

Chapter 11

External Solidarity in Integrated Border Management: The Role of EU Migration Agencies



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Abstract This chapter sheds light on the rather neglected external dimension of European Union (EU) migration agencies, in particular, the European Border and Coast Guard Agency (Frontex) and the EU Agency for Asylum that succeeded to and replaced the European Asylum Support Office (EASO). The chapter describes the normative and practical manifestations of solidarity in the external dimension of EU migration management (external solidarity), examining its embodiment in the work of the two agencies. It offers a thorough reflection on the consequences of this understanding of external solidarity from the perspective of the migrants and concludes that even though solidarity is a normative ideal, this does not absolve the concept of human rights risks. Activities, such as those examined in this chapter, which appear as the operationalisation of genuine solidarity, in fact, exacerbate existing risks for the compliance of the EU with its human rights obligations. Accordingly, the chapter

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upholds its normative conclusions by arguing that accountability should be part of the implementation of solidarity also in its external dimension.

Keywords Solidarity · Frontex · EASO · EUAA · Externalisation · Migration · Third countries · Cooperation

11.1 Introduction

Thriving debates have sparked on the conceptualisation of solidarity and its legal understanding in European Union (EU) migration and asylum law and policies.¹ It has been abundantly discussed in its internal dimension as a counter-balance to the disproportionate responsibility carried by the Member States at the external borders of the EU and, accordingly, as a ‘principle’ allowing for the establishment of a burden-sharing mechanism within the Common European Asylum System (CEAS).² However, less attention has been given to the nascent conceptualisation of solidarity in the external dimension of the EU common policies on migration and asylum.³

This chapter refers to the external dimension of solidarity as the increasing process of externalisation aimed at seeking the support and cooperation of third countries in the management of the migratory flows to the EU. In this connection, the chapter elaborates upon the external dimension of solidarity by looking at how the EU constructs the concept in its cooperation with third countries with the aim of managing migration and by reflecting on its consequences also from the perspective of the migrants. To pursue this goal, the chapter will especially reflect on the relatively neglected external dimension of EU migration agencies, namely the European Border and Coast Guard Agency (Frontex) and the European Asylum Support Office (EASO) and its successor, the EU Agency for Asylum (EUAA), as actors of external solidarity.

Since 2016, Frontex has conducted border surveillance operations in third countries and cooperates closely with an extensive network of countries of origin and transit in the context of information exchange and capacity building. EASO has been developing its external cooperation strategy that includes coordination and information exchange, capacity and knowledge building, and delivering targeted operational support to migrants, such as assisting with resettlement plans. Such a strategy will be revamped by the new EUAA.

In attempt to shed light on the mechanisms and forms of cooperation with third countries by these two EU migration agencies, this chapter flags the human rights concerns as well as the accountability gaps that the external dimension of EU solidarity may raise. These gaps and concerns constitute elements to prove how the concept of solidarity might be euphemistically used to pursue self-serving political

¹ See, *inter alia*, Marin et al. 2020, pp. 1–10; Miglio 2018, pp. 23–50; Tsourdi 2017, pp. 667–686.

² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), Article 80. For references, see especially Maiani 2016, pp. 622–645; Küçük 2016a, pp. 448–469.

³ Cf, respectively, TFEU, Articles 79 and 78.

interests through externalisation practices that may be detrimental to the safeguard of EU core values, such as the protection of fundamental rights.

This chapter, first, introduces the reader to the concept of solidarity, addressing its normative and operational manifestation in EU migration and asylum law (Sect. 11.2). Having built the basis for our analysis, we proceed to exploring the expression of solidarity in the external dimension of EU migration management, via the trends of externalisation and agencification (Sect. 11.3). Following that, we study external solidarity as it is operationalised by Frontex and EASO and EUAA (Sect. 11.4) and we present our conclusions with an eye on accountability for human rights violations (Sect. 11.5).

11.2 The Normative Foundations of Solidarity and Its Understanding in the Areas of Asylum and Migration

Having sprung from ethics and moral philosophy,⁴ solidarity has entered the EU constitutional order via the jurisprudence of the Court of Justice of the EU (CJEU) and has, accordingly, found its way in the EU Treaties. These introductory sections explore the normative foundations of solidarity in EU law and its understanding in the context of migration and asylum.

11.2.1 *The Multifaceted Manifestation of Solidarity in EU Law*

Solidarity has been at the core of the EU project since early on, while it also has a prominent place in the political discourse. The notion, however, lacks a commonly agreed understanding of its meaning, which has caused authors to examine if it is, in fact, an ‘elusive political statement’ rather than a legal principle that can carry the weight of normative consequences, duties and commitments.⁵

The CJEU first read solidarity in the light of the general principle of loyalty, later translated into ‘the principle of sincere cooperation’ under Article 4(3) of the Treaty on the EU (TEU).⁶ In *Commission v France*, the Court held that solidarity is ‘the basis of [...] the whole of the Community system’.⁷ Solidarity was seen as cooperative conduct on the part of a State that could even go against national interests. The Court initially discovered the principle in Article 3 of the European

⁴ Derpmann 2009, p. 303; Baldwin 1990, pp. 29–31; Durkheim 1984, pp. 42, 64.

⁵ Küçük 2016b.

⁶ Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (TEU).

⁷ CJEU, Joined Cases C-6/69 and C-11/69, *Commission v. France*, Judgment, 10 December 1969, ECLI:EU:C:1969:68, para 16; CJEU, Case C-39/72, *Commission v. Italy*, Judgment, 7 February 1973, ECLI:EU:C:1973:13, para 25; de Witte 2000, p. 153; Goldner Lang 2020.

Coal and Steel Community (ECSC) Treaty, dealing with the common European interest, which, according to the Court, presupposed a duty of solidarity amongst the Member States.⁸

The Lisbon treaty has given solidarity a prominent place in the EU constitutional order, by referring to solidarity in European societies as a founding value of the EU (Article 2 TEU) and to solidarity amongst Member States (Article 3(3) TEU) as one of the main objectives of the EU, while solidarity amongst peoples is central in the EU's relations with the broader world (Article 3(5) TEU). According to Article 67(1) of the Treaty on the Functioning of the EU (TFEU), the EU policies on asylum, immigration and external border control shall be based on solidarity among Member States. Article 80 TFEU highlights that the implementation of EU policies on border checks, asylum and immigration is governed by the principle of solidarity and fair sharing of responsibility between the Member States, including solidarity in financial terms. Solidarity is considered essential for maintaining the common area of free movement without internal checks, and the solidarity obligations of the Member States in this area are unconditional. Still, security (Articles 42(7), 222 TFEU) and energy (Articles 122, 194 TFEU) are also areas where solidarity takes a more specific form to address emergencies, such as foreign aggression, terrorism, or energy deficits, but also more broadly in the sense of sustainable energy management.

Solidarity commitments are also present in the Common Foreign and Security Policy (CFSP). Article 24(3) TEU, in particular, imposes solidarity obligations on the Member States, urging them to support the Union's external policy in the spirit of loyalty and mutual solidarity, as well as to comply with the Union's activities in this region.

Still, from a fundamental rights perspective, solidarity is found in the Charter of Fundamental Rights of the EU (Charter) as one of the indivisible and universal values upon which the EU is founded.⁹ Furthermore, the goal of deepening solidarity amongst the peoples is recalled in the preamble to the TEU. However, these understandings of solidarity towards individuals or peoples lack a normative element and judicial enforceability¹⁰ that can adequately mirror their relative importance in the EU legal system.

The CJEU has contributed to clarifying the scope of the concept of solidarity, identifying its distinctive features in a fragmented and often selective manner.¹¹ The Court has frequently discussed the concept of solidarity by referring to reciprocity¹² and the need to contribute to common interests, as Member States would seek to avoid responsibility under EU law. Thus, the Court's point of view was directed towards

⁸ CJEU, Joined Cases C-154, C-205, C-206, C-226 to C-228, C-263 and C-264/78, C-39, C-31, C-83 and C-85/79 *SpA Ferriera Valsabbia and others v. Commission of the European Communities*, Judgment, 18 March 1980, ECLI:EU:C:1980:81, para 59.

⁹ Charter of Fundamental Rights of the European Union [2000] adopted 7 December 2000, entered into force 1 December 2009, OJ C 326/391, Preamble para 3.

¹⁰ Küçük 2016b, p. 975.

¹¹ Küçük 2016b, p. 981–983.

¹² CJEU, Case C-39/72, *Commission v. Italy*, Judgment, 7 February 1973, ECLI:EU:C:1973:13, para 24.

achieving a common goal. This, however, does not necessarily require the strong to help the weak in a particular sector.¹³ The Court also examined the transnational limits of social solidarity, declaring that it is mandatory to show a ‘certain degree of solidarity’ by the host State to economically inactive migrant EU citizens.¹⁴

On the whole, while solidarity features prominently in EU legal provisions and the CJEU case law, no concrete definition is provided, allowing for the heuristic use of the term and its operationalisation in a vague landscape of binding normative consequences.

11.2.2 Solidarity in the Common European Asylum System and the Integrated Border Management: An Operational Dimension?

Solidarity has been abundantly and critically discussed regarding its role as a counterbalance to the disproportionate responsibility carried by the Member States at the external borders of the EU and, accordingly, as a principle allowing for the establishment of a burden-sharing mechanism with the Common European Asylum System (CEAS).¹⁵ Nonetheless, the legal basis in the Treaty is rather vague, as Article 78 TFEU on the CEAS does not mention it, while, as has been mentioned, Article 80 TFEU limits itself to state that all policies in the field of border checks, asylum and migration and their implementation ‘shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.’

Scholars pointed out that, instead of defining the scope of any legal obligations linked with Article 80 TFEU, EU institutions pursued a more operational approach ‘listing different measures that operationalise solidarity’,¹⁶ including the relocation of asylum seekers throughout the EU.¹⁷ Solidarity and responsibility are also meant to qualify the approach to the reform of the CEAS and, in particular, of the Dublin Regulation, as highlighted by the Joint Declaration on the EU’s legislative priorities for 2018–19.¹⁸ Interestingly, in 2011 the European Parliament published a Study on the Implementation of Solidarity, highlighting that, while the concept of solidarity has been left undefined in order not to limit its scope, one of its primary

¹³ CJEU, Case C-179/84, *Bozzetti v. Invernizzi and Ministero del Tesoro*, Judgment, 9 July 1985, EU:C:1985:306; CJEU, Case C-203/86, *Spain v. Council of the European Communities*, Judgment, 20 September 1988, ECLI:EU:C:1988:420.

¹⁴ CJEU, Case C-184/99, *Rudy Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, Judgment, 20 September 2001, ECLI:EU:C:2001:458, para 44.

¹⁵ Karageorgiou 2019, pp. 315–58; Karageorgiou 2016, pp. 1–12; Thym and Tsourdi 2017, pp. 605–621; Garlick 2016.

¹⁶ De Bruycker and Tsourdi 2015, p. 4.

¹⁷ In this regard, see Nicolosi 2016.

¹⁸ European Commission 2017.

goals is to foster trust.¹⁹ Solidarity and responsibility-sharing are necessary to assure Member States' loyalty as a minimal condition of trust because, as cases like *NS and ME* have significantly illustrated, blind trust in correctly implementing legislative instruments may not be sufficient.²⁰ Therefore solidarity constitutes the paradigm under which adequate tools need to be elaborated 'to assist other Member States to reach the standards set at EU level or even to compensate for their failure to do so'.²¹ More emphatically, in a recent Opinion, Advocate General Sharpston stressed that 'solidarity is the lifeblood of the European project',²² and, as illustrated by the development of the whole integration process, that means accepting and sharing responsibilities and burdens 'to further the common good'.²³

This operational dimension of solidarity is also found in the concept of Integrated Border Management (IBM), first legislatively defined in the 2016 Regulation on the European Border and Coast Guard (EBCG), as Frontex was officially renamed.²⁴ This definition includes border control, returns, prevention and detection of cross-border crime, inter-agency cooperation, and cooperation amongst member states and with third countries. Through coordination and cooperation, IBM's stated aim is to establish an effective coordinated system of border management of the external borders to ensure the free movement of persons in the EU via a high level of security and at the same time respect for fundamental rights. The 2019 EBCG Regulation has added fundamental rights education and training, as well as research and innovation as the overarching components in the implementation of IBM.²⁵

This definition sees IBM as a shared responsibility between Frontex and the Member States, operationalised through the surveillance and return operation and other activities of the EBCG. More broadly, solidarity is invoked in the context of EU migration policy to express (the need for) support for individual Member States that face particular migratory situations and direct national approaches towards achieving common goals jointly (Articles 67 and 80 TFEU).²⁶ This is also the promise of the

¹⁹ European Parliament 2011.

²⁰ See CJEU, Joined Cases C-411/10 and C-493/10, *NS and ME*, Judgment, 21 December 2011, ECLI:EU:C:2011:865.

²¹ Vanheule et al. 2011, p. 100.

²² CJEU, Joined cases C-715/17, Case C-718/17, C-719/17, *European Commission v. Republic of Poland and Others*, Opinion of Advocate General Sharpston, 31 October 2019, ECLI:EU:C:2019:917, para 253.

²³ CJEU, Joined cases C-715/17, Case C-718/17, C-719/17, *European Commission v. Republic of Poland and Others*, Opinion of Advocate General Sharpston, 31 October 2019, ECLI:EU:C:2019:917, para 16.

²⁴ Article 4 of Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251/01, 16.9.2016 (EBCG Regulation 2016).

²⁵ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/162, OJ L 295/01, 14.11.2019 (EBCG Regulation 2019), Article 3(2).

²⁶ Küçük 2016b, p. 971.

New EU Pact on Migration and Asylum.²⁷ Building EU Member State solidarity is one of the three fundamental elements around which the EU Pact on Migration and Asylum has been constructed, accompanied by improving third country cooperation and reinforcing the external borders. Dedicated to fair sharing of responsibility and solidarity is the Pact's second pillar, which stresses the need for intensifying returns and an enhanced role for Frontex.²⁸ Thus, the Pact clearly links solidarity with expulsion and border securitisation. Overall, the Pact puts further emphasis on externalisation and the place of agencies in this evolving field and confirms, by making this explicit, the link between the internal and external dimensions of migration management, because close cooperation with external partners has a direct impact on the effectiveness of policies inside the EU.

11.3 Solidarity in the External Dimension of EU Migration Management

The trend towards externalisation has become a distinct feature of the current phase of reform of the CEAS²⁹ and has become inherently intertwined with the trend towards 'agencification' of these policy areas.³⁰ It is, therefore, crucial to explore how the understanding of the concept of solidarity which, as discussed above, is essentially operational in the field of migration and asylum, translates to the external dimension.

This firstly requires a comment on the increasing process of externalisation of EU migration and asylum policies and considering the role of EU migration agencies as potential actors of solidarity with third countries and migrants in the external dimensions of these policies. The EU has, in fact, chosen to participate in this international effort of addressing migration-related challenges by creating partnerships with third countries and establishing cooperation aimed at preventing onward movement towards its territory and facilitating returns and readmission.

Externalisation has been studied to some extent in terms of general EU policy and in terms of macro-political analysis.³¹ Regarding specific angles, researchers have focused on migration deals (e.g. EU-Turkey Statement)³² and the relationship of individual Member States with third countries (e.g. cooperation between Italy and Libya).³³ Surprisingly, the role of EU migration agencies in the externalisation process has been greatly overlooked.

Cooperation with third countries has become essential for these agencies as they constitute the operational machinery by which the EU fulfils its role as a global actor

²⁷ European Commission 2020 (*Communication on a new Pact on Migration and Asylum*).

²⁸ Gkliati 2021.

²⁹ Cantor et al. 2022.

³⁰ Vitiello 2019, pp. 125–152.

³¹ El Qadim et al. 2020, pp. 1608–1638; Collyer 2016, pp. 606–624.

³² Council of the EU 2016.

³³ See Palm 2017; Ott 2008, pp. 515–540; Chamon 2019, pp. 1509–1548.

in the field of border control and migration management. This emerging architecture is predicated on the assumption that the migratory dynamics to the EU can only be appropriately dealt with if countries that constitute transit areas for most migrants arriving in the EU agree to: (i) jointly cooperate to stem migratory flows, (ii) share information regarding these migratory dynamics and (iii) build up their capabilities (with the help of the EU) to be regarded as safe countries from the perspective of migrants.

Increasing attention is currently paid to the externalisation of the EU policies, but externalisation itself is not a new phenomenon. Ever since the Treaty of Amsterdam in 1997, the EU and its Member States have been exploring the potential of the participation of countries of origin and transit in EU migration management.³⁴ Today, coupled with securitisation, it is used to respond to a multitude of crises, and is mainly implemented via cooperation agreements aiming to return and readmission and to stemming irregular migration to Europe.³⁵ Much of this cooperation is conducted informally, also on the basis of EU agencies' activities, and this creates significant accountability challenges.³⁶

The increased importance of the external dimension is illustrated by the EU Council five-year strategy documents for the overall development of the Area of Freedom Security and Justice (AFSJ), in which 'external action' has become a separate field of attention.³⁷ Partnership and cooperation with third countries for the purpose of managing migration are included in Article 78(g) TFEU as an area of priority for the CEAS. The ways in which the EU can try to assert itself as a global actor on the 'international scene' are plenty.

Related practices include strengthening the border control capacity of third countries, interception beyond international waters and into the territory of third states, and cooperation to facilitate returns. This cooperation is motivated by a carrot-and-stick approach with EU development funding, visa liberalisation, and accession negotiations becoming conditional upon enhanced control of borders.³⁸ Such superficial reciprocity and the title of 'cooperation' do not, in fact, represent a relationship of equals, and one can question whether the goals pursued are indeed common goals. One may only think of border restrictions imposed on countries that are members of the Economic Community of West African States (ECOWAS), which are diametrically opposed to the ECOWAS vision of a borderless region.³⁹ Moreover, the unequal socio-economic and political elements of the relationship and the interdependence between rich and poor countries need to be considered.⁴⁰

³⁴ Boswell 2003, p. 632.

³⁵ Cotrinovis 2015, p. 6; Carrera et al. 2016, p. 19.

³⁶ European Parliament 2020.

³⁷ European Parliament 2021.

³⁸ Palm 2016 p. 3; Stojić Mitrović 2020; Cantor et al. 2022.

³⁹ Economic Community of West African States (ECOWAS).

⁴⁰ Benhabib 2020, pp. 75–100.

With extensive use of financial incentives⁴¹ third countries are instrumentalised to realise the EU goals of restricting mobility and added to the EU's border control mechanisms.⁴² Cooperation with third countries of origin and transit enables the EU to extend its migration control beyond its borders and even international waters.⁴³ It is in the process of creating a buffer zone⁴⁴ at what has been characterised as a pre-border⁴⁵ or pre-frontier area.⁴⁶ On the other hand, the element of cooperation with third countries with the view to promoting mobility, regular migration opportunities and integration in the interest of a 'Global Approach to Migration and Mobility' (GAMM)⁴⁷ is much less developed.⁴⁸ There have been measures aiming at developing and improving the conditions in the countries of origin, but most measures are focused more on preventing people from leaving and returning people to regions of origin.⁴⁹

A variety of instruments has been created in the direction of externalisation, including political initiatives under the Common Foreign and Security Policy (CFSP),⁵⁰ cooperation missions, such as EU NAVFOR MED,⁵¹ and an increasing number of cooperation agreements with third countries. The numerous EU mobility and readmission agreements with third countries (e.g., EU-Morocco Mobility Partnership, 2013), bilateral agreements between a member state and a third country (e.g., Denmark-Rwanda Extraterritorial Processing Agreement, 2022), and the *sui generis* EU-Turkey Statement illustrate the inclusion of third countries in the EU migration management in the form of outsourcing responsibilities. The next step in this direction is enhancing the external dimension of EU agencies and their increased role in the cooperation with countries of origin and transit.

11.4 EU Migration Agencies and External Solidarity

EU migration agencies, particularly Frontex and EASO, have developed patterns of cooperation with third countries to fulfil their tasks and roles in prescribing norms and standards and enforcing them.⁵² More importantly, as these agencies have been

⁴¹ El Qadim 2018, pp. 341–363; de Lange et al. 2021.

⁴² Karageorgiou 2019.

⁴³ Moreno-Lax and Costello 2014, p. 1663.

⁴⁴ Hurwitz 2009, p. 75.

⁴⁵ Den Heijer 2012, p. 208; Karageorgiou and Spijkerboer 2019.

⁴⁶ Borrell 2020.

⁴⁷ European Commission 2011, pp. 5, 12–25; General Secretariat of the Council 2012, pp. 5–6.

⁴⁸ García Andrade 2013, pp. 263–265, pp. 279–281.

⁴⁹ Chou 2009, p. 543.

⁵⁰ Common Foreign and Security Policy (CFSP).

⁵¹ EUNAVOR MED Operation Sophia, About us. <https://www.operationsophia.eu/about-us/>. Accessed 19 September 2022.

⁵² Fernández-Rojo 2021.

given essential tasks within IBM, their status has become increasingly relevant in the international context.⁵³ The external dimension of these agencies takes different forms, including the conclusion of a wide array of cooperative arrangements with external partners.

This shift to agencification and externalisation understood as two complementary facets of the emerging EU migratory architecture is relaunched by the 2020 New Pact on Migration and Asylum. This has put particular emphasis on cooperation with third countries and reliance on the mandate of the migratory agencies.

11.4.1 Solidarity and the External Dimension of Frontex

11.4.1.1 The Normative Foundations of External Solidarity in Frontex

The establishment of Frontex in 2004 and its development have constituted a marked change in the approach to border management in the EU towards the coordination of operational cooperation among the Member States.⁵⁴ Established to implement the European IBM, cooperation was at the centre of its mandate as also indicated by the Agency's original name, 'European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union'. Solidarity in the area of migration is mainly expressed via financial support to manage sections of the borders that belong to individual Member States and the reinforcement of border controls, and Frontex has a vital role to play. In fact, the Agency was the manifestation of the aim of 'shared responsibility and solidarity among Member States'⁵⁵ and its establishment was based on the premise that control of the external borders is a shared responsibility of the Member States.⁵⁶ Solidarity is directed towards the Member States at the EU's external borders, and the aim of solidarity as cooperation translates in practice in the financing, organisation and coordination of joint operations surveillance and return operations by Frontex.

In joint operations, other Member States participate with personnel and equipment, and since the 2019 amendment of its Regulation, Frontex has a dedicated standing corps of 10.000 border guards and other experts, including (increasingly) the Agency's own statutory staff operating with executive powers equivalent to those of national border guards and with equipment (e.g., vessels, plans) owned by the Agency. Especially since the latest Regulation amendment, the Agency is passing from managing the operation cooperation of Member States to a more centralised

⁵³ Coman-Kund 2018, pp. 97–118.

⁵⁴ Rijpma 2012, pp. 84–102.

⁵⁵ EBCG Regulation 2019, see n. 25 above, preamble.

⁵⁶ EBCG Regulation 2019, see n. 25 above; Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/01, 25.11.2004, p. 1.

mechanism for border management, especially in the area of returns and cooperation with third states. At the same time, its independence and autonomy in its external competencies were overall strengthened.⁵⁷ The work of Frontex, more broadly regarding the coordination of the cooperation amongst member states and the centralisation of the management of operations, as well as its fundamental rights monitoring duties, constitute the EU's expression of solidarity in view of the common goals of IBM.

11.4.1.2 Operational Aspects of Frontex External Solidarity

Frontex has been involved in this outsourcing of EU migration management since early on. Building cooperation with neighbouring countries and with countries of origin and transit is an integral part of the EU's IBM and has contributed significantly to the success of Frontex. Its extent becomes apparent in the surveillance operations and the working arrangements (i.e. cooperation agreements) it concludes in and with third states. Frontex has concluded working arrangements with 18 countries: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, the Former Yugoslav Republic of Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Turkey, Ukraine, and the United States.⁵⁸

The cooperation of the Agency with third countries has been noticeably strengthened in the 2016 EBCG Regulation. Since then, the Agency may launch and finance technical assistance projects in third countries and provide other operational and technical assistance relevant to returns.⁵⁹ More importantly, it may launch surveillance operations in a third (neighbouring) country. In the 2019 amendment of its Regulation, the launch of border control operations was not limited anymore to neighbouring countries, and the Agency can then carry out such an operation anywhere in the world.⁶⁰ These first third-state border surveillance operations have been launched in Albania and Montenegro, while the Agency is preparing to deploy its standing corps to Senegal.⁶¹

In the area of return operations, states of return may provide the means of transport and the return escorts in collecting return operations, while border surveillance activities may be carried out in the territory of a third state under its command. Specific actions, such as the deployment of European Border Control teams with executive

⁵⁷ Gkliati 2021.

⁵⁸ A list is available on the website of Frontex (n.d.) Other Partners and Projects—Non-EU countries. <https://frontex.europa.eu/we-build/other-partners-and-projects/non-eu-countries/>. Accessed 5 October 2022.

⁵⁹ EBCG Regulation 2016, see n. 24 above, Article 54.

⁶⁰ EBCG Regulation 2019, see n. 25 above, Article 74.

⁶¹ Statewatch 2022.

powers, require establishing a status agreement between the EU and the third state, covering the operation's details.⁶²

Apart from specific operations, the work of the Agency is particularly relevant in relation to capacity building and information sharing, especially with African countries for the purpose of risk analysis, an activity essential for the production of knowledge required for border surveillance.⁶³ The Agency has a role as a 'normative power Europe' actor, exporting European norms and standards to third countries, analysing the impact of this transfer only from the perspective of the priorities of EU migration management.⁶⁴ Since 2010 Frontex has been in regular contact with the African countries that form part of the Africa-Frontex Intelligence Community (AFIC),⁶⁵ in the context of which in 2017 it launched a capacity-building project for Africa aiming to strengthen the capacity of AFIC countries to work on joint intelligence analysis of crime.⁶⁶ It is also involved in cooperation based on agreements concluded between a third country and an EU member state. Technically such agreements, in the form of Memoranda of Understanding or Technical Protocols, are concluded between Frontex and the border control authority of the third country.⁶⁷

The cooperation could be on the level of information exchange, training, research, development, or joint patrols. In particular, the collaboration may take the form of donations of border management technologies and assets, deployment of liaison officers to third countries, and financial means so that states develop their border security systems.⁶⁸ The aim is that the third countries are assisted so that they can successfully stop the departure of immigrant vessels aiming to reach Europe, intercept migrant vessels or readmit third-country nationals and return them to their respective countries of origin.

Information sharing is the core element of this cooperation with third countries,⁶⁹ and is found as part of working agreements with third countries, in the framework of information sharing communities, such as AFIC and the Western Balkans—Risk Analysis Network (WB-RAN), within the context of technical assistance and capacity building, as well as Frontex liaison officers stationed in third countries (currently in

⁶² EBCG Regulation 2019, see n. 25 above, Article 73(3)(4). Such a model agreement has been drawn by the Commission, establishing a framework for the cooperation of the Agency with third states. See European Commission 2016a.

⁶³ Horii 2016, pp. 242–258.

⁶⁴ Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Democratic Republic of Congo, Ivory Coast, Egypt, Eritrea, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan and Togo.

⁶⁵ Frontex 2017.

⁶⁶ For instance, Operation HERA was based on bilateral agreements that Spain had concluded with Mauritania and Senegal.

⁶⁷ Papastavridis 2010, pp. 89–90.

⁶⁸ FRONTEx, Situational awareness and monitoring. <https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/third-country-analysis/>. Accessed 12 September 2022.

⁶⁹ Marin 2020, pp. 157–180.

Turkey, Niger, Serbia, Senegal, Albania and a pending deployment in Ukraine).⁷⁰ Based on the model of the Frontex Risk Analysis Network (FRAN), these activities aim to facilitate information sharing, including classified information and joint risk analyses for the purpose of migration management and return.⁷¹ Still, Frontex seems to be the main recipient of this information exchange, while sharing data from the Frontex Risk Analysis Unit (RAU) to the authorities of third countries seems to be a secondary possibility and can happen on a case-by-case basis upon prior authorisation.⁷²

11.4.1.3 Legal Issues of Frontex as a Mechanism of External Solidarity

Such cooperation, often non-conditional upon compliance with human and refugee rights by the third country, has a plethora of inherent sensitivities.⁷³

These pre-border preventive actions are in obvious tension with the right of a person to leave a country, which is protected in Article 2 of the Fourth Protocol to the European Convention on Human Rights (ECHR) and Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR).⁷⁴

Furthermore, responsibility may result from violations committed against the individuals by the authorities of the third state. The cooperating countries are usually not subject to human rights commitments or have worrying human rights records. Many of these countries operate under different legal standards as they are not bound by the ECHR⁷⁵ or EU law.⁷⁶ Moreover, Libya is not bound by the 1951 Refugee Convention, while Turkey still retains a geographic reservation to the Convention, which means that its obligations stemming from the Convention are limited to applicants coming from Europe.⁷⁷

Serious human rights violations have been progressively documented by international organisations and NGOs, while the ECtHR and the United Nations High Commissioner for Refugees (UNHCR) have warned that it is not safe to send certain persons back to these countries. Libya is one of the most typical examples, being reported arbitrarily detaining people for long periods, inhumane detention conditions,

⁷⁰ Frontex, Frontex Liaison Officers to Non-EU Countries, <https://frontex.europa.eu/we-build/other-partners-and-projects/liaison-officers-network/>; Marin 2020, pp. 167–171.

⁷¹ Marin 2020, p. 166.

⁷² Marin 2020.

⁷³ Gkliati and Kilpatrick 2021.

⁷⁴ Fundamental Rights Agency 2013, p. 46; Migreurop 2011, p. 131.

⁷⁵ With the exception of Turkey.

⁷⁶ CJEU, Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, Judgment, 16 July 2020. ECLI:EU:C:2020:559.

⁷⁷ See UNHCR, United Nations High Commissioner for Refugees, States Parties to the Status of Refugees and the 1967 Protocol, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>; the most expected new asylum law in Turkey has not managed to remedy the inconsistency of the geographic restriction.

beatings, rape, and other forms of ill-treatment towards irregular migrants.⁷⁸ Amnesty International has been reporting the abuse of ‘tens of thousands’ of migrants at the hand of Libyan authorities and non-state actors, such as tribes and armed groups. It has highlighted the complicity of EU member states in such violations and expressly indicated that the EU has also been assisting Libya through Frontex.⁷⁹

Besides, observers repeatedly report ill-treatment of migrants in Mauritania.⁸⁰ Indicatively, the Nouadhibou detention centre in Mauritania has been renamed ‘Guantanamo’ by migrants.⁸¹ Finally, most North African states and Turkey have criminalised irregular exit imposing fines and imprisonment to those trying to leave the country without the necessary documents or outside the designated border crossing points.⁸²

Frontex does not provide information as to the fortune of the apprehended migrants and does not consider itself responsible for the treatment of individuals after they are surrendered to the authorities of the third state.⁸³ Moreover, there is no mechanism or policy that would allow monitoring of whether third States use the donated assets and equipment in accordance with human rights law.⁸⁴ Moreover, the expansive intelligence activities of the Agency, especially regarding the widespread exchange of information with third countries, poses significant risks to the right to privacy and data protection.⁸⁵ With the 2019 amendment of its Regulation, Frontex comes to the centre of extensive data sharing, including with third countries. It becomes an ‘information hub’,⁸⁶ where new specialised structures and mechanisms are created and operated by the Agency, including European Travel Information and Authorisation System (ETIAS)⁸⁷ and a centralised return management platform for processing all information relevant for returns.⁸⁸ Such information can also be shared with third countries, including countries of origin, from which the returnees were originally fleeing, which can prove detrimental for the safety of people seeking protection and can lead to retaliation measures against the migrants and their families.⁸⁹ It may also alert the state of persecution of the attempt of the person of interest to flee to the EU, which could stop them from reaching safety.⁹⁰ Without the necessary human rights safeguards, the Agency’s extensive powers risk being perceived as giving ‘green light

⁷⁸ Human Rights Watch 2019.

⁷⁹ Amnesty International 2017.

⁸⁰ Migreurop 2011, p. 14.

⁸¹ Amnesty International 2017.

⁸² Fundamental Rights Agency 2013, pp. 42–43.

⁸³ Amnesty International 2017, p. 11; Human Rights Watch 2009, p. 98.

⁸⁴ Fundamental Rights Agency 2013, p. 11.

⁸⁵ EBCG Regulation 2019, see n. 25 above, Articles 46–48.

⁸⁶ European Data Protection Supervisor 2016, p. 3.

⁸⁷ Frontex 2021.

⁸⁸ EBCG Regulation 2019, see n. 25 above, Article 50(1).

⁸⁹ Fundamental Rights Agency 2016a, para 3.1.

⁹⁰ Fundamental Rights Agency 2016a, p. 46.

for a blanket sharing with the third country of all information that may be considered relevant for returns', the EU Fundamental Rights Agency (FRA) has warned.⁹¹

Various sources have expressed repetitive criticism on the cooperation of Frontex with third countries and called for safeguards on the choice of countries.⁹² According to the Frontex Regulation, liaison officers 'shall only be deployed to third countries in which border management practices respect minimum human rights standards'.⁹³

However, such guarantees are not wholly reassuring. As has been pointed out, no information is provided on the criteria or the mechanisms of evaluation, thus constituting the guarantees unenforceable and in fact meaningless, while the Frontex Consultative Forum has urged for a prior fundamental rights risk assessment and an appropriate complaints mechanism also covering the Agency's activities in third countries.⁹⁴ Furthermore, there is no supervisory authority that would monitor the upholding of human rights standards in the cooperation agreements,⁹⁵ especially since much of this cooperation is done on an informal basis, which does not allow for the appropriate democratic and judicial oversight.⁹⁶

The working arrangements that Frontex concludes with third countries are not considered as international treaties but rather as soft law,⁹⁷ administrative acts of the Agency that attempt to escape the democratic and judicial scrutiny of formal international agreements. Moreover, cooperation under the title of 'technical assistance' may take place on a fully informal basis, without the need for working arrangements.⁹⁸ Such informalisation creates challenges for fundamental rights, accountability and the rule of law at large.⁹⁹

Moreover, the lack of transparency in the work of the Agency is a thorn in the quest for accountability. The working agreements with third countries are published by Frontex, but this is not also the case with respect to other equally important cooperation instruments.¹⁰⁰ As far as the redress mechanisms are concerned, the secrecy over Frontex operations and risk analyses does not leave much space for EU nationals to challenge the unlawful acts of the Agency by making use of their

⁹¹ Fundamental Rights Agency 2018, p. 13.

⁹² Moreno-Lax 2012; Fundamental Rights Agency 2013, pp. 10, 11, 16; PACE 2013, pp. 4, 5, 14; FRA holds that the EU should reinforce its efforts to strengthen the protection space in the transit countries, which should involve effective asylum systems, prevention of abuse, and access to justice.

⁹³ Article 14, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union, OJ L 304/01, 22.11.2011.

⁹⁴ Frontex Consultative Forum on Fundamental Rights 2015 and 2017

⁹⁵ Statewatch and Migreurop 2012, pp. 12, 13.

⁹⁶ Such cooperation agreements are still subject to a right of information by the EU Institutions, including the European Parliament. EBCG Regulation 2019, see n. 25 above, Article 73(7).

⁹⁷ Ott et al. 2013, pp. 32.

⁹⁸ EBCG Regulation 2019, see n. 25 above, Article 73(6); Marin 2020, p. 172.

⁹⁹ Santos Vara 2015, pp. 118–136; Rijpmma 2017, pp. 571–596.

¹⁰⁰ Marin 2020, pp. 163–164.

rights under Article 8(2) of the Charter and Article 12 of Regulation 45/2001.¹⁰¹ This lack of safeguards is even more prominent with respect to third-country nationals outside the EU that do not enjoy the same rights to accessing information.¹⁰² The external activities of EU agencies are more generally ‘characterised by secrecy and opacity’,¹⁰³ which is widely problematic from an accountability point of view.¹⁰⁴

Finally, studying issues of responsibility and accountability in the context of joint operations conducted in third countries raises new questions regarding outsourcing responsibilities under refugee and human rights law,¹⁰⁵ the extraterritorial jurisdiction of the CJEU or special agreements excluding Frontex personnel from criminal and civil liability in third countries participating in EU operations despite the extraterritorial exercise of executive powers.¹⁰⁶

11.4.2 *EASO and Its Strategy of External Solidarity*

11.4.2.1 **EASO External Action Strategy and Its Normative Foundations**

In accordance with its founding Regulation,¹⁰⁷ EASO ‘is fully involved in the external dimension of the Common European Asylum System’ (CEAS).¹⁰⁸ The objectives of the CEAS include the establishment of partnerships and cooperation with third countries for the purpose of managing inflows of people applying for international protection.¹⁰⁹

To this aim, at the political level, in 2013, EASO’s Management Board adopted the EASO External Action Strategy, defining the approach and general framework within which the Agency develops its work related to its external dimension.¹¹⁰ Given the changes in the wider EU external relation policy framework and in view of the support requested by third countries,¹¹¹ in 2019 EASO Management Board revised,

¹⁰¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8/01, 12.1.2001.

¹⁰² Gkliati and Kilpatrick 2021.

¹⁰³ Omičević 2021.

¹⁰⁴ Carrera et al. 2013, pp. 337–358.

¹⁰⁵ Gammeltoft-Hansen and Hathaway 2014, p. 235.

¹⁰⁶ Coman-Kund 2020.

¹⁰⁷ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, [2010] OJ L 132/11, 29.05.2010, Article 2(1).

¹⁰⁸ De Bruycker and Tsourdi 2016, pp. 471–538.

¹⁰⁹ TFEU, Article 78 (2)(g).

¹¹⁰ EASO 2019a.

¹¹¹ For references, see especially the contributions in Carrera et al. 2019.

improved and adapted the strategy in the EASO External Cooperation Strategy.¹¹² It is worth stressing that, as will be discussed in greater detail, this strategy will be most probably subject to further revision due to the recent adoption of the Regulation establishing the EU Agency for Asylum (EUAA) that succeeds EASO as of January 2022.¹¹³ The 2020 New Pact on Migration and Asylum, in fact, makes an explicit link between the internal and external dimensions of migration management, as close cooperation with external partners has a direct impact on the effectiveness of policies inside the EU. Accordingly, the new EUAA is called to play a major role to ensure such coordination, as required by the principle of coherence under Article 21(3) TEU.¹¹⁴ To this aim, it is worth stressing that Working arrangements for cooperation on external action have been already concluded with the European Commission's Directorate-General for Migration and Home Affairs (DG HOME) and with European External Action Service (EEAS).¹¹⁵

From a legal perspective, pursuant to Article 7 of the 2010 EASO Regulation, the Agency plays a coordinating role in the exchange of information and other action taken on issues arising from the implementation of instruments and mechanisms relating to the external dimension of the CEAS, and on resettlement taken by the Member States with a view to meeting the international protection needs of refugees in third countries and showing solidarity with their host countries. In addition, Article 7 of the Regulation in joint combination with Article 49 provides that EASO 'may cooperate with competent authorities of third countries in technical matters, in particular with a view to promoting and assisting capacity building in the third countries' own asylum and reception systems and implementing regional protection programmes, and other actions relevant to durable solutions'.

In the light of this framework, EASO has been pursuing an External Action Strategy that comprises different forms of active engagement, offering solidarity to third countries in terms of capacity building and to the refugees in terms of resettlement and other humanitarian initiatives. As will be illustrated, the operationalisation of this form of external solidarity requires a complex set-up of arrangements that will be further revised in light of the mandate of the new EUAA. In general, for EASO, and now the EUAA, to be able to engage in a third country, a specific Working arrangement could be established, but the Agency could also work under the general agreements that the EU has with a third country, such as an association agreement, Mobility Partnerships or common agendas on migration and asylum.¹¹⁶

¹¹² EASO 2019b.

¹¹³ Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468/01, 30.12.2021.

¹¹⁴ TEU, Article 21(3) establishes that:

'The Union shall respect the principles and pursue the objectives set out in paras 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies'.

¹¹⁵ Cf EUAA 2018; EUAA 2021.

¹¹⁶ See EASO 2019b.

11.4.2.2 The Twofold Operational Aspects of EASO External Solidarity: Technical Cooperation to Capacity Building and Resettlement

EASO has developed its strategy for external solidarity in two main areas that are worth analysing to collect evidence about the practice and contribution of the Agency and its legal implications in view of the recent process of transformation into the EUAA. These areas include delivering capacity building in third countries and cooperation in resettlement.

The support to third countries by delivering capacity building activities has prioritised countries that are more broadly involved in the European Neighbourhood Policy (ENP).¹¹⁷ Since its establishment, EASO's external activities especially focused on Turkey and Western Balkan countries¹¹⁸ through *inter alia* the EU-funded multi-country programme 'Regional Support to Protection-sensitive Migration Management in the Western Balkans and Turkey', in cooperation with international organisations, including the UNHCR and the International Organization for Migration (IOM).¹¹⁹ This form of multi-actor technical cooperation in third countries has contributed to strengthening the mechanisms of early identification, registration and proper referral of irregular migrants and asylum seekers as well as to implementing principles of international and European refugee law, including the respect for the obligation of *non-refoulement*.¹²⁰ In addition, this technical cooperation has promoted a coordinated approach at the procedural level to implement a return system in line with the objectives of IBM. While the technical cooperation between EASO and third countries is less structured and formalised than the one undertaken by Frontex, these activities of capacity building in third countries can be considered as an expression of an emerging model of administrative cooperation in the area of asylum and international protection to countries who share the borders with the EU or have become primary partners within the IBM for the management of migratory flows.¹²¹

In the area of resettlement, which constitutes an expression of international solidarity to refugees, EASO has offered bilateral and multilateral support to Member States intending to enhance their resettling capacity. Resettlement encompasses 'the selection and transfer of refugees from a State in which they have sought protection to a third State that has agreed to admit them—as refugees—with permanent residence status.'¹²² In this connection, the Agency has been working within the framework of the resettlement schemes that have been established under EU asylum

¹¹⁷ For references, see Poli 2016.

¹¹⁸ EASO 2019a, point 12 confirms that 'EASO External Action in the first years shall mainly focus on the enlargement countries and the Western Balkans as well as the European Neighbourhood partners, the Russian Federation, and countries included in RPPs'.

¹¹⁹ Publications Office of the EU 2019.

¹²⁰ Fundamental Rights Agency 2016b.

¹²¹ EASO 2021, p. 50.

¹²² UNHCR 2006.

law since 2015.¹²³ Despite its controversial legal aspect, an example is the 2016 EU-Turkey Deal, which established the so-called ‘1:1 scheme’ according to which ‘for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU from Turkey directly’.¹²⁴

EASO has worked in Turkey in the area of resettlement also on the basis of a framework agreement concerning the implementation of an 18-month pilot project established in 2019 to create an EU model to increase operational cooperation between States to facilitate refugees’ resettlement from Turkey.¹²⁵ While through this pilot project, EASO aimed to maximise the number of EU countries successfully involved in resettlement as well as the actual departures of vulnerable refugees from Turkey to the EU, numbers have been rather limited, with only about 10,640 persons arrived in the EU in the context of resettlement in 2020, 58% fewer than in 2019.¹²⁶

The new EUAA is expected to play a major role in implementing the practical arrangements within the Proposal for the Union Resettlement Framework that is to be adopted in the light of the New Pact on Migration and Asylum.¹²⁷ Article 35 of the EUAA Regulation concerning the new Agency’s cooperation with third countries establishes that ‘the Agency may support a Member State in the implementation of resettlement schemes, at the request of that Member State.’ The enhanced role of the Agency in the area of resettlement is of crucial importance, as this will contribute to implementing at the regional level the goals of the Global Compact on Refugees (GCR), calling for an expansion of resettlement and other forms of legal admission.¹²⁸

However, an issue that deserves careful analysis is whether the political priority of improving the asylum and reception capacity in third countries and embedded in the EASO External Action¹²⁹ is, in fact, a disguised incentive for the externalisation of asylum responsibilities from the EU to third countries. Should this be the goal of the EASO’s strategy, legal issues arise as the action of the Agency will actually pursue the objective of preventing the arrival of asylum seekers to the EU. Admittedly, this will be problematic and incompatible with the scope of Article 78 TFEU, which

¹²³ Cf General Secretariat of the Council of the EU (2015) Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20.000 persons in clear need of international protection, 11130/15, 22.07.2015. For a criticism, see De Boer and Zieck 2020, pp. 54–85.

¹²⁴ Council of the EU 2016. See Lehner 2019, pp. 176–185. From 1 June 2016, this mechanism was succeeded by the EU-Turkey Readmission Agreement, following the entry into force of the provisions on readmission of third-country nationals of this agreement, cf. Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation [2014] OJ L134/3, 7.5.2014.

¹²⁵ EASO 2018.

¹²⁶ EASO 2021, p. 245.

¹²⁷ European Commission 2016b, Article 8 (2)(d). For references, see Savino 2018, pp. 81–104.

¹²⁸ The Global Compact on Refugees (GCR) was adopted by UN General Assembly (2018) UN General Assembly Resolution of 17 December 2018, UN doc A/RES/73/151. See Nicolosi and Momoh 2022.

¹²⁹ EASO 2019a, point 4.

requires the EU to develop a CEAS, thereby assuming the responsibility for this policy area instead of delegating its execution to external partners.

11.4.2.3 The New EU Asylum Agency: Enhancing External Solidarity and Emerging Legal Issues

The external dimension of European solidarity is enhanced in the new Regulation 2021/2303 establishing that the EU Agency for Asylum, whose mandate builds on the functions and practice of EASO, also as regards cooperation with third countries.¹³⁰ In this connection, Article 35 of the Regulation more clearly refers to activities that the Agency can develop in third countries. Again, the reference is to capacity-building and resettlement. To this aim, Article 36 refers to the deployment of Liaison officers in third countries ‘in which migration and asylum management practices comply with non-derogable human rights standards’.¹³¹ These Liaison officers will act as an interface between the Agency and the national authorities responsible for asylum and immigration and other relevant services in order to gather information and facilitate access to legal pathways to the EU, including through resettlement.¹³²

Nonetheless, legal issues may arise regarding the deployment of the EUAA Liaison officers. In fact, as to the selection of third countries where to deploy the Liaison officers, Article 36(2) prioritises third countries which, ‘on the basis of information analysis..., constitute countries of origin or transit regarding asylum-related migration.’ A systematic reading of the EUAA Regulation arguably reveals a contradiction, because, whether, on the one hand, the Agency must operate in those countries that show a full and effective commitment to ‘comply with non-derogable human rights standards,’ on the other hand, the same provision mentions practical priorities linked with the relevance of third countries in terms of migratory flows. This interpretation is at odds with the fact that many countries that the EU might consider ideal external partners in the area of migration, because of their configuration as countries of origin or transit, in reality, do not offer adequate guarantees of human rights protection. Recent European case law has emphasised that the designation of a country of origin as safe is not necessarily all-encompassing, urging EU Member States’ authorities to conduct an individual risk assessment on a case-by-case approach.¹³³

In addition, there might also be issues related to the unclear identification of the relevant competent authorities in third countries, a circumstance that may frustrate the role of the EUAA Liaisons officers. In this scenario, Libya stands as a clear example,

¹³⁰ For preliminary comments, see ECRE 2021.

¹³¹ Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468/01, 30.12.2021 (EUAA Regulation), Article 36(1).

¹³² EUAA Regulation, Article 36(3).

¹³³ See, e.g., European Court of Human Rights (ECtHR), *DL v Austria*, Judgment, 7 December 2017 Application no. 34999/16; or ECtHR, *Khlaifia and Others v Italy*, Judgment, 15 December 2016, Application no. 16483/12.

but other African countries, such as Tunisia, might be in the same situation when a domestic legal framework governing asylum to conduct refugee status determination is not in place.¹³⁴

Finally, but more fundamentally, some considerations are necessary as regards the nature of the cooperation arrangements between the Agency and third countries. The EASO Annual Reports have highlighted a practice of cooperation based on different, though always informal, instruments, including written correspondence, letters of intent or working arrangements. Like the vast majority of EU agencies, EASO, and now the EUAA, could not conclude international agreements but their activities constitute a form of administrative or technical cooperation that does not create international legally binding obligations *stricto sensu*, as also stressed by the CJEU,¹³⁵ though this form of cooperation is treated by both parties (the Agency and the third party) as a source of binding commitment.¹³⁶

Such a circumstance does not only cast doubts about the actual nature of this form of cooperation but also contributes to blurring the margins of control over the activities of the Agency, more specifically of the Liaison officers in third countries. As emphasised, ‘the majority of these non-binding arrangements concluded by agencies with third countries and international bodies escape judicial scrutiny for the lack of intent to produce legal effect.’¹³⁷ Likewise, the European Parliament is not fully equipped to monitor and ensure political oversight of these cooperation practices due to its limited role in EU external action.¹³⁸ As in the case of Frontex, the lack of clear avenues for accountability is a major lacuna in the EU’s emerging governance of migration and asylum matters, which risks compromising the core value of solidarity, instrumentalised to self-serve EU political objectives of externalisation instead of promoting protection-sensitive elements.

11.5 Conclusion

Solidarity has been prominently featured in the EU legal order, with a flourishing case law upholding its axiological nature. In the areas of migration of asylum, solidarity has been analysed in its internal dimension essentially to interpret the legal implications of Article 80 TFEU. In an attempt to offer a thorough reflection on the scope of solidarity in EU migration and asylum policies, this chapter has explained the implications of solidarity in the external dimension of the Integrated Border Management, underscoring the risks and human rights concerns hidden in the emerging architecture of the EU migration law and policies.

¹³⁴ UNHCR 2016.

¹³⁵ CJEU, Case C-327/91, *France v. Commission*, Judgment, 9 August 1994, ECLI:EU:C:1994:305.

¹³⁶ In this regard, see Ott et al. 2013, p. 14.

¹³⁷ Ott et al. 2013, p. 37.

¹³⁸ For more references, see Guild and Moreno-Lax 2013, p. 23.

Activities that, owing to the operationalisation of solidarity, such as those examined in this chapter, may result in violations of human rights obligations of the EU. For instance, Frontex, the epitome of EU solidarity in border management, is currently under heavy scrutiny for allegations of human rights violations from multiple angles, including by the UN Special Rapporteur on the human rights of migrants and the European Parliament. Similarly, the recently established EUAA illustrates emerging legal concerns as regards the development of its mandate in cooperation with third countries.

Moreover, the fulfilment of the global obligations of the EU via development aid and support in capacity-building over the last decade has been heavily criticised on human rights grounds. Cooperation, which is often non-conditional upon compliance with human and refugee rights by the third country, has a plethora of inherent sensitivities. In fact, solidarity can, in practice, enhance human rights risks, as responsibilities are diluted, and the accountability safeguards are reduced. The chapter upholds its normative conclusions by arguing that accountability should be part of the implementation of the principle of solidarity also in its external dimension. Admittedly, this is a constitutional requirement, according to the principle of coherence between the internal and external dimensions of the EU policies. Thus, given that the concept is not neutral and absolved of human rights risks, there is no space for unaccountable solidarity.

In conclusion, in an area as sensitive to human rights as migration, solidarity cannot be a stand-alone ideal if it is not accompanied by appropriate accountability frameworks, which include judicial accountability, but also a robust system of external and independent monitoring.

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