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Impressum

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Editorial

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In this issue

The editors are pleased to present issue 2025/II of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

In the following paragraphs, we are giving a brief summary of the contents of the *Original Scientific Articles* section.

In the article *"Externalisation within the migration policy of the European Union"*, the author, Márton Balogh presents the agreements concluded between the EU and its partner countries (such as the EU–Turkey Statement and the EU–Tunisia Memorandum) and highlights the inadequate procedures and human rights concerns arising from the problematic nature of the externalisation system. Balogh concludes that although the externalisation of migration and asylum policy constitutes a step in the right direction insofar as it reduces the burdens placed on the EU, this must not occur at the expense of the effective protection of human rights. The author suggests that such cooperation should be concluded in the form of legally binding international treaties, thereby enabling the effective enforcement of institutional guarantees (such as the competences of the European Parliament and the Court of Justice of the European Union) as well as human rights safeguards (such as impact assessments).

Ágnes Töttős, in her study *"Achievements of the Hungarian Presidency of the Council in Promoting the Schengen Area as a Strategic Asset for the EU"*, addresses the strengthening of Schengen governance, the digitalisation of procedures (in particular the introduction of the CES/EES and ETIAS), and efforts to facilitate the accession of Romania and Bulgaria to Schengen. The author concludes that the Hungarian Presidency delivered transformative results, including the enlargement of the Schengen Area, as the Council adopted a decision to lift personal border checks with Bulgaria and Romania at the internal land borders from 1 January 2025. At the same time, challenges remained, such as delays in the implementation of the Entry/Exit System (EES) and the need for its phased rollout. According to Töttős, the Hungarian proposal to establish a Schengen summit remains on the

agenda and should be given serious consideration in light of the various threats and challenges facing the Schengen states.

In the article *"Critique on Universalism Versus Cultural Relativism Debate, With Special Attention to Customary Law and Constitutionalism In South Africa"*, Wandile Brian Zondo analyses the tensions between respect for customary law and compliance with universal human rights norms, citing the cases of *Bhe v. Khayelitsha Magistrate Court* and *Shilubana v. Nwamitwa* as examples. Zondo argues that the binary framework of the universalism versus cultural relativism debate often creates confusion and hinders constructive dialogue. He concludes that progress requires dialogue and an integrative approach that recognises the dynamic nature of cultures and allows customary law to adapt to constitutional values, ensuring the protection of human rights without discarding the importance of cultural identity.

In the study *"Questions of Attribution in the Conflict of Eastern Congo"*, Mátyás Kiss focuses on Rwanda's role in the conflict in eastern Congo, examining whether the internationally wrongful acts committed by the armed group known as M23 can be attributed to Rwanda under the rules of international responsibility, in particular Articles 4 and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). The author finds that the strict criterion of "complete dependence" required for recognition as a *de facto* state organ cannot be established with certainty in the case of M23, and although Article 8 ARSIWA appears to be the most applicable provision, the "effective control" test applied by the International Court of Justice sets an excessively high threshold, as control must extend to the specific operations in question. Kiss concludes that, on the basis of the existing evidence, it cannot be established that all internationally wrongful acts committed by M23 are attributable to Rwanda, and therefore calls for the development of a more coherent and uniform assessment framework in order to enhance the predictability of international law.

In the *Review* section Tiwai Mhundwa provides a book review for Maria Bergsröm and Valsamis Mitsilegas' 2025 book EU Law in the Digital Age published by Hart.

As usual, we thank the anonymous peer reviewers for their considerable effort working on the current issue.

We also encourage the reader to consider the PJIEL as a venue for your publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and EU law issues.

Externalisation within the migration policy of the European Union[1]

*Márton Balogh**

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Contents

[1] This article is primarily based on the author's XXXVI. National Conference for Student Research (OTDK) paper, which was honoured with II. place on the Conference. The aim for this article is to present the paper to the English-speaking experts. The author is committed to the facilitation of translation in order to break down the language barriers concerning science distribution. Therefore, the text was translated with assistance from the European Commission's eTranslation service.

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Abstract

The externalisation of the migration policy within the European Union is a new approach of blocking migrants from the possibility of activating the safeguards of the European human rights. Despite having several case studies and mal-practices of the externalisation globally (e.g. the practice of the USA or Australia), the EU is uncovering its own approach – with its own flaws. This article offers to present the existing externalisation agreements between the EU and its partner countries, shows improper procedures and gives recommendations in order to be more humane towards persons arriving to Europe. The methodology of the paper is to analyse the text of the partnerships, then analyse their execution. Problematic practices and procedures are highlighted. In the recommendations part, the author attempts to give solutions to these issues.

Keywords: migration, EU Migration and Asylum Pact, human rights, political agreements

I. Introduction

The Dublin III Regulation,[2] in force during the 2015 migration crisis, has been intensely criticised for its shortcomings in the execution of the EU's migration and asylum policy. During the most important test of the regulation–the migration wave in 2015–it received serious critique.[3] To address these critiques, a legislative reform initiative was launched in 2016 and is now part of the New Pact on Migration and Asylum (hereinafter: New Pact).[4]

The New Pact was adopted by the EU legislators on 14 May 2024.[5] The Pact–be-

[2] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). [2013] OJ L180/31.

[3] 'Asylum and migration in the EU: facts and figures' (*European Parliament*, 30 June 2017) <https://www.europarl.europa.eu/topics/en/article/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures> accessed 23 October 2025. *Nota bene*: Regarding the shortcomings, a number of reasons can be listed: the lack of definition of competences between Member State authorities. Unjust distribution of burdens between Member States and the lack of cooperation between them. No personal interviews with persons arriving at the borders. Minors were not provided with an interest representative. In the case of family reunification, the obligation to provide evidence by means of a document. (Source: European Commission (DG Migration and Home Affairs), 'Evaluation of the Implementation of the Dublin III Regulation – Final Report' (Brussels, 18 March 2016) <https://home-affairs.ec.europa.eu/system/files/2020-09/evaluation_of_the_implementation_of_the_dublin_iii_regulation_-_executive_sumary_en.pdf> accessed 23 October 2025.

[4] 'Migration and asylum pact' (*European Council*) <https://www.consilium.europa.eu/en/policies/eu-migration-asylum-reform-pact/> accessed 23 October 2025.

[5] 'Timeline - Migration and asylum pact.' (*European Council*) <https://www.consilium.europa.eu/en/policies/eu-migration-asylum-reform-pact/timeline-migration-and-asylum-pact/?> ac-

ing a package of legislative acts[6]–represents a comprehensive reform of the EU's migration and asylum acquis, including regulations to address possible future scenarios such as migration crises. E.g. the much-criticised Dublin III Regulation being repealed by the Asylum and Migration Management Regulation.[7] The Pact's ambitious aim is to ensure a fair and swift procedure for those arriving in Europe, while building the confidence of the European public by instituting an effective common migration and asylum policy.[8]

The New Pact aims to *establish* international partnerships and *deepen* existing agreements.[9] Targeted assistance, an effective return policy, the fight against migrant smuggling and the development of sustainable legal pathways to the EU are the primary European intentions in new partnerships.[10] However, this new approach is a new concern for academic and non-governmental organisations. This paper presents the externalisation of migration and asylum, as well as the European agreements established within this framework.

The importance of the topic is underlide by the novelty of the EU's externalisation measures, in particular its human rights concerns. Externalisation as a possible way of dealing with migration crises is becoming more and more common in practice. In the statement of Gillian Triggs, Assistant High Commissioner for Protection, at the 71st session of the Executive Committee of the High Commissioner's Programme, Ms. Triggs noted this short sentence on migration-related problems: "out of sight and out of mind".[11] In her speech,

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cessed 23 October 2025.

[6] Ten legislative acts are included in the Pact: screening regulation; the updated Eurodac database regulation; asylum procedure regulation; return border procedure regulation; asylum and migration management regulation; crisis regulation; qualification regulation; reception conditions directive; resettlement regulation. Source: 'The Council adopts the EU's pact on migration and asylum (*European Council*, 14 May 2024) <https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/> accessed 23 October 2025.

[7] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013. [2023] OJ L 2024/1351.

[8] 'Pact on Migration and Asylum' (*European Commission*, 21 May 2024) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/migration-and-asylum/pact-migration-and-asylum_en> accessed 23 October 2025.

[9] 'New Pact on Migration and Asylum: Questions and Answers' (*European Commission*, 23 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707> accessed 23 October 2025.

[10] Commission, 'New Pact on Migration and Asylum' (Communication) COM (2020) 609 final. Nota bene: The document sets out a number of other objectives that the Pact wants to change, such as firm and fair management of the external borders, fair and efficient asylum rules and simpler asylum and return procedures.

[11] 'Statement by Ms. Gillian Triggs, Assistant High Commissioner for Protection, to the 71th session of the Executive Committee of the High Commissioner's Programme' (*UNHCR*, 7

however, the Assistant High Commissioner praised the New Pact drawn up by the European Commission, saying that the legislative package seeks to promote a fairer distribution of responsibility among Member States and rejects push-backs at borders, in line with the recommendations made by the United Nations High Commissioner for Refugees (hereinafter: UNHCR). By contrast, Triggs sees externalisation as an uncertain, dangerous, responsibility-shifting practice with potentially damaging consequences.

Regarding the approach of the present paper, it relies predominantly on the primary EU law sources[12] and in particular an analysis of international partnerships between the EU and third countries. . As regards research methodology, the critical method was most heavily relied on. An important element of the paper is to highlight the questionable provisions of the analysed agreements, to present human rights concerns and to draw the appropriate conclusions. Given the novelty of the topic, the key element of the study is to make *de lege ferenda* proposals on the solution of presumed human rights concerns within the externalisation of migration and asylum in Europe.

October 2020) <https://www.unhcr.org/us/publications/statement-ms-gillian-triggs-assistant-high-commissioner-protection-71th-session> accessed 23 October 2025.

[12] The EU treaties used in the thesis: Consolidated version of the Treaty on European Union [2012] OJ C 326/1. (hereinafter referred to as: TEU), Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1. (hereinafter referred to as: TFEU) and the Charter of Fundamental Rights of the European Union [2012] OJ C 326/1.

II. Legal Background

The New Pact on Migration and Asylum emphasises the international role of the European Union, as migration and asylum are best managed through universal cooperation.[13] In this context, it is of paramount importance to develop new types of cooperation with countries of origin[14] and/or transit[15] as part of the EU's migration and asylum policy.[16]

1. Treaties

Art. 67(1) TFEU empowers the European Union to establish a common policy on asylum and migration, taking into account the fair treatment of third-country nationals.[17] The Geneva Convention Relating to the Status of Refugees of 28 July 1951 and its Protocol of 31 January 1967[18] (hereinafter: (Geneva) Convention) have major relevance, as the Geneva Convention defines the term 'refugee'.[19] The Convention also sets out a number of general obligations for the practice of host countries, including, *e.g.* the prohibition of discrimination against refugees on the basis of race, religion or country of origin,[20] freedom of movement[21] and the prohibition of expulsion or *refoulement*,[22] among other rights for refugees.

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[13] García Paula Andrade, 'EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?' (*EU Migration Law Blog*, 8 December 2020.) <https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/> accessed 24 October 2025.

[14] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9, art. 2 (n) 'country of origin' means the country or countries of nationality or, for stateless persons, of former habitual residence.

[15] The country through which migration flows (regular or irregular) move; this means the country (or countries), different from the country of origin, which a migrant passes through in order to enter a country of destination. 'Glossary: country of transit' (*European Commission, Migration and Home Affairs*) ≤https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/country-transit_en?prefLang=hu> accessed 24 October 2025.)

[16] Andrade (n 14).

[17] For the purposes of this paragraph, stateless persons shall be considered as third-country nationals.

[18] Legislative Decree No 15 of 1989 promulgating the Convention Relating to the Status of Refugees of 28 July 1951 and the Protocol Relating to the Status of Refugees of 31 January 1967.

[19] ibid, art. 1.

[20] ibid, art. 3.

[21] ibid, art. 26.

[22] ibid, art. 33(1). "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, member-ship of a particular social group or political

In subsequent chapters, it is relevant–in particular because of the examination of human rights concerns–that Art. 78(1) TFEU states the EU's obligation to develop a common policy on asylum, which must be consistent with the 1951 Geneva Convention and the 1967 Protocol. The TFEU underlines the respect of the principle of non-refoulement,[23] however Member States possess the right to expel third-country nationals *illegally* present in the European Union.[24] In addition, Art. 78(2)(g) TFEU empowers the European Parliament and the Council–acting in accordance with the ordinary legislative procedure–to conclude agreements with third countries for the purpose of managing the influx of asylum seekers or persons seeking subsidiary or temporary protection.

Art. 18 of the Charter of Fundamental Rights of the European Union (hereinafter: Charter) provides the right to asylum. In accordance with the Geneva Convention, the Charter lays down the obligation to ensure the right to asylum, the prohibition of collective expulsion, and the respect for the principle of non-refoulement. In the case of illegal migration, the EU's Charter of Fundamental Rights does not preclude the expulsion of persons who are unworthy of protection.

The Universal Declaration of Human Rights, which has become a customary law in the European Union also enshrines the right to seek asylum and the right to asylum as customary international law,[25] as well as the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).[26]

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opinion."

[23] TFEU, art. 79.

[24] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, para. 8. It must be noted that a further condition is that the expulsion Member State operates a fair and efficient asylum system. (ibid.) Nota bene: art. 79(2)(c) of TFEU also contains, in the same way as the directive, the competence of the Member States to deport and repatriate illegally staying persons.

[25] 1948 Universal Declaration of Human Rights, art. 14. As an international legal entity, the Declaration binds the European Union but does not have binding force in European law.

[26] Act XXXI of 1993 on the promulgation of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, and the eight additional protocols thereto. Nota bene: The European Court of Human Rights (ECtHR) concluded in *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012) p. 57, para. 9, that the transfer of migrants to Libya constituted collective expulsion, as they were returned without examining the individual situation of each person. The prohibition of collective expulsion was established by the ECtHR on the basis of Art. 4 of Protocol No 4 to the ECHR. It is worth mentioning the relevant case-law of the ECtHR, since it forms part of the general principles of the EU legal order, even though, under art. 6(2) TEU, accession has not yet taken place. (For more on the topic, see: Victor Davio and Elise Muir, 'Dialogue on the Way the CJEU Uses ECHR Case Law' (2023) 8 European Papers 317.

2. Categorisation of Externalisation

Externalisation policies–in broad sense–are procedures by which a state transfers its functions outside to its territory.[27] Externalisation as a set of extraterritorial procedures is an umbrella term.[28] The externalisation of migration essentially summarises the different practices of the countries of destination, in which third countries are entrusted with the control of migration processes.[29] It is important to point out that there is no uniform definition of externalisation–neither in international law or in European law–[30]therefore the paper relies primarily on the literature.

The *Refugee Law Initiative* was a research project by several experts, the results of which–especially in connection with the classification of the practice of externalisation–cannot be overlooked.[31] Based on the research, it is worth distinguishing two major categories: the externalisation of border protection[32] and the externalisation of the asylum system.[33] In order to avoid repetition, the author uses *outsourcing* occasionally, instead of externalisation.[34] The study does not include *periphering*–which was used in the Dublin III Regulation[35]–as a separate scientific dissertation on that topic could be prepared.[36]

In relation to border protection, two concepts should be distinguished: pushback; immediate return of arrivals without a decision on their asylum application[37] and pullback; blocking off persons on the territory of third countries from travelling further, on the basis of agreements with destination countries.[38] Pushback procedures have practically no positive side,[39] literature claims to have

[27] David Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' (2022) 34 International Journal of Refugee Law 120.

[28] Nikolas Feith Tan, 'Conceptualising Externalisation: Still Fit for Purpose?' (2021) 68 Forced Migration Review 8.

[29] ibid, 8.

[30] ibid, 9.

[31] Cantor and others (n 28).

[32] ibid, 132-141.

[33] ibid, 141-152.

[34] Other literature, such as Ermioni Xanthopoulou, 'Mapping EU Externalisation Devices through a Critical Eye' (2024) 26 European Journal of Migration and Law, follows the same principles.

[35] Regulation (EU) No 604/2013.

[36] The criteria for determining the Member State responsible are laid down in art. 7 to 15 of Regulation (EU) No 604/2013. Nota bene: Xanthopoulou (n 35) 116-118, describes the Dublin system.

[37] Cantor and others (n 28) 132.

[38] ibid, 135.

[39] Against Hungary, a judgment was handed down by the ECtHR.- In the case at hand which Pa-

only negative effects.[40] The concept of pullback includes similar practices with implementation by third countries.[41] Outsourcing border control is not a prima facie illegal act and it is always possible to verify whether the measures raise human rights abuses or not.[42]

Outsourcing the asylum system (*i.e.* the second type of externalisation) has two major sub-groups. One way of outsourcing is where the authorities of the country of destination act on the territory of the third country–therefore have jurisdiction with the authorisation of the third country–or the third country itself carries out the administrative procedure–possibly in cooperation with the country of destination–.[43] Since there is no positive right to be granted asylum in a *chosen* country, the processing of asylum applications in a third country is not prohibited.[44] It is also worth referring briefly to practices by authorities that make it difficult to cross borders, such as transit zones, port closures, fences or wall building,[45] or, *e.g.* the new screening regulation adopted by the New Pact.[46]

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kistanis were expelled from the territory of the country without the state considering their asylum applications. *Shahzad v. Hungary* App no 12625/17(ECtHR, 8 July 2021). Nagy Boldizsár, 'Magyarország bírái előtt. Menekültügyek az Emberi Jogok Európai Bíróságán, az Európai Unió Bíróságán és más fórumokon' (2019) 60 Állam- és Jogtudomány 120. Hungary, as other states in the Visegrad Group have taken a more restrictive approach to migration and asylum during the migration and asylum crisis and in the years leading up to the New Pact. See Ágoston Mohay, 'Migration and asylum law of the V4 in the European Union context: between harmonisation and reluctance' (2021) 17 Politics in Central Europe (s1) 761.

[40] Cantor and others (n 28) 133. Nota bene: The term pushback includes so-called hot returns, which inter alia contravenes the principle of non-refoulement. See: 1982 United Nations Convention on the Law of the Sea, 31363 UNTS 1833; Xanthopoulou (n 35) 123.

[41] Morocco can serve as an example of pullback practice. On the basis of an agreement with Spain, Morocco stops people crossing its territory, leaving for Spain via the mainland crossing of Ceuta or the water crossing of Melilla. Emma Smith, 'What's behind the death at Morocco's land border with the EU?' (*The New Humanitarian*, 8 September 2022) <https://www.thenewhumanitarian.org/analysis/2022/09/08/Migrant-crisis-Morocco-Spain-border> accessed 24 October 2025.

[42] Cantor and others (n 28) 135.

[43] Cantor and others (n 28) 141. Nota bene: An agreement has been concluded between Italy and Albania on the outsourcing of asylum procedures. Under the agreement, centres for asylum procedures will be set up in Albania, where asylum applications will be processed on the basis of Italian (and European law). If the claims are accepted, Italy will provide shelter. Steffen Angenendt and others, 'The Externalisation of European Refugee Protection, A Legal, Practical and Political Assessment of Current Proposals' (2024) 13 Stiftung Wissenschaft und Politik 3.

[44] Cantor and others (n 28) 144.

[45] Xanthopoulou (n 35) 110.

[46] Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (2024) OJ L2024/1356. Nota bene: It refers to the appropriate procedure (asylum procedure or return) for third-country nationals who have illegally crossed an external border, art. 1.

3. Migrant or Refugee?

In the context of the European Union's externalisation efforts,[47] *Human Rights Watch* (hereinafter: HRW) draws attention to a number of potential breaches.[48] HRW emphasizes the contradiction that represents the perceived and real purpose of externalisation. The perceived goal is to protect migrants from the adversities of travel,[49] but HRW claims the real goal is to curb migration flow.[50]

A cornerstone of the relationship between the 1951 Geneva Convention and European law is the definition of refugee.[51] A refugee is defined in Art. 1 of the Convention as a person "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ... ". The Qualification Directive[52] defines a refugee with the same content and under the same conditions. Refugee status is granted when a Member State recognises a person as a refugee.[53]

The term migrant is an umbrella term not defined in European (nor international) law, it refers to a person who is temporarily or permanently absent from his or her habitual residence beyond (or even within) a national border.[54] Migrants can be divided into two groups according to the inclusivist and residualist definitions.[55]

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[47] The Lisbon Treaty introduced a revised common migration policy, which has become an important tool for foreign policy and migration management. It is the reason why we can talk about a pan-European migration and externalisation policy. TFEU, arts. 77-80.

[48] Bill Frelick, Ian M. Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (*Human Rights Watch*, 6 December 2016) <https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants> accessed 24 October 2025.

[49] For the sake of giving a complete view and the topic, it must be added that the journeys are far from safe. Through the Mediterranean Sea, it was extremely dangerous to enter Italy, and many lives were lost at sea. Giulia Carbonaro, 'Four shipwrecks in five days: Why migrants tragedy keep happening in the Med' (*Euronews*, 9 August 2023) <https://www.euronews.com/2023/08/09/four-shipwrecks-in-five-days-why-migrants-tragedy-keep-happening-in-the-med> accessed 24 October 2025.

[50] ibid.

[51] 'Guaranteeing the right to asylum' (*European Parliament*) <https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu/guaranteeing-the-right-to-asylum> accessed 24 October 2025.

[52] Directive 2011/95/EU, art. 2(d).

[53] ibid, art. 2(e).

[54] 'Key Migration Terms' (*International Organization for Migration*) <https://www.iom.int/key-migration-terms> accessed 24 October 2025.

[55] The characteristics of the two views were developed on the basis of the following source:

The author's view is that the residualist view is closer to the prevailing perception in the European Union.[56] For residualists, a migrant can be a person who is not fleeing war or persecution, therefore legally is *not a refugee*. The 2015 migration crisis in Europe have raised the question as whether all applicants for asylum are in need of assistance or not.

On the basis of the residualist view, a distinction must also be drawn between the group of persons referred to as *illegal migrants*–which is often used in the media–on account of the unlawful breach of the requirements for entry, stay or residence in the Member States of the European Union,[57] and *irregular migration*. The latter means, in accordance with Art. 13 of the Schengen Borders Code the illegal crossing of land, sea or air borders of the Schengen Member States[58] and unauthorised stay in the Member States, which entails expulsion.[59] Illegal migration is often confused with irregular migration, the latter term referring to the irregularities in the *movement*. One of the main problems with irregular migration is the smuggling of migrants and the trafficking in human beings, combating this is a priority of the EU.[60]

'What is the meaning of 'migrants'?' (*Meaning of Migration*) <https://meaningofmigrants.org/> accessed 24 October 2025.

[56] Nota bene: The inclusivist view is that the refugee is also a migrant.

[57] 'Countering irregular migration: better EU border management' (*European Parliament*, 30 June 2017) <https://www.europarl.europa.eu/topics/en/article/20170627STO78419/countering-irregular-migration-better-eu-border-management> accessed 24 October 2025.

[58] The Schengen acquis comprising of two legal documents, the 1985 Schengen Agreement (Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.) and the Schengen Convention (Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.) has created an area free of internal borders called the Schengen area, where third-country nationals, together with nationals of the Member States, can circulate without border controls. Nota bene: Temporary border controls have also been reintroduced within the internal border-free zone, see more: 'Temporary Reintroduction of Border Control' (*European Commission*) <https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en> accessed 24 October 2025.
The Schengen Borders Code was part of the reform of the Pact on Migration and Asylum, the new regulation is Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (2024) OJ L2024/1717.

[59] Directive 2008/115/EC, art. 3(2)-(3).

[60] 'Timeline - EU migration and asylum policy' (*European Council*) <https://www.consilium.europa.eu/en/policies/eu-migration-policy/migration-timeline/> accessed 24 October 2025. Nota bene: A typical method for illegally crossing state borders is the use of false or falsified documents and the possibility of hiding in means of transport, which can potentially be life-threatening. 'Gyakorlati Lépések az Irreguláris Migráció Csökkentésére' *(European Council Migration and Home Affairs*) <https://home-affairs.ec.europa.eu/system/files/2020-09/12._hungary_national_report_practical_measures_for_reducing_irregular_migration_final_dec2012_en.pdf>

To conclude, migrants arriving irregularly may also be in need of international protection, as for those fleeing a real threat could also travel this way.

III. Existing Externalisation Agreements

In 2011, the European Commission issued a communication on the general approach to regional and sub-regional cooperation.[61] The scope of the cooperation was the Southern Mediterranean region (Morocco, Algeria, Tunisia, Libya and Egypt),[62] the Eastern region (Ukraine, Belarus, Moldova, Georgia, Armenia and Azerbaijan),[63] Africa (the partnership of 53 African states)[64] and the Western Balkans, Eastern Europe, Russia, Central Asia, the South Caucasus and Turkey played a strategically important role in the so-called Prague process.[65]

In addition to Mobility Partnerships–which were designed to facilitate labour mobility, readmission agreements and visa facilitation–and joint roadmaps–joint recommendations, targets and commitments[66]–which were previously either transnational or sub-regional in scope, the New Pact on Migration and Asylum explicitly aims to develop international partnerships with origin and transit countries of migration, listed in the previous paragraph.[67] Five key areas of cooperation are highlighted in the New Pact: supporting host countries, harnessing local economic potential, fighting migrant smuggling, improving the return process and developing legal migration pathways.[68] The author's view is that the externalisation of migration is embedded in this framework, because the cooperation with third countries can take the burden off the authorities of the Member States of the European Union, since, if the problem is tackled locally, illegal migration to the EU can be reduced.

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accessed 24 October 2025. 27. The European Commission has prepared an action plan to tackle migrant smuggling for 2021-2025, see more: Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A renewed EU action plan against migrant smuggling (2021-2025)' COM (2021) 591 final.

[61] Commission, 'Communication From the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions The Global Approach to Migration and Mobility' COM (2011) 0743 final.

[62] ibid, footnotes 10.

[63] ibid, footnotes 11.

[64] ibid, footnotes 12.

[65] ibid, part 3. Geographical priorities.

[66] ibid, part 4. Implementation mechanisms.

[67] Andrade (n 14).

[68] 'Pact on Migration and Asylum' (*European Commission*, 21 May 2024) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/migration-and-asylum/pact-migration-and-asylum/acting-together-deepen-international-partnerships_en> accessed 24 October 2025.

There are two important routes for migration to Europe: through the Turkish Eastern Mediterranean route and through African transit countries in the Mediterranean.[69] The European Union expects its partners to implement migration management objectives in exchange to gain the EU's economic support.[70] The Blue Card system,[71] seasonal work opportunities or visa facilitation, where third countries are actively involved in the fight against illegal migration are such incentives of support.[72]

1. Pre-New Pact Agreements

Before the New Pact on Migration and Asylum, an international partnership on migration and asylum was established between the European Union and Turkey.[73] With Turkey's assistance, the Eastern Mediterranean migration route[74] received almost 98% fewer arrivals in Europe in 2020, making the fight against migrant smuggling effective and saving lives by avoiding numerous maritime disasters.[75]

1.1. EU-Turkey Statement

According to the 2016 EU-Turkey Statement, migrants arriving in the first Schengen country, Greece via Turkey–which is a transit country– who are not eligible for international protection, will be immediately returned to Turkey, with

[69] While Africa is prone to be seen as a continent of economic migrants leaving for the European Union (e.g. due to Algerian or Malian weavers in France), many are forced to flee Africa. See Alain Antil and others, 'Migrations : logiques africaines' (2016) Politique Étrangère 12.

[70] In the context of international partnerships with African countries, the need to negotiate individually with African states is a challenge, as there is no comprehensive political dialogue in the African Union, due to its institutional constraints. See Victoire d'Humières, 'La coopération Union européenne/Afrique: l'externalisation des politiques migratoires européennes' 472 Question d'Europe 1, 4.

[71] Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC. (2021) OJ L 382/1. Nota bene: The Directive lays down the conditions of entry and residence and the rights of third-country nationals and their family members for more than three months in the territory of the Member States for the purpose of highly qualified employment.

[72] d'Humières (n 71) 6.

[73] 'EU-Turkey statement of 18 March 2016' (*European Council*, 18 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 24 October 2025. Nota bene: Regarding the declaration between the European Union and Turkey, it is important to mention that it is not an international treaty, but a political agreement.

[74] The route of the vast majority of irregular arrivals. 'Migration flows: Eastern, Central and Western routes' (*European Council*) <https://www.consilium.europa.eu/en/infographics/migration-flows-to-europe/> accessed 24 October 2025.

[75] 'Migration flows on the Eastern Mediterranean route' (*European Council*) <https://www.consilium.europa.eu/en/policies/eastern-mediterranean-route/> accessed 24 October 2025.

the European Union bearing the costs of the return.[76] As a Member State of the European Union, Greece conducts the asylum procedure and if the application is inadmissible, the EU sends the person back.[77] The EU supports legal migration by prioritising those persons' claim who have not entered its territory irregularly.[78] In return for every expelled illegal immigrant, the EU undertook to resettle the same number of Syrian refugees from Turkey.[79] The declaration takes the burden off from the authorities of the Member States, albeit not entirely. In return, the EU provides funds to Turkey for the benefit of individuals under temporary protection, *e.g.* health, education, infrastructure and food projects in support of the situation of refugees.[80]

On the basis of the Statement, its main priorities are to provide targeted assistance to refugees, to curb irregular migration and to return migrants who are not eligible for international protection to Turkey. In terms of human rights violations, it should be pointed out, however, that the European Border and Coast Guard Agency (Frontex) in the Aegean Sea has faced pushbacks[81] due to weaknesses in its internal control, but there have also been cases where Turkey has been reluctant to take back migrants who have been refused asylum.[82] The parties also agreed to accelerate the visa liberalisation process.[83]

In the final provision of the Statement, the European Union and Turkey enter into cooperation to provide targeted assistance to the humanitarian situation in Syria, in particular to the geographical areas on the Turkish-Syrian border, to alleviate the concerns of the local population and refugees.[84] A civil war broke out in Syria in 2011, leading to large numbers of people leaving their country,

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[76] EU-Turkey statement of 18 March 2016, para. 1.

[77] ibid. "This [return] will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion.".

[78] ibid, para. 2.

[79] ibid, para. 3.

[80] ibid, para. 6. The effectiveness of the projects is presented in the above quoted 'Migration flows on the Eastern Mediterranean route'.

[81] 'Human Rights Watch Submission to the Special Rapporteur's Report on Pushback Practices and Their Impact on the Human Rights of Migrants' (*Human Rights Watch*, 1 February 2021) <https://www.hrw.org/news/2021/02/01/human-rights-watch-submission-special-rapporteurs-report-pushback-practices-and> accessed 24 October 2025.

[82] 'Greece pushing to return 1,450 asylum seekers to Turkey' (*Info Migrants*, 14 January 2021) <https://www.infomigrants.net/en/post/29650/greece-pushing-to-return-1450-asylum-seekers-to-turkey> accessed 24 October 2025.

[83] All EU Member States will lift visa requirements for Turkish citizens if Turkey takes the necessary steps. (EU-Turkey statement of 18 March 2016, para. 5.) For more information on the visa liberalisation process in Turkey, see: 'The Visa Liberalization Dialogue' (*Republic of Turkey, Ministry of Foreign Affairs*) <https://www.ab.gov.tr/the-visa-liberation-dialogue_51819_en.html> accessed 24 October 2025.

[84] EU-Turkey statement of 18 March 2016, para. 9.

many of them on the Turkish Eastern Mediterranean route to Europe.[85] On the basis of the joint Statement, the EU will provide financial support for the reconstruction in the aftermath of the devastation of the Syrian civil war, in the hope of reducing migration towards the EU. However, for the sake of completeness, it should be noted that there have also been instances of Turkey returning arrivals–migrants and refugees–to war-torn Syria, where their fundamental human rights and their lives and freedom were at risk.[86]

1.2. Communication on an Effective Externalisation Policy[87]

At the time of the Turkish political agreement, the European Union set out a new direction for migration management, establishing new partnership frameworks with third countries.[88] In its 2016 Communication, the Commission sets out the desire to eradicate irregular migration on the one hand and forced displacement on the other, in coherence with public international law and fundamental rights and applying consistent, medium- and long-term policies.[89] With regard to aid to Syria, the European Union supports projects worth more than 7 billion € to restart lives closest to the country of origin of the refugees (*cf.* EU-Turkey agreement).[90] In 2016, the European Union launched high-level dialogues on migration cooperation with 16 priority cooperating countries.[91] Agree-

[85] Marko Valenta and others, 'Syrian Refugee Migration, Transitions in Migrant Statuses and Future Scenarios of Syrian Mobility' 39 (2020) Refugee Survey Quarterly 153.

[86] Bill Frelick, Ian M. Kysel and Jennifer Podkul, (n 49).

[87] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration' COM (2016) 0385 final.

[88] ibid. Nota bene: Unsuccessful externalisation efforts could also be pointed out, such as the agreement between Italy and Libya. Libya is not a member of the 1951 Geneva Convention. 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' (*UNCHR*) <https://www.unhcr.org/sites/default/files/legacy-pdf/3b73b0d63.pdf> accessed 24 October 2025. However, Italy has encouraged Libya to withhold and take back migrants (although the human rights violations committed in Libya were known). See more on the horrors of the situation in Libya. 'Libya: Nightmarish Detention for Migrants, Asylum Seekers' (*Human Rights Wach*, 21 January 2019) <https://www.hrw.org/news/2019/01/21/libya-nightmarish-detention-migrants-asylum-seekers> accessed 24 October 2025. Cf. *Hirsi Jamaa and Others v. Italy.*

[89] COM/2016/0385 final, part 4.

[90] ibid, part 1. Nota bene: The 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Lives in Dignity: from Aid-dependence to Self-reliance Forced Displacement and Development COM(2016) 234 final' reviews the EU's long-term strategic approach to regional and territorial development, humanitarian aid, regional cooperation and various catching-up projects (e.g. education, development, health).

[91] COM/2016/0385 final, part 2. The countries are: Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia. Sudan, Ghana, Côte d'Ivoire, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan.

ments have already been reached from some dialogues (not necessarily with priority countries).[92]

2. Post-New Pact Agreements

The communication on the New Pact on Migration and Asylum aims at creating new types of partnerships other than readmission agreements,[93] which will be able to provide more effective legal protection for refugees and will be mutually beneficial for the partner country and the European Union.[94] In this context, it is necessary to highlight the objective of the Pact, which was also raised in the context of the sub-chapter *EU-Turkey Statement*, to increase the effectiveness of the readmission mechanism.[95] These agreements are examined below, in particular regard to the achievement of the objectives of the Pact.

2.1. EU-Tunisia Memorandum

The EU's joint migration agreement with Tunisia (abbreviated as *MOU*) was concluded in Tunis in 2023 at a meeting between Tunisian President Kais Saied, European Commission President Ursula von der Leyen, Italian Prime Minister Giorgia Meloni and Dutch Prime Minister Mark Rutte.[96] Ursula von der Leyen, Giorgia Meloni and Mark Rutte took a pragmatic approach facing the accusations of autocratic ambition and racism against the Tunisian President ("the end justifies the means").[97] Like the EU-Turkey Statement, this agreement has not been translated into a binding legal instrument. The Memorandum divides the main areas of the agreement into five pillars: "macroeconomic stability", "economy and trade", "green energy transition", "people-to-people contacts"

[92] There are cases where the EU invests in certain projects or provides financial support to finance the priorities of certain countries, without a complete cooperation agreement. Such support has been established, for example, between the EU and Lebanon. 'Decision No 1/2016 of the EU-Lebanon Association Council agreeing on EU-Lebanon Partnership Priorities' (*European Council*) <https://www.consilium.europa.eu/media/24224/st03001en16docx.pdf> accessed 24 October 2025.)

[93] 'Readmission agreements between the EU and certain non-EU countries' (*EUR-Lex*) <https://eur-lex.europa.eu/EN/legal-content/summary/readmission-agreements-between-the-eu-and-certain-non-eu-countries.html> accessed 24 October 2025.

[94] COM(2020) 609 final, 6.4.

[95] There is no explicit rule that transit countries are obliged to readmit non-nationals, so the effective implementation of readmission agreements lies in the exchange of targeted EU support. ibid, 6.5.

[96] Jorge Liboreiro and Vincenzo Genovese, 'The contentious EU-Tunisia deal is finaly here. But what exactly is in it?' (*Euronews*, 17 July 2023) <https://www.euronews.com/my-europe/2023/07/17/the-contentious-eu-tunisia-deal-is-finally-here-but-what-exactly-is-in-it> accessed 24 October 2025.

[97] ibid.

and "migration and mobility".[98]

The last pillar of the Memorandum concerns migration and mobility measures. The MOU highlights the need to address migration at the root cause and to take a holistic approach.[99] Tunisia stresses that, in order to curb irregular migration, it surveilles its own borders and combats migration, which is in the mutual interest of the EU and Tunisia, by establishing legal migration routes.[100] To combat migrant smuggling, the European Commission is working on a framework to ensure that illegal migrants in Tunisia can be returned to their country of origin once they have been identified.[101] The EU provides mainly financial support, and additional training and equipment to ensure border protection.[102] In accordance with international law, the Parties agree to return Tunisian nationals illegally present in the EU to Tunisia and to return persons who have arrived illegally via Tunisia to their country of origin.[103] Tunisia in the latter instance serves as a country of transit for migrants. Facilitating legal mobility through visa preferences[104] and talent programs is also included in the migration and mobility pillar, which favors Tunisian talents.[105]

As regards the Memorandum, it is worth presenting the European Ombudsman's inquiry.[106]In particular, the criticism of President Saied and its possible im-

[98] Mémorandum d'entente sur un partenariat stratégique et global entre: l'Union européenne, représentée par la Commission européenne, ci-après individuellement dénommée l' «UE», et la République tunisienne, ci-après dénommée individuellement «la Tunisie», ci-après dénommés conjoitement les «parties». Within the framework of macroeconomic stability, the EU provides economic aid to Tunisia in order to achieve sustainable economic growth in the country and social and economic reforms. (1.) Priority will be given to the economy and trade in priority areas such as sustainable agriculture (including, *e.g.* access to clean drinking water or sustainable irrigated agriculture), the circular economy, the digital transition, aviation and investment. (1-3.) The Memorandum strengthens cooperation between partners on the transition to sustainable energy. (3-5.) In the area of people-to-people contacts, Tunisian nationals benefit from visa preferences (in particular, the Memorandum provides for the harmonisation of short-stay visas between Member States). (5.)

[99] ibid, 5.

[100] ibid, 6.

[101] For more information on the Commission's Global Alliance against Migrant Smuggling and the EU Framework, see: 'Commission launches a Global Alliance to Counter Migrant Smuggling and proposes a strengthened EU legal framework' (*European Commission*, 28 November 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6081> accessed 25 October 2025.

[102] Mémorandum d'entente, 6.

[103] ibid.

[104] The Memorandum sets out the need to reduce delays in issuing visas, their costs and administrative burdens.

[105] ibid, 7.

[106] Strategic initiative SI/5/2023/MHZ on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding.

pact on the management of migration in Tunisia must be emphasized here.[107] In a letter to Commission President Ursula von der Leyen, Emily O'Reilly, the then European Ombudsman , asked three questions about the Memorandum: firstly; whether the Commission carried out a human rights impact assessment prior to the conclusion of the agreement, secondly; whether the Commission plans to carry out a regular and systematic human rights impact assessment of the measures implemented, and thirdly; under Regulation 2021/947[108]–according to which the EU does not support measures that result in human rights violations– how does the Commission ensure that the actions set out in the Memorandum are compatible with human rights standards, and whether the Commission suspends the disbursement of funds in case of incompatibility.[109] The Commission replied as follows:[110] to the first question, the Commission's position is that there is no need to carry out a human rights impact assessment in relation to the Memorandum, which, although sets out common objectives, *is not a binding source of law*.[111] To the second question, however, the Commission has identified certain means of verification–such as verification visits–but in the absence of an impact assessment, it is certain in the view of the author that these verifications do not carry out an in-depth and systematic assessment of the risk of human rights violations.[112] To the third question, the Commission highlighted the preparedness and regular monitoring of the implementing partners, as well as the provision 11.6(a) of the general terms and conditions of the contribution agreements,

Nota bene: The European Council on Refugees and Exiles (ECRE) has compiled an extensive list of criticisms on the agreement: 'EU External Partners: EU's Dodgy Deal with Tunisia Sparks Outcry Amid Continued Crack-down Against Sub-Saharan Migrants by the Regime' (*ECRE*, 26 July 2023) <https://ecre.org/eu-external-partners-eus-dodgy-deal-with-tunisia-sparks-outcry-amid-continued-crack-down-against-sub-saharan-migrants-by-the-regime/> accessed 25 October 2025.

[107] For more on Saied's statements against sub-Saharan migrants, see: 'Tunisia's president accused of stirring racism with 'reckless' rhetoric' (*Financial Times*, 25 February 2023) <https://www.ft.com/content/c4ecf01d-c01a-4b06-a574-896bc0822850#:~:text=Kais%20Saied,%20the%20authoritarian%20Tunisian%20leader,%20said%20earlier%20this%20week> accessed 25 October 2025.

[108] Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 (Text with EEA relevance) (2021) OJ L209/1, art. 29.

[109] The questions are set out on page 2 of SI/5/2023/MHZ.

[110] Reply of the European Commission to the questions from the European Ombudsman – Strategic initiative SI/5/2023/MHZ on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding.

[111] ibid, 2-3.

[112] ibid, 3-4.

which allows suspension in case of human rights violations.[113]

With the lack of impact assessment and legal force, the a new form of international partnership has emerged following the EU-Turkey agreement, which has not made significant progress on guarantees for the protection of human rights. The MOU is not infamous thanks to the effectiveness of human rights protection, but the atrocities committed against black Africans–hundreds from sub-Saharan countries were deported to the desert without food and water by the Tunisian authorities[114]–and the Tunisian authorities' refusal to carry out checks.[115] It can be generally stated that the EU seems to consider its own borders' protection to be more important, even at the expense of human rights. In this context it should be highlighted that the European Union has helped Tunisia to prepare a draft law on asylum, which has not been adopted so far.[116] However, the law and jurisprudence of the country are not always coherent, for example regarding respect for the principle of non-refoulement.[117]

2.2. Agreements concluded in 2024

In 2024), the tendency to conclude agreements with third countries seems to be accelerating, as the European Union concluded agreements with Mauritania[118] and Egypt.[119]The agreements have similar content to the EU-Turkey and

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[113] ibid, 4-5. Nota bene: The cited document is: ANNEX II - General Conditions for Contribution Agreements.

[114] 'Tunisia: Crisis as Black Africans Expelled to Libya Border' (*Human Rights Watch*, 6 July 2023) <https://www.hrw.org/news/2023/07/06/tunisia-crisis-black-africans-expelled-libya-border> accessed 25 October 2025.

[115] Gregorio Sorgi, 'Tunisia denies entry to EU lawmakers on official visit' (*Politico*, 14 September 2023) <https://www.politico.eu/article/tunisia-denies-entry-to-eu-lawmakers-delegation/> accessed 25 October 2025.

[116] Fatma Raach and Hiba Sha'ath, 'Tunisia-EU Cooperation in Migration Management: From Mobility Partnership to Containment' in Carrera Sergio Nunez and others (eds), *Global Asylum Governance and the European Union's Role Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Springer 2025).

[117] ibid, 225; 'Algerian refugee deported from Tunisia now imprisoned in Algeria' (*Amnesty International*, 3 September 2021) <https://www.amnesty.org/en/latest/news/2021/09/algerian-refugee-deported-from-tunisia-now-imprisoned-in-algeria/> accessed 25 October 2025. Nota bene: The cited Nunez and others volume of studies on page 241 highlights, in relation to the EU-Turkey Statement, the implementation of the agreements and the inconsistency of the terms of the agreement when it comes to the enforcement of human rights, in particular at the expense of them. Orçun Ulusoy and others, 'Cooperation for Containment: An Analysis of the EU-Türkiye Arrangements in the Field of Migration' in Carrera Sergio Nunez and others (eds), *Global Asylum Governance and the European Union's Role Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Springer 2025).

[118] Déclaration conjointe établissant un partenariat sur les migrations entre la République islamique de Mauritanie et l'Union Européenne.

[119] 'Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Re-

EU-Tunisia partnerships, examined above. Their aim is to support the education of talented young people and their access to employment in the EU,[120] complemented by economic assistance–and the promotion of investment in the agreement with Egypt[121]–in order to achieve the European Union's migration goals.

In the context of migration and mobility, both partnerships emphasise the fight against irregular migration and the importance of the fight against human smuggling.[122] It should be noted that the EU-Mauritania agreement is a partnership on migration, however the agreement with Egypt gives the impression of a broader strategic cooperation, including migration. In the context of operational cooperation between authorities on migration, both Mauritanian and Egyptian personnel agree to deepen cooperation.[123] In the future, Frontex will also support Mauritania with equipment and training to help protect its borders.[124] It must be pointed out that the agreements in the current sub-chapter are not international treaties.

3. The Deterrent Nature of the Externalisation System

Since the establishment of migration regimes, different migration and asylum procedures have been used to differentiate between people who can or cannot enter the state, based on established criteria.[125] The role of international human rights should be to protect equal rights for everyone around the world, but practice is different.[126] Human rights are de facto territorial to this day.[127] Many countries around the world, including the European Union, are pushing migration management away from its territory through externalisation policies.[128] The legitimacy of the policies are disputed,[129] as many methods are in a grey area due to the powers conferred on other countries.[130] The externalisation policy

public Of Egypt and the European Union' (*European Commission,* 17 March 2024) <https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en> accessed 25 October 2025.

120 EU-Mauritania Statement, para. 1.1.-1.3; EU-Egypt Statement.

121 EU-Egypt Statement.

122 EU-Mauritania Statement, para. 4.1; EU-Egypt Statement.

123 EU-Mauritania Statement, para. 4.2.-4.3; EU-Egypt Statement.

124 EU-Mauritania Statement, para. 5.1.

125 David Scott FitzGerald, 'Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence' (2019) 46 Journal of Ethnic and Migration Studies 4.

126 See e. g. 'World Report 2024' (*Human Rights Watch*) <https://www.hrw.org/world-report/2024> accessed 25 October 2025.

127 FitzGerald (n 126) 5.

128 ibid.

129 ibid.

130 Xanthopoulou (n 35) 112.

of the European Union does not take the form of international treaties, but of joint declarations or memoranda. Taking into account the literature,[131] the author believes it is not a coincidence that the European Union does not conclude its agreements with third countries in the form of international treaties. *Cantor et al.*, referring to the judgment of the ECtHR in Othman (Abu Qatada) v. UK, point out that, as far as the protection of human rights is concerned, bona fide diplomatic guarantees are not sufficient without formal and substantive rules.[132] By defining *common* objectives with third countries in the EU's political declarations, it actually circumvents Art. 218 TFEU,[133] so that the CJEU cannot examine the conformity of the partner countries as safe third countries[134] and first countries of asylum[135] under Directive 2013/32/EU. In relation to Turkey, it was even mentioned that it did not respect the prohibition of refoulement, thus not fulfilling the conditions of a safe third country, nor could it accomplish the conditions of a first country of asylum.[136] The same has been proven with regard to the MOU.[137]

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[131] Cantor and others (n 28) 144. Proposals on the human rights implications of the practices used, it is stated that international treaties should replace the form of political declarations in order to allow for the examination of international responsibility.

[132] Cantor and others (n 28) 144; *Othman (Abu Qatada) v UK* App. no 8139/09 (ECtHR, 17 January 2012).

[133] There was an example of a challenge against the EU-Turkey Statement, but the General Court did not act on the case due to lack of jurisdiction. Case T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128 and Case T-193/16 *NG v European Council* [2017] ECLI:EU:T:2017:129.

[134] President Ursula von der Leyen raised the possibility of transfer from the European Union to safe third countries. 'EU conservatives embrace UK-style asylum plan' (*Financial Times*, 7 March 2024) <https://www.ft.com/content/ef07e57e-c9d5-4a3d-b68f-4d6911e47b45> accessed 25 October 2025. In the event of a positive assessment following an asylum procedure, the applicant could be protected by the safe third country. The criteria for countries are set out in art. 38 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (2013) OJ L180/60. On the basis of the criteria, these are countries where the threat of persecution or serious harm is absent, where the principle of non-refoulement is respected and where access to the asylum procedure is ensured and protection in accordance with the Geneva Convention is guaranteed.

[135] The first country of asylum principle is also regulated by Directive 2013/32/EU in Art. 35. These countries recognise the applicant as a refugee or the applicant enjoys adequate protection in this country, including non-refoulement.

[136] For additional information on the problems with the EU-Turkey Statement, see: Gloria Fernández Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) 1 European Papers 1097.

[137] For additional information on the problems with the EU-Tunisia Memorandum, see: 'Joint Statement: Tunisia is Not a Place of Safety for People Rescued at Sea' (*Human Rights Watch*, 4 October 2024) <https://www.hrw.org/news/2024/10/04/joint-statement-tunisia-not-place-safety-people-rescued-sea> accessed 25 October 2025.

Fitzgerald's quoted study outlines a defence system, which is intended to symbolise the protection of medieval fortresses by comparing contemporary externalisation practices to the structures of the fortification system.[138] The purpose of externalisation policies is to control and select individuals outside the territory of the country of destination from those who may enter, to those who may not enter.[139] These include, inter alia, the practice[140] of transit countries–or land-based buffer states–which, after having been found to be unworthy of an appropriate screening procedure, to limit the passage of a person to the country of destination through the country of transit.[141] As territorial borders are same as borders of jurisdictions, outsourcing border control means that elements of the European system of law–as the person does not enter the territory–are not activated.[142]

The French non-entrée summarises externalisation policies aimed at excluding refugees from jurisdiction.[143] In the light of the non-entrée, the European Union undertakes minimum commitment–primarily financial, secondly technical, thirdly by providing training to its partners–in principle to the humane management of migration and asylum, but seems to relieve itself and circumvent its international responsibility.[144] The EU shows a tendency to put its interests and those of its Member States against the interests of migrants, *e.g.* by referring to the protection of the "European way of life"[145] or by declaring a state of emergency.[146]

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[138] FitzGerald (n 126) 9.

[139] ibid, 9.

[140] It must be added that the study highlights in the classic Barbacan strategy that the arrivals had to wait in the temporary transit zones established in Serbia before they could enter the territory of Hungary. (ibid, 15.)

[141] ibid, 11-12.

[142] ibid, 16. Nota bene: it is highlighted in the study that these policies are not fully effective as long as smugglers are able to bring in migrants. (17.)

[143] James C. Hathaway and Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) 14-016 University of Michigan Law & Economic Research Paper 6. Nota bene: The new generation of non-entrée policies, based on pages 20-28 of the study, are political cooperation, mainly economic and investment cooperation in exchange for deterrence of arrivals, provision of financial incentives, equipment and training, joint or shared implementation with officials of the country of destination in the partner country, including European officials at the Greek-Turkish border, and implementation by the country of destination or international agencies such as Frontex on the territory of the partner country.

[144] ibid, 7.

[145] 'Promoting our European way of life' (*European Commission*) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life_en> accessed 25 October 2025.

[146] Xanthopoulou (n 35)115.

As regards the jurisdiction, it should be pointed out that there are rights which do not have exclusive territorial effect, such as Art. 33 of the Geneva Convention, the prohibition of refoulement.[147] In this regard, the international responsibility of the EU should be examined in two cases.[148] Firstly, the European Union may assume international responsibility if it assists third countries in committing an internationally illegal act in full knowledge of the circumstances, or if it provides material assistance to a third country knowing that the assistance constitutes a violation of human rights.[149] The liability of the European Union may also be examined in cases of personal liability where, in the context of inter-agency cooperation, European officials determine for the authorities of a third country the manner in which tasks are to be performed (management and control)[150] in such a way that the EU officials may be held responsible for an infringement resulting from the exercise of the other country's official authority.[151] The author believes the first instance may be more pertinent for the EU in that case, it is not necessary to establish the jurisdictional criteria, but only the support provided and the EU's awareness of human rights violations.[152]

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[147] Hathaway and Gammeltoft-Hansen (n 144) 30, cites in footnote 95: James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 160-171., where Hathaway enshrines the fundamental rights of migration and asylum, which are: non-discrimination (art. 3), movable and immovable property (art. 13), access to courts (art. 16(1)), rationing (art. 20), public education (art. 22), fiscal charges (art. 29) and the right to naturalisation (art. 34).

[148] Juan Santos Vara and Paula García Andrade and Tamás Molnár, 'The Externalisation of EU Migration Policies in Light of EU Constitutional Principles and Values: Reconciling the Irreconcilable? An Introduction to the Special Section' (2023) 8 European Papers 901, 904. The authors questioned, whether it is in fact a Member State's responsibility, since it is the Member States themselves that are implementing EU law on an extraterritorial basis.

[149] Cantor and others (n 28) 131. Nota bene: the extension of liability based on territorial jurisdiction alone is less likely to give rise to international liability as third countries implement non-entrée practices. It should be noted, however, that the concept of jurisdiction is developing before international and European (here, in particular, the ECtHR) jurisprudence. (Hathaway and Gammeltoft-Hansen (n 144) 32-34; *Al-Skeini and Others v. United Kingdom* App no 55721/07 (ECtHR,7 July 2011). This paper does not deal with bilateral agreements in detail, but it is necessary to refer to the Italy-Albania and the United Kingdom-Rwanda agreements, in which the former countries conduct the asylum procedure within the territory of the latter. (For more information on the two agreements, see, e.g. Salvatore Fabio Nicolosi, 'Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law' (2024) 71 Netherlands International Law Review 1, 7-9.

[150] Hathaway and Gammeltoft-Hansen, (n 144) 41. Nota bene: The European Union has agreements with some Western Balkan countries (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia) to carry out joint border protection tasks with Frontex officers. Xanthopoulou (n 35) 133-134.

[151] Al-Skeini and Others v. United Kingdom case, para. 135. Nota bene: the liability of EU officials may also exist where an illegal act is carried out by an authority of a third country under the direction and control of the official or where EU officials have effective control of that authority in this respect. (Hathaway and Gammeltoft-Hansen (n 144) 43-44. cites: James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 126-32, 146-161, 422-34.

[152] Hathaway and Gammeltoft-Hansen, (n 144) 53-61 address the 'Draft articles on Responsi-

IV. Recommendations

Although the European Union is committed to uphold human rights, the externalisation agreements concluded contain a risk of violations.[153] In addition to the examination of international responsibility, it is important to note that migrants do not have access at all–or only with extreme difficulty–to resort to forums examining the responsibility of states[154]–so it is not possible to resolve what happens with persons on the basis of the establishment of international responsibility–. There is reason to believe that the European Union may have a responsibility,[155] but the author believes, instead the question to answer is how to protect human rights in the extraterritorial dimension of migration and asylum.

The European Union understands that the right to apply for asylum must be guaranteed, but if another *safe third country* is able to provide adequate protection, the EU does not have to carry out the procedure itself.[156] Under the safe third country concept, asylum applications may be rejected without a substantive examination and applicants may be transferred to a *safe* third country by the authorities.[157] The safe third country–as well as the first country of asylum–in

bility of States for Internationally Wrongful Acts, with commentaries 2001.' art. 16., which is called "Aid or assistance in the commission of an internationally wrongful act". Importantly, the Venice Commission of the Council of Europe found art. 16 applicable to European states in its opinion on a human rights violation case, as they contributed to human rights violations. (Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoner. European Commission for Democracy through Law (Venice Commission), Opinion no. 363 / 2005, 17 March 2006. para. 45.) Nota bene: The commentary on the draft specifies that financial support may be sufficient to establish liability. In such a case, it is necessary to examine, on the one hand, the knowledge of the State granting the aid in relation to the commission of the unlawful conduct and, on the other hand, the intention to facilitate it (Commentary on art. 16, para. 9).

153 The following article finds human rights violations in all international partnerships concluded by the European Union: 'EU External Partners: EU accused of funding forced deportations from Türkiye — European Commission President calls for development of 'return hubs' — Egypt and Tunisia reportedly reluctant to co-operate with EU on migration deals; Libya showing more 'commitment" — NGOs denounce Tunisia as 'not a safe place' for disembarking rescued people and call for end of EU-Tunisia migration co-operation — More than 300,000 people flee into Syria from Lebanon' (*ECRE*, 17 October 2024) <https://ecre.org/eu-external-partners-eu-accused-of-funding-forced-deportations-from-turkiye-%e2%80%95-european-commission-president-calls-for-development-of-return-hubs-%e2%80%95-egypt-and-tunisa-r/> accessed 25 October 2025.

154 Nicolosi (n 150) 14.

155 Cf. Draft State Responsibility adopted by the Committee on International Law, art. 16; Venice Commission Opinion 363/2005.

156 Iris Goldner Lang and Boldizsár Nagy, 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' (2021) 17 European Constitutional Law Review 442, 447.

157 Berfin Nur Osso, 'Unpacking the Safe Third Country Concept in the European Union: B/orders, Legal Spaces, and Asylum in the Shadow of Externalization' (2023) 35 International

Regulation 2013/32/EU does not directly refer to the obligation to enforce European asylum rules and the Geneva Convention.[158] This is a shortage called into question by the literature, which makes the author think that at least the provision–according to which a country can be classified as safe by the EU Member States simply because of the fact of transit–should be removed from the Regulation.[159] It must be added that the concept of *safe country of origin*[160], which, like the two previous concepts, *prevents* the need to initiate an asylum procedure, has already been examined by the CJEU.[161] A revision of the other concepts would be necessary as well, in particular with regard to the legal *gap* on the basis of which Hungary rejected the applications of persons transiting through Serbia, referring to previous 'transit'.[162]

The European Union should conclude its partnerships exclusively subject to safeguards to the compliance with human rights obligations. The HRW study sets out six conditions to ensure human rights in EU partner countries.[163] In my view, the European Union should review its existing agreements under these conditions and–these conditions should govern the conclusion of any eventual new agreement. In particular, as suggested in the HRW study, any practice of sending asylum seekers to a place where there is a serious risk of violation of their human rights should be prohibited.[164] To ensure this, the author proposes a review on the basis of Art. 218(11) TFEU and Art. 263 TFEU, as the most effective way of guaranteeing legal protection would be for the Court of Justice of the European Union to examine the content of the agreements, in the light of the Union's binding fundamental rights and other obligations under its primary law.

Journal of Refugee Law, Volume 272, 273.

[158] Goldner Lang and Nagy (n 157) 462.

[159] ibid, 463.

[160] "A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict." (Annex I to Directive 2013/32/EU.)

[161] Case C-406/22 *CV v Ministerstvo vnitra České republiky* [2024] ECLI:EU:C:2024:841.

[162] Goldner Lang and Nagy (n 157) footnote 86.

[163] Bill Frelick, Ian M. Kysel and Jennifer Podkul, (n 49). Part IV: Recommendations for Promoting Government Migration Policies Protective of Human Rights To The European Union. The six conditions are: the same status as the 1951 Geneva Convention in the national legal system; a ban on sending migrants to a country in armed conflict; access of refugees (as well as beneficiaries of temporary protection) to the labour market; health and education; abstention from detention of asylum seekers–in particular children–; and respect for the prohibition of refoulement.

[164] ibid. Part IV: Recommendations for Promoting Government Migration Policies Protective of Human Rights To The European Union.

The European Union should strive to improve accountability. The fact that partnerships are concluded informally–being mere political agreements–does not allow the CJEU to assess compatibility with the Treaties, nor does it ensure democratic scrutiny between the institutions.[165] The European Parliament–which historically is an important institution protecting human rights[166] –did not take part in the conclusion of the agreements. In contrast, *e.g.* the readmission agreements concluded by the EU with Parliament's approval.[167] In a formal resolution in 2021, the European Parliament indicated that the European Union should equally respect human rights in its extraterritorial action, in particular in its agreements, in accordance with international law.[168] The Commission should systematically and publicly assess the impact on human rights when implementing its new partnerships on migration.[169] The most appropriate way to do this is, in the author's view, to establish legally binding international treaties, thus giving the CJEU the opportunity to examine their conformity with the Treaties on the basis of its powers under the TFEU.[170]

The author believes that to prevent violations, it is of particular importance to carry out the ignored[171] human rights impact assessment for all partnerships.[172] In addition to the impact assessment, the author considers important (in line with the EP resolution quoted) to develop uniform, regular and systematic monitoring, evaluation and accountability mechanisms to monitor possible infringements.[173] The EP proposed to involve the European Union Agency for Fundamental Rights–composed of independent experts–to assess the risks of cooperations and warned the Commission to draw up periodic reports on the

[165] TFEU, art. 78(2)(g) confers on the European Parliament and the Council the power to conclude formal partnerships.

166 E.g. it is worth listening to the plenary debate in Strasbourg on 4 October 2023: 'Need for a speedy adoption of the asylum and migration package (debate)' (*European Parliament,* 4 October 2023) <https://www.europarl.europa.eu/doceo/document/CRE-9-2023-10-04-ITM-003_EN.html> accessed 25 October 2025.

[167] Tineke Strik and Ruben Robbesom, 'Compliance or Complicity? An Analysis of the EUTunisia Deal in the Context of the Externalisation of Migration Control' (2024) 71 Netherlands International Law Review 199, 203.

[168] European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy (2020/2116(INI)), para. 1-4.

[169] ibid, para. 4-5.

[170] It must be added that Strik and Robbesom highlight the possibility of declaring partnership agreements (the authors are specifically examining the EU-Tunisia Memorandum) to be illegal if they were concluded by impeding the EP's legislative powers, such as readmission in the agreements or visas. Strik and Robbesom (n 168) 213-214.

[171] Cf. Ombudsman's inquiry SI/5/2023/MHZ.

[172] The purpose of impact assessments is to identify and describe the problem to be addressed and to monitor and evaluate the expected results. (European Commission, 'Better Regulation Guidelines' Brussels, SWD (2021) 305 final. 3.4. Impact assessment.)

[173] 2020/2116(INI), para. 7.

implementation of the agreements.[174] The author believes that these provisions would better serve the promotion of human rights.

V. Conclusion

The rights of asylum seekers are currently out of the spotlight in the implementation of externalisation policies. There is an emerging practice in European legal systems where legitimate violence can even be used against wrongdoers in the event of their culpable behaviour.[175] It should be noted, however, that the European Union's actions to protect its own citizens, economy and defence against border violations are not without foundation. Spain–like all EU country–provides access to its territory, as it accepts refugees in real need of assistance once they have applied for asylum. However, the European Union does not have to tolerate people smugglers profiting from irregular routes. Therefore, the agreements are, in the author's view, a step in the right direction with the externalisation of migration and asylum, however it must not come at the expense of the realisation of human rights.[176] I therefore propose a strict but consistent and transparent migration policy with international partners who accept and comply with the Geneva Convention. Furthermore, the conclusion of partnerships should take place exclusively in the form of international treaties, thus effectively enforcing institutional guarantees (scrutiny by the European Parliament and possible judicial review by the Court of Justice of the European Union) and human rights guarantees (*e.g.* impact assessment, periodic reports).

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[174] ibid, para. 10-11.

[175] Xanthopoulou (n 35) 126. cites: Case of *N.D. and N.T. v. Spain* App no 8675/15 and 8697/15 (ECtHR, 13 February 2020). Nota bene: the ECtHR legitimized pushbacks due to the culpable behaviour of offenders in the case. (Case of N.D. and N.T. v. Spain, para. 200.) Para. 24 of the case shows that the defendants made an attempt to cross the border illegally and were expelled from Spain. Nota bene: Regulation (EU) 2024/1356 introduces new rules for persons crossing borders without authorisation by introducing 'screening'.

[176] This is confirmed by Case of *M.K. and Others v. Poland* App no 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020), in which the ECtHR held that an asylum seeker cannot be transferred to a third country without it being certain that the third country will conduct the asylum procedure in compliance with the principle of non-refoulement (para. 172-173.). Goldner Lang and Nagy sees this as a factor influencing expulsion on the basis of the difference in behaviour between asylum seekers, in parallel with N.D. and N.T. Goldner Lang and Nagy (n 157) 458.

Achievements of the Hungarian Presidency of the Council in Promoting the Schengen Area as a Strategic Asset for the EU

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Abstract

Schengen not only remains a project designed for the benefit of the people but it has also evolved into a strategic asset of the Union, in three ways. First, as an essential enabler of the Single Market, second, as one of the EU's strongest response to the challenges of a world, and third, as a force for unity. In its Presidency Programme for the second half of 2024, Hungary aimed at facilitating strong European borders and a crisis-resilient system. The aim of this study is to examine to what extent the Hungarian Presidency was able to promote the Schengen area as a strategic asset for the EU, and will also highlight how the Hungarian Presidency helped achieving European goals in strengthening the Schengen area, especially as regards the digitalisation of procedures and the interoperability architecture, the strengthening of Schengen governance, and facilitating the full accession of Romania and Bulgaria to the Schengen area.

Keywords: Hungarian Presidency, Schengen, interoperability, Schengen governance, Schengen accession

I. Introduction

The Schengen area now covers 29 countries (25 of the 27 member states, as well as Iceland, Liechtenstein, Norway and Switzerland) and 420 million people.[1] In its June 2025 Conclusions the European Council marked the 40th anniversary of the signature of the Schengen Agreement and stressed that the Schengen area is one of Europe's fundamental achievements, which underpins freedom of movement, enhances security, and fosters cross-border life and the Single Market.[2] "Signed on 14 June 1985, the Schengen Agreement marked the beginning of a new era of strategic cooperation and deeper integration centred on the freedom and security of its people. The vision was simple yet profound: to build a Europe where citizens could move across internal borders without facing barriers, thereby fostering economic growth, cultural exchange and social cohesion, all while enhancing collective security."[3]

According to the latest report by the Commission on the State of Schengen,[4] Schengen not only remains a project designed for the benefit of the people but it has also evolved into a strategic asset of the Union, in three ways. First,

[1] Controls at the internal borders with Cyprus have not yet been lifted, and Ireland is not part of the Schengen area.

[2] European Council conclusions, 26 June 2025.

[3] Commission, 'Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 2025 State of Schengen Report' COM (2025) 185 final, point 1.

[4] ibid.

the Commission highlights Schengen's role as an essential enabler of the Single Market, as the Schengen area is a crucial driver of economic growth, competitiveness and Europe's economic sovereignty. Second, Schengen is seen as the EU's strongest response to the challenges of a world where threats are no longer confined to national borders as it provides a set of tools, collective resources and capabilities needed to tackle today's complex, transnational threats to freedom and security. Third, when hostile actors seek to weaken and fragment Europe, Schengen can be a force for unity, bringing Europeans closer together, while contributing to a shared tangible European identity.

Internal border controls and the threats to the Schengen area are a constant reminder that this achievement should not be taken for granted and that its preservation and strengthening requires continued political commitment from all parties. In its Presidency Programme in the second half of 2024,[5] Hungary aimed at facilitating strong European borders and a crisis-resilient system by setting out the following targets: "Europe has a common interest in ensuring strong external borders, therefore, in order to strengthen their resilience, the Hungarian Presidency will build upon the experience of the past five years to launch a reflection process that will highlight the specific challenges faced by different types of borders, the proposed responses, including the role of Frontex, as well as the best practices and innovative solutions of Member States. A key priority of the Hungarian Presidency is to strengthen the resilience of the Schengen Area to crises. Within the framework of the Schengen Cycle, the Hungarian Presidency will be responsible for monitoring the implementation of identified priority areas in order to maintain and streamline strong and robust Schengen governance. The Hungarian Presidency will also aim to facilitate the finalisation of the Schengen enlargement process, in particular by fostering a consensus in the Council on the lifting of border controls at the internal land borders of Romania and Bulgaria. The Hungarian Presidency wishes to ensure compliance with the schedule for the implementation of the new home affairs interoperability architecture, in particular with regard to the introduction of the European Entry Exit System (EES) as a new tool for increasing the internal security of the Schengen Area, and the preparation for the launch of the European Travel Information and Authorization System (ETIAS)."

János Bóka, Hungary's Minister responsible for EU affairs used a kitchen analogy to describe the presidency's work: it is not preparing Hungarian food from Hungarian ingredients, but preparing European food from European ingredients, which can be sprinkled with a pinch of paprika when served.[6] The aim of

[5] 'The Hungarian presidency programme' (*Hungarian Presidency, Council of the European Union*) <https://wayback.archive-it.org/12090/20250412082230/https://hungarian-presidency.consilium.europa.eu/en/programme/programme/> accessed 1 August 2025.

[6] Speech of János Bóka, Minister of EU Affairs at National University of Public Service on

this study is to examine, on the one hand, to what extent the Hungarian Presidency was able to promote the Schengen area as a strategic asset for the EU. On the other hand, the study will also highlight how the Hungarian Presidency's paprika flavour helped achieving European goals in strengthening the Schengen area. The study therefore presents the responsibility and results of Hungary's Presidency of the Council in strengthening the Schengen area in the second half of 2024 from the perspective of the three strategic roles identified by the Commission, and covers the relevant tasks and achievements of the Hungarian Presidency regarding Schengen.

II. chengen as the Essential Enabler of the Single Market

"First, as an essential enabler of the Single Market,[7] the Schengen area is a crucial driver of economic growth, competitiveness and Europe's economic sovereignty. In an increasingly volatile global landscape with the re-emergence of geopolitical tensions and geoeconomic competition, the European economy requires a barrier-free environment to flourish and less exposure to external dependencies. The Schengen area strengthens our collective resilience by supporting the free movement of goods, services and people. It plays a critical role in maintaining and strengthening supply chains across Europe and consolidating the Single Market, as underscored in the Letta report.[8]"[9]

Schengen is one of the EU's main achievements, as acknowledged by 72% of Europeans and 81% of EU companies. According to the 2024 Eurobarometer survey on Schengen,[10] a large majority of Europeans and businesses agree that Schengen is good for business in EU countries and that it has more advantages for their country. The survey shows an important increase in citizens' awareness of the Schengen area compared to the last Eurobarometer survey in 2018. Over a third of the EU citizens (35%) say that their experience with border checks when leaving or entering the Schengen area was smooth and efficient.

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3 May 2024. MTI, 'Az EU-elnökség nagymértékben öregbítheti Magyarország hírnevét' (*Magyarország Kormánya*, 3 May 2024) <https://kormany.hu/hirek/az-eu-elnokseg-nagymertekben-oregbitheti-magyarorszag-hirnevet> accessed 1 August 2025.

[7] See also Gabriel Felbermayr, Jasmin Katrin Gröschl, Thomas Steinwachs, 'The Trade Effects of Border Controls: Evidence from the European Schengen Agreement' (2018) 56 Journal of Common Market Studies 335.

[8] Enrico Letta, 'Much more Than a Market - Speed, Security, Solidarity - Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens', April 2024. <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf> accessed 29 November 2025.

[9] COM (2025) 185 final, point 1.

[10] 'Businesses' attitudes towards the Schengen area' (*European Union*) <https://europa.eu/eurobarometer/surveys/detail/3177> accessed 1 August 2025.

1. *The New Reform on the Digitalisation of Procedures and the Interoperability Architecture*

Over the past years, the quality control mechanisms, such as Schengen evaluations and vulnerability assessments have highlighted inconsistencies and vulnerabilities in the quality of border checks at the EU external borders. Several Member States face challenges related to the resources allocated for managing external borders, which limit their ability to ensure an effective implementation of border management and to respond to emerging challenges at the external borders. The consolidation of the digitalisation of procedures and systems as well as the implementation of the overall interoperability architecture should further enhance security and facilitate smoother travel to and outside the Schengen area. The entry into operation of new IT systems and ensuring their interoperability ushers in a new era for external border security and a significant further step towards the completion of the most advanced border management system in the world.

The Justice and Home Affairs Council endorsed the revised roadmap for interoperability architecture in October 2023.[11] According to the revised timeline, the Entry/Exit System (EES),[12] together with the shared Biometric Matching Service (sBMS) as the first component of interoperability, was to go live in Autumn 2024 as the first wave, followed by the European Travel Information and Authorisation System (ETIAS), the European Search Portal (ESP), the Common Identity Repository (CIR) and the Central Repository for Reporting and Statistics (CRRS) as the second wave, in spring 2025.

The EES established as an element of border management in the Schengen area is a central database that records the entry, exit and refusal of entry of third-country nationals crossing the external borders of the 29 Schengen Member States for a short stay.[13] As the EES's entry into operation is a significant and

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[11] 'Justice and Home Affairs Council, 19-20 October 2023' (*European Council*) <https://www.consilium.europa.eu/en/meetings/jha/2023/10/19-20/> accessed 1 August 2025.

[12] Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 [2017] OJ L327/20.

[13] It is the first system to collect biometric data, such as facial images and fingerprints, of third-country nationals crossing the external borders. The primary purpose of recording these data in the EES is to provide Schengen Member States with real-time access to the personal data of third-country nationals, their travel history and information on whether they have complied with the authorised duration of their short stay in the Schengen area. As a result, the EES will significantly reduce the likelihood of identity fraud and overstays, ultimately strengthening the

complex exercise, it is crucial that all stakeholders understand the vital role they have in ensuring that all the necessary preparatory work had been undertaken and that all resources would be in place for the date on which the system will go live. Several prerequisites have to be met: eu-LISA must confirm the technical readiness of all Member States and the carriers; all mandatory tests of the central systems have to be finalised, and Member States must be in what is known as the 'end-to-end' test phase; Member States must notify the Commission about their legal, operational and technical readiness to go live with the EES; once the above two criteria are met, the Commission can then confirm the date of entry into operation of the EES.

2. Developments during the Hungarian Presidency

Since October 2023 the JHA Council has regularly monitored its implementation to ensure the necessary political support and to provide reassurance on the progress made. While the Hungarian Presidency was ready to continue this monitoring exercise before and after the EES's entry into operation, however, three Member States – Germany, France and the Netherlands – did not send a positive signal set out in Article 66(1) of the EES Regulation by the given deadline, and therefore the preconditions were not met for the planned launch on 10 November 2024. This delay also affects the overall implementation schedule of the interoperability programme, with significant political, reputational, financial and operational consequences. The Council therefore invited eu-LISA to assess, together with the Member States and the Commission, the impact of the delay in the EES on the overall interoperability roadmap.

The Council also invited the Commission to assess as soon as possible the conditions necessary for the operation of the system and to propose possible options for the phased deployment of the EES to the relevant management bodies. Stakeholders involved in the operations of the EES have made clear their preference that the introduction of new processes at the external borders should be preceded by a period of adjustment for national authorities and travellers to give a greater degree of certainty. However, the EES Regulation only allows for a full start of operations, requiring all Member States to start using the EES fully and simultaneously for all travellers who are subject to registration in the EES at all their external border crossing points. Yet, as the objectives of the EES can be achieved more effectively and with greater certainty if a degree of flexibility is introduced at the start of the system's operations, a new legislative act enabling a progressive start of operations for a limited period of time is considered necessary. This Regulation proposed on 4 December 2024[14] derogates from the EES

security of the Schengen area.

[14] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a temporary derogation from certain provisions of Regulation (EU) 2017/2226 and Regulation

Regulation to the extent necessary to enable a progressive start of operations. The proposed Regulation also offers a flexible approach that accommodates the diverse needs of Member States: it enables those who wish to implement it gradually to do so, while enabling others to start operations fully from day one. This proposal also introduces measures that enable Member States to effectively manage exceptional circumstances, such as technical problems or periods of peak travel.[15]

As the new proposal was presented close to the end of the Hungarian Presidency, it could only initiate the start of negotiations in the relevant Council Working Party, while an interinstitutional agreement on the final compromise text between the Council and the European Parliament was reached at the second political trilogue on 19 May 2025. According to the roadmap, which the Council endorsed in March 2025, this phased approach should start in October 2025. The European Travel Information and Authorisation Information System (ETIAS) will become operational approximately six months later. While emphasising that it is crucial to continue investing the necessary efforts both when it comes to implementation but also in the preparations for a timely and smooth go-live, starting with EES, particular attention should be given to raising awareness about the new procedures and training, ensuring that all relevant stakeholders and travellers are well-informed. Coordinated communication is therefore a key element of the EES's going live, including key messages for possible crisis communication.

III. Schengen as the EU's Strongest Response to the Challenges of the World

"Second, Schengen is the EU's strongest response to the challenges of a world where threats are no longer confined to national borders. It enables us to harness our collective expertise and resources, forging a security framework that is far stronger and more effective than the sum of individual national systems. Schengen provides a set of tools, collective resources and capabilities needed to tackle today's complex, transnational threats to freedom and security. These threats, whether from organised criminal networks or hostile state or non-state actors, cannot be effectively addressed by individual nations. In today's geopolitical and security landscape, Schengen is no longer merely a benefit, it is a necessity."

(EU) 2016/399 as regards a progressive start of operations of the Entry/Exit System' COM (2024) 567 final.

[15] To mitigate such risks, Member States can suspend the use of the system, fully or partially, for a short period of time during the period of the progressive start of operations. This mechanism will also be retained for a limited period after the full start of operations.

1. Schengen Governance

Schengen governance is a framework that guides and oversees the functioning of the Schengen area at policy level. This includes a policy assessment of the current Schengen situation, the identification of challenges and best practices, and priority areas for action. Its main objective is for EU Member States and institutions to respond jointly, in a coordinated and strategic manner, to common challenges in the Schengen area, with particular regard to border protection and security issues. In order to ensure the functioning of a stable and strong Schengen governance system, it is essential to properly prepare and apply Schengen instruments and evaluation processes. A well-functioning, predictable framework ensures that strategic deficiencies that threaten the stability and resilience of the Schengen area are identified in a timely and accurate manner and then addressed with the necessary measures. Comprehensive cooperation ensures that the Schengen area functions effectively, maintaining the benefits of free movement while providing solutions to external threats.

Schengen Governance[16] is built upon, on the one hand, the annual Schengen Cycle, with the Schengen Council at its heart,[17] and the Schengen Evaluation and Monitoring Mechanism, on the other hand, coordinated by the European Commission.[18] In 2022, the Commission established the annual Schengen Cycle, to improve strategic and operational coordination on Schengen matters. It ensures

[16] 'Schengen Governance' (*European Commission*, 13 June 2025) <https://home-affairs.ec.europa.eu/policies/schengen/schengen-area/schengen-governance_en> accessed 1 August 2025.

[17] The Schengen Council, practically convened on the morning session of Home Affairs Council meeting, plays a key role in overseeing the functioning and political governance of the Schengen area. It brings together Ministers of Home Affairs from all Schengen countries to coordinate policies, address key challenges, and ensure the proper implementation of the Schengen rules. The Schengen Council also helps ensure a coordinated response to current and future challenges. Since 2022, the Schengen Members meet regularly to discuss their shared responsibilities and challenges, as well as to coordinate joint measures to common challenges affecting the Schengen area. To guide the Schengen Council's political discussions, the European Commission presents the Schengen Barometer+, which offers an overview of the key factors impacting the stability of Schengen. The Commission regularly presents the Barometers during the March and the October Schengen Council meetings.

[18] By conducting regular on-site evaluations, the Schengen evaluation and monitoring mechanism helps identify areas for improvement. The Schengen Scoreboard is a key tool of the Schengen cycle, visualising the level of implementation of recommendations resulting from Schengen evaluations. It aims at increasing the political visibility of the results from the Schengen evaluations, improving overall transparency. The Schengen Scoreboard helps Member States to identify areas in which they need to concentrate their efforts to boost implementation of the Schengen rules and supports policy coordination in and follow-up by the Schengen Council. In 2023, the Commission, together with Schengen countries, established a common and objective methodology for the Schengen Scoreboard. This tool is delivered annually to the Ministers of Home Affairs.

the smooth functioning and continuous improvement of Schengen by providing a structured framework for assessing how Schengen countries implement and comply with common rules. This allows to maintain high standards of security, and effective border management, ensuring that the benefits of Schengen – free movement, safety, and cooperation – are safeguarded for all. In 2022, during the French Presidency, the political governance of the Schengen Area was strengthened with the introduction of the Schengen Council.[19] The Schengen Cycle includes several tools which allow the Schengen Council to swiftly identify key challenges and set priority actions at both national and European levels. These tools guarantee regular 'health-checks' on the state of Schengen, identify risks impacting the Schengen area and ensure the effective implementation of the agreed rules.

Each year, at the beginning of a new Schengen Cycle, the Council identifies a limited number of priority regions for the Schengen Area. In doing so, the Ministers identify areas that need special attention in light of the current challenges to the stability of the Schengen Area. This is traditionally done in June based on the 'State of Schengen Report', which provides a picture of the health status for the Schengen Area.[20] The Belgian Presidency worked on a methodology for defining and monitoring Schengen Priorities based on the 2024 State of Schengen report of the Commission.[21] Compared to previous years, at the June 2024 JHA, ministers identified a small number (three) of focused priority areas and concrete actions within them for the next 12 months. The priorities, put forward by the Belgian Presidency and agreed by the Member States, aim to strengthen external border management, further enhance the effectiveness of returns, and enhance internal security.

During the Hungarian Presidency the implementation of the three identified priorities of the Schengen Council cycle remained in the focus of discussion. During the October 2024 JHA ministerial meeting[22] ministers focused on increasing the resilience of the EU's external borders and in particular on enhanc-

[19] 'Press kit. Results of the French Presidency of the Council of the European Union' (*French Presidency of the Council of the European Union*) <https://franceintheus.org/IMG/pdf/press_kit_Fr_presidency.pdf> accessed 1 August 2025. p. 14.

[20] The State of Schengen, published annually by the European Commission, marks the start of the Schengen Cycle and provides an overview of important Schengen-related developments as it assesses how Schengen countries are implementing key policies, highlights challenges, and identifies areas for improvement. In 2024 the Commission added to this report a proposal to set the priorities for the next Schengen Cycle.

[21] Commission, 'Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, State of Schengen report 2024' COM (2024) 173 final.

[22] 'Justice and Home Affairs Council (Home affairs), 10 October 2024' (*European Council*) <https://www.consilium.europa.eu/en/meetings/jha/2024/10/10/> accessed 1 August 2025.

ing the quality of border controls and improving cooperation with third countries. Many delegations raised the importance of providing adequate resources for external border protection and ensuring thorough use of EU information systems, and also underlined the role of Frontex in supporting member states and third countries it has signed agreements with. In December 2024 the ministerial discussion focused on increasing overall security through digitalisation.[23]

Since 2022, the regular meetings of the Schengen Council and the reinforced tools of the Schengen cycle have paved the way to increased common ownership, to a higher-level implementation of the Schengen rules and to boost mutual trust. The work to enhance the preparedness and resilience of the Schengen area to effectively manage common challenges is however not yet completed. The Belgian Presidency was striving to consolidate the process and Schengen governance, thus establishing the Schengen Senior Officials Meeting (Schengen SOM)[24] that was also held during the Hungarian Presidency for the second time.

2. Proposal of Establishing the Schengen Summit

The Schengen area without internal border controls is the most tangible achievement of the EU, yet, what we see today is that the Schengen area has never been more fragmented due to mass irregular migration and increased security threats. When the economic crisis raged in 2008, the response of the leaders of the Eurozone was a dedicated summit, where decisions are made on concerted action by the leaders of the zone, at the highest political level. The appropriate level of political coordination proved to be so essential in solving the crisis, that meetings were later institutionalized with an international agreement as the Euro Summit.

Today, the Schengen zone is in a similar crisis, and it seems logical to create the Schengen Summit at the level of heads of state and government, so Hungarian Prime Minister Viktor Orbán proposed introducing a system of Schengen summits.[25] Schimmelfennig also draw a parallel between the euro crisis and the crisis

[23] 'Justice and Home Affairs Council (Home Affairs), 12 December 2024' (*European Council*) <https://www.consilium.europa.eu/en/meetings/jha/2024/12/12/> accessed 1 August 2025.

[24] On 18 and 19 April 2024, the Belgian Council presidency organised the first-ever meeting between senior officials responsible for policy regarding the Schengen Area – the largest area of free movement in the world – in Antwerp. Three themes were addressed: the Schengen Declaration, the priorities of the Schengen Cycle 2024-2025 and the future of Schengen. See 'Senior officials responsible for Schengen met in Antwerp' (*Belgian presidency Council of the European Union*, 24 April 2024) <https://wayback.archive-it.org/12710/20241018234056/https://belgian-presidency.consilium.europa.eu/en/news/senior-officials-responsible-for-schengen-meet-in-antwerp/> accessed 1 August 2025.

[25] 'Press Statement by Prime Minister Viktor Orbán at an International Press Conference' (*Cabinet Office of the Prime Minister*, 8 October 2024) <https://miniszterelnok.hu/en/press-state-

of the Schengen area. He found that both crises had structurally similar causes and beginnings as exogenous shocks exposed the functional shortcomings of both integration projects and produced sharp distributional conflict among governments, as well as an unprecedented politicization of European integration in member state societies. Yet they have resulted in significantly different outcomes: whereas the euro crisis has brought about a major deepening of integration, the Schengen crisis has not.[26]

According to the Hungarian proposal, Member States must take over political control, since the protection of our borders and the security of the Schengen area cannot be treated as a purely legal and technical issue. Political commitment also requires political ownership on behalf of the Schengen states. In line with the Hungarian proposal, the summit would focus on the most substantial issues of the Schengen area to provide political guidance for ensuring its smooth functioning and promoting coordination between the states of the Schengen area in all relevant policy areas. Such decisions should be adopted at the Schengen Summits, and the EU institutions should be bound by these decisions in terms of implementation.

These regular, dedicated summits would also ensure that the countries of the Schengen area increasingly consider the impact on the Schengen area in other political decisions. Although the Schengen acquis is a compact legal framework, we can observe some synergies: if the asylum system fails, the Schengen area also starts to crack. Therefore, Hungary is of the viewpoint that we must be able to incorporate the interests of the Schengen area, and especially of our border protection, into decisions in other policy areas.

IV. Schengen as a Force for Unity

"Third, when hostile actors seek to weaken and fragment Europe, Schengen is a force for unity, bringing Europeans closer together. Schengen fosters unity and contributes to a shared tangible European identity. It is a deeply embedded political defence against attempts to sow division and distrust among Europeans."

Grabbe highlights that a unity involving Central and Eastern European countries is not just a necessity of the aspiring countries, instead the overall security of Europe depends on preventing the isolation of countries left at the edges of an enlarged area.[27] After Croatia joined the Schengen area in 2023, the Hungari-

ment-by-prime-minister-viktor-orban-at-an-international-press-conference/> accessed 1 August 2025.

[26] Frank Schimmelfennig, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises' (2018) 25 Journal of European Public Policy 969.

[27] Heather Grabbe, 'The Sharp Edges of Europe: Extending Schengen Eastwards' (2000) 76

an Presidency found it extremely important to mobilize its assets for Romania's and Bulgaria's Schengen accession.

1. The Path of Romania and Bulgaria to the Accession

The Act concerning the conditions of accession of the Republic of Bulgaria and Romania sets out that the provisions of the Schengen acquis shall apply to those States only if the Council so decides after having examined, in accordance with the applicable Schengen evaluation procedures, whether the Member States concerned fulfil the conditions necessary for the application of all parts of the acquis concerned.[28] Since their accession to the EU, Bulgaria and Romania have applied parts of the Schengen legal framework (the Schengen acquis), including those relating to external border controls, police cooperation and the use of the Schengen Information System. For the remaining parts of the Schengen acquis, which include the lifting of controls at internal borders and related measures, the Council decides unanimously on their application after it has been verified, in accordance with the applicable Schengen evaluation procedures, that they fulfil the necessary conditions.

On 9 June 2011, during the first Hungarian Presidency of the Council, the ministers acknowledged in two separate Council Conclusions that the evaluation process of Romania and Bulgaria's readiness to fully implement the Schengen acquis had been completed, and the European Parliament also gave its positive opinion on 8 June 2011. However, no Council Decision on the accession of Romania and Bulgaria to the Schengen area followed this, as apart from fulfilling technical conditions, a political decision taken by unanimity is also necessary for the Schengen enlargement. Yet, in December 2010 the Franco-German ministerial letter (to which by the time other Member States had joined as well) made it clear for the Hungarian Presidency that those Member States found Schengen enlargement premature.[29] "Opponents have argued that the two eastern European countries are in too much of a hurry to join, and that they are not ready to enter the Schengen area because of the risk to border security (linked to illegal migration, smuggling) as well as corruption concerns that have arisen."[30]

International Affairs 519.

[28] Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded [2005] OJ L157/203. art. 4(2).

[29] 'Six Months in the Service of a Stronger Europe Overview of the Hungarian Presidency of the Council of the European Union January – June 2011' <https://2010-2014.kormany.hu/download/f/d5/50000/HUPRES_EREDMENYEK_EN.pdf> accessed 1 August 2025.

[30] Ágnes Vass, 'A distinct Hungarian achievement: the Schengen accession of Romania and Bulgaria', (*HIIA*, 23 December 2024) <https://hiia.hu/wp-content/uploads/2024/12/1223_the-Schengen-accession-of-Romania-and-Bulgaria.pdf> accessed 1 August 2025. pp. 1-2.

Ripma explains that the situation, in which several Member States find themselves in 'Schengen purgatory', has a number of undesirable consequences. "It leads to a de facto duplication of the external borders and external border controls, creating uncertainty as to the applicable legal regime, given that internal and external borders have been defined as mutually exclusive. Schengen candidate countries have been increasingly participating in Schengen developing measures, most notably the interoperability regulations. They also guard their external borders in line with the Schengen Borders Code, and with the support of Frontex, yet they do not benefit from the advantages of borderless travel."[31] Furthermore, the fact that Romania and Bulgaria were still outside the visa-free travel area burdened the businesses and populations of the two countries socially and economically. Citizens of Bulgaria and Romania were discriminated against, as they face delays, bureaucratic difficulties and additional costs when travelling or doing business abroad, compared to their counterparts in the Schengen area. [32] Romania believed the country lost €10 billion a year as a result. For the same reason Bulgaria, three times smaller in terms of population, believed its economy lost €1 billion in 2023.[33] „If the fulfilment of the conditions does not entail the reward of efforts, i.e. full membership, the political elite and population of the country might become disillusioned with the integration process and turn into Euroscepticism."[34]

Romania and Bulgaria issued a joint declaration at the Coreper meeting of 2 March 2022[35] in which they acknowledged that the Schengen acquis had developed over the last years. Therefore, with a view to strengthening mutual trust on which the area without internal border controls is built on, they were willing to invite, on a voluntary basis and under commonly agreed conditions, a team under the coordination of the Commission, to ensure the application of the latest developments of the Schengen acquis since the evaluation, focusing on exter-

[31] Jorrit J. Ripma, 'Let's not forget about Schengen' (*EU Immigaration and Asylum Law and* Policy, 12 March2021) <https://eumigrationlawblog.eu/lets-not-forget-about-schengen/> accessed 1 August 2025.

[32] Resolution on the accession to the Schengen area. European Parliament, 2023/2668(RSP).

[33] Georgi Gotev, 'Hungarian presidency secures full Schengen membership for Bulgaria, Romania' (*Euractiv*, 22 November 2024) <https://www.euractiv.com/section/politics/news/hungarian-presidency-secures-full-schengen-membership-for-bulgaria-romania/> accessed 1 August 2025.

[34] Fruzsina Sigér, 'Enlargement Lesson from the Schengen Zone, What can the Western Balkan Countries Learn?' (2023) 26 Európai Tükör 141.

[35] Joint Declaration by the Republic of Bulgaria and Romania on the Draft Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013. Summary Record Permanent Representatives Committee 28 February, 2 and 4 March 2022. 7304/22, CRS CRP 10. <https://data.consilium.europa.eu/doc/document/ST-7304-2022-INIT/en/pdf> accessed 1 August 2025.

nal border management and police cooperation. The overall conclusions of the fact-finding mission in October 2022 stated that the field team did not identify any problems with the application of the latest developments in the Schengen acquis. Nevertheless, while a decision on the full application of the Schengen acquis in Croatia was adopted in the December 2022 JHA ministerial meeting, no consensus could be reached on the decision on the full membership of Bulgaria and Romania, as Austria and the Netherlands still had concerns. While the Netherlands criticised the rule of law situation in Bulgaria, Austria took a negative position regarding both Member States, citing that it was not worth further expanding a non-functioning Schengen area in the current migration situation.

2. The Final Steps towards the Schengen Accession

While in December 2023 the outgoing Dutch government came to the conclusion that Bulgaria met the conditions set for Schengen accession and could therefore agree to a decision leading to Bulgaria's full accession to Schengen,[36] Austria was still hesitant to give its consent, while also floating the idea of what it called 'Air Schengen', saying it was willing to ease rules for air traffic for Bulgaria and Romania if Brussels strengthens its external borders.[37] Austrian Interior Minister Gerhard Karner visited Bulgarian-Turkish border in early 2023 and asked for a threefold increase of Frontex officers and technical upgrades along the Bulgarian-Turkish and Romanian-Serbian borders, coupled with an injection of EU funds to pay for border protection infrastructure, and the Austrian minister also demanded greater surveillance at Schengen's internal borders.

On 30 December 2023 the Council adopted a decision[38] to apply, from 31 March 2024, the remaining parts of the Schengen acquis and to abolish checks on persons at internal air and sea borders. The Decision established that from 31 March 2024, there would no longer be checks on persons at EU internal air and maritime borders between Bulgaria and Romania and the other countries in the Schengen area. Nevertheless, a further decision was required by the Council to establish a date for the lifting of checks at internal land borders. Neither its network, nor the political timing were advantageous for the Belgian presidency, so the Hungarian Presidency had to prepare and take appropriate strategic steps

[36] 'Dutch government drops objection to Bulgaria joining Schengen' (*Euractiv*, 16 December 2023) <https://www.euractiv.com/section/politics/news/dutch-government-drops-objection-to-bulgaria-joining-schengen/> accessed 1 August 2025.

[37] Jorge Liboreiro, 'Brussels welcomes Austria's proposal of Air Schengen for Romania and Bulgaria' (*Euronews*, 11 December 2023) <https://www.euronews.com/my-europe/2023/12/11/brussels-welcomes-austrias-proposal-of-air-schengen-for-romania-and-bulgaria> accessed 1 August 2025.

[38] Council Decision (EU) 2024/210 on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania [2024] OJ L2024/210.

to pave the way to a consensus on full Schengen membership of Romania and Bulgaria.

On 22 November 2024 interior ministers of Austria, Romania, Bulgaria and Hungary, as well as EU Commissioner for Home Affairs Commissioner Ylva Johansson met in Budapest, where they agreed on a new border protection package, and backed Bulgaria and Romania to become full members of the Schengen area from 2025. The participating countries also agreed to send a joint contingent of 100 border guards (Austria 15, Bulgaria 25, Hungary 20, Romania 40) to the Bulgarian-Turkish border. The ministers also agreed that at least for six months they would continue conducting internal border controls[39] between Hungary and Romania and Romania and Bulgaria to prevent any serious threat to public policy or internal security. Finally, during the last JHA ministerial meeting during the Hungarian Presidency the Council adopted a decision to lift checks on persons at the internal land borders with and between Bulgaria and Romania from 1 January 2025.[40] Sándor Pintér, Hungarian Minister for Home Affairs said that the „decision to lift checks on persons at the internal land borders with Bulgaria and Romania marks a milestone for the Schengen area."[41]

V. Concluding Remarks

Amid institutional challenges and global crises, Hungary's EU presidency has delivered transformative achievements, including the expansion of the Schengen Area. Hungary has consistently advocated for the expansion of the Schengen area. The broadening of the Schengen zone, much like the enlargement of the European Union, is envisioned to fortify the involved parties, fostering increased integration and interconnectedness to address shared challenges more effectively. "Romania and Bulgaria's full membership is not only about border control; it carries significant national and geopolitical importance," Minister Bóka said.[42] "Millions of people across Europe work far from their place of residence, in other member states, so free movement is one of the most important expectations of those living there, which must be fully implemented everywhere."[43]

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[39] In accordance with Article 25a (4) and (5) of the Schengen Borders Code.

[40] 'Justice and Home Affairs Council (Home Affairs), 12 December 2024' (*European Council*) <https://www.consilium.europa.eu/en/meetings/jha/2024/12/12/> accessed 1 August 2025.

[41] ibid.

[42] Zoltán Kovács, 'Hungary's EU presidency achieved historical successes' (*About Hungary*, 14 January 2025) <https://abouthungary.hu/blog/hungarys-eu-presidency-achieved-historical-successes> accessed 1 August 2025.

[43] Balázs Molnár, Deputy State Secretary for European Policy on 20 January 2025. See Bíró Réka, 'Kulisszatitkok a Magyar EU-elnökség sikerei mögött' (*Magyar Nemzet*, 20 January 2025) <https://magyarnemzet.hu/kulfold/2025/01/kulisszatitkok-a-magyar-eu-elnokseg-sikerei-mogott> accessed 1 August 2025.

Yet, there is still a lot to work on. In line with the 4-party Declaration singed in Budapest, on February 3, 2025, Minister of the Interior Dr. Sándor Pintér, together with his Romanian and Bulgarian counterparts, and the Director General of Public Security of the Austrian Federal Ministry of the Interior, launched a 100-person police contingent in Kapitan Andreevo, Bulgaria, aimed at strengthening the surveillance of the Bulgarian-Turkish land borders. [44]

A larger Schengen area without border controls would make the EU stronger, however, the phased introduction of the EES is a stopgap measure that has to be implemented due to the insufficient level of preparedness of the three Member States. The required legislation itself meant a further delay in terms of the launch of the system, but it also entailed the rescheduling of other components of the interoperability programme and induced unplanned developments. Apart from the task of making the practical management of borders firm and smooth at the same time, a discussion on the future legal and strategic framework of Schengen and its governance is inevitable. The Hungarian proposal of establishing a Schengen summit is still on the table and should be seriously considered given the various threats and challenges Schengen countries need to face.

And even if Hungary succeeded in closing the latest accession round to the Schengen area, there are new tasks ahead as the President of the Republic of Cyprus, Nikos Christodoulides, has announced that Cyprus aims to join the Schengen area by the end of 2025.[45] Cyprus has been participating in the Schengen Evaluation and Monitoring Mechanism since July 2023, and the Schengen Information System is already operational in Cyprus, but full compliance will require further checks, which are expected to take place in the course of 2025. Its full accession could bring significant economic benefits, especially in the areas of tourism, foreign investment and the shipping sector, as the difficulties arising from heavy administrative procedures would be eliminated. Yet, in the event of accession, the Green Line[46] would become the EU's external border, which could lead to tighter controls at the existing crossing points, but could also further increase tensions between Greeks and Turks living on the island. In order to join the Schengen area, the European Union would have to renegotiate

[44] 'Rendőri kontingens a bolgár-török hatásszakaszon' (*Magyarország Kormánya*, 04 February 2025) <https://kormany.hu/hirek/rendori-kontingens-a-bolgar-torok-hatarszakaszon> accessed 1 August 2025.

[45] 'Cyprus Committed to Schengen Entry by 2026' (*ETIAS*, 21 May 2025) <https://etias.com/articles/cyprus-committed-to-schengen-entry-by-2026> accessed 1 August 2025.

[46] The Green Line is a buffer zone between the Greek-led Republic of Cyprus and the Turkish-occupied Turkish Republic of Northern Cyprus (TRNC), which is monitored by UN peacekeepers. The south-eastern part of the island is subject to EU rules, while the northern part is not officially subject to EU regulations. The government of the Republic of Cyprus previously announced on 4 October 2024 that it would remove the fence along the Green Line and strengthen the police presence through the use of surveillance cameras.

the Green Line regulations, which currently set the conditions for crossing the border.

Critique on Universalism Versus Cultural Relativism Debate, With Special Attention to Customary Law and Constitutionalism In South Africa

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Contents

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Abstract

I critique the longstanding debate between universalism and cultural relativism, particularly within the frameworks of customary law and constitutionalism in South Africa. As globalisation confronts diverse cultural expressions with prevailing human rights norms, the tensions between universalists, who advocate for universal human rights, and cultural relativists, who assert the primacy of cultural practices, have become increasingly pertinent. I explore the implications of this binary opposition on the interpretation and implementation of South African customary law in relation to the Constitution's Bill of Rights. Through an examination of case law, historical context, and legal frameworks, I argue that such debates often lead to more confusion than clarity, undermining efforts toward the effective co-existence of customary practices and constitutional mandates. The analysis also highlights that the dichotomy of universalism versus cultural relativism offers a more integrated approach that acknowledges the dynamic interplay of culture and law necessary for advancing democracy and human rights. I call for a dialogical framework to be employed in discussions around customary law to suggest pathways that honour constitutional commitments and cultural integrity in South Africa and beyond.

Keywords: Universalism, Cultural Relativism, Dialogical Approach, Customary Law, Constitutionalism.

"*There must be ongoing education to create public awareness about the repercussions and human rights concerns of the harmful cultural practices…, in particular educating, dialoguing and negotiating… (with communities) … on the human rights implications of these cultural practices to preclude future violations.*"[1]

I. Introduction

The debate between universalism and cultural relativism is a complex and multifaceted discourse that has permeated numerous fields, including anthropology, sociology, and law.[2] At its core, universalism posits that human rights are universal and should apply equally to all individuals, irrespective of cultural context. On the contrary, cultural relativism contends that human rights must be understood within the context of specific cultures, suggesting that practices considered as 'rights' in one culture may not have the same interpretation or acceptance

[1] JY Asomah, 'Cultural rights versus human rights: A critical analysis of the *trokosi* practice in Ghana and the role of civil society' (2015) 15 African Human Rights Law Journal 148.

[2] See István Lakatos, 'Thoughts on Universalism versus Cultural Relativism, with Special Attention to Women's Rights' (2018) 1 Pécs Journal of International and European Law 6; Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 414.

in another.[3] This debate takes on a unique dimension in South Africa, given the country's rich tapestry of cultures and its commitment to constitutional democracy.[4] The transition from apartheid to a democratic society in the 1990s ushered in a new constitutional framework that sought to accommodate and recognise customary law alongside universal human rights norms,[5] leading to significant tensions between these sometimes-opposing paradigms.[6]

Understanding the interplay between universalism and cultural relativism within the South African context is crucial for several reasons. First, it addresses ongoing tensions within the legal framework, particularly as they pertain to the application of the Bill of Rights in relation to customary law. Second, this study contributes to the broader discourse on how societies can navigate cultural differences while upholding fundamental human rights. Lastly, it seeks to propose pathways for legal frameworks that honour cultural integrity and constitutional commitments—a necessary exploration given contemporary society's increasing globalization and intercultural interactions.

This paper has three primary objectives. First, to briefly analyse the historical and conceptual underpinnings of universalism and cultural relativism, particularly in the context of South African customary law and constitutionalism. Second, to evaluate landmark cases that exemplify the tensions between these two frameworks in South African law. Lastly, critique the binary debate's limitations

[3] Neri Sybesma-Knol 'The United Nations System for the protection of human rights. What is happening to the principle of universality?' in: André Alen and others (eds), *Liberae Cogitationes. Liber amicorum Marc Bossuyt* (Intersentia 2013) 696.

[4] The Constitution of the Republic of South Africa, 1996, section 30 (right to language and culture), and 31 (right to cultural, religious and linguistic communities) provides for the rights to culture, language, and religion—rights that are instrumental to the practice of customary law. Section 15 (right to freedom of religion, belief, and opinion), 16 (right to freedom of expression), and 18 (right to freedom of association) are also reinforcing for the rights to cultural practices and customary law.

[5] The Recognition of Customary Marriages Act 120 of 1998 defines 'customary law' to mean the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. In the case of *Alexkor Ltd and Another v. Richtersveld Community and Others* (2003) 12 BCLR 1301, para. 51, the Constitutional Court held that the "Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law." See also JA Faris, 'African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems' (2015) 10 International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinary 171.

[6] See the case examples discussed under section VI of this article.

and propose a synthesis that can facilitate a more harmonious relationship between cultural practices and universal human rights.

II. Universalism

Universalism, as a philosophical and political concept, asserts that certain rights are inherent to all human beings by virtue of their humanity.[7] This notion gained significant traction post-World War II, particularly with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[8] The UDHR set forth comprehensive articles of rights that transcend cultural boundaries, emphasising the belief that all human beings deserve equal dignity and rights, irrespective of their cultural or social contexts.[9] Understanding universalism within the South African context necessitates considering the implications arising from its legal enactment, particularly in a nation steeped in colonialism and segregation.[10] The constitutional provisions enshrined in the 1996 Constitution reflect a strong commitment to universal human rights.[11] They aim to rectify past injustices and promote equality—principles that are both admirable and challenging in practice.[12]

III. Cultural Relativism

Cultural relativism emerged as a response to universalism, positing that beliefs, practices, and ethical standards can only be understood within their cultural

[7] TE Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 Harvard Women's Law Journal 89.

[8] Universal Declaration of Human Rights, 1948.

[9] See CM Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 Human Rights Quarterly 740.

[10] See NH Msuya, 'Advocating positive traditional culture to eradicate harmful aspects of traditional culture for gender equality in Africa' (2020) 41 *Obiter* 45.

[11] See WSJ Moka-Mubelo, 'Towards a contextual understanding of human rights' (2019) 12 Ethics & Global Politics 40; Ndivhuwo Mabaya, 'SA's Constitution embodies the Universal Declaration of Human Rights' (*News 24*, 10 December 2018) < https://www.news24.com/columnists/guestcolumn/sas-constitution-embodies-the-universal-declaration-of-human-rights-20181210> accessed 20 September 2025.

[12] See Nelly Lukale, 'Harmful Traditional Practices: A Great Barrier to Women's Empowerment' (*Girls* Globe, 24 February 2024) <https://www.girlsglobe.org/2014/02/24/harmful-traditional-practices-a-great-barrier-to-womens-empowerment/> accessed 29 November 2025; Motsami Molefe, 'Personhood and Rights in an African Tradition' (2018) 45 South African Journal of Political Studies 217; Paul Dubinsky, Tracy Higgins, Michel Rosenfeld, Jeremy Waldron and Ruti Teitel, 'What Is a Human Right? Universals and the Challenge of Cultural Relativism' (1999) 11 Pace International Law Review 107; and Faysal Ahmed, 'Universalism Versus Cultural Relativism: Does the Debate Matter for Human Rights' Protection in the 21St Century?' (*SSRN*) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4460861> accessed 18 September 2025.

contexts.[13] This theory gained prominence in the early 20th century, particularly through the works of anthropologists like Franz Boas, who argued against ethnocentric views that deemed certain cultures as superior to others.[14] Within the framework of human rights, cultural relativism challenges the universality of rights by advocating for a more nuanced understanding of how cultural practices shape human dignity and freedom.[15] In South Africa, where a multitude of indigenous cultures coexist, cultural relativism poses significant questions regarding the interpretation of the Bill of Rights and the primacy of customary law.[16] These questions come to the fore in discussions about practices like polygamy, traditional leadership, and land use, which often conflict with universally accepted human rights norms.[17]

IV. The intersection of universalism and cultural relativism

The intersection of universalism and cultural relativism is fraught with tension, particularly when human rights norms confront longstanding cultural practices.[18] The South African Constitution recognises customary law as part of the law of the land, which reflects a commitment to cultural diversity and pluralism.[19]

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[13] See MF Brown, 'Cultural Relativism 2.0' (2008) 49 Current Anthropology 363; and OO Táíwò, 'Two themes in Decolonizing Universalism' (2020) 16 Journal of Global Ethics 349.

[14] See GE Idang, 'African culture and values' (2015) 16 Phronimon 97; Michelle Parlevliet, 'Bridging the Divide - Exploring the relationship between human rights and conflict management' (2002) 11 CCR 1; ME Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' (2003) 25 Human Rights Quarterly 935; Sylvain Bayalama, 'Universal Human Rights and Cultural Relativism' (1993) 12 Scandinavian Journal of Development Alternatives 132.

[15] See Jaret Kanarek, 'Critiquing Cultural Relativism' (2013) 2 The Intellectual Standard 1; JJ Tilley, 'The Problem for Normative Cultural Relativism' (1998) 11 Ratio Juris 272; Fernand de Varennes, 'The fallacies in the "Universalism versus Cultural relativism" debate in human rights' (2006) 1 Asia-Pacific Journal on Human Rights and the Law 67.

[16] See AO Olaborede and NS Rembe, 'Reflections on the Debate Between Universality of Human Rights and Cultural Relativism in the Context of Child Marriage in Africa' (2018) 32 Speculum Juris Law Journal 93.

[17] See for examples, Nomthandazo Nhlama, 'The changing identity on succession to chieftaincy in the institution of traditional leadership: Mphephu v Mphephu-Ramabulana (948/17) [2019] ZASCA 58' (2020) 23 Potchefstroom Electronic Law Journal 2; Siyabulela Manona and Thembela Kepe, 'The High Court Ruling Against Ingonyama Trust: Implications for South Africa's Land Governance Policy' (2023) 82 African Studies 181.

[18] See Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity* (United Nations Department of Public Information 1995).

[19] Section 39 of the Constitution provides for the interpretation of the Bill of Rights, and section 39(2) provides that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Section 211(3) of the Constitution also mandate that the "courts apply customary law when applicable, subject to the Constitution and any legislation that specifically deals with customary law."

However, it also incorporates the Bill of Rights, urging adherence to universal human rights standards. This dual framework creates fertile ground for conflict. For example, while customary practices, like virginity testing and traditional male circumcision, may be cherished within certain cultural contexts, they could clash with the constitutional principles of human dignity, body autonomy, gender equality, and non-discrimination.[20] The interplay of these two approaches necessitates a deeper examination of how legal interpretations can accommodate both.

V. Overview of south African constitutionalism

The evolution of South African constitutionalism is intricately linked to the country's tumultuous history.[21] The transition from apartheid to democracy culminated in the adoption of the 1996 Constitution, which is often hailed as one of the most progressive in the world.[22] It is characterized by its commitment to human dignity, equality, and freedom, reflecting both universalist aspirations and

[20] In the submission (Harmful Social and Cultural Practices – Virginity Testing?) to the Select Committee on Social Services in the Provincial Legislature (NCOP), the South African Human Rights Commission (SAHRC) held that our past enjoins us to "strive to protect our indigenous cultural practices. These were the subject of domination and subjugation during the colonial and Apartheid years. In our new constitutional dispensation, we need to strive to seek to give recognition to cultural practices within our constitutional parameters. Culture, however, is not static, but dynamic. We therefore need to question many of our cultural practices and interrogate in a constructive manner the extent to which they conform with the constitution." The Commission for Gender Equality (CGE) once issued a report (Investigative Report into the 'Investigative Report into the 'Maiden Bursary Scheme Maiden Bursary Scheme Maiden Bursary Scheme' by the UThukela District Municipality) in which it was held that "the 'Maiden Bursary' Scheme amounts to a gender discriminatory practice against the girls as it creates an additional burden on them to shoulder the responsibility of refraining from sexual activity, without imposing the same burden of responsibility on boys through a similar Bursary Scheme." See also Hlako Choma and Tshegofatso Kgarabjang, 'The constitutionality of ukuhlola: a South African cultural practice' (2019) 9 Journal of Politics, Economics and Society 2; KG Behrens, 'Traditional male circumcision: Balancing cultural rights and the prevention of serious, avoidable harm' (2014) 104 South African Medical Journal 15; DN Koffman, 'Is cultural male circumcision compatible with international children's rights?' (2018) 26 De Rebus; Nicholas Mgedeza, 'How does the law protect initiates and their rite of passage?' (2016) 21 De Rebus.

[21] See Eric Kibet and Charles Fombad, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 African Human Rights Law Journal 340; Serges Djoyou Kamga, 'The Right to Development: The Missing Link in the South African Constitutional Order After 30 Years of Democracy' (2025) 41 Southern African Public Law; MB Ramose, 'The Evolution of Constitutionalism in Conqueror South Africa. Was Jan Smuts Right? An Ubu-Ntu Response' (2024) 25 Phronimon 1; Penelope Andrews and Stephen Ellmann 'Introduction: Towards Understanding South African Constitutionalism' (2001) 1076 Articles & Chapters 1.

[22] See JMF Fernós, 'South Africa's Forward-Looking Constitutional Revolution and the Role of Courts in Achieving Substantive Constitutional Goals' (2019) 53 Rev. Jur. U. Interamericana de P.R. 531.

recognition of South Africa's diverse cultural heritage.[23] The Constitution's preamble emphasises national unity in diversity, setting the tone for a legal framework that must navigate the complexities of various cultural practices while adhering to international human rights standards. Importantly, Section 2 of the Constitution validates the Constitution's supremacy, asserting that any customary law inconsistent with it is null and void.

1. The Role of Customary Law in the South African Legal System

Customary law occupies a unique position within the South African legal framework.[24] It is recognized under Section 211 of the Constitution, which mandates that customary law must be applied where it is consistent with the Constitution.[25] This provision acknowledges the existence of customary law and establishes parameters for its application, ensuring that it does not infringe on the rights entrenched in the Bill of Rights.[26] Despite this constitutional recognition, the application of customary law often faces challenges, particularly concerning gender equality and individual rights.[27] Many customary practices, such as those related to inheritance, marriage, traditional leadership, and informal land administration, may conflict with the rights guaranteed under the Constitution, creating legal dilemmas that require careful navigation.[28]

2. The Bill of Rights: Bridging Universalism and Custom (or not?)

The Bill of Rights, enshrined in Chapter 2 of the Constitution, serves as a pivotal point of convergence between universal human rights and customary law.[29] It guarantees fundamental rights such as equality, dignity, and freedom while simultaneously recognizing the importance of cultural practices. This dual com-

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[23] See sections 9, 10 and 12 of the Constitution.

[24] See CA Maimela and NL Morudu, 'Cherishing customary law: the disparity between legislative and judicial interpretation of customary marriages in South Africa' (2024) 45 Obiter 400.

[25] Section 211(1) of the Constitution provides that "the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution."

[26] Section 211(3) of the Constitution provides that "the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[27] For examples, *Mphephu-Ramabulana and Another v Mphephu and Others* (2022) 1 BCLR 20 and *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* (2022) 1 SA 251.

[28] For further discussions on the challenges often faced by traditional communities in South Africa, see WB Zondo, 'The South African Traditional Communities and Women for Rural Democracy and Land Rights: Traditional Governance and Land Administration' (2025) 8 African Journal on Land Policy and Geospatial Sciences 214.

[29] See Felix Dube, 'The South African Constitution as an instrument of doing what is just, right and fair' (2020) 54 *In die Skriflig/In Luce Verbi* 1.

mitment raises critical questions regarding how these rights can co-exist without negating one another. The interpretation of the Bill of Rights by South African courts has significant implications for the future of customary law.[30] Courts must balance the respect for cultural diversity with the necessity of upholding universal human rights, often leading to contentious legal battles.[31] The legal landscape reveals ongoing tensions as courts grapple with cases where cultural practices diverge from constitutional mandates.

VI. Landmark cases concerning customary law and the constitution

South Africa's courts have played a crucial role in shaping the interface between customary law and constitutionalism through landmark cases. These cases illuminate the ongoing legal struggles involved in reconciling culturally entrenched practices with the constitutional framework that enshrines human rights.

1. Case Example 1: (Bhe v. Khayelitsha Magistrate Court)

In *Bhe v. Khayelitsha Magistrate Court*,[32] the Constitutional Court grappled with the validity of customary law inheritance practices that discriminated against women and children born outside marriage.[33] The case centered on the application of male primogeniture, which allotted inheritance rights exclusively to male heirs in the customary law context.[34] The case challenged the validity of section 23 of the Black Administration Act, along with related regulations, which established a separate and unequal legal framework for black estate administration.[35] The Court held that these laws perpetuated racial inequalities and were incompatible with the Constitution, which obliges courts to develop and interpret customary law in accordance with constitutional rights. The Court held that the customary law rule violated the right to equality enshrined in Section 9 of the Constitution.[36] It emphasised that cultural practices must evolve to align with

[30] See Mtsweni Lindiwe and Maimela Charles, 'The role and effect of the Constitution in customary law of succession' (2023) 56 De Jure Law Journal 687.

[31] See the case examples discussed in section (VI) below.

[32] *Bhe v. Khayelitsha Magistrate Court* (2005) 1 SA 580.

[33] See Sindiso Mnisi Weeks, *The Interface between Living Customary Law(s) of Succession and South African State Law* (OUP 2010).

[34] See Chuma Himonga, 'Reflection on Bhe v Magistrate Khayelitsha: In honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' (2017) 32 Southern African Public Law 1; Kgopotso Maunatlala, 'Effects of the eradication of the rule of male primogeniture on the customary law of succession' (2023) 56 De Jure Law Journal 386.

[35] Black Administration Act, 38 of 1927.

[36] See Likhapha Mbatha, 'Reforming the Customary Law of Succession' (2002) 18 SA Journal on Human Rights 259; Chuma Himonga and Elena Moore, *Reform of Customary Law of Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realties* (Juta 2015).

contemporary equality and human rights understandings.[37] *Bhe* underscored the tension inherent in upholding both customary law and constitutional principles, ultimately setting a precedent for the adaptability of customary law within the constitutional framework.

2. Case Example 2: (Shilubana v. Nwamitwa)

In *Shilubana and Others v Nwamitwa*,[38] the Constitutional Court dealt with the issues of succession around the chieftaincy of the Valoyi community. Ms Shilubana, the daughter of the deceased *Hosi*, was opposed by Mr Nwamitwa, a male relative asserting his right based on the existing tradition of male primogeniture.[39] The court, in response to these arguments, simply focused its judgment on the decision of the traditional authority to appoint Ms Shilubana as the successor to the Valoyi throne. The court underscored that customary law must evolve and reflect the present democratic and constitutional framework of South Africa.[40] The court stated that, while section 39(2) of the Constitution obliges courts to develop customary law in accordance with the Bill of Rights, such development should be undertaken judiciously and sensitively, in an incremental manner.[41] The court also held that the traditional authority's decision to appoint Ms Shilubana as *Hosi* signified an important development in their customs.[42] Thus, it was held that the Valoyi authorities intended to bring an important aspect of their customs and traditions into line with the values and rights of the Constitution.[43]

This case further exemplifies the judicial struggle to balance customary practices and constitutional values.[44] The Constitutional Court, in this instance, recognised that referred customs must be assessed not solely on their historical foundations but considering constitutional principles.[45] It affirmed that customary law is not

[37] See Sindiso Mnisi Weeks, 'Customary Succession and the Development of Customary Law: The Bhe Legacy' (2015) Acta Juridica 215.

[38] *Shilubana v. Nwamitwa* (2009) 2 SA 66.

[39] ibid, para. 3.

[40] ibid, para. 68.

[41] ibid, para. 74.

[42] ibid, para. 91.

[43] See sections 1(c), 2, 30, 31, 39(2), and 211(3) of the Constitution.

[44] See Devina N. Perumal, 'Harmonising, cultural and equality rights under customary law - some reflections on Shilubana & Others v Nwamitwa 2009 (2) SA 66 (CC)' (2010) 24 Agenda: Empowering Women for Gender Equity 101; MB Ndulo, 'Legal Pluralism, Customary Law and Women's Rights' (2017) 32 Southern African Public Law 1; MJ Maluleke ,'Culture, tradition, custom, law and gender equality' (2012) 15 Potchefstroom Electronic Law Journal 2.

[45] See Drucilla Cornell, 'The significance of the living customary law for an understanding of law: does custom allow for a woman to be Hosi?' (2009) 2 Constitutional Court Review 395; Obeng Mireku, 'Customary law and the promotion of gender equality: An appraisal of the Shilubana decision' (2010) 10 African Human Rights Law Journal 515.

static; it can and must adapt to contemporary moral and ethical standards, particularly with respect to gender equality.[46] This case illustrated the Court's role in reshaping customary practices to align with universal values while respecting cultural heritage. [47]

VII. The role of the constitutional court in balancing interests

In considering cases like *Bhe* and *Shilubana*, the Constitutional Court has emerged as a critical arbitrator of the tensions between universalism and cultural relativism. The Court's rulings have illustrated a willingness to challenge archaic cultural norms that infringe upon constitutional rights. Through its judgments, the Constitutional Court has reaffirmed the Constitution's supremacy and demonstrated a nuanced understanding of how to harmonise cultural practices with evolving notions of justice and equality.

VIII. Critique of the universalism vs. cultural relativism debate

The contemporary discourse on universalism versus cultural relativism often manifests as a binary opposition, portraying cultures as monolithic entities in irreconcilable conflict.[48] This approach tends to oversimplify the complexities inherent to cultural practices and human rights.[49] Importantly, this binary framing negates the substantial intra-cultural variations that exist, often leading to harmful stereotypes and legal interpretations.[50] Furthermore, the historical context

[46] See B Mmusinyane, 'The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC)' (2017) 12 Potchefstroom Electronic Law Journal 135; ES Nwauche, 'Distinction without Difference: The Constitutional Protection of Customary Law and Cultural, Linguistic and Religious Communities - A Comment on Shilubana and Others v. Nwamitwa' (2009) 41 Journal of Legal Pluralism and Unofficial Law 67.

[47] See MT Chauke, 'The Role of Women in Traditional Leadership with Special Reference to the Valoyi Tribe' (2015) 13 Studies of Tribes and Tribals 34; JC Bekker and CC Boonzaaier, 'Succession of women to traditional leadership: is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?' (2009) 41 Comparative and International Law Journal of Southern Africa 449.

[48] See JW Neuliep and JC McCroskey, 'The development of a U.S. and generalized ethnocentrism scale' (1997) 14 Communication Research Reports 385; and Boris Bizumic and John Duckitt, 'What is and is not ethnocentrism? A conceptual analysis and political implications' (2012) 33 Political Psychology 887.

[49] See Adam Etinson, 'Some Myths about Ethnocentrism' (2017) 96 Australasian Journal of Philosophy 209; PW Taylor, 'The Ethnocentric Fallacy' (1963) 47 The Monist 563; MS Merry, 'Patriotism, History and the Legitimate Aims of American Education' (2009) 41 Educational Philosophy and Theory 378; and Boris Bizumic, 'Who Coined the Concept of Ethnocentrism? A Brief Report' (2014) 2 Journal of Social and Political Psychology 3.

[50] See Welshman Ncube, *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Ashgate/Dartmouth 1998); Eva Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19 Human Rights Quarterly 145.

of colonialism and power dynamics complicates this debate.[51] Many indigenous cultural practices have been framed as 'backward' due to colonial narratives that undermined their legitimacy.[52] In South Africa, this historical backdrop continues to influence the perceptions of customary law in juxtaposition with universal human rights.[53]

The limitations of the universalism versus cultural relativism debate are evident in South Africa, where rigid categorisations often fail to account for the dynamic nature of cultural practices and legal interpretations.[54] Instead of fostering constructive dialogue, the binary approach results in a stalemate.[55] Advocates for universalism dismiss cultural practices without engaging in meaningful dialogue, while proponents of cultural relativism may resist necessary reforms that align with human rights principles. Such dichotomy risks perpetuating injustices within cultural practices, particularly against marginalised groups, including women and children.[56] As such, unyielding adherence to either perspective can inhibit progress toward a more equitable legal framework that duly considers both constitutional commitments and cultural integrity.

Given the limitations of the binary debate, there is a pressing need to develop a new framework that transcends the polarised views of universalism and cultural relativism. This framework should emphasise the potential for integration, recognising that cultures are not static but rather evolving entities that can accommodate change. A synthesis approach advocates for acknowledging and respecting cultural practices while simultaneously ensuring adherence to univer-

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[51] See Ann Elizabeth Mayer, *Islam and Human: Tradition and Politics* (5th edn, Routledge 2013); Henry Steiner and Philip Alston, *International Human Rights in Context: Law Politics Morals* (Oxford University Press 2000); Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2012) 8; Michael Freeman, *Politics in the Developing World* (3rd edn, Oxford University Press 2005).

[52] See Raimundo Pannikar, 'Is the Notion of Human Rights a Western Concept?' in Henry Steiner and Philip Alston (eds), *International Human Rights in Context: Law Politics Morals* (Oxford University Press 2000).

[53] See Rein Müllerson, *Human Rights Diplomacy* (Routledge 1997) 84-85; Gayatri Patel, *How 'Universal' is the United Nations' Universal Periodic Review Process? An Examination from a Cultural Relativist Perspective* (University of Leicester 2015) 59.

[54] See Gayatri Patel, 'How 'Universal' Is the United Nations' Universal Periodic Review Process? An Examination of the Discussion Held on Poligamy' (2017)18 Human Rights Review 1.

[55] See Abdullahi Ahmed An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in Abdullahi Ahmed An-Na'im and Francis Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Insitution Press 1990); Naomi Nkealah '(West) African feminisms and their challenges' (2016) 32 Journal of Literary Studies 61; Obioma Nnaemeka, 'Nego-Feminism: Theorizing, Practicing, and Pruning Africa's Way' (2004) 29 Signs 357; Deirde Byrne, 'Decolonial African feminism for white allies' (2020) 21 Journal of International Women's Studies 37.

[56] See ER Hogemann, 'Human Rights Beyond Dichotomy Between Cultural Universalism and Relativism' (2020) 14 The Age of Human Rights Journal 19.

sal human rights obligations. Such an approach fosters dialogue and collaboration among various stakeholders—including governmental bodies, traditional leaders, and civil society organizations—toward creating a more cohesive legal framework.

IX. Integrating customary law within constitutionalism

In envisioning a way forward, the integration of customary law within the constitutional framework must be pursued with a commitment to both cultural recognition and universal human rights standards. This involves developing legal mechanisms that validate cultural practices that align with human rights while providing recourse for individuals whose rights may be infringed upon by detrimental customs. In practice, this might take the form of legislative reforms addressing specific cultural practices that contravene constitutional guarantees and robust educational initiatives to foster understanding of both cultural heritage and universal human rights.

Establishing mechanisms for recognising and integrating cultural practices into human rights frameworks is essential to facilitating a synthesis approach. For instance, community-based dialogue forums can serve as platforms for interrogating and redefining cultural norms, taking into account evolving human rights standards. Collaboration between traditional authorities and human rights advocates can also yield innovative solutions that preserve cultural integrity while promoting equality. This collaborative model underscores the potential for coexistence and mutual respect between constitutional imperatives and cultural values.

Finally, the call for contextual human rights applications reflects the recognition that universal human rights should not be interpreted in a monolithic manner. Instead, human rights frameworks must be adaptable to account for cultural values while safeguarding individual rights. This necessitates a more sophisticated understanding of rights that considers the socio-cultural context without compromising their universality.

X. Conclusion

In conclusion, the enduring debate between universalism and cultural relativism within the South African legal landscape underscores the complexities inherent in reconciling cultural diversity with constitutional imperatives. While the principles of universal human rights provide a crucial foundation for safeguarding individual dignity and equality, their application must be sensitive to the socio-cultural realities and historical contexts that shape customary law practices. The cases examined reveal a progressive judiciary committed to evolving customary norms in line with constitutional values, yet the binary framing of the debate

often hampers meaningful progress by oversimplifying cultural dynamics and perpetuating stereotypes.

Moving beyond this dichotomy necessitates embracing a dialogical and integrative approach, one that fosters continuous engagement among all stakeholders, including traditional leaders, communities, legal practitioners, and human rights advocates. Such a framework recognises that cultures are not static but dynamic entities capable of reform and adaptation, allowing customary practices to be validated when aligned with constitutional rights while challenging those that infringe upon fundamental freedoms. Effective legal reform, therefore, must be complemented by educational initiatives and community dialogues that promote mutual understanding and respect, ensuring that customary law can coexist harmoniously within South Africa's constitutional democracy.

Ultimately, the path forward lies in cultivating a nuanced, context-sensitive jurisprudence that upholds the universality of human rights without dismissing the importance of cultural identity. This synthesis not only advances social justice and equality but also affirms the nation's commitment to a genuinely inclusive and pluralistic society, one that recognises the legitimacy of diverse cultural expressions while steadfastly safeguarding the rights of all individuals. Such an approach promises a more coherent and sustainable legal framework capable of navigating the delicate balance between tradition and modernity, fostering a democratic ethos rooted in respect, dialogue, and constitutional integrity.

Questions of Attribution in the Conflict of Eastern Congo

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Contents

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Abstract

In recent months, the conflict in eastern Congo has intensified once again after following significant military gains by the armed group known as M23 in the territory of the Democratic Republic of Congo. In early 2025, the group captured several strategically important towns, from which numerous reports of serious violations of international law subsequently emerged. A longstanding question surrounding M23'as operations concerns the extent of support provided by neighbouring Rwanda.

This study focuses primarily on Rwanda's role in the conflict. After a brief historical overview, it examines whether the wrongful acts committed by M23 units may be attributed to Rwanda. Establishing attribution is essential to determining whether Rwanda's international responsibility may arise. The analysis first considers whether M23 could be seen as a *de facto* state organ under Article 4 of the ARSIWA. The study then turns to Article 8 of the ARSIWA. It outlines the "effective control" and "overall control" tests, developed by various international tribunals.

The conflict also highlights the widespread presence of non-state armed groups on modern battlefields and the close forms of cooperation they may develop with states. Given the divergent evidentiary standards applied by different international bodies, attribution remains a complex endeavour. The author's view is that a more coherent and harmonised evaluative framework would enhance legal clarity and predictability in the field of international responsibility.

Keywords: M23, attribution, state responsibility, Rwanda, ARSIWA, international law

I. Introduction

On 27 January 2025, the militia known as M23 – which is composed predominantly of Tutsi fighters – announced that it had captured Goma, the capital of North Kivu province, in the Democratic Republic of Congo (hereinafter: DRC).[1] After the fall of the city, M23 units advanced southwards with the openly stated aim of „liberating" Kinshasa, the capital of the DRC.[2] Following several days of fighting, the Congolese armed forces – supported by the regular Burundian army – managed to push back the militia's troops before they could seize

[1] Arlette Bashizi and others, 'Rwandan-backed rebels enter Congo's Goma in major escalation' (*Reuters*, 28 January 2025) <https://www.reuters.com/world/africa/rebels-enter-centre-congos-goma-after-claiming-capture-city-2025-01-27/> accessed 7 December 2025; Carlos Mureithi, 'Rwandan-backed rebels M23 claim capture of eastern DRC City Goma' *(Guardian,* 27 January 2025) <www.theguardian.com/world/2025/jan/27/m23-rebel-group-goma-drc-democratic-republic-congo-rwanda> accessed 7 December 2025.

[2] 'Rwandan-backed rebels vow to take DRC capital after claiming capture of Goma' (*Al Jazeera,* 31 January 2025) <www.aljazeera.com/news/2025/1/31/dr-congo-rebels-vow-to-take-kinshasa-after-claiming-capture-of-goma> accessed 7 December 2025.

another provincial capital.[3]

Nevertheless, in February, M23 fighters occupied and took control of Bukavu, the second-largest city in the eastern part of the DRC.[4] In March 2025, the leader of the rebel militia declared that calls for a ceasefire did not apply to them, and the group went on seize additional strategically important Congolese territories.[5] Meanwhile, according to the Human Rights Watch, M23 fighters deported more than 1.500 people from the occupied Congolese areas to Rwanda.[6]

In the final days of June 2025, Rwanda and the DRC – mediated by the US – signed a peace agreement. Under the terms of the agreement, the two states commit to ceasing their support for various armed groups; however, M23 did not formally join the accord, which may weaken the effectiveness of the settlement.[7]

In response to the renewed outbreak of the conflict, the United Nations Security Council stated in a resolution that the situation posed a threat to international peace and security in the region. It condemned the offensive of the M23 and called on the militia to immediately withdraw from the occupied Congolese territories. The resolution also urged Rwanda to cease any and all forms of support for M23, without delay.[8]

While M23 fighters were seizing Goma in January, protesters in the Congolese capital burned portraits of Paul Kagame, the Rwandian president, as well as Rwandan flags. Their anger was directed at the president, who has long been accused of supporting the insurgents.[9] According to the UN, these accusations are not unfounded. UN experts estimate that roughly 4.000 armed soldiers from

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[3] 'Congo's army and Burundian allies slow M23 rebel's southern march' (*Reuters*, 1 February 2025) <www.reuters.com/world/africa/congos-army-burundian-allies-slow-m23-rebels-southern-march-2025-01-31> accessed 7 December 2025.

[4] Carlos Mureithi, 'Rwanda-backed M23 rebels capture eastern DRC's second-largest city' (*Guardian*, 17 February 2025) <www.theguardian.com/world/2025/feb/17/rwanda-backed-m23-rebels-capture-drc-city-bukavu> accessed 7 December 2025.

[5] Giulia Paravinci, 'Congo rebels dismiss ceasefire calls, capture strategic town' (*Reuters*, 21 March 2025) <www.reuters.com/world/africa/congos-m23-rebels-enter-walikale-town-centre-extending-westward-push-2025-03-20> accessed 7 December 2025.

[6] 'DR Congo: M23 Armed Group Forcibly Transferring Civilians' (*Human Rights Watch,* 18 June 2025) <www.hrw.org/news/2025/06/18/dr-congo-m23-armed-group-forcibly-transferring-civilians> accessed 7 December 2025.

[7] 'Congo and Rwanda sign a US-mediated peace deal aimed at ending decades of bloody conflict' (*AP News*, 28 June 2025) <apnews.com/article/congo-rwanda-drc-peace-deal-m23-trump-5e5b52100729ad6587a6f267c6c79ae0> accessed 7 December 2025.

[8] SC Res. 2773, 21 February 2025.

[9] Ian Wafula, 'The evidence that shows Rwanda is backing rebels in DR Congo' (*BBC*, 29 January 2025) <www.bbc.com/news/articles/ckgyzl1mlkvo> accessed 7 December 2025.

neighbouring Rwanda are assisting the rebels.[10] Their analysis indicates that Rwanda's support for M23 extends beyond the presence of these troops, encompassing logistical and financial assistance, and ultimately amounting to the direct control of the insurgent group.[11]

It is important to note that the origins of M23's activities in the DRC date back several years. During this period, the group has repeatedly been accused of killings, torture, mass abductions, and sexual violence.[12]

The present study focuses primarily on Rwanda's role in the conflict. Following a brief historical overview (Section II), I first examine whether Rwanda can be held responsible for the atrocities committed by M23 units (Section III). The analysis relies on the rules of state responsibility, with reference to the jurisprudence of the International Court of Justice and other judicial bodies. In addition, I also consider the position of Uganda, the other state involved in the conflict. Finally, I offer some concluding remarks on the topic (Section IV).

II. Historical Overview

During the 1994 Rwandan genocide, extremist members of the Hutu ethnic group killed an estimated one million Tutsis, who constituted an ethnic minority in Rwanda, and they killed moderate Hutus as well. The genocide – which is believed to have lasted roughly 100 days – ended with the victory of the Rwandan Patriotic Front (hereinafter: RPF) over the genocidal Rwandan government. The extremist Hutu leaders fled the country. On 19 July 1994, a new government was formed in Rwanda, headed by a Hutu president, Pasteur Bizimungu. Paul Kagame was serving as a vice president, who was the Tutsi leader of the RPF. After the fighting, approximately two million Rwandan Hutus and Tutsis fled to the eastern part of what of today's DRC territory, though the majority returned to Rwanda within a few years.[13]

In 1996, the First Congo War broke out. Rwandan forces – led by President Kagame – and Congolese-based Tutsi militias launched an invasion of Zaire, the state located on the territory of the present-day DRC. Rwanda justified its ac-

[10] 'UN Rights body condems Rwanda and the rebels it backs in neighboring Congo. Violence mounts in East' (*AP News*, 7 January 2025) <apnews.com/article/congo-united-nations-human-rights-m23-rwanda-833477fe1a677d262162b75a1b46653b> accessed 7 December 2025.

[11] Damian Zane, 'What's the fighting in DR Congo all about?' (*BBC*, 1 February 2025) <www.bbc.com/news/articles/cgly1yrd9j3o> accessed 7 December 2025.

[12] Mark Townsend, 'Children executed and women raped in front of their familias as M23 militia unleashes fresh terror on DRC' (*Guardian*, 21 December 2024) <www.theguardian.com/global-development/2024/dec/21/children-executed-and-women-raped-in-front-of-their-families-as-m23-militia-unleashes-fresh-terror-on-drc> accessed 7 December 2025.

[13] 'Rwanda genocide of 1994' (*Britannica*) <https://www.britannica.com/event/Rwanda-genocide-of-1994> accessed 7 December 2025.

tions on the basis that the Hutu population living in eastern Zaire posed a threat to Rwanda's Tuti population. Rwanda received support from several states – especially Uganda, Angola and Burundi – as well as from Zaire's internal opposition. Thousands were killed in the fighting, and the methods used by Rwandan troops and Tutsi forces were brutal. As a result of the war, the Zairian government fled, and Rwanda effectively won the conflict when its allied opposition actors came to power in Zaire. Laurent Kaliba became the president, and the country's name was changed to the Democratic Republic of the Congo.[14]

People living in the affected regions did not enjoy peace for long. In 1998, the Second Congo War broke out, a conflict often referred to as "African's World War". The conflict was triggered when President Kaliba turned against his former allies, including Kagame. The conflict initially began with military actions by Rwanda and Uganda, aimed at toppling Kaliba, but it quickly escalated into a continent-wide crisis after Kaliba sought assistance from – among others – Angola and Namibia. In the end, nine African states were drawn into the fighting. The war was fuelled not only by geopolitical factors but also by economic interests: the mineral rich areas of eastern Congo were of strategic importance not only to local actors but to external players as well. The Second Congo War resulted in the deaths of several million people and a widespread humanitarian catastrophe. Although the war formally ended in 2003, political instability has remained a constant feature of the region.[15]

One of the most significant armed groups to emerge in the region is the so-called "March 23 Movement" (hereinafter: M23), which was formed in the early 2000s and its members primarily Tutsis. Its roots lie in the ethnic and political tensions that developed during the Congolese wars. M23 had previously captured the city of Goma in 2012 but later withdrew under pressure from the Congolese government and the international community. Despite having been repelled once before, the group re-emerged and became active again in the early 2020s.[16]

By July 2023, militants of M23 had taken control of significant parts of North Kivu province. The Congolese government repeatedly and publicly accused the Rwandan authorities of financing and supporting M23. Rwanda, in turn, accuses the DRC of supporting Hutu extremist militias, such as the group known as the

[14] 'Conflict in the Democartic Republic of Congo. Global Conflict Tracker' (*Council on Foreign Relations*) <https://www.cfr.org/global-conflict-tracker/conflict/violence-democratic-republic-congo> accessed 7 December 2025.

[15] Detailed analysis of the Second Congo War: Christopher Williams, 'Explaining the Great War in Africa: How Conflict in the Congo Became a Continental Crisis' (2013) 37 The Fletcher Forum of World Affairs, 81.

[16] Detailed profile of the M23: 'Actor Profile: The March 23 Movement' (*Armed Conflict Location and Event Data Project*, 23 March 2023) <www.jstor.org/stable/resrep48569> accessed 7 December 2025.

Democratic Forces for the Liberation of Rwanda. Rwanda and Uganda – as well as the militias they support – have substantial financial interests in Congolese mining operations.[17]

The United Nations' local peacekeeping forces[18] began their current operation on 1 July 2010. The mission was authorised to use all necessary means to carry out its mandate, including the protection of civilians and humanitarian personnel, and to support the government of the DRC in its stabilisation efforts.[19] In recent years, a series of local protests against the presence of UN forces has become violent, with a significant portion of the population regarding the peacekeeping missions as ineffective. In May 2023, the Southern African Development Community deployed troops to join the UN forces. Units of the East African Community were also present in the region, but they withdrew shortly from the increasingly volatile area.[20]

III. Question of attribution

The central issue of the present study is whether the serious atrocities committed by M23 fighters can be attributed to Rwanda. Clarifying this question is one of the preconditions for Rwanda's international responsibility for these events to be engaged. As the Permanent Court of International Justice stated in its 1923 Advisory Opinion, "states can act only by and through their agents and representatives."[21] State responsibility in international law cannot be invoked, until the question of attribution has been resolved. According to Condorelli and Kress, attribution is the term used to denote the legal operation having as its function to establish whether given conduct of a physical person, whether consisting of a positive action or an omission, is to be characterized from the point of view international law, as an act of state.[22] As already noted, attribution is the first condition of an internationally wrongful act.[23] The primary source of international responsibility – and thus of the rules on attribution – is customary international law, which has been collected in the 2001 Draft Articles on Responsibility of

[17] Conflict in the Democratic Republic of Congo (n 14).

[18] United Nations Organization Stabilization Mission in the Democratic Republic of the Congo. (MONUSCO).

[19] 'MONUSCO Fact Sheet' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/mission/monusco> accessed 7 December 2025.

[20] Conflict in the Democratic Republic of Congo (n 14).

[21] *German Settlers in Poland, Advisory Opinion, 10 September 1923. P.C.I.J. Series B, No. 6,* 22.

[22] Luigi Condorelli and Claus Kreß, 'The Rules of Attribution: General Considerations' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010), 221.

[23] János Bruhács, Bence Kis Kelemen and Ágoston Mohay, *Nemzetközi jog I* (Ludovika Egyetemi Kiadó 2023) 215.

States for Internationally Wrongful Acts (hereinafter: ARSIWA).[24]

1. Attribution under Article 4 of ARSIWA

The "simplest" case of attribution concerns the conduct of organs of the state. According to ARSIWA, the conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the state. An organ includes any person or entity which has that status in accordance with the internal law of the state.[25] It is important to note that not only *de jure* but also *de facto* state organs play a role in the context of attribution. A state cannot evade responsibility for the conduct of a body which, in practical terms, is regarded as an organ or operates as such, merely by invoking the fact that, under its internal law, the body does not possess that status.[26]

The question in the present case is whether M23 may be characterised as a *de facto* organ of Rwanda, given that it is safe to say that M23 does not a part of the Rwandan regular armed forces. To answer this question, it is necessary to turn to international judicial practice.

The International Court of Justice in the famous Nicaragua case required proof that the entity was in a relationship of complete dependence on, and was subject to the strict control of the state in order to be regarded as a de facto state organ. The Court identified several factors that may assist in determining whether such control exits. These include, for example, whether the state created the non-state actor; whether the state intervention went beyond training and financial assistance; whether the state exercised complete control over it and whether the state selected, appointed or paid the group's political leaders. The relationship must be based on such a degree of dependence and control that, as a matter of law, it is justified to treat the entity as equivalent to a state organ.[27] In the Bosnian Genocide case, the Court formulated a threshold according to which persons, groups or entities act in complete dependence on the state where, in the final

[24] GA Res. 56/83, 12 December 2001. Similarly, ten years later, the rules pertaining to the responsibility of international organisations were also collected (GA. Res. 66/100, 9 December 2011), though numerous questions of interpretation and application remain (certainly more numerous than as regards the ARSIWA). See Ágoston Mohay, Kelemen Bence Kis, Attila Pánovics, Norbert Tóth, 'The Articles on the Responsibility of International Organisations – Still Up in the Air after More Than a Decade?' (2023) 12 Pécs Journal of International and European Law 16.

[25] ARSIWA, art. 4.

[26] James Crawford, *State Responsibility* (Cambridge University Press 2013) 124-125.

[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986, I.C.J. Reports 1986,* paras. 108-109.

analysis, they are nothing more than mere instruments of the latter.[28]

In the case of M23, a UN Security Council document from 2012 may serve as a starting point. The letter was prepared for the Security Council by the Group of Experts on the Democratic Republic of Congo. It examines the activities of the M23 rebel group and, considering the events, the role of Rwanda and Uganda. The document notes that both the Rwandan and the Ugandan governments support M23's activities, and that Rwandan officials coordinated the establishment of the rebel movement as well as its main military operations.[29] It further records that units of the Rwandan regular army supported M23's operations in the DRC[30] and supplied the militia with weapons and ammunition.[31] Members of the Rwandan army recruited sympathisers and raised funds for M23 on Rwandan territory and Rwandan officials designated the political leadership of M23.[32]

These facts undoubtedly indicate a very close relationship between Rwanda and the M23. However, other factors may against the conclusion that a relationship of complete dependence has developed between the state and the military organisation. For instance, the militia possesses its own sources of revenue by engaging in illegal mining activities in the mineral-rich eastern border region of the DRC. The illicit trade of various minerals – such as coltan, cobalt, and gold – is expected to further intensify as hostilities reignite.[33] Rwanda's deliberate silence also contributes to the dynamic: although the export of raw materials extracted through such mining takes place from Rwandan territory, the state does not take any meaningful action against it. This passivity may reinforce the interpretation that Rwanda intentionally allows the militia to strengthen itself economically, which in turn could serve as a means of increasing its influence over the group. The Congolese state's inability to prevent the exploitation of such economic resources likewise plays a role.

In sum, although Rwanda provides substantial and extensive support to the M23 and exercises broad influence over the group's military activities, in my view the M23 cannot be regarded as a state organ of Rwanda. While Rwandan officials

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[28] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovia v. Serbia and Montenegro) Judgement of 26 February. 2007, I.C.J. Reports 2007,* para. 394.

[29] 'Letter dated 12 November 2012 from the Chair of the Security Council Committee established purusant to resolution 1553 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council', S/2012/843, 15 November 2012, 6.

[30] ibid, 7.

[31] ibid, 9.

[32] ibid, 11.

[33] Sonia Rolley and Felix Nijni, 'M23 rebels in Goma: gains to boost illicit mineral trade through Rwanda, analysts say' (*Reuters*, 28 January 2025) <www.reuters.com/world/africa/congo-rebel-gains-boost-illicit-mineral-trade-through-rwanda-analysts-say-2025-01-28> accessed 7 December 2025.

have played a role in the creation of the group and in supporting its military operations, the M23 displays several indications of autonomous functioning. First, the group possesses independent sources of revenue, such as the mineral extraction. Second, as noted above, Uganda also contributed to the establishment and support of the organisation. In my assessment, the fact that the militia is supported by not just one, but at least two states does not give rise to the criteria required for its recognition as a *de facto* state organ. Third, the group pursues its own military and political initiatives. A good example is that, following its defeats in the 2010s, it was able to rebuild its organisational structure in the early 2020s and relaunch military operations. Moreover, the M23 does not carry out Rwanda's declared foreign policy objectives; rather, it pursues its own aims, such as the planned capture of the capital of the DRC.

For a moment, I would also like to turn to the position of Uganda. Uganda does not directly participate in the hostilities, but it also stations troops in the eastern part of the DRC. In certain aspects, the country is playing a double game: on the one hand, it assists the Congolese government in hunting down armed Ugandan fighters linked to the Islamic State, while on the other hand it also provides support to the M23, even though it firmly denies the latter. The international community has accused Kampala of pillaging natural resources, including considerable quantities of gold.[34]

Based on documents made available by the United Nations, Uganda played a role in the establishment of the organization by allowing the M23 to maintain a permanent presence in the country's capital, where it was provided with political advice and technical assistance. In addition, the Ugandan regular armed forces supported the militia in planning various military operations and by offering military advice.[35] More recently, Uganda has again acted in a supportive manner by granting freedom of movement to M23 fighters on its territory.[36]

In the case of Uganda, the starting point is Article 16 of the ARSIWA. According to the article, a state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if that state does so with knowledge of the circumstances of the internationally wrongful act, and the act would be internationally wrongful if committed by that state.[37] Thus, if the internationally wrongful acts of the M23 are attributable to Rwanda and the responsibility of that state is engaged, Uganda's

[34] Barbara Plett Usher, 'Who's pulling the strings in the DR Congo crisis?' (*BBC*, 8 February 2025) <www.bbc.com/news/articles/cp8qp6p39e9o> accessed 7 December 2025.

[35] Letter dated 12 November 2012 (n 28) 12-18.

[36] 'Letter dated 16 December 2022 from the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council', S/2022/967, 16 December 2022, 12.

[37] ARSIWA, art. 16.

responsibility may likewise be engaged for its own contribution to those acts. However, if the conduct in question cannot be attributed to Rwanda and Rwanda's responsibility is therefore not engaged in relation to those events, Uganda's responsibility likewise cannot arise in respect of them under Article 16.

2. ttribution under Article 8 of ARSIWA

Under the rules of state responsibility, generally, the conduct of natural or legal persons does not constitute conduct of a state. However, circumstances may arise in which the conduct of such persons is nevertheless attributable to the state.[38] The ARSIWA contains several distinct legal bases on which the conduct of a non-state actor may be linked to a state. In the present case, the most easily applicable provision is Article 8 of the ARSIWA.[39] According to Article 8 the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.[40]

The commentary of the ARSIWA clarifies that the terms "instruction", "direction" and "control" in Article 8 are disjunctive; fulfilling even one these criteria is sufficient for attribution. At the same time, the instruction, direction, or control must relate specifically to conduct that constitutes an internationally wrongful act for the state under international law.[41]

About "instruction", it should be emphasised that although the criteria is relatively clear theoretically, its application presents difficulties. In the Bosnian Genocide case, the International Court of Justice noted that, for a state to invoke responsibility under Article 8 of the ARSIWA, the instructions must relate to each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.[42] This raises the question of how the notion of "operations" is to be understood. Must the state direct the entity to perform the specific act in

[38] Commentary of ARSIWA, art. 8. para. 1.

[39] Of course, this is not the only legal basis for attributing the conduct of individuals or groups of individuals to a state. Among others, the conduct of a person or entity which is not an organ of the state under article 4 but which is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance (ARSIWA, art. 5). The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority (ARSIWA, art. 9).

[40] ARSIWA, art. 8.

[41] Commentary of ARSIWA, art. 8. para. 7.

[42] Bosnian Genocide case, para. 208.

which the alleged violations occur, or will a more general instruction be enough? The Commentary of the ARSIWA endorses the latter view. Consequently, where the state issues ambiguous or open-ended instructions, conduct that is incidental to the mission or can reasonably be regarded as falling within its expressed ambit may be attributable to the state.[43]

A report issued in December 2024 by the UN Group of Experts found that the M23 operates under the military command of Sultani Makenga, who received instructions and support from the Rwandan army and intelligence services.[44] However, the fact that Rwandan officials issued general instructions to the group is, in itself, insufficient to establish attribution, as the instructions must – consistent with the ARSIWA Commentary – relate specifically to the perpetration of internationally wrongful acts.

An earlier UN report found that, on 29 November 2022, the M23 carried out a series of retaliatory killings against civilians in the town on Kisheshe. The experts concluded that the militia, conducted house-to-house searches targeting civilians, killing more than 100 persons without taking any steps to find out their identity. After the capture of the town, the armed group engaged in widespread lotting and acts of sexual violence.[45] For the atrocities to be attributable to Rwanda on the bases of Article 8, instruction-based test, it would need to be demonstrated that Rwandan officials issued instructions of such a character that their implementation could encompass the perpetration of these acts.

In practice, evidence that state officials have issued direct instruction to members of armed group to carry out internationally wrongful acts is rarely available. For this reason, it may be easier for the DRC and other states to demonstrate that the fighters were under Rwanda's direction or control at the relevant time.[46]

For conduct carried out under a state's direction or control to be attributable to that state, mere general control does not suffice. Article 8 of the ARSIWA, drawing on the ICJ's jurisprudence in the Nicaragua case,[47] proceeds from the standard of effective control, which requires that effective control extend to the specific operations, including the constituent elements of the act in question.[48]

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[43] Commentary of ARSIWA, art. 8. para. 8; Crawford (n 25) 145.

[44] 'Letter dated 27 December 2024 from the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council', S/2024/969, 27 December 2024, 11.

[45] 'Letter dated 13 June 2023 from the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council', S/2023/431, 13 June 2023, 18–19.

[46] Jennifer Maddocks, 'The conflict in Eastern DRC and the state responsibility of Rwanda and Uganda' (*Articles of War*, 6 February 2025) <lieber.westpoint.edu/conflict-eastern-drc-state-responsibility-rwanda-uganda/> accessed 7 December 2025.

[47] Nicaragua case, para. 115.

[48] Gábor Kajtár, *Betudás a nemzetközi jogban* (ORAC 2022) 45.

Whether the requirements of Article 8 are met must be assessed on a case-by-case basis. What emerges clearly both from the practice of the ICJ and from the rules of state responsibility is that the assessment must start from the effective control criterion.[49] As with instructions, direction or control must relate to the conduct whose breach of international law and attribution is under consideration. [50]

At the same time, it is important to note that effective control is not the only standard that has appeared in international judicial practice when examining this issue. The International Criminal Tribunal for the former Yugoslavia (ICTY) introduced a considerably different test, namely the "overall control" test.[51] According to this approach, the degree of control required by international law is satisfied where a state – or in an armed conflict, one of the belligerent parties – plays a role in organising, coordinating, or planning the military group's operations, going beyond merely financing, training, equipping, or providing operational support to it.[52]

It should be noted that in the Bosnian Genocide case, the ICJ took a critical stance towards the overall control test. The Court argued that the application of the overall control standard is inappropriate, as it stretches too far the connection that, under international law, must exist between the conduct of state organs and the responsibility of the state.[53] Ultimately, in that case, the Court returned to its "own" test, the effective control test, rather than adopting the standard developed by the ICTY.[54]

In the present case, the high threshold of the effective control test may be illustrated by the fact that execution of hors de combat persons by the M23 can only be attributed to Rwanda, if its exercised tactical control over the M23 during the period in which the executions occurred. If the involvement of the Rwandan armed forces was limited merely to the general supervision of the fighters, or if they did not exercise control over the specific attacks during which the executions took place, the threshold of effective control would likely not be met.[55] This example demonstrates that the effective control test sets a considerable high bar, and the victim states often face significant difficulties in obtaining the evidence necessary to prove its fulfilment. Given the close relationship between Rwandan and the M23, it is possible that certain internationally wrongful acts of

[49] ibid; Commentary of ARSIWA, 47.

[50] Kajtár (n 47) 46.

[51] Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia' (2007) 18 EJIL 649, 655.

[52] IT-94-1-A, *Prosecutor v. Dusko Tadič*, ICTY Appeals Chamber, para. 137.

[53] Bosnian Genocide case, para. 406.

[54] Bosnian Genocide case, paras. 413 and 417.

[55] Maddocks (n 45).

the M23 may be attributable to Rwanda under this test, but each operation must be assessed individually. Consequently, there is insufficient evidence to conclude that all internationally wrongful acts committed by the M23 are attributable to Rwanda.

IV. Conclusion

Despite the fact that the DRC has labelled the M23 as a terrorist group and has called upon the Security Council to impose sanctions on Rwanda for its alleged support to the group, Rwanda denies any involvement and has urged the parties to agree to a ceasefire.[56] For Rwanda's international responsibility to be established for the atrocities committed by the M23, it is essential that the acts carried out by the group be attributable to Rwanda.

The simplest way for establishing attribution would arise if the M23 were acting as a *de facto* state organ of Rwanda (or Uganda). However, such a conclusion cannot be sustained with certainty due to rigorousness of the "complete dependence" standard.

In my view, in the present case, Article 8 of the ARSIWA offers the most straightforward basis for determining whether the acts committed by non-state actors may be attributed to Rwanda. Among the notions of instruction, direction or control, the more specific concept of instruction does not apply here, as this would require evidence that Rwandan officials expressly instructed members of the M23 to commit internationally wrongful acts – and no such evidence exists. With respect to the concepts of direction or control, international jurisprudence has developed two distinct tests. The effective control standard formulated by the ICJ in the Nicaragua case is considerable stricter than the overall control test established by ICTY in the Tadič case. In my opinion, based on the documentation published by the United Nations, the degree of Rwanda's involvement does not meet the criteria of effective control. While in certain specific incidents the depth of the relationship between the M23 and Rwanda may render it possible that even this high threshold is satisfied, there is insufficient evidence to support such a conclusion for the conflict as a whole.

The present conflict also highlights how widespread non-state armed groups have become across various armed conflicts, as well as the extent of the harm these actors can inflict. The cooperation between Rwanda and the M23 serves as a clear example of how close the relationship between a state and a militia may become. The divergent attribution tests and differing evidentiary standards developed by various judicial bodies complicate the process of attributing conduct to a state, even though the purpose of the law is to prevent states from evading

[56] Sonia Rolley, 'Rwanda urges ceasefire in Congo, negotiations with rebels, foreign minister says' (*Reuters*, 29 January 2025) <www.reuters.com/world/africa/rwanda-urges-ceasefire-congo-negotiations-with-rebels-foreign-minister-says-2025-01-29> accessed 7 December 2025.

responsibility by outsourcing the perpetration of internationally wrongful acts to non-state actors. Considering this challenge, it may be worth considering to what extent the judicial tests applied to determine attribution – such as the effective and overall control tests – contribute to the consistent application of international law. Consequently, I take the view that developing a more comprehensive and unified framework for assessment could enhance the predictability of international law. Such a standard would need to bridge the existing divergences in judicial practice while preserving the essential requirements of holding states accountable.

Maria Bergsröm and Valsamis Mitsilegas: EU Law in the Digital Age

Tiwai Mhundwa*

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Over time, the legal landscape has had to adapt to the rise of global digitalisation and its impact on society and fundamental rights. *EU law in the Digital Age,* edited by Maria Bergström and Valsamis Mitsilegas, brings together twenty chapters that track the adaptation of EU law in response to evolving technology, such as Artificial Intelligence, and examines how human rights and laws are impacted during this shift. This analysis is crucial in light of recent developments in EU law such as the AI Act, the Digital Services and Digital Markets Acts, and the Interoperability Framework which the book discusses. Additionally, the book provides a holistic overview of the impact the digital revolution has on fundamental rights, the rule of law and democracy, raising several concerns of how rights are affected and the role that the EU plays in safeguarding these rights through its laws. Divided into five parts, the question of how the EU handles the pressures of digitalisation is explored through a multidisciplinary approach and by bringing together experts in several key areas of EU law such as the internal market, privacy and data protection law and immigration law.

The first part of the book focuses on the challenges of AI and how the European Commission and The Council of Europe seek to tackle these challenges through initiatives such as the AI Act and the proposed Convention on Artificial Intelligence. From mapping out the uses of AI in areas such as predictive policing and process automation in chapter Two, to highlighting the shortcomings of AI in chapter Four, this section offers a balanced perspective of how AI will further revolutionise the law through initiatives discussed in chapter Three. The second part of the book introduces digitalisation and fundamental rights in the context of the internal market. The EU's digital package consisting of the Digital Services Act (DSA) and the Digital Markets Act (DMA) are discussed in chapter Five whilst chapter Six discusses the evolution of product liability due to the development of AI. Additionally, this section analyzes risk and trustas

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emerging discussions in law due to AI, drawing from discussions from the anti-money laundering field. AI and criminal Justice is analysed in part three, exploring human rights under the influence of algorithms and analysing the impact of AI and deepfake technology on the rule of law, legal certainty and democracy. Part Four is narrowed down to AI and evidence, more specifically**,** forensic AI. It examines issues such as the right to fair trial, fact finding in proceedings with the use of AI tools such as consumer product AI, and the cross-border nature of evidence which calls for the need for more co-operation between service providers and law enforcement authorities in proceedings. Lastly part Five of the book discusses AI and migration, specifically exploring the impacts of digitisation on the fundamental rights of travellers. This includes an analysis of the impact of the interoperability framework and systems such as the European Travel Information and Authorisation System (ETIAS) which were proposed to be used in the protection of from terroism and the strengthening of the EU's borders. Throughout these parts, the unifying concern is how the rule of law and fundamental rights are affected by the dynamic digital reality and, more concerningly, Artificial Intelligence.

Having outlined the structure and scope of *EU Law in the Digital Age* , an evaluation of the key themes and concerns that are emphasised throughout the book will be made. Although written on a wide range of legal issues, the authors link their sections to the influence of Artificial intelligence in the context of EU Law. In explaining this relevance Gösta Petri highlights the EU's definition of AI in the AI Act which is crucial in understanding what technology falls under this definition so the appropriate laws and effects can be analysed.[1] The book clearly lays out how the EU has evolved in response to the growth of AI. From early Council of Europe initiatives, such as Recommendation 2102(2017) of the Parliamentary Assembly of the Council of Europe on Technological Convergence, Artificial Intelligence and Human Rights, to the first comprehensive EU risk based framework on AI (AI Act) the trajectory of EU AI governance is clearly traced.[2] Rudi Fortson KC takes a different approach by contrasting the approach of the UK, no longer a part of the EU, when it comes to tackling AI in law, more specifically in the realm of criminal law. Fortson highlights how a principle based and pro-innovation approach is taken in the UK which relies on regulators in a given sector, with the House of Lords highlighting that an overarching AI regulation like the AI Act would be an inappropriate response to the spread of AI.[3]

1 Gösta Petri, "AI and Justice – From Policy to Practice" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 14.

2 Regulation (EU) 2024/1689 (Artificial Intelligence Act) [2024] OJ L2024/1689, Recommendation 2102 of the Parliamentary Assembly of the Council of Europe about Technological Convergence, Artificial Intelligence and Human Rights.

3 Rudi Fortson KC, "UK Strategy on AI – Implications for Criminal Law" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 217.

In line with the theme of AI, the book also places emphasis on the impact of AI on rule of law. According to Karine Caunes, the rule of law serves as the underpinning of democracy, suggesting that there is a triangular relationship between the rule of law, democracy and human rights, and the challenges of AI therefore impact this relationship.[4] Light is shed on self determination through the right to consent and the right to vote which may be affected by the use of AI in the political atmosphere, especially by the use of deepfake technology as Clementina Salvi points out.[5] Deepfakes can distort civil discourse by spreading disinformation and fabricating fake scenarios, thus impacting decision making and undermining the formation of free consent, self determination and the rule of law. [6]

The impact AI has in criminal proceedings has also been exemplified in the book. Emmanouil Billis questions whether AI in criminal justice can be incorporated in a manner which respects fundamental rights and the rule of law. [7] Rule of law principles such as legal certainty, transparency, impartiality and equality can only be upheld, not by solely relying on AI, but maintaining a human centric and complementary approach which requires human judgment and intervention in criminal proceedings.[8] However, Authors such as Katalin Ligeti also point out that even with a human-in-the loop, judges and correctional officers may still rely on the outputs of AI used in criminal proceedings to make their decisions as opposed to remaining impartial, thus affecting the rule of law.[9]

Fundamental rights like right to privacy and data protection as set out in the Charter of Fundamental rights and other equivalent laws are a key focus in the book. The authors illustrate how digitalisation and AI have created new risks for individuals and these rights. Teresa Quintel and Mark D. Cole note that certain data protection principles such as data minimisation and proportionality can be undermined due to the transnational nature of digital evidence, highlighting that certain production orders for e-evidence may be disproportionate especially with the abuse of state authority.[10] Similarly, digitalisation by governments could

4 Karine Caunes, "The Challenges of AI: A Mapping Exercise" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 51.

5 Clementina Salvi, "Challenges of Deepfake Technology" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 186.

6 ibid.

7 Emmanouil Billis, "AI in Criminal Justice" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 151.

8 Emmanouil Billis, "Challenges of Deepfake Technology" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 153.

9 Katalin Ligeti, "AI Evidence: Ensuring a Fair Trial" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 226.

10 Teresa Quintel, "Transborder Access to e-Evidence" in Maria Bergström and Valsamis Mitsi-

be used to increase surveillance in violation of the right to privacy as pointed out by Elspeth Guild, a proportionality assessment of such technology is therefore crucial in assessing the impact on fundamental rights.[11] The right to privacy and data protection is even more vulnerable for travellers due to evolving border control technology such as the European Travel Information and Authorisation System (ETIAS) and the interoperability of migration systems.[12] This puts foreigners at risk of disproportionate over-surveillance, as upheld by the CJEU in cases such as Quadrature du Net and Others, thus potentially violating their rights to privacy and data protection.[13]

A distinct character of the book is the ability to link the relevance of EU law to relevant major non-EU legislation such as the link made between the US Clarifying Lawful Overseas Use of Data Act (CLOUD Act) and the EU e-Evidence Regulation in chapter sixteen. Here, Quintel and Cole show the overlap of these instruments, offering differing legal perspectives from specifically the US.[14] However, the discussion on international digitalisation is limited and may have gone further to discuss other key competitors such as China in order to aptly track how the EU is progressing with regards to adapting to digitalisation and AI. The strong EU focus leaves limited room for comparison to other jurisdictions which is crucial considering the transnational nature of the digital world. Future versions may delve more into several other jurisdictions, allowing for a holistic analysis and comparison on the effects of a digital world on law. Additionally, the chapters minimally discuss how member states are to interact with the legislation created by the EU and could provide further analysis of how national institutions will tackle and interpret these instruments in practice, highlighting potential differences in harmonisation. As the book analyses AI at large, the focus is mostly from a legal perspective. A more technical approach such as explaining the key technical terms in AI would help in understanding how legal norms are related to AI technology in reality. Lastly, more emphasis could be placed on the role of private companies in digitalisation as opposed to focusing on the vertical relationship between companies and governments. Chapter five on the DSA/DMA package and chapter six on product liability do cover the

legas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 285-287.

11 Elspeth Guild, "The Traveller and the Digital Border" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 303.

12 Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 (ETIAS Regulation) [2018] OJ L236/1.

13 Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier Ministre and Others* EU:C:2020:791.

14 Teresa Quintel, "Transborder Access to e-Evidence" in Maria Bergström and Valsamis Mitsilegas (eds), *EU Law in the Digital Age* (Hart Publishing 2025) 266.

private sector and their power, yet other key issues such regarding private actors could still be discussed in other chapters as well.

In conclusion, *EU law in the Digital Age* offers a comprehensive analysis on the efforts of the European Union in adapting to digitalisation and AI, identifying the need for laws to adapt to new technology in order to effectively protect fundamental rights, democracy and the rule of law. The interdisciplinary approach is crucial in highlighting the areas of law that are affected by technological advancement. The book as whole serves as a significant contribution to the understanding of EU laws in the digital context, showing the evolving relationship between technology, regulation and fundamental rights.