM, UNHCR and the ICMPD (*International Centre for Migration Policy Development*), relocated the EUBAM mission from Libya to Tunisia. With a budget of 23 million Euro, EUBAM was supposed to "reform the Tunisian security sector". More than half of the budget was earmarked for stepping up border security.

Such agreements between Tunisia and the EU, along with bilateral agreements with individual EU Member States and Tunisia, serve to out-

source border control and human rights responsibilities. The EU and its Member States use their political, financial and economic power as leverage against Tunisia. After the fall of the dictatorship, the fragile political elite needed EU backing and support, leaving it with little choice but to accept European demands.<sup>117</sup> The tactic of linking readmission programmes with visa facilitation programmes proved effective for the European border regime. Tunisian border authorities took on the task of intercepting people on the move while they were still in Tunisian territorial waters, if they managed to leave the coast at all. In addition, the EU expected Tunisian officials to intercept boats departing from Libya and then to deal with the asylum procedures of those concerned.<sup>118</sup>

The EUTF-funded *Border Management Programme for the Maghreb Region* (BMP-Maghreb) was launched in 2018. Its aim, with a budget of 55 million Euro, was further strengthening the borders of Morocco and Tunisia to combat migratory movements into Europe. One of the most important points of the programme (following the pattern of European border policy in Libya) is surveillance of territorial waters and maritime borders.<sup>119</sup> With regard to Tunisia, the EU's goals are coordination of border protection, technical strengthening of the coast guard and increased exchange of information, for example via the Eurosur surveillance network. Operational cooperation at sea between Tunisia, other North African coastal states and EU Member States, with special mention of Italy, is to be promoted through BMP-Maghreb, with Frontex invited as an observer and intermediary organisation.

The programme is implemented by Italy but managed by the ICMPD, a non-governmental, international organisation based in Vienna. Since its establishment in 1993, the ICMPD has evolved from a consultancy project to a significant part of the EU border regime and is increasingly tasked with coordinating procurement projects to provide police, military and customs authorities in non-European states with modern surveillance and policing equipment. ICMPD is both a service provider for European states and an important protagonist in externalising management of the EU's external borders. In recent years, the organisation has gained further key countries when it comes to sealing Europe's borders through the accession of Malta, Turkey and Germany, bringing its current membership to 18. Membership applications to join from the Netherlands and Greece are in the pipeline. In addition, ICMPD cooperates

with the African Union, almost all EU Member States and EU agencies (e.g. Europol and EASO), Interpol, as well as international organisations such as UNHCR and IOM. ICMPD is involved in border and migration management programmes in Tunisia, Morocco, Lebanon, Libya, Jordan, Iraq, Turkey, Kosovo, Armenia, Georgia, Bangladesh, Ghana, and Central Asian countries. Funding is through contributions from Member States, the European Commission, the UN and other multilateral organisations, as well as bilateral donors. In 2020, this non-governmental organisation concluded cooperation agreements with Pakistan and Nigeria and signed a MoU with the African Union.

The projects in Tunisia number among the ICMPD's largest contracts. European states make no secret of their geopolitical claims to power and fantasies of omnipotence in this context; for example, Karl Nehammer, then Minister of the Interior and now Chancellor of Austria, stated in June 2020: "The Tunisian border is also an Austrian border when it comes to preventing irregular, illegal migration".<sup>120</sup> Numerous EU-funded projects running at local, regional and national levels serve to entrench Tunisia's maritime and land borders, with "migration management projects" for data collection, development of Tunisian authorities, and, above all, procurement measures and training programmes for the Tunisian police, implemented with a total budget of 33 million Euro. BMP-Maghreb also relies primarily on provision of equipment and surveillance technology. (accounting for 70 per cent of the budget). All its projects are aimed at restricting the freedom of movement of people fleeing to keep them away from Europe. To that end, the EU stipulates that the Tunisian law enforcement authorities shall implement their border control system. Although it is a little-known body, ICMPD should be understood as an important part of European border outsourcing, which is yet another way of concealing responsibility and evading accountability.<sup>121</sup>

In Tunisia, as in many other regions, the COVID-19 pandemic drove the social and economic crisis. In 2020, the number of departures from Tunisian shores rose by 310 per cent compared to the previous year.<sup>122</sup> 26,349 people attempted to leave Tunisia, most of them Tunisian citizens. However, there was also an increase in the number of people on the move from countries south of the Sahara, Syria and Yemen, despite the borders with Libya being tightly sealed.<sup>123</sup> Over half of those fleeing were

intercepted by the Tunisian coast guard. The EU's funding and equipment projects also "paid off" in the following year. While a total of 42,019 people were intercepted between 2011 and 2020, 19,408 people seeking protection were intercepted by Tunisian authorities between January and September 2021 alone, representing 46 per cent of the previous ten-year total.<sup>124</sup>

Due to the agreements concluded, many of those who made it to Italy despite all the harassment faced the threat of deportation in violation of international law.<sup>125</sup> However, since the pandemic has not only exacerbated the causes of migration but also makes deportations more difficult, people on the move are forced to stay in overcrowded, desolate initial reception camps. In these hotspots, they often have neither access to information about their case nor to legal counsel. Within this opaque system, people are then transferred again to what are known as repatriation centres, which are just as overcrowded and violent as the hotspots. Here, too, people seeking protection often have no access to legal advice. Lawyers are not allowed to meet with their clients due to coronavirus-related restrictions, and since detainees are obliged to hand over their mobile phones, they are often deported before they have even had a chance to speak to their lawyers. There is no guarantee of a proper assessment of their case in keeping with the principle of non-refoulement.

In addition, in practice the hotspots already function primarily as return centres, where the Italian authorities and Frontex – although this is not within their brief – carry out initial checks to distinguish between asylum-seekers and "economic migrants". Tunisian nationals are usually automatically classified as "economic migrants" and therefore excluded from regular asylum procedures, regardless of their individual experiences and reasons for fleeing. As soon as people's identity has been determined, deportation proceedings are initiated against anyone that does not agree to a "voluntary return". People in this category are transferred to detention pending deportation or deported directly to Tunisia. This procedure repeatedly leads to abuse of authority, administrative errors, human rights violations and mistreatment of people fleeing. Such cases seem to occur mainly when people on the move refuse to reveal their identity voluntarily due to fear of deportation.<sup>126</sup> Serious violations of the law have also repeatedly been committed during deportation flights co-financed by Frontex. For example, some deportees had their hands

tied before boarding the plane. For a body search, they had to undress completely until employees of the Tunisian consulate confirmed their Tunisian nationality. The deportees were monitored by police in full riot gear, but no interpreters were present.<sup>127</sup>

The growing number of departing boats also led the EU to step up its pressure on the Tunisian government. While Italian minister Di Maio threatened to suspend the 6.5 million Euro for development cooperation in Tunisia if Tunisia did not implement more forceful measures to stop departures, another agreement between Italy and Tunisia was signed back in summer 2020, below the radar of public attention. Italy immediately provided a further 11 million Euro for border interdiction in Tunisia and training of Tunisian border guards. In order to discuss the arrangements in the deal, the Italian Ministers of Interior and Foreign Affairs as well as the EU Commissioner for Home Affairs and the Commissioner for Enlargement and European Neighbourhood Policy met with the Tunisian President, the Prime Minister and the Foreign Minister *ad interim*. The European Union representatives classified Tunisia as a “safe third country” despite all the documented dangers and the lack of protection for people on the move, although it is general knowledge that arbitrary detention is rife, along with inadequate and sometimes fatal conditions in the camps, persecution of LGBTQIA+, and unlawful pushbacks to Libya.<sup>128</sup> At the same time, it was made clear to the crisis-ridden country that aid from the EU is always conditional.

Planning also began that year for a de facto detention centre in Tunisia close to the Libyan border. In cooperation with the IOM, UNHCR and other UN organisations, a camp for up to 50,000 people was to be built near a military zone in Bir El Fatnassya. Once again, a location in the middle of the desert was chosen to house people seeking protection. The camp was designed to be run by Tunisian authorities, in all likelihood with makeshift buildings, scant fire protection standards and only minimal humanitarian conditions. There is reason to fear that inmates will be at the mercy of corruption and will de facto have no access to an asylum or legal system.<sup>129</sup> Not without reason, concerns have been expressed that such an “emergency camp” will degenerate into a permanent facility and an EU-designed “disembarkation platform” to hold people against their will until their status is clarified. With the nearby military airport, the EU’s long-cherished wish could be realised and the camp could be

transformed into a hotspot outside the EU. Due to the ongoing resistance from the civilian population, the Tunisian government has so far refused to accept the idea of European hotspots in Tunisia.<sup>130</sup>

As part of BMP-Maghreb, an “*Integrated System for Maritime Surveillance*” (ISMariS) was also launched to promote inter-agency cooperation and outsourcing of interception operations.<sup>131</sup> While pooling of surveillance measures (coast guard control systems, radar systems, transmitters and receivers for positioning, night vision equipment, as well as thermal and optical sensors) is established by the Italian Ministry of the Interior, the data collected is also shared with other EU Member States, Eurosur and Frontex. To that end, satellite images, as well as images from drones and aerostatic balloons, are collected and analysed by Eurosur. Monitoring extends beyond the European coastline to a 500-square-kilometre border area that also includes Tunisia. Through the EU4BorderSecurity programme and the increase in Eurosur funding, the EU is also financing other such projects for other countries around the Mediterranean.<sup>132</sup>

In May 2021, Ylva Johansson, EU Commissioner for Home Affairs, and Luciana Lamorgese, Italian Minister of the Interior, travelled to Tunisia again to initiate another agreement to stem the movement of people fleeing. Once again, the aim was to use economic support as a means of blackmailing the country into continuing the unlawful border blockade. Johansson explained that Tunisia should be provided with the means and instruments to close borders to Europe, but also to deport non-Tunisians. Talking as if people were simply pieces of freight, the EU Commissioner expressed the hope that the Tunisian authorities would be able to “take back their citizens who have migrated to Europe”.<sup>133</sup> In early June 2021, Tunisian President Kais Saïed went to Brussels for further talks with European Council President Charles Michel and European Commission President Ursula von der Leyen. The EU pledged €300 million in macro-financial assistance to Tunisia, while Italy promised €200 million in development funds.<sup>134</sup> The ongoing negotiations are inter alia addressing the EU’s demand that non-Tunisians be transferred to Tunisia too as part of the readmission agreement.

The EU is Tunisia’s most important trading partner and largest provider of donor “aid” yet Europe uses this situation to impose European border policy goals on the North African state. This strategy has gained particular momentum in the wake of the WANA uprisings and revolts,

as well as the fall of the Ben Ali regime in 2011, as Tunisia has since been experiencing political instability and deteriorating economic conditions. The EU and its Member States, both before and after the revolution, have tacitly supported the Tunisian authorities' systematic human rights abuses.

Brussels, meanwhile, relies on introduction of a "local integration programme" by the Tunisian government in cooperation with UNHCR. However, both before and after 2011, the Tunisian government made it difficult or impossible for people seeking protection to apply for asylum. On the one hand, asylum-seekers were prevented from even reaching UNHCR's office, and on the other hand, scope for staff to correctly determine protection status was considerably restricted. As a result, people on the move in Tunisia are not only prevented from leaving the country, but also deprived of their right to apply for asylum. In August 2021, for example, Slimane Bouhafs, a political activist from Algeria, supposedly protected under international law, was abducted from his home in Tunis and extradited to the very country that was persecuting him for his political stance. There are also countless examples of pushbacks to Libya. For example, in September 2021, a group of about 100 people fleeing of sub-Saharan origin (including children and pregnant women) was intercepted by Tunisian units off the coast and taken to the Libyan border. After being robbed and mistreated by the officers, they were forced across the border at gunpoint and soon after the first was abducted.<sup>135</sup>

Countless projects and programmes, such as those run by the ICPMD, drive empowerment of military, police and law enforcement agencies and enable them to unleash their force on people fleeing. At the same time, Frontex operations are also having fatal consequences in Tunisia. Although the EU border agency does not have an official agreement with Tunisia that would formalise operational cooperation, unlawful returns still occur frequently, with Frontex handing over people fleeing who have been intercepted at sea to the Tunisian military or coast guard.<sup>136</sup> This aiding and abetting of pullbacks, which is a breach of international law, also demonstrates the EU agency's attempt to wash its hands of its search and rescue obligations. Despite the disastrous results of this strategy, the EU and its Member States seem determined to continue pursuing it. In Tunisia, people on the move experience increasingly harsh and even life-threatening living conditions due to this policy of increased



border controls that make it more difficult to flee, criminal violations of human rights in Tunisian and Italian camps, exit bans and criminalisation, illegal refoulements through European pushbacks and Tunisian pullbacks, and construction of mass camps; at the same time this also fostering exploitative smuggling networks and even more risky crossings. All these factors inevitably lead to high fatalities and many people going missing.

### Frontex in the Central Mediterranean

Frontex plays a key role in implementing European border policy, which equates migratory flows with threats. It is no accident that the EU border agency's expansion coincided with the period when the Mediterranean became the world's deadliest migration route. The political decision to endow Frontex with vast sums of money and unchecked power made the EU's priorities apparent: protecting borders from alleged threats takes precedence over protecting lives. Purported search and rescue missions were henceforth understood as part of border control and thus as an instrument to stem movement of people fleeing.<sup>137</sup> Claiming that this is about saving lives, since people would not drown after all, is a macabre lie in view of the systematic human rights violations at Europe's borders and conditions in the Libyan camps, leading to a dangerous normalisation of violence as a tool of "migration management". "In Libya, I was locked up in a traffickers' prison. It was like a horror movie. Everyone was totally skinny, covered in lice, it stank terribly. I was speechless and thought I was already dead. Like everyone, I was injured from the journey through the desert. I was in pain, with open wounds. You can't imagine living like that. The men who work for the traffickers would beat us every day. And they would always come in the evening to get women. To make it stop, one day the oldest of us stood in front of the door – and said 'No!' They shot him. At some point you are happy to die", reported 24-year-old Husein, who fled Somalia.<sup>138</sup>

Frontex operations such as "Operation Nautilus" in 2007 cemented the isolationist "Fortress Europe" approach in the Central Mediterranean. In Malta and Italy, Frontex officers were tasked with "identifying migrants", while at sea they were "combating migratory flows in the Central Mediterranean". The purpose of "Operation Hermes" in 2011 was also to identify and return people seeking refuge who have been illegalised.<sup>139</sup> One

border that politicians apparently do not mind crossing in this context is that of shame; as early as October 2013, Ilkka Laitinen, then Frontex director, admitted to systematic pushbacks by the EU agency.<sup>140</sup>

In 2014, Operation Triton replaced the Italian Mare Nostrum rescue at sea programme in the territorial waters of Malta and Italy. Triton was coordinated by Frontex to “strengthen” the Italian coast guard and was led by the Italian Minister of Defence. The emphasis placed on active SAR operations was reflected, inter alia, in the operation’s budget, which at €38 million per year was significantly lower than the €108 million spent on Mare Nostrum. In 2015, Operation Triton was upgraded to Expanded Triton and equipped with additional equipment. The upgrade included ships, patrol boats, helicopters and RABITs (*Rapid Border Intervention Teams*) specialised in “filtering out” illegalised migrants. A total of 26 European countries participated in the operation, which continued to focus on border surveillance rather than on saving lives. The geographical area of the operation was massively expanded, making SAR activities even less likely. Expanded Triton also marked the beginning of coordination between Frontex and Eunavfor Med operations, and cooperation with NATO forces deployed in the Mediterranean was requested.<sup>141</sup> The militarisation of borders under the EU border management agency in response to movements of people on the move was thus complete.

In February 2018, Operation Triton was replaced by Operation Themis, which is still running today. Themis incorporates expansion of the operational area to Algeria, Tunisia, Libya, Egypt, Turkey and Albania. Frontex supports the Italian authorities to register arrivals and talks about an “increased focus on law enforcement”, feeding into the scare-mongering image that people seeking protection pose a threat to Europe.<sup>142</sup> Frontex also became involved in implementing the MoUs and provided targeted support to technical implementation projects. In 2018, the three-year project SAFIC (*Strengthening the Africa-Frontex Intelligence Community*) was launched, aiming, inter alia, to advance exchange of information with the Libyan authorities. Although SAFIC’s focus was clearly on border and migration control, the allocated budget of four million Euro came from the EU’s Instrument contributing to Stability and Peace.<sup>143</sup>

In 2018, the European Commission confirmed that Frontex was scouting the Tunisian coast using satellite imagery and radar during a test phase of *Eurosur Fusion Area Pre-Frontier Monitoring*. Drone test flights

were conducted over Algeria, Libya and Tunisia for monitoring purposes. Picking up on the Libyan example, the data collected will be shared with Tunisian coast guards to allow direct intervention by non-European forces. In addition, the EU demanded that Tunisia cooperate with Frontex to collect and share information on migratory movements.<sup>144</sup>

On behalf of Europe and supplied with information from EU agencies, Tunisian coast guards also carry out pullbacks from international waters – far from Tunisian territorial waters and the Tunisian SAR zone. In Tunisian waters, *pushbacks* are also carried out *by proxy*, either by European border guards directly or by private vessels commandeered for this purpose. There are even documented cases of intercepted boats being transferred from Libya to Tunisia.<sup>145</sup> Using financial support provided to the Tunisian border guard authorities, including patrol boats, to conduct pullbacks is a human rights scandal. The tactics used claim lives. In one incident in 2011 at least 21 people died during an attempted interception of a refugee boat that was rammed by the Tunisian navy and broken in two.<sup>146</sup>

At sea, the European units deployed in Frontex operations, like everyone else, are legally obliged to rescue people in distress and help them reach safety, namely European territory.<sup>147</sup> However, the EU agency's political mandate entails preventing migrants from crossing the EU's external borders.<sup>148</sup> Faced with this set of twofold, incompatible tasks, the agency has made its choice: border protection takes precedence over saving lives. Frontex coordinated only a fraction of all rescue operations in the Central Mediterranean, the lowest figure of any SAR organisation. In 2016 and 2017, NGO vessels carried out the highest proportion of rescues in the Central Mediterranean (26 per cent), followed by the Italian Navy (21 per cent), the Italian Coast Guard (20 per cent) and Eunavfor Med (17 per cent). Frontex, at 8 per cent, brought up the rear for rescue operations, but also when it came to fulfilling SAR and EU fundamental rights obligations.<sup>149</sup> The agency has deliberately shifted its area of operation far away from Libyan territorial waters and thus operates outside the zone where most emergencies occur. Back in 2014, Klaus Rösler, then Frontex Director, declared that the agency would not consider assisting in maritime emergencies outside its area of operation.<sup>150</sup> This strategic decision is still being implemented today, with Frontex ignoring distress calls and allowing people to drown.

The EU agency would much rather launch a mega project for aerial surveillance (*Multipurpose Aerial Surveillance*; MAS).<sup>151</sup> Using aircraft and drones, Frontex can now spot boats in distress from the air. Limiting operations to aerial surveillance is the technical gateway to avoiding assistance at sea, loosely based on the motto “know everything, do nothing”. In recordings, you can watch people drowning in real time without any awkward obligation to rescue them. Lacking its own SAR assets, Frontex (sometimes) informs other authorities of emergencies. Contrary to earlier denials, Frontex plays a direct role in scLYCG pullbacks. Only informing the “competent” Libyan scJRCC about maritime emergencies means that people on the move are picked up and abducted by the scLYCG.

All EU authorities are well aware that Libya “does not meet the criteria for designation as a safe place for disembarkation after rescue at sea”.<sup>152</sup> It is not a safe place for people seeking protection to land and European states have not agreed to disembarkation of people fleeing at their ports – as even the United Nations High Commissioner for Refugees never tires of emphasising. However, Frontex’s sophisticated surveillance machinery is not used to document unlawful pullbacks, let alone prevent them. Rather, scLYCG interceptions are carried out deep inside the Maltese SAR zone and made possible by information relayed by Frontex officials. The EU agency supports massive violations of international law by creating a situation of proxy unlawful deportation. These scLYCG interceptions often result in violent scenes where people in distress are attacked, chased, shot at or even left to die at sea.<sup>153</sup> Despite – or precisely because of – the countless human rights crimes and deaths that have occurred, the *European External Action Service* (EEAS) sums up the scLYCG’s cooperation in the second half of 2020: “The Libyan Coast Guard has been made more effective and excellent results have been achieved”.<sup>154</sup>

Coordinates of boats full of people on the move and photos taken from Frontex aircraft are also exchanged via unofficial channels – in some cases directly to scLYCG officials via private WhatsApp messages. In contrast, the reconnaissance data is not made available to civilian SAR organisations. These NGOs, which would ensure that those rescued reach a safe port, are not informed about the maritime emergencies, thus favouring the interceptions.<sup>155</sup> However, even when NGO or commercial ships are the only vessels in the vicinity of an emergency, Frontex sometimes withholds information about emergencies at sea. This strategy

adopted by the agency, letting people die rather than allowing them to cross the border, became known as the “left to die” scenario. The Italian and Maltese authorities generally do not provide assistance in emergencies or forward the information to the civilian SAR ships. The Member States and the EU provide no answer to the question “Why not?”.

During its operations, Frontex has fuelled smear campaigns against maritime rescue NGOs, making their work much more difficult. In 2017, an internal Frontex report made international headlines, accusing civil-society rescue vessels of collaborating with smuggling networks, although without providing any proof. Nevertheless, the baseless accusations were used by prosecutors in Italy to launch investigations and start rampant criminalisation of rescue at sea.<sup>156</sup> A report by the European Union *Fundamental Rights Agency* (FRA) in June 2021 showed that 9 of 15 NGO vessels operating in the Central Mediterranean were prevented from operating by legal proceedings.<sup>157</sup>

Meanwhile, people who are intercepted and returned to Libya face well-documented violence, abuse, torture and detention in “concentration-camp-style conditions”.<sup>158</sup> The European side is keen to claim that European law is not being violated, as EU protagonists do not have direct command of the pullbacks and the incidents are therefore solely Libya’s responsibility.

Frontex is increasingly conducting the “fight against migrants” as an independent, autonomous body, and thus escaping oversight by the EU and its Member States. Under the umbrella of FASS (*Frontex Aerial Surveillance Services*), chartered small aircraft for surveillance of the EU’s external borders are now offered as a service to EU Member States. The strategy was first used to support Italian authorities in 2017, then extended to Croatia, and finally to the Aegean Sea, the Black Sea, Libyan waters and the Atlantic Ocean using large, long-range drones.<sup>159</sup> While the FASS missions initially took place in the EU’s “pre-frontier area”, the area of operations now extends far beyond European territories. Frontex no longer conducts FASS missions led by EU Member States, but instead acts on its own. This extends the issue of the lack of legal responsibility. The agency’s organised non-responsibility gives rise to loose ends concerning liability and accountability. This is because the EU itself, unlike its Member States, is not a party to the European Convention on Human Rights (ECHR). Victims of pullbacks and other human rights violations

facilitated by Frontex services are thus unable to bring cases before the European Court of Human Rights (ECHR) in Strasbourg. Legal action against Frontex is also significantly hampered by the EU agency's lack of transparency. For example, the agency keeps details of its aircraft secret and the locations of its operations are regularly concealed by ensuring position transponders do not allow flight tracking when Frontex aircraft and drones are involved in returns to Libya that violate human rights.<sup>160</sup> When the platform "Frag Den Staat" ["Ask the State", a German non-profit organisation that requests documents through the Freedom of Information Act] tried to obtain information about Operation Themis's naval and air capabilities, bringing a case to receive information before the Court of Justice of the European Union (ECJ), Frontex refused to provide any information and filed a lawsuit against the journalists. "Frag den Staat" is now supposed to pay 23,700 Euro for external private-sector lawyers used by Frontex. The agency's own legal department, financed by European taxpayers, was apparently not consulted.<sup>161</sup>

By keeping SAR activities to a minimum and sealing off of European borders at literally any cost, Frontex systematically disregards its legal obligations to help save human lives and to respect the non-refoulement principle, as stipulated for example in the Frontex Regulation and the EU External Maritime Borders Regulation.<sup>162</sup> This system of border enforcement is supported and fostered by EU Member States. The focus on aerial surveillance was conceived and implemented at a time when the border agency was well aware that the maritime resources that Member States provided for Frontex operations were woefully inadequate – both in terms of the volume of resources needed and the length of operations. In 2016, European countries provided less than half of the seagoing vessels requested by Frontex, although the need for aircraft such as planes and surveillance drones was fully met. In 2017, 73 per cent of the costs for ships and 100 per cent of the funding needed for aircraft were provided. The situation was similar in 2018 (71 and 100 per cent respectively), and in 2019 only 11 per cent of the ships needed were funded, while monies were provided for 37 per cent of the aircraft requested by Frontex.<sup>163</sup>

Such gaps in demand should, in theory, be filled by Frontex's powers to lease assets. However, instead of prioritising maritime operations and chartering vessels in the face of severe and persistent shortages of maritime assets, Frontex did the contrary. Since 2015, Frontex has invested

€100 million in leasing and acquiring aircraft, but spent €0.00 on leasing or acquiring maritime assets.

In 2017, addressing the question of maritime equipment such as ships and boats, it was only stated that Frontex was considering using chartered vessels, but would first need a study to see whether the age-old concept of chartering well-equipped ships and trained crews for operations at sea was “realistically possible”. Other approaches to air surveillance appeared to be realistic enough, on the other hand. Frontex announced for example that it would test zeppelins for use at the EU’s borders. So far, the agency has invested 3.4 million Euro in two such trials.<sup>164</sup> At the end of 2018, Frontex was still in the exploratory phase regarding maritime operations, announcing that it would “conduct a pilot project to test the concept of leasing and chartering maritime patrol vessels”.<sup>165</sup> However, even in 2019, the agency had nothing more to report than its intention to develop “a strategic concept of operations with the assistance of Member State experts and external experts” to procure “one or more coastal patrol vessels with technical crew”.<sup>166</sup> At the same time, the Frontex budget for air surveillance was increased to 27 million Euro. In the same year, Frontex additionally published a tender to purchase the agency’s first in-house surveillance drones. A two-year contract for 50 million Euro was awarded for these drones in 2020.<sup>167</sup> A tender for acquisition of vessels is still not even in the pipeline.

Since Frontex has largely restricted border protection to air surveillance, the probability of dying on the Central Mediterranean route has doubled annually.<sup>168</sup> The causal link between the deaths and the agency’s deliberate non-presence is exemplified by a maritime emergency observed by Frontex air surveillance in 2021. All 130 people on board died, as neither the agency itself nor the coast guards of Italy, Malta or Libya felt a need to send rescue vessels to the scene or to communicate with the civilian maritime rescue ships. When asked why the border agency had not done more to save the lives of these people, Frontex noted coldly in an email: “It is also important to mention that Frontex currently has no ships in the Central Mediterranean”.<sup>169</sup>

### “I Leave You to Die in the Water”

The EU has steadily expanded its presence in the Central Mediterranean through military units and Frontex, and has largely shifted to aerial sur-

veillance. However, the focus has not been on saving lives, but on preventing migration. Operations Triton and Themis are an obvious attempt to circumvent the Hirsi ruling and are designed to enable Frontex officers to carry out even more pullbacks and unlawful returns. Frontex reforms in 2016 and 2019 gave the agency the power and means to seal off external borders. Eunavfor-Med operations are also run on the premise of border security. Europe continues not to realise targeted, non-military SAR missions. Frontex head Leggeri's position anyway is that these "do not fall under the mandate of the EU". The European Commission reinforced this statement when it said that "Frontex is neither a search and rescue organisation nor does it assume the tasks of a coordination body for rescue operations".<sup>170</sup>

The EU has decided to militarise its borders and not to provide the resources required to save lives at sea. Relentless reinforcement of border police and calculated outsourcing of further border controls to sCLYCG and Tunisian border guards mean thousands of innocent people die at sea and in detention camps. At the same time, Member States at the Union's external borders are implicitly encouraged to take measures that restrict access to their territory for people on the move, even if this means violating obligations under international law. Combining impunity for such violations with the Dublin Regulation and the ensuing responsibility of coastal states for any arrivals legitimises violent border policies and leads to the failure of state-organised rescue at sea operations. For example, on 9th April 2020, the *Maltese Armed Forces* deliberately damaged a distressed boat carrying 66 people in the Maltese SAR zone, which they had previously left to fend for itself for 40 hours in acute distress. After cutting the cables in the engine, a Maltese officer told those on board, "I leave you to die on the water. No one will get to Malta."<sup>171</sup>

Criminalisation of civilian SAR operations also takes a heavy toll. Rescue vessels are seized, detained, and decommissioned on flimsy grounds, while crew members are prosecuted. Overall, the fleet of NGO rescue ships in the Mediterranean has shrunk significantly since 2017. The remaining vessels are systematically prevented from leaving European ports before their missions and blocked if they want to enter these ports with survivors on board.<sup>172</sup> As a result, the only remaining SAR capacities are deliberately constrained.

Beyond its borders, the European Commission is specifically looking for partners among its southern neighbours, such as Libya, Tunisia,



Morocco, but also Egypt and Yemen, exerting political and economic pressure on them through “development funds” and projects such as the SPRING programme (*Support to Partnership, Reforms and Inclusive Growth*) initiated in 2011, thus ensuring that these countries implement whatever European border policy demands.<sup>173</sup>

In 2020, official figures indicate that 11,891 people were victims of an EU-funded pullback to Libya, and a further 13,466 people seeking protection were trafficked to Tunisia; the number of unreported cases is probably much higher.<sup>174</sup> In 2021, the EU again used funding and political pressure to direct violent and unlawful pullbacks of around 31,000 refugees to Libya and over 20,000 to Tunisia.<sup>175</sup> They were all again exposed to arbitrary state action, violence and human rights violations in these countries.

Sealing borders and refusing to come to the aid of people on the move when their lives are in danger makes the Mediterranean one of the most dangerous escape routes in the world. Even official figures reveal that 23,150 people have died there between 2014 and late 2021, about 19,000 on the Central Mediterranean route. In 2021, someone died on average every five to six hours on this route.<sup>176</sup> These people were denied the right to life by the EU and its Member States, whose deliberate and carefully planned policies are responsible for the mass grave in the Mediterranean. Each of these deaths is a direct consequence of Europe's growing obsession with an isolationist “Fortress Europe” approach, manifested in a ruthless political and operational agenda directed against migrants.

### **The Western Mediterranean and the Canary Islands**

Spain, historically a hub of exile and migration, remains one of the most popular (first) destinations for people seeking protection in the European Union. Only 14 kilometres separate the African and European continents at the Strait of Gibraltar. The Spanish archipelago of the Canary Islands, 100 kilometres off Morocco's west coast in the Atlantic Ocean, is the European territory closest to the West African coast.

The Spanish exclaves – the port cities of Ceuta and Melilla on the Moroccan coast, which have been hubs in important transit routes and transfer points for centuries – constitute the EU's only mainland borders with Africa. Since the 15th century, the two cities have been part of Spanish territory and inextricably linked to European colonial history. The exclaves remained in

Spanish hands even after Morocco's independence from French and Spanish colonial occupation in 1956. Ceuta has an area of 18.5 square kilometres and just under 85,000 inhabitants. Melilla's 86,500 inhabitants live in an area of 13.4 square kilometres. Since Spain joined the European Community (EC) in 1986, the land borders of Ceuta, which are about eight kilometres long, and of Melilla, which are roughly eleven kilometres long, have been part of the European Union's external borders. While the exclaves became part of the EC and later the EU, they are not part of the Schengen Area.

Spain's role in colonial history remains perceptible, both in the exclaves and beyond. The former Spanish colony of Western Sahara, which was annexed by Morocco in 1975 and is still fighting for its independence today, lies on the northwest coast of Africa. The sparsely populated, mostly sandy and almost 270,000-square-kilometre territory extends roughly 1,000 kilometres along the coast. It is believed to contain the largest phosphate deposits in the world. As early as 1965, the UN called for decolonisation of the Spanish province. In 1974, Spain announced that it would grant the Sahrawis greater autonomy and proposed holding a referendum on independence. However in 1975, the Spanish government withdrew without ever holding such a referendum and Morocco occupied the territory. In 1991, the UN Security Council voted in favour of the Western Sahara independence referendum. Due to Morocco's total refusal to organise it, 30 years on a referendum has still not been held. In this context, the government in Rabat benefits from the international community's unwillingness to act as an impartial mediator. After Horst Köhler resigned as UN Special Representative for the Western Sahara Conflict for health reasons in 2019, the post remained vacant until October 2021. When the peace mission was extended in 2020, there was no longer any mention of the referendum that the UN had previously called for. The conflict is also causing strife between Morocco and neighbouring Algeria: their shared border has been closed since 1994 and up to 200,000 Sahrawi refugees from Western Sahara have been living in precarious conditions in camps around the Algerian desert city of Tindouf for decades.<sup>177</sup>

As people on the move head towards Spain, they follow various routes that shift regularly as measures are implemented to keep borders closed. These routes are used by people from sub-Saharan countries as well as from countries in **northern Africa**. When Malta and Italy closed their

borders to people on the move in the late 2010s and the number of arrivals dropped by 80 per cent in 2018, the Western Mediterranean route became the most frequently used route to Europe.<sup>178</sup> In 2019, 57,000 people managed to reach Spain via this route, more than in the previous eight years combined.<sup>179</sup> They all risked their lives on the crossing, while many more were intercepted and others did not survive. The West African route to the Canary Islands has now become the busiest route to Spain for people seeking protection.

As well as being one of the most important European countries for immigration, Spain also turns away more people than any other EU state at its borders. In the last ten years, 2,373,505 people were refused entry along Spain's borders, meaning that 60 per cent of all rejections at the EU's external borders took place here (in 2008, it was even 83.4 per cent of all rejections).<sup>180</sup>

Obviously, neither Spain nor the EU can manage to decide to let people seeking protection cross the border and access their rights. Instead, the EU's external borders are being massively reinforced. Over and above Spain's border guards and Frontex forcibly keeping people on the move away from the borders, this task is increasingly being outsourced to third countries. The European Union has realised that it is easier, both operationally and in terms of accountability, to stop people from leaving Africa's shores than it is to prevent them from reaching European territory. Morocco in particular is the focus of this cooperation with Spain and the EU. Since 2014, Morocco has received around 343 million Euro from the EU to prevent migratory movements to Spain. That sum amount could rise to several billion Euro by 2027 as a result of the EU's Asylum, Migration and Integration Fund (AMIF).<sup>181</sup> Human rights organisations, which have repeatedly criticised Moroccan officials' brutal treatment of people seeking protection and drawn attention to human rights abuses, are being ignored. Instead, other North and West African states, such as Algeria, Senegal and Mauritania, are being brought in to help keep Europe's borders tightly sealed and are paid to enforce European interests.<sup>182</sup> Spain's tried-and-tested concept, which can be understood as a neo-colonial undertaking, entails involving other states and taking advantage of their dependence on the Global North, subsequently citing their sovereignty in case of human rights violations and life-threatening situations; it has now become established throughout Europe.

### Western Mediterranean Route

In 2020, 95 per cent of those who entered Spain without a residence permit (40,106 out of a total of 41,861) came by sea, most reaching the coasts of the southern mainland and the Canary Islands.<sup>183</sup> The route that is supposedly easiest, as it is the most direct, by sea across the Strait of Gibraltar that separates northern Morocco from southern Andalusia, is hardly used. It is not just difficult conditions on the water (rapidly changing currents and sudden fog) that make the route through this highly militarised zone dangerous. This route is not an option for people on the move due to police checks, arrests, and constant surveillance of people fleeing in Morocco, especially in the coastal city of Tangier and the surrounding area. Those apprehended here are taken to the south of Morocco, where they must start again from scratch or are left with nothing.<sup>184</sup>

*El Corredor*, the Algerian route leading to the Balearic Islands or the Spanish mainland, is used less frequently due to interceptions by the Algerian coast guard and the long distances it involves. Between January and September 2020, the Balearic Islands registered just 413 illegalised arrivals.<sup>185</sup> However, although the EU pays Algeria 55.8 million Euro from the *EU Trust Fund for Africa* (EUTF), established in 2015, to prevent migration, and although people apprehended suffer considerable penalties (up to six months imprisonment for leaving the country without permission), *El Corredor* is the second most frequently used route to Europe for North African people on the move.<sup>186</sup> In particular, people from sub-Saharan countries who are seeking protection, including unaccompanied children, are systematically detained in Algeria and collectively expelled in the south of the country, violating international law.<sup>187</sup>

Most of these heading to the Spanish mainland currently leave from Morocco, although the Strait of Gibraltar tends to be avoided due to the pronounced police and military presence. The significantly longer sea route makes the journey more expensive, but above all riskier. Routes from Morocco's west coast across the storm-prone Atlantic as well as from Morocco's Mediterranean coast across the Alborán Sea are also used. At the beginning of 2019, the Spanish government announced its intention to reduce the number of people on the move arriving in Spain by 50 per cent.<sup>188</sup> To achieve this, boats transporting people fleeing their homes are increasingly intercepted by the EU-instructed Moroccan Navy or Coast Guard and returned to Morocco before they can reach the Span-

ish SAR (*Search and Rescue Zone*).<sup>189</sup> The Spanish Guardia Civil also intercepts people on the move and transfers them to the Moroccan authorities. This often results in physical abuse, while access to legal procedures, legal aid, and interpreters is denied.

In addition to the Guardia Civil's ships, the Spanish maritime rescue mission *Salvamento Marítimo* is now also being misused to block boats. This public institution, under the responsibility of the Spanish Ministry of Development and with the clear aim of saving lives at sea, also carried out rescues outside the Spanish SAR zone in previous years. However, in order to keep the number of people arriving in Spain as low as possible, its operational structures have been explicitly changed, especially for the Strait of Gibraltar and the waters off Andalusia. Initially, rescue service vessels were simply transferred to other parts of the country to reduce capacity, and active search and rescue operations on the Mediterranean coasts were minimised. *Salvamento Marítimo* crews must now first obtain authorisation from the Guardia Civil to rescue people outside the Spanish SAR zone, instead of conducting direct operations as before. Messages about boats in distress are therefore first shared with Moroccan authorities and the Guardia Civil, which subsequently decides whether or not to inform the Spanish rescue units. Since the introduction of this system, boats in distress outside Spanish waters have not been rescued but are instead simply observed by the Spanish until the inadequately equipped Moroccan units pick them up. The Spanish units pay and instruct other protagonists to carry out pullbacks in order to avoid responsibility for unlawful pushbacks. A *Salvamento Marítimo* employee has summarised the operating procedures when dealing with people in distress at sea: "We leave, find the boat and then wait one or two miles away for the Moroccans, who then rescue it. If [the boat's engine] works, they head for us and we evade them and head north towards Spain".<sup>190</sup> This perverse cat-and-mouse game can last several hours and inevitably results in deaths. Civilian maritime rescue vessels are also systematically prevented by Spain from doing their work through bans on leaving ports or even passing through the Strait of Gibraltar.<sup>191</sup> Once again, "refugee and migration control" are officially given precedence over saving lives. At this external border, too, people seeking protection are more likely to be left to die than be allowed into the EU.

## Jumping the Fence – The Exclaves of Ceuta and Melilla

Although the exclaves with their land borders are one of the few places where a safe border crossing from Africa to Europe could easily be made possible, most refoulements of people seeking protection in Spain take place there.

As early as 1987, just one year after Spain's accession to the EC, construction work began to erect fences along the land borders with Morocco in order to prevent migratory movements to Spain and thus to the EC. To further seal the border, the Spanish government implemented a massive border security system in the mid-1990s (in Ceuta in 1993 and Melilla in 1996) with considerable support from the EU, which bore 75 per cent of the costs, and this infrastructure has been steadily expanded ever since. The border fortifications in Ceuta rapidly consisted of two parallel six-metre-high fences with another, slightly lower fence between them. As in Melilla, the facility is equipped with floodlights, surveillance cameras and motion detectors. In addition, a ditch and a barbed-wire fence hamper access to the border from the Moroccan side. The border is patrolled by Spanish and Moroccan security forces both on land and on water. The second expansion phase of the border fences, initiated 2012, cost more than 133 million Euro. Whereas in the 1990s it was the EU that urged Spain to seal off the borders to the exclaves, now Spain demanded EU funds for more fences and to ward off those seeking protection – “securing” the borders was rapidly conceived as a major European project.<sup>192</sup>

People seeking protection are thus forced to enter Ceuta and Melilla by other means, such as climbing over the metre-high border fences in groups – a life-threatening practice called *jumping the fence*. *N.D. and N.T. v. Spain* is a case that sadly became notorious, yet the events in question were not an isolated incident.<sup>193</sup> In September 2005, several hundred people tried to cross the Ceuta fence into Spanish territory. The militarised Guardia Civil's defensive strategy resulted in five deaths, with more than 100 injured. A total of 156 people managed to cross into Ceuta. Several dozen people were arrested and abandoned in the Moroccan desert without water and without any formal procedure, in particular with no opportunity to apply for asylum.<sup>194</sup> This common deportation practice of the exclaves is dubbed “hot deportation” (*devoluciones en caliente*). For ten years, the pushbacks, which violate international law, had

no national legal basis, but were based solely on instructions from the Guardia Civil, stipulating that people who had not yet crossed a spontaneously proclaimed “operational border” were to be deported immediately. Ultimately, in 2015, Spain created a simple legal basis in Spanish law in an attempt to legalise pushbacks. The Law for the Protection of Citizen Security (*Ley de protección de la seguridad ciudadana*) aims to create the impression that pushbacks are legal.

The territory has become even more inaccessible since 2015, when the Spanish government passed an amendment to the Aliens Act 4/2015 with special regulations for Ceuta and Melilla (*Régimen especial de Ceuta y Melilla*). This law stipulates that non-EU citizens who want to cross the border using illegalised routes can be turned away without further ado. This amendment was another attempt to legalise pushbacks, contrary to international law. As there were no de facto legal entry possibilities at that time either, access to asylum was painfully restricted, particularly affecting vulnerable people such as unaccompanied minors and victims of trafficking. Pushbacks were and are also carried out on children.<sup>195</sup> In 2014, for example, an unaccompanied minor from Mali was deported from Melilla to Morocco without being informed of his rights and without being provided with legal assistance or an interpreter. The UN Committee on the Rights of the Child reaffirmed the rights of unaccompanied minors at European borders and declared unlawful the attempt to shift land borders through legal definitions and through creation of “exceptional zones” and “operational borders”. However, the Committee took five years to issue this opinion.<sup>196</sup> Unlike the UN Committee on the Rights of the Child, the ECtHR avoided the issue, later caving in as a response to political pressure from EU Member States and handing down a ruling contrary to views expressed by the Committee on the Rights of the Child.

In another case of collective expulsion without individual proceedings, in 2017 the ECtHR initially ruled in favour of the applicants, who had crossed the border fence in 2014 with a group of around 80 people and were immediately sent back to Morocco. However, Spain requested that the case be referred to the Grand Chamber of the ECtHR. While international organisations and NGOs have criticised the pushbacks for years as contrary to international law, the Grand Chamber of the ECtHR buckled under political pressure from European Member States in February 2020 and, in a highly criticised ruling, declared forcible refoulements at

Spanish borders lawful under certain conditions.<sup>197</sup> The Grand Chamber found that there was no violation of the European Convention on Human Rights or Protocol No. 4, as the applicants had not successfully entered Spain. It was held that the legal safeguards in case of expulsion would apply only if entry had occurred. The court also cited alleged existing legal possibilities for entry and access to asylum procedures. The judgement was greeted with joy by EU Member States, who greatly simplified its tenor and instrumentalised it for their own purposes. As early as March 2020, various decision-makers referred to the same ruling when people on the move attempting to apply for protection in Europe were mistreated and in some cases even shot at the Turkish-Greek border.<sup>198</sup>

Spain's 2014 amendments to the Guardia Civil's operational protocols and the 2015 legislative amendments with special regulations for the exclaves clearly create provisions that are contrary to international law and are supported by the ECtHR ruling. The newly established criteria in the protocols and laws for determining when "illegal entry" has occurred play a key part in legalisation of border violence. Entry is now only considered to have officially taken place when the innermost fence of the border installation has been crossed. If people fleeing are caught in the barbed wire fences, are forcibly repelled by border guards or are arrested near the fence (also on the Spanish side), they are held not to have entered Spain and can be returned to Morocco immediately without further formalities.

After another 800 people on the move managed to climb the Ceuta border fence in July 2018, Spain reactivated a 1992 agreement with Morocco that allows for immediate deportation of arrivals to the place where they crossed the border. In 2018 and 2019, reports continued to pile up about rejections, collective expulsions and pushbacks by Spanish border guards, including individual incidents with up to a thousand people involved. Legalisation and legitimisation of border violence was flanked by repression and criminalisation of people seeking protection. In October 2019, the provincial court of Cadiz in Ceuta sentenced nine people seeking protection to eighteen months in prison for organising the jump over the fence in July 2018. In addition, they were ordered to pay damages to the Spanish authorities: 10,511 Euro to the Spanish state for damage caused to the fence and more than 4,000 Euro to the Guardia Civil for damaged cars and uniforms.<sup>199</sup>

The *European Council on Refugees and Exiles* (ECRE) reported in 2019 that although border posts where asylum applications could be submit-



ted were available, Moroccan border guards prevented people on the move from sub-Saharan Africa from reaching them.<sup>200</sup> The exclaves' border fortifications were reinforced again that year. To that end, the height of the fences was increased from six to ten metres in places and barriers were installed to prevent people from climbing over. Additional motion detectors, video surveillance, and thermal imaging cameras were installed and a facial recognition system was also set up. The EU provided the 32.7 million Euro spent on militarising Ceuta and Melilla's borders.<sup>201</sup>

The EU likewise financed Moroccan special units, including their infrastructure and equipment. These units primarily combat political dissent within the country and deal with "migration control". Spanish army helicopters take off from Melilla to spy on unofficial camps of sub-Saharan refugees in Morocco that are subsequently ruthlessly cleared and destroyed by Moroccan officials, with arbitrary arrests and violence against the people on the move considered to be part of the strategy. Spain promised Morocco additional vehicles for border control worth 25 million Euro.<sup>202</sup>

Increasingly impassable border fences mean that people seeking protection now attempt more frequently to reach Spanish territory by water. Swimming, on boats or makeshift rafts, they try to cross from the Moroccan coast and bypass the border fence that juts out into the sea over an extensive area. Depending on the chosen route, weather conditions and how fit they are, this can take more than six hours. To avoid being intercepted by the Moroccan coast guard or the Spanish Guardia Civil, people often set off in bad weather. That leads to numerous deaths and missing persons in this context too.<sup>203</sup>

It is remarkable that Morocco does not even officially recognise Spanish sovereignty over the cities of Ceuta and Melilla, despite the seamless border controls on both sides. This dispute over sovereign territory is utilised by both Spanish and Moroccan authorities to turn away people on the move. If it facilitates pushbacks at sea, Spanish authorities are content to accept that Morocco considers not only the cities but also the sea off the enclaves as Moroccan.

In the *Sonko v. Spain* case, the UN Committee against Torture ruled that Spain had violated Articles 12 and 16 of the Convention against Torture in a refoulement outside Ceuta.<sup>204</sup> The Guardia Civil had intercepted four

people from Senegal trying to reach Ceuta. Shortly before reaching the Moroccan coast, the Guardia Civil forced the four people to jump into the water and destroyed their rubber dinghy. One of the four refused to jump because he could not swim. The Guardia Civil forced him into the sea – and later tried unsuccessfully to revive the drowned young man on land.

The “El Tarajal” trial examined the criminal responsibility of 16 Guardia Civil officers for the deaths of 15 people seeking protection and serious injuries suffered by another 23 in 2014. 15 people drowned after attempting to reach Ceuta by sea and being forced back by the Guardia Civil with tear gas, rubber bullets and truncheons. Another 23 people were injured, some seriously. One of those involved reported: “The first few times they [the Spanish Guardia Civil] shot in the air when they realised we were reaching the Spanish side, that we were crossing the border, and then they shot at the bodies. The first bullet hit me in the back and the second in the jaw”.<sup>205</sup> However, instead of pursuing the allegations in court in main proceedings, in October 2019, the case was dropped for the third time. The court in Ceuta held that the migrants, who had set off from El Tarajal beach with around 200 others, “were not people in danger at sea”. In July 2020, the *Audiencia Provincial* dismissed the appeal against dismissal of the case, which the survivors appealed against again in 2020.<sup>206</sup> The court assessed the Guardia Civil’s action as “reasonable”, as it had not even been proven “that these people drowned in Spanish waters”.<sup>207</sup>

In the past, it was mainly people from sub-Saharan countries who tried to reach the exclaves. Since the outbreak of the COVID-19 pandemic and the almost closure of the Spanish borders, Moroccans have increasingly tried to cross the fences into Europe. After years of being able to go in and out of the exclaves to work there, they were now abruptly cut off from Ceuta and Melilla. The Moroccan authorities significantly reduced military border surveillance when the Spanish government admitted Brahim Ghali, Secretary-General of Frente Polisario, which is fighting for Western Sahara’s independence, to a Spanish hospital in spring 2021 for treatment of a serious COVID-19 infection.<sup>208</sup> It rapidly became apparent that the EU had made itself vulnerable to blackmail by outsourcing its fight against migration to Morocco and that the lives of those seeking protection were no more than a pawn in diplomatic strategies and political objectives as far as the states involved were concerned.

As the threat of interception by Moroccan border guards had vanished, large numbers of people began moving from Morocco to Ceuta on the morning of 17th May 2021. Entire families and individuals of all ages and social backgrounds swam around the enclave's border fence or used small boats. Most were former residents of the enclave, Moroccan citizens with economic and/or family ties, who had been hit hard by the strict closure of the border. A contingent of Spanish military and several police units used threats and violence to push the people back, forcing those who had made it to the other side to return to Morocco through a door in the fence. On 18th May, the movement continued and dozens of migrants also scaled the ten-metre-high border fence. They were met by the Guardia Civil in full riot gear and prevented from entering Spanish territory with tear gas and rubber bullets. This refoulement, which was in breach of international law, was accompanied by Spanish military patrols at the Moroccan border and by armoured vehicles on the exclaves' beaches. The soldiers actively prevented people from reaching Ceuta by sea. They were detained in the water, sometimes for hours. The Spanish military and the Guardia Civil violently and systematically conducted Hundreds of pushbacks, which the Moroccan authorities refused to carry out for the EU in that period. None of those affected had their case considered individually and not a single asylum application was granted.<sup>209</sup> Up to 10,000 people reached Ceuta in this short window of time. On 22nd May, 7,000 of them were already deported or forced to "return voluntarily" without their reasons for fleeing or a potential protection status being examined.<sup>210</sup> Morocco had abandoned border protection, but willingly allowed those illegally rejected back into the country. In the heat of the moment, Spain promised Morocco an additional payment of 30 million Euro to stem the movement of people seeking protection to Europe.<sup>211</sup> After two days, the Moroccan border guards resumed the EU mission and prevented further major movements to Ceuta.

In the following week, hundreds of people also tried to cross the fences into Melilla. The Spanish security authorities reacted with what are known as anti-entrance measures (*dispositivos anti-intrusión*). This technical term refers to standardised violent pushbacks in which border guards deploy truncheons, pepper spray and other forms of violence to prevent migrants from entering Spanish territory. The unlawful pushbacks were supported by helicopter operations that monitored the events from above.

In the face of non-existent legal entry routes and excessive border control measures, some people are now forced to stay hidden in cars for several days without food and water until their bodily functions are so diminished that they can no longer be detected by EU-funded thermal imaging cameras when crossing the Moroccan-Spanish border.<sup>212</sup>

People who make it across the borders of the exclaves despite all these defensive measures are taken to temporary reception centres (*Centros de Estancia Temporal de Inmigrantes*; CETI) where they can apply for asylum.<sup>213</sup> Living conditions in the CETIs are precarious, mainly due to overcrowding. In Melilla, for example, there were 1,354 people per 782 accommodation places in August 2020, according to official figures. In June 2020 around 900 minors were crammed into the centre for unaccompanied minors in Melilla, “*La Purísima*”, which has space for 180 people. Chronic overcrowding means that many people seeking protection (including children) are forced to live on the streets.<sup>214</sup> Inhumane or non-existent accommodation for people on the move is another facet of European border violence. To make matters worse, asylum-seekers are only allowed to travel on to the Spanish mainland after their application has been examined. This preliminary examination often takes many months and human rights organisations repeatedly criticise the lack of transparency in the process. Where people seeking protection come from often determines how their application is handled. People from sub-Saharan Africa in particular face long waiting times.<sup>215</sup>

Despite a ruling by the Spanish Supreme Court in February 2021 that asylum-seekers have the right to move to the mainland once they have officially requested asylum, they continue to be denied this right.<sup>216</sup> For example, the police refuse to hand over confiscated passports needed to travel. Systematic and constant harassment, arbitrary controls, detention, pushbacks, forced returns, degrading conditions in the camps, and endless bureaucratic processes normalise the use of violence against people fleeing their homes. Fearing unlawful deportation and the living conditions in the centres, many people therefore do not go to the CETIs and instead try to hide on boats and in trucks in order to reach the Spanish mainland. On this intra-Spanish flight out of the exclaves, also known as *risky*, migrants again put their lives in danger.<sup>217</sup>

In 2020, 1,755 people officially entered Melilla and Ceuta illegally by land, which is more than 72 per cent fewer than in the previous year. In the

same period, border crossings by sea have decreased by over 34 per cent in Ceuta and by as much as 95 per cent in Melilla. Although the consistent defensive measures against people on the move has reduced movement into the exclaves, the reasons why people leave their homes have not vanished into thin air as a result, just as people fleeing their homes continue to need protection. The number of illegalised arrivals in the Canary Islands rose from 2,687 in 2019 to 23,023 in 2020, for example – a 757 per cent increase.<sup>218</sup> Adding more border infrastructure, as in the case of Ceuta and Melilla, therefore not only leads to a shift in flight routes, but above all means the routes taken are even riskier and more deadly.

### The Canary Islands – Nightmare or Dream Destination

The Canary Islands lie about 100 kilometres off the African coast in the eastern Central Atlantic. The archipelago with its two million inhabitants is one of Spain's 17 autonomous communities (*comunidades autónomas*). One of the first cases of illegalised entry took place here in 1994, when two Sahrawis arrived in Fuerteventura in a small boat. Since then, this extremely dangerous sea route has been used with steadily increasing frequency. The collapse of fishing (for which European large-scale fishing fleets are known to be partly responsible), war and crises in various African regions and curtailment of other routes in North Africa (European policy is again partly responsible for both factors) have forced more and more people on the move onto the West African route. As early as 2006, in the much-maligned *Crisis de los Cayucos* (Crisis of the Refugee Boats), well over 30,000 people on the move arrived in the archipelago via the Atlantic. Due to growing repression in Morocco, many people now set sail hundreds of kilometres further south in Mauritania, Senegal or the Gambia. Those seeking protection spend days, sometimes weeks at sea until their small, poorly equipped boats reach the Canaries – if they are not intercepted or sink first.<sup>219</sup>

Nevertheless, the long route to the Canary Islands is today the most frequent escape route to Spain. The result is a shocking number of dead and missing people. The huge distances as well as the wind, waves and currents of the rough Atlantic often prove fatal. In the last week of October 2020 alone, at least 480 people died within seven days.<sup>220</sup> NGO *Caminando Fronteras* estimates that in 2021 at least 4,016 people lost their lives

trying to reach the Canary Islands. Meanwhile, in Trinidad and Tobago in the Caribbean, boats are washing up with badly decomposed bodies – of people from Africa who were trying to reach Europe.<sup>221</sup>

People on the move not only have to overcome the forces of nature, but are also threatened by state and non-state violence along the route. Countries along the coast such as Morocco, Mauritania and Senegal, as well as transit countries like Niger and Mali, are paid by EU Member States (e.g. Spain and Germany) to intercept people before they can get on the boats.<sup>222</sup> In 2020, the Spanish government also sent two warships, a coastal patrol boat, an aeroplane, a helicopter, and a submarine to Morocco, Senegal, and Mauritania. In cooperation with the Guardia Civil and the police, the maritime borders of Morocco, Mauritania, and Senegal are to be further sealed off and militarised.<sup>223</sup>

Many of these pushbacks are clearly contrary to international law because of the violence used, the deaths and the violation of the principle of non-refoulement (enshrined in customary international law, the Geneva Refugee Convention, the European Convention on Human Rights and the Convention against Torture, inter alia). The practice is maintained despite court rulings and decisions by various UN committees.<sup>224</sup> For example, in 2008, in *J.H.A. v. Spain*, the UN Anti-Torture Committee explicitly confirmed the extraterritorial applicability of the refoulement prohibition stipulated in Article 3 of the Convention against Torture with regard to pushbacks at sea, even if the pushback and subsequent detention of people on the move by Spanish authorities initially took place in international waters and subsequently in Mauritanian territorial waters or territory.<sup>225</sup> Spain's actions are thus not only highly inhumane, but also officially illegal. Off Mauritania, the castaways were initially forced to lie at anchor for eight days, regardless of their state of health, before being allowed to go ashore. During their detention at sea, they were guarded by Spanish officials and forced to live in cramped quarters without sufficient ventilation, with no light or mattresses. The guards restricted access to toilets and showers. 23 of them refused to sign a declaration of "voluntary repatriation" because they risked political persecution in their native Kashmir. As a result, they were held under Spanish supervision in a former fish factory in Nouadhibou, Mauritania. After a month in detention, with no legal representation and no possibility of contacting the outside world, they began a hunger strike. The strike ended after

three days when an “agreement” was reached with the Spanish authorities. Spain had offered the people seeking protection three options: 1. remain in detention indefinitely, 2. agree to “voluntary repatriation” or 3. deportation to Morocco, Senegal, Mali, Egypt or South Africa. An asylum procedure in the EU – that they would actually be entitled to – was not an option according to the Spanish authorities.

In complete disregard of supposed European principles, Spanish Interior Minister Fernando Grande-Marlaska was pleased to note in late 2020 that 40 per cent of the boats crossing from, for example, Senegal or Mauritania to the Canary Islands never arrive there, but are intercepted at sea and returned to the African coast. He attributed this “success” to good cooperation and collaboration with transit countries.<sup>226</sup> He did not mention that neither human rights nor a functioning asylum system are guaranteed in these countries, nor that some of these states are quite simply dictatorships. In addition to the extraterritorial applicability of the refoulement prohibition, European Union policy of sealing borders to keep people out also disregards the right to leave the country, which is guaranteed under international law and stipulated *inter alia* in the Additional Protocol to the ECHR (European Convention on Human Rights). The right to leave the country is elementary and a necessary prerequisite for exercising other human rights, such as the right to protection against torture, inhuman or degrading treatment or punishment, and the right to asylum. Although border controls are not *per se* illegal under international law, they must be carried out in accordance with the aforementioned provisions of international law. As early as 2013, the Council of Europe's Commissioner for Human Rights stated in a policy paper: “EU Member States must with immediate effect individually and collectively stop push-backs that prevent people from leaving their country of origin or entering the EU and exercising their right to asylum”.<sup>227</sup>

People on the move who make it to the Canary Islands against all odds face inhumane living conditions. Although the number of arrivals is lower than on the Aegean islands in Greece, reception conditions here are also disastrous. After arriving, a long stay in overcrowded reception centres is likely, as the Spanish government refuses to let a significant number of people onto the mainland before a decision has been made on their asylum applications. While women and children have a better chance of being transferred to the European continent, thousands of peo-

ple are crammed into the camps on three of the islands. The disgraceful living conditions have been vigorously criticised by various human rights groups. The prison-island concept follows the Greek model – people on the move are systematically prevented from leaving the country by the police, even though they are not officially detained.<sup>228</sup> Meanwhile, the Spanish migration minister José Luis Escrivá rejects comparisons with Lesbos in Greece on the crude and sweeping grounds that most people that arrive on the Canary Islands are not in need of protection and can therefore be deported.<sup>229</sup> Such argumentation completely disregards the formal nature of the right to asylum. It is not the Spanish migration minister who can decide on a whim or on the basis of his knowledge of geography and politics whether someone needs protection, but only the competent authority in an asylum procedure guaranteed by law. Every person has the right to go through such a procedure, completely independent of the outcome of that procedure.

Spain is also on a par with other EU countries when it comes to criminalising people on the move. While it is obviously European borders that claim thousands of lives, attempts are being made to blame other people on the move for the deaths.<sup>230</sup>

When the numbers of arrivals rose again in summer 2020, some people were accommodated in hotels that were empty due to the pandemic. In November, when 8,000 people reached the Canary Islands within a month, thousands were still forced to live in adverse conditions, such as the overcrowded camp at the Arguineguín pier in Gran Canaria, also known as the “Port of Shame”. People seeking protection did not have access to adequate sanitary facilities or to legal advice and slept on concrete floors. Meanwhile, media representatives, photographers and journalists were denied access to the port to prevent them from reporting on the situation. It rapidly became clear that housing some of the people who had arrived in the hotels had little to do with protecting their dignity, but was rather about economic support for European hoteliers, who received 40 Euro per person per day from the government. In early 2021, EU-funded collective camps were set up and accommodation in hotels was no longer funded.<sup>231</sup>

Although Spain has officially decided against Greece’s hotspot principle (probably because of the negative effects on the image of the popular tourist destination Canary Islands), a team of EASO staff was also



stationed there in March 2021 to support the Spanish authorities. Frontex is also sending teams to the Canary Islands to reinforce the local police forces.<sup>232</sup> It seems likely that the “turn them away, lock them up and expel them” principle will soon be implemented just as vigorously as on the Greek islands. Spain’s “reception system” is already rooted in brutal deterrence policies, while the Canary Islands have become a miserable waiting room for deportations and a black spot as far as human rights are concerned.

### Frontex in the Western Mediterranean and the Atlantic

Of course, Frontex is also involved in the Spanish border blockade. The European border protection agency likes to present itself as a law enforcement agency that averts disaster, essentially portraying people on the move as criminals and potential security threats. This constantly repeated narrative, however, does not reference any specific defence against terrorism, instead defining migratory movements as a threat in their own right. This is particularly worrying because Frontex officers conduct sensitive human rights interviews with intercepted people. Since 2006, in cooperation with the Guardia Civil and the National Police, the EU agency has coordinated three *joint operations* in Spanish territory on land and at sea as well as in the waters of non-EU Member States: “Indalo”, “Minerva” and “Hera”.

Operation Indalo was first deployed in the Western Mediterranean in 2007, with the aim of stopping migratory movements, especially from Morocco and Algeria, to Andalusia.<sup>233</sup> The Spanish Ministry of Defence ordered the involvement of the Spanish army in the operation in 2019. This protocol has been renewed annually since then.

Operation Hera was conducted in the Atlantic Ocean from 2006 to 2018 and was the first *joint operation* between the EU agency and the Guardia Civil on Spanish territory. The operation was launched in response to what was dubbed the *Crisis de los Cayucos* and was intended to prevent people seeking protection from reaching the Canary Islands. 2.8 million Euro of the initial 3.5 million Euro budget was funded by Frontex. Under the aegis of “Hera I”, Frontex staff from nine EU countries were stationed on the Canary Islands to question arrivals and initiate their repatriation. Within a few months, thousands of people were sent back to the place

they wanted to leave. Frontex flights have since been used to collectively expel people seeking protection to countries other than their countries of origin and that cannot offer them adequate protection and legal assistance.<sup>234</sup>

In the course of “Hera II”, Spanish, Portuguese, Italian and Finnish ships became part of the Frontex operation between August and September 2006. The vessels patrolled the coasts of Mauritania, Senegal and the Cape Verde Islands to monitor and intercept departing boats carrying people seeking protection. Any boat detected was directed back to the port of departure with the permission and cooperation of the Senegalese and Mauritanian authorities. Due to the “success” of the operation and at the request of the Spanish government, Hera was repeated annually until 2018 and the deployment times were extended. Staff from other EU Member States were brought in and surveillance at sea was extended and supplemented by aerial surveillance. Checks carried out before repatriating people seeking protection that have been apprehended at sea remain opaque, as is typical of Frontex. The officers simply make “assumptions” about the nationality of undocumented persons, while interpreters are only called in if Frontex deems them “necessary” and “available”.<sup>235</sup> In practice, this means: almost never.

The bilateral agreements between Spain and the African states concluded during that period in combination with *Joint Operation Hera* subsequently served as a blueprint for what was soon to become common practice throughout the EU – externalisation of border control through cooperation with non-EU Member States. To that end, it also became possible for units and equipment from the EU Member States participating in the operation to be deployed to and used in non-EU Member States. At the same time, Spain concluded a number of other anti-migrant agreements with Morocco, Senegal, Mali and Mauritania, such as repatriation agreements, fishing bans, and restrictions on sales of plastic containers that could be used as fuel canisters for boats.<sup>236</sup> When the number of people on the move arriving in the Canary Islands increased in 2020, the operation was relaunched as “Hera III”. Monitoring of routes from the sea and from the air was stepped up with support from various EU Member States and in cooperation with the Senegalese authorities to ensure people could be prevented even more effectively from leaving the coasts of the African continent.

Operation Minerva supports the Spanish operation *Paso del Estrecho* between Spain and Morocco in the Strait of Gibraltar every year. Since 2006, up to 19 EU Member States have sent troops to set up border checkpoints under the direction of the Spanish National Police and Frontex to prevent people seeking protection from moving across the Strait. The operation automatically issues expulsion orders against all migrants apprehended at sea. The operation was suspended between 2016 and 2018 and then resumed.<sup>237</sup>

In Ceuta, too, Frontex officers have been deployed in *Joint Operation Minerva* since 2021, under pressure from the EU, to prevent people on the move from hiding in trucks or boarding ships to make the crossing to the Spanish mainland. The EU agency is supposed to “deal with the challenges of migration and police management at the borders of the ports of Algeciras, Ceuta and Tarifa”.<sup>238</sup> Frontex is also instrumental here in restricting freedom of movement, criminalising people on the move and jeopardising their safety. Furthermore, there are reports of Frontex officers entering the CETI in Ceuta in civilian clothes to question people on the move about their migration history and plans.<sup>239</sup>

In January 2021, differences between the Spanish government and Frontex became public. Spain was not very enthusiastic about ceding control of the *joint operations* completely to Frontex. Frontex, on the other hand, empowered by its again expanded remit, intended to conclude independent bilateral agreements with non-EU Member States on its own initiative in order to patrol their coasts. When the Spanish National Police and Guardia Civil insisted on running the operations, Frontex threatened to suspend *joint operations* altogether. After this attempt to seize even more power failed, the EU agency eventually agreed to extend the operations for another year.<sup>240</sup>

“‘There’s a Baby On Board!’ They Did Nothing at All”<sup>241</sup>

Spain, like other Member States, is using force to seal off Europe’s external borders. In cooperation with the EU, the freedom of movement of thousands of people on the move is systematically restricted in the exclaves of Ceuta and Melilla and on the Canary Islands. The newly established “fast-track prisons for migrants” (*cárceles “express” para migrantes*; CATEs) in southern Spain are also co-financed by Brussels.<sup>242</sup>

If the numbers of arrivals in Spain is falling (as was the case in 2009 and subsequent years), it is not because fewer people are seeking pro-

tection. The lower figures are due to unlawful, violent defensive actions undertaken by Spanish border guards and Frontex operations to stop the boats. By externalising border control and putting pressure on non-EU protagonists, European migration policy is implemented on the African continent and at the same time responsibility for human rights crimes committed in this context is outsourced. The EU's "border security" has meanwhile been pushed outward to north-western Africa, where financing is provided for repressive structures to stop people on the move and responsibility for halting their movement is delegated to countries of transit and departure. According to *Caminando Fronteras*, more than 4,400 people died trying to reach Spain by sea in 2021. Most died on the way to the Canary Islands. It is the highest death toll ever recorded on this escape route and twice as high as in 2020.<sup>243</sup>

30 million of the 55 million Euro available from the 2018 BMP Maghreb programme went to the Moroccan government.<sup>244</sup> This money was to be used to reinforce Morocco's borders, purchase equipment for land, sea and airborne control missions, and build an IT infrastructure for "capturing, archiving and identifying digital biometric data". Through the project *Support for integrated management of borders and migration in Morocco* (*Soutien à la gestion intégrée des frontières et de la migration au Maroc*), another 40 million Euro from the EU Trust Fund for Africa (EUTF) went to the Moroccan government to prevent unauthorised border crossings, buy more equipment and intensify cooperation with the EU and its Member States.<sup>245</sup> In the same year, the European Commission declared that an additional 70 million Euro would be transferred to Morocco for border controls.<sup>246</sup> The Moroccan government accepted the remit of preventing people on the move from moving into Europe and confirmed that it had officially intercepted 89,000 people seeking refuge at the Spanish border in 2018 and another 70,000 the following year.<sup>247</sup> No information was provided concerning what happened to the people intercepted.

In 2016, the European Court of Justice (ECJ) ruled in a case concerning a fisheries agreement between Morocco and the EU that Morocco could not exercise sovereign powers over Western Sahara.<sup>248</sup> In adopting this stance, the court implicitly confirmed the opinion under international law that occupied Western Sahara does not belong to Morocco. However, instead of complying with the ruling and ensuring that Morocco's unlawful occupa-

tion and exploitation of Western Sahara's resources is brought to an end, the EU continues to participate in this undertaking. Morocco, Spain and the EU are aware of what it would mean for Europe's border regime if Rabat did not fulfil its remit of "fighting migration". The Moroccan government need not fear that it will be condemned by the EU for its occupation and economic plundering of Western Sahara, which per se causes large-scale migration movements. The EU willingly accepts that the people of Western Sahara serve as a bargaining chip in European border policy.

The Spanish Ministry of the Interior is reacting to the foreseeable increase in migration from North and West Africa with increasing defensive measures rather than support for people seeking protection. In 2020, the structure of the Guardia Civil was reformed and the *Border and Maritime Police Command* (*Mando de Fronteras y Policía Marítima*) was created. The unit's main task is to stop onward travel of people on the move in the Atlantic Ocean, the Strait of Gibraltar and the Alborán Sea by further militarising the maritime borders. At the same time, the unit takes charge of management and coordination of Frontex operations as well as the Spanish coordination centre of the European border surveillance system Eurosur. Immediately after this reform, the Spanish Interior Minister visited Algeria to promote the externalisation of "border security" there as well.<sup>249</sup>

Keeping the Spanish external border of the EU tightly closed has not only resulted in thousands of people whose rights are denied, who are detained, go missing or die, but has also sparked a boom for smuggling networks and even more so for the "migration control" industry. Research by the newspaper *Público* and the *Fundación porCausa* revealed that 1,677 contracts totalling 660.4 million Euro were signed with "immigration control" companies in Spain over the course of just a few years. Most of the deals were concluded without a public tender.<sup>250</sup> Spain is one of the most important markets for this shadow industry and often serves as a European testing ground for defensive measures directed against people seeking protection. The contracts are awarded to private companies like the Spanish company *European Security Fencing*, which produces the state-of-the-art barbed NATO wire for the border fences in the Ceuta and Melilla exclaves that not only cuts deep into the flesh but is designed to entangle and maim people on the move until officials on either side decide to release them<sup>251</sup>. In other European countries, too, arms and security companies are implementing contracts worth billions of Euro to

fight migration. It is worth noting that these companies are also active in politics: in the European Security Research Programme (ESRP), for example, they act as official advisors to the European Commission and secure funds for the development of drones and other defence technologies.<sup>252</sup> Such barbaric border installations have been adopted throughout the EU, just as many other European countries are also enthusiastically copying the practice of deploying so-called development aid to put pressure on non-EU Member States to participate in sealing Europe's borders.

Meanwhile, the campaign to legitimise violent border practices is in full swing at both the Spanish and European levels – fuelled by horror stories of threat and terror, border protection takes precedence over protecting people seeking protection, barriers are given more importance than freedom of movement, and the quest for power and control is accorded higher priority than the right to asylum and to life.

## The Eastern Mediterranean

### Cyprus

The most frequently used route into the European Union in the eastern Mediterranean is from Turkey to Greece. However, the island state of Cyprus is also a destination and transit country for people on the move. The Republic of Cyprus, which makes up about two-thirds of the island lies in the south and is a member of the EU. The Turkish Republic of Northern Cyprus in the north of the island is not recognised by any other state except Turkey. The two areas have been separated since 1974 by what is known as the Green Line – a demilitarised buffer zone 180 kilometres long and up to 30 kilometres wide. People on the move often travel to northern Cyprus via Turkey to later continue to the south of the island. More than 9,000 of the 10,868 arrivals in the first ten months of 2021 crossed the Green Line.<sup>253</sup> Others arrive by sea in boats from Turkey, Lebanon and sometimes directly from Syria.<sup>254</sup>

The reality of how people on the move live in Cyprus is relatively sparsely documented – although the small country with its approximately 1.2 million inhabitants has the highest number of asylum-seekers per capita in the EU.<sup>255</sup> In absolute numbers, however, the number of people seeking protection is relatively low; in 2020, just over 7,000 people filed an initial application for asylum there.<sup>256</sup> As Cyprus is difficult to

reach, as it is about 80 kilometres from the Turkish mainland and about 100 kilometres from the Syrian and Lebanese coasts, it is not a preferred destination for people fleeing. Moreover, Cyprus is not part of the Schengen Area, so only a few officially recognised refugees make it from here to mainland Europe. Nevertheless, due to more stringent border controls and an isolationist “Fortress Europe” approach along other routes, the number of asylum-seekers in Cyprus has tripled since 2016.<sup>257</sup>

Like the rest of the EU, the island state is responding with deterrent measures and isolation. Although the Green Line is not a border in the official EU view, as the Republic of Northern Cyprus is not recognised, the Cypriot Interior Minister, Nicos Nouris, complained to the EU Commissioner for Home Affairs, Ylva Johansson, about major problems in controlling the stretch of land.<sup>258</sup> In March 2021, the Cypriot government started building an eleven-kilometre barbed wire barrier along the Green Line.<sup>259</sup>

People trying to reach Cyprus by sea are rigorously pushed back.<sup>260</sup> In March 2020, among other incidents, it was reported that the Cyprus Coast Guard pushed a boat carrying 175 people from Syria back to sea. In September of the same year, further incidents were reported in which the coast guard forcibly returned more than 200 people who had reached or were trying to reach Cyprus by boat to Lebanon – a country where refugees make up about 22 per cent of the total population.<sup>261</sup> To justify this, the Cypriot government invokes a bilateral agreement with Lebanon. For Syrian people on the move in particular, this violent approach entails the acute risk of what are known as *chain pushbacks* to Syria in violation of international law.<sup>262</sup> As recently as October 2021, Johansson stated that the agreement between Cyprus and Lebanon raised “many questions”, adding that EU provisions do provide scope for people to apply for asylum at the EU’s maritime borders.<sup>263</sup>

However, as elsewhere in the EU, Cyprus concentrates on further restrictive measures rather than making rights accessible to people on the move. In early November 2021, French Interior Minister Gérald Darmanin promised to initiate talks on readmission agreements between Cyprus and French-speaking African countries.<sup>264</sup> Shortly afterwards, on 10th November, Cyprus announced that it would submit a request to the European Commission to suspend asylum procedures for people who had arrived on the island without permission. As an argument for sus-

pending a human right, the government alleged that Turkey was deliberately directing people on the move to Cyprus.<sup>265</sup> On the same day, Cypriot officials told a group of 61 people fleeing by boat that they would expel them to Lebanon. To avoid the unlawful pushback, they instead headed towards Italy.<sup>266</sup> People are now trying to travel directly from Lebanon or Syria to Greece or Italy in small boats as a direct consequence of the rigorous sealing of Cyprus' borders. This not only denies refugees their rights, but also puts their lives in immediate danger, as the already long and often deadly sea route is extended from 80 kilometres to over 1,800 kilometres.

NGOs and human rights groups have also long complained about the unspeakable living conditions of people fleeing and the systematic human rights violations in Cyprus, an EU Member State. The Cypriot asylum system is – quite deliberately – in a desolate state. Asylum-seekers often have to wait years for a decision on their applications. Strict and short deadlines for applicants make access to legal aid and translators extremely difficult. In 2020, only 1,838 out of 7,117 first asylum applications were granted – 92 per cent were rejected at first instance.<sup>267</sup>

At the same time, hundreds of people seeking protection are detained in cramped and unhygienic conditions without any legal status. They face “excessive force if they protest against the poor living conditions and detention”.<sup>268</sup> People on the move in Cyprus are forced into illegality and are subjected not only to hostility but also to precarious and often exploitative working conditions. Xenophobia and racism are on the rise in Cypriot politics and society – as in other European countries – and are increasingly deemed acceptable. People on the move are victims of hate crimes and even murder.<sup>269</sup>

As if that were not enough, the Cypriot authorities, in cooperation with the EU agencies Frontex and EASO (*European Asylum Support Office*), use all available means – including unlawful methods such as deliberate misinformation and psychological blackmail – to force people fleeing into “voluntary return”. Frontex and EASO staff had no qualms about telling a Syrian asylum-seeker that it would be best for her to return to Lebanon, where Cypriot officials had already illegally deported her husband and two children. Furthermore, a Frontex official brazenly lied to the woman when he tried to convince her that Lebanon was considered a “safe” country.<sup>270</sup>



When the Taliban invaded Kabul in August 2021, the Cypriot state responded to the impending suffering of the Afghan population with calls for immediate Frontex operations to prevent illegalised border crossings of Afghan refugees into the EU.<sup>271</sup>

### Greece

Greece and its approximately 2,000 islands lie at the southern end of the Balkans. To the north, the Hellenic Republic borders, its only EU neighbour, Bulgaria, as well as Albania and North Macedonia. The border triangle with Bulgaria intersects the 192-kilometre land border with Turkey, with which Greece also shares a maritime border in the East Aegean Sea that makes up 90 percent of the Greek-Turkish border. In many places, Greece's Aegean islands and the Turkish mainland are separated by only a few nautical miles, yet this stretch of water has nevertheless claimed many lives.

The route from Turkey to Greece is one of the most frequently used migration routes into the EU, with people from Iraq, Syria, Afghanistan, Somalia, Eritrea, Morocco and Algeria making their way there. The sometimes devastating living conditions – for both locals and refugees – in Lebanon, Jordan and Turkey have also intensified migration towards Greece. The EU has responded to these developments with border fences and violence instead of with European solidarity.

While Greek migration policy in the 1990s and 2000s was mainly reactive, the government changed course in 2011, when the number of arrivals increased significantly due to the Syrian conflict.<sup>272</sup> Shaken by the sovereign debt crisis, Greece felt overwhelmed and seemed unwilling to rise to the challenge, failing for years to bring its reception conditions and asylum procedures into line with European legislation. In 2011, the European Court of Human Rights (ECtHR) found glaring structural deficiencies in reception conditions, as was later confirmed by the European Court of Justice (ECJ).<sup>273</sup> With the ECtHR ruling, the Dublin Regulation was de facto annulled for Greece. The ECtHR ruled against Greece and Belgium, finding violation of Article 3 and Article 13 of the European Convention on Human Rights (ECHR). In Greece, asylum-seekers are subjected to inhuman and degrading living conditions, with serious deficiencies in the asylum procedure. It is therefore prohibited under human rights law to deport people to Greece, even if Greece was the country of entry and/or the person concerned has already applied for asylum there.

In mid-August 2012, the Greek government launched “Operation Aspidia” (Greek for “protective shield”) and deployed 1,800 additional police and border guards to seal the crossing at the Greek-Turkish border river Evros, which is known as the Meriç on the Turkish side. After this initially shifted migratory movements to Bulgaria, Bulgaria rapidly copied the Greek policy of sealing the border. After Bulgaria erected a 30-kilometre wall along the border with Turkey and deployed 1,500 border police to monitor the Bulgarian-Greek border, the “problem” was soon pushed back to Greece.

The Greek “Operation Xenios Zeus” aimed to ensure that illegalised people on the move were apprehended within Greece, detained and, if at all possible, deported.<sup>274</sup> This increased repression not only resulted in the detention of several people seeking protection, but also forced many people to seek safety in other EU countries via the Western Balkan route. Only two months later, in October 2012, the Greek government extended the possible length of administrative detention for migrants and asylum-seekers, increasing it from six to 12 months. In December of the same year, a 12.5-kilometre fence equipped with NATO wire was erected on the Greek-Turkish land border.<sup>275</sup>

As people were not only denied safe and legal entry routes to the EU, but unauthorised entry was also made successively more difficult, people on the move increasingly opted for the even more dangerous (and potentially fatal) sea route between the Turkish mainland and Greek islands in the Aegean.

In 2013, special *First Reception Centres* (FRC) were set up by the Evros for the first time and are still in operation today. Since then, people seeking protection are supposed to be registered in these centres, with their identity and nationality being checked during the initial reception procedures. However, since the FRCs opened, people fleeing have been turned away without these formal steps, and thus without access to an asylum procedure, and have been deported to Turkey. This practice now affects almost everyone seeking protection. The FRCs are the precursors of today’s hot-spots, officially called RICs (*Reception and Identification Centres*).<sup>276</sup>

2014 and 2015 saw a sharp rise in the number of people seeking protection who arrived in Europe as a result of the WANA uprisings and the growing number of wars and crises worldwide, for example in Syria, Iraq and Afghanistan. Thousands fled from Turkey to the Greek

Aegean islands every week. From 2014, the islands of Lesbos, Chios, Kos and Samos were the main destinations.<sup>277</sup> In 2015, the IOM recorded a record number of one million arrivals in Europe by sea, about 850,000 in Greece.<sup>278</sup> Although the Greek islands were generally the first European Union territory that the boats reached, most people were keen to apply for asylum in other EU Member States. Secondary onward travel via the Western Balkan route reduced pressure on the islands to provide for tens of thousands of people on the spot. Nonetheless, the alleged political overstretch at both the national and European level throws a spotlight on the inadequacies of the Greek and European asylum systems. It has become increasingly apparent that there is a generalised unwillingness to find a shared solidarity-based response that respects human rights when it comes to responding to the increasing number of people seeking protection. Although the vast majority of people fleeing were attempting to escape conflict, persecution and human rights crimes, the EU has been denying more and more of them international protection. Until asylum procedures are legally concluded, there is no guarantee of adequate accommodation nor sufficient access to medical care, education or legal aid. The economic and thus political crisis in Greece, which has been simmering away since the 2008 economic crisis, made it much more difficult for the Greek state to react to the many arrivals and to offer effective protection.<sup>279</sup> As other EU Member States refused to take in significant numbers of refugees from Greece, the challenges arising from the financial crisis, corruption and above Greek and EU reluctance to make improvements for people on the move led to a further deterioration in their living conditions.

In 2015, the Greek government, now under the second Tsipras cabinet, officially suspended Operation Aspida due to a lack of funding and did not repair the border fence, which had been partially destroyed by winter floods.<sup>280</sup> In March 2015, a document was leaked stating that migrants would no longer be detained at the borders and would instead be provided with documents allowing them to leave Greece within 30 days. These documents could thus be used as unofficial travel documents for intra-European transit. The EU's reaction by no means expressed greater solidarity with the Greek state. Brussels readily seized the opportunity to declare the migratory movement a "migration and border control crisis" and thus an exceptional situation that had to be combatted – at any

price. From then on, the principal motivation was to prevent people on the move from entering Europe at all. In this spirit, in November 2015, the Balkan route was effectively closed by completely blocking the border between Greece and North Macedonia for people on the move. Other plans included making it impossible for people on the move to enter the EU from Turkey through a mixture of deterrence and repression.

### *The EU-Turkey Agreement*

In 2015, the negotiations between the EU and Turkey on “fighting migration”, spearheaded by Germany, moved to a new level. Gerald Knaus, founder of the European Stability Initiative (ESI) – a “policy planning group” that wields political influence by disseminating its “insights” in government and public spheres – <sup>281</sup> is considered the architect of the agreement that was to be concluded between the EU and Turkey. The EU ignored Turkey’s status as one of the largest host countries for refugees, simply considering the neighbouring state as a transit country and focusing solely on European interests. As early as 7th March 2016, Donald Tusk, then EU Council President, announced at the end of the EU-Turkey summit: “The days of irregular immigration are over”.<sup>282</sup> On 18th March, the European Council issued a statement reaffirming the plan to prevent as many potential asylum-seekers as possible reaching Europe.<sup>283</sup> This immediately sparked vigorous criticism from numerous NGOs and also from the Parliamentary Assembly of the Council of Europe.

The deal known as the EU-Turkey Agreement, which consists of nine points, stipulates, inter alia, that anyone who arrives on the Greek islands without permission and does not apply for asylum or whose application is rejected as unfounded or inadmissible will be returned to Turkey at the EU’s expense. The scheme is only feasible if these people are systematically and fundamentally denied access to a legitimate asylum procedure. Asylum-seekers are instead (de facto) detained and forced to live in inhumane conditions without having effective access to legal assistance and support. Above all, however, every effort is made to prevent asylum-seekers from going through the asylum procedure in the EU in the first place. In order to be able to deport as many people as possible to Turkey, the Greek bill on asylum was specially adapted in April 2016. The new law 4375/2016 established a “special asylum regulation” for the Greek islands and the region of the land border with Turkey. Although Turkey was not

explicitly listed as a “safe third country”, the prerequisites for categorising Turkey as a “first country of asylum” were significantly curtailed, making deportations to Turkey easier. In return, the EU Member States committed to taking in one Syrian refugee from Turkey for every Syrian returned to Turkey from the Greek islands under the “1:1 mechanism”.

In all measures taken to seal off Europe's borders, policymakers have failed entirely to note that Turkey is not a safe place for people on the move. Women on the move in Turkey are at high risk of sexualised violence and forced prostitution.<sup>284</sup> Moreover, Turkey signed the Geneva Refugee Convention (GRC) with the reservation that it only applied to refugees from European countries. From the Turkish government's point of view, this means that it does not apply to people from Syria, Iraq or Afghanistan, for example.<sup>285</sup> Turkey does not guarantee refugees a legal status comparable to that envisaged in the Refugee Convention, which would grant corresponding rights and protection. Syrians can apply for what is known as *temporary protection status*, but this option is not open to people of other nationalities who are seeking protection. People from other countries seeking protection can apply for *conditional refugee status*, which is not comparable to the status stipulated in the *Refugee Convention*.<sup>286</sup> Moreover, in many cases, it is impossible to attain *conditional refugee status* due to long waiting times and bureaucratic hurdles. By September 2017, just 5 per cent of non-Syrians sent back from Greece were able to apply for asylum in Turkey; only two applications were ultimately granted. By January 2019, over two-thirds of non-Syrians who had fled their homes and been returned to Turkey from Greece had been deported to their countries of origin.<sup>287</sup> The EU is thus participating in what are known as *chain pushbacks* in violation of international law, in which people seeking protection are not deported directly to the potential persecutor state, but to a third intermediate state, from where they are in turn deported to their country of origin. Unlawful deportations and pushbacks at the Turkish-Syrian border are the fatal consequences of the decision to de facto consider Turkey a “safe third country” in most cases.<sup>288</sup>

Meanwhile, the EU had committed to pay an initial three billion Euro to Turkey, officially to improve living conditions for refugees in Turkey. Further payments were promised. Brussels also dangled the offer of resumption of EU accession talks with Turkey, visa-free travel for Turkish citizens, an extension of the Customs Union, and the prospect of a

“Voluntary Humanitarian Admission Programme” that would provide additional resettlement quotas for Syrians in Turkey.<sup>289</sup>

With the signing of the agreement, the EU, which was increasingly sealing its borders, made itself vulnerable to blackmail, as Turkey could subsequently utilise border openings as a means to exert pressure at any time. Consequently, the Turkish government would not need to fear any serious criticism from the EU for its domestic and foreign policy actions – such as its military occupation of northern Syria or repression of Kurds, people on the move, political opponents, and journalists in Turkey – as noted by the Committee to Protect Journalists, Turkey has one of the highest figures for imprisoned journalists worldwide, second only to China.<sup>290</sup> Turkey, already hosting over 2.5 million refugees in often inhumane conditions in 2016, did not simply step up surveillance of its borders with the EU, but also closed off its border with war-torn Syria. Cynically, the EU Enlargement Commissioner, Johannes Hahn, admonished the Turkish government to receive “refugees” in accordance with the Geneva Refugee Convention. At the same time, the EU financed construction along the Syrian border of a three-metre-high wall, initiated in 2014.<sup>291</sup> The aim was to build a 911-kilometre-long concrete wall reinforced with barbed wire and 25-metre watchtowers.

On the European side, implementation of the deal was mainly the responsibility of the Greek government and administrative authorities. Thousands more Frontex officers were sent to support the Greek authorities in further militarising the EU’s external border.<sup>292</sup> The situation was more difficult to observe at the highly militarised land border, but even there pushbacks, documented sporadically since 1990 and supported by Frontex, increased rapidly. The number of refugees arriving on the Aegean islands declined abruptly. The brutal and unlawful methods have also repeatedly affected (and continue to affect) people whose stay in Greece is authorised. For example, there are documented cases of people who were already recognised as refugees in other EU countries and were only in Greece to visit family and friends, but were deported anyway. Picked up by the Greek police and stripped of their passports, they were taken to Turkey. There they found themselves stuck in a procedural limbo for years – in a country that some people previously recognised as refugees by EU Member States, had never set foot in until this point.<sup>293</sup>

In order to enforce this consistent, rejectionist, isolationist “Fortress Europe” approach, refugee and human rights obligations of the EU and its

Member States were deliberately circumvented and violated. The number of arrivals only fell because the EU, with the Turkey deal, ordered the neighbouring state to stop departures by all means. At the same time, the controversial legal status of the EU-Turkey Agreement makes it difficult to challenge the deal on legal grounds.<sup>294</sup> In February 2017, the European Court of Justice (ECJ) ruled that the EU (or EU institutions) had not been involved in the EU-Turkey deal at all and therefore dismissed the lawsuit in question as inadmissible.<sup>295</sup>

It was not just that the devastating situation of people on the move in Turkey was ignored; on the Greek side of the external border, a mechanism of organised human rights violations was set in motion on an unprecedented scale. Based on the *“Fast-track Border Procedures for the Eastern Aegean Islands”* introduced by the new Greek Asylum Law 4375/2016, people on the move have been detained in what are known as hotspots or detention centres on the Aegean islands since 20th March 2016. Overnight, reception centres had turned into prisons for people seeking protection. Those who had arrived in Greece before 20th March were transferred back to the islands. The miserable conditions in the camps rapidly became catastrophic. The already overcrowded Moria camp on Lesbos was bursting at the seams, leading to inhumane conditions that encompassed a lack of food and fresh drinking water, as well as insufficient access to sanitation, medical care and legal aid. A similarly horrific scenario unfolded on the other islands. The dearth of adequate reception conditions sparked a rise in physical and gender-based violence in the camps – including suicide attempts by children and deliberate self-harm, through which people hoped to escape the “fast-track border procedures” and be transferred to the mainland.<sup>296</sup> “[In the camps] life depends on pure luck! I’m not exaggerating; it’s like a war zone – you have to fight to survive. You’re fighting not just against knives and violence, but also against state ignorance; you’re fighting against hunger; you’re fighting against despair. Men, women and children live in the camps as if they were in the middle of a battlefield. The wounds inflicted on their mental health will stay with them for the rest of their lives”, 26-year-old Hadi reported from Kara Tepe camp.<sup>297</sup>

Based on interviews by staff from the European Asylum Support Office (EASO) and the Greek asylum authority, a kind of preliminary procedure

has since been set up upstream of the asylum procedure to determine whether Turkey can be considered a “safe country” for the applicants. This preliminary admissibility check is an important component of the externalisation policy, making access to the asylum procedure even more difficult, even if people are already on European territory. Consistently deporting people seeking protection to Turkey – which by no means fulfils the requirements of a “safe third country” – is a further transgression within the EU’s externalisation policy.<sup>298</sup> In this system, applications are rejected in a fast-track procedure without any examination of their merits and with the insinuation that Turkey is “safe” for applicants. People who are allowed to apply for asylum, and thus cannot simply be deported, have to stay on the islands until their asylum procedure is concluded, a process that all too often drags on for many long months or even several years. Particularly persons in need of special protection were initially exempt from these procedures, although it should be noted that such “need for protection” was often not recognised. Nowadays those persons are no longer automatically exempt from what are dubbed *special procedures*. The conditions in the hotspots and the asylum procedures implemented fail to comply with international and EU law. In 2019, the UN Committee against Torture also criticised Greece’s role in the EU-Turkey Agreement and the practice of preventing people seeking protection who arrive on the Aegean islands from travelling on to the mainland.<sup>299</sup>

After the attempted coup in Turkey in July 2016, Ankara declared a state of emergency for the whole of Turkey, which further curtailed the rights of people on the move and increased the risk of unlawful deportations and refoulements. At the same time, the attempted coup gave the Turkish government a chance to unleash a huge wave of repression, which continues to this day and has led to about half a million investigations being initiated. Thousands of alleged “enemies of the state” – such as human rights lawyers, activists and journalists – have been imprisoned, while tens of thousands of opposition activists have fled Turkey to Europe.<sup>300</sup> However, even this development could not dissuade the EU from sticking to the agreement and continuing to claim that Turkey is a “safe country”.

A few years later (in 2019 and 2020), there were already 3.6 million officially registered refugees living in Turkey, the world’s largest host coun-



try. Meanwhile, 80 per cent of those who have fled Syria and are now in Turkey – the vast majority officially registered refugees – live below the poverty line while waiting months for their applications to be processed and face exploitation, including child labour.<sup>301</sup>

### *Violence at the Greek Borders*

Greece's land borders are guarded by the Greek police, border guards and the military; at sea and on the Aegean islands, the police and the Hellenic Coast Guard take on this role. At both the land and sea borders, Frontex and the notorious “masked men” assist the Greek units in the border and deterring people seeking protection. These “masked men” form a non-official group that is infamous for violent attacks on people on the move and brutal pushbacks. In 2020, it was revealed that the “masked men” cooperate with the Hellenic Coast Guard, or may indeed even form part of it.<sup>302</sup> Concealing ordered police violence and use of masked officers without registration numbers was also documented at the Croatian-Bosnian border in 2021.<sup>303</sup> Frontex has been coordinating *Joint Operation Poseidon* in the Eastern Mediterranean since 2006. In 2011, the operation was expanded into a permanent operation. Poseidon is divided into two parts: *Poseidon Sea* monitors the EU's maritime borders with Turkey in the Aegean Sea with up to 13 vessels. Border guards from 27 EU Member States and Schengen-associated countries take part in the operations. *Poseidon Land* monitors the land border between Greece and Turkey along the Evros River. The declared aim of the *joint operation* is “effective control of the Greek-Turkish border and prevention of irregular immigration in the Eastern Mediterranean”.<sup>304</sup> To achieve this, Frontex uses typical security policy means against people on the move, for example “emergency measures” such as the deployment of Rapid Border Intervention Teams (RABITs) to intercept migrants on land and at sea. The main aim is to ensure that people seeking protection do not reach European territory.

In 2016, the RABITs were replaced by the European Border and Coast Guard Teams (EBGTs). The EBGTs have a permanent force of 1,500 border guards who can be deployed in the event of large-scale migratory flows. Their mission remains the same: to prevent people fleeing from crossing the border and otherwise to repatriate them as rapidly as possible.<sup>305</sup> The functioning of *Joint Operation Poseidon* was severely criticised both

before and after the EU-Turkey deal, including by the UN Special Rapporteur on the Human Rights of Migrants.<sup>306</sup>

People on the move are victims of (violent) crimes both on land and on water. Both the Hellenic Coast Guard and right-wing mobs feel entitled to use violence to prevent boats with people who have fled their homes from mooring. Journalists, activists and aid organisations experience massive attacks and are prevented from doing their work. For some time now, civil protagonists such as the organisations Alarm Phone and Mare Liberum have been drawing attention to systematic legal violations at the EU's external borders. Unlawful pushbacks by Frontex and pushbacks by the Hellenic Coast Guard in the presence of Frontex are well documented.<sup>307</sup> The primary division of labour between Frontex and the Greek coast guard, in which Frontex tracks down the boats and the coast guard pushes them back, serves to conceal the systematic violence exercised by the Greek authorities on migrants "tracked down" by Frontex.

Boats in distress bearing people fleeing their homes are denied help for hours by authorities on both sides of the Turkish-Greek maritime border. In June 2020, a German Frontex crew left a boat to its own devices for 38 hours after the Greek coast guard had removed the boat's engine. An unaccompanied Afghan minor broadcast the incident live on the internet, ultimately forcing Frontex to intervene. The young Afghan was arrested and served six months in prison without being charged.<sup>308</sup> In most cases, however, the survivors are not brought to Greece but pushed back into Turkish waters, where they are eventually picked up by the Turkish authorities.

Alarm Phone has repeatedly contacted NATO forces and Frontex representatives to draw attention to boats in distress. It did not receive a single response nor did it observe any rescue operation being carried out in response to its requests.<sup>309</sup> In most cases, the boats were in distress due to brutal manoeuvres carried out by the Hellenic Coast Guard, which tried to push the boats away. Journalists and activists have revealed that in summer 2020 alone, more than 1,000 people on the move were secretly taken to the edge of Turkish territorial waters by European border guards and abandoned on inflatable life rafts. Other survivors tell how they were forced at gunpoint to tie their rubber dinghy to a Greek coast guard speedboat, which then towed them to Turkey.<sup>310</sup>

The Greek border-sealing tactics – with generous support from Frontex – have expanded in recent years from individual cases of life-threatening sabotage (dismantling or destroying engines) and failure to render assistance (moving away from boats in distress) to an escalating system of violence. Shooting at boats, smashing up rubber dinghies and abandoning people on life rafts or uninhabited islands – even if they have already reached Greek territory – are now part of everyday life at the European border. Unlawful refoulements and pushbacks have mushroomed since the COVID-19 pandemic. Frontex provides extensive support for these strategies by blocking boats with people seeking protection or manoeuvring to create waves to push the boats away.<sup>311</sup> These pushbacks are clearly unlawful and violate the principle of non-refoulement and the right to an asylum procedure. Furthermore, the *modus operandi* displays scant regard for European and international law, while also riding roughshod over human rights and international protection obligations.

In 2021, the number of arbitrary arrests and detentions, threats, intimidation involving use of firearms and physical violence (beatings, abusive searches, deaths through failure to render assistance) by European border guards continued to rise. Although all these incidents took place within areas where the EU border agency operates, Frontex attempted to assume a humanitarian veneer.<sup>312</sup> After its active involvement in unlawful pushbacks was exposed again and again, along with its acts of violence towards people on the move and its human rights violations, the border agency tweeted: “The tireless Frontex surveillance team works day and night. They again played an important role in the rescue of more than a 100 people and helped to avoid more casualties”.<sup>313</sup> This self-promotion as a body that promotes and respects human rights is not simply inaccurate and misleading – it is also dangerous. Border controls and border police at Europe's external borders in practice violate European and international law on a regular basis by aiming primarily to prevent effective access to asylum procedures, by force if need be.

The Greek government had not previously tried to present the pushbacks as legal, instead simply denying their existence entirely until that fiction could no longer be maintained. In October 2021, the Greek coast guard tried for four days to tow a ship with around 400 people seeking protection on board back to Turkey before finally bringing the ship to the port of Kos after all.<sup>314</sup> In November 2021, Greek Prime Minister Kyr-

iakos Mitsotakis therefore changed track and began simply calling the pushbacks lawful, claiming that Greece was intercepting boats at sea “in accordance with European Union rules. The country is entitled to intercept boats and wait for the Turkish Coast Guard to pick them up and take them back to Turkey”. The minister went on to say: “This is our policy, we will stand by it, and I will not accept anyone pointing the finger at this government and accusing it of inhumane behaviour”.<sup>315</sup>

At its maritime borders alone, EU Member State Greece carried out unlawful pushbacks against at least 15,803 people seeking protection in 2021.<sup>316</sup> Against the background of life-threatening “defensive measures” against refugees by Frontex and Greek border guards, people on the move now try to cross directly from Turkey to Italy. This significantly longer journey by boat across the open sea is even more dangerous. Between 23rd and 25th December 2021, three overcrowded sailing boats capsized in relatively mild weather; at least 31 people were killed and dozens more were reported missing.<sup>317</sup>

Meanwhile, the European institutions ignore numerous videos shot by people in distress and broadcast live, as well as photos, audio recordings, interviews, detailed testimonies and investigative research on European border guards’ violence. The authorities remain inactive Even in the face of irrefutable evidence of the criminal practices pursued by the Greek coast guard and Frontex. The European Commission simply pays lip service to values, accepting promises from Greece to comply with the law rather than insisting on an independent human rights monitoring mechanism.<sup>318</sup> As a result, systematic violence towards people seeking protection at the EU’s external borders, who are deprived of their rights, is tacitly endorsed. The European Parliament relativises the importance of efforts by people fleeing to assert their human rights by making access to asylum dependent on whether boats face an “emergency”. While the Greek state and Frontex sometimes dismiss accusations against them as “fake news”, yet sometimes declare them a “necessity”, the EU is working flat out to legalise their crimes.<sup>319</sup>

In contrast, SAR activities are constantly criminalised. In August 2021, the Greek government again intensified repression against civilian maritime rescue with Law 4825/2021. The “duty to rescue” was de facto turned into a ban; non-compliance can trigger criminal prosecution and fines of up to 2,000 Euro per person and 12,000 Euro per organisation.<sup>320</sup>

Unlawful expulsions, which have occurred sporadically at the Greek-Turkish land border since the 1990s, have become such a systematic practice in the Aegean and at land borders that they must be considered an important pillar of Greek migration policy. People seeking refuge are also deprived of their rights and experience violence at land borders.

On 28th February 2020, Turkish President Erdoğan declared that the border to Europe would be opened and that the deal agreed in 2016 had been scrapped in light of the intensifying Syrian war and the EU's failure to deliver on its promises. After Erdoğan's announcement thousands of people flocked to the Turkish-Greek border at Meriç/Evros, while the Turkish authorities coerced others into travelling there.<sup>321</sup> About 20,000 people gathered at the border. People seeking protection were blatantly reduced to nothing more than bargaining chips for Turkey and the EU.

The EU response was crystal clear: protecting the external border is more important than protecting human rights. As a result, European officials brutally prevented refugees from crossing the border.<sup>322</sup> Greek border guards carried out unlawful pushbacks, using rubber bullets, tear gas, stun grenades and live ammunition. In parallel, the Aegean was turned into a highly militarised zone within just a few weeks. Proclaiming a dramatic need to protect Europe's borders and repeatedly depicting migratory movements as a danger, a new wave of violence against refugees was relativised and legitimised. At the same time, the Greek government summarily suspended the right to asylum.<sup>323</sup> Although this was obviously illegal, European Commission President Ursula von der Leyen seized the opportunity to thank and praise Greece as Europe's "protective shield". Greece's behaviour, which violates both European and international law, was rewarded with an additional EU payment of 350 million Euro for border protection and a Frontex rapid deployment in the Evros region – despite all objections that the deployment was incompatible with human rights.<sup>324</sup>

In this escalating spiral of border closures enforced with violence, on 4th March guards began firing bullets at people trying to cross the border. There are reports that tear gas grenades were also aimed at people. That was the day when Muhammad Gulzar from Pakistan and Muhammad al-Arab from Syria were shot and killed by Greek soldiers. Six people were seriously injured. It seems fair to assume that others who disappeared during this period while trying to cross the border and have not

reappeared are also dead. It is estimated that about 5,000 people were pushed back violently when they tried to cross the river into Greece.<sup>325</sup>

Reports testify to the systematic violence tens of thousands of people encounter constantly in Greece: sometimes apprehended deep within Greek territory, their mobile phones, documents, cash and other possessions are first of all confiscated. Beaten, kicked, forcibly stripped of their clothes, and deprived of water, food and medical care, they are dragged from police station to police station or put into unofficial detention centres before being brought back to the border river where they are forced onto boats and taken back to Turkey.<sup>326</sup> The *Border Violence Monitoring Network's* (BVMN) Torture and Pushback Report analysed testimonies from 86 groups totalling 4,583 people illegally returned to Turkey from Greece in 2020. 89 per cent described violence that could be classified as torture and degrading and inhumane treatment. 44 per cent referred to being forced to undress, 15 per cent mention the use of firearms, and 10 per cent state that Electric Discharge Weapons were used. Over half of the groups subjected to torture or degrading and inhuman treatment included children and minors.<sup>327</sup>

The scale of the systematic crimes escalated rapidly and has since spilled over into much of mainland Greece. Dozens of testimonies document pushbacks from Komotini, Xanthi and even Thessaloniki, where refugees are picked up on the outskirts of a camp or at food distribution points and subsequently taken across the border. In individual cases, groups have even been brought to Turkey from camps on the other side of the country, in Igoumenitsa on the Albanian border.<sup>328</sup> This highly coordinated approach by the authorities led, inter alia, to the average number of people in group pushbacks rising from about 12 in 2019 to almost 100 in 2020 – unlawful pushbacks thus organised as a form of mass processing. In this context, the people on the move who are being pushed back pass through an average of three detention centres before being taken to the border.

With the intensified system, new trends in land-border refolements took hold. Since spring 2020, Greek authorities have been using a tactic that involves abandoning groups on small islets in the Evros rather than transporting them to the Turkish side of the border river. People end up stuck there for days without any supplies, while border guards on both sides prevent them from crossing the river – often with firearms.<sup>329</sup> Euro-

pean officials use this tactic to avoid the legal consequences of crossing to the Turkish side. Another method with the same aim has been observed in almost all documented cases of land pushbacks since October 2020: people seeking protection themselves are forced or bribed by Greek authorities to steer boats used for pushbacks across the river.<sup>330</sup>

In October 2021 Gerald Knaus was still asserting the brilliance of “his” EU-Turkey deal: “We need a reboot of the EU-Turkey Declaration. Much of it has worked very well.”<sup>331</sup> Although he readily concedes that the deal needs a few cosmetic repairs, he advocates above all applying the concept to other states, contending for example that a solution along these lines would be expedient for the situation on the Polish-Belarusian border.

UNHCR, the UN Working Group on Arbitrary Detention, the UN Committee against Torture, the Greek National Commission for Human Rights, the Council of Europe’s Commissioner for Human Rights, the UN High Commissioner for Refugees and, last but not least, civil society organisations have repeatedly reported on the pushbacks and on systematic and growing border violence. However, the EU and the Greek government are keeping a low profile when it comes to responding to criticism or reining in their border guards. The indisputable crimes and human rights violations documented have merely led to Brussels and Athens mutually passing the buck. It is emphasised that *command and control* for the operations ultimately lies with the Member States despite the “dual responsibility” of the agency and the Member States enshrined in the Frontex Regulation and the fundamental obligation to comply with applicable law.<sup>332</sup> It is therefore claimed that human rights violations committed in the context of Frontex operations are not the agency’s – or the EU’s – responsibility.

To make matters worse, only very scant information about the number, origin and location of Frontex officers is available. That includes information about whether these officers are deployed close to the border. While Frontex Director Leggeri consistently denies such deployments, it remains unclear how the agency’s *Serious Incident Reports* (a mandatory procedure for Frontex officers to report any situation in which fundamental rights may be violated) could nonetheless provide information about shootings on the Turkish side of the border. The significant gaps in the agency’s reporting and accountability mechanisms result in a glaring lack of transparency and accountability.<sup>333</sup>

Clearly, Frontex's monitoring and reporting system does not satisfy fundamental impartiality or due process criteria, and nor is it intended to, apparently. In this spirit, the EU has stipulated that the Frontex Management Board will conduct investigations itself. The 2021 in-house working group "Fundamental Rights and Legal Operational Aspects of Operations in the Aegean" simply concluded that the incidents of unlawful refoulement it had investigated had mainly occurred in Turkish waters.<sup>334</sup> This implies that Frontex is relieved of all human rights obligations on that front. However, deploying vessels coordinated by Frontex outside European territorial waters – whether with Turkey's consent or acquiescence or not – does not absolve either the EU agency or Greece as an EU Member State from the obligation to respect fundamental and human rights. The European border management agency should also be aware of that. This consistent and deliberate failure to seriously investigate the situation, let alone take practical steps to improve it, transmits a clear signal from the EU and its Member States that collective expulsions and state violence are accepted as an integral part of their migration and border policies. That is why crimes committed by Greek border guards and Frontex officials meet with the approval of the EU's highest echelons. In this vein, Margaritis Schinas, Vice-President of the European Commission and Commissioner for Promoting Our European Way of Life, has praised Frontex's role and its efficiency in securing the EU's borders.<sup>335</sup>

The appalling upsurge in crimes committed by the state at the Greek-Turkish maritime and land borders went hand-in-hand with criminalisation and repression of NGOs and solidarity-oriented organisations. The situation in the camps deteriorated drastically as a result of new legislation, measures to stem the coronavirus pandemic and the growing numbers of people living there.<sup>336</sup> Instead of upholding the rule of law, Europe relies on deterrence, militarisation and methods that violate international law. The EU is locking itself away behind closed borders – with all its might. Like the EU, the Greek state has opted to treat people on the move as if they were a threat and as potential adversaries that pose a risk to the country's sovereignty. At the same time, Greek media claimed in spring 2020 that Turkey was sending refugees infected with coronavirus to Greece as "bioweapons". Parallel to this dehumanising portrayal of people seeking protection, the police presence at border crossings



with Turkey was boosted to 1,150 officers. The 400 border guards and 200 unpaid volunteers already deployed were also reinforced by 400 police officers from Greek “Units for the Reinstatement of Order” (MAT) and 150 officers from the Aspida programme.<sup>337</sup>

27 EU Member States as well as a number of other countries in the Schengen Area have stationed border guards in Greece and deploy ships, boats, planes, helicopters, emergency vehicles, and equipment. Frontex coordinates over 600 operations at the Greek land and maritime borders. In addition, the EU agency is also active in countries around Greece, for instance deploying 60 officers on the first Frontex mission in a third country at the Albanian-Greek land border. Frontex is now carrying out pushbacks from Albania, which is not in the EU, into Greece to prevent people seeking protection from reaching other EU Member States via the Balkan route. Other officers are deployed to the Bulgarian-Turkish border as part of the *Flexible Operational Activities – Western Balkans*.<sup>338</sup>

The EU is providing support to the tune of 700 million Euro for a huge upgrade to Greece's external border infrastructure. It is being invested in measures including reinforcing border defences, as well as weapons and other armaments. Greece's shopping list includes ammunition, M84 stun grenades, chemical grenades, hand grenades, sound cannons (*Long Range Acoustic Devices*; LRADs) designed to cause pain, shock, panic, and disorientation, drones, watchtowers, barbed wire, lie detectors, and numerous high-tech instruments such as thermal imaging cameras. At least 62 million Euro are being spent on repairing and expanding the border fence along the Evros. Trials are also underway there to test live camera technology that removes foliage virtually to detect people hiding in the undergrowth; the project has received eight million Euro support from the European Commission.<sup>339</sup>

It should be pointed out here that the EU is neither at war nor is it preparing for war. This inordinate militarisation serves solely as a means of defence against people on the move.

*Welcome to Europe – (Administrative) Violence Instead of Rights*  
The origins of the word “hotspot” hints at Europe's perception of refugees. Originally a military term, it describes a “region in a contaminated area in which the level of radioactive contamination is considerably greater than in neighbouring regions in the area”.<sup>340</sup> Equating people

seeking protection with contamination, danger and disease is tantamount to demonising them and serves to legitimise militarisation of borders. Even the most cynical observers would have found it hard to imagine that the new Kara Tepe camp would be located on a contaminated former military site; violence and tear gas were deployed to force people to move into this new camp that was built after the fire in Moria,

Since 2016, decisions in these hotspots have been taken in a fast-track procedure that entails a preliminary examination to determine whether people seeking protection will be granted the right to apply for asylum in the EU. They are however automatically denied this right if Turkey is considered “safe” for them.<sup>341</sup> The hotspot system thus serves primarily to enforce rapid returns to Turkey. People allowed to apply for asylum in the EU must stay in the hotspots until the procedure is completed. However, instead of rapid review of these applications as originally intended, people are forced to live in the camps for up to a year.

For a while the situation in camps on the mainland was not quite as desolate as on the islands, yet even in Thessaloniki, for example, it is dangerous to leave the camps. People seeking refuge are often picked up by the police and illegally pushed across the border into Turkey. Developments in recent years suggest that living conditions for people seeking protection are also continuing to deteriorate on the mainland.

Since the EU has never transposed the hotspot concept into European law, it largely remains an informal legal practice. Decision-makers on the ground enjoy immense discretion in their decisions, largely without any legal oversight. As a result, international law, such as the Refugee Convention and the European Qualification Directive, is permanently violated, as are standards concerning refugee protection.<sup>342</sup> Generalised detention on the Greek islands of people seeking refuge is not compatible with the right to freedom enshrined in human rights legislation, especially when thousands have to eke out an existence in inhumane, hostile conditions with extremely limited access to medical and psychological care or legal assistance. In addition, European secondary legislation and case law from the European Court of Human Rights (ECtHR) stipulate detention pending deportation is not permitted if deportations are de facto impossible and if there is no “reasonable prospect of deportation”. That means that all detainees currently held pending deportation should be released.<sup>343</sup>

Officials in the hotspots take a different view, which means that unaccompanied minors are also detained in hotspots instead of receiving the protection and assistance guaranteed by the UN Convention on the Rights of the Child. In 2019, the ECtHR held in two rulings that Greece had violated its human rights obligations by holding unaccompanied children in so-called protective custody in police stations and detention centres.<sup>344</sup> UNHCR also criticised widespread detentions, although it is deeply involved in maintaining the camp structures. Aid organisations such as Médecins Sans Frontières have withdrawn from Moria on Lesbos because people in the camp were systematically deprived of their rights.<sup>345</sup>

Scope to detain asylum-seekers immediately upon arrival was further extended by another amendment to the Greek Asylum Law in November 2019, Law No. 4636/2019. At the same time, protection measures for asylum-seekers were curtailed, including abolition of measures for people who need special protection. In addition, asylum applications can now be rejected if applicants refuse to move to a camp, fail to notify a change of address or miss a deadline. The deadline for appeals against decisions was reduced to five days and the process was made so complicated that applicants without legal assistance have hardly any chance of success. Provision of free legal aid was dramatically restricted.<sup>346</sup> This lowered protection standards and created arbitrary procedural and material hurdles; as a result, asylum-seekers are unlawfully excluded from asylum procedures without adequate assessment of their need for and entitlement to international protection. At the same time, the Greek government announced that it would transform the reception centres on the Aegean islands into completely closed camps and deport more people back to Turkey. Proclaiming that “we are taking measures that make our country less attractive as a migration destination”, the Greek Minister for Migration and Asylum, Notis Mitarakis, played down the needs and rights of people seeking protection.<sup>347</sup> In May 2020 amendments to make legislation more stringent brought even harsher punitive measures. The rights of the most vulnerable were curtailed, while asylum application deadlines were shortened for new arrivals, in order to exclude them from the asylum process and return them to Turkey and/or their countries of origin, yet at the same time other deadlines were extended, condemning people to live in camps for years. When benefits for officially recognised refugees were slashed, thousands in mainland Greece were made homeless.<sup>348</sup>

Citing the Taliban's seizure of power and the higher numbers of asylum-seekers from Afghanistan thus anticipated, additional legislation was adopted in 2021, further cementing the Mitsotakis government's moves to strip refugees of their rights. In particular, arbitrary detention and informal refoulement from Greece were made even easier.<sup>349</sup> Furthermore, in June 2021, the government announced that Turkey would henceforth be classified as a "safe country" for people seeking protection from Afghanistan, Bangladesh, Pakistan, Somalia and Syria, which meant that potential asylum-seekers from those countries would no longer be authorised to apply for asylum in Greece. With this decision, what are known as 1:1 mechanism readmissions, which initially applied to Syrians who had arrived on the Greek islands, were extended unilaterally to four other nationalities and to the whole of Greece.<sup>350</sup>

Despite all the inhumanity and illegality, five hotspots, now officially described as *Reception and Identification Centres* (RIC), are operating in Greece on Lesbos, Samos, Chios, Leros and Kos. Originally designed with a capacity of 7,450, in 2020 14,265 people lived there.<sup>351</sup> The RICs are run by the Greek authorities and EU agencies. Frontex, EASO, Europol, Eurojust as well as the *Greek Asylum Service* (GAS), the Greek *Reception and Identification Service* (RIS) and the Greek police are involved.<sup>352</sup> EASO and Frontex in particular have a very strong presence in and around the camps.

Both Frontex and EASO should be independent of national interests and political influences in order to fulfil their statutory mandate, as is also emphasised in the agencies' founding regulations. In reality, however, the EU agencies are institutionally and functionally dependent on the EU institutions and the Member States. For example, their governance structures, particularly the Management Boards, are dominated by the EU Member States. The Management Boards have extensive scope to influence project planning and implementation and are meant to play a central role in supervision of the agencies. As these processes are in addition implemented in cooperation with the Member States, what actually happens in practice is far removed from their official mandates.<sup>353</sup>

Frontex staff in the hotspots are involved in identifying and verifying the nationality of people seeking protection. Although the agency's role is supposed to be advisory and supportive, it is virtually the only body

involved in this process. In this context the Greek government relies unquestioningly on the results of procedures implemented by Frontex. Since the documents issued by the agency are considered “non-papers”, individuals are not allowed to access them, making it almost impossible to challenge decisions. The prescribed age assessment procedure, for example, stipulates that a step-by-step, full medical and psychosocial assessment should be conducted by the RIC, but this de facto only superficial checks are conducted by the police and Frontex. As a rule, this assessment is simply omitted and officials thus conclude that minors are adults.<sup>354</sup> As a result of incorrect age assessments, unaccompanied minors are often detained as if they were adults and have to endure questioning unaccompanied. This procedure re-traumatises young people who actually need and have a legal right to particular protection.

EASO, like Frontex, is not officially authorised to influence national asylum authorities' decisions on individual asylum applications. Its role is to implement the core requirements of the Common European Asylum System (e.g. equal treatment and fairness) and to ensure that all asylum procedures are handled consistently across all Member States. In practice, however, EASO does have decision-making powers yet does little to comply with its remit and uphold the EU's proclaimed values and standards. EASO has Brussels' full backing to turn away people seeking protection. In 2016, the European Commission and some Member States were keen to keep an EASO report under wraps, as it did not confirm Turkey's classification as a “safe third country”. Members of the EASO Management Board also rejected the paper.<sup>355</sup> There is practically no accountability for EASO. The EU agency does not have to provide any information or explain its actions to civil-society representatives.

EASO staff play an active role in fast-track border procedures. After a 2018 legal reform, Greek-speaking EASO staff were authorised to carry out all administrative measures for processing asylum applications, including regular procedures. In 2020, EASO and Greece signed an agreement to double the number of EASO staff in the country to 1,000. EASO is responsible, inter alia, for conducting hearings in what are known as inadmissibility procedures, which determine whether Turkey is to be considered a “safe third country” for an applicant. EASO is thus the first instance involved in questioning people seeking protection. As a result, the hearings on asylum-seekers' admissibility are essentially conducted by peo-

ple who are not empowered to take decisions on these matters (EASO officials), while the competent officials from the Greek asylum authorities are not present. As a result, EASO not only assumes the authority to decide on asylum applications but is de facto overstepping its mandate. EASO procedures display a systematic refusal to conduct fair hearings or examine individual cases, as well as lacking an effective appeals process, and thus these procedures do not provide the requisite protection.<sup>356</sup> As a rule, the Greek asylum authorities meekly accept the “non-binding recommendations” drafted by EASO.

In another equally worrying development; EASO staff have been scouring social media since January 2017 in search of any indications of new migratory movements to Europe. People from numerous countries have been monitored, especially speakers of Pashto and Dari (spoken in Afghanistan) or Arabic, as well as Tigrinya and Amharic (common in Ethiopia and Eritrea), Nigerian Edo, Turkish and Kurdish. Every week, these Big Brother reports landed on the desks of EU Member States and institutions, UNHCR and Interpol. In 2018, Member States requested that EASO send information to Europol too. EASO has no legal basis whatsoever to collect sensitive personal data from people on the move in this fashion, as was at least emphasised by European Data Protection Supervisor Wojciech Wiewiórowski. As a result of this misuse of data, Greek police deployed tear gas grenades to attack hundreds of people from Afghanistan, Iran and Pakistan who, as the “Convoy of Hope”, attempted to cross the Greek-Bulgarian border into other EU countries in spring 2019. An EASO spokesperson was delighted to note that “very early detection” of the group had made the operation a success.<sup>357</sup>

UNHCR is also firmly integrated into the hotspot structures on the Greek islands and plays an active part in many aspects of the camps, in roles that range from building infrastructure to providing accommodation and food. This stands in contradiction to UNHCR’s mandate, which involves “supervising international conventions providing for the protection of refugees”.<sup>358</sup> Rather than defending refugees’ rights and exhorting EU Member States to respect their obligations under international law, UNHCR has become part of the system that violates these rights.<sup>359</sup>

Outsourcing tasks that are actually national responsibilities pursuant to the EU Reception Directive makes it difficult for the residents in camps

to identify who holds responsibility. At the same time, as due to being directly involved, UNHCR no longer criticises Greek asylum decisions or the accommodation made available to people seeking protection there. As a result, silence prevails and serves to entrench the unspeakable and consolidates the narrative of an isolated “humanitarian” crisis, rather than anyone highlighting that this is a permanent state of affairs produced by deliberate political decisions. Further problems arise because UNHCR’s rights-based approach has been pushed entirely into the background: courts such as the ECtHR and the ECJ often refer in their decisions to assessments and reports by international organisations like UNHCR, which now provides few grounds for further critical enquiry. Instead of writing detailed reports on how the rights of people on the move have been distorted and violated or systematically documenting camp structures and asylum procedures, UNHCR has become part of a sophisticated structure of non-responsibility and contributes – willingly or not – to stabilising the systems that deprive people of their rights.<sup>360</sup>

UNHCR has moved so far away from its position as guardian that it is no longer even able to prevent the most brutal pushbacks when people have already arrived in a hotspot and are requesting protection. Its staff are impotent accomplices to crimes committed by European border guards and “masked men” against people seeking protection. For example, in January 2021, four people from Somalia and Palestine arrived at Camp Viale on Chios and spoke to UNHCR staff. UNHCR staff repeatedly assured them that they were now safe and took the new arrivals to the police inside the camp. There they were stripped of their belongings, including money and phones, before being handed over to hooded men in civilian clothes. They forced them into a van, then onto a boat and dumped them on an uninhabited island, where they were stuck for three days with no drinking water or food. While one of the men tried to reach land and help with a raft cobbled together from flotsam, the others were picked up by the Turkish Coast Guard and returned to Turkey.<sup>361</sup>

*“Got More Money?”*<sup>362</sup>

Turkey has taken in more officially recognised refugees than any other country and twice as many as the EU as a whole.<sup>363</sup> It has received six billion Euro so far under the EU-Turkey Agreement. The European Council decided to pay another three billion Euro until 2024. Officially, this

money is used to provide protection and accommodation for people on the move who have arrived in Turkey, but in practice the EU pays to keep them away from its borders. Large sums are thus disbursed to a state that contributes directly to migratory movements, be it through interference in the Libyan conflict, establishment of the so-called protection zone in northern Syria, driving out Kurds and supporting Islamist militias, or repression of the opposition and Kurds within Turkey. In the interest of keeping its borders firmly closed, the EU demonstratively refrains from criticising the Turkish government's crimes.

In human rights terms, the EU-Turkey Agreement is tantamount to a declaration of moral bankruptcy. The issue is not simply living conditions for people on the move in Turkey, but above all how the right to asylum is undermined in Greece, an EU Member State, along with systematic human rights violations in that country. Despite rulings from international and national courts, decisions by various UN committees, and countless appeals by international organisations, Europe continues to maintain a cruel, legally untenable border and asylum system. The deal with Turkey is diametrically opposed to European and international law on refugees, irrespective of EU support for the Agreement or the Greek government's legal machinations.

Since 2018, Greece has brought charges against dozens of members of SAR civil-society organisations, inter alia for smuggling and espionage, and some have been sentenced. The proceedings are likely to drag on for years, obstructing, if not entirely preventing, the work done by these NGOs.<sup>364</sup>

There are thousands of brutal, unlawful pushbacks by European officials at Greek sea and land borders and pullbacks by Turkish ships are bought with EU funding. The Greek islands have become a dead-end for tens of thousands of people seeking protection, with constantly deteriorating living conditions. On the mainland, applying for asylum is now virtually impossible. Since the Greek government has declared Turkey a "safe third country" for the five most frequent nationalities that apply for asylum, citizens from those countries are excluded from the asylum procedure. Chances are not much better for people from other states. Insufficient office capacities and a lack of staff often mean that regional asylum authorities are not accessible. Limited availability of interpreters compounds the problem. The UN Committee against Torture pointed out



that access to asylum usually fails at the registration stage due to the Skype-based appointment system.<sup>365</sup> The Greek Ombudsman, Andreas Pottakis, described Skype-based registration as a “restrictive system that contradicts the principle of universal, consistent and unhindered access to the asylum procedure” and should be seen as part of the problem rather than a technical solution.<sup>366</sup>

Both recognised and non-recognised beneficiaries of protection face a disastrous situation in Greece, rendering the term “protection” completely meaningless, and the right to asylum has been whittled away to nothing but empty words. As a result, many people seeking refuge – including officially recognised refugees – leave Greece, although this is not permitted, hoping that in other EU Member States they will not, for example, be forced to live on the streets. European courts continue to prohibit deportations back to Greece and in some cases permit a second asylum procedure in another EU Member State. Nevertheless, the Dublin Regulation enables inaction on the part of countries within the European Union that have no external borders, fostering and legitimising their reluctance to offer protection to people on the move.

Countless crimes at Europe's external borders and in the hotspots go unpunished – violence and disregard for the law are inevitable components of Fortress Europe. Perpetual deterioration of conditions is also extremely dangerous because the “Greek model” serves as a blueprint for the European Commission's upcoming “New Asylum and Migration Package”.<sup>367</sup> The EU will continue to do its utmost to reject, detain and expel people on the move, rather than upholding the rule of law and ensuring that these people are protected and that their dignity is safeguarded.

## The Balkans and Eastern EU

Geographically, the term “the Balkan region” refers to the Balkan Peninsula and includes Albania, Bosnia & Herzegovina, Bulgaria, Kosovo, Montenegro, North Macedonia, Serbia and Hungary, as well as Croatia, Romania and Slovenia. Greece and parts of Turkey, which we have already discussed, are also part of the Balkan region.

Since 2015, many Europeans have also heard of what is known as the Balkan route. In summer 2015, many people seeking protection crossed the Greek-North Macedonian border, continued via Serbia to Hungary

and then travelled on to Austria, Germany and other countries in Western and Northern Europe before the corridor was closed again. When looking at migratory movements from Turkey via Greece to other EU countries, the systematic violence towards people on the move and the way in which they are deprived of their rights becomes apparent. The coordinated European policy of keeping borders firmly closed, the power dynamics between the EU and its neighbouring states and the policy of externalisation, i.e. the outsourcing of border and migration control to and in third countries, are also linked to state-orchestrated violations of rights in the form of pushbacks (unlawful refoulements) and brutal police violence on the Balkan route.

The catastrophic conditions that people on the move end up living in and their scant protection and prospects are also part of this systematic violence. This escape route is particularly risky as refugees on the Balkan route travel from Greece, which is in the EU, to non-EU countries in order to re-enter the EU; the entire route is riddled with deterrent measures and attempts to seal borders.

In considering the situation that people on the move encounter along the Balkan routes, it is crucial to consider power relations within the various states there and their relationships to the EU. Bulgaria, Croatia, Romania and Hungary are EU Member States but, with the exception of Hungary, are not (yet) part of the Schengen Agreement that provides for free movement of persons and goods without border controls within the Schengen Area. Bosnia & Herzegovina, Serbia, Montenegro, Kosovo, North Macedonia and Albania aspire to join the EU, but are still at various stages of accession negotiations. As part of this process, potential Member States must implement reforms, such as establishing or adapting their national asylum system to comply with the Common European Asylum System (CEAS). To facilitate this, candidate countries receive financial resources through support programmes such as the European *Instrument for Pre-Accession Assistance* (IPA), which focuses on institutional democratisation and economic development, as well as on migration and border management.<sup>368</sup> Through the IPA mechanism alone, countries in the Balkans received €216 million between 2007 and 2019 for “migration control”. This includes support for construction of new border posts, provision of modern equipment and training for border guards, and setting up detention and deportation centres. Since 2015, an

additional 141 million Euro in European aid has been provided. The EU has funded the construction of dozens of camps along the Balkan route as part of its efforts to seal its external borders.<sup>369</sup>

“Migration control” was already a key issue in the Stabilisation and Association Agreements that the EU concluded with the states of former Yugoslavia in the early 2000s. In those days, the EU did not yet view neighbouring countries primarily as transit routes for people fleeing from other states, but focused instead on ensuring that governments in the Balkans prevented their own citizens from leaving. Free movement of people and mobility were to be dictated by labour market demand in Western Europe.

The power imbalance between the EU and neighbouring states shaped political relations then as now, which all too often meant that the “EU wish list” was simply fulfilled across the region. Since Albania, Bosnia & Herzegovina, North Macedonia, Kosovo, Montenegro and Serbia were named as potential EU Member States during the 2003 EU “Western Balkans” summit in Thessaloniki, and indeed probably before this, the EU has leveraged the accession negotiations to bring pressure to bear concerning border and asylum policy. Since 2015, there has been a much greater focus on extending border surveillance and “migration management”. In this context, the EU leaves no room for doubt: cooperation on the part of the Balkan states is crucial if accession negotiations are to continue.<sup>370</sup> To put it bluntly, EU accession could be described as being dependent on each candidate country’s performance in migration management. When the Schengen Area was established to enable freedom of movement for EU citizens, a “classist and racist mobility order”<sup>371</sup> was created that can only be maintained by increased militarisation and stricter controls at borders, along with checks within the country even in areas not close to the borders – e.g. through racial profiling and dragnet investigations. Implementation falls primarily to states with EU external borders and the buck is increasingly being passed to neighbouring countries.

Outsourcing of EU border and migration control is also the cornerstone of numerous bilateral partnerships between individual Member States and neighbouring countries. Croatia, Austria, the Czech Republic, Poland, Slovenia, Serbia, Slovakia and Hungary, for example, have concluded agreements with North Macedonia and are sending police forces

to guard the border. Germany has provided North Macedonia with border surveillance equipment.<sup>372</sup>

Croatia, on the other hand, as an EU Member State and Schengen candidate, is tasked with preventing people on the move from travelling further into the Schengen Area. In March 2021, Croatia successfully completed the four-year Schengen evaluation procedure, in which external border controls play a key role. Calls by human rights organisations to make respect for human rights a condition for Croatia's Schengen membership were ignored.<sup>373</sup> On the contrary, the large-scale – well-documented – violations of basic human rights at the Croatian border are only possible with the tacit approval of the other Schengen and EU Member States. Human rights violations at the EU's external borders are an integral part of the EU's migration and border policy. This is also apparent in the light of the funding provided, as the budget for upgrading border surveillance (from technology to operation of entire police stations) is much larger than for humanitarian support, let alone for promotion of sustainable, inclusive solutions.<sup>374</sup> Allegations of unlawful pushbacks and violence against refugees in Croatia, Hungary and Romania have not diminished EU funding.

The Hungarian government in particular, under Viktor Orbán's leadership, is pursuing a blatantly Islamophobic and racist strategy vis-à-vis people seeking protection. Against that backdrop, Hungary is often cast as an outsider within the EU – due to other anti-democratic developments too – and European politicians sometimes publicly criticise Orbán's inhumane and unlawful anti-refugee measures. However, considering recent developments on the Polish-Belarusian border rapidly makes clear how flimsy such lip service is: the "Hungarian model" has long been the method of choice throughout the EU. Resolute objections by the EU and its Member States are glaringly absent, let alone any practical opposition to a system based on barbed wire, outbursts of violence by European border guards, plans to construct walls, and provisions in national legislation that legalise pushbacks.

This chapter begins by reviewing the events of 2015 and the violence that arose after a humanitarian corridor into the EU was temporarily opened. The next section provides examples of important developments in recent years in Hungary, an EU Member State that rides roughshod over human rights. Insights into developments in Serbia and North Mac-

edonia shed light on the role played by countries in what is referred to as the EU's pre-frontier area. This chapter also provides a brief outline of the situation people on the move face in other countries along the Balkan routes and the roles these states play in Fortress Europe by examining the topics of pushbacks and violence, Frontex in the Balkans, and living conditions in camps and non-official accommodation. Recent developments at the EU's borders with Belarus are addressed at the end of the chapter.

### 2015 and Beyond – Waves of European Violence

In 2015, people on the move briefly managed to break through the walls around Fortress Europe and open up a corridor from Greece to Austria and Germany. It was above all the war in Syria and armed conflicts in Iraq that forced hundreds of thousands to flee. While the majority of those seeking protection abroad found refuge in Turkey, Jordan and Lebanon, a fraction tried to reach Austria and Germany via Greece, North Macedonia, Serbia and Hungary. The interplay of various factors briefly led to a corridor opening up. As long as states along the route remained transit countries rather than countries of destination, they helped organise rapid passage for people on the move. In 2015, the North Macedonian parliament passed a law that allowed refugees to travel through the country legally. A document called a 72-hour pass was issued at the border to anyone who stated that they intended to apply for asylum. Officially, the paper served to define the deadline by which applicants had to go to one of the reception centres.<sup>375</sup> However, since this document allowed legal travel within North Macedonia, in practice it was used to head further north, closer to the EU – as the authorities in North Macedonia had guessed. A similar provision was in force in neighbouring Serbia to the north. There, buses transported arrivals from Preševo in the south to the country's northern borders, where people seeking protection would leave Serbian territory to head towards Hungary or Croatia.<sup>376</sup> However, that only worked while borders to the EU were relatively permeable.

Hungary promptly responded by erecting a fence along the border with Serbia and with violence toward people seeking protection, who in turn did everything they could to escape the inhumane Hungarian “reception camps”. Refusing to register in Hungary, they instead camped out in the

Keleti railway station in Budapest, demanding to be transferred to other EU Member States. The governments of Hungary, Germany and Austria were forced to grant the freedom of movement demanded in response to both public pressure across Europe and in particular to the refugees' determined insistence on their rights and safety.<sup>377</sup> People seeking refuge were thus temporarily able to cross rapidly through the countries of the Balkan Peninsula on foot, by public transport or on specially organised buses and trains. Soon however measures to keep borders firmly closed were introduced for example by Austria and Slovenia, causing chain reactions in neighbouring countries, so that more and more people ended up trapped beyond the EU's external borders.

In autumn 2015, Slovenia was already refusing entry to people fleeing unless they could prove that they came from Syria, Iraq or Afghanistan. Croatia, Serbia and North Macedonia followed suit. Shortly afterwards, transit of Afghans was also made illegal.<sup>378</sup> In spring 2016, at Austria's initiative, state-organised transit through the region by bus and train was stopped and people on the move were prevented from continuing their journey. Overnight, thousands were stranded in various locations along the Balkan routes, while the EU-Turkey Agreement that had just been concluded was supposed to stop migration far from the EU.<sup>379</sup>

Since the temporary humanitarian corridor was suspended in 2015/16, two main routes have emerged, one from Greece via North Macedonia, or, more rarely, via Kosovo to Serbia and Bosnia & Herzegovina, continuing to Hungary or Croatia. In 2015, over 550,700 arrivals were counted in Serbia. From September to December 2015 alone, 552,071 people fleeing crossed Croatia, according to official figures.<sup>380</sup> These numbers dropped drastically in subsequent years. Between January and November 2021, only 12,623 people officially arrived in Serbia.<sup>381</sup> The second route runs from Greece via Albania and Montenegro to Bosnia & Herzegovina and on to Croatia. In 2018, 24,067 arrivals were registered in Bosnia & Herzegovina compared to only 755 in the previous year. In 2021, 15,488 people reached Bosnia & Herzegovina by mid-December.<sup>382</sup>

Another route from Bulgaria and Serbia via Romania to Hungary was increasingly used in 2020. It should be noted here that migration routes are neither constant nor straightforward, as becomes apparent in reports from many people, some of whom experienced dozens of pushbacks.

Instead, the paths taken by people trying to reach Western Europe via the various Balkan routes are subject to forced circular mobility.<sup>383</sup> People often try to enter the EU at a number of borders, are forced to head back into the heartlands of the countries they have just come from, may spend the winter in Belgrade or Sarajevo, travel onward within the region, have a go elsewhere, get through or give up and head back towards Greece. The odyssey often costs them years of their lives, as well as considerable sums of money and their health. Routes shift constantly due to attempts to seal borders and in response to pressure exerted through repression and adverse living conditions at the borders – people seeking protection thus experience direct and indirect violence everywhere due to the EU's border regime. Even though unauthorised entries into the EU via the Balkan routes have decreased dramatically since 2016, the EU never tires of citing a “high level of migratory pressure”. This stokes the rhetoric of a “crisis” and of “people on the move as a threat”, thus legitimising and normalising an isolationist stance and violence at the borders.

In 2015, Hungary established a legal no-man's land in what are known as transit zones next to the metre-high fences along the border with Serbia and Croatia. The intention was to make these centres the only place where it would be possible to apply for asylum, although lawyers were granted only limited access and many human rights organisations were refused entry. Limited, arbitrary access to these transit zones led to hundreds of people being trapped on the Serbian side of the border.<sup>384</sup> In addition, Hungary passed a law in 2016 that allowed police to return people seeking protection to Serbia if they were apprehended up to eight kilometres beyond the border – just as if they had not even entered Hungary. In March 2017, this practice was extended to the whole country and as a result people were pushed back to Serbia even if they had never been there previously, having entered Hungary via Budapest airport, for example. A 2016 Amnesty International study demonstrates that the traditional method for dealing with unauthorised entries had been replaced by generalised unlawful pushbacks.<sup>385</sup> Figures from the Hungarian human rights organisation *Hungarian Helsinki Committee* indicate 72,000 such cases just between July 2016 and July 2021 alone, with people returned to Serbia without individual examination of their cases and thus unlawfully.<sup>386</sup> There are repeated reports from people

directly affected by beatings by police officers and being chased by dogs. In December 2020, the European Court of Justice (ECJ) ruled that Hungary's pushback regulations, adopted in 2016 and 2017, were not compatible with EU law.<sup>387</sup> Yet the practice of pushbacks continues unabated: between December 2020 and July 2021, 22,000 further cases were registered.<sup>388</sup>

There was virtually no chance of receiving legally enshrined protection in Hungary, as is still the case today, and conditions in the transit zones were catastrophic. Nevertheless, people camped for weeks alongside the transit zones in order to enter Hungary through official channels.<sup>389</sup> However, the restrictive and non-transparent practices concerning permission to enter the country meant that hope and confidence rapidly dwindled. Fewer and fewer people were permitted to enter the Hungarian transit zones, until in 2018 only one person per day was allowed to cross.<sup>390</sup>

The European Court of Human Rights (ECtHR) issued numerous interim measures to tackle the issue of people being held in the transit zones, where they were systematically denied access to food. In 2017, a ruling found that the transit zones and "the applicants' confinement to the transit zone amounted to a de facto deprivation of liberty".<sup>391</sup> However, the Hungarian government was convinced that it was in the right and even denied any responsibility to provide food to people who had not applied for asylum or whose asylum application had been rejected.<sup>392</sup> Hungary also passed laws criminalising support for people on the move and making it difficult for independent organisations to work.<sup>393</sup> In May 2020, the ECJ ruled that automatic and indefinite placement of asylum-seekers in transit zones constituted a form of unlawful detention. As a result, Hungary closed the transit zones. Subsequently, it would only be possible to file asylum applications at Hungary's embassies in Belgrade and Kiev.<sup>394</sup> In November 2021, the ECJ again condemned Hungary's actions and ruled that simply rejecting as inadmissible asylum applications from people who had entered Hungary via a "safe third country" was contrary to European law.<sup>395</sup>

It caused enormous problems for people on the move when Hungary, situated on the main route to Europe in 2015, opted to close its borders, and remains problematic today; at the same time this decision stepped



up pressure on neighbouring EU countries. In 2015 the Greek village of Idomeni, near the border with North Macedonia, became infamous when thousands of people attempted to travel from there to North Macedonia. North Macedonia is a small country bordering Greece to the south and Serbia to the north. Transit migration is not a new phenomenon for the country, but has become more visible. People fleeing were only able to cross the country clandestinely. If they were picked up by the police, they ran the risk of imprisonment in the notorious Gazi Baba camp in the capital Skopje. People were held there indefinitely, often under the pretext that they had to wait for the trial of their alleged smugglers. Reports of inhumane conditions and brutal violence also alarmed the UN Committee against Torture, which called on the government to remedy the disastrous conditions immediately, for example by closing the detention centre.<sup>396</sup> In 2015, the government stopped detaining people on the move and instead allowed them to cross the country, although it re-opened the detention centre at the end of the same year.<sup>397</sup> In the meantime, a 72-hour pass, introduced in June 2015, allowed people who stated that they wished to apply for asylum to travel legally through North Macedonia. In order to push people seeking protection to head to Serbia, North Macedonia operated special over-priced trains specifically to transport refugees from the south of the country to the north. The International Organisation for Migration (IOM) provided support for transportation from the border crossing to the registration centre.<sup>398</sup>

When the temporary corridor was closed, state-organised transit towards Serbia ended too. North Macedonia applies a strict pushback policy. This is legitimised with the argument that all its neighbours are “safe third countries”.<sup>399</sup> In recent years, numerous unlawful pushbacks have been documented, during which police officers beat people with truncheons and with their fists and even set dogs on them.<sup>400</sup>

The increasing impermeability of borders in 2015/2016 meant that people were stranded in countries neighbouring the EU, initially mainly in Serbia. The existing challenges came to a head in the Serbian city of Subotica, with approximately 100,000 inhabitants, near the border with Hungary. As early as 2011, refugees travelling to the Hungarian border had set up informal camps there. To this day, a number of *jungles* (a collection of makeshift dwellings and self-built shacks) and *squats* (in empty buildings)

in the region are still being used, with regular evictions by the police likewise continuing. Although the routes taken by refugees have shifted since 2015, people are still attempting to cross the border between Serbia and Hungary from Subotica and Horgoš – despite repressive measures by Serbian police and violent pushbacks by Hungarian border guards.<sup>401</sup>

In the south of Serbia, refugees face arbitrary deportations to North Macedonia. The camp in the southern Serbian town of Preševo, once a transit point for people on their way north, is now a de facto closed detention centre. People apprehended during evictions of unofficial camps in other parts of the country (such as near the border with Romania) are often taken to Preševo.<sup>402</sup> Reports suggest that transfers from official camps in Belgrade to Preševo are also arranged. People detained report that they need special letters authorising them to leave the camp and are obliged to do work in the camp to obtain these letters. A huge number of checks and controls are carried out in Preševo and in the surrounding area. That means any refugees moving around outside camps constantly run the risk of being picked up by the police and deported back to North Macedonia and from there to Greece.<sup>403</sup>

However, deportations directly from camps are also documented. For example, in March 2020, a group of 20 people of various nationalities were brought to what is known as the *Command Office* under the pretext that they had to renew their ID cards, which identify them as camp residents. When they arrived there, uniformed and masked police officers made the people get into a van that took them to the border with North Macedonia, where the officers used truncheons to force them to cross.<sup>404</sup>

In 2020, Serbia began to build a 147-kilometre fence on its border with North Macedonia. According to the mayor of Preševo, the fence is part of an agreement with the EU – although a Commission spokeswoman denied this.<sup>405</sup>

Currently, the second main route from Greece is via Albania and Montenegro or Kosovo to Bosnia & Herzegovina, which – like Serbia – shares a border with Croatia in the north. The route initially shifted to the Serbian-Croatian border in 2015 when fortifications and surveillance were stepped up at the Serbian-Hungarian border.

Although a few refugees had already reached Croatia via Bosnia & Herzegovina at the end of 2015, figures did not increase significantly until

2018, as Serbia's borders with Hungary and Croatia were impermeable and brutal pushbacks were common. Some people therefore arrived in Bosnia & Herzegovina after unsuccessful attempts to reach the EU via Serbia, while others took the route from Greece via Albania and Montenegro. Brutal pushbacks by the Croatian police were identified particularly clearly at the border with Bosnia & Herzegovina. In addition, the poor conditions in which people seeking refuge lived in Una-Sana canton, near the Croatian border, caused international outrage on several occasions, albeit only briefly – although this did not lead to lasting change: set up as a temporary shelter in April 2020, the Lipa tent camp, 25 kilometres from Bihać, was only accessible by mud track and was entirely unsuitable for housing people when winter was on the way. The local authorities nonetheless closed the Bira camp in Bihać that, although it was little more than a draughty hall, at least had solid walls, unlike the tents in Lipa. Residents were supposed to move to the overcrowded Lipa camp, where there was no electricity or running water and no proper protection from sub-zero temperatures. There was subsequently a major fire in the camp in late December 2020 and a weeks-long media spectacle about the people holding out in the snow in the remains of the camp. At the same time, an additional 3,500 people on the move were living outside official camps, many of them homeless and camping out in shacks they had cobbled together or in empty buildings in north-western Bosnia & Herzegovina.<sup>406</sup>

In November 2021, shortly before the onset of the next winter, Camp Lipa 2.0 opened, this time with containers and space for 1,500 people. Families and unaccompanied children are also to be accommodated here, far from any kind of infrastructure. Those behind this project are now celebrating this new camp, while squats in the surrounding area are being cleared and people living there forced onto buses to Lipa.<sup>407</sup> The bulk of the funding comes from the EU, although considerable bilateral support has also been made available, *inter alia* from Germany's civil protection agency, Technisches Hilfswerk, as well as from the Austrian Ministry of the Interior, and the Italian Ministry of Foreign Affairs.<sup>408</sup> At the same time by tightening up border security and keeping borders tightly closed, the EU and its Member States have played a major part in creating this desolate situation in Bosnia & Herzegovina for people seeking refuge.

In addition, local political unwillingness is also a contributory factor. In Tuzla, for example, an industrial town in north-east Bosnia & Herzegovina, the municipal administration as well as international organisations are still largely doing nothing at all to help, while for several years the civilian population has already been providing humanitarian support to people on the move who pass through Tuzla on their way to western Bosnia & Herzegovina.<sup>409</sup>

The vicious circle of pushbacks, violence and the precarious situation in transit forces people to cross the borders from various places – over and over again – in the hope of one day escaping the EU's border surveillance regime and not being forced back once again to Serbia or Bosnia & Herzegovina. This also results in refugees moving back and forth between Serbia and Bosnia & Herzegovina, which leads to more people dying or going missing along the Balkan routes.

In the east, people seek another route to escape the endless limbo of violence. They travel to Romania, an EU Member State, from Bulgaria or Serbia. In 2020, the number of people applying for asylum in Romania rose by 238 percent compared to the previous year.<sup>410</sup> The six existing state-run shelters for refugees are overcrowded and conditions there are poor. The Romanian border police also illegally deport people seeking protection back to Serbia. UNHCR has been registering pushbacks from Romania to Serbia for years. Between April and December 2017, there were at least 1,386 collective expulsions.<sup>411</sup> That trend has become markedly more pronounced, with at least 13,459 people transferred to Serbia during collective expulsions in 2020 alone.<sup>412</sup> In addition, numerous refugees report that deportations often involve violence, humiliation, and arbitrary detention by the Romanian police – a pattern that seems shockingly typical in EU countries with EU external borders.

Further south on the Balkan Peninsula, Bulgaria shares borders with Romania and Serbia, as well with Greece and Turkey. As early as 2013, Bulgaria relied on systematic pushbacks, violence and detention to reduce the number of arrivals from countries such as Syria and Afghanistan.<sup>413</sup> People who entered Serbia through Bulgaria in subsequent years report attacks with dogs and firearms – the Bulgarian border police have also become notorious for their brutality.<sup>414</sup> In Bulgaria the rejection rate for asylum-seekers, apart from Syrians, is likewise extremely high, hitting

99 per cent for Afghans.<sup>415</sup> The few people granted access to protection receive no support to begin settling down in Bulgaria and are at risk of poverty, exclusion and homelessness.<sup>416</sup> Echoing the situation at the borders between Greece and Turkey or between Serbia and Bosnia & Herzegovina, pushbacks in both directions occur between Bulgaria and Serbia.<sup>417</sup>

### Human Rights Violations in the Name of “Secure Borders”

Pushbacks are used in the EU to force unwanted people out. These people are systematically denied access to proper procedures and to their fundamental right to lodge an application for asylum. Pushbacks violate European and international law – they are unlawful, regardless of whether violence is applied or not, and even if governments keep coming up with new justifications. In the Balkans, pushbacks often occur at the so-called “green” and “blue” borders, which are unpaved border crossing-points in forests and fields or along rivers. People on the move who have been picked up after an illegalised border crossing into the EU are transported by police back to the national border and forced to leave the EU again by re-entering the next country. But pushbacks are also carried out by non-EU countries which have been firmly integrated into the Fortress Europe project (like North Macedonia and Serbia). As if this dramatic breach of fundamental rights were not enough in itself, these pushbacks often entail severe mental and physical abuse. International human rights organisations and local groups have documented numerous cases of unlawful pushbacks and the associated violence in detail and have been collecting testimonies. Between January and November 2021 alone, 8,790 people reported pushbacks from Croatia to Bosnia & Herzegovina to the Danish Refugee Council. From May 2019 to November 2020 the organisation counted 22,500 pushbacks at this same border.<sup>418</sup> An appropriate reaction, e.g. an end to the funding of this practice by the EU and its Member States, has not been forthcoming to date and nor have consequences for the perpetrators at the borders and those who issue their orders. As a result, not only are people who are unwanted in the EU kept out by all available means; they are also humiliated, tormented and debilitated in order to stop them from trying again, while the countries of Europe lean back and let others do their dirty work.

Kala (17) and Zihaul (25) from Afghanistan report police violence during a pushback from Croatia to Bosnia & Herzegovina: “During the last game, they even took our jackets and our backpacks. My brother was left in the rain with only a T-shirt. In the backpack there were my mom’s medicines. She is very ill and she needs them but they did not care and now she does not have them anymore. They use tasers on our necks to make us fall down. They use sticks against us even if we surrender. Usually, it is a female officer to beat the women, but sometimes they even use dogs against us.”<sup>419</sup>

Many reports by people on the move refer to the habitual practice of chain pushbacks, i.e. pushbacks across several borders at once. These demonstrate the supra-regional system to pushbacks, with police forces in different countries coordinating hand-overs of people on the move at the borders. While border guards in one country transport these people back to one border, their colleagues in the neighbouring state are already waiting to take them on to the next. In Croatia, people on the move often experience violence during these operations – just as they do during “ordinary” pushbacks from Croatia – before they are forced back into Bosnia & Herzegovina or Serbia. Chain pushbacks are also carried out in other places. They extend from Italy to Slovenia and from Austria via Slovenia to Croatia and on to Bosnia & Herzegovina or from Bulgaria via North Macedonia and Greece to Turkey.<sup>420</sup> In other words, EU Member States like Italy, Austria and Slovenia are not only blind to the asylum requests of those concerned, but also deliberately ignore well-documented human rights violations by the Croatian police. The states involved usually cite bilateral readmission agreements that they have signed with their neighbours. Pushbacks are thus given the appearance of existing within a legal framework. This perfidious bureaucratisation of practices that profoundly strip people of their rights, deny them protection and subject them to violence has been condemned by the courts of several countries. One of the most far-reaching rulings was passed down by a court in Rome (*Tribunale Ordinario di Roma*) in January 2020. Up until then, the Italian police had justified pushbacks into Slovenia by citing a bilateral readmission agreement with Slovenia concluded in 1996. The court in Rome declared these “official” pushbacks based on the agreement to be illegal, as they violated the right to asylum and hence interna-

tional, national and EU law.<sup>421</sup> The court also found that access to effective legal remedies and legal counsel had been denied and instructed the Italian authorities not to ignore the practice of chain pushbacks and threats of violence by Croatian officials.<sup>422</sup>

Another two judgments from Slovenia and Austria sent out a strong message, although they did not go so far as challenging readmission agreements as such. In August 2021, the Supreme Court in Slovenia ruled that Slovenia's bilateral agreement with Croatia violated its obligation to respect the principle of non-refoulement and unlawfully denied the affected parties access to application procedures for international protection.<sup>423</sup> In a similar case, when an affected person was handed over by Austrian officials to Slovenian police officers and then 'returned' first to Croatia and eventually to Bosnia & Herzegovina, the higher administrative court in Styria ruled in July 2021 not only that this person's right of access to an asylum procedure had been denied but that his human dignity had been violated by humiliating treatment and search on the part of the Austrian officials.<sup>424</sup>

Against the backdrop of the state approval of and even incitement to apply unlawful practices at European borders, important evidence of this border violence has been provided by independent international human rights organisations, local groups and teams of investigative journalists in the form of (photographic) documentation, reports and the gathering of testimonies. That also means, however, that incidents are only recorded when such activists are operating in the area and have access to the people affected and/or to border facilities. In other words, the hidden number of unrecorded human rights violations and pushbacks cannot be underestimated.

The Border Violence Monitoring Network (BVMN) was created in 2017 as an alliance of local and international organisations engaged in documenting widespread border violence throughout the region and publishing reports by affected persons. In 87 per cent of the pushbacks recorded by the BVMN in Croatia in 2020, the individuals concerned described inhumane or humiliating treatment by police officers.<sup>425</sup> The details reveal a recurrent pattern to the pushbacks. If a group of people are picked up in, for example, Croatia, the first thing that happens is that their mobile phones are smashed or the cameras are rendered useless. The guards steal their money and transport them to the so-called "green

border”, i.e. an unofficial crossing-point. Often all their personal belongings will be deliberately destroyed, including clothes, sleeping bags and shoes – things that people seeking shelter in empty buildings and tents crucially need for survival. It is not unusual for people to be forced back across the border in their underwear or else completely naked, obliging them to walk miles to the next village in this state. Many respondents, especially men, report physical violence by border personnel. Family members often witness their fathers, brothers and/or partners suffering abuse at the hands of police officers.

The BVMN’s annual torture report with a focus on Croatia and Greece analyses these testimonies for recurrent patterns of violence. In Croatia, six forms of regular violent practice emerged, all of which were classified by the network as either torture or other inhumane or degrading treatment: excessive and disproportionate use of (physical) force, use of electric discharge weapons, forced to strip, use of firearms (e.g. to threaten people), degrading treatment in custody and degrading treatment in police vehicles. Apart from these strikingly recurrent patterns of violence, cases have also been recorded of extreme physical and sexualised abuse against both men and women.<sup>426</sup> This includes beatings, sometimes lasting several minutes, by officers using fists, sticks, but also branches and other objects. “He [Croatian policeman] hit me on the head, on the body everywhere. There is too much pain I have,” reported one young man after a pushback from Croatia to Bosnia & Herzegovina, during which he and the other nine people in the group were punched, beaten with sticks and kicked.<sup>427</sup>

Moreover, border guards frequently use tasers, i.e. electric shocks, and severe bites indicate attacks by police dogs trained for the purpose. The organisation No Name Kitchen reported one case of Croatian police officers telling people on the move “to walk very fast to Bosnia. After some minutes, the group saw police dogs running after them. While trying to run away, the sister of the respondent fell down to the ground. The respondent tried to help her up. At that moment, one police dog bit him in his lower back. He was, fortunately, wearing a big jacket, which meant that the teeth of the dog did not touch his flesh. (...) one police dog attacked another group member and bit into his leg.”<sup>428</sup>

There are frequent descriptions of Croatian officers lining up in pairs right by the border who make people run the gauntlet one by one so that



they are beaten and kicked from each side as they cross back.<sup>429</sup> In many places borders follow rivers which are “weaponised” during pushbacks. People are forced across the river regardless of whether or not they can swim. After that they have to walk in wet clothes to the next village, often several kilometres away. In winter especially, in snow and at temperatures below freezing, this particular torment is life-threatening.

It is at least as common to apply violence that leaves no visible traces. Insults, threats and verbal humiliation are part of the standard repertoire of mental abuse at EU borders. During pushbacks people are often held for hours in police stations, internment camps or other unsuitable places, where they are frequently denied food, drink and access to toilets. The Croatian police use journeys back to the border to torment people on the move in the back of the van. Respondents report that the officers drive dangerously fast to scare people or make them sick. Other reports mention officers turning up the heating or air conditioning to expose people to extreme or fluctuating temperatures. Moreover, there is plenty of documentation about police along the Balkan route using guns to frighten people, either by waving them threateningly or by actually firing shots at close range. One respondent reported from the border between Bosnia & Herzegovina and Croatia: “When the police arrived I was saying to them ‘please, peace with us, peace’ but they weren’t interested on that and pulled guns on us. I heard that they loaded it. One of the officers came to me with his gun and put it directly on my head while he was shouting on me ‘who’s the leader? I know it’s you.’”<sup>430</sup>

Many reports of pushbacks contain descriptions of humiliating sexist, racist and anti-Islamic behaviour. They simultaneously indicate that there are intricate links between discrimination of this kind and European border policy and the deeply inhumane actions of the police officers concerned act.<sup>431</sup> A group of people on the move from Afghanistan (including two children aged five and eight) told how they were forced during a pushback from Croatia to Bosnia & Herzegovina to throw their warm clothes, shoes and sleeping bags onto a fire – and they also had to burn a copy of the Quran that they had with them: “We begged them to at least let us keep the kid’s warm clothes, and the Quran, but they just yelled and mocked us.”<sup>432</sup>

The list of cruelties inflicted on people on the move by police officers during pushbacks is a long one and each report outdoes the last in terms

of contempt for other human beings. As these are not isolated cases, it is all the more startling that the culprits are able to feel so secure and enjoy impunity. The governments concerned dispute the very existence of pushbacks, despite the abundance of well-documented incidents. The Croatian government baulks at no excuse, however absurd. The cover-up of border crimes ranges from the outrageous accusation that activists dress up as police officers in order to harm the Croatian state and assertions that victims are faking their injuries to outright denials of irrefutably documented incidents.<sup>433</sup> In other cases the Croatian government justifies pushbacks as a necessary and legitimate practice to defend the EU's borders.<sup>434</sup>

Videos published in October 2021 show hooded Croatian police officers of the *Interventna Policija* unit driving people across a frontier river by beating them on the legs. This was the first time that an investigative team managed to film the violence on the Croatian border. Drone footage shows a group of people on the move climbing out of a prison van near the border. Then they are forced across the green border to Bosnia & Herzegovina.<sup>435</sup> But real consequences failed to materialise: after the material was released, the Croatian government suspended three officers, referred to “isolated cases” and cynically boasted that Croatia was the only EU country to have installed a border monitoring mechanism. For a long time Croatia ignored requests to respond in some form to the accusations of brutal, inhumane force and unlawful pushbacks. In 2018 Croatia received 6.8 million Euro under the European Emergency Assistance Programme (EMAS) set up by the Internal Security Fund – Borders and Visa (ISFB). The money was intended, inter alia, to cover the operating costs of 10 border police stations and to set up a monitoring mechanism “to ensure that all measures applied at the EU external borders are proportionate and are in full compliance with fundamental rights and EU asylum laws”.<sup>436</sup> For a long time nothing at all happened apart from further reports of human rights violations by the Croatian police. As a consequence, in August 2020 a delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited Croatia. The delegation's report did not come out until December 2021, a lag of more than a year, for the simple reason that Croatia refused to approve it until the bitter end. The CPT confirmed that pushbacks and the use of force that frequently accompanied them constituted a “well-established, unlawful *modus operandi*”. The report

also stated that there were no mechanisms in place to prevent violence against people on the move and that perpetrators did not have to fear any consequence for their actions.<sup>437</sup>

The “New Pact on Migration and Asylum” presented by the European Commission in 2020 provides for an Independent Monitoring Mechanism (IMM) to be implemented by every Member State in order to ensure that fundamental rights are respected. That does not sound like a bad idea at first, but in 2020 civil society organisations were already flagging up weaknesses in the framework, such as the fact that the terms and conditions do not provide for any monitoring beyond the screening procedures described in the Migration Pact. These procedures are designed to identify individuals who do not meet the requirements for legal entry into the EU and subsequently direct them to appropriate border procedures. Another critical issue raised was a failure to ensure the independence of monitoring parties and a lack of clarity about consequences once any violations of fundamental rights were ascertained.<sup>438</sup>

How this all looks in practice is illustrated by Croatia, where such an IMM was, indeed, implemented in summer 2021 after years of inactivity. Upon closer scrutiny it is obvious that the Croatian IMM displays so many weaknesses that any independent monitoring or investigation of accusations are highly improbable. The IMM makes no reference to green and blue borders, or in other words those unmarked crossings where most of the pushbacks occur. Under the mechanism proposed by Croatia, the monitoring team can only visit these sections of the border by prior arrangement and no more than 20 times per year. Another problem is that the Croatian ministry of home affairs, to which police units are accountable, actually appoints the monitoring parties and even funds them. It is hardly surprising, then, that to date none of the independent civil society organisations which have been observing access to asylum in Croatia or violations of human rights have played any role in these monitoring activities. The IMM proposed by the EU lacks definition in major respects. This is no way to terminate violations of human rights on the EU's external borders. If anything, there is a risk that the monitoring mechanism will merely serve as an instrument of concealment while suggesting that due process is somehow being respected.<sup>439</sup>

These crimes, most of which are brazenly dismissed as isolated incidents, constitute a depressing ode to the demise of the rule of law in the EU.

European public servants commit violence and torture without either the culprits or the governments who issue their orders being held to account. On the contrary, the Union and its members seem to be perfectly satisfied with the way their external borders are being policed by the states in the Balkan region. During the decision-making process for Croatia's accession to the Schengen Area, NGOs such as the Croatian Centre for Peace Studies demanded that accession be contingent on an end to human rights violations on the Croatian border.<sup>440</sup> Far from it: in December 2021, just a few weeks after those videos of police officers wielding sticks were published in October and the ECtHR ruling in November that Croatia had been responsible for the death of Madina Hussiny in the wake of a pushback, the Member States of the European Union gave their final consent to its accession.<sup>441</sup>

In January 2020 Horst Seehofer, who was then Germany's minister of home affairs, had words of praise for the Croatian police: "We stand by Croatia as partners. The current migration flows are confronting all of us with huge challenges that we can only master together."<sup>442</sup> He found no words to criticise the brutal, unlawful methods used by Croatian border units, but instead presented his counterpart with thermal cameras worth 350,000 Euro for use at the border. Ursula von der Leyen, the President of the Commission, made her own position clear at the EU's Western Balkans Summit in October 2021: "We are a European family. We share the same history, the same values."<sup>443</sup> In the light of the unpunished atrocities, she saw no need to explain why these values would include systematic crimes against human rights and unbridled inhumanity rather than dignity or freedom.

On the Balkan route, too, EU border policy has resulted in countless deaths and disappearances. It is no consolation that border fatalities along these paths are much lower than on the sea routes or across the Sahara. And here too, the true death statistics are unknown. Even without harassment and violence by border officials, survival along the Balkan routes would be arduous. The lack of access to medical care, lack of food and lack of shelter make the winters especially fraught with hazards. Injured and weakened by the rigours of long treks and pushbacks, it is hard for people to restore their health, and under these conditions pneumonia poses a lethal risk.

As pushbacks are by now routine, people on the move try to penetrate as far as they can into EU territory. For fear of being discovered close to

the border, they prefer to make their way through hostile terrain or risk dangerous forms of transport such as the underside of trucks. In March 2021, for example, four people died in a serious traffic accident when they tried to cross Croatia in an articulated trailer.<sup>444</sup> On 21st November 2017 six-year-old Madina Hussiny was hit and killed by a train. The family had been victims of a pushback in Croatia and were obliged to walk back along the railway track to the nearest Serbian town.<sup>445</sup> Solidarity enabled them to take their case to the ECtHR. In November 2021 the Court ruled that Croatia had violated a number of fundamental rights of Madina and her family and had denied them their right to apply for asylum. The judgment also drew attention to Croatia's inadequate efforts to investigate the incident.<sup>446</sup>

Electrocution by overhead railway cables kills people who try to cross the border on the roof of a train.<sup>447</sup> In the summer of 2020 seven people suffered a cruel death stowed away in a sea container in which they had hoped to reach Italy from the Serbian town of Šid. In Croatia, however, the container was loaded onto a different ship and the remains of the seven men were discovered four months later in Paraguay.<sup>448</sup>

The rivers that people have to cross on their way over a border or during a pushback can also be death traps. In June 2016 a young Syrian perished as he tried to cross the frontier river between Serbia and Hungary. Hungarian police forced him to turn back and he drowned.<sup>449</sup> The 2020 report on the situation of people on the move by the Serbian organisation "KlikAktiv" described hazardous attempts to cross the River Drina along the border between Serbia and Bosnia & Herzegovina. Although most people use boats, these are often confiscated by Bosnian border guards before forcing them to swim back the other way, risking their lives in the process. During a search for two people reported missing after a pushback by Bosnian police, who were eventually found dead, the police also came across seven more victims of drowning along the Drina.<sup>450</sup> Other people on the move fall prey to landslides and natural elements encountered as they trek for long days through remote terrain. Landmines, vestiges of the war in Bosnia that lasted from 1992 until 1995, still pose a deadly risk. In March 2021 a refugee died in Croatia when a landmine exploded, and four other people were injured.<sup>451</sup>

The fate of most people on the move who set off on dangerous paths into the EU remains uncertain, their situation undocumented and their death

unnoticed. Countless people go missing. Family members, friends and travelling companions publish notices on social media with names, photos and the last known whereabouts of the missing persons. Information concerning missing persons is shared in these groups, as well as reports of deaths and details about who will ensure corpses are repatriated. The dead are not always identified and often cannot be buried by their families. The graveyard in Bihać, a Bosnian town near the Croatian border, now has a section reserved for the last resting places of people on the move. Many of these bear the inscription “N.N. Lice” – unknown person.<sup>452</sup>

## **Frontex in the Balkans**

Wherever the EU erects walls around its fortress, its doorkeeper Frontex is not far away. Frontex supports the national border security units in Member States, including in Greece, Bulgaria and until early 2021 in Hungary. An evaluation of its Serious Incident Reports – the procedure that requires Frontex officials to record every situation where fundamental rights may have been breached – shows that by 2019 Frontex was already aware of human rights violations by border guards and that Frontex staff were often on site at the time.<sup>453</sup> However, neither were attacks on people on the move and unlawful pushbacks prevented, nor were any operational consequences implemented. Not until early 2021 did the agency terminate its operations in Hungary following a judgment from the European Court of Justice (CJEU) that Hungary’s asylum system was in breach of EU law.<sup>454</sup> But the reaction from Frontex was extremely tardy. Its own Consultative Forum had pointed out in its annual report in 2016 that the EU agency would have to end its operations on the border between Hungary and Serbia if it could not ensure that asylum-seekers had access to the asylum procedure.<sup>455</sup> The eight-kilometre rule that Hungary applied in order to legalise pushbacks near to its border had just entered force and it was blatantly at odds with that requirement.

Reports frequently indicate that Frontex officers are actively involved in violating human rights by participating in pushbacks. In June 2020 a respondent described how six Frontex guards in balaclavas beat people during a pushback from Albania to Greece with a “kind of truncheon but like metal”.<sup>456</sup>

Given the gravity and the quantity of accusations that Frontex officers have been directly or indirectly involved in human rights violations, the

opportunity for a thorough judicial review is crucial at both national and European level. However, as these crimes were committed and debated while national and European figures were busy shifting responsibility back and forth, it is very difficult to hold Frontex staff to account. For missions outside the EU in Albania, Bosnia & Herzegovina, Montenegro, North Macedonia and Serbia, the EU agency went so far as to use bilateral agreements to embed the immunity of its personnel from criminal, civil and administrative prosecution under the jurisdiction of the host country. This immunity can only be waived by the home state that has posted the team member in question.<sup>457</sup>

Externalisation has long been an essential feature of border surveillance. Non-EU states are requested, paid and/or economically and politically pressured by the EU to keep people on the move away from the EU's borders. The above-mentioned Frontex operations in third countries are a relatively new component of this farming-out exercise. Since 2019 the mandate of the EU's border protection agency has provided for operations, including executive missions, to be carried out in third countries and for the creation of what it calls "antenna offices" in non-EU states. In this way, Frontex has extended its intelligence and prosecution remit into a declared "pre-frontier area" with an enormous reach. This expansion is taking place despite the fact that neither the EU nor Frontex is able or permitted to exercise sovereign rights in territories outside the EU. As a result, it is practically impossible to subject operations by European border guards to judicial scrutiny and if appropriate to charge them with an offence. The first of these operations began in Albania in 2019. Several dozen Frontex officers were deployed there with their own vehicles and equipment to police migration movements from Greece to Albania.<sup>458</sup> The operation is based on a status agreement that the European Commission has concluded with Albania. Similar agreements have also been signed – or are in the pipeline – with other countries in the region such as Montenegro, Serbia, North Macedonia and Bosnia & Herzegovina.<sup>459</sup> Since 2020 there have been two Frontex missions to Montenegro and since June 2021 Frontex officials have been deployed to Serbia to patrol its border with Bulgaria.<sup>460</sup>

One focus of these operations is to monitor and collect the personal data of people on the move. These monitoring activities were initially performed by the European Asylum Support Office (EASO) until it was

established that EASO had no authority to do this and was therefore acting unlawfully.<sup>461</sup> In January 2020, the European Council therefore concluded that there was a need to develop “national biometric registration/data-sharing systems on asylum applicants and irregular migrants” in Balkan partner countries.<sup>462</sup> The long-term goal is to feed these data into the EU’s Eurodac system. Frontex was entrusted with the implementation. The EU agency was already responsible for setting up “national coordination centres” for interconnected data collections. After Serbia, Bosnia & Herzegovina was likewise supplied with AFIS (Automated Fingerprint Identification System) technology, which is compatible with the Eurodac system. Although Balkan countries which are not EU Member States have no access to Eurodac’s database, Frontex can presumably retrieve and pass on these data without the usual constraints of data protection law. This knowledge about migration movements, the citizenship of people on the move and the countries they pass through in transit has the potential to function as an “extended Dublin mechanism”, enabling the EU to deport people on the move who have entered third countries in the Balkans in unauthorised ways.. And sure enough, the rate of deportations from EU countries such as Italy and Austria to non-EU countries in the Balkans has tripled since 2016.<sup>463</sup>

## **No Protection, No Future: Degrading Conditions as a Form of Violence**

The countries in the Balkan region see themselves as countries of transit for people on the move heading to the European Union. That perception was reinforced by the corridor that made the journey from Greece to Austria and Germany possible in 2015. Many people on the move do, indeed, intend to enter the EU, but upgrades of border surveillance equipment and systematic pushbacks are making sure that these people are stuck in states outside the EU with virtually no chance of reaching their destination.

In the autumn and winter of 2020/21, the European media carried images from Bosnia & Herzegovina showing people huddled in blankets outside flimsy tents creaking under the weight of snow. The outrage from politicians and civil society were an indictment of the intolerable conditions in Lipa – the camp without water, power or proper winter accommodation in 2020 that was eventually razed almost entirely by fire – and



Vučjak – built in 2019 on a former landfill in a forest close to land-mined terrain. Faced with the catastrophic situation in winter 2020/21, the EU made another 25 million Euro available and told the Bosnian authorities to “manage” migration better.<sup>464</sup> The priority on this occasion did not lie with the wellbeing of those seeking protection, but with securing impermeable frontiers. The money from the EU served above all to “strengthen Bosnia and Herzegovina’s capacity in border management, in particular through equipment and training”. Since 2018 the EU has given Bosnia & Herzegovina 101.85 million Euro for tasks such as enhancing its border surveillance, obstructing people on their way to the EU and accommodating them in inhuman conditions. “Humanitarian purposes” accounted for just 16 per cent of the budget.<sup>465</sup>

The short-lived media drama around the existential anxieties that were exacerbating the tribulations of people on the move winter by winter suggested that the solution lay in more money, more blankets or simply better camps. But the camps are often part of the problem. They do not offer living conditions that reflect people’s human rights and nor do they provide access to protection and prospects for the future. They are places where people are penned up while their data are recorded until – if the New Asylum and Migration Package has its way – they can be deported to their countries of origin.

These camps, especially those along the EU’s external borders, increasingly resemble prisons. Between 2015 and 2017 the Serbian government used EU funds to re-open old facilities and build new ones. Since 2018 Bosnia & Herzegovina has also been generating camps to accommodate people trapped there because of the systematic pushbacks by EU countries. Another function of these camps is to remove people from public view. Informal accommodation like, unofficial campsites and squats have been evicted and the inhabitants transferred to overcrowded official camps. In Serbia it is common practice to shift people from the north to the south of the country, making it easier to return them to North Macedonia and Bulgaria. These state-run refugee camps are thus not humanitarian places where people are offered a place to sleep and protection, but migration management tools to collect people, isolate them and govern their movements.

Conditions are precarious in these facilities, which are sometimes hugely overcrowded. People routinely report inadequate hygiene and a

lack of medical provision.<sup>466</sup> The camps are often no more than empty hangars and in winter in particular they do not offer sufficient protection from the cold. People also report that the food they are given does not even satisfy their hunger, let alone keep them healthy. In Albania people living in the camps described begging on the streets of Tirana for food to fill their bellies.<sup>467</sup>

In many places people lose their place in a camp if they have been absent for a certain time. That means that anyone who tries to cross the border and returns after a pushback, often with no resources, injured and without papers, will have lost any claim to this meagre accommodation.

Violence between residents or by security guards is a widespread problem in collective accommodation, and it is exacerbated when there is no protection for especially vulnerable groups. After visiting Bosnia & Herzegovina in 2019, the UN Special Rapporteur on the human rights of migrants noticed that unaccompanied minors who are placed in regular camps for want of appropriate alternative housing do not receive protection there.<sup>468</sup>

The concern of many that they might one day find themselves in a sealed camp was confirmed during the COVID-19 pandemic. The Serbian government imposed a total lockdown on these facilities, while the general population was restricted by evening or night-time curfews. Soldiers were positioned at the camps to prevent people from leaving their overcrowded accommodation.<sup>469</sup> Whereas a purported concern about health may be used here and there to restrict the movement of people on the move disproportionately, many camps make a fundamental point of locking people in. People are held here without charge, without due process and without any conviction. Often the lack of residence status and a blanket assumption that they will seek to avoid deportation are reason enough to place people seeking protection in administrative custody. Once the maximum period of detention has been exceeded they are released only to be detained again soon afterwards. This perfidious game continues until they can be deported or manage to find another way out of the country. In Postojna, near the Slovenian capital Ljubljana, people are even held in custody when they have already received a deportation order or are waiting to launch an asylum procedure. The conditions there are degrading. According to the Croatian organisation “Are You Syrious?”, people are housed in containers inside a hall surrounded

by a fence. From this camp, too, there are also repeated unofficial removals to Croatia, where people on the move are again exposed to the risk of violent pushbacks to Bosnia & Herzegovina or Serbia.<sup>470</sup>

In border regions there are many other places, apart from the official camps, where people on the move live and survive. Empty houses, industrial sites – sometimes ruins without power, water or glass windows – or unused rail coaches and tents unsuitable for winter temperatures offer a bolt-hole for weeks, if not months. When repressive measures against people on the move are stepped up in the towns, they often have to resort to remote places of refuge such as forests and build their own shelters. People living outside the official camps are constantly at risk of being driven away by the police. This usually happens in the early hours of the morning. Those who cannot escape quickly risk being carted away in buses, and sometimes transported a long way from the border to an overcrowded camp. Their few possessions – tents, clothes, but also personal belongings and papers – are routinely destroyed in the process.

While the corridor to Hungary and Croatia was temporarily open, the Serbian capital Belgrade became a stopover for many people. For a while the authorities let people on the move sleep in a central park while unused railway buildings known as the “Belgrade Barracks” served as provisional accommodation for hundreds. However, once it became clear that they would no longer be able to leave Serbia quickly towards the north, this short-lived tolerance on the part of the authorities came to an end. To make matters more complicated, the sites where people on the move found makeshift shelter are earmarked for demolition to make way for the gentrification project “Belgrade Waterfront”.<sup>471</sup> The district around the bus station is still a magnet for people on the move, but they have to reckon with repressive measures by the police and also by ultra-nationalist groups who have made it their duty to patrol the streets of Belgrade and clear the public space of anyone they identify as a person on the move.

There have also been reports in Bosnia & Herzegovina of threats and attacks on provisional accommodation of people on the move and on civil society activists who support them. The UN Special Rapporteur on the situation of human rights defenders issued a statement in November 2020 highlighting the threats, smear campaigns and assaults to which human rights defenders like activist Zehida Bihorać Odošić

are exposed.<sup>472</sup> For people living outside the official camps in particular, the support of volunteers is vital and even essential to survival. Local and international groups help out with warm winter clothing, shoes and sleeping bags, but also firewood and food. Access to regular medical care is also unavailable to people living outside the official camps. They depend on humanitarian aid from NGOs if they are injured by police violence, but also if they suffer from hypothermia or frostbite.<sup>473</sup>

The living conditions at the EU's external borders – in both official and unofficial camps – are part of the structural violence against people on the move. That has long-term consequences, because if at some point these people ever make it to a safe place, many must reckon with the effects of chronic disease or poorly mended bone fractures, quite apart from the impact on their mental health.

The lives of people seeking protection are determined not only by untenable living conditions, but also by the all-pervasive lack of future prospects. Those who are harshly turned away at the EU's borders cannot expect to find access to their fundamental right to asylum somewhere else. The European Union, laureate of a Nobel Peace Prize, is knowingly and wilfully accepting that people on the move are being trapped in countries with completely dysfunctional asylum systems.

For those who remain in, say, Serbia or Bosnia & Herzegovina and wish to build a life there, access to an asylum procedure and the pathway to lawful residence status constitute an almost insurmountable hurdle. Protection rates are low, case processing takes a long time and the application is often thwarted by a lack of translators, unwilling public agencies and a blatant lack of information about bureaucratic procedures for potential applicants. In Serbia people seeking protection must first declare their intention to apply for asylum, but this is not the same as actually applying for asylum. Once they have their provisional application in their hands they are given 72 hours to report at the camp to which they have been allocated. If they do not do this, they are suddenly in the country “illegally”. There is no support from the public agencies to organise their journey to the camp or to cover the fare. Besides, there is usually no intelligible information in a whole range of languages, which means that applicants are unaware of this tight deadline and often fail to turn up on time. Many police officers simply refuse to register asylum requests. Moreover, language barriers make it nigh on impossible to file an asy-

lum application without the help of legal advice centres and lawyers. But if people are living in remote camps, they lack access to independent advice and support. In 2020 the option to file an asylum application was suspended from March to May, citing the COVID-19 pandemic as a reason, although the application could have been made in writing.<sup>474</sup> In addition, the path to citizenship remains closed to people who have fled their homes. The waiting time for replacement identity papers often drags on for years. Those affected are therefore unable to travel as they wish and their mobility is heavily restricted.<sup>475</sup> Between 2008 (the year that Serbia introduced its asylum system) and 2019, only 156 people applied for protection, and about 40 per cent of those left the country again due to their lack of future prospects.<sup>476</sup> In 2020 the rejection rate for submitted asylum applications was almost 73 per cent, a slight increase on 2019. In 2020 ten individuals were granted refugee status, nine individuals were granted subsidiary protection, but 53 applications were rejected. 89 procedures were terminated because the applicants had already left the country. All in all 145 asylum applications were filed in Serbia in 2020.<sup>477</sup>

In Bosnia & Herzegovina too, the poor capacity for handling asylum applications has led to a backlog of unprocessed cases. The negligible number of individuals who are actually granted a protected status have little prospect of state assistance to enable them to find their feet in society.<sup>478</sup> 244 asylum applications were registered in Bosnia & Herzegovina in 2020. Only one person was recognised as a refugee. 28 were granted subsidiary protection, 62 applications were turned down.<sup>479</sup>

The adverse circumstances, bureaucratic hurdles and harassment with no realistic prospect of improving their lives are the reason why many people on the move continue their journey towards the EU.<sup>480</sup> But the EU shows little interest in improving the situation of people making their way across the Balkans, let alone offering them protection in a Member State. The EU's priorities are to make sure that people on the move stay beyond its borders and to retain its ability to send those who manage to cross those borders back to their countries or origin or else the Balkan transit countries. To that end, it not only approves of those brutal pushbacks, but continues to expand deportation capacities in the Balkans in partnership with Frontex and the International Organisation for Migration (IOM). Apart from outsourcing the task of sealing its borders and building a Big Brother collection of data, it is constructing detention and deportation

centres and implementing “voluntary return” programmes. Ubiquitous police violence, a lack of access to asylum procedures and a practice of systematic removal in the Balkan states – fundamental violations of human rights on a mass scale – meet with no objections from Brussels.

## **Routes to and through Poland, Latvia and Lithuania**

Little attention has been paid to movements of people along the northern route through Eastern Europe that leads from Belarus to Poland, Latvia or Lithuania as not many people used it. However, while this book was being put together in the latter half of 2021 events came thick and fast and we have attempted a provisional summary here.

From the summer of 2021 onwards, Lithuania, Latvia and Poland observed a growing number of people trying to cross their borders on foot from neighbouring Belarus. Most of the people on the move came from Afghanistan, (Kurdish areas of) Iraq and Syria, but also various African countries, and most reached Belarus via Minsk Airport. Despite the dramatic conditions in these countries of origin, neither the general public nor the political community talked about the situation on the EU borders in terms of asylum, protection and people fleeing their homes. Instead, the dominant narrative was that the Belarusian dictator Alexander Lukashenko was luring people to Belarus to use them to put pressure on the EU, or even as a “weapon”, by letting them move on towards the north-western border. There is nothing new about people seeking protection being abused as bargaining chips in the EU’s fortress policy. How vulnerable the EU has made itself to blackmail by awarding contracts to governments ranging from dodgy to dictatorial to keep people on the move away from its borders was evident, for example, in spring 2020 along the border between Turkey and Greece and in May 2021 on the border between Morocco and the Spanish exclave Ceuta.

The EU sealed its borders, ostensibly to ward off Lukashenko’s efforts to blackmail the EU into easing sanctions and recognising his authoritarian regime. The price was paid by the people trapped between border installations who could move neither forwards nor backward. The EU, for its part, had no qualms about depriving these people, who had already been exploited by Lukashenko, of their dignity and their rights and abusing them in this power struggle. On the Belarusian side their path was blocked by border guards while on the other side they were sur-

rounded by EU border forces preventing them from entering sovereign EU territory. Rather than guaranteeing the safety of these people and giving them a chance to apply for asylum, they were brutally pushed back. Barbed wire fences were erected along the border to Belarus at breakneck speed and soon work had even begun on building new walls. Lithuania and Latvia officially announced that they intended to push people back to Belarus – with the excuse that they would indicate the way to an official border crossing-point. Polish officers, meanwhile, instead of bringing people to an official crossing-point to Belarus, abandoned them in the middle of the forest in the border zone. Zydrunas Vaikasas, head of the Lithuanian border unit in Poskonys, commented: “Since August 3rd we have been doing what the Interior Minister told us: if illegal migrants enter Lithuania and thus the EU, we first warn them that it is not legal. If they keep trying, then we should physically push the men back.” Prime Minister Ingrida Šimonytė called the whole effort (including the use of military forces and the construction of a border fence several hundred kilometres long) a “peaceful measure”.<sup>481</sup>

Lithuania amended its asylum law in August 2021, further eroding the right to asylum. In the event of an emergency or other “extraordinary situation” asylum applications can now be rejected if the applicant crossed the border in an “irregular” manner. The government does not seem to be at all disconcerted by the fact that this will be in breach of international law.<sup>482</sup> Other statutory amendments are planned to permit the indefinite detention of people seeking protection if such an “extraordinary situation” arises.<sup>483</sup>

That same month, two amendments to domestic law likewise entered into force in Poland, both of which had serious implications for the situation at the border between Poland and Belarus. The first amendment related to conditions in the guarded centres for foreigners. Keeping these people in accommodation cells with a floor area of two square metres per inmate is now authorised. This means that twice as many people can be detained as before. The effect of the second amendment is that persons who entered the Republic of Poland without authorisation will be instructed to leave its territory immediately and brought back to the border. This makes pushbacks not merely lawful, but regular procedure.

On 2nd September 2021 Poland declared a state of emergency in the region along its border with Belarus and demarcated an exclusion zone

three kilometres wide guarded by 13,000 soldiers and border police. At this time 32 people from Afghanistan had already been stuck for over three weeks near the village of Usnarz Górny between Belarusian border guards on one side and the Polish border police on the other. When the state of emergency was declared, the region became totally inaccessible. These people on the move were denied all contact with anyone on the Polish side of the border, such as employees of civil society organisations, lawyers, journalists or doctors. In addition, they were denied access to food, appropriate shelter and medical care on the Polish side.<sup>484</sup> The people who were lured to Belarus by Lukashenko's perfidious blackmail attempt were brutally pushed back by EU officers, only to be exposed once again to harassment, threats and violence from Belarusian border guards. Their return to Minsk was by now impossible.<sup>485</sup>

Research by Amnesty International showed that the Polish border police forced the 32 people back to the Belarusian side of the border.<sup>486</sup> On 20th October – they were still holding out on the strip between Belarus and Poland – 17 people managed to break through the barbed wire fence that the Polish police had erected around them. They were caught by the border police and pushed back to Belarus.<sup>487</sup> Most of those who, despite all such adversities, manage to cross the border are forced back through the barbed wire to Belarus.<sup>488</sup>

In October Poland had already begun building fortified installations along the border with Belarus and sent additional police and army units into the border area. The construction of a wall two to five metres high is planned for spring 2022.

Poland's rigorous fortress policy is hardly surprising, for in recent years Poland has already violated the rights of people on the move who were trying to reach Polish territory via the official border crossing between Poland and Belarus. The ECtHR has issued several interim measures to Poland to grant applicants access to the asylum system in Poland, but these orders have been ignored and the persons concerned have been sent back to Belarus.<sup>489</sup>

With the latest legislative amendments the Polish government is taking a step further by legalising pushbacks and completely invalidating the rules on protecting refugees. Even if this use of pushback has long since been a reality on the borders of Poland and many other EU countries, this change in the law crosses yet another line: the pretence that



governments are committed to respecting human rights, at least in the legislation adopted, has finally collapsed.

Since then thousands of people have been trapped in the no-man's-land between border fortifications in Lithuania, Latvia or Poland and Belarus as the winter arrived. The fate of these people, exposed to the elements with no rights or protection, is perceived and presented in the EU only as a threat to the external borders.<sup>490</sup> But banishment to the forests of the border region is not merely inhumane and degrading; it is also at odds with European and international law. Despite requesting asylum and despite the legal obligations thus incumbent on EU Member States, the few people who do make it across a border are pushed back by border units, thus exposing them to the violence of the border police in Belarus.

Estonia and the United Kingdom dispatched troops to Poland in November 2021 to support the sealing of the border. Now the people on the move who are stuck there must fear deportation to countries like Iraq and Syria.<sup>491</sup> Laurynas Kasčiūnas, chair of Lithuania's National Security and Defence Committee, responded to the construction of high-tech border installations in Lithuania with the words: "This fence protects democracy."<sup>492</sup> Just a few kilometres away, a four-year-old girl was lost in the biting December cold in the no-man's-land along the Polish-Belarusian frontier when Polish border guards forced her parents back across the line.<sup>493</sup>

In the EU the brutal sealing of the border is predominantly met with approval and the fate of people on the move is dehumanised in the narrative about "hybrid warfare". Frontex boss Fabrice Leggeri declared himself to be "impressed by the means deployed to secure the border" in Poland.<sup>494</sup> The European Council had already let it be known in the summer that the EU and its Member States had increased their "solidarity" through "the deployment of the FRONTEX rapid border intervention and additional technical assistance" and were ready to "strengthen it even further".<sup>495</sup> Meanwhile reports accumulate about fatalities as a result of this cruel fortress policy. Even by mid-November 2021 the bodies of nine people on the move had been found near the border on Polish territory. The media talked of at least 19 deaths in the whole Polish-Belarusian border zone. The hidden number of EU border victims is significantly higher. People on the move have reported further missing persons and deaths in the forests of the border area between Poland and Belarus.<sup>496</sup> People are

dying of exhaustion and cold or from the consequences of violence by border guards. A number of women have lost their unborn children.<sup>497</sup> The EU Commission has meanwhile proposed tripling the border protection budget for Latvia, Lithuania and Poland to 200 million Euro and deploying more Frontex units to the borders with Belarus.<sup>498</sup>

## European Borders Far from the EU

### Where and How Borders can Travel Further than People

The EU shuns neither cost nor effort, nor a moral and legal sell-out, when it comes to sealing its borders. The wide-ranging measures are not confined to border units in Member States and the EU agency Frontex, but are also implemented by countries that do not belong to the Union. Joint border control mechanisms, funding and training for border forces in third countries, readmission agreements and an international “war on traffickers” are designed to stem movements of people long before they reach the borders of the EU and to prevent people from making use of their right to asylum in the EU. The need for protection of people on the move, their physical and mental wellbeing, play just as little part in this as their rights. When the EU invests in non-Member States, so-called border protection always takes priority over notions of human protection or appropriate admission rules or conditions for people fleeing their homes.

Moreover, the EU stands out more for pouring oil on the fire than for combating the reasons why people are forced to flee. Examples are the billions earned by the arms industry, especially in Germany, France, Belgium and (now no longer an EU member) the United Kingdom, in keeping regimes such as those in Saudi Arabia and Egypt equipped with weapons. The same goes for the intervention of EU countries in conflicts and wars, fighting fire with fire. This exacerbates regional and supra-regional instabilities to the enormous detriment of living conditions and the security of the population due to support for militia groups and the fanning of ethno-nationalist hostilities. And the climate disaster, which will be – if it is not already – one of the biggest causes of people leaving their homes, is substantially down to the EU. The 27 countries that currently make up the European Union are together responsible for about 18 per cent of global carbon dioxide emissions since the beginning of the Industrial

Revolution.<sup>499</sup> 16 per cent of the global clearance of tropical rainforest in 2020 is attributed to the EU, although it accounts for just 5.6 per cent of the world's population. The EU thus ranks second among the planet's biggest destroyers of forests.<sup>500</sup> The COVID-19 pandemic, which has only added to the reasons why people leave their homes, has not been adequately contained because of short-sighted, selfish financial interests, including the resolution by the EU Parliament to block the waiving of vaccine patents.<sup>501</sup>

This means that over and above outsourcing of sealing the border, the EU's economic prosperity is founded on externalisation. Much of the value created in the European economy draws on neo-colonial structures and an "imperial lifestyle" where patterns of consumption and production are "based on disproportionate access to natural resources and labour power on a global scale".<sup>502</sup> The hegemony for the alliance of industrial nations that results provides, in turn, the basis for it to negotiate its numerous migration agreements with third countries.

The process of outsourcing border controls by no means stops with immediate neighbours. Adjacent states are not the only ones urged, blackmailed or paid by the EU to keep people on the move away from European soil. So, too, are states that do not share a common border with an EU Member State. The Nobel Peace Prize-winning EU does not confine itself to damaging restrictions on free movement – like EU Directive 2001/51/EC, which required airlines (or any other "carrier") to take responsibility for border controls outside the EU and refuse any passengers who do not have valid papers, even if they would be entitled to protected refugee status under international law. Frontex operations, including executive missions, in third countries *without* a direct EU border have been taking place since 2019. This has extended intelligence, policing and military measures by Frontex to a declared "pre-frontier area" of huge dimensions. This geopolitical extension of European border surveillance includes the analysis and exchange of data with non-EU states.<sup>503</sup>

However, the strongest pillar underpinning outsourcing of border control rests consists in shifting the implementation of the fortress policy to other countries. The negotiations usually lack transparency and are conducted out of public view, ending in informal arrangements without legal status. Money, less stringent visa requirements or conces-

sions on mobility are offered to privileged groups in return for “migration defence”. Otherwise trade sanctions loom if third countries will not be harnessed to the yoke of European border policy. However, because there is an imbalance of power between the EU and its chosen “partners”, these negotiations are not exactly conducted between equals. Economic and political pressure, whether as a stick or as a carrot, impinges on the national sovereignty of the partners in negotiations and all too often relegates the legal status of people on the move.<sup>504</sup> One social consequence of this outsourcing policy is that conflicts are exacerbated in the countries of origin and the countries of transit where people become trapped. While these people find it almost impossible to build an economic livelihood, racism and xenophobia towards people on the move results in criminalisation and stigmatisation.<sup>505</sup>

There are countless reports of systemic violence and violations of human rights experienced by people on the move in regions – like the West Balkans and (North) Africa – where the EU has been particularly active in applying this type of externalisation. It is, in fact, European border and asylum policy that intensifies humanitarian and human rights crises by breaching international law, not least the principle of non-refoulement or the duty to rescue people in distress at sea. This continuing expansion of outsourced border control does not baulk at third countries sending people back to countries where torture and persecution await or at cooperating with authoritarian governments.<sup>506</sup> Those who invoke the fantasy of “mass immigration” in the parliaments of Europe by drawing on concepts associated with natural disasters or wars in order to justify action of any kind are blind to the fact that most migration movements are between countries of the Global South. Involving the International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) is designed not only to legitimise but to beef up neo-imperialist policies. Many of the official but inhumane refugee camps are supervised or even run by these bodies, who thereby assume a share of the responsibility for structures that deprive people of their rights, while those seeking protection are encouraged by staff to return to their countries of origin or at least under no circumstances to apply for their human right to asylum in the EU.

A string of “migration summits” have smoothed the path to supranational and in some cases bilateral agreements with the EU and its Mem-

ber States on restricting migration far away from European frontiers and “readmitting” those who make it into the EU despite all its efforts to prevent this. They include the Budapest Process of 1991, the Tampere Special Summit of 1999, the Rabat Process of 2006 with its focus on migration routes in West Africa, the EU-Africa Dialogue on Migration and Mobility of 2007 and the Eastern Partnership Panel on Migration and Asylum of 2011, which sounded out partnerships with Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine.<sup>507</sup> Now partnerships like this exist with numerous countries that share no border with the EU, such as Ethiopia, Mali, Niger, Nigeria, Mauritania, Senegal, Côte d’Ivoire, Gambia, Ghana and Guinea, or with Afghanistan, Bangladesh, Pakistan, South Korea, Armenia, Georgia and Kazakhstan.<sup>508</sup>

The New Pact on Asylum and Migration of 2020 aims to strengthen these bilateral agreements and EU programmes even more. With this in mind, Brussels and its High-Level Working Group on Migration and Asylum have prioritised five regions: North Africa, the Sahel zone, sub-Saharan Africa, the Western Balkans and the “Silk route” (sic).<sup>509</sup>

A number of financial instruments are available to the EU to maintain “border security” and “migration control” in third countries. By setting up different funds, all with their own durations and vague objectives, a veil is cast over monetary flows and resources that were actually intended for development cooperation but are used for the military equipment of neighbouring states. These are just a few examples: the financing instrument for development cooperation (DCI), the European Development Fund (EDF), the European Instrument for Democracy and Human Rights (EIDHR), the Asylum, Migration and Integration Fund (AMIF), the Internal Security Fund (ISF), the European Neighbourhood and Partnership Instrument (ENPI), the Instrument for Pre-Accession Assistance (IPA), the EU Emergency Trust Fund for Africa (EUTF) and the budgets for the EU agencies Frontex, EASO and Europol. Although tracking funds through these different mechanisms is “fragmented and incoherent”, it is nevertheless clear that the fortress policy forms the common core.<sup>510</sup>

The strategy of “more money for more border control” generates a permanent dependence which particularly affects countries on the African continent and must be seen as a continuation and expansion of colonialism. With its so-called Khartoum Process (formally: EU-Horn of Africa Migration Route Initiative), a summit held in Rome in November 2014,

the EU initiated cooperation with countries in the Horn of Africa. The principal aim of the negotiations was to step up the migration policy partnership between the EU and countries of origin and transit in order to dissuade people in East Africa from seeking protection in Europe. To this end, the EU met with representatives from the countries of origin concerned, notably Ethiopia, Djibouti, Eritrea, Kenya, Somalia, Sudan and South Sudan, and the transit countries Egypt, Libya and Tunisia. In the “fight against illegal migration flows”, the European participants had no qualms about working with the military dictatorship in Eritrea under Isaias Afewerki or with the Sudanese dictator Omar al-Bashir, who was wanted by the International Criminal Court. Payments for outsourcing European border security were made to regimes that were major triggers for people leaving their homes.<sup>511</sup>

Just a year later, in November 2015, representatives of 33 African states met with delegates from 32 European countries for a “Migration Summit” in Valletta, Malta. It was attended alongside the EU by Europol, Frontex, UNHCR and the IOM. Under the guise of “combatting irregular migration”, further measures were resolved to advance the externalisation of the sealed border and to facilitate readmission agreements. The decision was also taken to set up the EU Emergency Trust Fund for Africa, which promised financial support for third countries willing to enter into agreements.

### Niger – Europe’s Deadly Frontiers in the Sahara

How far the EU is prepared to go – in both the geographical and the political sense – in outsourcing its borders is illustrated by the example of Niger. The unbridled assertion of European interests in the landlocked West African state is no less paradigmatic for its blatantly drastic nature. In this chapter we will speak primarily of “migrants”. That is because in this region the boundaries between labour migration and refugee movements are fluid. Besides, the people on the move on this route tend to apply the term “migrants” to themselves.

Mobility is an ancient phenomenon in the Sahel zone and a major feature of social and economic life in the region.<sup>512</sup> One country that plays a significant role within this mobility is Niger. The country has eight regions – Agadez, Diffa, Dosso, Maradi, Niamey, Tahoua, Tillabéri and Zinder – and a surface area of 1,267,000 square kilometres. It has borders

with Libya, Algeria, Nigeria, Benin, Burkina Faso, Mali and Chad. As there is widespread poverty, the country is heavily dependent on international aid – a factor that the EU has been exploiting relentlessly for years.

If we analyse the various forms of migration in Niger, we see that it is at one and the same time a country of origin, transit and destination.<sup>513</sup> Historically, however, Niger was above all a country of emigration, with Nigeriens migrating into neighbouring countries. Even today, many leave the country for the north, intending to return home once they have earned some money abroad, so that much of Niger's migration is temporary, seasonal and circular, and this ties in with the agricultural character of the Nigerien economy. Most of these people settle temporarily in Algeria or Libya.<sup>514</sup> Nigerien migrants heading north are joined by citizens of other African countries who have to travel through Niger to reach countries in North Africa. As Niger lies on the route between West and North African states, it is regarded today as an important area within the trans-Saharan migration corridor and has become one of the key countries of transit for various forms of migration.<sup>515</sup> The people who cross the country originate mostly from Nigeria, Mali, Senegal, Guinea, Guinea-Bissau, Côte d'Ivoire, Gambia, Liberia, Sierra Leone, Burkina Faso, Ghana, Benin and Togo.<sup>516</sup>

In theory, many of them are able to enter Niger legally, as their countries of origin belong to the Economic Community of West African States (ECOWAS), where there is free mobility: in May 1979 the members of ECOWAS adopted their first Protocol relating to Free Movement of Persons, Residence and Establishment, which enshrined the right of ECOWAS citizens to freely enter Member States without a visa and to reside and establish themselves in such states in order to carry out economic activities.<sup>517</sup> To facilitate the free circulation of persons in the region, the ECOWAS members designed a common passport known officially as the ECOWAS passport, which was introduced in December 2000. In practice, however, many migrants travel without adequate papers. Those who do not have the proper documents to prove that they are citizens of an ECOWAS country must pay a higher price at the checkpoints than international migrants with a passport, but in this way they can often pass the border into Niger.

To reach North African countries like Libya or Algeria, people must pass through the town of Agadez. As it lies south of the desert, it is a major

node on the North African migration route. The fact that everyone has to stopover in Agadez on their way to their destination has led to local businesses being set up, especially for the provision of transport and accommodation. As a consequence, migration has generated economic opportunities in a region with few alternatives and has thus become an integral part of daily life. Migration has brought livelihoods to people in the region and is now a resilience strategy essential to survival.<sup>518</sup> Once travellers have spent some time in Agadez, they usually continue their journey through the Sahara to reach their destination. After leaving Agadez, the road forks. One way leads through Arlit towards either Tamanrasset in Algeria via the border point at Assamakka or across the border at Tchibarakaten towards Djanet. The other route leads via Séguédine and security points in Madama and Dao Timni, then crosses the Libyan border to Sebha. On their route from Agadez to the North African borders, the migrants pass additional checkpoints where both the drivers and their passengers are charged a transit fee, and in this way too the region profits from the migratory movements.<sup>519</sup>

Nowadays migration policies in Niger are deeply influenced by European interests. The presence of foreign countries in the Sahel zone increased in particular after 2013, when France launched “Opération Serval” to combat Islamist groups in Mali. Building on this a range of international troops were stationed in Niger. Officially this is an anti-terrorist operation, but it also includes tasks such as border control, securing access to natural resources and “migration management”.<sup>520</sup> Apart from the deployment of international troops, the biggest mission operates under the name “EUCAP Sahel Niger” (EU Capacity Building Mission in Niger).<sup>521</sup> The mission was born in 2012 as part of the EU’s Common Security and Defence Policy and it focused on three main topics: training Nigerien security forces, strengthening the ability of the security sector to combat terrorism and organised crime, and improving human resources. But supporting the security forces to control migratory movements more effectively and to combat “irregular migration” in the region were additional objectives.

In terms of migration, the EU began in 2015 pursuing a stronger crisis narrative that links migrants in Niger to a threat to the EU’s stability, terrorism, criminal activities and social unrest.<sup>522</sup> As a consequence, defining migration as a security problem led to so-called security measures



and the task of containing migration was shifted to the regions of origin. Presenting the desert as an uncontrolled space exploited by human traffickers shifted the focus of EU politicians to the Sahel zone and the Sahara. Since then, migration in Niger has been an official concern of the European partners and Niger became one of the five focus countries in the EU's "new Partnership Framework" with third countries established in 2015 under the European Agenda on Migration.<sup>523</sup>

The Migration Summit in Valletta was another important event in further consolidating European engagement in Niger. It was held in November 2015 and was intended to bring the EU and African countries together to build a partnership and identify purportedly common solutions to mutual challenges. The outcome was an EU Action Plan against "migrant trafficking".<sup>524</sup> The EU Emergency Trust Fund for Africa (EUTF) was created as a result of this Action Plan. For five years, and with a total budget of 4.2 billion Euro, the EUTF has been funding projects to address root causes of irregular migration and to secure borders in 26 African countries with a focus on North Africa, the Horn of Africa, the Sahel zone and Lake Chad. The largest chunk, altogether about 247.5 million Euro, has gone to Niger. Twelve national projects are currently being financed by the EUTF.<sup>525</sup> Partners in these projects include, amongst others, the IOM, the German development agency GIZ, UNHCR and the Belgian and French development agencies. Altogether 25 per cent of the EUTF budget is earmarked for border administration and security. Only 6 per cent of the budget, by contrast, is available for short-term economic alternatives.<sup>526</sup>

The EU's commitment to the country is justified in terms of the alleged link between stability in the Sahel zone and the EU's security. As described above, Niger, one of the world's poorest countries, is highly dependent on development aid and needs donor funds not only to reduce national poverty but also to prevent political unrest as a consequence of these economic difficulties.<sup>527</sup> Developing a strategy to combat "irregular migration" has inevitably become a priority for the Nigerien government – without it being a real problem for the country.

An important law enacted in Niger a few years ago is its Act 2015-36 on Unlawful Trafficking in Migrants (*Loi 2015-36 Relative au Trafic Illicite de Migrants*), which reflects the externalisation efforts of the European Union in the Sahel zone and demonstrates how deeply rooted Europe's

influence on migration policies in the region has now become. On 26th May 2015, under pressure from its European partners under the New Partnership Agreement of 2015, the Nigerien government adopted legislation that forbids Nigeriens to transport international migrants from the town of Agadez towards the north.<sup>528</sup> Whereas migrants are not punishable under the Act, penalties now await the drivers of their vehicles. If drivers who are carrying third country nationals northwards from Agadez are arrested, they are charged with human trafficking and their vehicles are confiscated. After this law was adopted, all those who had been facilitating transport were told to cease their activities immediately. In return for putting an end to their local transport operations, these former drivers were promised alternative financial support to set up new businesses, from which very few currently benefit. Instead, the law led to an economic standstill in the Agadez region and a large proportion of the population who had hitherto been living off migration in the broader sense suddenly became unemployed.

Today both the transport companies and migrants have devised various strategies for getting round the new restrictions. However, the controls on official routes and the criminalisation of transport carriers have made migration to Libya and Algeria more expensive and dangerous.<sup>529</sup> The testimonies of those who risk their lives to cross the desert on routes declared unlawful are distressing to read: "No water, no water. My body was dead but it kept on walking, it was already in another world, only my spirit kept on walking. I could see the souls of my ancestors, like angels, I was really almost dead. (...) In Niger you pay for your death."<sup>530</sup> Transport companies are now obliged to use unofficial routes, for which local security officers demand bigger bribes. Although the law purportedly only targets international migrants and is intended to stop them continuing their journey to the north, the official figures for Nigerien migrants have also dropped. This has huge consequences for the local population, for whom the income from different types of migration is an important factor in their own resilience strategy to counter unemployment, poverty and drought to some degree.

Apart from Act 2015-036 and several working groups involving representatives of both civil society and government bodies, national migration policy in Niger currently seems to be pursuing two tracks. Both are another example of the powerful European influence on Nigerien migra-

tion policy. The first was developed in 2016 after a visit by EU Commissioner Christos Styliandis in July of that year and is known as the “Migration Platform” (*Cadre de Concertation sur la Migration*). The purpose of this platform is to formulate broad migration policy recommendations. It is led by the head of the EU delegation and by the minister of home affairs. This platform, however, also received its funding from the European Union. Although international and national stakeholders take part in the biannual meetings, the civil society stakeholders constantly point out that the choice of invited organisations is determined by the extent to which they concur with the interests of the European donors.

The second track is the Cross-Ministry Migration Committee (*Comité Interministériel chargé de L'Élaboration du Document de la Politique Nationale de Migration*), which has the task of developing a national migration policy. Its members, apart from representatives from nearly all the ministries, include UN bodies, the national Human Rights Council and two civil society organisations.<sup>531</sup> Historically speaking, this committee was formed back in 2007, when its members were primarily consulted on issues and strategies relating to irregular migration, but in 2017 the German development agency GIZ reactivated the committee as part of its “migration policy advice” project, which was designed to last three years and funded to the tune of 3.25 million Euro by Germany's Federal Ministry for Economic Cooperation and Development.

Apart from these national strategies, international organisations play a decisive role in Niger. In 2015/2016 the IOM and its partners set up a Migrant Resource and Response Mechanism to draw up a comprehensive migration management strategy and purportedly help to enhance security and stability in Niger. This mechanism has three main objectives: humanitarian assistance for migrants in transit centres, support for what it calls Assisted Voluntary Return and Reintegration (AVRR), and promoting cooperation between countries of origin and transit.<sup>532</sup> Under the umbrella of the Migrant Resource and Response Mechanism, the AVRR programme targets people who decide to go back to their home country “voluntarily” but do not have sufficient resources to do so. Between 2015 and 2018, 11,936 migrants returned through the AVRR programme.<sup>533</sup> Just how voluntary these return mechanisms are remains, however, an open question, as the programme illustrates the underlying connection within IOM structures between a superficially humanitarian discourse

and a migration control agenda.<sup>534</sup> Studies and interviews with “voluntary returners” suggest that return was often presented to them as the only option and that in particular promises of support in their countries of origin have been met inadequately or not at all by international organisations.<sup>535</sup>

In addition, and as part of the Migrant Resource and Response Mechanism, the IOM has begun, with the support of Niger’s government, to carry out search and rescue operations for people stranded in the desert. By August 2019 the IOM had rescued about 20,000 people in the Sahara. Once they are brought back, they can receive support in six transit centres which are run by the IOM with financial support from the EU. There are however multiple indications that this support comes on condition that migrants must opt for “voluntary return” and reintegration. As a result, according to IOM statistics, nearly all the rescued migrants choose to take part in the AVR program, reflecting the organisation’s strong alignment towards returning migrants to their countries of origin<sup>536</sup> and sending a clear signal that the purported assistance is not available if it is subsequently apparent that people have left the country again as fast as they can.

One of the most recent schemes to be implemented in Niger is the Emergency Evacuation Transit Mechanism (ETM). In 2017 UNHCR created an EU-funded ETM to make it easier to evacuate to Niger the “refugees and asylum-seekers” stuck in Libyan detention centres who are seen as most at risk. After a Memorandum of Understanding between UNHCR and the government of Niger was signed in 2017, a total of 3,080 “refugees and asylum-seekers” had been transferred to the Nigerien capital Niamey by July 2020, where their status was to be determined before transferring them on to third countries. If what is dubbed their refugee status is effectively determined, the process with countries of resettlement begins, the aim being to resettle them quickly in a European or North American country. Although the operational partners such as UNHCR and government bodies have strongly promoted this approach, the mechanism has attracted criticism – quite rightly. The government of Niger only consented to this mechanism on condition that all the evacuees accorded what is dubbed refugee status would be rapidly resettled. However, the process turned out to be far more long-winded for UNHCR than expected and the partner countries are not willing to cooperate. Consequently, the

resettlements are not happening as fast as they should and the mechanism cannot keep up with the waiting list. Some of the first people who were evacuated in 2017 are still in one of these centres in 2022.<sup>537</sup> As a result, large groups of people on the move are holding out under very poor conditions in transit centres in and around Niamey. After protests about the conditions in 2018, the Nigerien state was obliged to suspend evacuations for three months, although they later recommenced.

An additional challenge for the ETM in Niger is the lack of a solution for evacuees whose refugee status is not recognised by UNHCR and who therefore do not qualify for the resettlement programme. Integrating them into Nigerien society does not appear to be an option that the government is keen to pursue, while resettlement in their own countries of origin poses a problem, as negotiations with the governments concerned usually lead nowhere and many people on the move do not wish to return to their countries of origin. In the light of all this, the question arises as to why the government of Niger was prepared to take on an additional challenge such as implementing the ETM. One reason could be that on one level this is a win-win situation for both sides: the country benefits financially from the support of the programme donors and can stabilise its economy, while the European partners can once again outsource some of their migration management to other countries. In this manner, Europe can preserve a humanitarian veneer by funding the ETM in Niger, while the government of Niger continues to profit from the “development aid” that it is so dependent on.<sup>538</sup> The encroachment into national sovereignty, the general restrictions on free movement and the economic wreckage wrought on large groups of the population who used to earn a living from migration-linked services play as little a role in this as the living conditions and prospects for people on the move.

The massive influence wielded by European partners – be it in the form of Law 2015-036 or their influence over national legislation and the ETM – leaves Niger's decision-makers facing a dilemma: on the one hand there is the legal framework of ECOWAS, with its free movement of persons and goods within the region, and on the other the pressure on the Nigerien government from European partners to implement the EU's externalisation practices in return for development aid. This means that Niger is now markedly dependent on financial support from the EU. And yet the implementation of Nigerien policy does not serve the interests of

the Nigerien people, but those of the European donors, who will carry on pumping plenty of money into the country to combat migration movements there.

The case of Niger – which is valid for many other African states – clearly demonstrates how the Global North is still exploiting dependencies created during colonisation to pursue its own economic interests under the mantle of “development cooperation” and at the same time to ward off migration at any cost.

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# The Criminalisation of People on the Move

**Not only does the European Union** deny people on the move safe, lawful entry paths and try to prevent their entry with the aid of brute force, but people on the move are also increasingly criminalised for the simple fact of being in transit. In the European Union, people are detained on a mass scale, deported as “punishment”, charged with steering the boat in which they were fleeing. The woman who set fire to herself in despair because she saw no way out of her situation is treated as a criminal, like the father whose child died on the journey. In discourse and in courts, mobility of people viewed as being unwanted is addressed as a criminal offence, and even denounced as a danger and threat to security in Europe. All kinds of assistance, from making a soup or letting a flat to life-saving action such as rescuing people in distress at sea, is criminalised as “facilitating unauthorized entry or residence”. Every protest is followed by another wave of repression.

There are many facets to the criminalisation of people on the move and it happens at very different levels. Sometimes it is blatant and visible, while other factors accumulate successively and contribute in less obvious ways to presenting migration as a criminal act and “penalising” it accordingly.

Criminalising the mobility and the sheer existence of people on the move is a fundamental feature of Europe’s fortress policy. If people on the move manage to reach the EU despite the many obstacles placed in their way, they are denied their political and social rights. They are stigmatised, monitored and socially isolated as dangerous criminals. As part of a systematic policy of deterrence, their lives are made as difficult as possible.

This is well illustrated by some of the remarks that have been made by leading European politicians. “They are unwanted in Denmark. And they

will feel like that,” warned Denmark’s former Minister for Immigration and Integration Inger Støjberg on Facebook.<sup>539</sup> Adonis Georgiadis, the vice-president of Nea Dimokratia, the governing party in Greece, struck a similar chord with brutal frankness: “To make them stop coming, they have to hear that things are bad for the ones who are here.”<sup>540</sup> The former British Prime Minister Theresa May was no less blunt when she said her aim “was to create here in Britain a really hostile environment for illegal [sic] migration”.<sup>541</sup>

Besides, criminalising people serves the essential function of suggesting that there are legitimate reasons for the exclusion, deprivation of rights and degrading violence that these people suffer along Europe’s borders in the name of “national sovereignty” and “border security”. Presenting the general public with an image that links people on the move to crime and a variety of threatening scenarios in diffuse or sometimes specific ways justifies and facilitates inhumane treatment and the use of force: “in this way events that are intolerable in terms of human rights [can] be integrated into the moral consciousness as normal.”<sup>542</sup>

Such border practices and the controls and decisions associated with them about whether to include or exclude someone are not confined to the external borders of a territory. They also extend to the boundaries between people viewed as belonging and people who are not seen as belonging. This boundary is drawn in many places and on numerous occasions within a territory as well, and that is an everyday experience for many people – for example, in the way they are accommodated, in bans on working, in the constant risk of detention or deportation, etc.: “The border is everywhere.”

## **Mobility as a Crime**

In November 2020 a young man was arrested on the Greek island of Samos after his six-year-old son perished on the sea crossing from Turkey to Greece. The dinghy sank after it was driven against the cliffs on the island’s rocky coast. The passengers fell overboard and the child drowned in the waves. His father was charged with “endangering the wellbeing of a child” because he had exposed his son to a life-threatening risk by crossing the sea. He faces up to ten years in jail. As far as anyone knows, he is the first person in Europe to be held responsible for the death of their child while fleeing. There had already been shipwrecks in the Aegean Sea



when parents lost children. In 2015 the photograph of little Alan Kurdi lying dead on a beach circulated around the world. At the time there was an international outcry, and the grief of the father who was the only family member to survive was hard to imagine. “People must not look away from the terrible things happening on the way to Europe just because we cannot get a visa. I cry every time I hear a boat has gone down,” said Alan’s father Abdullah Kurdi.<sup>543</sup>

For a brief moment the call for legal and above all safe entry routes grew louder. Move on a few years and a father with the same fate is blamed for his son’s death. That is not simply cruel and disrespectful; it equates to a de facto criminalisation of fleeing one’s country, because fleeing to Europe inevitably means exposing one’s self and one’s children to danger. Even after the death of the two Kurdi children and their mother<sup>544</sup> and many other people, lawful routes of entry are denied to people on the move. Quite the reverse. The routes are becoming increasingly arduous and dangerous – and the blame for that lies with a conscious decision by European politicians, not with a father seeking a better life for himself and his children.

The accused father has since been granted asylum in Greece, which means that he has a right to be there even by Europe’s laws and standards. The price he had to pay for access to that right was murderously high.

“This policy is so irresponsible that it is morally closer to the recklessness of manslaughter than to the virtue of rescue. It showers fortune on the few, kills thousands, and ignores millions.”<sup>545</sup>

Even if the case of the young father reflects an unprecedented phase of escalation, it sits well with the deliberate criminalisation of people on the move, which is perfidiously justified as protecting the very people it aims to deter.

For years, on a pretence of “anti-smuggling measures”, people have been systematically arrested on Europa’s maritime borders for “driving” a boat, i.e. steering the vessel used for transit, and charged and detained for “facilitating unauthorized entry”. It is obvious that this is by no means about tackling “heartless smuggling networks”, protecting refugees and preventing fatalities at sea and land borders, not only because there are far more effective options, such as states carrying out their own sea res-

cue operations or at least not actively trying to stop NGOs from rescuing people. If this was really about protecting people on the move, the politicians responsible should be making sure that people on the move never become dependent on third parties and do not have to undertake perilous journeys like Mediterranean crossings. Relying on smugglers is often the only option open to people for getting from A to B, and the profile of the smugglers is not always the one suggested by European agencies.

The true purpose behind the countless arrests for “smuggling” is revealed in particular by the fact that most of those detained are people on the move. They take the helm because someone has to do it; some steer a boat because they cannot pay to cross as passengers (or to take their families too) and they can lower the price by taking on this task; others steer the boats because they are forced to do so at gunpoint or with physical violence. However, people who have steered boats are usually convicted even when other passengers confirm the facts of the situation before a court or testify that they owe their lives to the defendant, even when the defendants are travelling with children, parents and siblings, even then and without any evidence to the contrary being submitted. Moreover, in many cases these charges and arrests are entirely arbitrary, as when the police or coastguard cannot indicate for certain who really was at the helm, as survivors reported in a case in the Canary Isles, when the boat drifted for days in the Atlantic and the people on board threw the corpses of their dead companions into the water one by one, including the “driver”.

Instead of preventing deaths, this criminalisation practice in the Central Mediterranean has driven up the number of fatalities and contributed to some of the worst maritime disasters in recent history.<sup>546</sup> As air surveillance images are often used to identify the (alleged) pilot, the presence of aircraft has in some situations triggered emergencies at sea, because the “skipper” moved away from the engine as a plane approached in order not to be filmed in its vicinity.

It is not deaths in the Mediterranean that the European Union and its Member States are fighting, or the violent treatment or exploitation of people seeking protection. It is their *arrival*. The EU does not ultimately care who steers the boat and whether they are earning money or are helping or are themselves people on the move. All that matters is that

newcomers stop arriving. And one way of doing this is to ensure that nobody will dare to steer a boat bearing people on the move or – on land – to give them a quick lift in a car. Even if the person concerned is heavily pregnant or needs urgent hospital treatment.<sup>547</sup> The primary objective is and remains deterrence.

In Italy, on average, one person is arrested for every 100 who arrive. In Greece it is estimated that one or two people are arrested off every boat that arrives, although the number of passengers there is usually much smaller than in the Central Mediterranean.<sup>548</sup> In the United Kingdom the government has been applying this practice since 2019, after arrivals via the English Channel rose. About 20 people are currently believed to be in custody there.<sup>549</sup> Under the new Nationality and Borders Bill the maximum penalty would increase to a life sentence. In Greece, according to official statistics from the Greek Ministry of Justice in 2019, people imprisoned for “facilitating unauthorized entry” make up the second largest group in Greek prisons (1,905 persons). In Italy the number of people arrested since 2013 for (allegedly) steering a boat is estimated at 2,500. Penalties there range from two to 20 years, but in some cases life imprisonment.<sup>550</sup> The penalties in Greece are especially draconian. Here “facilitating unauthorized entry” often attracts a harsher punishment than murder. The sentence is calculated on the basis of how many people were carried, with *up to* ten years per person in a “simple” case. In the event of aggravating circumstances, such as “endangering human life” (if, for example, the ship goes down or more generally if the vessel is unseaworthy), the sentence will be *at least* ten years per person. If anyone dies, the punishment is lifelong imprisonment – per fatality.<sup>551</sup> That was the tariff for 23-year-old Hasan from Afghanistan, who risked the crossing to Greece with the above-mentioned father and his son and took the helm: 230 years plus life.<sup>552</sup>

Because the penalty stands to be so severe and because defendants have no fixed abode, the authorities basically assume that there is a risk that they will abscond. In other words, once charged they are placed in custody straight away and are obliged to remain there throughout the judicial proceedings, including any appeal, until the final ruling. What that means in concrete terms is that usually these people are separated immediately after arrival from the rest of their group, from children, parents, partners and siblings, subsequently spending years in prison with-

out having been found guilty of anything by a court. Samuel D. [name changed] was arrested for “aiding and abetting” and placed in custody in Greece in October 2019. The matter first came to court in September 2020 – when Samuel had already been in prison for almost a year. He appealed after he was sentenced by the first court. The hearing was scheduled for June 2022, by which time he will have spent almost three years behind bars without a final court judgement. “In this way we make criminals of asylum-seekers who have no choice but to take the helm of a boat,” said lawyer Dimitris Choulis, who acts as counsel in many cases like this.

It is not just that years are taken away from a person’s life; once they are released, their new life in Europe begins with a criminal record and stigma. To make matters worse, in many cases a criminal record will even lead to international protection being refused once the prison sentence has been served so that the person can be deported directly. Subsidiary protection, for example, can be denied if someone has been convicted of a criminal offence subject to a minimum prison sentence of three years.<sup>553</sup> There is thus an intricate relationship between the EU’s three guiding principles of deterrence, closed borders and deportation and the result is to deprive people on the move of every possible right.

But the criminalisation of people on the move does not begin in the police stations and courts of Europe. Its foundations are frighteningly deep. By using disparaging terms such as “asylum tourism”, “asylum shopping” and “illegal immigration”, European politicians have for years not only been systematically casting aspersions on the motives and legitimacy of people seeking protection. They also give the impression that this is necessarily linked to crime. The term “illegal” attaches a criminal status to people whose only “crime” is to be in breach of administrative provisions in the context of migration law. Usually a person seeking protection has no choice but to enter a country in an “irregular” manner in order to apply for asylum – which they are entitled to do under European and international law.<sup>554</sup> Article 31 (1) of the Geneva Refugee Convention provides that penalties shall not be imposed for “illegal entry”. However, the term “illegal” suggests that those seeking protection have no right to come to Europe or to be in Europe, or indeed that this is a punishable, criminal act. The way in which these words are applied arbitrarily and indiscriminately to entire groups of people in public discourse (as in the slogan: “Stop illegal migration!”) shows that this is about smear-

ing, stigmatising and denying all legitimacy to unwanted migration, and not – as is often claimed – about “protecting the right to asylum” or the “rule of law”. Quite the opposite. There are all kinds of reasons why people can find themselves in a situation without the “right” papers, and it very rarely has anything to do with committing a crime. However, the “illegal” tag stigmatises people as inherently criminal simply because they are on the move and leads to them being treated as if they deserved no rights.<sup>555</sup> For a long time, attention has been drawn from very different angles to the serious implications of this language. Indeed, back in 1975 there was a call at the United Nations General Assembly to use the word “irregular” or “undocumented” rather than “illegal”. And yet these terms continue to be applied systematically.<sup>556</sup> Aviva Chomsky criticised the practice by pointing out: “When we use the term ‘illegal’, we are implicitly accepting the idea that all people are not created equal, that all people do not deserve equal rights, and that the law should treat people differently depending on the category they are assigned to.”<sup>557</sup>

In another mantra, official EU documents and publications almost always talk about migration that is not permitted in the same breath as “combating smuggling” and “anti-trafficking”, vaguely linking migration per se to criminal behaviour. No distinction is made in this wording between the crime of human trafficking, which is by definition a violent form of exploitation, and (commercialised) assistance for refugees, consequently encompassing the latter category of assistance within the former, markedly stigmatised category. Moreover, the EU’s “fight” against people who are fleeing their homes is spun as an attempt to protect them.

Certainly since the attacks on the World Trade Centre on 11th September 2001, if not before, migrants have been presented as a fundamental threat to security in Europe. Framing people in need of refuge as a threat is by no means a stratagem confined to the far right. Scary, dehumanising concepts like “flood”, “avalanche”, “tsunami” and “invasion” are common currency in the media and also in public statements by politicians when describing people who flee to Europe because of climate disasters, exploitation, war or the lack of a future. It is the dominant narrative: in strategy papers, on websites and in speeches at both national and European level, “irregular” migration is systematically lumped together with organised crime, benefit abuse, drug dealing and even terrorism. When the EU issued a declaration, for example, to mark the 50<sup>th</sup> anniversary of

the Treaty of Rome, it actually boasted: “We will fight terrorism, organised crime and illegal [sic] immigration together.”<sup>558</sup>

After attacks and acts of violence, politicians often call volubly for border controls and asylum law to be tightened or for a “security check” on *all* refugees.<sup>559</sup> Even if the culprit is a citizen of the country, as with the London bombings in 2005. This creates the impression that violence and terrorism are the result of “irregular” migration and asylum-seekers are stigmatised *a priori* as dangerous – with portentous consequences. In summer 2021, when global attention was focused on Afghanistan and the people trying to escape from there, the EU Commission urged Member States to screen fleeing Afghans as they entered the EU in order to “minimise security risks” and ensure that nobody was admitted who “could pose a security threat towards the European Union”.<sup>560</sup> This “screening” practice is one of the reasons why evacuating local workers from Afghanistan has proved to be such a slow process – with lethal consequences. By December 2021 the Taliban had killed at least 100 people who had previously worked with Western troops.

Issues relating to asylum and migration become elementary security issues when “irregular migration” is called a “serious threat to security”, an “attack” and even a “war”,<sup>561</sup> which therefore has to be averted. The border policy pursued by the EU is presented in this context as a necessary measure to ensure the safety of the European population.

The role this security discourse plays in denying people their right not only to asylum but also to life was blatantly clear during the events along the border between Poland and Belarus in the autumn and winter of 2021 or along the border between Greece and Turkey in spring 2020. In both cases, European politicians talked of “hybrid warfare” by hostile countries intended to “destabilise” the EU.<sup>562</sup> Although these accusations were aimed at those in power in Turkey and Belarus, the presence and potential arrival of people on the move was labelled as nothing less than a “weapon of war” and categorised as a fundamental threat. When you are under threat, you protect, arm and defend yourself. And that is how the EU Member States have been dealing with those caught in the crossfire whose need for and right to protection is overlaid by the image evoked that couches them as the enemy. These processes are part of an ongoing securitisation and militarisation of European migration policy that construes “irregular” migration as a crisis and a danger, thereby lay-

ing the basis for “exceptional measures”.<sup>563</sup> These include increasingly restrictive asylum laws, militarised border installations, surveillance, and mass detentions and deportations. The security policy framing legitimises monitoring of people on the move, locking them up or allowing them to freeze to death in a forest for all to see. The images that emerge in the process – such as those of heavily armed border guards patrolling with dogs along high-tech border facilities – (re)produce in turn the construct of newcomers as a security risk, reinforcing the picture of threat that triggers an evolving spiral of violence.<sup>564</sup>

### **Systematic Disenfranchisement and Oppression**

The effect of broadly criminalising refugees is to deny people seeking protection the supposedly universal human rights that are equally applicable to everyone. When Greece officially announced at short notice in March 2020 that it was going to suspend a human right – the right to asylum – for a month, it did so citing a “state of emergency” resulting from the “sudden *inflow* [sic] of third country nationals”. It should really be self-evident that terms like “human rights” and “suspension” do not go together, but an “emergency” on the Turkish border was used to justify exceptional measures and to make the impossible possible. These people were not refugees, explained the Greek Prime Minister Mitsotakis, but an “attack” by neighbouring Turkey, so new arrivals seeking protection should all be sent straight back without registering their asylum applications in Greece. As we have already described, it is common practice in many places across Europe for public agencies simply to ignore asylum applications and to pushback people seeking protection. Using unlawful and even violent means. So far, the governments responsible have officially denied this or have insisted that the shockingly brutal and evidently orchestrated pushbacks had happened without their knowledge and certainly not on their instructions. In Greece, however, the unlawful procedure was officially justified in the light of an “exceptional emergency” – eliciting praise and support from the European Commission, which thanked Greece for acting as Europe’s “protective shield”. Dozens of people were detained immediately upon arrival and, contrary to the Geneva Refugee Convention, sentenced to prison for “unauthorised entry”, many of them in summary proceedings;<sup>565</sup> according to the Greek Council for Refugees there were even minors among them.<sup>566</sup>

Warsaw went a step further when, in mid-October 2021, the Polish parliament voted to change the law, granting lawful status to pushbacks which are in breach of international and European law.<sup>567</sup> Since that point, asylum applications no longer have to be examined if the applicant did not enter the country directly from a territory where he or she was at risk. Together with eleven other EU Member States, the Polish government had one week earlier sent an open letter to the European Commission arguing “that the EU needs to adapt the existing legal framework to the new realities” and calling for a revision of the Code that would authorise pushbacks across the EU in the face of “hybrid threats” and “hybrid attack”.<sup>568</sup> Backed by a discourse that presents newcomers as a weapon, thereby dehumanising them, people seeking protection are detained without food in freezing temperatures in a border no-man’s-land. A “state of emergency” is proclaimed that does not allow anyone to come near the people seeking protection, including aid organisations, lawyers and journalists. The resulting immediate threat to the life and limb of these people, meanwhile, is not considered to be an emergency. Their suffering and death are apparently not worth being treated as urgent and are thereby normalised. The state of emergency couches some people’s mere existence – freezing cold, hungry and seeking protection – as an exceptional threat to Europe. That is how a decision to build a wall with a surveillance system and motion detectors for 366 million Euro could be fast-tracked.<sup>569</sup> In late December 2021, at least 19 people had already died on the Polish-Belarusian border.<sup>570</sup>

While refugees are denied their rights in some places, in others these rights are interpreted or amended so that they can be turned against them. As criminal and residence law become increasingly intertwined, instruments that authentically derive from the field of criminal law and that are associated with this in the public mind, including detention and jail sentences, are applied to enforce migration policy. At the same time, “migration management” mechanisms such as deportations and removals are used to fight crime. This trend is known as “crimmigration” and it is both a consequence and a cause of the criminalisation of people seeking protection. It erodes protection rights and guarantees intended to ensure that those concerned benefit from due process and it reinforces their public perception as criminals.



Pinto de Albuquerque, a judge at the European Court of Human Rights, put it this way: “This has been called the crimmigration trend. Tinged with the ignoble legacies of racism and xenophobia of the 20th century, this policy perceives the migrant as the newest “enemy”, a social outcast whose presence is no longer a valuable contribution (...) but instead endangers social order, the social-security balance and the organisation of the labour market, if not the continent’s ethnic and religious fabric. (...) [This is a] strong-armed social control strategy which demonizes irregular migrants as criminals.”<sup>571</sup>

The blurring of criminal and residence law can easily be observed in the mass detention and internment of people on the move. The number of migrants, asylum-seekers, rejected asylum-seekers, stateless persons and persons without a residence permit in detention has reached unprecedented levels in Europe.<sup>572</sup> As well as a rise in the number, capacity and take-up rate of detention centres, the legal basis and duration of detention are constantly being extended. Detention of people seeking protection has long since ceased to be the exception and has become standard practice. Estimates suggest that about 600,000 people a year are detained in the European Union without ever committing a criminal offence, often for lengthy periods and without proper judicial review or accountability – merely because they (allegedly) did not comply with the rules for crossing the border or for residence.<sup>573</sup> People can be detained because they are on European territory without a residence permit, because their entry was refused at an EU border, following rejection of their asylum application and in some case while the asylum application is being examined.<sup>574</sup> Although European legislation provides that detention in a migration policy context must always be a last resort and that the duration must be as short as possible, Member States’ rules setting out procedures for ordering, extending or limiting detention are often so vague that custody degenerates into an arbitrary tool. For example, EU countries systematically intern people so that they can be later be removed, even when there is currently no prospect of removal. The European Return Directive does actually define a maximum period of detention, but even this is 18 months and can be extended by various means.<sup>575</sup> Using detention for the purposes of migration policy – sometimes years of imprisonment cloaked as a standard administrative procedure – has been trivialised and institutionalised at European level.

In Greece, domestic legislation allows detention to be extended in breach of international and European provisions until a removal can be enforced. The United Kingdom, a former member of the EU, also imposes no limit on duration. There, the longest period that someone was kept in detention by applying administrative residence rules was more than six years.<sup>576</sup> In countries where there are laws or administrative rules to set maximum lengths of detention, these are often bypassed by ordering a person's release only to detain them again a little later on the same grounds.<sup>577</sup> Whereas criminal law prescribes certain protective and procedural standards for the accused, these do not apply when people are in detention awaiting removal, as the rules here fall under migration law and were not designed as punishment.

In detention, a person seeking protection becomes a prisoner although they have not been convicted of any crime. Since 2010, EU legislation has actually precluded locking people up in ordinary prisons for purposes of migration control. There is a rule known as the separation principle, which requires that when migrants are detained on administrative grounds they must be kept in dedicated facilities and only in exceptional cases – if, for example, a Member State has no such facility especially for the purpose – in a regular prison, and even then they must be separated from the criminal prison population. Many countries, however, simply ignore this requirement or else intern “unwanted” persons in places that are not officially prisons but are ultimately not very different.<sup>578</sup> In all these cases, these people are treated like convicted criminals.

The mass detention of migrants generates both the crime of being “illegal” and the criminal profile of the “illegal person”. This is a vicious circle legitimated by the detention: these people could be criminals, and so they must be held in custody; and they must be criminals because they are in custody.<sup>579</sup> These prejudices and stereotypes are subsequently extended to people who are not in detention. Migrants become “detainable subjects”,<sup>580</sup> depriving them of liberty is widely regarded as justified and is recklessly implemented.

Detaining people on the move for the purpose of European “migration management” is not confined to European soil. For four years newcomers caught in the coastal waters of Senegal were detained and taken to Mauretania, where they were held at a camp financed by Spain near the town of Nouadhibou. They were locked up in an old fish factory for

months without judicial review before most were ultimately removed to their countries of origin.<sup>581</sup> Providing cash to build camps for migrants in African countries of origin and transit has long since been an integral part of European policy.<sup>582</sup>

However, herding people together in prison-like facilities and taking away their freedom is not restricted to the detention of people seeking protection. It has become a systematic accommodation practice. People are isolated, interned sometimes indefinitely in mass camps and treated like criminals – for arriving in the EU. Police or security forces watch over them and keep them under surveillance. They often have scant, if any, access to support from outside, and they have little space or privacy and no chance to determine their own lives. The small space that seems “private” is broken into by police officers who come, sometimes in the middle of the night, to deport them by force.

In Hungary, for example, new arrivals were “accommodated” right on the Serbian border, cut off from the rest of the population, in containers in a so-called transit zone surrounded by a tall fence and barbed wire. They were so isolated there and their movement so severely curtailed that in 2020 the Court of Justice of the European Union ruled that the conditions amounted to detention and ordered Hungary to close the camp.<sup>583</sup>

Yet where one camp is closed, the next is already being put up somewhere else. In September 2021 the first of five new *Closed Controlled Access Centres* opened on the Greek island of Samos. The camp, intended as a reception centre for asylum-seekers, resembles a high-security prison. Geographically isolated and far removed from any town, it is enclosed by a double fence made from NATO barbed wire and equipped with X-ray devices and magnetic doors. People held there must scan their fingerprints as they enter and produce digital ID, and cameras and drones watch people round the clock. No one who for whatever reason does not have a Greek asylum card has been allowed out of the camp since mid-November 2021 – indefinite deprivation of liberty. In December 2021 a district court in Greece ruled that this regulation was unlawful.<sup>584</sup> The dystopian camp is a pilot for other de facto closed camps scheduled to follow on the Greek Aegean islands of Leros, Lesbos, Kos and Chios. Whereas the people “accommodated” there use terms such as “dehumanising”, “prison-like” and even “Guantánamo”, the EU Commission feels that the barbed wire

and total surveillance are compatible with human dignity and has made 276 million Euro available for construction.<sup>585</sup>

In the spring of 2020, Maltese authorities took people on the move who had just arrived to ships outside sovereign waters 13 nautical miles away from the island. They called this “initial accommodation”. Access was granted neither to lawyers nor to the national Welfare Agency for Asylum-seekers.<sup>586</sup>

Accommodation in the AnkER Centres set up by Germany in 2018 is also described by those held there as “prison-like”.<sup>587</sup> Although people living there are not de facto deprived of their liberty, these facilities do display key features of a “total institution”.<sup>588</sup> The German acronym “AnkER” stands for “arrival, decision and removal”. All these things are supposed to happen in one place. People must remain there for the entire duration of their asylum procedure and preferably not leave the camp. Children even have their lessons there in many cases. “We are working on removals being carried out from the initial reception facilities where possible, because we know that removal is far harder once people have been integrated into communities by voluntary helpers,” explained Angela Merkel before they were built.<sup>589</sup> In these centres people are kept under round-the-clock surveillance by security personnel and in many centres they are not allowed to lock their rooms and showers. NGOs offering independent legal advice have only limited access, if any at all. Enforced removals, some of them in the middle of the night, place enormous mental strain on those held in these centres, especially on the children. Before the AnkER Centres were set up, the rule was that people should not spend longer than six months in an initial reception facility, but for the AnkER Centres this timeframe has been extended to 24 months.

People arriving in Europe are placed in remote facilities and isolated from the rest of society. The message is clear to both those in the EU and beyond its borders: these newcomers are not and will not be part of this society. They are considered to be potentially a source of danger and consequently it is held that they must be segregated, monitored and guarded.

Fingerprinting and taking photographs, reading and evaluating data carriers, searching homes – these are also methods usually only used in criminal investigations. However, it is regarded as appropriate to apply them to people seeking protection. They are not granted a right

to personal or data privacy in Europe. The boundary between purported “migration management” and “crime management” is becoming increasingly blurred and migration policy objectives are used to justify huge incursions into people’s fundamental rights that hardly any other section of the population would tolerate.

European migration policy has long been criticised as a laboratory and testing ground for a range of surveillance methods. As the security policy arguments are played out to justify “exceptional measures”, reducing “irregular” migrants to a “security risk” and disenfranchising them on this basis, the legal framework for the collecting of biometric data and for surveillance is constantly expanded. This proves particularly beneficial for companies in the business of monitoring and surveillance, who are raking in huge profits and seizing the opportunity to test their technologies on real human beings to whom the usual rules about data protection and privacy are held not to apply. Increasingly networked, growing databases, mobile phone forensics and artificial intelligence turn people on the move into objects who can be surveyed, analysed and controlled in the extreme.

Legislation in Austria, Germany, Denmark, Norway, the United Kingdom and Belgium permits the confiscation of mobile telephones in order to check the data provided by asylum applicants.<sup>590</sup> In Germany this procedure is applied whenever an applicant cannot produce a passport – which tends to be the case for more than half the number of asylum-seekers.<sup>591</sup> The people in question are ordered to hand over their telephone and access data to the competent agency. In Denmark the authorities can also demand a Facebook password as part of the procedure.<sup>592</sup> Practices like this are a disproportionate and ubiquitous incursion into the fundamental rights of an especially vulnerable group, although it does not usually even provide any serviceable results in terms of verifying data.<sup>593</sup>

In 2003, on the wave of a hostile climate towards refugees across the EU, the Eurodac database was set up to prevent so-called asylum shopping [sic – official EU term<sup>594</sup>]. To ensure implementation of the Dublin Regulation and protect the asylum system from “abuse”, fingerprints are taken from all asylum-seekers in Europe and stored for ten years. In 2013, in order to “prevent, uncover or investigate terrorist or other serious crimes” the narrowly defined purpose of the database was abolished, granting the police and other law enforcement bodies all over Europe

access to the data. In 2017 the access was extended to Europol. This is another step towards placing all people on the move under general suspicion and stigmatising them as potential suspects and criminals. A reform of Eurodac as part of the New Pact on Migration and Asylum now envisages a further massive expansion of this database. The EU Commission plans to add facial recognition software to the fingerprinting and to store images of people's faces as well. The minimum age for collecting data is to be reduced from 14 years to six.<sup>595</sup> A number of conditions that currently limit access to Eurodac for prosecutors are to be deleted.

The new Migration Pact provides, moreover, for thorough "security screening" of everyone arriving in the EU. According to the European Data Protection Supervisor, the proposals lack "substantive legal provisions on personal data protection" and the question of how data are to be gathered and how this will be supervised is likewise inadequately described.<sup>596</sup> As noted by the European Data Protection Supervisor and human rights organisations, the EU Commission is thereby facilitating mass surveillance of people on the move.

In addition, asylum-seekers who commit offences often risk being punished twice over, because they can be deported as a consequence of their criminal conviction. Usually residence status is cancelled by a deportation order. If the persons concerned cannot be removed, e.g. because they come from a war zone or face persecution in their home country (which applies to anyone recognised as a refugee), even if they are still on state territory, they then find themselves in a permanent disenfranchised position, with removal possible at any time. The sociologist Abdelmalek Sayad calls this "double punishment", lawyers speak of "punishment outside the criminal law".<sup>597</sup> Citizens are punished once for a crime; people who are not wanted are punished "firstly for the offence they committed and secondly for who they are".<sup>598</sup>

If those affected seek to defend themselves against this violation of their rights and protest, perhaps against an unlawful pushback or against degrading accommodation, casting off the role ascribed to them as depoliticised shunting material and organising as political subjects, they are confronted with reprisals and repression – often in collective form.

That is what happened to the individuals dubbed the Moria 35, who were detained in summer 2017 in the Moria camp on the Greek island of Lesbos. People living at the camp had been protesting for months against

the inhumane conditions there. A group of people from predominantly African countries had been organising since the winter of 2016/17, after several people died in the camp as a result of the cold and inadequate medical care. They wrote letters to the European Parliament, negotiated with the camp managers and held peaceful demonstrations. On 18th July 2017, after a peaceful sit-down strike outside the asylum bureau, police stormed the camp with special armoured units and brutally made 35 arbitrary arrests. “As far as I can see, I was only arrested because I’m Black,” said Didier Ndiay from Senegal. Those arrested were subsequently held in detention pending investigations for nine months until the case was brought to court and 32 of them were convicted – although they were not even conclusively identified as having taken part in the protests and some of them produced alibis.<sup>599</sup>

In 2020, when the camps at Moria on Lesbos and Vathy on Samos burned down, scapegoats were quickly found and severely punished. Instead of seeing the fire as a disaster waiting to happen in an utterly overcrowded, appallingly organised and sometimes lethal infrastructure, the Greek state arrested six young people after the fire in Moria and presented them as the culprits and sole arsonists. This was an attempt to nip in the bud any further public debate about camp conditions and political responsibility. The fire happened at a time when the number of people living there had hit 12,000 in a camp originally built for 2,800 people. For nearly six months movements of people living in the camp had been restricted because of the COVID-19 pandemic and there was a growing fear of infection. The first person tested positive just one week before the fire. Rather than taking infected individuals away from the camp and improving conditions for the people shut away there, the government planned to seal the entire site off with a double NATO-wire high-security fence and all protests were put down by force. The “Moria 6” were treated as guilty by the authorities from the moment they were arrested. The Greek Minister of Migration and Asylum stated just one week after the incident that “the camp was set on fire by six Afghan refugees who were arrested”, denying them their right to a fair trial based on the presumption of innocence. Four of them were sentenced to ten years in prison and the other two to five years.<sup>600</sup>

Both the arrests and the predominant discourse that followed the fire in Moria concerning reception of people on the move exemplify the

increasing criminalisation of people seeking protection. Under headings such as “False Signal or Human Duty”, the idea that anyone at all should be resettled was publicly rejected as long as there was a “well-founded suspicion” that one of the camp’s residents could possibly have started the fire. This turned the burden of proof on its head and implied collective punishment for thousands of people.<sup>601</sup>

In February 2021 a heavily pregnant 26-year-old mother of three children set fire to herself in despair on Lesbos. The woman, who had fled Afghanistan with her children and had been living in a tent for two years in degrading conditions, had suffered a mental breakdown when she learnt that she was not to be flown out to Germany as announced but was to remain in the camp. The Greek state thereupon charged her with arson and the destruction of property.<sup>602</sup>

In March 2019 three young people, aged 15, 16 and 19 – the “ElHiblu3” – were arrested in Malta and charged with nothing less than “terrorism”. They had been rescued at sea with another 105 people by the merchant ship “El Hiblu 1”, but this vessel then tried to take them back to Libya after receiving instructions from an aircraft flying on behalf of the EU military mission Eunavfor Med. When the people who had just fled Libya realised this, they protested against their unlawful return, whereupon the vessel changed course and brought them to Malta. These people had simply insisted that their basic human rights and international law be respected. They were now punished for this by the Maltese authorities, who picked out the three teenagers to make an example of them. “Don’t do what they did. Look, this is what to expect if you defend yourself against an illegal pushback!” is the unmistakable warning. When the oil tanker finally put into port in Malta, Maltese units stormed the vessel and arrested the three unarmed, barefoot young men, who were accused of taking control of the ship by force. The three teenagers had been interpreting exchanges between the crew and their fellow passengers. The charges against them are so serious that they potentially face life imprisonment. Even if the three are eventually found innocent, the proceedings have already cost them years of their life, which they have only been able to spend in an apartment in Malta rather than in custody in a Maltese prison because supportive NGOs raised bail for them. They are not allowed to leave Malta.

The two people accused in the “Vos Thalassa” case can tell a similar story. They, too, were arrested immediately after arriving in Italy. They



and another 65 people had protested when the Italian tugboat “Vos Thalassa”, which had rescued them at sea, unlawfully tried to hand them over to so-called Libyan coastguards. As the “ringleaders” of a mutiny against the crew, they were sentenced to three years and six months in prison and fined 52,000 Euro on charges of violent resistance to public officers and aggravated aiding and abetting of unauthorised immigration. They had already spent over three years in prison when, in December 2021, Italy’s Supreme Court of Cassation [the country’s highest court of appeal] handed down a ground-breaking judgement recognising their right to self-defence against an unlawful pushback and declaring them not guilty on all charges.

### Criminalising Migration

Criminalising people on the move would be unthinkable without a discriminatory concept of migration. All these examples of violence and disenfranchisement are ultimately rooted in a systematic denial of the right to mobility and the right to seek refuge. This form of criminalisation is so powerful precisely because it is hardly challenged any longer. For European citizens, migration and residence in other countries are taken for granted and they enjoy almost unlimited freedom of movement, whereas other people are treated by language and by the law as “illegal”. That “fact” is firmly established in public thinking and is now considered by and large normal.

And yet that concept of “illegal migration” is a recent invention. It dates back to the 1930s, but did not really come to prominence until the 1980s and 1990s. It is true that the image of the “burdensome foreigner” has been around for a long time, and so has the idea of “unwanted migration”. However, the notion of the “illegal migrant” with all its implications is a new construct.<sup>603</sup> The ease with which some talk these days about “illegal migration” is a result of political processes in the 1990s and a response to growing migration in the wake of globalisation.

As a consequence, certain exclusionary practices have become accepted as normal. We live in an age when it is considered normal to intern people because they migrate; to deport people who have lived in a place for decades but then lose their job and home; not to grant people access to medical care because they must not officially reside where they are. It is “normal” for people to die at the physical, administrative and

statutory borders of Fortress Europe. European immigration and migration policy dramatically violates the political and social rights of countless people. All this is justified by referring to their unauthorized entry or residence.

“Illegal migration” is a social construct to contain and control *unwanted* migration. Freedom of movement is for elites, for the well-heeled and well educated, constraints are for people who are unwanted for economic or political reasons.<sup>604</sup> Restrictions on visas issues or the impossibility of even applying for a visa, and consequently limited options to travel backwards and forwards between the EU and a country of origin, force people to set off along dangerous routes, forces people into and generates illegality.

That means that criminalisation of migration is the first step in justifying the use of force against unwanted people. When it becomes normal, when it is internalised, it supplies the basis and springboard for more violence, justified on the grounds that there is some “state of emergency” or that people are not simply “illegal” but “dangerous” as well.

Given that where we are born is random, that all human beings are equal and that individuals are autonomous, exclusion and disenfranchisement cannot be justified on grounds of migration policy<sup>605</sup> – unless the basis for argument is racism or social Darwinism.

That is why combating “criminalisation of refugees” must always mean combating criminalisation of migration in general and advocating for freedom of movement.

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# Criminalisation of Solidarity

**While the criminalisation of maritime rescue** by civilian organisations attracts a certain degree of media and public attention, the criminalisation of solidarity with people on the move elsewhere is widely ignored. And yet there are many places inside and outside the borders of Europe where assisting people on the move is perceived and prosecuted as a criminal offence. For those who provide such support, this threat is a daily reality – with serious consequences not only for people acting in solidarity, but above all for people on the move. Be it in Calais, on Lesbos, at the border between Croatia and Serbia, in the Roya Valley in France, in German churches, at airports in Iceland or at bus stations in Nigeria: individuals and organisations who work to uphold the rights and dignity of human beings regardless of residence status are systematically discredited, harassed and charged by the authorities. These, let us remember, are the individuals and organisations who take on responsibilities that government agencies ought to be assuming, except that those government agencies either fail to do the job or deliberately undermine efforts to carry out this work. These are individuals and organisations who assist others in distress without asking to see a passport first. Prosecutors target friends and relatives who try to bring their loved ones to a safe place and arraign large numbers of people on the move as “smugglers” because someone took the helm of a boat. Also criminalised are restaurant owners, people who rent out rooms and taxi drivers<sup>606</sup> who have at some time or other provided their services without discrimination to anyone who pays and must suddenly face criminal charges or even lose their business.

In the European Union, criminal, civil and administrative law are systematically applied to punish solidarity with people on the move – solidarity with those whose arrival and residence European countries are

determined to prevent. As the UN Special Rapporteur on the situation of Human Rights Defenders has pointed out, “defenders of people on the move face unprecedented restrictions, including threats and violence, denunciation in public discourse, and criminalization.”<sup>607</sup>

The EU goes to great lengths to present such solidarity above all as a commercial exercise by criminal networks of smugglers operating internationally, whose motives are profit-seeking and exploitation, and who knowingly risk the safety and lives of people on the move. The almost mantra-like references by European agencies to the “criminal gangs” who, for example, “endanger lives on heavily laden, non-navigable boats”<sup>608</sup> constitute an attempt both to distract attention and to discredit those involved. It is not merely that “facilitating unauthorized entry” is fundamentally equated with crime from this perspective, but in assessing who should take the responsibility and blame for the death and exploitation of people on the move the focus is thereby shifted away from European policy and rests entirely with smugglers. And here smuggling is routinely conflated or even equated with “human trafficking”, which is legally a clearly distinguished crime, exacerbating the public stigma. Although there may well be cases where the boundary between the two activities is fluid, these are two fundamentally different cases. Smuggling means that there is a mutual agreement between the smuggler and the person being smuggled to arrange an unauthorized border crossing. Human trafficking, on the other hand, means the unlawful carriage of persons against their will involving the use of coercion, bribery, violence and deceit. Smuggling is understood as a transaction between the two parties in which the smuggled person retains a degree of choice about the actions and options, whereas the definition of human trafficking highlights the exploitative element and hence the lack of choice.

Criminalising solidarity is presented above all as combating “unscrupulous criminals” and thus cloaked in a humanitarian veneer as if it were intended to protect people on the move. The very opposite is the aim, however. The intention is to discredit any support for people who try to enter Europe.

The EU has constructed a fortress that makes it virtually impossible for people on the move to enter Europe without help. Smugglers are a symptom of that, not the cause. In reality they are often the only option left to people on the move who want to continue their journey. Even if

they (must) take money for the venture or profit from it. Accommodation must be rented, border guards bribed, documents forged and fuel purchased. Anyone who demands that a helper should pay for all this out of their own pocket is substantially reducing the options for people on the move. If the smugglers are making a living out of it, that may actually be safer for their “customers”, as the former will have a vested interest in success. If someone does all this in an “organised” and “repeated” manner, all the better: they have experience and know what they are doing.

The idea that the “moral” bar should be set higher when working with people on the move than in any other business is not rooted in ethics but in stigmatisation. Only a few decades ago, helping refugees was regarded as “honourable” and even rewarded with medals, and smugglers could sue before the courts to collect their wages. In 1977, for instance, West Germany’s Supreme Court ruled in favour of a man who helped a family escape the GDR and flee to the West. Later the family only paid him half the agreed amount of 45,000 DM, so he launched legal proceedings. “There was an appropriate relationship between the service and the compensation,” argued the Karlsruhe judges.<sup>609</sup>

However, the more Europe seals itself off, the harder and riskier it becomes to provide this assistance and the higher the price. Far from protecting people, severely criminalising support for people on the move makes their journeys even more dangerous – when, for example, the smugglers leave the boat halfway across to avoid arrest and hand over the helm to people on the move, who often have no idea how to skipper a vessel. Mawda, a two-year-old Kurdish girl, lost her life to this unbridled criminalisation. A Belgian policeman accidentally shot her in the head when his patrol car began a wild pursuit of the vehicle in which she was sitting – because the police expected to find a smuggler and people without papers. Her parents were restrained by force from accompanying their child to hospital and they were in prison when they learnt that their daughter had died.<sup>610</sup>

Doubtless there are people who take advantage of the neediness and dependence of people on the move, who exploit the situation and treat them badly or degradingly. That does not only apply to unscrupulous profiteers in Libya, but also to the owners of vegetable plantations in Europe where people are treated like modern-day slaves. In all these cases, making entry and residence illegal forces people on the move to

place life and limb in the hands of third parties, leaving them in extreme cases utterly at the mercy of such third parties.

In their vigorous stigmatisation of smuggling, European authorities are by no means concerned about *how* smugglers treat the people they smuggle or whether they take (too much) money for doing it. All that concerns them is *that* they smuggle. One clear indication of this is that the wellbeing of those affected is not raised as an issue anywhere else by the EU. Greece publishes official statements condemning the shameful treatment of people fleeing their home by smugglers while its own security forces *throw* those very same people *into the sea*.<sup>611</sup> The well documented collaboration between European agencies and Libyan militias who rake in millions of dollars from needy people on the move likewise demonstrates that the EU has no problem working with “organised criminal networks” who not only exploit refugees and migrants but make them victims of their crimes against humanity.<sup>612</sup> On the contrary, the EU funds and trains such groups; real human traffickers like the Libyan “Bija” are welcomed, dined and paid for<sup>613</sup> – as long as they stop people from coming to Europe.

Demonising human smugglers of any kind and attributing them sole blame for the suffering and death of people on the move is not only deeply dishonest, but part and parcel of the European fortress policy. It is all too true that crossing the sea in a dinghy for many miles is extremely hazardous, like being transported in the back of a truck that is not merely searched at the border but monitored with thermal cameras and carbon dioxide detectors to flush out stowaways. The question is which options remain for safer, more dignified travel, given the EU’s escalating border fortification policy. Not that we wish to play down or justify the life-threatening transportation of people huddled in vans without enough oxygen. But anyone who really cares about protecting people and their dignity ought to wonder why they have to hide in the back of a van in the first place. Whereas it used to be possible to reach a destination unlawfully but at least safely by, for example, obtaining false documents from smugglers and boarding a plane, that door has pretty much closed, as the EU has tightened checks at European and international airports, stepped up training in the detection of false papers and increased the pressure on airlines and other carriers by threatening higher fines to make sure they take care of immigration control on behalf of govern-

ments. Criminalising entry for people seeking protection, criminalising facilitation of entry, equipping borders with more and more technology while expressing moral outrage at smugglers who do not drive newcomers across the border personally in their own cars is hypocritical and two-faced. Those being smuggled are usually aware that they are putting their lives at risk, but they have no alternative. The many people who have drowned in the Mediterranean and died of thirst in the Sahara and suffocated in trucks and frozen in forests are the victims of Europe's fortress policy, which leaves them no other routes.

It is dangerous, therefore, to fall for the EU's discursive trick of making scapegoats of smugglers, for anti-smuggling measures are essentially anti-refugee measures, as long as border policy remains as it is at present. Indignation about the treatment of people on the move that claims to be founded on much-lauded European values must turn its wrath on a policy that not only makes it impossible for people on the move to enter the EU in a regular and safe manner, but denies them a chance of defending themselves (through legal channels) against bad treatment by outlawing their journeys. The most effective tool against smugglers and smuggling – and the only truly effective weapon against all the dying – would be to make the assistance of smugglers unnecessary.

"There is no LEGAL way to reach Europe. If you have no visa you have to risk your life to go to Europe. The authorities are making it every time more difficult and more dangerous to cross the borders. That's why it is impossible to enter Europe without the help of people, whom you call 'smugglers'. Even the ways with the smugglers are risky. But it is necessary that someone helps you. Every story of a refugee is different. But the common problem is the border. There exist different ways of supporting refugees in crossing borders. It needs knowledge, planning and courage. There are different kind of smugglers. You can be cheated, tortured or blackmailed. You have no rights if you go to a smuggler. You cannot ask for special seats like in a plane. But good smugglers are fast, show or lead us a good way, give us shelter and food, know the weather. A good smuggler can neither give you a guarantee for successful border crossing nor a guarantee for your life. But a good smuggler tries to take care of your life. We would prefer not to be dependent on having a smuggler. But we see it as a service, generally paid, which will exist as long as it is illegal to cross borders" (Refugee Protest Movement Vienna, 2014).<sup>614</sup>

The discursive drumbeating against “evil smugglers who exploit refugees” is not merely disingenuous. It is yet another tool for criminalising people on the move and preventing them from arriving in Europe. Neither is it the fault of smugglers that legal, safe routes into Europe are barred to people on the move, nor is it only smugglers – in the sense of commercial facilitators – who are criminalised. Quite the reverse, those in the sights of the criminal investigators are above all individuals who act out of solidarity, friends, family, those who have the interests of people on the move at heart. This is reflected both in the legal framework and in practice.

### **The “Facilitators Package”: A Legal Framework for Broad-brush Criminalisation**

The criminalisation of help for people on the move has been enshrined in legislation by what is known as the Facilitators Package.<sup>615</sup> This package is the legal framework introduced by the EU in 2002 to define the criminal offence of “facilitating unauthorised entry, transit and residence” in the EU and to establish concomitant criminal penalties. The “Facilitation Directive” 2002/90/EC, combined with Framework Decision 2002/946/JHA, obliges Member States to impose “effective, proportionate and dissuasive sanctions” on any persons who intentionally assist a person who is not a national of a Member State to enter, or transit across, the territory of a Member State and against any persons who, for financial gain, intentionally assist a person who is not a national of a Member State to reside within the territory of a Member State. In simple terms, the directive makes it a crime to assist irregular entry in any way regardless of material gain, whereas assisting residence is “only” a crime if it is done for financial gain.

This means that the EU directive is in breach of international standards. The “Protocol Against the Smuggling of Migrants by Land, Sea and Air” adopted by the United Nations as a supplement to the Convention Against Transnational Organized Crime defines the offence of smuggling migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person (...)”. The accompanying guide to implementation explicitly points out that the purpose of the Protocol is to punish organised crime, where such financial or material benefit is the actual motive for smuggling. It notes this ref-



erence to profit as the underlying motive was designed to exclude support for charitable or altruistic reasons from the scope. “It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.”<sup>616</sup> States are clearly called upon to ensure that the “procurement of illegal entry or transit” by individuals or groups is not defined in such a way as to criminalise actions not designed for material or financial gain. All the Member States of the EU (except Ireland) have ratified this Protocol.

However, the “Facilitators Package”, as the EU likes to call it, only includes profit-making as a criterion in the case of irregular *residence*. When it comes to support for irregular *entry*, seeking profit is not a constituent factor of the offence, but is merely listed as an aggravating factor.<sup>617</sup> Instead, Member States are granted additional discretion in deciding which actions are to be punished and which are not. The directive leaves Member States free to decide whether NGOs, family members and anyone else acting without a motive of material gain should be prosecuted in a criminal court. As a result, only 8 out of 28 Member States currently exempt “procuring illegal entry” on humanitarian grounds from criminal prosecution.<sup>618</sup> And even where there is no provision for prosecution, that does not always mean that nobody is criminalised. Italy – one of those eight countries – essentially seeks to justify criminalising rescue at sea – for example, by the crew of the “*Iuventa*”, by Médecins sans Frontières or by Save the Children – by asserting that the defendants had not really rescued persons in distress but had faked rescue scenarios and deceived the Italian authorities to conceal “handovers” of people at sea that had been pre-arranged with the smugglers. Moreover, these organisations are accused of profiting from their actions by attracting media attention and income from donations.

Even where independent courts can find no basis for conviction, where investigations against individuals are closed or these people are found innocent, the mere fact that a criminal investigation has been launched will have an impact on those concerned and a dissuasive impact.

The provisions of the EU Directive that make it a criminal offence to “procure illegal residence” comply with the UN Protocol insofar as the latter also refers to a profit motive. Service providers such as people who let rooms, hotel owners and Airbnb hosts nevertheless still fall within the scope of criminal prosecution, even if they only charge the usual price for

the service and not more than they would for any other guest. In other words, a company or organisation with a business model that consists in providing a service runs the risk of being treated as criminal if they provide the same service to people without papers – a factor that further exacerbates existing everyday racism. It makes it appear normal to be much stricter about checking up on people who are not *white*. Besides, in 13 out of 28 EU countries there is no need to derive any financial benefit in order to be charged with “procuring illegal residence”, as taking money would only be regarded as an aggravating factor when assessing the punishment.<sup>619</sup> These 13 countries justify criminalising the procurement of *residence* without financial gain by citing the exception set out in Article 6 (4) of the UN Protocol: “Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.”<sup>620</sup>

That means, when all is said and done, that anyone can be criminalised for “helping” a person without papers in some way, not “only” family members and aid organisations. In this way a directive that was allegedly designed to combat criminal smugglers is systematically used to prosecute anybody who helps a refugee or migrant. And Europe’s authorities are investing a huge amount of energy in this, sparing neither cost nor effort: homes are raided, people are kept under surveillance, wiretapped, embroiled in lengthy court proceedings.

It is hardly surprising, therefore, that the number of criminal offences recorded has been rising especially since 2015.<sup>621</sup> That was the year of the “long summer of migration”. It sparked a tremendous wave of solidarity and support across broad sections of the European population but at the same time it made the lethal consequences of Europe’s fortress policy especially visible. The disastrous shipwreck off Lampedusa in April 2015 claimed more than 700 lives alone. The EU was prompted by this to declare “the fight against migrant smuggling” one of its top priorities on the migration agenda.

As a consequence, the number of investigations on grounds relating to the aiding and abetting of entry or residence has risen considerably since 2015. The practice of criminalisation is not confined, however, to prosecution through the courts. Solidarity is increasingly openly discredited by political decision-makers and has become a target for harassment and repression by the police. Activities are made more difficult, if not impos-

sible, by bureaucratic requirements, even leading to charges, criminal investigations, fines and imprisonment. A person does not even have to provide deliberate assistance to be accused of “procuring unauthorized entry or residence” and labelled a “smuggler”. It is enough to offer someone with “false” papers a meal or a lift in a car. The focus ranges from simple provision of food, shelter or transport to monitoring and publication of human rights violations, legal defence or life-saving measures such as rescue at sea. Those affected are organisations, activists, priests, journalists, relatives of refugees, local mayors and numerous individuals who have quite simply picked up a hitchhiker.<sup>622</sup>

This can above all be observed in places where people on the move are most likely to pass through or stay; e.g. in hotspots, (un)official camps near national borders, in the Mediterranean Sea, but also on the streets of European capitals, where many people on the move and people without papers are affected by such issues as homelessness. In these places, the actions of the state and of public agencies are often accompanied by a refusal or omission to carry out their tasks, and even serious violations of the law and human rights. These are the places where migrants are confronted with degrading and sometimes life-threatening conditions and consequently also where organisations and individuals actively respond by filling the gaps in provision left by the state and publicising the infringements of the legal provisions that they witness.

### Public Smear Campaigns

Offering practical solidarity to people on the move is increasingly presented in public debate as if it were associated with organised crime. Apart from the shift in discourse already described – away from “helping refugees”, which has positive connotations, towards concepts with a negative connotation like “smuggling” – people engaging in acts of solidarity are being turned into scapegoats for crises and emergencies that arise because public bodies are not doing their job. Often categorising something as criminal provides public justification for stepping up repression.

Since 2016 slurs have increasingly been cast in public discourse on sea rescues. It was none other than Frontex boss Fabrice Leggeri who in 2017 accused sea rescue organisations of conniving with smugglers and functioning as a pull factor, although he never produced any evidence.<sup>623</sup> Not long afterwards the Italian prosecutor in Catania, Carmelo

Zuccaro, followed suit and told Italian media that he had information to suggest that sea rescuers and smugglers were working together and that money being earned was “more than drugs” (in Italy the ‘Ndrangheta alone made over 24.2 billion Euro from the drug trade in 2013).<sup>624</sup> This hit the headlines all over Italy, linking civilian sea rescuers in the public mind to organised multinational crime. Zuccaro later admitted that he had no proof.<sup>625</sup> However, the accusations were soon repeated by Luigi Di Maio, Italy’s vice-president at the time, in tweets and statements to the press. He never presented any evidence either. By that point, however, the assertions had long since been circulating in public and a committee of enquiry set up to look into the matter by the Italian parliament recommended, even though it produced no findings, that NGOs operating in the field should be subjected to a series of control and monitoring mechanisms. Since then a definite swing in public opinion has been observed with regard to civilian sea rescue, especially in Italy. This whipping up of public sentiment – Amnesty International called it a “smear campaign”<sup>626</sup> – was followed by systematic administrative blockades, harassment by public agencies and even criminal investigations that even now continue to hamper or prevent the work of these organisations and have had serious personal consequences for the individuals concerned.

Terms like “water taxi”, “shuttle”<sup>627</sup> and “ticket to Europe” are used by politicians as synonyms for maritime rescue, discrediting life-threatening, traumatic journeys across the sea and the rescue missions themselves as harmless “taxi rides” and casting aspersions in public on the need for lives to be saved in such operations. These terms have the added effect of suggesting that civilian sea rescuers are “service providers”, an assertion that goes hand in hand with the charge that they actively or “at least indirectly are running the business of unscrupulous smugglers”.<sup>628</sup> Individuals and organisations who took action as a *reaction* to deaths by drowning in the Mediterranean and set up civilian rescue teams or emergency hotlines (such as Alarm Phone or Helena Maleno Garzón and Musie Zerai) are now told that it is only because they do what they do that people set off on these journeys, and that therefore they are responsible not only for migration but ultimately also for the suffering and death of migrants. This accusation has been picked up widely in the media ever since.<sup>629</sup> In early 2020 Sebastian Kurz, then Chancellor of Austria, said: “Sometimes private sea rescuers, without intending to, support the

smugglers. And that is how the activities of the private sea rescuers leads to more deaths. It's a fact: Because of rescues in the Mediterranean and a direct ticket to Europe, more and more set off and that way more and more drown. All those who think they are doing a good thing must confess that this proven increase in deaths is a result of their actions. I deeply regret that and will continue to fight it."<sup>630</sup>

The pull-factor accusation is not confined, however, to civilian maritime rescue. It pops up with reliable frequency wherever racism and state inactivity result in degrading or even life-threatening conditions for people on the move, so that organisations and individuals respond by taking action. In all these places the European Union deliberately leaves people to face intolerable circumstances and in all these places the politicians in charge accuse those who extend solidarity to these people of acting as a pull factor. In 2017 the mayor of the French harbour town Calais made several public statements claiming that the organisations and groups operating there were the reason why people came to Calais, and she also accused the volunteers of "serious criminal machinations".<sup>631</sup> These accusations were repeated and endorsed by the French minister of home affairs at the time. The mayor used this to justify a blanket ban on handing out food and drink to people without papers, calling the presence of the volunteers a "threat to peace and security".<sup>632</sup> Those volunteers have reported growing hostility and even physical assault by some local residents and the police, encouraged and legitimated by these public smears.

In Croatia the minister of home affairs and deputy prime minister Davor Božinović sent a letter to members of parliament in March 2018 falsely claiming that volunteers from the Croatian aid organisation "Are You Syrious?" were handing out phone numbers, route maps, money and tips for entering Croatia, and that this was inciting and "facilitating unauthorized entry".<sup>633</sup> His letter was picked up and circulated by nearly all the mainstream media in Croatia. Shortly before this, the NGO had prompted public debate about the death of six-year-old Madina Hussiny and initiated criminal proceedings against the Croatian government. The child had been fallen under a train after an unlawful pushback by the Croatian border police.<sup>634</sup> The organisation, which has since had to ward off threats and attacks by members of the public, reports that the aggressors routinely quote false information published by the ministry.

## Bureaucratic Obstacles

Organisations and individuals who extend solidarity to people on the move are systematically confronted with technical, administrative and bureaucratic demands that hamper and slow down their activities, sometimes paralysing them altogether. These demands require (and divert) attention, time, energy and in many cases financial input in order to understand, challenge or meet arbitrary and disproportionate conditions imposed by the authorities to maintain legal status. In the event of non-compliance, penalties can be steep and even imprisonment may loom. Moreover, the constant threat of criminalisation poses a huge mental strain on people and groups wishing to express solidarity.

In Greece, for example, a law was introduced in 2016 that placed every organisation hoping to work in the field of asylum, migration or integration under a state regulatory body. In 2018 this “register of Greek and foreign NGOs” was joined by a register of the “*members of Greek and foreign NGOs*”.<sup>635</sup> This more or less unavoidable insistence on state monitoring required compliance with time-consuming conditions for organisations and volunteers who hoped – or rather were obliged – to register, and meeting these terms placed an enormous administrative strain on the organisation and its resources of time and money. In spring 2020 the rules designed to restrict assistance by civil society organisations, which tellingly enough only apply to organisations working in the fields of migration, asylum and integration, became even more stringent. Vaguely formulated terms grant unlimited leeway for rejecting or revoking the registration of NGOs and individuals, even when they do meet the many requirements. The organisation Refugee Support Aegean (RSA), for example, had its registration turned down in October 2021, after waiting for 15 months, partly on the grounds that the articles of association list people threatened by deportation among those the members wished to support in exercising their rights. The reasons provided for rejection merely made a vague reference to this being against the law in Greece. 19 Greek NGOs issued a joint statement criticising the decision as a demonstration of how the register is being used to silence civil activities in the field of asylum and migration.<sup>636</sup>

For years, vessels used for rescue or for monitoring violations of human rights have been clobbered with bureaucratic tricks such as the derecognition of a flag or new, equally arbitrary security requirements

that seem to have been devised specifically for search and rescue (SAR) NGOs and are evidently intended to sabotage their work. In late 2018 Malta imposed a blockade lasting more than three months on several SAR vessels wishing to leave port, due to purported licensing irregularities, and likewise blocked take-off by the reconnaissance plane “Moonbird”, which the NGOs Humanitarian Pilots Initiative and Sea-Watch use to fly and report on activities by the so-called Libyan coastguard and Frontex. In April 2019 the Dutch shipping authority altered the technical rules without any prior notice just as “Sea-Watch 3”, which was then flying a Dutch flag, was about to set sail. Internal documents later confirmed what the sea rescue organisation had already guessed: it was not safety concerns, as the authorities claimed, that triggered this amendment, but a desire to stymie the work of the rescue mission.<sup>637</sup>

During an inspection of several SAR vessels in summer 2020 Italian authorities found “considerable safety and operational defects” in all of them which would “impair the safety of the vessels as well as their crews and rescued persons”, reported the Italian ministry of home affairs. The ships would not be allowed to leave before fixing them. The defects were such things as “too few sanitary and wastewater facilities to cope with the number of persons rescued”, “too many life jackets on board” and “carriage for more people than indicated in the certificate” – a complaint which, if thought through, reverses the duty to rescue shipwrecked people and prohibits it instead.

In 2020 the German ministry of transport issued the 19th Ordinance on the adjustment of technical and fiscal conditions in shipping, which amended the rules in such a way that small vessels serving to monitor human rights compliance, such as the “Mare Liberum”, “Mission Life-line”, “RESQSHIP” and “Louise Michel”, all of which are registered under the German flag, are almost permanently prevented from sailing. The association “Mare Liberum”, which records human rights violations in the Aegean Sea, had won a court case the previous year against the German authorities that had impounded their ship. In March 2020 the ministry then simply changed the Ordinance. The new rules provide that all vessels deployed for humanitarian or environmental purposes are to be treated like commercial maritime shipping, confronting them with requirements as to design, equipment and crew which they either cannot meet at all or only at huge financial cost. In the reasons given, the min-

istry explicitly refers to sea rescue operations and, just like the Dutch and Italian authorities, cynically cites the safety of people on board, who would drown without the support of SAR NGOs at sea.<sup>638</sup>

### Intimidation by Police and Security Forces

Constant identity controls, threats and insults, mental and physical abuse – efforts at harassment and intimidation by security forces are another factor in criminalisation. Often disproportionately stringent prosecution measures of the kind usually reserved for (threats of) serious crime are applied to volunteers and activists: people are kept under surveillance, phone calls are tapped, homes and property are searched and confiscated, undercover agents are planted. Practices that (re)produce an image of criminal machinations in the public mind. The idea is to intimidate and deter those concerned, to prevent them doing their work. As described above, this is especially common along the main transit routes for people on the move and at the places where migrants tend to gather, where volunteers often do the work that public agencies should be doing and where they record and publicise infringements by the police and authorities.

The police in Calais, for example, repay the volunteers for their efforts and criticisms by carrying out arbitrary identity checks and issuing threats, but also by means of negative policing – which simply means that concerns raised by the volunteers are deliberately ignored by the police and not taken seriously. Police officers frequently interfere and disrupt when food is being distributed and issue disproportionately high parking fines to volunteers in the area.<sup>639</sup>

In summer 2018, when the activist Tom Ciotkowski was near Calais and chanced upon French police officers performing arbitrary identity checks on a group of people who were trying to hand out food, he filmed the officers kicking and hitting people. He intervened and asked the officers for their numbers, whereupon one of the officers pushed him over a railing that separated the pavement from the road. He was almost run over by a passing truck. He was arrested, detained in police custody for 36 hours and charged with “insulting and assaulting a police officer”. The penalty if found guilty would have been five years in prison and a fine of up to 7,500 Euro. In June 2019 he was cleared by the court thanks to a video submitted in evidence. Instead, one of the three police officers



was given a suspended sentence of 18 months for falsification of evidence and grievous bodily harm.<sup>640</sup>

The border region between Italy and France offers another example of a repressive strategy on the part of the police. The huge police and military presence is intended to prevent the entry and transit of people on the move at any price. The French police routinely carry out unlawful pushbacks and actively stop people from applying for asylum. Because of the increasing checks, people are switching to ever higher mountain paths and ever more dangerous routes to enter France. Many of these routes are especially life-threatening when snow falls. In response to this situation a resistance and solidarity movement has been evolving over the years at many places along the border, such as in Briançon or the Roya valley, where local residents welcome people, provide medical care, arrange food and shelter, take them to the nearest railway station, search for people in the mountains or organise legal aid. The French authorities react with arrests, road blocks, nocturnal raids and drone surveillance. Cédric Herrou, an olive farmer in the Roya valley, reported that he has to allow more time to drive from his farm to town as he is frequently stopped by police, who check his papers and keep detaining him provisionally.

The crew of the civilian rescue ship “*Iuventa*” was kept under surveillance for many months. The Italian intelligence service fitted bugging devices to the bridge of the vessel and deployed an undercover agent. In August 2017 the Italian authorities seized the ship and personal belongings of the crew in a major police operation that was all over the media, again conveying an impression that crimes were being committed to the general public and to representatives of the media who, after a tip-off, were there with cameras at the ready alongside the police officers waiting for the ship to dock in the port at Lampedusa. In March 2021 four members of the crew were charged with “aiding and abetting unauthorized entry”.<sup>641</sup> It emerged that not only had crew members been subjected to tapping and surveillance during the investigations but that the police and prosecutors had recorded hundreds of conversations with countless people, unlawfully listening in on confidential phone calls between lawyers and their clients and between journalists and their sources. These methods were condemned as one of the worst attacks on press freedom in recent Italian history.<sup>642</sup>

In the Central Mediterranean it was more or less standard practice from 2018 to 2020 for Malta and Italy not to allow boats that had rescued people at sea into their ports for several days or weeks. A number of cases illustrated that this harassment was not confined to vessels operated by civilian sea rescue missions: the German container ship “MV-Marina” in May 2020, the Lebanese cattle transporter “Talía” in July 2020, the Danish oil tanker “Maersk Etienne” in August 2020 and even the “Diciotti” belonging to the Italian coastguard in August 2018. In the case of the “Maersk Etienne” the crew and rescued passengers had to spend another 38 days on board the oil tanker until they were finally allowed ashore. After more than five weeks, during which one passenger attempted suicide, far from a government coming to its senses, it was the Italian civilian sea rescue organisation *Mediterranea* that responded to urgent calls from the “Etienne” when their own vessel was making its way to the Central Mediterranean. They took the people on board and brought them to Sicily – with bitter consequences: the Italian authorities began investigations that have still not been concluded.<sup>643</sup> Measures like this are designed to deter merchant vessels from rescuing people at sea, as they must reckon with substantial delays and pressures, and even criminal prosecution. The same applies to fishing boats from North Africa, whose owners have already been taken to court by Italian authorities, had their boats confiscated and consequently lost their livelihoods.<sup>644</sup>

The Croatian NGO “Are You Syrious?” reports instances of volunteers who have helped people on the move and, for example, accompanied them to a police station, being held and questioned for several hours without being accused of anything specific. They are subjected to humiliating interrogation, shouting and intimidation, such as police officers insinuating that they know where they spend their free time. In addition, the police routinely turn up at the NGO’s office in large numbers, or place it under observation and carry out arbitrary identity checks, creating a public impression that the office is a hotbed of crime. When the NGO tried to hold a press conference in spring 2018 to talk about harassment and intimidation by the authorities, staff intending to speak at the conference were suddenly summoned to the police station for questioning just before it began.

In Germany in January 2019 the police raided the offices and private quarters of five pastors as well as parish facilities. They seized mobile tele-

phones, documents and sensitive pastoral data. The suspicion: “facilitating unauthorised residence”. The clergy had granted church protection to asylum-seekers because the appalling conditions they would face in Italy made a Dublin Regulation transfer impossible. They had informed the authorities accordingly. A court later found that the searches had been inadmissible and the investigations into the five pastors were dropped soon afterwards.<sup>645</sup>

The Club of Catholic Intelligentsia, a charity in Poland, complained of a “scandalous attempt at intimidation” when their regional office near the Belarusian border was searched by police in December 2021. Armed officers seized laptops and mobile telephones and questioned volunteers for hours. The authorities defended their excessive approach on the grounds that the organisation was suspected of helping people to cross the border. On the previous day, a group of Polish activists had been stopped by soldiers in the forest. Heavily armed troops forced them to lie on the ground face down and searched them. People living in the border region reported that their private homes were under surveillance.<sup>646</sup>

In all the cases described here, the methods used by the police and criminal investigators, quite apart from any charges or convictions, are disproportionate and discriminatory and all too often they violate fundamental rights. Government ministers, public agencies and public servants are using their powers and competence not to pursue a legitimate public purpose but to intimidate and deter on a wide scale for political motives.

## Prosecutions and Convictions

Since 2015 the number of criminal investigations into individuals who support the rights of people on the move in one way or another has risen considerably.<sup>647</sup> The think tank Open Democracy registered 250 cases in 14 European countries between 2015 and 2019. Most of them were recorded in 2018. In many instances independent courts saw no basis to convict and the accused were found not guilty, a further indication that prosecution is often a political tool used for deterrence. At the same time, new offences have been introduced on the statute books, existing offences have been abused and individuals have faced disproportionately draconian charges. These range from membership of a criminal organisation to associations with terrorism.<sup>648</sup>

With the German “Orderly Return” or “Hau-Ab-Gesetz”, a preceding linguistic and bureaucratic criminalisation of those dubbed opponents of deportation found formal expression in 2019. The ministry of home affairs declared all information relating to deportation procedures as official secrets in the criminal sense. That means that anyone who reveals these “secrets” is committing a punishable act. This explicitly included the date of removal, which it has not been permitted to announce since 2015, and any summons to attend an embassy or to establish capacity to travel. After vehement protests from civil society, this “offence” can no longer be committed by anyone, but only by those who are bound by their job to official secrecy in this domain. Nevertheless, ordinary members of civil society can still be charged with aiding and abetting or with instigating the offence.

One activist in Germany was dragged before a court for instigating criminal behaviour in August 2020 after his name was given on the website [www.aktionbuergerinnenasyl.de](http://www.aktionbuergerinnenasyl.de) as the person legally responsible for content. The website asks people to protect people threatened with removal to a war zone or where they face persecution and if necessary to hide them in their homes. He was found not guilty.<sup>649</sup>

Proceedings have been initiated in Germany against many pastors and other clergy in connection with the granting of church asylum on charges of “facilitating unauthorised residence”. In summer 2020, the 62-year-old abbess Mechthild Thürmer was found guilty by a court and fined. Because she has refused to pay she now faces prison.<sup>650</sup> In September 2021 she was awarded the Göttingen Peace Prize.

In Iceland Jórunn Edda Helgadóttir and Ragnheiður Freyja Kristínardóttir faced drastic consequences after protesting peacefully against the removal of a person who was sitting on the same plane. While the plane was at rest and the doors still open, they refused to sit down. In April 2019 they were convicted of “seriously endangering flight safety”. The three-month prison sentence was commuted to two years on probation and they were each ordered to bear the court costs of 8,000 Euro.<sup>651</sup>

The “Stansted15” sought to prevent a deportation flight in March 2017 by carrying out a non-violent blockade on a private runway alongside the London airport. They were charged under an anti-terrorism act dating from 1990, which incurred the risk of life sentences. The fact that some of the individuals threatened with removal had not yet had their proce-

dures completed, so that deportation was clearly in breach of the law, was not taken into account. After the district court found them all guilty, the appeal court cleared them of the charge of terrorism in January 2021.<sup>652</sup>

In Greece the authorities have, since 2018, been investigating a group of local and international volunteers who provide help for boats arriving on the island of Lesbos. The defendants face charges not only of “facilitating unauthorised entry”, but also “membership of a criminal association”, money laundering and espionage. Among them are Seán Binder and Sara Mardini, who herself fled to Europe from Syria across the Aegean Sea in 2015 and then returned to Lesbos to help others. Both spent more than three months in pre-trial detention in Greece. After over three years of waiting in trepidation, they attended their first day of hearings in November 2021, only to have the case postponed indefinitely due to procedural errors by the court, exposing them to another gruelling wait.

After the refugee camp in Calais was forcefully dismantled by the authorities, depriving people of even this provisional shelter, many of them ended up at the Park Maximilien in Brussels. A network of solidarity was thereupon set up, with people offering to put up these homeless people themselves and in some cases trying to help them travel on to the United Kingdom. This led the Belgian police to tap the mobile phone of Anouk van Gestel, one of the network, and in summer 2018 a special response unit raided her home in the early hours, took away various items including her computer and mobile phone, and charged her and ten others with “membership of a criminal association and of an international smuggling ring”. In May 2021 she and her three Belgian co-defendants were found not guilty, but the other seven co-defendants, who are not Europeans, were given suspended sentences for “smuggling” because they had helped other people on the move to board trucks bound for the United Kingdom in order to collect money for their own crossing.

In Belgium people on the move are increasingly found guilty of sharing information about trucks that stop along the motorway or of closing the door behind others once they have boarded a truck. Even if there is no evidence of any kind of material gain, they are convicted on the grounds that their intention of organising their own crossing is construed as taking advantage

The public smear campaign against civilian sea rescues culminated in 2017 in the seizure of the “Iuventa”, carried out as great media spec-

tacle. The crew and the operator “Jugend Rettet” had refused together with other sea rescue organisations to sign a “code of conduct” proposed by the Italian prime minister of the day, Marco Minniti. The document contained several breaches of law and would have severely restricted the work of small rescue boats like the “Iuventa” in particular. Investigations were launched against ten crew members for “aiding and abetting unauthorised entry” and after several years of uncertainty charges were officially brought against four of them. They face up to 20 years of prison and six-figure fines in the event that they are found guilty. This case is especially absurd, as the NGO has always cooperated with the Italian authorities and had usually even handed over the people it rescued to the Italian coastguard to bring ashore. Unlike all the other NGOs, whose vessels were temporarily impounded while crew members were investigated, the “Iuventa” remains impounded until the present day.

This case was the prelude to a whole series of criminal prosecutions of civilian rescuers, all of whom have so far been found not guilty. In 2018, investigations were carried out into an officer and two other members of the crew of the Spanish vessel “Open Arms” on counts of “facilitating unauthorised entry” and “forming a criminal association”. That same year the captain of the “Lifeline” was ordered to pay a fine of 10,000 Euro for allegedly failing to register the ship in Malta. In March 2019 investigations were launched against a head of mission and a captain of the “Mare Jonio”, in May against a captain of the “Sea-Watch 3”. All of them were eventually cleared. There followed a decree by the Italian minister of home affairs Salvini, requiring private rescue vessels entering Italian waters without permission to pay a penalty ranging from 10,000 to 50,000 Euro. That is what Carola Rackete did in June 2019, after waiting in vain for over two weeks for permission to land, despite deteriorating conditions on board. She was promptly arrested and also accused of “aiding and abetting unauthorised entry”, of “resisting authority” and “attacking a warship” because she struck a coastguard vessel while entering the port. All the investigations against her were terminated definitively two years later and her arrest was declared inadmissible.<sup>653</sup>

The aforementioned French farmer Cédric Herrou was charged several times with “facilitating unauthorised entry and residence”. His farm is close to the border between France and Italy where the French police regularly carry out unlawful pushbacks. After a court sentenced him

to four months on probation in 2017 he took the matter to the French Constitutional Court, which ruled in July 2018 that the principle of *fraternité* enshrined in the Constitution implied that helping people without valid papers could not of itself be a punishable offence.<sup>654</sup> It struck down the guilty verdict against Herrou and referred the case back to the appeal court in Lyon, which cleared him on all counts in May 2020. The public prosecutor in Lyon sought to appeal on technical grounds, but in March 2021 the court of cassation refused the application, putting an end at last to a torment lasting more than four years, during which Herrou was arrested eleven times, saw his home searched five times and went through court proceedings five times.<sup>655</sup>

In summer 2017 73-year-old Martine Landry picked up two minors on the French side of the checkpoint at Menton/Ventimiglia and accompanied them to the nearest police station. The minors had been unlawfully pushed back to Italy by the French police, even though a youth department in France had already accepted competence in the matter. The police officers, who apparently did not appreciate the attention, raised a charge against Landry of “facilitating the unauthorised entry of minors”. The prosecution called for five years in prison and a fine of 30,000 Euro. In July 2020 – after nearly three years – the case was finally closed.<sup>656</sup>

Benoît Ducos, a mountain rescuer in the Alps, was arrested in 2018 for driving a woman in labour to hospital. He belongs to a group of volunteers known as the Marauders who patrol the border area between France and Italy looking for people who need help. One winter he came across the heavily pregnant woman who was walking with her husband and two small children along a snow-covered path near Briançon in south-east France in an attempt to avoid the checkpoints. On the way to hospital they were stopped by a police patrol car and Ducos was informed that he was not allowed to carry passengers without papers. Ducos was taken to the police station, and the father and two small children were unlawfully removed to Italy. Soon afterwards the woman gave birth in hospital. The charge of “facilitating unauthorised entry and transit” was dropped after nearly six months.<sup>657</sup>

The mayor of the Italian border town Ventimiglia introduced a fine of 200 Euro in 2015 for handing out food to people without a valid residence status. The town council in Calais adopted a similarly draconian measure in March 2017, issuing a decree that made it a punishable offence

to remain frequently and repeatedly in an industrial zone where NGOs were distributing food. A little later the ban was extended to other places used by organisations and volunteers and eventually it was prohibited to gather or remain in these places at all. The reason provided was the need to protect the safety of Calais residents, who were at risk because food was being handed out. The NGOs went to court to complain that the bylaw was in blatant breach of a whole number of basic and human rights. The decree was declared null and void by a court.<sup>658</sup> In September 2020 the mayor of Calais placed another ban on distributing food and drink to migrants within the town centre, this time citing the COVID rules and the “maintenance of public order” as grounds. This time the court had no objections.<sup>659</sup>

Domenico “Mimmo” Lucano, the former mayor of the Italian town of Riace, took in many arrivals in his capacity of mayor of a town that was suffering increasingly from exodus. He housed them in empty apartments instead of camps and found them training and jobs. The “Riace model” established an international reputation and was seen for a long time as the symbol of a welcoming Italy and of a migration policy that showed things could be done differently.

In October 2018, under the right-wing home affairs minister Matteo Salvini, Lucano was removed from office, temporarily taken into custody and then placed under house arrest. Later he was banished from the town. One of the accusations against him is that he arranged marriages between asylum-seekers and Italian citizens so that the former could not be removed. Another is that he awarded contracts for local refuse removal to the only two local migrant cooperatives. He also allegedly transferred surplus public funds that he should have paid back to other local projects to upgrade the community. Certainly, the scandalous and utterly puzzling sentence of 13 years and two months in prison together with a fine of 500,000 Euro handed down to Lucano in late September 2021<sup>660</sup> is not customary for failing to comply with the administrative rule. The fact that the court sent Lucano down for almost twice as many years as the prosecution had requested suggests that this is the draconian punishment for his political views and all they represent.

In 2018 the Croatian Dragan Umičević, a volunteer with the Croatian NGO “Are You Syrious?”, was fined 8,000 Euro – the prosecution had asked for prison and a fine of nearly 48,000 Euro – for “facilitating unauthor-



ised entry". The supreme court in Croatia confirmed the sentence in December 2021.<sup>661</sup> In March 2018 Umičević had drawn the attention of the police to a large group of people on the move who had just crossed the border from Serbia. This was the family of Madina Hussiny, a six-year-old girl who had been killed on the railway track in the wake of an earlier pushback by the Croatian police. The European Court of Human Rights ruled in November 2021 that Croatia had recklessly neglected the girl's right to life, that the authorities had subjected the family to torture, denied them access to legal aid and international protection, and prevented them from investigating the girl's death, and that activists and lawyers for "Are You Syrious?" had been systematically harassed.<sup>662</sup> When the family crossed the border again, Umičević wanted to make sure that this time at least the rest of the family would find justice. This was his undoing.

Those inhabitants of Poland who defy repression and prohibition to look for people in distress in the forests along the border to Belarus creep past border guards in the dark so as not to arouse attention and possibly trigger another unlawful pushback. When they find half-starved, half-frozen people, they give them food, drink and clothing but must leave them in the icy forest because otherwise they would be committing a criminal offence. Those who, despite all this, allow needy people into their houses, hide them in the attic and remember the times when their grandparents sheltered Jews in the same manner.<sup>663</sup>

On Greek islands in the Aegean, there are few residents these days who hurry to help new arrivals. People on the move do often contact NGOs, sending them photographs and live coordinates, and often the locals see these people pass their houses before they are packed into black vans and sent back to sea – but witnesses of unlawful pushbacks are not wanted, and nor are efforts to prevent them and to demand that asylum-seekers be officially registered. Anyone who attends the scene or informs the authorities of arrivals will quickly be charged, at least with "facilitating unauthorised entry", but perhaps with collaborating with "criminal smuggling networks". That applies to activists, journalists and lawyers alike.

In November 2021, when a pushback looked imminent on the island of Samos just as a delegation of European MPs was visiting, one local lawyer seized the opportunity and asked the politicians to accompany an NGO

in a search for the group of new arrivals. Notis Mitarachi, the migration and asylum minister, commented personally on the matter, telling a press conference that he found it “extremely odd that this person knew where the people had gone”. He called upon the public prosecutor to investigate this “very strange incident” and obtain “insider information” concerning local lawyers.<sup>664</sup>

This elicited a response from an association of Greek lawyers called “Alternative Intervention”: “According to certain rhetoric, mere telephone contact between some people and a lawyer makes the latter a human trafficker [sic]. We are aware of the complete disenfranchisement of people on the move, even at times the denial of their right to life, but now we learn that the Minister has intervened with regard to the clients of lawyers. Is it forbidden for a person on the move to communicate with a lawyer? Instead of reporting the disappearance of 19 people, the Minister turns his sights on the person who saved five people from an enforced pushback. (...) Have people on the move been degraded into our most dangerous enemies? Or does the government simply want to create a space where it can violate their rights unconditionally? In order to abduct them, put them on boats and tow them to Turkey.”<sup>665</sup>

### **Drastic Impact on Fundamental Rights and Human Rights**

Criminalising and obstructing assistance for people on the move has devastating effects. Slandorous statements by politicians fan popular anger, leading to animosity and physical attacks that target not only people on the move but also those who help them. All over Europe volunteers and organisations extending solidarity are reporting hostility, death threats and bodily assault. The offices, cars and private property of NGOs and volunteers are attacked and damaged. Right-wing groups feel emboldened to take action against places, groups and individuals who stand for solidarity, and are becoming increasingly uninhibited.

For the associations concerned, this can entail the loss not only of voluntary input, but of funding too. “Choose Love”, a key donor in the field of civilian aid for migrants, cited the risk of criminalisation among the reasons for withdrawing financial support for 2022 – some of it already pledged – from several groups in France and Greece, with the result that various projects to support refugees had to be terminated.<sup>666</sup>

Arrests and court proceedings mean public stigma for those concerned, who are tagged as “criminal”. They can also drag on for many years, bringing with them a huge workload and mental and financial strain, regardless of whether they lead ultimately to a conviction or even a trial. In the case of the “Iuventa” crew, the investigations lasted nearly four years before a charge was laid. More time will pass before the matter comes before a court. Lawyers expect the proceedings to take another five to ten years. To date not a single sea rescue organisation nor any of their crews have been convicted. But what remain are the public allegations, a rusty ship that was seized and has been impounded for four years, a human rights association that has disbanded under the pressure, and a veil of disgrace over crews and over sea rescue in general. Instead of rescuing people in distress, those concerned now have to prepare for potential proceedings.

Criminalisation costs money, time and energy that could be better invested elsewhere. Instead of supporting people on their dangerous sea crossing, sea rescue missions now routinely struggle with new legal and technical requirements and the associated legal disputes. Merchant and container ships, even fishing boats, now steer a wide berth around certain areas, often under explicit orders from public authorities. When they do come across a boat in distress, all too often they abandon rescue and change course or even join in an unlawful pullback or pushback by handing people over to the so-called Libyan coastguard or taking them back to Libya themselves.<sup>667</sup> This has fatal consequences for people in distress. Things are no different onshore along the external and internal borders of Europe. Rather than helping people who literally land on their doorstep in need, residents of the Greek islands or along the Croatian or Franco-Italian or Polish-Belarusian border do not even dare approach them for fear of being prosecuted.

The objective is to deter people from looking at what is going on and responding actively. This aims to further isolate people on the move and to ensure that there are no witnesses when Europe’s public agencies violate human rights.

Criminalisation of migration and of support for people migrating does not stop at the borders of Europe, however. Quite the reverse: the EU is attaching more importance to deals with African countries who can be harnessed to the cause of migration management as “gatekeepers” so

that migrants never progress as far as Europe.<sup>668</sup> Governments who do not consent to stopping people or taking back deportees will receive no money. The more actively they assist, the more money they receive. As one of the measures in an EU plan of action to combat “smuggling of migrants”, the EU’s Emergency Trust Fund for Africa (EUTF) was set up in 2015. For five years and equipped with an overall budget of 4.2 billion Euro, the EUTF finances projects primarily designed to implement the European border policy wish list. Niger, one of the world’s poorest countries, is receiving the biggest slice of the cake, amounting to about 247.5 million Euro, which makes it heavily dependent on the EU. As chance would have it, the government of Niger was the first in West Africa to impose sanctions of up to 30 years in prison and a fine of up to 45,000 Euro for carriage of migrants.<sup>669</sup> This land-locked country is a member of the Economic Community of West African States (ECOWAS), a union of 15 African countries whose 350 million inhabitants enjoy freedom of movement. The Nigerien city of Agadez is the last town before the Sahara and for centuries it has been a hub for traders and travellers heading towards the Mediterranean. From there, they have to cross thousands of kilometres of desert to reach Libya. Until 2015, transporting travellers both within Niger and from there to Libya was a perfectly normal and legal activity. In fact, it was one of the main sources of income. The new legislation defines assisting foreigners (regardless of whether they are from another ECOWAS country) to enter or leave Niger as unlawful “smuggling”. Between mid-2016 and April 2018, Nigerien security forces in Agadez and along the road to Libya arrested more than 282 drivers, car owners, service brokers and providers of accommodation and confiscated 300 to 350 vehicles.<sup>670</sup> The EU equipped the Nigerien government not only with financial resources, but also with vehicles and radar devices. Frontex dispatched liaison officers and collects satellite data about movements in the Sahara. Border guards trained in Europe were stationed at watering points. This resulted not only in many people losing their source of income, but also in many more people dying of thirst on the journey, partly because drivers must now undertake considerable detours to avoid arrest. One Nigerien journalist who set up an emergency hotline commented as follows: “Our country has degenerated into a graveyard in the service of Europe.”<sup>671</sup> Under pressure from the EU, mobility has been criminalised, and more and more restrictions

have been placed not only on migration to the EU but also on freedom of movement within Africa that has existed in most regions for many decades.<sup>672</sup>

The next time talk turns to a “criminal smuggling ring”, it is worth taking a close look at what exactly the crime is supposed to be. And the second question to ask is whether our outrage should be directed at the defendants or those accusing them. There is a broad spectrum of options and motives for helping someone to cross a border. The reason for doing so at all is always the same: the lack of safe, lawful routes.

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# Injustice Framed as Justice: Asylum Procedures in the EU

**Europe's border policy founded on deterrence** and fortification also functions within the EU, where it has a considerable impact on the lives of people seeking protection. Apart from structural violence and lawlessness along the various routes, once people on the move have reached the EU they are frequently confronted at an individual legal level with the hurdles and chicanery of Europe's asylum system.

There are major differences between the procedures laid out by the 27 Member States. Despite efforts at harmonisation in recent years, and although the various directives and regulations that make up the Common European Asylum System (CEAS) are quite detailed in some areas, there is a great disparity in administrative practices, including processing of applications, reception conditions, removals and pre-deportation custody.<sup>673</sup>

For all the differences, there are also similarities, given that ultimately asylum procedures in the various Member States are governed by the same principle: in line with the dogma of deterrence, every step in the procedure is designed to be as difficult as possible so that people think three times about whether they really can or want to apply for protection. The defining tactic of any asylum procedure is attrition. It applies far beyond the legal decision in any particular case and is by nature a kind of chastisement: "So you think you want to seek refuge here? Then suffer for it!" It affects people seeking protection in Kara Tepe as well as in German AnKER centres (Centre for arrival, decision and return), on the street in Italy as well as in an abandoned house on the Croatian border in winter, where police strip people of shoes, jackets and phones during unlawful pushbacks.<sup>674</sup>

Anyone who manages to lodge an application for asylum in the EU, which claims to defend humanitarian values and rights, ought to expect a procedure governed by the rule of law and to be given an opportunity to present their reasons for fleeing their home in detail. Even within the

Member States there is a tenacious belief that the rule of law applies and hence a widespread view that once someone has been turned down in an asylum procedure it must be fine to deport them again.

Ultimately, both views are based on a common erroneous premise that asylum procedures in Europe are consistently fair and thus always produce “just” (or at least “lawful”) outcomes. That is not the case. Although this list is not exhaustive, and bearing in mind the major differences between Member States, six central problems determine the prospects of success or failure for people seeking protection:

- no access to an asylum procedure
- no access to free legal advice and information
- flawed procedures
- degrading reception conditions
- arbitrary grants of protection and procedural design
- asylum as an empty promise.

The overall effect of these shortcomings is often a *de facto* lack of rights for those seeking protection, which is seen on many levels. Moreover, these deficiencies cannot be put down to casual errors or “regrettable circumstances” that public agencies are working hard to rectify. They are deliberate and in coming years they are more likely to be intensified than eliminated.<sup>675</sup>

### No Access to Asylum Procedures

The first challenge for a person seeking protection begins before the procedure, or rather the application that is a prerequisite for accessing the asylum procedure. Everyday life along Europe’s land and sea frontiers is a dystopian *perpetuum mobile* of border violence, pushbacks, militarisation and fortification. In fact, there has been a steep decline in arrivals in the various Member States over the last few years, while unlawful pushbacks have increased considerably. These developments in migration policy are reflected at the individual legal level. Almost nobody manages to apply for international protection in the manner envisaged in the legislation.<sup>676</sup>

Under Article 6 of the EU’s Asylum Procedures Directive (APD), a person can make an application for international protection to any authority competent under national law by stating in an informal manner that they are seeking this protection. Basically it is enough to say a sin-

gle word, like “asylum”. Article 6 (2) APD provides that the person who has made such an informal asylum application must have “an effective opportunity to lodge it as soon as possible”. In practice almost everyone has to undertake several attempts to cross the EU border. Hardly any asylum-seeker manages to formulate an application the first time they do.<sup>677</sup> Attempts to obtain access to the European asylum process are frequently prevented by unlawful pushbacks – a practice that some in Europe are trying desperately to justify at all levels: verbally, legally, politically and socially. However, these pushbacks are incontestably unlawful, as the right to asylum legally includes not only a substantive (“material”) component, i.e. substantive examination of facts and reasons pertaining to an individual’s decision to flee their home, and a corresponding granting of protection but also a procedural (“formal”) component. The procedural element means that everyone – irrespective of whether or not protection is eventually granted – has the right to a fair procedure, i.e. the right to present those personal reasons for seeking asylum in a procedure governed by the rule of law. While there are debates among lawyers about the right of entry and the specific rights of refugees,<sup>678</sup> once the border has been crossed the law is clear: nobody can be sent back without due process being observed. This has been standardised with various scopes and fields of application – in international and European law.<sup>679</sup>

Fortifying the borders has led to a big decline in “successful” arrivals of asylum-seekers in the European Union. A comparison of recent statistics on initial applications shows that these fell by more than one third in 2020. In the first quarter of 2021, applications lodged were again down by over a third (37 per cent) year-on-year. The trend is continuing.<sup>680</sup> The decrease in arrivals and initial applications in no way reflects the actual need for protection. Since 2010/2011 the global number of asylum-seekers has been rising annually and has currently hit a dramatic high with more than 82 million people.<sup>681</sup> However, instead of responding to this growing need for protection, the only consensus at the European level seems to be increased deterrence, fortification and deportation.

## No Access to Free Legal Advice and Information

Another element of the fortress policy involves making it harder for asylum-seekers to exercise their rights. In many Member States, access to independent information and legal advice from lawyers and NGOs is



being prevented or seriously impaired. Instead, people are to be advised as quickly and thoroughly as possible about the fastest way to leave Europe again.

Early legal and above all independent advice about how to go about the procedure is crucial to enable people seeking protection to exercise their rights and to ensure the quality of the process. The core of the procedure is the hearing, which is the opportunity for a person seeking protection to explain their personal reasons for fleeing their country of origin. The records of these hearings are the basis for the decision of the competent asylum authority. It is very difficult and rarely effective to submit different or additional information at a later stage of the procedure. That makes preparing for the hearing crucially important for asylum-seekers in order to ensure a thorough understanding of their rights and obligations during the asylum procedure in general, and specifically at the hearing.

In good asylum counselling, asylum-seekers are advised on how they should structure their presentation and what rights and obligations they have in the asylum procedure. There are many good reasons for leaving a country, but not many of them fall under the Geneva Refugee Convention (GRC) and EU secondary law,<sup>682</sup> which are the basis for granting international protection. The hearing is not only about the personal reasons for leaving, but also about *how* they are presented. Asylum-seekers need to understand which aspects of their personal history to emphasise, where to provide more detail and where not to place the focus. The experiences of fleeing one's home and the reasons for persecution are often linked to traumatic experiences, and so people tend not to address them at their hearing or only touch upon them superficially. Instead, many asylum-seekers will use a hearing to highlight their willingness to work hard, to integrate and to "deserve" their residence status during the hearing. However, such efforts to display good will, motivation and in particular willingness to work can quickly be interpreted against the applicant. Economic grounds, even extreme poverty, are not relevant in an asylum procedure and insisting on a willingness to work is often taken to mean that the applicant only left their country of origin for "economic reasons". In-depth up-front advice is therefore key to the outcome of an asylum hearing. Unfortunately, in many parts of the EU the reality is quite different.

By contrast, so-called advice about returns is actively promoted, be it in Greece, Austria or Germany. Here asylum-seekers are given information about how to abandon their application “voluntarily” and leave the country as fast as possible. Usually this return advice is provided when the asylum application is being lodged, frequently in collaboration with the International Organization for Migration (IOM). People are informed in a number of different languages how to leave, before they have even presented their reasons for seeking asylum. People seeking protection are *de facto* told to leave while they are applying for asylum. The implicit but crystal-clear message “You are not wanted. Go, as soon as possible,” has an effect: in many countries the figures for “voluntary returns” are markedly higher than the figures for completed removals. However, in many cases “voluntary return” is anything but voluntary. Often considerable pressure is put on asylum-seekers with insinuations that their applications do not stand a chance and that they can either return to their countries of origin immediately with a small grant or later, without any funds and entirely under their own steam.

This type of “forced voluntary departure” has been tried and tested in many EU Member States for years. In Greece, for example, the number of “voluntary returners” exceeds the number of removals many times over. However, here, too, “voluntary return” is often anything but voluntary.<sup>683</sup> In Germany, return counselling tends to put mental and financial pressure on people seeking protection to leave the EU by the fastest route. The longer they stay in Germany and the later they decide, the less money they receive for their “voluntary return”. This is a deliberate tactic to encourage rapid, ill-considered decisions. In Germany, asylum-seekers even get a bonus of 500 Euro if they opt for return before an initial decision has been made in their procedure.<sup>684</sup>

The European Court of Human Rights (ECtHR) took a clear stance on this procedure, observing that not every “voluntary return” is voluntarily undertaken. A signature on a piece of paper is not sufficient evidence of a free decision in a situation characterised by coercion and disinformation. In the *N.A. versus Finland* case, a complaint was filed by the family of an Iraqi suffering from political persecution who left Finland on its “voluntary return” programme. A month after returning to Iraq he was killed by three bullets in the street. Finland argued that it was not responsible for the Iraqi’s death because he had gone back “voluntarily” and had

actually signed a paper prior to return declaring that the government agencies bore no liability for the consequences. The Court did not accept this argument and ruled that the return had not been voluntary, and that Finland had acted unlawfully by breaching its duty to protect and its duty to establish risk as set out in Article 2 and Article 3 of the European Convention on Human Rights (ECHR).<sup>685</sup>

Access to other information that does not relate to returning as quickly as possible to the country of origin, on the other hand, is frequently rendered difficult or complicated. Many EU countries have adopted similar strategies here, for example by amending their laws so that advice can only be offered by government agencies and not by independent NGOs. Under the guise of purportedly “independent government advice”, *non-governmental*, *truly* independent legal advice is replaced. It goes without saying that “independent” advice can never be provided by the opposing party in the same procedure (in the case of an asylum procedure, by the asylum authority and related government offices). Logically, legal advice cannot be offered by the other side in a legal dispute. Strictly speaking such advice cannot even be “neutral”, as it must comply with the principles of legal advocacy, which means “safeguarding the interests of the client”. A legal advocate or legal counsel must act in the client’s interest, not be “neutral” and certainly not an arm of the other side.

This perversion of justice is exemplified by Austria, which introduced a government-funded counselling structure of this kind. It was launched under an aura of innocence in 2019 with the assertion that the aim was “not to displace, only to complement” non-governmental advice. It was claimed at the time that half the advice would be provided by non-governmental and half by government agencies.<sup>686</sup> By 2021, however, the independent advice had already been completely displaced. These days the advice in Austria is provided by a new government agency as a one-stop shop for legal advice, advice about returning and support for returnees.<sup>687</sup> Having one agency to dealing with all three topics clearly indicates where the focus of this government “support” lies.

Similar efforts can be observed in Germany. Since 2019, following the adoption of the “Clear Off” Act (officially known as the “Orderly Return Act”), advice on asylum procedures is offered in the AnkER centres by the Federal Office for Migration and Refugees (BAMF). These new provisions stipulate that BAMF itself takes responsibility for initial “independent

government advice on asylum procedures". In a second stage, advice can be provided by either BAMF "or charitable associations". However, these charitable associations are not entitled to federal funding for their work or their labour costs. Concerns that independent associations might have their funding cut with the excuse that the government advice structure is to be rolled out across the country have proved correct.<sup>688</sup> Here too, just as in Austria, the German government initially wore an innocent halo: the coalition agreement declared its aim to be "nationwide independent asylum advice". The reality, as in Austria, looks very different two years later.<sup>689</sup>

Another trend that can be observed in many Member States is the *de facto* obstruction of effective legal advice. Even when that advice remains available on paper, advisers and lawyers confront significant practical hurdles.<sup>690</sup> For example, access to reception facilities is made considerably more difficult for them, especially in closed facilities or detention centres. In addition, centres are often located in remote areas. People seeking protection wishing to make use of these legal advice structures therefore need to spend a lot of money and invest a lot of time.<sup>691</sup>

The COVID-19 pandemic has also been used to make access to reception facilities harder. Greece even suspended its asylum procedure for a while, closed down agencies and imposed major restrictions, most of which remained in place when infection rates declined, on the movement of people seeking protection and restricted access for lawyers and advisers.<sup>692</sup> However, the Greek government found further ways to restrict access to legal representation for people on the move. Following the adoption of stricter rules in 2019, only lawyers have been permitted since January 2020 to initiate an appeal, although the costs are borne by the public purse. That sounds good to start with, but the practice is very different, because on the Greek islands the deadline for an appeal against a decision is ten days, and as there are not many lawyers on the islands these deadlines are often missed, so that decisions become final and rejections can no longer be challenged.<sup>693</sup>

As a result independent legal advice has become considerably more difficult to obtain in many Member States, both *de jure* (due to amended legislation) and *de facto*. This results in poor hearings where people do not or cannot tell their whole story and hence to a general deterioration in the quality of asylum procedures. All of this also makes it more difficult for people to exercise their rights in later procedural steps.

### Flawed Procedures

There are a range of deficiencies relating to hearings and administrative procedures that result in a high error rate in asylum decisions. The spectrum of flaws is so wide that we can only offer a cursory summary and a few examples. They include the failure to conduct a personal interview *in situ*, poor interpretation, inappropriate questions, separating the roles of interviewer and decision-maker, a restrictive and discriminatory credibility check, and the lack of consideration for vulnerability and trauma.

In many Member States (at least in some cases) the exchange between the person seeking protection and the staff of the relevant body is not conducted in person but by video link or telephone. In the United Kingdom, formerly a Member State of the EU, hearings are always conducted by video link, and it is not unusual for everyone concerned (panel, asylum-seeker, lawyer, interpreter) to be in a different place. In Hungary too, interpretation is almost always provided by video or telephone, with the connection often breaking up, which is not only frustrating but leads to gaps in the interpretation.<sup>694</sup> In Norway, Ireland, France, Sweden, Belgium, Bulgaria, Germany, Greece, Latvia, Poland and Romania, hearings in certain legally defined cases are also held without personal contact.<sup>695</sup> This is a problem because the hearing is supposed to address events that can be extremely private, intimate and traumatic. An appropriate atmosphere cannot usually be created online or over the phone, and non-verbal communication is nigh impossible. Assessing the credibility of a submission and the credibility of the asylum-seeker is practically impossible under such circumstances. Technical hitches and concerns about data protection can substantially impair the quality of the conversation, resulting in a poor hearing.<sup>696</sup>

Another core problem in the asylum procedure is inadequate interpretation. It is essential that interpreters are precise, complete and professional in what they say, because a poor translation can have serious consequences for the applicant. If the account of the asylum-seeker is not fully conveyed, an asylum application may be rejected because of unsubstantiated claims (i.e. a lack of proper detail). If an interpreter is unprofessional and/or dismissive about the applicant, distrust can result in important information not being sufficiently articulated. Imprecise translations can be construed as contradictions on the part of the asylum-seeker and can result in rejection. If a question is not translated cor-

rectly, the answer may potentially be wrong or unfavourable, and that can also lead to a negative decision.

As there are very few interpreters available for some languages, the authorities routinely resort to poor or untrained interpreters or else hold the hearing in another language (usually English or French), of which asylum-seekers do not always have sufficient command. The lack of interpreters primarily affects speakers of Kurdish (Sorani or Pehlewani), Pashtu, Urdu, Tamil, Swahili, Tigrinya, Bambara, Lingala, Tamil, Mandinka, Nepalese and Bengali – languages spoken in many war and crisis zones. In Portugal trained interpreters are not used at all in many areas. Instead the authority will draw on someone it *assumes* knows the language well enough. In Bulgaria there are no interpreters at all for some languages, so that hearings are held in a different language determined by the staff of the authority. There were well documented cases of hearings in Romania where no interpreter was present at all.<sup>697</sup>

The style used by the interviewer when asking questions can also result in unlawful asylum decisions. It is easy to generate uncertainty or defensiveness in an interviewee by inserting a critical undertone. Questions should be phrased in an open-ended form at first to permit a coherent account. Narrowly formulated questions produce shorter responses, even if the asylum-seeker perhaps has a great deal more to say. The question “Were you politically active in your country of origin?” risks prompting a brief “yes” or “no” without eliciting further information that might be crucial to recognising refugee status.

Another important aspect in decisions about asylum applications is the credibility of the applicant, and the best way to assess that is in a personal exchange. If the decision maker is not the same person as the interviewer, contradictions in the record, mistakes in the interpretation or other misunderstandings can have serious consequences. Despite this, hearings in Greece, for example, are often conducted by staff of the European Asylum Support Office (EASO), whereas the decision is incumbent on the Greek asylum authority. In Germany too, this separation of functions is sometimes practised, although various administrative courts have ruled it to be unlawful and invalid.<sup>698</sup>

To apply for asylum, a person must make a coherent and plausible case that they have a “justified fear of persecution”. There are individual criteria for this that depend on age, perceptive skills, ability to remember, and

possible vulnerabilities or trauma.<sup>699</sup> The other side to this coin is that no evidence is required, i.e. the applicant is not bound by a strict burden of proof in the legal sense. But despite that principle, such evidence is often demanded, or else a person's credibility is refuted on ludicrous grounds. In Hungary asylum-seekers are subjected to a psychological test to establish whether they really are homosexual. The Court of Justice of the European Union (CJEU) has ruled that this test constitutes a disproportionate breach of the asylum-seeker's privacy and declared it unlawful.<sup>700</sup>

Any discrimination or prejudice on the part of decision makers will seriously affect the credibility check and can mean that an application is rejected, as happened to a gay Afghan in Austria. The decision maker wrote in his evaluation: "Neither your gait, your bearing nor your clothes remotely suggest that you might be homosexual." The official's analysis continued: "It is said that you have often been embroiled in arguments with your room-mates. In other words you display aggressive potential that is not to be expected in a homosexual." Besides, it was held to be suspicious that the applicant spent time on his own: "Do homosexuals not tend to be sociable?"<sup>701</sup>

In addition, trauma can severely affect memory and the ability to relate events chronologically. The accounts of traumatic situations required in a hearing place tremendous mental strain on those concerned. According to Article 15 (3) APD, asylum authorities are legally bound to respect vulnerabilities and other needs. This obligation is frequently not met. It can happen that female survivors of sexual violence are told to present their reasons for fleeing their country in the presence of a man (as an interviewer and/or interpreter) and consequently omit important details from their account of persecution.

However, often vulnerabilities are not even established in the first place as the legal framework for this is insufficiently detailed and does not, for example, call for a questionnaire or conversations held in confidence with trained staff. Secondary EU law contains only fragmentary provisions on handling trauma and vulnerability – and hence on responding to people with a particularly acute need for protection.<sup>702</sup>

## Degrading Reception Conditions

The mental and physical strain of being on the move does not end once the asylum application is lodged. As described in earlier chapters, the reception conditions in many Member States are catastrophic.

Numerous studies show that the mental health of people seeking protection is severely impaired by experiencing poor reception conditions. Typical features are insecurity, the rigours of camp life, a lack of access to health care and information, delays in the asylum procedure, detentions and the fear of removal, and a sense of hopelessness.<sup>703</sup> Countless studies indicate that detention in particular has a long-term negative impact on the mental health of people seeking protection, far beyond the time of their detention.<sup>704</sup> An Australian study examined the extent to which depression among refugees could be attributed to their *previous* experience and how much of it was due to detention *in the country of arrival*. The survey revealed that more than half of those who had spent more than six months in detention were still suffering from clinical depression three years after their release. That was twice as many as the group that had “only” been detained for one to five months. The likelihood of long-term depression was therefore not heavily correlated with earlier experience in transit and above all associated with reception conditions in the detention facilities.<sup>705</sup> In other words, every month spent in a refugee camp or closed reception centre increases the statistical probability of suffering many years of depression and permanent mental problems.

This systematic and long-term inhuman treatment in European reception centres also has legal consequences. Many asylum-seekers are deflated and exhausted, angry, frustrated, traumatised or disillusioned. Some simply no longer have the energy to pursue their limited legal options. Mental strain is the gateway to “voluntary return”, which deliberately plays on the despair and insecurity of asylum-seekers. This burden likewise discourages people seeking protection from appealing against negative decisions or mustering the energy to find a job or training opportunity in order to build an alternative pathway to residence status.

The European version of a “fair asylum process” deliberately fosters the hopelessness that leads to fewer rejected applicants seeking a legal remedy and makes “voluntary return” more likely – and so we can add it to the long list of mechanisms for sealing off the EU fortress.

### **Arbitrary Grants of Protection and Procedural Design**

If we consider that administrative procedures are intended to decide on a person’s right of residence, we might ask how long such a procedure



should appropriately take. Of course, a certain duration is essential to ensure the legal status of the procedure. On the other hand, a person should not be left in doubt for a long time, especially when they are languishing in camps and other such reception facilities. The diversity of procedures also makes it hard to conclude what the “right” duration should be. From a legal perspective, standards of human rights are at risk both from excessively short and excessively long asylum procedures.<sup>706</sup> The EU caters for both scenarios.

Article 31 (3) and (9) APD provide that the competent authority must make its initial decision within six months. In practice it can take anything from a few days to over a year. The airport procedure in Germany, for example, is supposed (under § 18a (6) no. 2 of the Asylum Act) to generate a decision within two days. In the Netherlands applicants from “safe third countries” can expect a decision within eight days.<sup>707</sup> When the period is as short as this, many asylum applications are unlawfully rejected without granting the applicant enough opportunity to present their personal story. The spectrum of procedures and durations is particularly broad in Greece. Whereas a *fast-track border procedure* there is designed to produce a decision within seven days, the regular procedure can last well over a year, in some cases several years. During the COVID-19 pandemic some asylum-seekers have had to wait more than a year simply for their first hearing.<sup>708</sup>

Although a “correct” duration cannot be determined in the abstract, the European Union as a Nobel Peace Prize laureate might be expected to ensure as prompt an asylum procedure as possible and one that complies with the highest standards. In many Member States, however, the procedural design is hampered by arbitrary interventions and political objectives. On the external borders of the EU, procedures are frequently fast-tracked (and most decisions are negative), whereas a recognition procedure in a country without an external EU border can take substantially more time. The official explanation is that applications are classified according to their prospects of success so that “easier cases” can be resolved faster than “more complex cases”. Although that reasoning is legally admissible, the approach is the basis for rapid negative decisions and slow – hence few – positive decisions.

This playing for time is reflected in the way German authorities deal with asylum-seekers. More and more asylum applicants are leaving

Greece for Germany, where they file another application for protection. The administrative appeal court (*Oberverwaltungsgericht*) in North Rhine-Westphalia handed down two ground-breaking judgments in January 2021 stating that persons whose refugee status had already been recognised in Greece should not be sent back there as they would face “extreme material poverty”.<sup>709</sup> These persons were therefore entitled to seek asylum in Germany too. Many of these applicants come from Afghanistan, which means that their protection status is quite likely to be recognised, or at least that deporting them to their country of origin will be prohibited. For BAMF, the German authority responsible, this implied that it ought to issue positive decisions in these cases. Instead, BAMF imposed an in-house moratorium on such decisions.<sup>710</sup> It emerged in February 2021 that the moratorium had been in place since December 2019. So rather than be forced to make a *positive* decision, it seems, it is better not to make one *at all*.<sup>711</sup>

Both the administrative law procedure and the results it produces are often characterised by arbitrariness. The percentage of applications approved does not reflect actual developments in the countries of origin concerned, but is instead the result of politically determined (low) reception quotas or serves other interests, such as prioritising people who speak the language of the host country. Besides, the percentage of applications approved varies considerably depending on the Member State and partner country involved. The records may suggest a harmonised approach, but the percentage of applications approved for Afghanistan ranges from 1 per cent in Bulgaria to 98 per cent in Switzerland. (Switzerland is not a member of the EU but it has signed bilateral agreements making it part of the Schengen Area and a party to the Dublin Regulation.) The percentage of applications approved for Turks ranges from 11 per cent in Greece (as a neighbour of Turkey the aim is presumably to keep reception quotas as low as possible in order not to create “incentives”) and 96 per cent in Switzerland. Venezuelans enjoy a 23 per cent protection rate in Belgium and 98 per cent in Spain. Syrians in Spain only qualify for a protection rate of 35 per cent, but almost 100 per cent in some other Member States.<sup>712</sup> That means the question of the EU country in which asylum-seekers can lodge their application is a fundamental factor. Nevertheless, the Dublin Regulation leaves them practically no choice or scope for decision when it comes to their country of application

(in practice they have a little influence, e.g. by dint of Art. 9, 10, 12, 16 and 17 of the Dublin III Regulation). It is common, therefore, for people from the same place of origin and with similar reasons for seeking protection to be recognised by one EU Member State or Schengen partner but not by another.

Subsidiary protection, too, is turned on its head and abused to keep asylum-seekers out of the EU. The original idea was to create a protection status for people who do not qualify as refugees under the Geneva Convention but who nonetheless are at risk of “serious harm” in their country of origin. Subsidiary protection is a particularly suitable option for people fleeing war. However, EU countries use this weaker option of subsidiary protection as a method for refusing more protection by granting it precedence over full refugee status. The concrete outcome is to place people in a weaker position. Intervals between compulsory reviews for the extension or withdrawal of subsidiary protection status are much shorter. Some Member States take a particularly restrictive view of the right to family reunion, forcing relatives outside the EU to resort to dangerous journeys and to attempt what is classified as illegal entry. This is especially hard on minors, who are treated as unlawful “latecomers” [travelling to join other family members] but are actually in particular need of protection. In 2020 children and teenagers accounted for about a third of the first applications in the EU.<sup>713</sup>

### Asylum As an Empty Promise

Even when a person is formally granted protection, the status does not necessarily mean practical protection. In many Member States people with protection status are not granted support through integration services, lack prospects in the employment market and even accommodation. The zero integration principle is at work in many countries. In Greece many recognised refugees are on the streets leading a life with no medical care, no roof over their heads and not enough to eat.<sup>714</sup> That, too, suits politicians: the Greek migration minister Notis Mitarakis openly admits that recognised refugees have to look after themselves.<sup>715</sup> In Bulgaria, people with protection status are often homeless and receive no state support at all. There is a similar pattern in Hungary.<sup>716</sup>

The precarious situation of recognised refugees also has legal consequences. European asylum law is based on the assumption that formal

recognition of protected status entails genuine protection and that asylum procedures in the Member States will be fair and generate a coherent outcome. That is why people seeking protection can only lodge their application *once* in the entire European Union. Even the Court of Justice of the European Union can now see that these fundamental assumptions are at least partly inaccurate. The CJEU has therefore ruled that in such cases a new asylum application in another Member State is admissible.<sup>717</sup> German courts have followed suit, stating that in certain instances persons who have already been granted a protection status in Greece, Italy or Bulgaria must be allowed a second asylum procedure in Germany, as their certified protection is in truth worth nothing.<sup>718</sup> The Common European Asylum System is founded on the principle of offering as little protection as needed, but in many cases it does not offer any at all.

Case law in recent years demonstrates that even formal acknowledgements of protection do not improve the living conditions of refugees. In such instances European asylum law has degenerated into an empty promise. One clear indication that the system has fallen apart is the obligation in some EU countries, in the light of human rights standards, to carry out a second asylum procedure instead of applying the Dublin III Regulation: injustice is framed as justice and applicable law leads to violations of human rights. Or to put it another way: in the view of German courts and the Court of Justice of the European Union, European asylum law can be so unjust that it must occasionally be set aside.

The idea that asylum procedures lead to fair outcomes is a myth at present in many Member States. Given blatant discrepancies in (for example) quotas and major legal flaws in a range of asylum procedures, the belief that the procedure is fair and those who are rejected should be deported is no longer tenable and bears no relation to the real experience of people seeking protection in Europe. Instead of talking about “effective” removals, it would be more appropriate to ensure that decisions meet the standards enshrined in law. The arbitrary nature of decisions is a sign that people asking for protection are being systematically deprived of their rights.

While the EU fails to defend the human rights of refugees and denies them a legal livelihood in Europe, there are those who are happy to exploit their illegalised residence for commercial gain. Hundreds of thousands of illegalised people in the EU are working under conditions

resembling slavery to provide Western and Central Europe with cheap food. In places where large swathes of land are devoted to industrial agriculture, illegalised people from sub-Saharan Africa, Morocco, Eastern Europe and Latin America account for up to and over 90 percent of the underpaid and overexploited workforce.<sup>719</sup>

In line with Europe's fortress policy, politicians have deliberately opted in recent years for fundamental choices that make the universal right to asylum as inaccessible as possible. People seeking protection are dehumanised, victimised and racialised instead of being seen as human beings with individual identities and diverse interests from different social, cultural, economic and political backgrounds.<sup>720</sup> The asylum procedure and the decisions it produces are part of the discourse about a "humanitarian crisis" that presents granting protection as an act of human mercy. But a just asylum procedure is not an act of mercy. It is a legal right.

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# Good Prospects? Panorama of Violence

## **“Anything Might Happen! You Could Even Die”<sup>721</sup>**

Considering the recent history of European border and asylum policy, the many facets of a systematic, closed-borders approach, be it on a bureaucratic, legal or physical level, and the violence perpetrated in pursuing this policy, it becomes apparent that the principles constantly invoked by the European Union and its Member States are not worth the paper they are written on. While cases involving injuries, violence and deaths are steadily increasing at the EU borders, with unlawful pushbacks, pull-backs, and criminal violations of human rights simply par for the course, European governments boast of their alleged humanity and respect for the rule of law, which could hardly form a more glaring contrast to the brutal reality of the border regime. To maintain this blatant discrepancy, Brussels avoids any serious scrutiny of the ideological-philosophical foundations of Fortress Europe or the way in which European policy forms a continuum with the colonial past.<sup>722</sup>

Every effort is made to systematically curtail mobility and access to asylum for migrants. At the same time, more and more people all over the world are fleeing their homes, a phenomenon that is essentially triggered and driven by the exploitation of the Global South that has been underway for centuries and rich industrialised countries’ “geopolitical interests”, along with war and crises, the climate catastrophe and now the COVID-19 pandemic to boot. Safe and legal ways for people on the move to enter the EU are steadily diminishing, illegalised routes are growing more dangerous, criminalisation of people seeking refuge and anyone that assists them is in full swing, externalisation of European borders spreads deep into other continents, new racist agreements hostile to migration are adopted and existing deals consolidated. The EU has dug itself in, attempting to legitimise its inhumane policy of isolation and

border violence by pedalling a narrative that portrays people seeking refuge as a threat. This distorted version of reality plays out in use of language, as well as in the legal, political and social terms.

The increasing linguistic categorisation that brands some as “illegal” signifies, to turn the argument on its head, rhetorically entrenching a distinction between “humans” with rights and “migrants”, implicitly assumed to have no claim to human rights. This is how violence and injustice against people seeking protection are normalised, while societal discourse becomes coarser and less nuanced. Dehumanising people by using terms like “asylum tourism”, “refugee crisis” or “hybrid weapon”, in the process seeking to lump together everyone seeking refuge into one single group tinged with generalised, consistently negative connotations, serves as a breeding ground for xenophobia and racism.<sup>723</sup>

Legal transgression of previous taboos, such as the ruling handed down by the European Court of Human Rights (ECHR) in *N.D. and N.T. v. Spain*, which gave the green light to systematic and brutal pushbacks at the Spanish-Moroccan border, are a sad indication of the vigorous erosion of the law and legality already underway.<sup>724</sup> Measures are not adopted in the spirit of legally recognised principles. Inaccuracies, gaps or questions concerning jurisdiction in legal texts serve as loopholes, while fundamental tenets of the rule of law are systematically circumvented, distorted or undermined in order to “take account” of Europe’s wish to uphold its closed-borders policy.<sup>725</sup>

The same pattern can be detected in dramatic political announcements that pull out all the stops in an attempt to disguise the European Union’s rejection of its self-proclaimed values as a demonstration of “righteous virtue”. In the face of the suspension of the right to asylum and acts of violence at the borders in Greece and Poland, Brussels did not merely dish out further funding but also explicit praise. The “guardian of the treaties” did not insist on compliance with either the European Charter of Fundamental Rights or the Asylum Procedures Directive.<sup>726</sup> It has become impossible to talk in terms of isolated one-off cases or exceptional situations in the light of the European Commission’s failure to react to systematic, state-orchestrated border violence, moves in Croatia to strip people seeking refuge of their rights, and the appalling situation at the borders with Belarus. The EU, alternately lauding the cruel and unlawful closed-borders measures adopted or simply remaining

silent about these strategies, condones and encourages Member States’ behaviour.

The upshot of this linguistic, legal and political shift in discourse is that responsibility towards refugees is denied. At best, people on the move are given help out of a sense of “mercy” – Europe is far from granting them their rights, which are enshrined in law (and supposedly in morality). Political and media campaigns that deliberately objectify migrants or even depict them as a threat, are having a growing impact. In 2015, a public and media outcry was unleashed when AfD politician Beatrix von Storch called for shots to be fired at people along the border.<sup>727</sup> When this bloodthirsty demand became a reality in 2020, so-called mainstream society barely batted an eyelid.<sup>728</sup> As recently as May 2021, Greek Minister of Migration Notis Mitarakis described pushbacks as “necessary”.<sup>729</sup>

Warsaw can expect little opposition to its policies when hundreds of people are crammed into the no-man’s land of the Polish-Belarusian border on the anniversary of the fall of the Berlin Wall, with women suffering miscarriages there and others dying of exhaustion, hunger and cold. On the contrary, the pivot to the right in Europe is becoming more pronounced, fuelled by fear-mongering and racist sloganeering by European heads of state. Even “left-liberal” parties now make statements that would have been considered beyond the pale just a few years ago. Democratically elected parties are gradually and unobtrusively realising the radical right-wing Identitarian Movement’s ethnically obsessed, racist dreams. It therefore comes as no surprise that right-wing mobs feel emboldened to act out their cynically misanthropic ideologies at the borders, where they support unlawful pushbacks, beat up people seeking protection, journalists and anyone helping newcomers.<sup>730</sup> That has not provoked an outcry from the general public or from politicians or legal circles. Silent assent and political inertia are again the sole response when “shadow armies” of “masked men” assault people on both sides of borders in Greece or Croatia.<sup>731</sup>

The EU has long since made up its mind: the issue is protection *from* people on the move, not *of* them. The focus is on defending and maintaining social and economic hierarchies. The price to be paid is a much more difficult situation for countless people seeking refuge, who may as a result even lose their lives, coupled with outright rejection of the inviolability of human dignity and a blatant refusal to uphold human rights, freedom,



and the rule of law. In an increasingly globalised world, the EU – unless it is promoting the economically desirable kind of migration – relies on isolation and a closed-borders approach. Perfidiously categorising people as “economically useful” and “economically worthless” is not simply cynical, for it often proves lethal and is nothing but an unabashed attempt to maintain the existing power balance between the Global North and South. In adopting this strategy, the Nobel Peace Prize laureate deliberately overlooks how it has contributed to and continues to maintain globally entrenched inequalities, relationships grounded in exploitation and other crisis-related processes, as well as its ensuing responsibility. Without an ounce of shame, the EU’s motto “United in diversity” disguises an identity that is grounded in exclusion.

Nevertheless, the EU, as an “association of democratic states”, is keen to ensure that its use of violence has at least a semblance of being proportionate and justified. To that end, “problematic” violence is outsourced to third countries or non-official border guards, such as the “masked men”, in one fell swoop also outsourcing accountability and responsibility. Institutional forms of organisation are chosen to exercise other forms of violence in an effort to make the actions implemented appear compatible with a liberal democratic order. Setting up Frontex, the European Border and Coast Guard Agency, was an important step in violently closing and militarising borders. It is argued in this context that the force used is permissible, justifiable or can even be condoned as it can be managed, controlled and authorised on the basis of a predefined set of rules (such as Frontex’s mandates and rules of engagement).<sup>732</sup> The fundamental problem, however, is that Frontex plays a central role in border control operations in Europe, yet it is *de facto* scarcely accountable. Frontex officials can do as they please, while the EU abdicates any responsibility.

Frontex lauds violent border closures as hazard-prevention operations, a definition that serves to justify any means used. Statements by the former head of Frontex, Ikka Laitinen, such as: “These are not refugees, but illegal migrants”,<sup>733</sup> are supposed to make this violent approach not only legitimate, but also crucial to “combat illegal migration”. Generalisation of this topos, which underpins military action against people on the move, also systematically excludes people entitled to international protection according to the criteria of the Geneva Refugee Convention and deprives them of their rights.<sup>734</sup>

The EU views violence against people seeking refuge as an effective method and considers that leaving them to die is an appropriate deterrent to “teach” people that they should not seek protection. This kind of inhumane justification of violence and death as an “educational method” is only conceivable or socially acceptable due to generalised othering of people seeking refuge, in other words, denial of their humanity. The extent to which racism is a motivation here may become clear if you attempt for a moment to imagine EU border guards refusing to assist an unseaworthy rubber dinghy with 150 *white* English people or try to picture tens of thousands of *white* North Americans being forced to live for years in tents without even the most basic supplies.<sup>735</sup>

When people fleeing are thus reduced to nothing but a threat, there is complete disregard for the harsh realisation that pushbacks or pullbacks, over and above violating the principle of non-refoulement, may even in certain cases constitute attempted murder. Although non-EU countries are encouraged to carry out pullbacks, there had long been denials that European officials were conducting pushbacks. These are now openly admitted and said to be an appropriate measure. This legitimisation represents a fundamental move away from human rights principles, calling into question the universality of human rights and thus attempting to put them up for debate.

Seeking to distract attention from this constitutional disaster, a series of “exceptional situations” is constantly created to provide grounds for the way in which Frontex officials and national border guards act. At the same time, those “exceptions” create the impression that respect for human rights and protecting life and limb are firmly anchored in the border agency’s standard operating procedures, thus suggesting that Frontex is inherently defined by violence. Emphasising the “exceptional circumstances” in which force is used distracts attention from the fundamental decision to tolerate force as an operational principle during border controls. However, the European closed-border regime can only be maintained if violence is used. To avoid shifting to a less violent system or being forced to admit that violence is systemically and deliberately deployed, the EU will maintain its pretence that people who are injured, go missing or die at the borders, along with blows, kicks and pushbacks by European officials, constitute the exception in an otherwise non-violent, legitimate border apparatus.

### What Path Should We Take? And Who Should Come Along?

Frontex's expansion and empowerment is proceeding apace. Kilo-metre-long walls and barbed-wire fences are being erected at the EU's external borders, many with EU co-financing and all with EU approval. Myriad (sometimes bilateral) agreements and treaties to "combat migration" are concluded with third countries to outsource violence and, above all, responsibility. Political promises and blackmail in the form of so-called development aid encourages non-EU countries to implement European border policy. So-called disembarkation platforms (sic!) are to be set up in North African countries and people on the move who are intercepted in the Mediterranean are to be taken to these platforms in contravention of the *refoulement* ban.<sup>736</sup>

In addition, Europe is developing into a high-tech fortress thanks to the *Smart Border System*, scheduled to go into operation in 2022.<sup>737</sup> This biometric control system for registering people from third countries represents a further violation of human rights and deploys data retention.<sup>738</sup> Concerns about the immanent stigmatisation and criminalisation of those affected, worries about abusive use of data misuse, and the enormous costs are just some of the criticisms levelled at this major supra-national digital surveillance project.<sup>739</sup> Through the iBorderCtrl research project, funded by the EU to the tune of four and a half million Euro, Europe seeks to close its borders even more tightly, for example by drawing on artificial intelligence and Orwellian inventions such as the video lie detector. The follow-up project TRESSPASS, which advances research on this type of border technology, is funded by the European Commission to the tune of about eight million Euro.<sup>740</sup>

In September 2020, the European Commission presented a proposal to reform the European asylum system – the "New Asylum and Migration Package". Parts of the package, such as the establishment of an EU asylum agency, have since been adopted by the European Council.<sup>741</sup> Other aspects were vehemently rejected by some EU Member States from the outset – inter alia because governments feel the draft does not go far enough in sealing borders even more tightly shut.<sup>742</sup> That is above all alarming because the changes to the European asylum system contained in the proposal will not in any way improve the situation of migrants. No legal solu-

tion that respects human rights has been found to resolve the problem of the catastrophic living conditions of people on the move (irrespective of whether they are travelling to Europe, are at the borders or inside the EU). The only consensus is that the borders should remain closed.

The Commission draft envisages that people seeking protection will be pre-screened during “screening procedures” to determine whether they will be allowed to file an asylum application or will be allocated to what is known as an asylum border procedure. The proposed text states that these people will therefore be considered as “not having entered” the EU for up to ten days, even if they are quite clearly in an EU Member State. Non-obvious vulnerabilities can all too easily be overlooked or disregarded in the screening procedure and it will only be possible to implement this procedure by detaining people seeking protection. Although people will be deprived of legal guarantees due to the fictitious status of “not having entered” the EU, this system introduces huge obstacles to accessing legal and social support. The Commission perverts language and its supposed values with what it dubs solidarity mechanisms (sic!), whereby Member States unwilling to take in asylum-seekers must participate in deportations. For example, the euphemistic term “return sponsorships” that is used in the draft also makes a mockery of the concept of “solidarity”, focusing as it does on sharing responsibilities for deportations rather than for granting asylum.

The Asylum and Migration Management Regulation (AMM Regulation) is intended to replace the Dublin III Regulation. The principle of the responsibility of the state of first entry has been retained. Moreover, the “solidarity measures” are so complicated and unrealistic that countries with EU external borders, such as Greece and Italy, continue to bear the brunt of responsibility for asylum procedures.

If people on the move do not want to stay in the first EU country that they enter, the new proposal stipulates, *inter alia*, that family reunification applications should be subject to significantly shorter deadlines, cut from three months to two months. EU Member States already often fail to respect these deadlines, in many cases thus preventing family reunification. Mechanisms penalising people who move to a Member State that is not responsible for them are intended to exclude refugees from social benefits as far as possible. While social benefits supposedly already represent the “minimum subsistence level compatible with human dignity”,

additional benefit cuts are foreseen for asylum-seekers whose application has been rejected. This undermines the significance of human dignity in the context of migration policy – higher welfare benefits are thus apparently needed to safeguard the dignity of EU citizens than to preserve the dignity of asylum-seekers whose application has been rejected.

A new “Regulation addressing situations of crisis” will allow Member States that have particularly high levels of asylum applications to deal even more expeditiously with asylum procedures and deportations. It will become significantly easier to order Dublin detentions – when people on the move are detained to secure their transfer to the first country of entry, which is responsible for handling their application –, increasing already widespread deprivation of liberty that serves the sole purpose of facilitating administrative procedures. Furthermore, it will also become possible to return unaccompanied minors to their country of first entry. Although numerous human rights violations by employees of EU agencies such as Frontex or EASO (*European Asylum Support Office*) are well-documented, the New Migration Pact provides for closer cooperation between such EU institutions and Member States to deal with asylum reception procedures, registrations and returns.<sup>743</sup>

Claims that these measures prevent and combat human trafficking and other crimes are used as a fig leaf to justify measures that are highly questionable from a human rights perspective and that seek to combat migration, enforce rigid visa policy, reinforce border controls and hinder family reunification. The principle of non-refoulement is increasingly undermined and legal guarantees and support for people on the move are largely abolished. The side effect is a significantly increased risk of exploitation and human trafficking.<sup>744</sup>

Despite well-documented violence against people seeking refuge, refusals to grant international protection, and degrading living conditions in camps and hotspots, policy-makers continue to pursue and exacerbate precisely those policies that led to this state of affairs. Externalisation of “security” at the EU’s external borders and intensified cooperation with third countries also feature in the reform proposal – without any kind of efforts to secure greater responsibility or appropriate accountability obligations.

It will also be made even more difficult for civil society to support newcomers. At the same time, there is no mention at all in the Commission’s

new package of laws and initiatives of establishing a state-run maritime rescue unit. That is a dramatic shortcoming in the light of the death toll in the Mediterranean and the violence exercised at Europe's land borders. The package also almost entirely ignores the issue of "legal" migration and the problems of exploitation in the workplace, discrimination and racism that are ubiquitous in the EU.<sup>745</sup>

"Peaceful Europe is an oxymoron, as Europe is the core of war, racism and aggressiveness. (...) Europe is nothing but nationalism, colonialism, capitalism and fascism", Franco Berardi proclaimed in 2017 when Germany, France and Italy met once again in Paris to discuss further measures to promote the isolationist closed-borders policy.<sup>746</sup> It is still the case today that people on the move will continue to die at the EU's borders unless there is a change of course in European policy on migration. And even those who manage to cross the border will continue to be excluded from European society. They will be relegated to the margins of society through illegalisation. In this context, it is important to emphasise the historical dimension of nationalism and racism in Europe. It becomes clear that state discrimination is part of a continuum through twofold discrimination arising from political/legal regulation of immigration coupled with the disadvantaged position assigned to migrants. That relates not "only" to biologicistic-racist and/or ethnic constructions of belonging, but also to citizenship.<sup>747</sup> While most people from Western industrialised countries enjoy *de facto* freedom of movement, almost any kind of migration is made more difficult for people from the Global South. Political and economic policies pursued by industrialised countries in the Global North contribute significantly to pressure that pushes people to migrate – be it due to overexploitation of natural resources, labour exploitation (either locally or indirectly through EU-based companies) or the political and financial support to dictatorial regimes that violate human rights.

Many of the reasons why people flee their homes stem from colonialism and the resulting inequalities, which persist to this day and have always shaped the livelihoods of people from the Global South. The EU's role in making matters harder across Africa is a clear example of the effects of (neo-)colonialism and the refusal to recognise migration as a necessity. Constant use of "development aid" as leverage reveals how relationships of political and financial dependency are perpetuated.

However, migration policy cannot be linked to “development aid”, for the latter does not aim to improve the livelihoods of people in the Global South, but to maintain European supremacy. Many of these funding mechanisms, such as the EU Trust *Fund for Africa* (EUTF), focus exclusively on migration and keeping the EU’s borders closed. This does not address the concerns and needs of people from countries across Africa, as becomes apparent, inter alia, in that only 1.5 per cent of the EUTF budget is earmarked for migration programmes between the EU and Africa and between African countries.<sup>748</sup>

The isolationist closed-border policy disregards the social and economic situation in many countries of the Global South. Nation-state-territorial sovereignty, which seeks by force to prevent individual global freedom of movement, leads to the consolidation of privileges on the one hand and disadvantages on the other.<sup>749</sup> In this spirit, the EU denies most migrants not “only” the right to mobility, but a fundamental right to exercise any rights. Anyone who wants to show solidarity with people on the move and is unwilling to accept systematic border violence must engage with the right to freedom of movement and thus call the nation state into question.<sup>750</sup>

Chronic endeavours to pedal the narrative that migration can and should be prevented are not only shameful, but backward-looking and doomed to failure. While individual routes can be temporarily blocked by violence, the consequence is not no migration, but displacement of flight routes. This is accompanied by unacceptable living conditions and risks for those affected. Migratory movements cannot be prevented or stopped – but political decision-makers can affect how agonising and lethal they will be. The approach chosen by those who hold political responsibility in the EU becomes apparent in testimonies from people forced to leave their homes, such as that of 17-year-old Anis, who fled Afghanistan: “I started a journey, I crossed borders, rivers, seas, forests – just to reach peace, security, freedom and dignity. But the journey unfortunately did not lead me to what I was looking for; instead it became a journey of inhumanity, a journey full of racism, a journey full of hardship, struggle, patience and discrimination”.<sup>751</sup>

While Fortress Europe continues to step up its rhetoric and fortify borders to cement existing power relations and hierarchies, resistance is

growing. On both sides of the walls of Europe, the revolt against the racist and capitalist order is becoming more visible and tangible. Demands for equality and justice, for international or even anti-national solidarity are vigorously asserted. Migrants are organising and protesting together with people in solidarity within the EU against a system based on inequality, exploitation and oppression. A new generation of people with a background of migration is growing up in Europe, has broken free of the stereotype of the “frugal guest worker” or the “grateful refugee”, and are increasingly vocal and self-confident in expressing their concerns on the streets, in editorial offices and parliaments. This is a generation that addresses and criticises the consequences of colonisation, yet at the same time is part of European society and finds many allies. “We will not beg. The government is responsible for human rights”, said Sudanese activist Napuli Langa in Berlin. “It has signed up to these agreements and must honour them. If it remains silent, it becomes guilty. That’s the crazy part of it: they call us ‘illegals’, but they are the ones taking away our rights, putting us in prisons. Through our protest, that is now becoming public. And that’s what they’re afraid of”.<sup>752</sup> Transnational and transcontinental networks in which people on the move join forces with groups and movements in solidarity within Europe are no longer rare. Networking across nationalities and border fences, realising that we can only tear down these walls together, opens up new opportunities to counter borders of violence with unbounded solidarity.



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# Responsibility in the Face of History – A New Pact for Europe

*Epilogue: Donatella Di Cesare*

**“Europe” has not assumed the supranational form** that some predicted and many hoped for when the EU was founded. On the contrary, it has always remained a conglomeration of nation states, something like an assembly of flat-owners in which everyone jealously guards their privileges and asserts their own identity. Even more: the EU almost slavishly repeats the old model of the state, which is upheld especially at the borders, where the peninsula presents itself as a hyperstate – as Fortress Europe. While the barbed wire thus rises again from the recent past, enclosing countries that have only recently outgrown fratricidal conflicts, measures to foster an isolationist “Fortress Europe” are constantly multiplying at the borders: walls, watchtowers, radar installations and cameras, infrared sensors, drones and helicopters, security forces, intelligence services, special units. The same policing logic is pursued at ports and airports, where every loophole, no matter how tiny, is subjected to systematic surveillance. The fortress has dug itself in over the years with warlike means and methods, creating a hostile desert where sanctuary remains a mirage and arrival or admission is just a dazzling illusion.

Through these measures, the promise has been betrayed – the promise that Europe could become not just the shared locus of a rediscovery of politics, but rather a testing ground for new forms of living together, no longer tied to ancestry and birth, finally breaking free from the toxic myth of the nation. Citizenship based solely on residence, and thus also open to people from elsewhere, could have been envisaged. The European passport, on the other hand, only certifies and reaffirms an abstruse duplication of affiliation, suggesting between the lines that you can only be considered European if you are first and foremost German, Italian, French and so on. Anyone who loses their specific internal nationality would remain disturbingly stateless. The obsessive immunisation of bor-

ders is to a large degree rooted in this absence of a politics of community and living together.

The most obvious proof of this failure is what has been dubbed the “migration crisis” of recent years. While individual nations are to blame for refusing to accept migrants, Europe as a whole has shown itself incapable of opening its heart to hospitality. And it will have to answer to history for this failure. The homeland of human rights has not hesitated to trample once again on those very rights. Unaware of the battles unleashed in the name of territory, the crimes committed in the name of bloodlines, the ashes of Auschwitz on which its fragile democracies were constructed.

Europe is thus waging its undeclared war on migrants at the almost sacred border of the hyperstate. A suitable word to describe this does not yet exist. This leads us to continue to use that old term “war”, which does not adequately reflect the complexity of what is currently happening. This war is undeclared not only because there has been no official proclamation, no statement of action, but also and above all because its status as a war is denied. This is precisely the hallmark of a phenomenon that forms a disturbing continuum with the dark past of the camps and extermination. It is an undeclared war waged under the guise of hypocrisy and passing the buck. No-one even needs to get their own hands dirty. All you have to do is to leave those bodies, negligently embarked on unseaworthy boats, to drown. After all, it is their own fault for venturing out to sea. There is no need to meet the refugees on an equal footing on the Balkan route or in the Baltic States. All you have to do is leave them to die of cold, hunger and deprivation in the undergrowth. No one asked them to come – they could have simply stayed at home. If migrants are seen as always guilty anyway and tainted with the original sin of having set out in the first place, and thus endangering the state-centred world order, the rejection uniformly practiced by European countries is in reality nothing but a justified “return”, “repatriation”. That means it’s not worth being too thorough about inspecting documents at checkpoints. It is easier to just reject them outright. European citizens therefore need not worry at all that people who come knocking on our door – such as Syrians or Afghans – no longer have a home and a homeland, also due to policies pursued by the West. The European Union is merely protecting its citizens by defending its borders, which also means vigorously combating the “smugglers”

and “human traffickers”. After all, they are the ones who are responsible for what happens every day in the Mediterranean or along snowy Alpine tracks. Tunisian slave traders and Turkish merchants, all of them unscrupulous rascals prepared to do anything to turn a profit – Europe is fighting them in order finally put a stop to the “immigration business”. Why should anyone accept such an insidious invasion? After all – so the story goes –, it is the pro-immigration activists, the internationalists, the cosmopolitans who are aiding and abetting “deportation”. All the NGOs that claim to act in a humanitarian spirit – such as Médecins Sans Frontières, SOS Méditerranée, Jugend Rettet, Sea-Watch or Save the Children – are just supporting human trafficking, promoting unauthorised immigration, hold the strings of the conspiracy firmly in their hands, and are fostering progressive contamination of the European identity and way of life. They are the true criminals.

With this narrative, Europe has so far been able to absolve itself of any responsibility. This perverse reversal of roles and blame has meant that people who have saved lives through humanitarian actions can even be hauled up in court. The most blatant examples of Carola Rackete or Pia Klemp are just the tip of the iceberg. Everyone who continues to wield the flag of justice, the banner of humanity, taking action in cross-border zones to assist people fleeing in camps or castaways on the open sea, has been excluded from the realm of legality. They are instead targeted by a barrage of attacks that seek to put them out of action.

As part of its ruthless policy to stem what are dubbed “migratory flows”, Europe has gone so far as to conclude unprecedented agreements with neighbouring countries, irrespective of whether they are ruled by dictatorial regimes, mired in the chaos of civil war or arbitrarily flout even the most fundamental rights. Cooperation with Turkey or Libya has made it possible to detain refugees who would be entitled to asylum in huge collective camps beyond Europe’s borders or directly adjacent to them. Millions of people live crammed together there in appalling conditions, condemned to mere survival, immobility and invisibility. In addition to policing measures, bureaucratic and procedural restrictions have been introduced with the poorly disguised aim of indefinitely extending the already agonisingly long waiting times. However, there is more at play than just an externalisation of bureaucracy in the name of temporary protection on the ground. Violence has also been outsourced. In the

Libyan camps, migrants – women, men, children – are tortured in the name of and on behalf of European citizens. You can pretend you know nothing about it. Yet it is all part and parcel of the undeclared war and it is no longer possible to deny that this is going on.

Barriers erected between citizens and migrants have however, in no way prevented the dispositive of immigration, which on the one hand attracts while on the other hand rejecting, from remaining fully operational: borders are opened to let in vital “foreign labour” and closed to implement repressive measures to “combat illegal immigration”. Inclusion at one and the same time also signifies exclusion. And migrants are always in demand but not welcomed – tolerated as workers, but unwanted as foreigners. Without taking even the slightest responsibility for the lives of the people concerned, governance of the “flows” filters, selects, and chooses. Power is thus exercised over compliant bodies that are admitted temporarily and subsequently expelled or deported once again. The dispositive of immigration thus appears as one form of the broader dispositive of flexibility imposed by the market – and is thus just as violent.

It comes as no surprise that resentment, hatred and anger have gained the upper hand in recent years, that regressive ideas, brutalised slogans, crude assertions and misleading simplifications have prevailed. Far-right parties have managed to inject this poison drop by drop into everyday speech, transforming immigrants into scapegoats for all ills, enemy number one. There was no counter-narrative. On the contrary, there was an anticipatory capitulation, an acquiescence, a wink, a nod, an awkward and hypocritical complicity. For it is impossible to claim on the one hand to want to fight xenophobia and racism and on the other hand to blindly pursue a policy that leaves migrants to their fate in the camps, hunts down so-called “illegal immigrants” and in some countries still denies citizenship to second-generation children. Nothing whatsoever has been done to counter the negative image of migrants. Moreover, in the guise of a widespread notion of state sovereignty, a whole series of such topics has crept into political camps that in all other respects pursue very different political agendas.

The myth of autochthony, the parochial politics of property, petty-bourgeois prosperity chauvinism have promoted a grammar of hatred: on the one hand “us”, on the other hand “them”, dark and mon-

strous, repugnant and detestable, blamed for all our diffuse unease. The pandemic has incidentally played its part too, further reinforcing the fences of immunitarian democracy, the rigorous division between those who are enclosed, protected, vaccinated, immune, and those who can remain outside, exposed to all storms.

Drawing on the pattern of widespread yet inadmissible confusions that equate citizenship with possession of land and conflate belonging with a guarantee of exclusive goods, social justice is increasingly confined within national borders. The poor are pitted against immigrants – here too, the undeclared war leaves its mark. Many claim that charity only works on a national level. As if the question of responsibility could be circumvented in a globalised world: just because you do not see the effects of your actions, it does not mean that you are innocent. Just as it is not acceptable to buy goods at dumping prices, manufactured in another country where the price paid was exploitation, if not a human life, we must not close our eyes to the arms trade that is conducted more or less covertly by our own countries. Interdependent global society calls instead for greater responsibility.

A dangerous identity-driven nostalgia that proclaims that citizens are unchallenged arbiters, absolutely sovereign and entitled to decide who they want to live with, turn away or reject, is spreading in all European countries. It seems to be the hour of the sovereignists, reactionaries who are convinced that the general public can only be protected within the nation state's closed borders. The imperative to remain master of your own fate is selfishly elevated to a principle of government. This seemingly realistic view is actually chasing a chimera. There will be no return to the erstwhile nation states. History teaches us that there is no way back to the past. That has also been demonstrated clearly by the pandemic. Many European citizens only survived thanks to joint cooperation and solidarity efforts.

That means that it is not only state borders that pose a problem, but national borders in particular. This fictitious notion of the nation, based on birth and thus on descent, unfolds its full devastating potential today, tempting us to confuse *démós* and *éthnos*. But the people that make up a nation are not tantamount to an ethnicity and cannot be defined by ethnic boundaries. This is precisely where the danger of a serious erosion of democracy lies. It is impossible to understand why a polity should be

based on genetic descent rather than on constant participation of citizens exercising their rights. In this sense, cohabitation is the real challenge for European democracy.

Europe must indeed be defended – in a spirit of transformation rather than of a sense of preservation. That is not simply because geo-economic and geo-political conditions have changed, but because the European project needs to be revitalised in the name of social justice, solidarity and hospitality. The new pact between citizens and Europe cannot leave migrants out and must therefore be inclusive.

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# Appendix

## List of Abbreviations

AFIS	Automated Fingerprint Identification System
Anker Centre	Arrival, Decision, Removal Centre
AMIF	Asylum, Migration and Integration Fund
AMM-VO	Asylum and Migration Management Ordinance
APD	Asylum Procedures Directive
AVRR	Assisted Voluntary Return and Reintegration
BAMF	Federal Office for Migration and Refugees
BMP-Maghreb	Border Management Programme for the Maghreb Region
BVMN	Border Violence Monitoring Network
CATE	<i>Cárceles 'express' para migrantes</i> ; Fast-track prisons for migrants
CEAS	Common European Asylum System
CETI	<i>Centros de Estancia Temporal de Inmigrantes</i> ; Temporary Reception Centres for Migrants
CIREFI	Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration
CFI	Court of First Instance, European Court of Justice
CoC	Code of Conduct
COI	Country of Origin Information
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EASO	European Asylum Support Office
EBGT	European Border Guard Teams
ECHR	European Convention on Human Rights
ECCHR	European Center for Constitutional and Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECRE	European Council on Refugees and Exiles
EC	European Community
ECSC	European Coal and Steel Community

ECtHR	European Court of Human Rights
EEC	European Economic Community
EEAS	European External Action Service
EMAS Programme	Emergency Assistance Programme
ESI	European Stability Initiative
ESFP	European Security Research Programme
ETM	Emergency Evacuation Transit Mechanism
EU	European Union
EUBAM Libya	EU Border Assistance Mission to Libya
EUCAP Sahel Niger	European Union Capacity Building Mission in the Sahel in Niger
Eunavfor Med	European Union Naval Force – Mediterranean
Euratom	European Atomic Energy Community
Eurodac	European Asylum Dactyloscopy Database (to compare asylum-seekers' fingerprint data)
Eurojust	European Union Agency for Criminal Justice
Europol	European Union Agency for Law Enforcement
Eurosur	European Border Surveillance System
EUTF	EU Trust Fund for Africa
FASS	Frontex Aerial Surveillance Services
FRA	European Union Fundamental Rights Agency
FRC	First Reception Centre
Frontex	European Border and Coast Guard Agency (acronym based on French <i>frontières extérieures</i> , external borders)
GAA	Greek Asylum Authority
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit (German international cooperation agency)
GRC	Geneva Refugee Convention
ICMPD	International Centre for Migration Policy Development
IMM	Independent Monitoring Mechanism
IOM	International Organisation for Migration
IPA	Instrument for Pre-Accession Assistance
ISFB	Internal Security Fund – Borders and Visa
ISMariS	Integrated System for Maritime Surveillance
ICC	International Criminal Court
ITMRCC	Italian Maritime Rescue Coordination Centre
LGBTQIA+	Lesbian, Gay, Bisexual, Trans, Queer, Intersex, Asexual (the plus sign is used to include all other gender and sexual orientations that do not dovetail with the letters).
LRAD	Long Range Acoustic Device <i>aka</i> sound cannon
OLAF	<i>Office européen de lutte antifraude</i> (European Anti-Fraud Office)
NATO	North Atlantic Treaty Organization



## Appendix

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NGO	Non-governmental organisation
MAS	Multipurpose Aerial Surveillance
MoU	Memorandum of Understanding
RABIT	Rapid Border Intervention Team
RC	Refugee Convention / Geneva Convention
RIC	Reception and Identification Centres
RIS	Reception and Identification Service
SAFIC	Strengthening the Africa-Frontex Intelligence Community
SAR	Search and Rescue (in air and maritime emergencies) / rescue at sea
scJRCC Tripoli	so-called Joint Rescue Coordination Center Tripoli.
scLYCG	so-called Libyan Coast Guard
SIBML	Support to integrated border and migration management in Libya
SIS	Schengen Information System
SOLAS	International Convention for the Safety of Life at Sea
SPRING Programme	Support to Partnership, Reforms and Inclusive Growth Programme
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
WANA	West Asia and North Africa

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## Appendix

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