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EU Lawlessness Law:
Europe's Passport Apartheid from Indifference to Torture and Killing

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EU LAWLESSNESS LAW:
EUROPE'S PASSPORT APARTHEID FROM INDIFFERENCE TO TORTURE AND KILLING

Dimitry V. Kochenov[*] and *Sarah Ganty*[**]

Abstract

We take a close look at the most important legal techniques deployed by the European Union to make sure that the whole spectrum of denying non-citizens rights – from dignity to the right to life – is never presented as a violation of EU law even in the cases when dozens of thousands are hunted and detained by proxies while the Mediterranean has been turned by EU's and Member States' incessant efforts into a mass grave. Making this possible is the work of what we term 'EU lawlessness law'. We explain how EU lawlessness law operates, how the EU pays for it, how it passes legal scrutiny and what its objectives are. We outline why it is a grave violation of EU values and why deploying legality to ensure that the most significant rights are turned into fiction is an affront to the Rule of Law. To present a complete picture of EU lawlessness law, we delve into the treatment of non-Europeans both inside and outside the Union. The core principle is always there and it is the principle of passport apartheid. Its starting point is that citizenships, blood-based statuses of attachment to public authority distributed at birth, are among the most significant building blocks of EU's world-making by law. In the EU, there is usually no need to break the law to deny the foreigner crucial rights: apartheid européen works well from the internal market to the Belarusian forest and an EU-funded Libyan prison for the innocents, who committed no crime. This contribution elaborates on this starting point using two examples: the near complete exclusion of non-EU citizens from the fundamental freedoms in the EU from the inception of the Union; and the pro-active

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stance of the Union and the Member States in ensuring that the right to seek protection in the EU is turned into an unworkable proclamation. EU lawlessness law is always on the side of the Union and we outline a spectrum of injustice to showcase different instances of how EU's legality enters into direct conflict with the Rule of Law to denigrate non-Europeans. Money matters – and the EU Emergency Trust Fund for Africa emerged as a reliable and unaccountable purse for EU lawlessness law. Acting either directly, or by proxies in the fog of its lawlessness law, the EU can torture, kill, imprison and enslave and it does so mostly targeting the racialised people from its former colonies. It is thus not only about 'Europeans' vs abstract 'non-Europeans', we argue: race and origins plays a critical role on the ground. FRONTEX, an EU agency, is at the forefront of stripping non-Europeans of rights. The atypical nature of the Union as an ideal type of passport apartheid with a complex legal structure imparting invisibility on non-citizens, while deluding responsibility and boasting no effective accountability structures for more than 25.000 drowned and 100.000 captured in the Mediterranean, as we will show, has been served well by own lawlessness law. The passport apartheid core of the punishing EU legal system is significantly undertheorized and this paper aims to start bridging the gap between the day-to-day reality of outright exclusion of non-citizens from dignity and the law and EU's billions invested alongside countless other incessant efforts to promote lawlessness on the one hand and the lack of accountability and the numerous proclamations about the Union's equitable value-laden nature on the other.

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EU's passport apartheid: The fluid "other" between EU law on rights and EU lawlessness law

The objective of this paper is to scrutinise the constitutional fundamentals of the EU, in law and in fact, by providing a renewed focus on the famed role of the individual in the operation of the supranational integration project.[1] To present a fuller picture and thus continue to develop the available literature,[2] we move beyond the classical takes on EU citizenship,[3] oxymoronic 'market citizens' included.[4] Our focus is on the totality of persons touched by the operation of EU law, including all non-citizen 'others' – either in the territory of the Union or beyond, especially those finding themselves in the liminal spaces of the EU's border violence.[5] We zoom in on the routine normalisation of direct departures from the EU and national law in the books, as well as the direct and indirect victimisation of the racialised 'other' at the Eastern border[6] and in the Mediterranean, in

[1] FG Jacobs (ed.), *European law and the individual* (North Holland, 1976).
[2] D Thym (ed.), *Questioning EU citizenship* (Hart, 2017); L Azoulai, S Barbou des Places, and E Pataut (eds.), *Constructing the person in EU law* (Hart, 2016); C O'Brien, 'I trade, therefore I am: Legal personhood in the European Union' (2013) 50 *CMLRev* 1643.
[3] F Wollenschläger, 'A New Fundamental Freedom beyond Market Integration' (2011) 17 *ELJ* 1; D Kostakopoulou, 'Ideas, Norms and European Citizenship' (2005) 68 *MLR* 233; P Magnette, *La citoyenneté europeenne: droits, politiques, institutions* (Editions de l'Université de Bruxelles, 1999); C Closa, 'Citizenship of the Union and nationality of member states' (1995) 32 *CMLRev* 487; S O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer Law International, 1996); For an overview, *see* D Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *ICLQ* 97.
[4] C O'Brien, *Unity in Adversity* (Hart, 2017); N Nic Shuibhne, 'The Resilience of Market Citizenship', 47 *CMLRev*, 1597; TK Hervey, 'Migrant Workers and Their Families in the European Union' in J Shaw and G More (eds.), *The New Legal Dynamics of European Union*, (Clarendon Press, 1995). Cf: D Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union', in F Amtenbrink et al (eds), *The Internal Market and the Future of European Integration* (Cambridge University Press, 2019) 217.
[5] A Macklin, 'Liminal Rights: Sovereignty, Constitutions, and Borders' in M Tushnet and D Kochenov (eds.), *The Politics of Constitutional Law Handbook*, (Edward Elgar, 2023).
[6] Amnesty International, Latvia, 'Return Home or Never Leave the Woods, Refugees and Migrants Arbitrarily Detained, Beaten and Coerced Into "Voluntary" Returns' (2022), 18. Available at: https://www.amnesty.org/en/documents/eur52/5913/2022/en/; Amnesty International, Lithuania, 'Forced out or locked up. Refugees and Migrants abused and abandoned' (2022). Availabe at: https://www.amnesty.org/en/documents/eur53/5735/2022/en. A Jolkina, 'Trapped in a Lawless Zone' *VerfBlog* 2 May 2022. Available at https://verfassungsblog.de/trapped-in-a-lawless-zone/; A Jolkina, 'Trapped in a Lawless Zone: Humanitarian Crisis at the Latvia-Belarus Border' (2022) *Researchgate*, at: https://www.researchgate.net/publication/358914378_Trapped_in_a_Lawless_Zone_Humanitarian_Crisis_at_the_Latvia-Belarus_Border and https://www.latvia-belarus-border.com/; A Jolkina, 'Seven Months in a Freezing Forest' *VerfBlog* 15 November 2022. Available at https://verfassungsblog.de/seven-months-in-the-freezing-forest/; A. Jolkina, Legalising Refoulement: Pushbacks and Forcible 'Voluntary' Returns from the Latvian-Belarus Border, RLI Blog on Refugee Law and Forced Migration, August 22,

an EU-sponsored war on the former colonials which includes arming thugs and funding prisons for the passport poor in the lawless spaces, such as post-conflict Libya and weak former colonies further afield.[7] This war claimed more than 25.000 lives over the last eight years and left more than 100.000 innocent people captured and imprisoned or enslaved and sold for ransom by the proxies enlisted by the EU and its Member States.[8] The focus is thus on the non-citizens inside as well as outside the EU and the law and lawlessness applying to their condition.

A specific legal framework is deployed in the EU to ignore non-citizens, by making the core rights, principles and the very territory of the EU as a constitutional system unavailable to them,[9] or to otherwise humiliate, torture, and sometimes kill them, either directly or indirectly, as a result of concerted EU and Member State efforts.[10] This legal framework is marked by absolute nationality-based segregation and goes to the

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2022. Available at: https://rli.blogs.sas.ac.uk/2022/08/22/legalising-refoulement-pushbacks-and-forcible-voluntary-returns-from-the-latvian-belarus-border/.

[7] OLAF final report on Frontex, Case No OC/2021/0451/A1. Available at: https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/. For a summary of the report, see: L. Izuzquiza, V. Deleja-Hotko, A. Semsrott, Revealed: The OLAF report on Frontex, FragDenStaat, 13 October 2022. Available at: https://fragdenstaat.de/en/blog/2022/10/13/frontex-olaf-report-leaked/; I Urbina, 'The secretive prisons that keep migrants out of Europe', *New Yorker* (28 November 2021). Available at https://www.newyorker.com/magazine/2021/12/06/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe

[8] For 2022, 1200 lives by September alone. J. Sunderland, Endless Tragedies in the Mediterranean Sea. Europe's Commitment to Rescue would save lives, *Human Rights Watch*, 13 September 2022. Available at: https://www.hrw.org/news/2022/09/13/endless-tragedies-mediterranean-sea#:~:text=More%20than%201%2C200%20people%20have,over%20sea%20rescue%20is%20central. For more data, see Missing Migrants Project: https://missingmigrants.iom.int/.

[9] D Kochenov and M van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' in D Thym, M Zoetewij Turhan (eds.), *Degrees of Free Movement and Citizenship*, (Lieden/Boston: Brill Nijhoff, 2015), p. 66–100.

[10] See, *inter alia*, Urbina, note 7 above; T. Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice' (2017) 31(2) *Journal of Refugee Studies* 232; Concord, 'Partnership or Conditionality?, Monitoring the Migration Compacts and EU Trust Fund for Africa', (2018). Available at https://concordeurope.org/wp-content/uploads/2018/01/CONCORD_EUTrustFundReport_2018_online.pdf; C Costello and I Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 *GLJ* 311; See also, Nils Melzer, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', (26 February 2018) U.N. Doc. A/72/335; Agnes Callamard (Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions), 'Unlawful Death of Refugees and Migrants', (15 August 2017) U.N. Doc. A/72/335. See OHCHR & UNSMIL, 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya', (Dec. 20, 2018) p. 58-59, Available at https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf.

foundational heart of the internal market and the original four freedoms, but is infinitely more complex than stating that a stateless worker in Latvia should not be entitled to freedom of movement[11] and that a Nigerian in Brussels has to be discriminated against on the grounds of nationality.[12] The complex legal framework we scrutinise, which aims at the exclusion of the non-citizens through the execution of a conscious policy, could be presented as a spectrum.

This spectrum ranges, at one of its extremities, from the appeals to the original constitutional design[13] and scope of Union law[14] as a core element of the federalist bargain at the heart of the EU,[15] in order to make the core elements of the EU legal system unavailable to non-citizens.[16] At the other end we find a pro-active legal construction of

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[11] I Ziemele, *State continuity and nationality: the Baltic States and Russia: past present and future as defined by international law* (M Nijhoff, 2005); A Dimitrovs and V Poleshchuk, 'Kontinuitet kak osnova gosudarstvennosti i ètnopolitiki v Latvii i Èstonii' in V. Poleshchuk, V. Stepanov (eds.), *Ètnopolitika Stran Baltii*, (Moscow: Nauka); D Kochenov and A Dimitrovs, 'EU Citizenship for Latvian "Non-Citizens": A Concrete Proposal' (2013) 38 *Houston Journal of International Law* 1.

[12] *Criminal proceedings against Ibiyinka Awoyemi*, C-230/97, EU:C:1998:521, para 29. Compare with the treatment of the same facts in *Skanavi and Chryssanthakopoulos*, C-193/94, EU:C:1996:70. Cf. C Hublet, 'The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?' (2009) 15 *European Law Journal* 757; CA Groenendijk, 'Citizens and Third-country nationals: Differential Treatment or Discrimination?' in JY Guild, E Coulie (eds.), *L'avenir de la libre circulation des personnes dans l'U.E.*, (Bruylant, 2006) 85; E Guild and S Peers, 'Out of the Ghetto? The personal scope of EU law' in S Peers, N Rogers (eds.), *EU immigration and asylum law: text and commentary*, (Leiden: Martinus Nijhoff Publishers, 2006) pp 110; P Boeles, 'Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?' (2005) 12 *Sociaal-Economische Wetgeving* 502; R Plender, 'Competence, European Community Law and Nationals of Non-Member States' (1990) 39 *ICLQ* 599.

[13] Hansen and Jonsson, *Eurafrica: the untold history of European integration and colonialism* (Bloomsbury academic, 2014); W Maas, *Creating European citizens* (Rowman & Littlefield, 2007); D Kochenov, 'EU Citizenship in the Overseas' in D Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (The Hague: Kluwer Law International, 2011).

[14] P Caro de Sousa, 'Quest for the Holy Grail—Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) 20 *ELJ* 499, p. 201; A Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *LIEI* 43; D Kochenov and R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37(4) *ELRev* 369.

[15] N Nic Shuibhne, 'Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen If the Polity Bargain Is Privileged?' in D Kochenov (ed.), *EU citizenship and federalism: the role of rights*, (Cambridge: Cambridge University Press, 2018); E Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through Its Scope' in D Kochenov (ed.), *EU citizenship and federalism: the role of rights*, (Cambridge: Cambridge University Press, 2018); D Kochenov, 'On Tiles and Pillars: EU Citizenship as the Federal Denominator' in D Kochenov (ed.), *EU citizenship and federalism: the role of rights*, (Cambridge: Cambridge University Press, 2018).

[16] Kochenov and van den Brink, See note 9 above.

bespoke lawlessness and arbitrariness, making sure that any rights owed to the 'other' – including dignity and not infrequently life itself – are rendered entirely ephemeral and unusable in practice.

The part of the spectrum which is the newest and most extreme in terms of its devastating effects, is thus focused on absolute legal marginalisation which at times results in the physical annihilation of racialised non-citizens in the border spaces: by the concerted efforts of the EU and its Member States as well as their foreign agents the Mediterranean has been transformed into a mass grave of humongous proportions.[17] The literature on the criminal nature of this transformation is growing.[18] *All* the rights on the books are denied on the basis of citizenship and race. The main tool here is what we term the 'lawlessness law'. The lawlessness law is a steadily evolving system of conscious legal arrangements purposefully aimed at removing any accountability and or enforceable rights claims from the totality of the liminal context when dealing with the racialised 'other' attempting to reach European soil from the former colonies of the EU,[19] or claim EU law rights, once settled in the Union.

The lawlessness law is very complex in its operation and is marked by a radical departure from the core values on which the Union and the Member States are said to be built, in particular the Rule of Law.[20] It operates through different tools, as we demonstrate, from

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[17] T Achiume, 'Racial Borders' (2022) 110 *Georgetown Law Journal* 445; T Achiume, 'Digital Racial Borders' (2021) 115 *AJIL Unbound* 333; S Munshi, 'Race, Geography, and Mobility' (2016) 30 *Georgetown Immigration Law Journal* 245.

[18] I Kalpouzos, International Criminal Law and the Violence against Migrants, 21(3) German Law Journal (2020); I Mann, 'Border Crimes as Crimes against Humanity' in C Costello, M Foster and J McAdam (eds) *Oxford Handbook for International Refugee Law* (2021); I Mann, The New Impunity: Border Violence as Crime (March 3, 2020). *University of Pennsylvania Journal of International Law*, Vol. 42 (Forthcoming). See also: Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute.

[19] The reports on EU and US citizens as well as the nationals of other 'Western' countries being pushed back at sea or imprisoned by the EU-sponsored Libyan thugs with the use of FRONTEX intelligence are very limited. The system is clearly designed to make EU law inapplicable to Africans and Asians from the 'global south'. For an exceptionally rare report of a French national being pushed back see, R Brito, 'From Turkish jail, French woman accuses Greece of "pushback"', (2022) *AP News*, Available at https://apnews.com/article/middle-east-france-prisons-greece-europe-1c58212ff10310deebae2b769d31e386. The Turkish ethnicity of the victim is an important part of the story showcasing the racialized nature of the crime.

[20] B Grabowska-Moroz and D. Kochenov, 'The Loss of Face for All Those Concerned: EU Rule of Law in the Context of the "Migration Crisis"' in V Stoyanova and S Smet (eds.), *Migrants' Rights, Populism and Legal Resilience in Europe*, (Cambridge: Cambridge University Press, 2022).

moving the EU's agreements with principled human rights implications outside the scope of EU law,[21] to setting up enormous intrusive and unaccountable funding schemes to establish, preserve and sponsor the export of rights violations outside the EU's borders,[22] as well as deploying FRONTEX, an EU agency,[23] to commit and cover up crimes, break the law and share vital intelligence with EU-sponsored thugs hunting the passport poor on the Union's behalf.[24] Torture, pushbacks and killing of thousands of innocent people – either directly or via proxies – happen in an atmosphere of near-total unaccountability and seemingly outwith the reach of the law of the Union. It is evident that the EU acts in concert with its Member States, rather than alone and this article chose to focus on the EU, rather than the Member States' side of the story, leaving it to the lawyers specialized

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[21] E.g. GF Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem', (2016) 1(3) *European Papers* 1097; R Lehner, 'The EU-Turkey-"deal": Legal Challenges and Pitfalls' (2018) 57(2) *International Migration* 176; E Kassoti and A Carrozzini, 'One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Asser Press/Springer, 2022), p. 237

[22] C Castillejo, 'The European Union Trust Fund for Africa: What Implications for Future EU Development Policy?' (2017) Briefing Paper 5/2017 (German Development Institute); Oxfam, The EU Trust Fund for Africa Trapped between aid policy and migration politics (2020) *Oxfam Briefing Note*, Available at https://policy-practice.oxfam.org/resources/the-eu-trust-fund-for-africa-trapped-between-aid-policy-and-migration-politics-620936/. C Molinari, 'Digging a Moat around Fortress Europe: EU Funding as an Instrument of Exclusion' in T De Lange, W Maas, and A Schrauwen (eds.), *Money Matters in Migration: Policy, Participation, and Citizenship* (Cambridge University Press, 2021). See also Urbina, see note 7 above.

[23] M Fink, *FRONTEX and human rights: responsibility in 'multi-actor situations' under the ECHR and EU Public Liability Law* (Oxford University Press, 2019), p. 3-4. (Fink discusses at length the question of responsibility of multi-actor situation involving FRONTEX (the joint operations more specifically)). See also: R Mugianu, *FRONTEX and Non-Refoulement. The International Responsibility of the EU* (Cambridge University Press, 2016); JP Kalkman, 'FRONTEX: A Literature Review' (2021) 59(1) *International Migration*; See also the contributions in the Verfassungsblog's current debate on FRONTEX and the Rule of Law Available at https://verfassungsblog.de/category/debates/FRONTEX-and-the-rule-of-law-debates/; M Gkliati and J Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations' (2021) 17(4) *Utrecht Law Review* 57.

[24] Joint investigation conducted by Bellingcat, Lighthouse Reports, Der Spiegel, ARD, and TV Asahi: Bellingcat et al., 'FRONTEX at Fault: European Border Force Complicit in "Illegal" Pushbacks' (23 october 2020), Available at https://www.bellingcat.com/news/2020/10/23/FRONTEX-at-fault-european-border-force-complicit-in-illegal-pushbacks/; Steffen Lüdke, Classified Report Reveals full Extent of FRONTEX Scandal, (29 July 2022) *OLAF*, Available at https://www.spiegel.de/international/europe/FRONTEX-scandal-classified-report-reveals-full-extent-of-cover-up-a-cd749d04-689d-4407-8939-9e1bf55175fd; Statewatch Border surveillance, drones and militarisation of the Mediterranean (2021), Available at https://www.statewatch.org/analyses/2021/border-surveillance-drones-and-militarisation-of-the-mediterranean/; J Sunderland and L Pezzani, *EU's Drone is Another Threat to Migrants and Refugees*, (2022) Human Rights Watch, Available at https://www.hrw.org/news/2022/08/01/eus-drone-another-threat-migrants-and-refugees; J Rijpma and M Vermeulen, 'EUROSUR: saving lives or building borders?', (2015) 24(3) *European Security* 454. See also, crucially, OLAF final report on FRONTEX, note 7.

in the national legal systems where EU's lawlessness law is active to scrutinize national law violations resulting from EU's lawlessness law deployment.[25]

The mildest – and the most constitutionally far-reaching – form of lawlessness law is what could be described as the EU's disappearance act: like a rabbit in the top-hat of a street clown, the EU usually disappears *as such* when a non-EU citizen enters the scene. It is the only 'citizens-only' constitutional system in the contemporary world. 'Thou shalt not oppress the stranger'[26] emerges as the opposite of the EU's core values. The story is not new in of itself, but the intensity of this Balibarian 'apartheid européen'[27] has grown significantly since J.H.H. Weiler bemoaned its first seeds being sown in the EU:[28] the fruit of the active cooperation between the Member States and the Institutions, with a particular emphasis on the Commission and ECJ initiating and rubberstamping lawlessness, and ensuring the secure and unaccountable flow of funds, is the lawlessness law determining the rightless position of the foreigner in the EU's legal system.

Most crucially – the lawlessness law is not a temporary or unusual departure from EU law. Rather, as the analysis below demonstrates, it *is* the law of the Union functioning as designed, intentionally breaking core principles of EU and international law and creating, precisely, exclusion from the most important elements of the law for the non-citizens inside the Union, as well as turning the boundaries of the Union – from the

[25] First such studies are already being published. See, e.g., G Baranowska, 'Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021', XLI *Polish Yearbook of International Law*, 2021.
[26] Exodus 23:9.
[27] É Balibar, *Nous, citoyens d'Europe ?: les frontières, l'État, le peuple* (Paris: La Découverte, 2001) pp 192.
[28] JHH Weiler, 'Thou shalt not oppress a stranger: on the judicial protection of the human rights of non-EC nationals - a critique' (1992) 3 *European Journal of International Law* 651.

Mediterranean[29] to Belarus,[30] into lawless places of death, torture and hopelessness for the citizens of a *particular set* of the former colonies. Tendayi Achiume is unquestionably right: 'first world' and its boundaries are deeply racialised: those drowning in the Mediterranean come strictly from the former colonies,[31] not from the US and Japan. Those tortured in the Białowieża forest are not 'Westerners' either:[32] the racism of EU's border violence and migration management more generally has been rightly emphasized in the literature[33] and remains an unquestionable given once the goals and the practical operation of EU's lawlessness law are scrutinized.

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[29] Already 14 years ago: Human Rights Watch, *Stuck in a Revolving Door: Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union* (2008), Available at https://www.hrw.org/report/2008/11/26/stuck-revolving-door/iraqis-and-other-asylum-seekers-and-migrants-greece/turkey; And more recently, Lighthouse Reports, *Aegean Pushbacks lead to Drowning* (2022), Available at:https://www.lighthousereports.nl/investigation/aegean-pushbacks-lead-to-drowning/; Human Rights Watch, *Greece: Investigate Pushbacks, Collective Expulsions* (2020), Available at:https://www.hrw.org/news/2020/07/16/greece-investigate-pushbacks-collective-expulsions; Amnesty International, *Greece: Violence, lies, and pushbacks – Refugee and migrants still denied safety and asylum at Europe's borders* (2021), Available at https://www.amnesty.org/en/documents/eur25/4307/2021/en/; Human Rights Watch, *FRONTEX failing to Protect People at EU Borders* (2021), Available at https://www.hrw.org/news/2021/06/23/FRONTEX-failing-protect-people-eu-borders; Border Violence Monitoring Network, *Special Report: Covid-19 and Border Violence along the Balkan Route* (2020), Available at https://www.borderviolence.eu/special-report-covid-19-and-border-violence-along-the-balkan-route/.

[30] Amnesty International Latvia, *see* note 6; Amnesty International Lithuania, *see* note 6; All the works of Jolkina in note 6; D Kochenov and B Grabowska-Moroz, 'The EU's Face in Łukašenka's Mirror' *VerfBlog* 26 April 2022. Available at https://verfassungsblog.de/the-eus-face-in-lukasenkas-mirror/.; G Baranowska, 'A Tale of Two Borders: Poland's continued illegal actions at its border with Belarus', (2022) *VerfBlog* 2022/3/10, Available at https://verfassungsblog.de/a-tale-of-two-borders/.

[31] OLAF final report on FRONTEX, note 7.

[32] Amnesty International Latvia, *see* note 6; Amnesty International Lithuania, *see* note 6.

[33] Achiume, See literature in note 17 above; See also S Mau et al, 'The Global Mobility Divide: How Visa Policies Have Evolved over Time', (2015) 41(8) *Journal of Ethnic and Migration Studies* 1192; U Erel, K Murji and Z Nahaboo, 'Understanding the contemporary race-migration nexus', (2016) 39(8) *Ethnic and racial studies* 1339; T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20(4) *European Journal of Migration and Law* 452; K de Vries and T Spijkerboer, 'Race and the regulation of international migration. The ongoing colonialism in the case law of the European Court on Human Rights' (2021) 39(4) *Netherlands Quarterly of Human Rights*' 291. See also MB Dembour, *When Human Become Migrants, Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press, 2015); S. Ganty, 'Silence is not (Always) Golden. A Criticism of the ECJ's Approach towards Integration Conditions for Family Reunification', (2021) 23(2) *European Journal of Migration and Law*.

The EU is a clear-cut example of the passport apartheid in action,[34] where citizenships[35] – i.e. blood-based statuses of attachment to public authority distributed by lottery at birth[36] – are taken particularly seriously. That citizenships predetermine the course of life for all of us to a great degree and vary immensely around the world in terms of their rights and liability contents, is not a new observation: the literature is growing on the rigid caste system which distinguishes the global aristocracy which possesses of 'super citizenships'[37] from the second and third tier nationality statuses, replacing rights with liabilities.[38] In a world where inequalities are spatialized,[39] citizenship, as the boundary-focused institution,[40] came to play a role as the key tool in the establishment and reinforcement of global inequalities.[41] The world's poor are locked into the formerly colonized spaces of no opportunity, while the world's super-rich – EU and US citizens, along with a few others – benefit from increasing inter-citizenship rights which radically amplify the opportunities they enjoy outside of the territory under the sovereign control of the authority which issued their citizenship in the first place.[42] The global operation of citizenship and migration law based on this blood aristocracy principle is truly harsh,[43] retracing the racialised prejudices and the divisions between the colonizers – such as the

[34] D Kochenov, 'Ending the passport apartheid. The alternative to citizenship is no citizenship—A reply' (2020) 18 *International Journal of Constitutional Law* 1525–30.
[35] D Kochenov, *Citizenship* (MIT Press, 2019).
[36] A Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009).
[37] Kochenov, See note 35 above, chap. Conclusion.
[38] Y Harpaz, *Citizenship 2.0: dual nationality as a global asset* (Princeton University Press, 2019); D Kochenov and J Lindeboom (eds.), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing, 2020); D Kochenov and J Lindeboom, 'Empirical Assessment of the Quality of Nationalities: The Quality of Nationality Index (QNI)' (2017) 4 *European Journal of Comparative Law and Governance* 314.
[39] B Milanović, *Global Inequality: A New Approach for the Age of Globalization*, (Harvard University Press, 2016).
[40] R Brubaker, *Citizenship and Nationhood in France and Germany*, (Harvard Univ. Press, 1992); C. Joppke, *Citizenship and immigration*, (Cambridge University Press, 2010).
[41] Milanović, See note 39 above; B Milanović, *Capitalism, Alone: The Future of the System that Rules the World*, (Harvard University Press, 2019); D Kochenov, 'The Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic' in D Kochenov, K. Surak (eds.), *Residence and Citizenship Sales: The Changing Boundaries of Belonging*, (Cambridge University Press, 2022 forthcoming).
[42] D. Kochenov, '"Interlegality – Citizenship – Intercitizenship"' in J Klabbers, G. Palombella (eds.), *The Challenge of Inter-Legality*, (Cambridge: Cambridge University Press, 2019) pp 133-135.
[43] Achiume, See note 17 above; M. Boatcă, 'Unequal Institutions in the Longue-durée: Citizenship through a Southern Lens' in D. Kochenov, K Surak (eds.), *Residence and Citizenship Sales: The Changing Boundaries of Belonging*, (Cambridge University Press, 2022); M Boatcă, *Global Inequalities Beyond Occidentalism* (Routledge, Taylor & Francis Group, 2016).

EU's Member States[44] – and the colonized.[45] The life chances of the victims of citizenship are undermined in a 'natural' setup of citizenship-based exclusion from dignity and rights: the overwhelming majority of the excluded happen to be the racialised former colonials. International and national migration and citizenship laws around the world, taken together, are there to ensure that improving one's life chances through legal migration is usually impossible,[46] and 'illegal' migration is severely punished, controlled and criminalised.[47] In contrast, the national constitutional systems tend to emphasise equality before the law, including to an increasing degree for resident non-citizens,[48] underlining again, the nationalist and territorialist nature of citizenship as a concept.[49] The EU's citizenship-based set-up, just as its lawlessness law, which is deployed at the Union's external border to safeguard the day-to-day operation of the apartheid européen, is thus in clear contradiction with the core constitutional principles of all of the Member States of the Union, which apply within the territorial confines of those legal systems.

This contribution is divided into five parts to provide a concise yet multifaceted overview of EU's passport apartheid and to map the core aspects of the EU's lawlessness law in action. Part one asks who the EU is for, and documents the near complete exclusion of non-EU citizens lawfully present in the EU from the fundamental freedoms, from EU-wide non-discrimination proclamations, as well as from the very idea of the European Union itself, with its territory, supranational rights in that territory and EU-wide law as

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[44] Hansen and Jonsson, See note 13 above.
[45] Boatcă, See note 43 above; de Vries and Spijkerboer, note 33 above; T Spijkerboer, 'Coloniality and Recent European Migration Case Law' in V Stoyanova and S Smet (eds.), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press, 2021); W Schinkel, 'Against "Immigrant Integration": for an End to Neocolonial Knowledge Production', (2018) 31(6) *Comparative Migration Studies* 31(6).
[46] The states of the Gulf remain a notable exception to this rule. Milanovic, See note 39 above, pp 149.
[47] Kochenov, note 41 above; W. Schinkel, See note 45 above; W. Schinkel, 'The imagination of "society" in measurements of immigrant integration' (2013) 36 *Ethnic and Racial Studies* 1142; A. Favell, 'Integration: twelve propositions after Schinkel' (2019) 7 *Comparative Migration Studies* 21; See also D Kochenov, '*Mevrouw de Jong gaat eten*: EU Citizenship and the Culture of Prejudice' (2011) *EUI Working Paper RSCAS* 2011/06. Cf. Sarah Ganty, *'L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'UE'*, (Larcier, Collect. Droit de l'Union européenne 2021).
[48] C Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 *European Journal of Sociology* 9.
[49] L Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2008); J Tully, *On Global Citizenship: James Tully in Dialogue* (Bloomsbury Publishing, 2014).

such. Indeed, the 'working-living space',[50] which the EU shapes through the area of freedom, security and justice is offered to 'citizens'[51] and is thus outlined on the basis of possession of a nationality of one of the Member States of the Union.[52] Part one equally explains how EU citizens could also exceptionally be excluded from the scope of EU law.[53] This part thus sets the scene for regarding the EU as a highly exceptional personhood – i.e. a blood-based – constitutional system, which entirely disappears as far as its core elements are concerned, from the life of virtually anyone with a non-European passport, no matter whether 'legal' or 'illegal' in the Union. Any passport, as a symbol of citizenship, is a personalised border between one's rights and liabilities, carried in one's pocket.[54] The EU, with all its rights and protections – the internal market and the dozens of thousands of pages of the *acquis* uniting 27 Member States and taking the citizen's side – only emerges, like in a fairy tale of wizardry and day-dreaming, if the colour of the passport you carry is the correct one: a deep burgundy. The EU's very existence as a consequential legal reality[55] depends on the status of personal attachment to a particular authority and is outlined on the basis of its *personal* rather than geographical scope. The EU is about 'its own': non-citizens are *en masse* outwith its law, which was also designed that way. The colonial origins and racist assumptions underpinning the original framing of the Union[56] are especially emphasised.

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[50] O Golynker, 'European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration' in A Halpin, V Roeben (eds.), *Theorising the Global Legal Order*, (Oxford: Hart, 2009) p 151.

[51] Art. 3(2) TEU: 'The Union shall offer *its citizens* an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (emphasis added).

[52] M van den Brink and D Kochenov, 'Against Associate EU Citizenship' (2019) 57 *JCMS: Journal of Common Market Studies* 1366–82; D Kochenov, 'EU Citizenship: Some Systemic Constitutional Implications' in N Cambien, D Kochenov, E Muir (eds.), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges*, (Brill, 2020).

[53] The personal scope of the law is never at issue, as soon as EU citizenship is in sight, while material is more complex: E Spaventa, 'Seeing the wood despite the trees? on the scope of Union citizenship and its constitutional effects.' (2008) 45 *CMLRev*. 13; D Kochenov, 'The Right to Have What Rights? EU Citizenship in Need of Clarification' (2013) 19 *European Law Journal* 502.

[54] M Keshavarz, *The Design Politics of the Passport: Materiality, Immobility, and Dissent* (Bloomsbury Visual Arts, 2019).

[55] P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 814.

[56] Hansen and Jonsson, See note 13 above.

Part two documents the situation of non-citizens of the EU outside the Union, thus moving to document the harshest areas of the lawlessness spectrum which the EU and the Member States build to make sure that the EU's passport apartheid knows no significant exceptions and works as designed: sharply excluding all the former colonials from any usable rights in the internal market and the Union as a whole. Only minimal exceptions apply, as we shall see. Several brief case-studies of lawlessness law in operation will offer vivid illustrations of the successes of lawlessness law as a lived experience of trauma, torture, alienation and loss. Against the background of the case-studies, the Part documents the proactive stance of the Union and the Member States in ensuring that the right to seek asylum or protection in the EU is turned into an unworkable proclamation, making our key point clear: EU lawlessness law exemplifies an instance when legality is deployed to annihilate the very essence of the Rule of Law and the protection of human rights.

Against this background the Parts that follow turn to the technicalities of EU lawlessness in operation, interested, in particular, in how international cooperation aimed at erasing rights and dehumanise the former colonials is organized by the EU (Part III); how billions of euros are spent in the absence of any accountability to fund the orgy of lawless violence installed by the Union and its Member States at its external borders – Part IV.

The last Part of the article offers a case-study of FRONTEX to show case the main techniques deployed by EU's lawlessness law to ensure that responsibility and accountability for grave violations of the law on the books remains ephemeral serving the needs of the unhindered operation of EU's passport apartheid.

The lawlessness law framing of the passport apartheid system at the heart of the EU's constitutionalism, rigorously applied inside and also outside the territory of the Union, is backed by a detailed analysis contained in the three parts. All the examples below, taken together, demonstrate that the EU is a deeply atypical constitutional system, in that it assumes that the core of its law should not apply to those who 'do not belong' by default, including the idea of the Union's as a territory of directly enforceable constitutional rights. This starting position, fetishising the personal status of legal attachment to the Union, makes the European integration project the best case study of passport apartheid in the world, since no other legal system is as explicit in excluding foreigners from the most

essential rights by default. The atypical nature of the Union on this count is significantly undertheorized and this paper aims to start bridging the gap between the reality of EU law and the numerous proclamations about the Union's equitable value-laden nature. Before we proceed a disclaimer is in order: our focus is not on irregular migration, return and detention *inside* the EU,[57] or at the border *per se*,[58] including locking people in inhumane conditions or the criminalizing migrants and refugees – a phenomenon known as crimmigration.[59] Although the edifice of EU lawlessness law unquestionably enters those areas, this is not the primary focus of what follows, as our aim is much more general: we demonstrate that Europe's passport apartheid backed by EU lawlessness law is among the constituent features of the EU legal order, running as a red thread from the organization of the internal market, the scope of EU law and the very idea of non-discrimination, to the mobilization of violence and lawlessness outside of the territory of the Union.

I. Who is the EU for? Between benevolence and indifference

The European Union as a constitutional system is poised to offer directly enforceable rights to its citizens, making such rights part of the citizens' 'legal heritage', if we recall *Van Gend en Loos*.[60] The core rights on offer from the very beginning amounted to the freedom of movement and the right not to be discriminated against on the basis of

[57] Cf, eg,, E(L) Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) 13 *EUConst* 471.
[58] V Mitsilegas, The EU external border as a site of preventive (in)justice (2022) *ELJ* 1, 15-17.
[59] See for instance: M van der Woude, V Barker & J van der Leun, Crimmigration in Europe (2017) 14(1) *European Journal of Criminology* 3; G Cornelisse and M Moraru, Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance (2022) 7(1) *European Papers* 127. For a rescent example, of crimmigration see: D Alvon, Quand les migrants victimes de passeurs sont jugés et condamnés à leur place, 14 November 2022. Available at: https://www.liberation.fr/idees-et-debats/editorial/quand-les-migrants-victimes-de-passeurs-sont-juges-et-condamnes-a-leur-place-20221114_KNVAT5ZTJRHGTJSCCEFXV7HX24/?utm_medium=Social&xtor=CS7-51-&utm_source=Twitter#Echobox=1668496967.
[60] *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62,1963 E.C.R.3.; C.f. D Kochenov, 'The Citizenship Paradigm' (2013) 15 *Cambridge Yearbook of European Legal Studies* 197.

nationality, which Gareth Davies believed *de facto* 'abolishes'[61] the nationalities of the Member States, as these can no longer be legally consequential within the scope of application of EU law (beyond establishing the bridge to EU citizenship, that is).[62] As designed, the Union was supposed to exclude from the free movement of persons the racialised colonials of the African part of Eurafrica[63] and other overseas possessions.[64] The pressure exerted on the UK to exclude its own colonial subjects with British documents from the scope of free movement rights is unquestionably a direct reflection of the same logic,[65] as was the ECJ's *Kaur* case law,[66] indirectly endorsing this racist policy, which left the UK condemned by the ECommHR,[67] at the expense of any inclusive interpretation of EU citizenship law.[68] The current Article 203 TFEU reminds us of those remote times.[69] The article allows the Council, acting unanimously, to conclude agreements aimed at introducing the free movement of workers with 'countries and territories'. Under 'countries and territories' the TFEU clearly refers to the entities

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[61] G Davies, '"Any Place I Hang My Hat?" or: Residence is the New Nationality' (2005) 11 *European Law Journal* 43.

[62] D Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' (2010) *EUI Working Paper* RSCAS No 2010/23.

[63] Hansen and Jonsson, See note 13 above (This book demonstrates beyond any reasonable doubt that the colonies would have been entirely excluded from the scope of the Treaties, thus making any talk of any freedom of movement moot, if not the forceful French position making the signature of the Treaty of Rome directly dependent on the support of the other founding EU Member States to the colonial project.); Cf. D. Custos, 'Implications of the European Integration for the Overseas' in D. Kochenov (ed.), EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis, (The Hague: Kluwer Law International, 2011).

[64] Kochenov, See note 11 above; For more on the territorial configuration at the time of inception of the integration project, See D Kochenov, 'The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon', 20(2) *Michigan State Journal of International Law*, 2012, 669; D Kochenov, HE Bröring and EH Hoogers, 'De Caribische koninkrijksgebieden en de Europese Unie. Over de status van UPG en LGO naar Europees recht' *26 TAR Justicia,* 2010, 10.

[65] The UK famously obliged, bringing two Declarations on nationality to exclude the absolute majority of its non-white subjects from the scope of application of European law via moving them outside the personal scope. Questionable form the point of view of EU law, the Declarations were fully endorsed (albeit indirectly) by the Court in *Kaur*, as will be discussed below. Cf. D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and a Difficult Relationship between Status an Rights' (2009) 15 *Columbia Journal of European Law* 169; G-R de Groot, 'Towards a European Nationality Law' (2004) 8 *Electronic Journal of Comparative Law* (unpaginated). Available at: http://www.ejcl.org/83/art83-4.html.

[66] *The Queen v. Sec'y of State for the Home Dep't ex parte Manjit Kaur*, Case C-192/99, 2001 E.C.R. I-1237.

[67] *East African Asians v. UK*, (Application. Nos. 4403/70 et al.) (1973) 3 E.H.R.R 76; .Cf. Anthony, Lord Lester of Herne Hill, 'Thirty Years On: The East African Case Revisited' (2002) *Public Law* 52.

[68] Kochenov, note 65 above.

[69] D Kochenov 'Article 203 TFEU' in M Kellerbauer, M Klamert, J Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, (Oxford University Press, 2019).

enjoying a special connection with Denmark, France, the Kingdom of the Netherlands[70] or (then) the United Kingdom, as explained in Article 198 TFEU.[71] What is special about those places is that the majority of them are inhabited by populations of predominantly non-European origin. No such agreements have been concluded, since contemporary interpretation of the nationalities of the Member States excludes the possibility of direct discrimination on the basis of race and ethnicity – something that the original Treaties, premised on the need to continue the colonisation project,[72] did not unequivocally frown upon.

The approach to the personal scope of European law at its inception was thus markedly colonialist and post-modern at the same time, as non-discrimination on the basis of nationality, were it to begin to operate, meant steadily undoing the constitutional essentials of the Member States. At the same time, however, the ideal 'European' which emerges during the early decades of European integration remains decidedly white.[73] Non-citizens are steeply excluded from the European legal order in its entirety, including EU citizenship, EU freedom of movement of persons and EU non-discrimination on the basis of nationality principle.

a) Principled exclusion of non-citizens from the European legal order

In addition to the racist-colonialist premises of the early free movement of persons law, the precise scope of the core internal market rights in Europe was not made clear from

[70] Which is not the same as 'the Netherlands', the latter being one of the three *landen* of the Kingdom, enjoying in the constitutional structure of the Kingdom the rights equal to those of two other *landen*: The Netherlands Antilles and Aruba. *See* HE Bröring, HG Hoogers and D Kochenov, 'Staatsrechtelijke consequenties van de toekenning van een UPG-status aan Aruba en de Eilandgebieden van de huidige Nederlandse Antille' (2011) 1 *Caribisch Juristenblad* 21.

[71] The full list of such 'countries and territories' is reproduced in Annex II to the TFEU. The special regime of association applies to such territories by virtue of Article 349 TFEU and Part IV of the TFEU. These should not be confused with the French overseas departments (*DOM*), the Azores, Madeira and the Canary Islands, to which the provisions of the TFEU apply in full but with possible derogations by virtue of Article 349 TFEU. For a detailed analysis of the differences in application of EU law to the territories mentioned in Annex II TFEU and those enjoying a special status under Article 349 TFEU. S*ee* D Kochenov, 'The Application of EU Law in the EU's Overseas Regions, Countries, and Territories' note 64 above.

[72] As rooted in the Schuman Declaration.

[73] Hansen and Jonsson, See note 13 above.

the very beginning and took its contemporary shape as a result of a complex evolution, which made the resulting EU citizenship both less racist than its original 'free movement of persons' counterpart, and more orthodox at the same time, in that all non-citizens, no matter how stable their legal status in the Member States would be, ended up being excluded by default from the rights enjoyed by EU citizens, with only a handful of limited exceptions. The result is a supranational law which is essentially unavailable as far as the most important rights are concerned, either in whole or in part, to anyone not in possession of EU citizenship, while at the same time, open to the idea of not discriminating on the basis of race among those who are in possession of this status. Consequently, a change in citizenship from European to a non-EU (think of Brexit, for instance)[74] results, in the absolute majority of cases, in the sudden and compete disappearance of the whole operation of the most essential elements of the European legal order vis-à-vis the non-citizen, even if the latter is permanently settled in the EU.[75]

The treatment of foreigners in the EU deteriorated significantly from the moment Étienne Balibar diagnosed the situation of third-country nationals in the EU as 'une population infériorisée en droits, donc aussi en dignité'.[76] Indeed, it is essential to make a clear connection between the Balibarian apartheid diagnosis that predated the worst – torture and killings en masse – and the very rationale underpinning of the EU legal system's engagement with the persons excluding non-citizens from core rights virtually from the start of the European integration project. It requires a clear intention that the law is not for the foreigner to rely upon, for the Union to progress from denying the foreigner dignity to pushing her back into the open sea. The question of how far this framing of the 'other' is a birth defect of the EU as opposed to a foundational feature by design is open and will need further research. EU's colonial origins and the potentially racist first steps in its law on personhood point strongly towards a systematic denigration of the former colonials *by design*, emerging in the day-to-day operation of the EU's lawlessness law, aimed at

[74] D Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in C Closa (ed.), *Troubled Membership: Dealing with Secessions from a Member State and Withdrawals from the Union* (Cambridge: Cambridge University Press, 2017).
[75] *Criminal proceedings against Michelle Ferrer Laderer*, Case C-147/91, 1992 E.C.R. I-4097, para 7.
[76] Balibar, See note 27 above, p. 192.

removing foreigners from the former colonies from the realm of rights and to make them invisible in the eyes of the EU legal system. It is a short step from taking away dignity and personhood to taking life itself.

Importantly, while citizenship is a usual 'natural' justification for differentiated treatment,[77] the inferiorisation at issue does not merely concern exclusion from certain rights reserved uniquely for citizens. Rather, it is about applying an entirely different legal reality to third-country nationals. A legal reality based on the misrepresentation of European law and politics, diminishing the importance of the European Union vis-à-vis its Member States. The denial of the achievements and the most foundational aspects of the construction of the constitution of the Union in Europe in the context of dealing with foreigners is a cynical exercise which contributes a great deal to othering and humiliation. J.H.H. Weiler is right: 'Nationality as referent for interpersonal relations, and the human alienating effect of Us and Them are brought back again, simply transferred from their previous intra-Community context to the new inter-Community one. We have made little progress if the Us becomes European (instead of German or French or British) and the Them becomes those outside the Community or those inside who do not enjoy the privileges of citizenship'.[78] The context of exclusion has only intensified since the publication of Professor Weiler's analysis in the *Yale Law Journal* more than 30 years ago.

The central element to all European approaches to third-country nationals (barring EEA and Swiss nationals) and their direct EU law rights consists in pretending that the European Union is simply not there for them. What is at stake is a consistent approach to the EU's own achievements and the new legal-political reality being brought to life in Europe. The Balibarean 'apartheid européen' thus works in a much more sophisticated – and consequently problematic – way than simply denying citizenship rights to non-citizens. While the latter is any citizenship's core function – this is a legal status delimiting the boundary of exclusion; the former has to do with the core underlying factors of law in Europe.

[77] Kochenov, *Citizenship*, See note 35 above.
[78] JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale L.J.* 2403, p. 2481.

Consequently, third-country nationals are *never* in possession of the same rights as EU citizens in the EU, no matter how secure their settlement status in a particular Member States. Non-EU citizens will mainly possess EU rights stemming from three sources: derivative rights through a family connection with an EU citizen, but also via the company they work for;[79] international agreements concluded by the Union and the Member States with the third countries of nationality – especially the EEA, EU-Swiss and EU-Turkey agreements;[80] or a common immigration and asylum policy since the entry in force of the Treaty of Lisbon.[81] The immigration and asylum secondary law includes the long-term resident status enshrined in Council Directive 2003/109/EC created as a watered-down response to the Tampere European Council Presidency Conclusions;[82] the family reunification status which provides its beneficiaries with derivative rights and is based on

[79] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) [2004] OJ L 158. It is worth noting that some derivative rights for third-country nationals can also result from employment relationship with a company using its right to provide services in the Member State other than its own (*Raymond Vander Elst*, C-43/93, EU:C:1994:310, paragraph 21; *Rush Portuguesa Lda*, C-113/89, EU:C:1990:142, paragraph 12; *Seco SA and Desquenne and Giral*, 62 and 63/81 [1982] ECR 223); Kochenov and Van den Brink, see note 9 above. For instance, the ECJ has recently judged that 'third country nationals, who temporarily reside and work in different Member States in the service of an employer established in a Member State, may rely on the coordination rules laid down by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for Regulation No 883/2004, in order to determine the social security legislation to which they are subject, provided that they are legally staying and working in the territory of the Member States' (*Balandin*, C-477/17, ECLI:EU:C:2019:60).

[80] Relevant agreements with a number of countries have been concluded. The most important of them are:
- Association Agreement with Turkey (Ankara Agreement) and an additional protocol to it [1963] OJ 3687; [1977] OJ L361/1; Customs Union with Turkey [1996] OJ L 35.
- Euro-Mediterranean Agreement establishing an Association with Algeria [2005] OJ L 265); Egypt [2004] OJ L 304; Israel [2000] OJ L 147); Jordan [2002] OJ L 129); Lebanon [2006] OJ L143); Morocco [2000] OJ L 70); Tunisia [1998] OJ L 97.
- Interim Association Agreement with the Palestinian Authority [1997] OJ L 187).
- The EEA Agreement [1997] OJ L1/1).
- EC – Switzerland Agreement [2002] OJ L114/6.
- Stabilisation and Association Agreements with Macedonia [20004] OJ L 84/13) Albania [2009] OJ L 107/166) Bosnia and Herzegovina [2008] OJ L 1689/13) Montenegro [2010] OJ L 108/3) Serbia [2010] OJ L 28/2).

[81] Articles 79(1) and 78(1) TFEU.

[82] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (Text with EEA relevance) [2009] OJ L 263.

family connections either with an EU citizen or with a third-country national settled in the EU;[83] status based on sectoral legislation i.e. student, researcher or worker (including highly-skilled and seasonal workers);[84] and finally third-country nationals who benefit from a refugee or a subsidiary protection status.[85]

The number of overlapping statuses for non-citizens of the Union forms a highly complex web of entitlements and obligations,[86] creating a picture of astounding sophistication.[87] As a result, after excluding non-citizens benefiting from EU rights indirectly via a family or company, the EU as a single legal system and the internal market as a territory of opportunity only exist for third-country nationals under international agreements with the EEA countries and with Switzerland. The rest of the EU framework that purports to tackle non-citizens' rights is nothing but an integral part of the Union's 'disappearance act': it is all about the Member States and the rights in the territory of the Member States, excluding the idea of the EU in principle.

Not only non-citizens are excluded, however, as plenty of Europeans who cannot establish a connection with the internal market – following the dominant judge-created orthodoxy – are also excluded from a significant share of rights, most notably from non-discrimination on the basis of nationality[88] (at least until they move, if they can). The

[83] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251

[84] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2016] OJ L 132; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94; 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.

[85] 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.

[86] P Eleftheriadis, 'Citizenship and Obligation' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012) 159; D Kochenov, 'EU Citizenship without Duties' (2014) 20 *ELJ* 482.

[87] Kochenov and van den Brink, See note 9 above.

[88] A Tryfonidou, *Reverse Discrimination in EU Law* (Kluwer Law International, 2009); D Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2010) 08/10 *Jean Monnet Working Papers (NYU Law School).*

personal scope of the EU as a constitutional system is thus truly complex[89] and, atypically for a modern constitutional system, neo-feudal in nature,[90] in that the application of EU law to a concrete individual depends on the individual's personal life history – travel, education, family connections – rather than the status of nationality per se. The idea of equality before the law thus emerges as a truly ephemeral promise.[91] Most importantly, the idea of travel across the boundaries between the Member States evolved into one of the key activators of rights, showcasing the arbitrary and ethically and morally untenable premises of EU citizenship as a legal status.[92] Indeed, this is merely the 'law of taking a bus':[93] no crossed border (no matter whether real or ephemeral) amounts to a disqualification from rights, while crucial building blocks of the internal market are removed from the scope of the political by the very set up of the Union.[94]

Recent hopes for the re-articulation[95] of the scope of the law along more equitable and at least to some extent justifiable lines have not materialised.[96] Without going into details which are not relevant to this paper, the course which emerges leads away from granting key primary rights to many EU citizens,[97] and none at all to third-country nationals at the level of the Union as a whole. The former colonials, who would be strictly excluded under

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[89] Spaventa, see note 15 above; Caro de Sousa, See note 15 above.
[90] D Kochenov, 'Neo-Mediaeval Permutations of Personhood in the European Union' in L Azoulai, S Barbou des Places and E Pataut (eds.), *Constructing the Person: Rights, Roles, Identities in EU Law* (Oxford: Hart Publishing, 2016).
[91] A Somek, *Knowing What the Law Is: Legal Theory in a New Key*, (Oxford: Hart Publishing, 2021); Kochenov, See note 66 above.
[92] Kochenov, See note 13 above.
[93] Ibid.
[94] GT Davies 'Social Legitimacy and Purposive Power' in Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart, 2015); Somek, 'Europe: Political, Not Cosmopolitan' (2014) 20 *ELRev* 142. For a crucial broader context, see, JHH Weiler 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in C Closa and D Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).
[95] D Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18(1) *Columbia Journal of European Law* 55; S. Platon, 'Le champ d'application des droits du citoyen européen après les arrêts Zambrano, McCarthy et Dereçi' (2012) 48 *RTDEur*. 21; M. van den Brink, 'EU Citizenship and EU Fundamental Rights' (2012) 39 *LIEI* 273; M Hailbronner and S Iglesias Sánchez, 'The European Court of Justice and Citizenship of the European Union' (2011) 5 *Vienna Journal of International Constitutional Law* 498.
[96] H Kroeze 'Distinguishing between Use and Abuse of Free Movement Law' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges*, (Leiden/Boston: Brill-Nijhoff, 2020); D Kochenov, See note 43 above.
[97] O'Brien, *Unity in Adversity*, See note 4 above; O'Brien, 'I Trade Therefore I Am', note 2 above.

the original thinking behind the Eurafrica project, *are* granted rights, however, as long as they can present an EU passport.[98] That said, racialized '*alochtonous*' Europeans of colonial origin can be stripped of EU citizenship more easily, as part of the Court's turn against multiple citizenships.[99]

b) EU citizenship and non-nationals of the Member States

EU citizenship, as *ius tractum* (or derivative) status,[100] is intimately connected with the nationalities of the Member States, as one cannot acquire an EU citizenship status without possessing such a nationality. However, we should remember that the exclusion of third-country nationals from EU citizenship was not a given in early 1990 and that before Maastricht, the European Parliament had defended a citizenship status which would be independent from the nationalities of the Member States, and open to third-country nationals.[101]

The wording of the crucial Treaty provisions on the intrinsic relationship between EU citizenship and the nationalities of the Member States can potentially mislead. Notwithstanding that fact that Article 9 TEU states that 'every national of a Member State shall be a citizen of the Union',[102] the meaning of 'nationality' in this provision is not

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[98] Even some political rights are granted in the former colonies still connected to the Union: *Eman and Sevinger*, C-300/04, EU:C:2006:545.

[99] Next to EU citizenship such individuals usually hold sub-standard unrenounceable citizenship statuses by birth, which are used by EU Member States against them, in order to fascilitate the stripping of these individuals of their Member State nationality and all rights in the EU. The Court of Justice finds the persecution of dual nationals lawful, without focusing on the racial undertones of the questionable policy without any demonstrable aim. Cf. D Kochenov and D de Groot, 'Helpful, Convoluted, and Ignorant in Principle: EU Citizenship in the Hand of the Grand Chamber in *JY*' (2022) 47 *ELRev* 699; K Swider, 'Legitimising Precarity of EU Citizenship: *Tjebbes*' (2020) 57 *CMLRev* 1163; D de Groot 'Free Movement of Dual European Citizens' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges* (Leiden/Boston: Brill-Nijhoff, 2020); D Kochenov, 'The *Tjebbes* Fail' (2019) 4 *European Papers* 319; D Kochenov, 'Dual Nationality in the EU: An Argument for Tolerance' (2011) 17 *ELJ* 323.

[100] Kochenov, note 65 above.

[101] Magnette, *La citoyenneté europeenne*, See note 3 above; D Kostakopoulou, 'European Union citizenship and member state nationality: rethinking the link?' in S Konopacki (eds.) *Europe in the Time of Crisis* (Wydawnictwo Uniwersytetu Łódzkiego, 2014); J Shaw (et. al), 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law? ' (2011) *EUI Working Paper RSCAS* 2011/5; J d'Oliveira, 'Case C-135/08 *Janko Rottman v. Freistaat Bayern* Case Note 1' (2011) 7 *EUConst*. 138.

[102] *Rottmann*, C-135/08, EU:C:2010:104. Cf. D Kochenov, 'Annotation of *Rottmann*' (2010) 47 *CMLRev* 1831.

defined at EU level and is a sovereign competence of the Member States to establish.[103] In *Kaur* the ECJ clarified, albeit indirectly, that the Member States are free to create special categories of nationals, which would not benefit from EU citizenship.[104] Latvia has *de facto* – but not *de jure* – benefited from this possibility by making sure that its 'non-citizen' status of legal attachment to the Republic, which is reserved for ethnic minorities, is not connected to the status of EU citizenship.[105] The Court recognised the validity of the unilateral limitations implied in distinguishing 'nationality' from a 'nationality for Community purposes' in the Declarations appended by some Member States, most notably Germany and the UK, to the Treaties.[106] As a consequence, only 'nationals for the purposes of Community law' became EU citizens, codifying a problematic approach of *de facto* racist exclusion introduced in order not to extend supranational-level rights to racialised colonials with formal legal links to the UK.[107] The question remains open whether persons belonging to the category of nationals for the purposes of supranational law should be Member State nationals at all. The historical examples established by the first UK Declaration seems to point towards the fact that such a nationality is not required: non-UK nationals fell within the category of 'nationals for the purposes of Community law' based on the UK Declaration.[108] While the whole idea of taking such

[103] *Rottmann*, C-135/08, EU:C:2010:104; *Micheletti*, C-369/90, EU:C:1992:295; *Kaur*, C-192/99, EU:C:2001:106; S Hall, 'Determining the Scope ratione personae of European Citizenship: Customary International Law Prevails for Now' (2001) 28 *LIEI* 355.
[104] *Kaur*, C-192/99, EU:C:2001:106.
[105] Kochenov and Dimitrovs, See note 9 above.
[106] Kochenov and van den Brink, see note 9 above; Treaty of Accession to the European Communities of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, 1st U.K. Declaration [1972] OJ L 73. It was later updated upon the entry into force of the 1981 British Nationality Act. See, e.g., G-R de Groot, note 65 above; AC Evans 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981' (1982) 2 *YEL* 173, p. 189; KR Simmonds, 'The British Nationality Act 1981 and the Definition of the Term "National" for Community Purposes' (1984) 21 *CMLRev* 675. See also AG Toth, 'The Legal Status of the Declarations Attached to the Single European Act' (1986) 23 *CMLRev* 803 (on the legal effect of declarations in EU law).
[107] Those excluded were exactly the (former) citizens of the UK and colonies excluded uniquely on the ground of race, as the European Commission of Human Rights has found, making the first decision of the European human rights protection system unequivocally finding race discrimination by a participating state against a large chunk of its citizens: See note 57 above; Instead of changing the racist practice, the UK opted for solidifying the exclusion back then, giving all those discriminated against second-rate passports reserved for non-white former colonials: I Tyler, 'Designed to Fail' (2010) 14 *Citizenship Studies* 61.
[108] 1st UK Declaration point (a). Cf. de Groot, note 65 above.

Declarations seriously provoked scholarly criticism,[109] after *Kaur* this is the law.[110] What if a third-country national could fully fall within the personal scope of EU law?[111] In any case, reproducing the division between 'Us' and the 'Them' would mean that, in the words of Andrew Evans, 'the integration processes which both structure and are structured by Community law have failed to achieve the fundamental objective of a "frontier-free Europe" for persons'.[112] EU citizenship is thus narrower, at least in theory, than the nationalities of the Member States, excluding all non-nationals, but the scope of rights stemming from EU law is narrower still.

c) The scope of free movement rights in the EU

Before the formal inclusion of the status of European citizenship into the text of the Treaties at Maastricht, the European Economic Community Treaty was silent about which categories of persons residing in the territory of the European Communities[113] could benefit from Community workers' free movement and residence rights,[114] and to transfer this right to derivative categories of recipients.[115] The 'informal *acquis*' on the matter – a set of practices and unwritten rules – was growing fast, however.[116] Since there was no reference to the requirement to possess a Member State nationality in the Treaties, 'the Treaty could be [and should have been] interpreted in such a way as to cover all the workers legally resident in the Union, not only those in possession of the Member State's nationality for Union law purposes',[117] as one of us argued alongside Martijn van den Brink. Yet the first regulations on workers' free movement as interpreted by the ECJ

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[109] R Plender, 'An Incipient Form of European Citizenship' in Francis G Jacobs (ed), *European Law and the Individual* (North Holland, 1976) p 39. See also Kochenov and Plender, See note 14.
[110] *Kaur*, EU:C:2001:106.
[111] Kochenov and van den Brink, see note 9 above.
[112] A Evans, 'Third-country nationals and the Treaty on European Union' (1994) 5 *EJIL* 199, p. 201; Kochenov and van den Brink, see note 9 above.
[113] This concept used to be contested, but for no good reason. Cf. Kochenov, 'The Application of EU Law in the EU's Overseas Regions, Countries, and Territories' note 64 above.
[114] Maas, See note 13 above.
[115] Ibid; C.f. Kochenov and Plender, See note 14.
[116] A Wiener, *"European" Citizenship Practice – Building Institutions of a Non-State* (Westview Press, 1997); MJ Elsmore and P Starup, 'Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy' (2007) 26 *YEL* 57.
[117] Kochenov and van den Brink, See note 9 above.

adopted a very narrow view of the Treaty, by considering the possession of a Member State nationality as a *conditio sine qua non* for benefiting from the freedom of movement in the territory of the Communities.[118] Some authors have been particularly critical of this approach, which could be regarded as 'inconsistent with the goals of the Common Market'[119] as Michael Becker put it. There seems to be no rational economic reason for the borderless Market not to recognise the freedom of movement of EU citizens and third-country nationals alike.[120] A worker is a worker, inventing borders specifically for the category of workers with a particular set of passports while they contribute to the internal market project in the same way as other Europeans seems irrational, to say the least. And indeed, some other freedoms are more aligned with the officially stated goals of the internal market, it would appear: the free movement of goods, in one example, applies to all the goods legally in the territory of the Union.[121] Services provide the contrary example, however. The Court provided a literal interpretation of the relevant restrictive Treaty provision early on:[122] a Member State nationality was essential to benefit from this type of free movement.

The abolition of border controls following the entry into force of the Single European Act could have pushed the then Communities to reconsider the approach towards the freedom of movement for third-country nationals, but no step was made in that direction. In fact, the adoption of EU citizenship less than a decade later set in stone the link between freedom of movement and EU citizenship, i.e. the possession of a nationality of a Member State of the Union.[123] Member States clearly do not trust each other as far as 'foreigners' go, while the Court pushed them to ensure that the mutual recognition of each other's

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[118] Ibid.; Cf Kochenov and Plender, See note 14 above.
[119] MA Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals' (2004) *Yale Hum Rts and Dev* 132, p. 138; Cf. Evans, note 112 above.
[120] G Blanke and A MacGregor, 'Free Movement of Persons within the EU: Current Entitlements of EU Citizens and Third-country Nationals – A Comparative Overview' (2002) 8 *IntTrLRev* 173. See also, M Hedemann-Robinson, 'Third-Country Nationals, 'European Union Citizenship, and Free Movement of Persons: a Time for Bridges rather than Divisions' (1996) 1 *YbEUL* 321; T Hoogenboom, 'Integration into Society and Free Movement of Non-EC Nationals' (1992) 3 *EJIL* 36.
[121] Article 29 TFEU. The ECJ also includes in the products of other Member States for taxation purposes, products legally imported from the third countries (Article 110 TFUE) e.g. *Cooperativa Co-Frutta Srl.*, C-193/85 EU:C:1987:210.
[122] *Criminal proceedings against Michelle Ferrer Laderer,* See note 65 above.
[123] Article 20 and Article 21 TFEU.

nationalities is not questioned.[124] The result is a situation where the Member States are free to make whatever nationals they like out of any available human material they see as useful, and are bound to respect each other's choices of new citizens,[125] but not their residence permits, even permanent,[126] at least not for the purposes of the virtually unconditional settlement which would be the standard required by EU's free movement of persons rules. The territory of the Union as a single space where fundamental rights and protections are offered to all those settled in the territory does not exist, therefore, for those who are not in possession of a Member State passport, no matter how much time they spent in the Union and however permanent their stay in the territory of one of the Member States. EU free movement law as designed is absolutely blind to these people.

d) The scope of non-discrimination on the basis of nationality in the EU

Non-discrimination on the basis of nationality[127] and the freedom of movement evolved hand-in-hand. The link between the two is so intricate that it can be found in the provisions of the Treaties related to other freedoms.[128] Indeed, it is settled case law that discrimination on grounds of nationality is liable to restrict freedom of movement.[129] As is the case with the free movement of persons and its personal scope limitations, non-

[124] *Mario Vicente Micheletti et al. v. Delegación del Gobierno en Cantabria Case*, C-369/90, 1992 E.C.R. I-4239. See, for a bigger picture, HU Jessurun d'Oliveira, 'Union Citizenship and Beyond', in N Cambien, D Kochenov, and E Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill-Nijhoff, 2020), p. 28.

[125] HU Jessurun d'Oliveira, 'Golden Passports: European Commission and European Parliament Reports Built on Quicksand', in D Kochenov, M Sumption and M van den Brink (eds), *Investment Migration in Europe and the World: Current Issues* (Oxford: Hart Publishing), 2023. The Commission and the European Parliament have called for ignoring this rule on a number of occasions, but so far without any success: D Kochenov, 'Policing the Genuine Purity of Blood: The EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union', 25(1) *Studies in European Affairs*, 2021, p. 33–62; D Kochenov and E Basheska, 'It's All about the Blood, Baby!' *COMPAS Working Paper* (Oxford University) No. 162 (2022).

[126] D Acosta Arcarazo, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership' (2015) 21 *ELJ* 200.

[127] Article 18 TFEU; G Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003); Boeles, See note 12 above.

[128] Free movement of workers: Article 45 TFEU; Free movement of goods: Article 36–37 TFEU; Free movement of capital: Article 65(3) TFEU; Free movement of services: Article 61 TFEU.

[129] *Raugevicius*, Case C-247/17, EU:C:2018:898, para 27-28; *TopFit, Daniele Biffi*, C-22/18, EU:C:2019:49, paras 29 and 44.

discrimination on the basis of nationality has been consistently blocked by the Court from applying to non-citizens in the absence of direct Treaty text providing to this end.

Like the EU free movement of persons law, the Treaties contain no list of nationalities to which the non-discrimination norm would be applicable and every good reason exists – as outlined by Pieter Boeles years ago[130] and developed by others[131] – to extend this prohibition to cover all nationalities for all settled foreigners. Living a dignified life in the Union is not a border control applicable at the point of entry.[132] To do this would move the EU closer to the leading democracies around the world, which do not draw any citizenship-based distinction in their treatment of settled foreigners with respect to the majority of their laws.[133] Indeed, the same is true within the EU, at the Member State level, both by virtue of EU and national law: discrimination against non-citizens – at least sufficiently settled – is not ok.[134] So far, this basic standard remains wishful thinking, however, at the level of the Union as a whole, even though the Treaties again do not prohibit – albeit also do not mandate – an interpretation consistent with the mainstream international standards, also respected by the Member States.

Indeed, equal treatment has always been at the heart of the European integration project – since the Treaty of Rome was signed in 1957 – as Sir Richard Plender recalled in 1976, evoking 'an incipient form of European citizenship'.[135] Initially, the principle of non-discrimination on grounds of nationality mainly concerned foreign companies, labour

[130] Boeles, note 12 above.
[131] Ibid.; See also literature cited in note 12 above.
[132] Boeles, note 12 above.
[133] Ibid.
[134] D Kochenov 'Growing Apart Together: Social Solidarity and Citizenship in Europe' in F Pennings and G Vonk (eds.), *Research Handbook on European Social Security Law*, (Edward Elgar, 2015); AP van der Mei, 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State' (2005) 7 *European Journal Migration and Law* 203, p. 210; M Bell 'The Principle of Equal Treatment: Widening and Deepening' in P Craig et G. de Búrca (dir.), *EU Law. Text, Cases, and Materials* (Oxford, OUP, 2010); O de Schutter, 'Interdiction de discriminer envers les étrangers et obligation d'intégration par le droit' in J. Ringelheim (ed), *Le droit et la diversité culturelle* (Bruxelles, Bruylant, 2011). See E Brouwer and K de Vries, 'Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach', in M van den Brink, S Burri et J Goldschmidt (eds.), *Equality and human rights : nothing but trouble?* (Utrecht, SIM, 2015).
[135] R Plender 'An Incipient form of European Citizenship' in FG Jacobs (ed), *European Law and the Individual*, (Amsterdam, North Holland, 1976).

migrants and imports.[136] As recalled by Chloé Hublet, 'it is a condition sine qua non for the creation of a common market among the various European states which have ratified the Treaty of Rome, that neither the nationality of individuals, nor the national origin of goods, services or capital, should be pertinent criteria for the development of this market'.[137] The Treaty of Maastricht moved this provision into Part One of the EC Treaty, which dealt with general principles, ahead of Part Two dealing with the citizenship of the Union. Maastricht thereby codified the previous *acquis* without formulating it too restrictively, leaving the door open to an extensive interpretation.[138] In this context, some scholars and Advocates General called for the extension of the scope of what is now Article 18 TFEU to include third-country nationals,[139] as well as reverse discrimination against EU citizens.[140]

The formal link between EU citizenship and prohibition of non-discrimination on grounds of nationality became steadily more clearly articulated over time at the expense of any expansive interpretation to include non EU nationals.[141] The *Herren der Verträge* moved non-discrimination on grounds of nationality into Part II TFEU on 'non-discrimination and citizenship of the Union' of the Treaty of Lisbon. Yet the question remains how far this move restricts the potential application of Article 18 TFEU to non-citizens of the Union, especially in light of the wording of Article 18 TFEU. Eventually, the ECJ gave a very narrow interpretation of Article 18, limiting it to mobile EU citizens[142] – exactly what Sir Francis Jacobs argued for in his oft-cited *civis europaeus sum* Opinion in *Kostantinidis*.[143] The limited *ratione materiae* – reduced to the scope of application of the Treaties – and *ratione personae* scope – only mobile EU citizens – of Article 18 TFEU

[136] M Bell, note 134 above.
[137] C Hublet, note 12 above.
[138] Kochenov and Plender, See note 14 above, p. 372.
[139] Hublet, note 12 above; Groenendijk, note 12 above, p. 85; Guild and Peers, note 12, p. 110.
[140] Opinion of the Advocate General Sharpston in *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, C-434/09, EU:C:2010:560, para 144.
[141] EU Commission, Fourth Report on Citizenship of the Union, (2004) COM 695 final, p. 8, para 3(2).
[142] E.g. *Athanasios Vatsouras and Josef Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, para 42.
[143] Opinion of Advocate General Jacobs in *Christos Konstantinidis v Stadt Altensteig*, C-168/91, EU:C:1992:504. D Kochenov 'Civis Europaeus Sum Thirty Years on: The Opinion of AG Jacobs in Konstantinidis' in G Butler and A Łazowski (eds), *Shaping EU Law the British Way: UK Advocates General at the Court of Justice of the European Union* (Oxford: Hart Publishing, 2022).

reflects nothing more than 'the straightjacket of a market integration rationale', to put it in Mark Bell's words.[144] Article 21(2) CFR, which also prohibits discrimination on grounds of nationality, could have been interpreted as applicable to third-country nationals, especially in light of the corresponding right in Article 14 ECHR,[145] especially Article 14 of the ECHR. The ECJ, however, drew an equation sign between the scopes of Articles 18 TFEU and 21(2) CFR.[146] The restrictive application of the provision significantly reinforces the formal exclusion of third-country nationals from the European integration project.

Under secondary legislation, third-country nationals who are long-term residents within the meaning of the relevant Directive enjoy, as per Article 11 of the Directive, equal treatment in the context of several potential grounds of discrimination, including for access to employment and self-employed activity,[147] education and vocational training, social security, social assistance and social protection, tax benefits, access to goods and services. Nonetheless, this right can be restricted and general non-discrimination on the basis of nationality is nowhere in sight, as we have seen. Member States may limit equal treatment in respect of social assistance and social protection to core benefits,[148] interpreted in light of Article 34 CFR at the discretion of Member States,[149] but only if the Member States, when implementing the Directive, 'have stated clearly that they intended to rely on that derogation'.[150] In this regard, the Court made clear that should the benefit not be considered as a 'core benefit' and if the State had already explicitly stated its intention to derogate from the right to equal treatment regarding that benefit, the conditions for the allocation of that benefit, such as proof of the possession of a basic

[144] Bell, note 134 above, 612.
[145] To be taken into account given Article 51(3) CFR.
[146] *X*, C-930/19, EU:C:2021:657.
[147] The Commission sued Hungary for failing to fulfil its obligations under Art. 11(1)(a) of Directive 2003/109 by not admitting TCNs who are long-term residents as members of the College of Veterinary Surgeons, which prevents those TCNs from working as employed veterinarians or exercising that profession on a self-employed basis. Only after the Commission brought this case to the ECJ, Hungary took the necessary measures to fulfil its obligations (See *Commission v. Hungary,* C-761/19, ECLI: EUC:2021:74).
[148] Article 11(4) of Directive 2003/109. See also: *Kamberaj*, C-571/10, para 90 and 91 and *Land Oberösterreich*, C-94/20, para. 38.
[149] *Land Oberösterreich* C-94/20, paras 39 and 44.
[150] *Kamberaj* C-571/10, para 87.

command of German imposed on long term residents and not on nationals, 'come within the scope of the powers retained by the Member States, without being governed by that directive or coming within its scope'.[151] As a consequence, discrimination on the basis of nationality remains the rule, showing that even the equal treatment clause is often subjected to the principle that discriminating against non-EU citizens on the basis of nationality is absolutely fine.[152]

The principle of equal treatment in Article 20 CFR is unable to mitigate the absence of protection against discrimination on grounds of nationality: humiliating 'integration tests', unthinkable in the case of EU citizens and serving no identifiable purpose besides entrenching the exclusion of the non-citizen, are routinely imposed on settled third-country nationals. The practice of such tests received the blessing of the ECJ – as long as the punishment for 'failing' the test is strictly limited – 'the situation of third- country nationals is not comparable to that of nationals as regards the usefulness of integration measures' and as a consequence 'the fact that the civic integration obligation at issue in the main proceedings is not imposed on nationals does not infringe the right of third-country nationals who are long-term residents to equal treatment with nationals, in accordance with Article 11(1) of Directive 2003/109'.[153] Discrimination on the basis of nationality in the EU is the rule in the case of the third-country nationals in the EU.

The absence of protection against discrimination on grounds of nationality has even been used to reduce the scope of protection of other fundamental freedoms for third-country nationals, especially discrimination on grounds of racial or ethnic origin, as recent developments regarding Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [154] – the so-called Race Directive[155] – and Article 21(1) CFR demonstrated. In *Kamberaj* for instance, the ECJ

[151] *Land Oberösterreich* C-94/20. Another preliminary ruling regarding equal treatment of long-term residents regarding the access to basic income is currently pending in case, C-112/22.
[152] Schinkel, See note 45 above; Favell, See note 39 above; Ganty, See note 47 above; Kochenov, '*Mevrouw de Jong*', note 47 above.
[153] *P&S*, C-579/13, EU:C:2015:369; Ganty, note 47 above.
[154] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 No. L180.
[155] U Belavusau and K Henrard, *EU Anti-Discrimination Law Beyond Gender,* (Oxford: Hart, 1st ed, 2018).

considered that the difference in treatment between long term residents and nationals regarding housing benefits was based on grounds of nationality and not race or ethnic origin and was therefore not part of the scope of Directive 2000/43.[156]

What is crucial is that by humiliating third-country nationals by *de iure* excluding them from dignity and equality in the context of EU supranational law by default, the Union unquestionably undermines its own citizenship to a great degree: no democratic status of equals can exist in a Union alongside a cast of second-rate human beings who are invisible, even only in theory, in the context of the continental law. Observing similar injustices in the context of Germany, Michael Walzer has rightly concluded that 'tyrant citizens'[157] are also depriving themselves of dignity by installing caste injustice, excluding through othering many of those living with them. EU citizens also emerge as such tyrant citizens: the highest caste in a layered arrangement of personhood, honest justification of which on moral and ethical grounds is unavailable.

It is thus indispensable to turn to the analysis of the EU law rights, which some third-country nationals possess within the EU, in order to paint a fuller picture of the EU's lawlessness law, premised on the Balibarian axiom of citizenship-based apartheid. That the difference between different kinds of third-country nationals is understood according to the basic premise that different nationalities of the world are of radically different quality,[158] emerges immediately: the rights that 'other' Europeans get in the EU are incomparable to the rights that the former colonials get in the EU. Worse still, the rights that citizens from predominantly 'white' countries get in the EU are radically different from the rights that the citizens of racialised spaces get in the EU: whatever the logical reasons and justifications advanced for this might be, we cannot but observe that the EU law of persons is unequivocally racist.[159] This fact is not only reflected in the push-back

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[156] *Kamberaj*. As confirmed later in *Land Oberösterreich*, paras 58 and 59, as well as *Jyske Finans A/S*, C-668/15, EU:C:2017:278; Cf. K. de Vries, 'Woontoeslag voor langdurig ingezeten derdelanders; beperkte definitie rassendiscriminatie. Noot bij HvJEU 10 juni 2021, C-94/20 (*Land Oberosterreich*)' (2021) 18 *European Human Rights Cases Updates*.

[157] M Walzer, *The Spheres of Justice* (Basic Books, 1983) Chapter 2.

[158] Cf. Kochenov and Lindeboom, See literature in note 38.

[159] If this is a consolation, any law of an affluent Western democracy reflects the same divide. Indeed, this is the core sign of the global passport apartheid: the EU is not an exception, it reflects the rule: Kochenov,

statistics and the bestial death toll at the EU's external frontiers,[160] but also in the treatment of refugees: blond Ukrainians have a radically different legal framework applied to them compared with all other peoples fleeing similar catastrophes at home.[161] Moreover, while Ukraine's crisis is not the EU's doing, many Member State of the EU took active part in the unlawful occupations of Iraq, the useless war in Afghanistan, the destabilisation of Libya and Syria, and now mistreat the desperate refugees from those places at their own borders.[162] Although Poland, Denmark, Italy, the Netherlands and Spain as well as the Baltic States occupied Iraq and are thus directly co-responsible for the misery the occupation created, the refugees from there are not blond enough to be helped in the EU. EU law for the whites is different from EU law for the racialised former colonials.

II. EU's lawlessness law: From ignoring to killing the other

The most extreme side to the EU's passport apartheid is the treatment of the racialised former colonials who are non-citizens at the EU's borders and further afield. Here the EU does not simply leave the other unnoticed, following the othering pattern applied to the third country nationals within the territory of the internal market. Instead of simply making the non-citizen non-existent in the eyes of the law, the Union aims to destroy, in the case of the former colonial passport poor from the least affluent regions of the world, their dignity, humanity and rights. Outside the territory of the Union, the Union enslaves, tortures and kills by proxy[163] in an atmosphere of carefully articulated near-absolute lawlessness greenlighted by the Court of Justice and paid for by significant and

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See note 34 above; Achiume, 'Racial Borders', See note 17 above; M Boatcă, *Global Inequalities*, note 43 above.

[160] European Council for Refugees and Exiles, *Central Med: Death Toll Continues to Rise on the Busiest Sea Route to Europe*, (2022) Available at https://ecre.org/central-med-death-toll-continues-to-rise-on-the-busiest-sea-route-to-europe/#:~:text=Between%20August%202021%20and%20January,death%20toll%20continues%20to%20rise; UN News, *Deaths at sea on migrant routes to Europe almost double, year on year*, (2022) Available at https://news.un.org/en/story/2022/04/1117292.

[161] Eg Baranowska, *see* note 6; C Costello and M Foster, '(Some) refugees welcome: When is differentiating between refugees unlawful discrimination?' (2022) 22 *International Journal of Discrimination and the Law*, 244.

[162] Eg Jolkina, 'Trapped in a Lawless Zone', *see* note 6 (*ResearchGate* and *VerfBlog*).

[163] See the literature cited in note 10 above.

unaccountable transfers of the EU's public funds. The crucial element in the production of lawlessness is EU law itself, which operates in this context as a lawlessness law. EU lawlessness law aims at successfully establishing a system of sophisticated tools to assault and dispossess of rights the former colonial non-citizens at the border, exclude any responsibility and deploying legality to create lawlessness and the complete annihilation of rights for the racialised non-Europeans from the former colonies. The essential aim of the EU's lawlessness law is to disconnect the very idea of the Rule of Law from the treatment of the non-citizens outside of EU's territory. This is done through an active production of lawlessness by the ECJ and the Commission, as well as other institutions with the full participation and in full knowledge of the Member States.

The lawlessness law makes sure that any 'other' lucky enough to get close to the EU will not just be a non-person in eyes of the EU integration project – which is the standard apartheid européen in action as described by Balibar and Weiler; instead, the other will be drowning in the sea or dying of cold and beatings in the forests at the EU-Belarusian border, in an atmosphere where to endure is against the law, as the lawlessness law simply denies all, including the most fundamental rights which shape today's EU legal order, as well as the ECHR and international law. The lawlessness law has one mantra: 'we are not to blame' and the ECJ, as well as the other EU institutions and the Member States work together to ensure that there is no law to protect the racialised other. This is achieved by unleashing its own police force,[164] FRONTEX[165] or EU-funded proxy militias in the lawless spaces[166] to operate with complete impunity by law: legality is thereby presented as safeguarded and helps the destruction of the Rule of Law. The Commission sends

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[164] See, eg, Baranowska, See note 6 above; Jolkina, see note 6 above (all her works listed); See also, M Giuffrè, 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24(4) *International Journal of Refugee Law* 692; V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control' (2020) 21 *GLJ* 385.

[165] See literature in note 23 above.

[166] Urbina, note 7 above. See for instance: CNN, 'Migrants being sold as slaves' (2017) Available at http://edition.cnn.com/videos/world/2017/11/13/libya-migrant-slave-auction-lon-orig-md-ejk.cnn; MSF, 'Italy-Libya agreement: Five years of EU-sponsored abuse in Libya and Central Mediterranean' (2022), Available at https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean; Oxfam, 'An emergency for whom? The EU Emergency Trust Fund for Africa – migratory routes and development aid in Africa' (2017) *Oxfam Briefing Note*, Available at https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-emergency-for-whom-eutf-africa-migration-151117-en_1.pdf.

unequivocal signals that 'suspending' rights is fine,[167] while the case-law fails to capture the systemic nature of the assaults on the rights across all the frontier,[168] when it does not actively contribute to the deployment of legality against the Rule of Law. This is done through the creation of emergency regimes around borders,[169] construing agreements attacking the rights of non-citizens as not falling within the scope of the law[170] and making sure that the EU money funding the thugs drafted by the Union to commit atrocities on EU's behalf is not subjected to rigorous accountability standards,[171] while presenting as not officially occurring the sharing of intelligence,[172] and empowering the enslavement and kidnapping of non-citizens for ransom as well as their torture and killing.[173]

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[167] Press release: European Commission, 'Asylum and return: Commission proposes temporary legal and practical measures to address the emergency situation at the EU's external border with Belarus' (2021), Available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6447. The Commission has proposed a package of several measures including a Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland (COM(2021) 752 final,); a proposal to amend the Schengen Code (COM(2021) 891 final) as well as a proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum (COM(2021) 890).

[168] Singling out Hungary to say that push-backs are not ok, while the Commission all but 'authorises' this behavior in the Baltic States and Poland creates a deeply problematic and misleading picture. To mislead the public is one of the core aims of lawlessness law. See *Commission v. Hungary*.

[169] Eg See the Polish (extension) of the temporary ban on staying at the border with Belarus: Ro Zporządzenie Poz. 488, w sprawie wprowadzenia czasowego zakazu przebywania na określonym obszarze w strefie nadgranicznej przyległej do granicy państwowej z Republiką Białorusi, Ministra Spraw Wewnętrznych I Administracji, (1 marca 2022), Available at https://www.dziennikustaw.gov.pl/D2022000048801.pdf; See also the Latvian law to return to Belarus irregularly without formal return procedures any person who has crossed irregularly Latvia borders: Order No. 518 Regarding the Declaration of Emergency Situation, (10 August 2021) Republic of Latvia, Available at https://likumi.lv/ta/en/en/id/325266-regarding-the-declaration-of-emergency-situation.

[170] Statement of the EU Heads of State or Government, 07/03/2016, (8 March 2016) Available at https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/; and European Council, EU-Turkey statement, (18 March 2016) Available at https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/; Cf. sub-Part a) below. See also: *NF v European Council,* ECJ: T-192/16, EU:T:2017:128; B Schotel, 'The EU-Turkey Statement and the Structure of Legal Accountability' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Asser Press/Springer, 2022), p. 73; E Cannizzaro, 'Denialism as the Supreme Expression of Realism—A Quick Comment on *NF v. European Council*' (2017) 2 *European Papers* 251

[171] Oxfam, note 166; See also: European Court of Auditors, 'European Union Emergency Trust Fund for Africa: Flexible but lacking focus' (2018) *Special Report n°32*, p. 4; T Spijkerboer and E Steyger. 'European External Migration Funds and Public Procurement Law' (2019) 4(2) *European papers* 493.

[172] See, Statewatch, note 24 above; D Deibler, 'EUROSUR – A Sci-fi Border Zone Patrolled by Drones?' in J Camenisch, S Fischer-Hübner; M Hansen, *Privacy and Identity Management for the Future Internet in the Age of Globalisation* (Springer, 2015).

[173] Urbina, note 7 above. See also: OHCHR & UNSMIL, Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya, (2018)) 58–59, Available at . https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf.

FRONTEX, the air force of Libyan thugs[174] drafted by the EU to crush non-citizens, is thus officially not to blame and can hide itself from weak if not fake human rights due diligence standards.[175] The EU kills in defence of its *de facto* foundational value: the passport apartheid. Its law is there to make sure that it should not be reproached: we only build prisons and provide boats, guns and intelligence hinting at whom to hunt at sea – the doing of the deeds is not us. This is lawlessness law in action. The EU thus deploys the legal arsenal at its disposal to create an atmosphere of absolute lawlessness and the delusion of responsibility, while playing a central role in what is happening to the non-citizens attacked for no wrongdoing. Let us consider three sets of examples of what is going on, before analyzing EU lawlessness law in some more detail.

a) Example no. 1: 'Can you imagine that they died while I was holding them?'

'We were in the water for 13 hours. They were alive with me right up to the last hour. After that I could do no more. Can you imagine that they died while I was holding them? I don't understand why I didn't die with them.'[176] Mohammed, 31, is Syrian. On September 10, 2022, he boarded a boat in Tripoli with his wife, Shifaa, 30, and their two children – a 9 months old Asem and a 5 year-old Abdulwahab, as well as eighty other refugees. Italy was the final destination: 'I took the family with me because I wanted to give them a better future'.[177] Their engine stopped working near the Greek island of Rhodes: 'we knew that the journey entailed a risk, but we thought we would get help if we got into trouble at sea'.[178] Instead of providing any help, masked Greek coast guard officers came on board only to violently beat up all the passengers and rob them: they took their bags, money and

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[174] See I Urbina's talk on EU Citizenship Apartheid at Yale Law School European Law Association on 29 April 2022 speaking about the air power of the Libyan thugs. The recording is available here: https://www.theoutlawocean.com/appearances/yale-law-school-a-reconceptualization-of-the-mediterranean-migrant-crisis/.
[175] C Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21, *GLJ* 459.
[176] Mohamed testimony is available on TV2 website via the following link: https://www.tv2.no/nyheter/dei-kasta-oss-i-doden/15154260//.
[177] Ibid.
[178] Ibid.

mobile phones (the Greek coastguard denied all of this, but the testimonies are always very similar). After a few hours all the refugees were forcibly put into four inflatable life rafts: 'They tried to throw us to death. They took us down in the life raft. They then turned their boat around and drove around us to make waves so that we would sink'.[179] All the eighteen people in Mohammed's raft were in the water within a few minutes. The waves were high and the water was cold. Mohammed tried to keep the children above the water while he clung to the raft: "we started swallowing water. I managed to revive my youngest son nine times. I sucked the water out of his mouth and spit it out'.[180] There were other children and people who could not swim. When the Turkish rescue arrived after 13 hours, eleven people had drowned, among them, Shifaa, Asem and Abdulwahab.

A year earlier, Sidy Keita, 36, from the Ivory Coast and Didier Martial Kouamou Nana, 33, from Cameroon were killed in similar circumstances. Sidy left his country after participating in protests against President Alassane Ouattara and Didier, a mechanic, hoped to join his brother who had been living in France since 2014.[181] On 15 September 2021, they both boarded a dinghy from a place near Kusadasi on the Turkish coast. They wanted to reach Greece. There were 36 other people with them. The dinghy arrived on the shore of Samos very early in the morning. 28 people, among them children and a pregnant woman, were intercepted by the authorities who beat them and brutalized them (including internal physical search for the pregnant woman), punched them in the face and in the stomach, robbed them all their belongings. All the 28 intercepted people were crammed onto two rafts and pushed towards the Turkish waters. A baby was violently thrown into a raft 'as if they were throwing a garbage can'.[182]

Sidy and Didier, who managed to flee along with six others were intercepted later on the road by Greek police officers: after being stripped off of all their belongings, they were loaded on a speedboat and driven out to sea. After half an hour, the coastguards beat them

[179] Ibid.
[180] Ibid.
[181] K Fallon, 'It's an atrocity against humankind': Greek pushback blamed for double drowning', *The Guardian*, 17 February 2022. Available at: https://www.theguardian.com/global-development/2022/feb/17/its-an-atrocity-against-humankind-greek-pushback-blamed-for-double-drowning. See also: Lighthouse Reports, 'Aegean Pushbacks Lead to Drowning, 17 February 2021'. Available at : at:https://www.lighthousereports.nl/investigation/aegean-pushbacks-lead-to-drowning/.
[182] Ibid.

before pushing them into the water one by one. Neither Sidy, nor Didier could swim: they both drowned, their bodies were found a few days later on the Turkish shore. Didier left a wife and two children. His body was repatriated to Cameroon thanks to the savings of his brother while Sidy's body was buried in Izmir because his family did not have enough money to bring his body back to the Ivory Coast.

Push-backs by Greek Coast Guard, in full knowledge and with the complicity of FRONTEX, became business as usual over the last years only to intensify since 2020.[183] It is reported that between January 1st, 2020 and November 17, 2022, 48,425 people (and a total of 1823 boats) were pushed back from the Greek islands into Turkish waters.[184] The *modus operandi* is well-documented and consistently applied by Europeans:[185]people are picked up by the Coast Guard, violently robbed of their belongings and thrown in rafts or directly into the water. Videos of such practices are abundant and publicly available.[186] Hellenic authorities systematically lie,[187] while FRONTEX, boasting full knowledge of the killings, if not assisting them, buries its head

[183] ECRE, Greece: Systematic Pushbacks Continue by Sea and Land as MEPs Demand EU Action, Deaths Up Proportionate to Arrivals, Number of People in Reception System Reduced by Half – Mitarachi Still Not Satisfied, 30 September 2022. Available at: https://ecre.org/greece-systematic-pushbacks-continue-by-sea-and-land-as-meps-demand-eu-action-deaths-up-proportionate-to-arrivals-number-of-people-in-reception-system-reduced-by-half-mitarachi-still-not/.

[184] The data are available on the following website: https://datastudio.google.com/u/0/reporting/1CiKR1_R7-1UbMHKhzZe_Ji_cvqF7xlfH/page/A5Q0.

[185] There are increasing proves of these atrocious practices and of the complicity of Frontex, including interviews with witnesses, anonymous testimonies of Greek officials, leaked classified documents, satellite imagery, social media accounts and online video as well as investigations by NGO's and journalists. See for instance the recent report of the UN Office of the High Commissioner for Human Rights, Nowhere but back: Assisted return, reintegration and the human rights protection of migrants in Libya, 11 October 2022. Available at https://www.ohchr.org/en/documents/reports/nowhere-back-assisted-return-reintegration-and-human-rights-protection-migrants.

[186] See for instance: https://www.tv2.no/nyheter/dei-kasta-oss-i-doden/15154260/.
See also: https://twitter.com/ABoatReport/status/1571628093059772418 and more generally the videos and evidence uploaded on the website of the *Aegan Boat Report* organisation: https://aegeanboatreport.com/.

[187] ECRE, Greece: Systematic Pushbacks Continue by Sea and Land as MEPs Demand EU Action, Deaths Up Proportionate to Arrivals, Number of People in Reception System Reduced by Half – Mitarachi Still Not Satisfied, 30 September 2022. Available at: https://ecre.org/greece-systematic-pushbacks-continue-by-sea-and-land-as-meps-demand-eu-action-deaths-up-proportionate-to-arrivals-number-of-people-in-reception-system-reduced-by-half-mitarachi-still-not/; R. O'Keeffe, Mitarachis lies – again – about deaths in the Aegean, Koraki, 22 September 2022. Available at: https://www.koraki.org/post/mitarachis-lies-again-about-deaths-in-the-aegean

in the sand.[188] The recent OLAF Report demonstrates that FRONTEX relocated its aerial forces to different operational areas of activity in order to avoid witnessing incidents in the Aegean Sea implying obvious fundamental rights violations, including killings by Greek authorities,[189] thereby helping impunity.

b) Example no. 2: 'Then they entered the prison with a stick and were beating people like animals'

Yambio David is from South Sudan. He left his country in 2016 to flee the civil war. In 2019 he tried to cross the Mediterranean, but was intercepted by the Libyan 'Coast Guard' – a quasi-military organization equipped and trained by the European Union in the aftermath of the Libyan civil war. Yambio was captured and sent to a camp in Misrata – one of the fifteen recognized detention centers in Libya some of which the EU helped to build[190] – a 'concentration camp', as Yambio describes it, where he spent several months in inhuman conditions for committing no crime: 'What I experienced in Libya is unimaginable, unspeakable. I survived so much violence.'[191]

Yambio is one among thousands of migrants of having experienced atrocious conditions in Lybian camps.[192] Like him, Aliou Candé, 28, from Guinea-Bissau was brought to the prison of Al Mabani on February 5, 2021, where about fifteen hundred innocent people kidnapped from the sea are held indefinitely on no charges. Inmates, collected from the sea by EU-equipped thugs take turns sleeping on floor pads – three prisoners per square meter – and are beaten and tortured with electric shocks by the guards for no apparent reason. Children and women are raped by guards or subjected to other forms of sexual

[188] N Waters, E Freudenthal, Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks, Bellingcat, October 23, 2020. Available at: https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegalpushbacks/#:~:text=Vessels%20from%20the%20European%20Border%20and%20Coast%20Guard,Der%20Spiegel%2C%20ARD%20and%20TV%20Asahi%20has%20found.
[189] OLAF final report on FRONTEX, note 7.
[190] Cf. Urbina, note 7.
[191] J Dumont, Sur les réseaux sociaux, Refugees in Libya "donne une voix" aux migrants détenus en Libye, *Infomigrants*, 2 November 2022. Available at http://www.infomigrants.net/fr/post/44425/sur-les-reseaux-sociaux-refugees-in-libya-donne-une-voix-aux-migrants-detenus-en-libye (our translation).
[192] Ibid.

violence. Prisoners (men and women) are sold into forced labour, some are killed. There is no access to clean water and only one toilet per hundred prisoners is made available. Suffering from all kinds of medical conditions, including skin diseases, is rampant. 'Unimaginable horrors' is the characterization given to the conditions of the captures by the UN High Commissioner for Human Rights.[193]

In the absence of any procedural guarantees innocent people are deprived of liberty and enslaved for an indefinite period of time. Freedom can be bought for twenty-five hundred Libyan dinars (more or less five hundred dollars), but it implies to have a family who can afford such a ransom and Aliou's family could not.[194] On September 13, 2019, he left his eight-month pregnant wife, in search for a better life. When he was caught by the Libyan 'Coast Guard', the boat was seventy miles away from Tripoli, out of Libyan waters but still within the Libyan Coast Guard's 'expanded jurisdiction'. Ian Urbina retells the story well: 'Around 5 p.m. on February 4th [2021], the migrants noticed an airplane overhead, which circled for fifteen minutes, then flew away. Data from the ADS-B Exchange, an organization that tracks aviation traffic, show that the plane was the Eagle1, a white Beech King Air 350 surveillance aircraft leased by FRONTEX. (The agency declined to comment on its role in the capture.) About three hours later, a boat appeared on the horizon. [...] Everyone started crying and holding their heads, saying, "Shit, it's Libyan."'[195]

Many migrants never make it to the Libyan detention centers: sometimes Libyan 'Coast Guard' fire on the migrant boats as well as the Western ships conducting humanitarian operations, revealing the actual motives of the 'Guard', which have nothing to do with saving people. It is thus no surprise that fatal shooting against migrants are reported on a regular basis.[196] The only task, which the EU pays for is to ensure that noone reaches

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[193] UNSMIL/OHCHR, Desperate and Dangerous: Report on Human Rights Situation of Migrants and Refugees in Libya, 18 December 2018, available at: https://unsmil.unmissions.org/sites/default/files/libya-migrationreport-18dec2018.pdf. See also: RFI, MSF suspends work in Libyan detention centers in protest over violence, 27 June 2021. Available at https://www.rfi.fr/en/africa/20210627-msf-suspends-work-in-libyan-detention-centers-in-protest-over-violence-migration-doctors-without-borders.

[194] Urbina, note 7.

[195] Ibid.

[196] See, eg, UNICEF Libya Flash Update 1: Migrant raids and detention, 4 October 2021. Available at https://reliefweb.int/report/libya/unicef-libya-flash-update-1-migrant-raids-and-detention-4-october-2021.

Europe's shores and impunity is the rule. As Ian Urbina explains, 'migrants are disappearing into "unofficial" facilities run by traffickers and militias, where aid groups have no access'.[197] Sometimes, prisoners are released if they accept to come back to their country of origin, like Lamin from Gambia: 'They brought me to a prison. But even at that point I didn't think about going back. Then they entered the prison with a stick and were beating people like animals. Sometimes they would take your money and good clothes. They broke my teeth. So I accepted return'.[198] And indeed, accepting assisted return is often the only way 'to escape an environment of impunity, abusive detention conditions, threats of torture, ill-treatment, sexual violence, enforced disappearance, extortion, and other human rights violations and abuses'.[199] 'I have lost all the money my family collected to pay my journey [...] I was beaten and lost one eye in a prison. Now, I am back to 'phase zero' with only debts and nightmares', explains Mamodou.[200]

Yambio eventually made it to Italy in June 2022 and since then endlessly speaks out about the bestial conditions of migrants in the hands of the EU's proxies in Libya[201] maintaining the lawlessness law on the ground. As for Aliou, he did not survive his stay at Al Mabani. One night in April, a scuffle occurred in his cell. After laughing and cheering for three hours instead of offering help, the guards fired into the cell for 10 minutes, Aliou was struck in the neck and died within 10 minutes.[202] Crimes against humanity, in the words of the UN Human Rights Office of the High Commissioner,[203] are on-going. The EU, together with the Member States is the architect of the bestial system of violence

[197] Urbina, note 7.
[198] UN Office of the High Commissioner for Human Rights, Nowhere but back: Assisted return, reintegration and the human rights protection of migrants in Libya, 11 October 2022. Available at https://www.ohchr.org/en/documents/reports/nowhere-back-assisted-return-reintegration-and-human-rights-protection-migrants.
[199] Ibid.
[200] Ibid.
[201] Dumont, note 191 above. He is behind the Twitter, Instagram and Facebook accounts refugees in Lybia among others: https://twitter.com/RefugeesinLibya
[202] Urbina, note 7. See also: MSF, Libya: One dead and two injured in shooting in Tripoli detention Center, 9 April 2021. Available at: https://www.msf.org/people-dead-and-injured-following-libya-detention-centre-shooting
[203] UN Office of the High Commissioner for Human Rights, Nowhere but back: Assisted return, reintegration and the human rights protection of migrants in Libya, 11 October 2022, p. 5. Available at https://www.ohchr.org/en/documents/reports/nowhere-back-assisted-return-reintegration-and-human-rights-protection-migrants.

spreading all across the Mediterranean Sea and generously paid for by European money.

c) *Example no. 3: 'The commandos were beating us a lot with electric shocks, and it is something you cannot imagine'*

Mohamed, who is from Iraq, approached the Latvian Border from Belarus on 13 August 2021 with a group of other refugees.[204] He was accompanied by his wife and kids. The Latvian authorities refused to let them enter Latvia or apply for asylum. On the eighth day in front of the border, in the forest, without food and supplies they were forcibly transferred by unidentified commandos to a site with two tents in the woods:[205] 'Latvian authorities transferred people to tents upon apprehending them at the border, kept them in the tent overnight until the early morning, and then forcibly returned them' into the 'limbo between the two countries until a new apprehension by Latvian forces'.[206] Amnesty International explains that people were repeatedly and violently shuffled back and forth between Latvia and Belarus.[207]

Mohamed and his family were unsure about what would happen to them: 'for two months it was not clear where we would be based because sometimes we were in the border and it was like football; they were just shooting us to different places and for 26 days we were in a tent which was under control of Latvian Government in the forest'.[208] In fact, these tents are nothing but detention centers with restrictions to move inside or outside: they are outposts for daily unlawful forced returns to Belarus.[209] Mohamed recounted:

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[204] Amnesty International Latvia, *see* note 6. Mohamed has been interviewed by Amnesty International in May 2022. The other testimonies come from the same report. See also: Jolkina, 'Legalising Refoulement', note 6.
[205] Amnesty International Latvia, *see* note 6, 29.
[206] Ibid., 26-27.
[207] Over 6,500 people have been deterred from crossing the Latvia-Belarus border irregularly since 10 August 2021 and as of 7 March 2022, only 143 individuals have been allowed entry into Latvia from Belarus according to Latvian authorities: available at https://www.rs.gov.lv/lv/jaunums/7-marta-noversts-10-cilveku-meginajums-nelikumigi-skersot-latvijas-baltkrievijas-valsts-robezu.
[208] Amnesty International Latvia, *see* note 6, 27.
[209] Ibid, 23.

'Around the tent, at all times, there were three to four black buses with commandos. [...] They were there so that we don't move, don't run, we don't do any bad things.'[210] The conditions in the woods described by the refugees were unbearable: the tents were overcrowded, with no basic hygiene, as the only toilet was a hole in the ground, no proper food (they were fed with rice crackers and cookies) etc. Moreover, they had no possibility to communicate with the outside world because their personal items, including phones, were confiscated or intentionally damaged.

Hassan, a young man from Iraq, who spent five months in the forest at the border sheds more light on the atrocities committed by European authorities at EU's land border: 'They forced us to be completely naked without underwear. Sometimes they beat us when naked, then they forced us to cross back to Belarus, sometimes having to cross a river which was very cold. They did not care that it was winter, and we had to enter the cold water. They forced us threatening us with machine guns, saying they would shoot us if we didn't cross. Once they made us cross through a lake when it was snowing and covered in ice. One of us felt that the ice was not enough to hold us, and he fell in the water, we spent one hour to take him out.'[211] It was mainly Commandos officers, who were identified as perpetrators of violence and abuse, even though border guards also committed acts of violence. Latvian Commandos torturing people in the forest in the absence of the law constitute an unidentified special force in black gear, armed and with covered faces and are different from Latvian border guards and the army, but cooperate with them.[212] Adnan a Kurdish man from the Kurdistan Region of Iraq spent over two months at the border since October 2021: 'They were...kicking me in the legs, with electric things, long sticks. They hit me so much I fell on the ground, I felt so much pain and I felt nothing at the same time. They hit me all over my body, I was screaming and shouting. They said if you don't want to go back, we will hit you so much that we will force you to.'[213]

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[210] Ibid.
[211] Ibid., 34.
[212] Ibid., 18.
[213] Ibid., 32. A case is currently pending before the ECtHR, *H.M.M. and Others v Latvia*, Application no. 42165/21, 3 May 2022. According to the allegations against Latvia 'The pushbacks to Belarus continued until some of the applicants were allegedly forced to agree to be removed to Iraq. Those applicants who so

Despite Amnesty international reports, NGOs and independent researchers denouncing the intolerable situation in the Belarussian Forest, the European Commission never criticized mass passport apartheid violence at the Belarusian border in direct breach of the law, rather giving its blessing to racist lawlessness.[214] The role of FRONTEX in violations of fundamental rights in the Belarussian Forest has been quite unclear. FRONTEX was clearly present in Latvia,[215] even, before the state of emergency and certainly took active part through a return counselling expert deployed at Latvia's request.[216] Amnesty International is also clear on the fact that Human rights violations documented at the Latvian-Belarusian Border 'appear to have taken place in areas where FRONTEX is operational, including at border locations where FRONTEX patrolling officers were deployed, and in detention facilities where the agency has access, including through its return expert'.[217] After two months spent in the frozen woods, Mohamed and his family were transferred to detention facilities in inland Latvia where he was repeatedly harassed and threated because he refused to sign for a voluntary return to Iraq.[218] He tried to denounce the violence he, his family and fellow refugees have been repeatedly victim of over a Court hearing, but the judge answered it was none of his business.[219]

d) EU lawlessness law as a violation of the Rule of Law

The lawlessness law has been quite effective, given how complex its justifications and indeed how lawless its objectives are. Its effectiveness can be proven by the fact that the EU has consistently denied any *reality* of the lawlessness it has so laboriously created in close cooperation with the Member States, not merely accountability or responsibility for

agreed were allowed to enter Latvia and were removed to Iraq without their asylum claims having been registered and reviewed by the Latvian authorities.'

[214] Press release: European Commission, 'Asylum and return: Commission proposes temporary legal and practical measures to address the emergency situation at the EU's external border with Belarus' (2021), Available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6447.

[215] FRONTEX, Frontex provides support for Lithuania, Latvia at their borders with Belarus, 1 July 2021. Available at: https://bit.ly/3O65vck

[216] Amnesty International Latvia, *see* note 6, 26.

[217] Ibid. (IOM generously funded by the EU has been operating the assisted return programme' including in cases of non-voluntary 'voluntary returns').

[218] Ibid., 41.

[219] Ibid., 48

it. In what follows we demonstrate that all the actions and inactions directly or indirectly linked to the most far-reaching violations of human rights inherent in what the EU terms as 'migration management' under the banner of 'emergency'[220] or 'addressing the root causes of migration'[221] have been carefully designed within the auspices of the EU's lawlessness law to create and manage the EU's lawless border zone through informal agreements, money and diluted-to-zero responsibility in a direct and concerted attack on EU values as expressed in Article 2 TEU[222] – the 'untouchable core' of today's EU legal order[223] – as well as, in particular, the very idea of the Rule of Law and Human Rights. The law, as designed and as applied, is there to ensure the inapplicability of any core Rule of Law considerations – respect for fundamental principles and values, as well as basic accountability – and faithlessness to human rights. The lawlessness law is thus a ruthless violation of EU, but also ECHR and international law. Given how far it breaches the values of Article 2 TEU establishing the baseline of values applicable to the EU and the Member States alike, it is also clear that the EU's lawlessness law violates Member States' law as well: there can be no lawful delegation to destroy the Rule of Law, deny human rights and undermine basic accountability – the core elements of EU's lawlessness law.

The success of the EU's lawlessness law, which has made travel to the EU deadly dangerous for countless former colonials, and those killing and enslaving or making killing, enslaving and torture possible entirely unaccountable, demonstrates that holding legality in high esteem is not enough to ensure that the EU behaves like – and is – a true Rule of Law and fundamental rights-based constitutional system.[224] There is a design problem in the EU which not only concerns the operation of the EU legal system, but also the EU's constitutional nature.[225] Adherence to the principle of the Rule of Law, which is

[220] Gkliati and Kilpatrick, See note 23 above.
[221] See N Zaun and O Nantermoz, 'The use of pseudo-causal narratives in EU policies: the case of the European Union Emergency Trust Fund for Africa' (2022) 29(4) *JEPP* 510.
[222] M Klamert and D Kochenov, 'Article 2' in M Kellerbauer, M Klamert, J Tomkin, (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press).
[223] Ibid.
[224] KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, After All', 38 *YEL* 2020 3.
[225] D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 74.

sufficiently articulated in the EU by now,[226] would require what Gianluigi Palombella characterised as 'a limitation of law(-production), through law'.[227] Such limitation failed to emerge as an important factor in the making and application of EU law.[228] 'This reality results from a most problematic approach adopted by the Union: in addition to an inexplicable immodesty (which is not illegal, per se, of course), the Union suffers from a fundamental misrepresentation of the key function of the European system of human rights protection, which is to ensure that no legal system in Europe feels itself autonomous from human rights',[229] as one of us argued earlier. The EU's failure is particularly visible in the field of migration and asylum, where the Court reveals 'overzealous concern for the technicalities of the legislative instruments before it and sparse to no reference to human rights instruments or values'[230] – this is the crucial way that the Court takes active part in the creation of the EU's lawlessness law and empowers attacks on EU values by other EU institutions.

Indeed, any system of law which is solely based on a legality check – whose accuracy itself is sometimes more than dubious if not outright impossible[231] – in the name of the autonomy of its own law,[232] and absolutely refuses outside scrutiny[233] while continuously

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[226] L Pech, 'The Rule of Law as a Constitutional Principle of the European Union', (2009) *Jean Monnet Working Papers (NYU Law School)* No. 4/2009; L Pech, 'Rule of Law as a Well-Established and Well-Defined Principle of EU Law'(2022, early view) *The Hague Journal on the Rule of Law*.
[227] G Palombella,'The Rule of Law as an institutional ideal' in L Morlino and G Palombella (eds*), Rule of Law and Democracy: Inquiries into Internal and External Issues* (Leiden: Brill, 2010).
[228] Kochenov, note 225.
[229] Ibid.
[230] A Küçüksu, 'Adjudicating Asylum as a Technical Matter at the Court of Justice of the European Union: Neglecting Human Rights when the CEAS Appears to be in Jeopardy?' in E Kassoti and N Idriz, *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Asser Press/Springer, 2022), p. 169.
[231] P Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2022) *ELJ* 1; D Kochenov and P Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe' (2022) 60 *JCMS* 150.
[232] J Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 *OJLS* 328; G Palombella, 'Beyond Legality – before Democracy', in C Closa and D Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).
[233] Opinion 2/13 *(ECHR Accession II)*, ECLI:EU:C:2014:2454; Cf. B de Witte and Š Imamović, 'Opinion 2/13 on accession to the ECHR. Defending the EU legal order against a foreign Human Rights Court' (2015) 40 (5) *ELRev* 683; P Eeckhout, 'Opinion 2/13 on EU accession to the ECHR and judicial dialogue—autonomy or autarky?' (2015) 38 *Fordham International Law Journal* 955; Kochenov, note 225 above.

churning out grave injustices[234] (including the violation of the most fundamental human rights, such as the right to life and prohibition of torture),[235] is unquestionably at the antipode of the very idea of the Rule of Law, let alone any of the other EU values. The EU legal order tends to leave outstanding fundamental rights issues to other legal orders, either national or in the Council of Europe, while being directly responsible for the context, where human rights and Rule of Law violations are abundantly possible and perpetrated in an atmosphere of absolute impunity.[236] At best, this results in a good deal of confusion and denial of responsibility, which could simultaneously amount to a situation where a near complete legal vacuum prevails, which is exactly the aim of EU's lawlessness law. Successfully reaching this aim amounts to denying EU values, including the Rule of Law and the protection of fundamental rights, in their entirety. This is done through appeals to legality and through the complexity of the European continental structures for sharing responsibility for the crimes being perpetrated. The EU thus knowingly instrumentalises an exaggerated attention to legality in the absence of the Rule of Law as a working normative ideal,[237] as a way to achieve the priorities of EU's lawless law in killing off the very idea of rights and the Rule of Law at the border. The ideal of 'migration management' in this context aims at ensuring a total absence of human rights, Rule of Law and basic accountability to crush any migration from the formerly colonised spaces: no non-citizen former colonials should arrive. Crucially for the completeness of the legality-framed lawless law edifice, the ECJ actively participates in building this lawless system of absolute violation of rights to the fullest possible extent.

We proceed by outlining and looking closer at three main strategies deployed in the context of the successful operation of EU's lawless law to pursue the goal of undeterred exclusion of 'migration management' from the realm of Article 2 TEU values. These

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[234] See for a broad debate: D Kochenov G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart, 2015); F de Witte, *Justice in the EU* (Oxford University Press, 2015).
[235] Lighthouse Reports, *Aegean Pushbacks lead to Drowning* (2022), Available at:https://www.lighthousereports.nl/investigation/aegean-pushbacks-lead-to-drowning/; European Council for Refugees and Exiles, *Central Med: Death Toll Continues to Rise on the Busiest Sea Route to Europe*, See note 160 above. UN News, *Deaths at sea on migrant routes to Europe almost double, year on year*, See note 160 above.
[236] D Kochenov, 'The EU and the Rule of Law: Naïveté or Grand Design?', in M Adams, EH Ballin and A Meuwese (eds.), *EU Rule of Law between Idealism and Realism* (Cambridge: Cambridge University Press, 2017).
[237] Palombella, note 232 above.

include, firstly, lawless (ditto 'soft law') deals with third countries aimed at installing the disapplication of rights to non-citizens – deals placed entirely outside the realm of the law and creating a vacuum of rights and responsibility. Such lawless deals will be analyzed in Part III. The second strategy is removing any accountability for the ever-increasing major spending on the lawlessness infrastructure which aims to create and export rightlessness and the absence of any legal checks on abuses of the EU's core values and the vital rights of others outside the EU's territory, going as far as procuring torture and killings by proxy. The unaccountable purse of EU's lawlessness law is scrutinized in Part IV. The third strategy we focus on is the deployment of FRONTEX, an EU agency, to achieve aims incompatible with the values on which the Union and the Member States are founded. All three approaches, taken together, ensure that the lawlessness law of the EU functions as designed, providing a legality shield against the Rule of Law and ensuring robust funding and a lack of responsibility for the newly-created lawless spaces, where rights are inaccessible to those tortured, enslaved and dying, and where the EU has done nothing wrong. The number one agency of EU's lawlessness law – FRONTEX – is the subject-matter of Part V.

We show that these strategies, deployed by the institutions and the Member States and sometimes vetted or even co-created by the Court of Justice, entail unchecked fundamental rights violations by placing the actions and inactions of EU institutions outside the scope of EU law. Although already articulated before 2015, the key lawlessness law mechanisms did not immediately pose grave problems in terms of violations of the fundamental rights of non-citizens of the Union outside the EU territory. The so-called 'refugee crisis', which was a fundamental rights crisis manufactured by the Union to minimise compliance with international obligations[238] and entailed a much smaller scale movement of people than the Russian war in Ukraine (the latter not characterised as a migration crisis at all),[239] has pushed these mechanisms to their paroxysm as they now not only cover up but also encourage atrocities,[240] without the EU moving a finger to stop

[238] Grabowska-Moroz and Kochenov, note 20, above.
[239] Baranowska, note 6 above.
[240] Eg Urbina, note 7 above; N Muiznieks, 'Stop Your Backsliding, Europe', (2016) *New York Times,* Available at https://www.nytimes.com/2016/03/15/opinion/stop-your-backsliding-europe.html. See also,

them, knowingly setting aside the application of the core values of the constitutional system to the matter in question.

III. EU Lawlessness law through deals outside the law

EU's lawlessness law creates unaccountable spaces by moving crucially important international agreements with far-reaching human rights implications 'outside the scope' of the law.[241] While the Commission and the Member States support the design of a deceptively legalistic justification for the lawless legal space that such agreements create, the ECJ has played a fundamental role in moving such deals also outside the boundaries of accountability.[242] Although the use of informal instruments in the external dimension of EU Migration and Asylum Policy is not new,[243] such instruments have proliferated in recent years as the fight against illegal immigration has been elevated to the EU's absolute priority.[244] Below we focus on three examples: unpublished 'not binding' readmission agreements designed to suspend the Rule of Law and annihilate non-citizens' rights; the EU-Turkey deal placed outside the scope of EU law to make sure 'binding' rights and 'fundamental' values are unavailable; and 'development', a popular buzzword for the export of lawlessness and suspension of the Rule of Law.

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the description of the *S.S. case* in V Moreno-Lax, See note 164; V Stoyanova, 'The Right to Life under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 *GLJ* 436.

[241] A Pijnenburg, 'The Informalisation of Migration Deals and Human Rights of People on the Move: Does It Matter?' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Asser Press/Springer, 2022), p. 147. Cf. E Cannizzaro, note 170 above; Kassoti and Carrozzini, note 21 above; JS Vara and LP Matellán, 'The Informalization of EU Return Policy: A Change of Paradigm in Migration Cooperation with Third Countries?' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Asser Press/Springer, 2022), p. 37.

[242] *NF v. European Council*, T-192/16, EU:T:2017:128.

[243] For instance, through partnership, Mobility partnership are addressed to third countries willing to cooperate in the fight against irregular migration and having effective mechanisms of readmission.

[244] E Cusumano, 'Migrant rescue as organized hypocrisy: EU maritime missions offshore Libya between humanitarianism and border control' (2019) 54 *Cooperation and Conflict* 3; See Zaun and Nantermoz, note 221 above; Molinari, note 22 above.

a) Undisclosed 'non-binding' readmission agreements

The so-called readmission agreements are a must when it comes to these soft deals: even the Migration Pact considers these instruments a key tool for the efficient expulsion of migrants.[245] These deals mainly concern cooperation on readmission, which has been inserted almost systematically as a condition for unlocking any of the advantages offered by the European Union to its poorer partners: Schengen visa facilitations[246] or budgetary transfers for development cooperation for instance.[247] No such agreements have been concluded with the 'developed' Western nations and former colonisers.

Although many such agreements have been concluded under the formal rules governing the conclusion of international agreements,[248] a growing number of 'non-binding readmission arrangements' are governed by soft law, implying that they do not purport to trigger legal obligations between parties. Because these arrangements are non-binding, they do not follow any substantive and procedural rules governing the conclusion of international agreements. So much so that they are not even available on the website of the Council, or published in the *Official Journal*, raising serious questions of basic transparency and democratic control,[249] as well as the Rule of Law: 'non-binding' obligations, and deprivations of rights for non-citizens, are created based on undisclosed legal arrangements. It is not a surprise to learn that such agreements have been 'concluded' (at the moment of writing) with Afghanistan,[250] Guinea,[251] Bangladesh,[252]

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[245] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions on a New Pact on Migration And Asylum, Com/2020/609 Final, Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609.

[246] SF Nicolosi, 'Refashioning the EU Visa Policy: A new turn of the screw to Cooperation on Readmission and to Discrimination?' (2020) 22 *European Journal of Migration and the Law* 467, p. 490.

[247] See the next sub-Part.

[248] See Article 218 TFEU for the procedure concerning the negotiation and conclusion of formal international agreement, which includes guarantees.

[249] M Gatti, 'The Right to Transparency in the External Dimension of the EU Migration Policy: Past and Future Secrets' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Asser Press/Springer, 2022) 97.

[250] EU-Afghanistan Joint Way Forward (2016). Available at : https://www.asyl.at/files/93/18-eu_afghanistan_joint_way_forward_on_migration_issues.pdf

[251] Good Practice (in force since July 2017). The text is not publicly available.

[252] EU-Bangladesh Standard Operating Procedures (2017). Available at https://ec.europa.eu/transparency/documents-register/detail?ref=C(2017)6137&lang=en

Ethiopia,[253] the Gambia[254] and Ivory Coast,[255] mostly unstable and impoverished former colonies subjected to significant EU influence in a number of policy areas.[256]

It has been claimed that informal deals make negotiations with third countries easier and are more efficient in terms of results, which are measured in increased numbers of returned migrants. Both points have been convincingly disproven.[257] Why then conclude such soft deals if not in order to bypass the EU legal system's procedural and substantive constraints when concluding international agreements, including essential Rule of Law guarantees,[258] as well as making the deprivation of rights thereby brought about more radical?

Third country nationals sent back to dictatorships on the basis of these questionable 'non-binding' 'soft law' deals are powerless to dispute them. Worse still, the content of some of these agreements is unknown and has never been made public. The EU denies rights to former colonials based on secret unpublished legal framework. These deals have been repeatedly denounced by civil society: the signatory countries cannot be considered safe third countries. The example of Afghanistan would suffice,[259] the deal with which was *renewed* in 2021.[260]

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[253] EU-Ethiopia Admission Procedures (2019), Available at https://www.statewatch.org/media/documents/news/2018/jan/eu-council-regugees-return-ethiopians-15762-17.pdf (The draft version of the document was leaked by Statewatch).
[254] Good Practices on Identification and Return (2018). (The text of this arrangement is not available).
[255] Good Practices (2018). (The text of this arrangement is not available).
[256] Vara and Matellán, note 241 above, p. 37.
[257] Ibid.
[258] Molinari, note 22 above. C Molinari, 'Parallel Paths that Need to Cross?: EU Readmission Deals and Constitutional Allocation of Powers' (2020) *VerfBlog*, Available at https://verfassungsblog.de/parallel-paths-that-need-to-cross/.
[259] E.g. European Council for Refugees and Exiles, 'Joint statement: One year after the country's takeover by the Taliban – How did Europe welcome Afghans in need of protection?' (9 September 2022), Available at https://ecre.org/joint-statement-one-year-after-the-countrys-takeover-by-the-taliban-how-did-europe-welcome-afghans-in-need-of-protection/
[260] See, Joint Way Forward on migration issues between Afghanistan and the EU, 2 October 2016, Available at https://www.eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf. It was replaced by another Joint Declaration on Migration Cooperation between Afghanistan and the EU, 13 January 2021, Available at https://www.statewatch.org/media/1801/eu-council-joint-declaration-afghanistan-5223-21-add1.pdf
12 EU-Bangladesh Standard Operating Procedures (2017), Available at https://ec.europa.eu/transparency/documents-register/detail?ref=C(2017)6137&lang=en.

As it stands, EU soft law offers a well-known loophole to escape the most basic guarantees in terms of the Rule of Law and fundamental rights. Quite astonishingly, the EU does not judge it necessary to be bound by fundamental rights and Rule of Law standards when it comes to concluding agreements for and paying to return undocumented third-country nationals to the signatory country. We can only agree with Caterina Molinari that 'recourse to alternative forms of governance precisely to bypass the law, rather than to improve or complement it, is problematic. It may lead to the conclusion that such a use of soft law is unconstitutional *tout court*'.[261] Indeed, the absence of binding effect does not imply that these soft law deals have no legal effect or relevance, including in the context of the enjoyment or denial of crucial EU law rights.[262] And of course, these can have direct effects on the positions of the specific individuals trapped within the ambit of *de facto* lawlessness.

The problem lies not so much with the informal character or the atypical legal nature of these deals. Soft law is today fully part of EU integration, including the common EU framework on migration and asylum. The enforcement of soft law is a regular item on the governance agenda.[263] The issue is much deeper than a legal qualification or a question of informality and precisely relates to the absence of willingness on the part of the EU to have its own actions and inactions checked against fundamental rights and the Rule of law at any stage – far beyond respect for the institutional balance[264] and transparency,[265] let alone the basic Rule of Law requirement that the law affecting your situation be *published*.[266] The EU willingly uses the legal loopholes which it itself designs, in order to adopt deals to escape any kind of scrutiny, accountability or responsibility. This leads to

[261] Molinari, note 22 above.
[262] Vara and Matellán, note 241 above.
[263] Ioana Ştefan, 'Soft Law and the Enforcement of EU Law', in A. Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).
[264] The Court held that the principle of institutional balance laid down in Article 13(2) TEU is applicable to the signature of non-binding agreements as regards the relations between the Commission and the Council: *Swiss MoU*, C-660/13, EU:C:2016:616. See also: Molinari, note 22 above.
[265] Gatti, note 249 above.
[266] T. Bingham, *The Rule of Law* (Penguin, 2010).

arbitrariness, the main enemy of the Rule of Law.[267] Absent the usual safeguards, the EU's actions are designed to facilitate fundamental rights violations.

b) EU – Turkey: switching off the law by informal agreements outside of its scope

The infamous EU-Turkey Statements[268] go one step further than the secret non-binding agreements with the poorest former colonies, ruining lives and placed by design outside of the realm of the law, their far-reaching legal effects notwithstanding. The Turkey deal takes the departure from the basic idea of the Rule of Law much further and is remarkable for the leading role played by the Court of Justice in the making of the lawlessness law.[269] Agreed in March 2016, the deal established that starting from 20 March 2016 all new irregular migrants crossing from Turkey into the Greek islands be returned to Turkey and that for every Syrian returned to Turkey from Greek islands, another Syrian would be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria.[270] The EU disbursed EUR 3 billion for the so-called 'Facility for Refugees in Turkey' to sweeten the deal. The deal was announced on the website of the Council – no other text or document was made available. All of this was decided at a meeting which took place in accordance to the EU-Turkey joint action plan and which aimed to respond to the crisis situation in Syria.

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[267] M Krygier, 'Tempering Power', in M. Adams et al. (eds.), *Bridging Idealism and Realism in Constitutionalism and Rule of Law* (Cambridge University Press, 2016).

[268] Statement of the EU Heads of State or Government, 07/03/2016, (8 March 2016) Available at https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/; and European Council, EU-Turkey statement, (18 March 2016) Available at https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[269] According to Aysel Küçüksu, the Court has reduced its role in this area to an administrative and passivist one (note 230 above at 169); Mauro Gatti also considers that ECJ mainly plays passive role (note 249 at 97). However, not applying constitutional principles, is, in fact, a very proactive stands against the Rule of Law and third country nationals' fundamental rights and, in this sense, the Court has played a very active role.

[270] E.g. For Turkey, See Refugees International, 40 NGOs Denounce Greece's New Law Designating Turkey as a Safe Third Country, (14 June 2021), Available at https://www.refugeesinternational.org/reports/2021/6/14/40-ngos-denounce-greeces-new-law-designating-turkey-as-a-safe-third-country. For Afghanistan, seeUNHRC et. All, 'Vulnerability Screening Tool, (2016), Available at https://www.unhcr.org/protection/detention/57fe30b14/unhcr-idc-vulnerability-screening-tool-identifying-addressing-vulnerability.html

When the deal was challenged before Court, the Council argued that it did not take part in the agreement and that the press statement was an informal Member State statement and not an EU statement.[271] The Court upheld the argument despite numerous convincing clues[272] that the agreement was, in fact, not only clearly an EU deal, but also a straightforward international agreement.[273] In agreement with Bas Schotel, a leading expert, 'the EU is using more law than meets the eye when executing the Statement'.[274] The Court acted vis-à-vis the spirit of *Herren der Verträge* as a Ciauşeschean parliament, rubber-stamping the whims of the Politburo: the ABC of the Rule of Law was disapplied right down to its principled roots. As a result, this deal which was found to have nothing to do with EU law, effectively suspended it. The deal was entirely financed by EU money and published on an EU portal. It resulted in thousands of people being sent back to Turkey and deprived of their EU law (as well as national law) rights and protections. Their situation was given no consideration either in light of international or European law. The Court, in other words, endorsed the complete destruction of the law, introducing a new low in terms of basic standards: when the sovereign does not feel like being bound by the law in an area, the law will be warped by the sovereign to have this effect, and that will then be the law – the lawlessness law – outside the realm of judicial scrutiny. Some scholarship has been astonishingly unclear in its analysis of what happened, failing to see the EU's lawlessness law in its entirety. So according to Aysel Küçüksu, the Court has reduced its role in this area to a passive administrative one.[275] Mauro Gatti equally spoke of a passive role for the Court.[276] Such perspectives are absolutely untenable in principle: the creation of a lawlessness law, which greenlights setting aside all key constitutional principles in the acts of a constituted entity, unquestionably amounts to very proactive stance against the Rule of Law and fundamental rights, let alone compliance with international obligations.[277]

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[271] *NF v. European Council*.
[272] See Cannizzaro, note 170 above.
[273] Kassoti and Carrozzini, See note 21 above, p. 237
[274] Schotel, note 170 above.
[275] Küçüksu, note 230 above at p. 169
[276] Gatti, note 249 above.
[277] The Court does the same also in other fields, including the deployment of lawlessness law to whitewash the attacks by the powers that be on its own independence: D Kochenov and G Butler, 'Independence of the

The concrete outcome of this shameful jurisprudential innovation, which will haunt the legacy of the Court long after the judges who dismissed EU law have left the bench, is the fact that the actual law, with all its rights and protections, which *is* subjectable to judicial review, is set aside and violated in *all* cases the Court indicated as falling outside the law. The ECJ thus acted as a high priest of lawlessness: a failure of tempering power in the EU, revealing the structural Rule of Law deficiencies at the core of the supranational legal system.[278] That switching off the law falls completely outside the realm of EU law is quite astonishing.[279] Even more so, given how many NGOs[280] and scholars[281] have denounced the most blatant violations of fundamental rights in returning migrants to Turkey.

In short, the EU has managed to elude any legal responsibility, leaving deported migrants powerless, with no legal remedy to the established deficiencies of the Greek justice system, especially in this particular context, and involving the extreme vulnerability of the victims of lawlessness.[282] The Court, in accord with other institutions, has created a lawless no-man's-land and plenty of people have been placed there, without any rights and protections. Anyone can cite the lawlessness law in operation – the relevant Court decision – should any doubts concerning the legality of the destruction of EU law applicable to these third country nationals arise. Bas Schotel is right that this way of declining any legal authority to escape legal accountability is unsustainable in the long

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Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2021) 27 *ELJ* 292.

[278] Krygier, note 267 above

[279] Pijnenburg, note 241 above.

[280] Eg Refugees International, 40 NGOs Denounce Greece's New Law Designating Turkey as a Safe Third Country, (14 June 2021), Available at https://www.refugeesinternational.org/reports/2021/6/14/40-ngos-denounce-greeces-new-law-designating-turkey-as-a-safe-third-country; Asylum Information Database, 'Removal and Refoulment' (17 August 2022), Available at https://asylumineurope.org/reports/country/turkiye/asylum-procedure/access-procedure-and-registration/removal-and-refoulement/, O Ulusoy and H Battjes, S'ituation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement', (2017) 15 *VU Migration Law Series,* Available at:https://www.asyl.at/files/140/21-rueckschiebungen_indie_tuerkei_reportderuni_amsterdam_sommer_2017.pdf; Human Rights Watch, 'Turkey Forcibly Returning Syrians to Danger', (26 June, 2019), Available at https://www.hrw.org/news/2019/07/26/turkey-forcibly-returning-syrians-danger

[281] Eg Arribas, note 21 above; Lehner, note 21 above.

[282] M Fink and N Idriz, Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies? in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Asser Press/Springer, 2022), p. 117.

term and 'seriously questions the EU's ability to organize independent and neutral judicial review in its own case',[283] hinting at the systemic failure of the crucial Rule of Law guarantees.

In *Acces Info Europe* the General Court went as far as even exempting the Commission from complying with the basic rules in terms of transparency, concerning access to information requests indispensable to challenging EU's behaviour.[284] The General Court ruled in favour of the Commission, which refused to give the applicant access to all the documents 'containing the legal advice and/or analysis of the legality' of the EU-Turkey Statement and the implementing actions,[285] under the pretext that it was allegedly covered by the exception relating 'to the protection of the public interest as regards international relations'.[286] The General Court dealt with this case as if no mass injustice or violation of rights being perpetrated by the EU was at stake, barring the route for any check. Here too was the lawlessness law in operation, barring any responsibility and setting aside pleas for the actual application of the law as nothing exceptional. Another famous case comes to mind, where the Council argued that an opinion of its legal service whitewashing inaction against large-scale Rule of Law violations was not available for release because it was 'given orally'.[287]

c) Export of lawlessness under the pretext of 'development'

Other examples of the EU escaping accountability regarding the deals concluded with the third countries for 'migration management' purposes demonstrate that the above examples are not at all exceptional: lawlessness law frequently relies on international agreements and the whitewashing of the attacks on the Rule of Law by the Court point towards it staying this way.

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[283] Schotel, note 170 above at p. 85.
[284] *Access Info Europe*, T-851/16, EU:T:2018:69.
[285] *Access Info Europe*, para 6.
[286] *Access Info Europe*, para 122.
[287] *Pech v Council*, T-252/19, ECLI:EU:T:2021:203.

In 2017 the Italian government signed a Memorandum of Understanding on Migration with Libya,[288] which was partly sponsored by the EU[289] (EUR 42 millions) through the EU Emergency Trust Fund for Africa (EUTF)[290] to support integrated border and migration management, including 'Libyan border management authorities' and the enhancement of their maritime surveillance capacity. This deal was renewed in 2020 for three further years and according to Médecins sans frontières, 'is part of a broader defensive strategy being pursued by European governments, based on a security approach against migrants. Rather than giving migrants protection, it seeks to keep them out'.[291] It is no secret that at the time of writing Libya is not an example of a functioning state. There can be no serious conversation about human rights safeguards by the 'border guard', which is more akin to a group of thugs equipped by the EU for hunting migrants at sea for profit.[292]

Numerous other such 'partnerships' concluded under the EUTF are essentially the same: beyond the issues of accountability and transparency mentioned above, mirroring the far-reaching breaches of the basic elements of the Rule of Law in the EU-Turkey deal, these soft law agreements are concluded in the name of the cooperation and development goals to justify the spending of the money so classified. It is obvious at the outset that such goals have very little to do with migration management aiming at depriving the former colonials of rights. The contrary seems to be true: Branko Milanović demonstrates with clarity that *more* rather than less migration is the way to assist development.[293]

As discussed in more detail below, the partnerships concluded in the framework of EU funds are based on the Migration Partnership Framework (MPF) adopted by the Commission in June 2016.[294] This framework closely focuses on EU interests promoting

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[288] The agreement is available at: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf
[289] The Other part funded through the Italian 'Missions Decree', the legal framework via which the Italian government and parliament authorize and fund international military commitments. See, MSF, note 228 above.
[290] The workings of EUTF will be discussed in the next sub-Part.
[291] *Pech v Council,* See note 308 above.
[292] Urbina, note 7 above.
[293] Milanović, note 39 above.
[294] 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

the closure of the borders in its former colonies and other of the least affluent countries in the world, aimed to keep non-EU citizens out of the Union and sending former colonials back[295] to the places of no opportunity assigned to them by birth: passport apartheid in action.[296] The framework mobilises resources to achieve this specific goal through positive and negative incentives. Whether indirectly via Members States or directly via these soft deals, EU money emerges as the main lever for the EU to externalise 'migration management', i.e. to carry out the harsh exclusion of the racialised other and outsource respect for human rights as explained in the next sub-Part. EU money plays the most significant role in the story of the practical operation of the EU's lawlessness law at the borders and beyond: it funds the destruction of human rights and the preservation of the EU's complete lack of legal responsibility, as installed by the Court of Justice under the guise of legality. The unaccountable EUTF has been the umbrella for the distribution of immense amounts of funds invested to quash opportunities and derail human lives by making the very idea of the law legally unavailable. Let us look at the financial side of the EU's export of lawlessness in more detail.

IV. Funding EU lawlessness law: What the money can buy

The lawlessness installed by EU's lawlessness law is actively exported abroad. Generous funding for such export is paid out of the EU budget and aims at the legalised annihilation of the EU's and Member States' human rights obligations by outsourcing the management of the external border for certain categories of non-citizens to lawless spaces created in the former colonies and other poorest countries in the world – including some of those, with which the EU has secret 'soft' agreements. The core aim of this funding is to exclude migration from the former colonies no matter what,[297] even if this comes at the expense of turning away from the very idea of human rights and due process of law and costs

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under the European Agenda on Migration' (7 June 2016) COM(2016) 385 final, Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0385 .

[295] C Castillejo, 'The EU Migration Partnership Framework: time for a rethink?' (2017) *Discussion Paper, No. 28/2017* (German Development Institute).

[296] Keeping former colonials confined to the spaces of no opportunity is the core objective of the global migration and citizenship law: See Kochenov, note 28 above at p. 1525–1530.

[297] Molinari, note 22 above.

dozens of thousands of lives and billions of euros. Countless atrocities committed on a daily basis are generously funded by European money, which also funds a legal framework for excluding all accountability. This is the practical operation of the EU's passport apartheid outside of the Union's borders.

Different EU funds are used and include, beyond migration and border management-related funds and development and cooperation funds, also security and defence funds, creating a very complex funding landscape. 'International development cooperation' remains the usual banner for such spending. The previous multiannual financial framework (MFF) mostly relied on the EUTF to achieve migration management goals, allowing that fund to emerge as the purse for the EU's lawless law. Expenditure was intrinsically linked to the informal agreements which install soft law outside EU law's scope, in order to undermine rights and make real EU law at times de facto inapplicable. In what follows we look at the money available, the lawlessness it creates, question whether such expenses are related to 'development cooperation' at all, and dwell on the absolute lack of accountability and transparency underpinning the disbursement of this funding, which backs the EU's export of lawlessness and undoing of human rights.

a) EUTF: the purse for the EU's lawlessness law

EUTF was created at the Valletta Summit on Migration in November 2015 through a constitutive agreement[298] concluded between the Commission[299] and donor states – 24 EU Member States, the United Kingdom, Norway and Switzerland. The EUTF exists under the auspices of 'EU development funds' for external actions for emergency, post-

[298] Agreement establishing the European Emergency Trust Fund for Stability and Addressing the Root Causes of Irregular Migration and Displaced Persons in Africa and its Internal Rules, concluded on 12 November 2015. Available at: https://ec.europa.eu/trustfundforafrica/sites/default/files/original_constitutive_agreement_en_with_signatures.pdf.; See also, European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, Board meeting minutes, 12 November 2015, Available at https://ec.europa.eu/trustfundforafrica/sites/default/files/minutes_1st_eutf_for_africa_board_meeting_0.pdf, p. 3.

[299] The Director General for international Cooperation and Development signed the agreement.

emergency or thematic actions.[300] As an informal agreement and hence outside of the EU budget strictly speaking, EUTF is very malleable[301] in achieving its stated aim of contributing 'to a flexible, speedy and efficient delivery of support to foster stability and to contribute to better migration management'[302] and helping to address 'the root causes of destabilization, forced displacement and irregular migration, by promoting economic and equal opportunities, strengthening resilience of vulnerable people, security and development'.[303] More specifically, it has been presented as one of a number of '[i]nnovative instruments to offer targeted support'[304] 'to those partner countries which make the greatest efforts but without shying away from negative incentives'.[305] The EUTF has mainly been used to impose the European migration management agenda which priorities the objectives of the EU's lawless law to solidify and perfect the EU's passport apartheid over any African aspirations.[306] The EUTF's deployment is thus in direct conflict with the EU values of the Rule of Law and human rights protection.

As of December 2021 (the last data available at the time of writing), the money spent amounted to more than five billion euros (EUR 5 061.7 million) and the number of contracts signed reached EUR 4 917.1 million.[307] Almost 90% of the funding came from the Union: the European Development Fund (EUR 3 385.8 million) on the one hand and

[300] Article 187 of former Regulation 966/2012 ((repealed by Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012)); and Article 42 of former Council Regulation 2015/323, repealed by Council Regulation (EU) 2018/1877 of 26 November 2018 on the financial regulation applicable to the 11th European Development Fund, and repealing Regulation (EU) 2015/323.
[301] European Court of Auditors, note 171, p. 4.
[302] Valletta Summit, Action plan 11-12 November 2015, (2015), https://www.consilium.europa.eu/media/21839/action_plan_en.pdf, p. 1-2.
[303] Ibid. at p. 2.
[304] Ibid. at p. 2.
[305] European Commission, Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, note 294 above, p. 2.
[306] Castillejo, note 21 above.
[307] EU Emergency Trust Fund for Africa, Annual Report 2021 (2022). Available at https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf-report-2021-eng-for-digital.pdf.

the EU budget (EUR 1 052.7 million), on the other.[308] The rest included contributions by the Member States and other state donors.[309] Among the four areas which have been financed, migration management is the one which had absorbed the most money by 31 December 2021: 31% (EUR 1 515.7 million). This is alongside the 28% (EUR 1 384.6 millions) spent on 'Strengthening resilience of communities'; 22% (EUR 1 101.1millions) on 'Improved governance and conflict prevention'; and 17% (EUR 855.5 millions) on 'Greater economic and employment opportunities'. North African countries, including Libya, Morocco, Tunisia, and Egypt only received money for migration management.[310] Projects funded under the banner of 'development' where approved as an incentive for the partner country to address the root causes of migration.[311]

b) The 'shadow immigration system' the EU paid for

EU money is invested into the creation, maintenance and extension, in the words of Ian Urbina, of a 'shadow immigration system,'[312] which recognises no human rights protections and is premised on lawlessness and the absence of accountability – the direct antipode of what EU law unconditionally requires. The strategy of generously paying for the certainty that migration from the former colonies is pushed outside the law has been widely documented by journalists and NGOs. Widespread torture, enslavement, kidnappings and killings, by EU-funded agents outside its territory demonstrates that the respect for human rights remains essentially theoretical, as succinctly put by the European Court of Auditors.[313]

Having effectively barred lawful migration from the absolute majority of the former colonies, the EU moved on to support those in power in the poorest regions of the world

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[308] Including the Development Cooperation Instrument (DCI), the European Neighbourhood Instrument (ENI), the Asylum, Migration and Integration Fund (AMIF) and funding from the Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO).
[309] See note 328 above at p. 15.
[310] Ibid.
[311] Oxfam, note 166 (in November 2017, two-thirds of the EUTF for Africa was allocated to development-focused projects, yet 'most of them were approved with the objective of 'addressing the root causes of migration'). See also: Oxfam, See note 19.
[312] Urbina, note 7 above.
[313] European Court of Auditors, note 171, p. 3.

by soliciting their help in barring any safe routes to access international protection.[314] The EU seems to be actively backing any means of achieving this questionable goal. European funding contributes, inter alia, to the sabotaging of humanitarian rescue operations at sea, as it supports the hunting, capture, and trafficking of migrants by the 'Libyan Coast Guard' it has equipped.[315] The objectives of the 'Guard' have nothing to do with humanitarian assistance or indeed, guarding the Libyan boarder, which explains why the Guard threatens humanitarian missions.

EU funds support secret prisons in Libya, where the thugs who are the recipients of the EU's contributions, detain the people they intercept trying to reach the EU.[316] Thousands of people are detained indefinitely on no charge in the lawless spaces harnessed by the EU's passport apartheid as a vital tool for the export and indulgence with impunity of lawlessness, which is deployed to achieve lawless goals by switching off human rights and the Rule of Law. In this sense the EU's use of the 'Libyan Coast Guard' is similar to Russia's deployment of the 'Wagner Group' private army of 'Putin's cook' Prigozhin[317] in the African countries, to achieve similarly lawless goals by proxy. Inhuman treatment in the prisons where hunted people who committed no crime are detained is widespread, as they are kept 'in horrendous conditions'[318] and constantly abused: reports list sexual violence and torture in the prison system whose actual *raison d'être* seems be generating ransom from those who the thugs help the EU to 'save' from the sea,[319] and enslave others.[320] It goes without saying that those who survive are not sent to safe countries at

[314] MSF, 'Italy-Libya agreement: Five years of EU-sponsored abuse in Libya and Central Mediterranean' (2022), Available at https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean.
[315] Urbina, note 7 above
[316] Concord, See note 8 above.
[317] BBC News, 'The Wagner Group: Why Is the EU Alarmed by the Russian Mercenaries in Central Africa', 19 December 2021, https://www.bbc.com/news/world-africa-59699350.
[318] Oxfam, See note 19 above.
[319] UNHCR, '"On this journey, no one cares if you live or die.": Abuse, protection, and justice along routes between East and West Africa and Africa's Mediterranean coast' (2020), Available at https://www.unhcr.org/5f2129fb4; CONCORD, 'Concord, Partnership or Conditionality?: Monitoring the Migration Compacts and EU Trust Fund for Africa'.
[320] CNN, See note 228.

all.[321] The EU thus directly supports the development of the detention and smuggling industry in Libya, where all actors are now reported to expect a 'share of the pie'.[322]

Funding repressive state agencies including in the formerly genocidal countries abounds. The creation of an intelligence centre for Sudan's secret police is one example, but more general 'shopping lists', such as the one reported by Oxfam, which was sent by an official in Niger and included cars, planes and helicopters, used as 'incentives' for the development of anti-immigrant policies[323] demonstrate that the EU *de facto* pays bribes to incentivise the export of lawlessness as part of the operation of its passport apartheid. The result is the orchestration of the intertwined operations of the governments of the poorest countries with the security forces and militias in the context of their involvement in human trafficking and smuggling activities.[324]

c) 'Migration management': the antithesis of the goal of cooperation and development

Beyond the serious violations of human rights, the truth is that the EUTF totally ignores the genuine scientific evidence that its approach runs counter to the goals of development set out in the Treaty. On the face of it, EUTF is part of the Union's policy in the field of development cooperation enshrined in Article 208 TFEU. The Treaty is clear about the fact that the 'Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty' and it is difficult to understand to what extent 'migration management' helps reach this goal, especially when this money has been used as leverage to incentivise African partners: an apparent diversion from the Treaty objective of the 'eradication of poverty'. Certainly, killings, torture, enslavement and the transfer of ransoms would not make the countries in question – especially Libya – a less impoverished place. Clare Castillejo observes that this

[321] Through the Emergency Transit Mechanism (ETM) which aims to evacuate migrants from Libya & was financed by the EUTF; See note 339 above.
[322] Concord, See note 8 above.
[323] Oxfam, note 19 above.
[324] Concord, note 8 above.; Oxfam, note 19 above at p. 20.

diversion 'appears to be part of a broader trend towards the securitization of EU development assistance': the money is given to the most powerful actors in terms of their migration management actions rather than to those most in need.[325]

It seems equally true that EUTF undermines the EU's development commitments by 'skewing aid allocations towards countries based on their migration profile, and by abandoning aid effectiveness principles'.[326] Development is diverted towards migration management.[327] In other words, the upholding and reinforcement of the EU's passport apartheid in the least developed parts of the world – far from EU's borders *sensu stricto* – emerges as the core vision of 'development' that the EU offers to its former colonies and other least affluent spaces on the globe, which precisely suffer from the attacks on migration the most, given that, to quote Branko Milanović again, migration *is* development,[328] in that there is no other way to boost the development of the least affluent places than by allowing the people assigned to them via passport apartheid the freedom to get out and back in again.

Approached from the opposite vantage point the same remains true: development – even if it is not achieved through migration – *implies* migration and not the other way around. It has been convincingly shown that the use of the 'pseudo-causal narrative' – addressing the root causes of migration through development assistance to countries of origin and transit – is a phony reason.[329] In fact, 'it contradicts the broad academic consensus that development fuels migration rather than stops it [...] the poorest of the poor cannot migrate, as migration involves costs'.[330] Those who designed the funds were very well aware from the outset that the narrative they backed with billions of euros relies on disproven causal claims.[331] It has been demonstrated that the 'root causes of irregular migration' excuse is based on 'a strategic and selective non-use of genuine research and

[325] Castillejo, note 21 above.
[326] Ibid.; See also, I Bartel, 'Money against Migration The EU Emergency Trust Fund for Africa' (2019), *Heinrich-Böll-Stiftung*, Available at https://eu.boell.org/sites/default/files/money_against_migration.pdf.
[327] Oxfam, note 166 above.
[328] Milanović, note 39 above.
[329] See Zaun and Nantermoz, note 221 above.
[330] Ibid., and the literature cited therein.
[331] Ibid.

evidence that there are no causal effects between on the one hand reducing irregular migration and, on the other hand, the eradication of poverty in Africa and that EU policy makers knowingly adopt and accept causal narratives that go against extant evidence, while allegedly following an evidence-based approach'.[332]

In essence, however, these considerations would appear to matter little, since it is absolutely clear that it is impossible to justify the export of lawlessness and the funding of structures, which are designed to escape accountability in promoting grave human rights violations, whatever the official spending line. The designers of the funds knew this very well – not only the recent research on the connections between development and migration, but also the key principles of EU law have been ignored in the process of setting up and deploying the funds. The only possible explanation for why this is so brings us back to the core aspects of the essence of EU's lawlessness law: only the objective of legally departing from core legal obligations and accountability structures could possibly explain the mode of enforcement of the passport apartheid, which the Union has decided to establish outside its border. Outside the realm of the lawlessness law the situation would be radically different, given that the export of the Rule of Law and all the factual achievements of this spending as outlined above are repugnant to the values of the Union as set out in Article 2 TEU, and it emerges that what we are dealing with amounts to a grave misuse of EU funds.

d) Abuse of funds behind EU's lawlessness law

Any grave misuse of funds is usually marked by the same key characteristics: attempts to undermine transparency and destroy accountability in spending. The purse for the EU's lawlessness law is not an exception in this regard. It is non-transparent and unaccountable *by design* not as a result of some breakdown of good intentions. It is therefore unsurprising that a fund with a high level of flexibility for concluding contracts was presented by the designers of this aspect of EU's lawlessness law as absolutely

[332] Ibid.

indispensable from the start.[333] The resulting flexibility is marked not only by a lack of transparency, but also effectively by the absence of any specific framework for how the money should be spent:[334] the initial strategic guidance was framed so broadly that it attracted criticism from the European Court of Auditors.[335] The Official Development Assistance (ODA) criteria binding for the EUTF have been so stretched that it is more akin to a misuse of development aid.[336] In fact, ODA has been increasingly used to pursue the EU interest in fighting irregular migration and conclude readmission partnerships, including through the EUTF.[337] The EUTF's Trust Fund Board does not hide this, as we have seen. Money is most commonly made available to the countries from where former colonials usually originate.[338]

Given that the Fund is not part of the EU budget, it is not obliged to follow any of the usual governance processes required for development instruments, including for the oversight of spending and the selection of the projects to fund. The Fund is run by two bodies: the Trust Fund Board (also called the Strategic Board) and the Operational Committee, both composed of the EU Commission and the donors' representatives.[339] The management of the Trust Fund is ensured by the Commission and is responsible for the implementation of the actions financed by the Board.[340] The other Member States[341] and later the European Parliament[342] could only act as observers on the Trust Fund Board. They do not have any say over authorising spending. Although there were slight improvements following the Auditors' report, especially in terms of communication and visibility, the core idea remains of spending money in obscurity focused solely on the objective of the

[333] Valletta Summit, Action plan, note 321, pp. 1–2.
[334] In November 2017, Oxfam showed that the EUTF for Africa was not governed by a clear and coherent policy: Oxfam, note 166 above.
[335] European Court of Auditors, note 171.
[336] Castillejo, note 21.
[337] Oxfam, note 166 above.
[338] Ibid.
[339] Articles 4, 5 and 6 of the Agreement establishing the European Emergency Trust Fund for Stability and Addressing the Root Causes of Irregular Migration and Displaced Persons in Africa and its Internal Rules, concluded on 12 November 2015. Available at https://ec.europa.eu/trustfundforafrica/sites/default/files/original_constitutive_agreement_en_with_signatures.pdf.
[340] Ibid, Article 4(2) and (7).
[341] They only may be invited as observers for the Operational Committee (Ibid., Article 6(1)(1)).
[342] Ibid.

EU's passport apartheid.[343] This means, essentially, that the funds constitute a tool for the donors to promote their own domestic political priorities and goals, mainly with EU taxpayer money, especially in light of its blurred and flexible spending rules and objectives.[344] Italy's involvement in Libya mentioned in the previous sub-Part constitutes one example among others.[345] It is also unsurprising that the projects supported by the EUTF funding primarily benefit the Member States of the EU with a post-colonial relationships with Africa.[346]

'Partners', ie the former colonies where the lawlessness law is being exported to, have no say: they *may* be invited as observers for both the Trust Fund Board and the Operational Committee.[347] African ownership is also much weaker than within traditional European cooperation instruments. EUTF appears to be more transactional than partnership-based,[348] due to its imbalanced character.[349] The 'partnerships'[350] are based on the Migration Partnership Framework (MPF) adopted in June 2016 by the EU Commission.[351] They are 'the most openly interest-driven of the EU's migration initiatives, and indeed the one[s] that appear [...] furthest removed from the principles of genuine partnership'.[352] Beyond the money received through these partnerships, third-country partners also benefit from wider EUTF programming.[353]

Money from the EUTF has been the 'main bargaining chip of the Migration Partnership Framework'.[354] Clare Castillejo shows that the projects financed under the EUTF through

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[343] Ibid.
[344] Oxfam, The EU Trust Fund for Africa Trapped between aid policy and migration politics, note 19 at p.20; See also, European Court of Auditors, note 171.
[345] Concord, note 8 above.
[346] Bartel, note 345 above.
[347] Agreement establishing the European Emergency Trust Fund, Articles 5(1)(1). and 6(1)(1).
[348] Castillejo, note 21 above.
[349] MSF, note 228 above.
[350] Among others, with Ethiopia, Mali, Niger, Nigeria and Senegal (Libya is under the Memorandum of Understanding on Migration concluded with Italy). In fact, Niger and Libya constitute the most problematic partnerships also because of their strategic position in immigration management: Libya constitutes the primary point of departure to Europe for the Central Mediterranean route and Niger is a key transit country on the Central Mediterranean route for migrants from Western Africa: Ibid.
[351] European Commission, Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, note 294 above.
[352] Castillejo, note 21 above.
[353] Ibid.
[354] Ibid.

partnerships for migration management 'have suffered from inadequate local ownership, weak alignment with local priorities and systems, untransparent selection procedures, slow implementation, and lack of sustainability'.[355] There is no strong consensus among Member States and within Member States on EUTF activities – while Italy is keen to use positive and negative incentives based on partnerships, Ireland is much more sceptical (but also less affected by migration), and is much more worried about EU values and principles.[356] The same seems to be true among EU institutions and within EU institutions.[357]

In other words, the political context makes effective and fair partnerships difficult if not impossible: 'EUTF projects cannot be in line with the principles of development aid': money is heaped onto actors who are responsible for atrocious human rights violations and it does not effectively contribute to the long term stability of the country it is overtly intended to assist.[358] The EUTF emerges as nothing more than a loophole in the palette of the tools deployed by EU's lawlessness law, which allows the EU and the Member States to escape any responsibility.

The EUTF for Africa is coming to an end, transposed – on the basis of the same rationale for addressing the root causes of irregular migration – into the EU Budget under the Neighbourhood, Development and International Cooperation Instrument (NDICI – around EUR 80 billion).[359] Ten percent of the NDCI will be devoted to migration-related purposes, which is a very significant increase. We should not forget the availability of

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[355] Ibid.
[356] Ibid.
[357] Ibid. European External Action Service (EEAS) and DG DEVC versus the Council Secretariat and DG Home which insist on a prioritization of returns.
[358] Concord, note 8 above.
[359] 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) OJ L 209, 14.6.2021'; Available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32021R0947. See recital 51: 'To contribute to that end and without prejudice to unforeseen circumstances, indicatively 10 % of the financial envelope for the Instrument should be dedicated particularly to actions supporting management and governance of migration and forced displacement within the objectives of the Instrument. In addition, that target should also include actions to address the root causes of irregular migration and forced displacement when they directly target specific challenges related to migration and forced displacement.'

other funds to cover the externalisation of immigration management.[360] Indeed, the new multiannual financial framework (MFF) for 2021–2027 allocates EUR 22.7 billion to finance the Asylum, Migration and Integration Fund (AMIF), the Integrated Border Management Fund (IBMF), and the main migration-related EU decentralised agencies. This is again a larger amount than was allocated in the 2014–2020 period.

More specifically, the NDCI can be distributed through an 'incentive based approach' on the basis of a third-country partner's performance in several fields including 'cooperation on migration'.[361] Among the principles the fund intends to uphold, the tenth is in fact very similar to the EUTF approach, since it calls for the maximizing of synergies and the building of comprehensive partnerships, while paying specific attention to countries of origin and transit based on a flexible initiative approach, calling for a flexible funding mechanism.[362] In other words, the NDCI follows in the footsteps of the EUTF, adopting the same 'self-proclaimed "evidence-based" approach relying on a pseudo-causal narrative contradicting widely accepted scholarly findings regarding migration'.[363] The systemic misuse of billions of euros to ensure the successful operation of the EU's lawlessness law is thus not stopping anytime soon.

Contesting this assault on the Rule of Law and human rights is theoretically possible: Bas Schotel is right that the annulment actions targeting the Commission decisions funding allocations or even the Council decision establishing the migration funds might be a possible way to restore some legal accountability for the spending. The problem is more profound, however, than merely bringing an action for annulment before the Court. As we have seen above, based on the *EU-Turkey Deal* but also the *Sharpston* cases, the Court itself is not necessarily an independent arbiter.[364] Indeed, it is one of the architects of the EU's lawlessness law, helping the EU elude any legal responsibility. Having placed the EU-Turkey abuses outside the law, what is the guarantee that funding and equipping the thugs of the 'Libyan Coast Guard' and sharing intelligence with them to help hunt and

[360] M Dassù, 'Judy asks: Why the delay on an EU migration policy? (2017) *Carnegie Europe, Judy Dempsey's Strategic Europe*, Available at https://carnegieeurope.eu/strategiceurope/72953.
[361] Article 20(1) Regulation (EU) 2021/947.
[362] Article 8(10) Regulation (EU) 2021/947.
[363] Zaun and Nantermoz, note 221 above.
[364] Schotel, note 170 above at p.82.

imprison people who have done nothing wrong, with a view to enslaving them and selling them for ransom will not be greenlit by the ECJ, as falling outside the scope of EU law?

The lack of transparency makes it even harder to challenge the funding allocations. More importantly, it is difficult to imagine how every soft deal concluded with a third-country partner could be challenged *a posteriori*, especially when they are concluded by Member States or by the Board of the EUTF composed of some Member States, non-Member States and the EU Commission. More fundamentally, the pseudo-causal narrative of 'addressing migration root causes' is a powerful shield which has been used by the EU institutions and Member States without the Court ever questioning it, even when leaving the wide discretion sought means disapplying the most basic rights and derailing lives. The problem is precisely that the EU *acquis* as applied does not appear to be checked against any other law, including human rights or Article 2 TEU values, not even in such extreme situations of mass violence and abuse. Far-reaching and structural Rule of Law deficiencies plague the very heart of EU law, turning it into an eager actor of injustice.

V. The Apex of EU lawlessness law: FRONTEX and the dilution of responsibility to zero

Pushbacks and pullbacks of racialised former colonials at sea and on land – resulting in thousands of deaths – have become business-as-usual at the EU's borders: Europe kills. This is despite their obviously illegal character and their violation of the most basic human rights including the right to life, the prohibition of torture and inhuman treatment, and *non-refoulement* and the right to request and obtain asylum.[365] These

[365] Mugianu, note 23 above, p. 89; E Papastavridis, 'The EU and the Obligation of Non- refoulement at Sea', in F Ippolito and S Trevisanut (eds.), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press, 2016); GS Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-refoulement' (2011) 23 *International Journal of Refugee Law* 443; M Baumgärtel, *Demanding Rights, Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press, 2019); See also, *Torubarov* ECLI:EU:C:2019:62; *Commissioner v. Hungary,* C-808/18, ECLI:EU:C:2020:1029; *Hirsi Jamaa and others v. Italy* (Application no. 27765/09) (2012); *Safi and others v. Greece* (Application no. 5418/15)(2022).

practices have been documented not only in the Mediterranean,[366] but also on land – first at the Serbian border with Hungary[367] and more recently at the Belarusian border with Poland, Latvia and Lithuania[368] as well as the Bulgarian border with Turkey[369]. This is nothing but an externalization of immigration control at the EU external border itself raising many questions of preventive (in)justice entailing important Rule of law deficit.[370] Interestingly, the EU Commission and Member States increasingly used the excuse of the instrumentalization of migrants by other third States to adopt restrictive and exclusionary measures towards migrants, 'framing migration flow as a weapon of war' in the words of Mitsilegas, [371] although the Court has made clear that such push-backs are illegal and that a declaration of martial law or of a state of emergency cannot deprived refugees to access the international protection procedure. [372]

Even within the borders, the conditions and violations of human rights in the hotspots (reception centers supposed to help) in Greece and Italy have been repeatedly denounced, without any substantial changes.[373] Year after year, the EU makes the fortress ever more impregnable, resulting in people taking ever greater risks to cross borders. Some have tried to use the few legal avenues they have to avoid risking their lives – such as applying for a humanitarian visa at a Member State embassy in a third country – in vain, however. The Court's response is irrevocable: the EU has no say in the issuance of humanitarian

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[366] See the literature cited in note 25 above.
[367] FRO Observations, *Situation at the Hungarian-Serbian Border* (2016); Available at https://helsinki.hu/wp-content/uploads/10.-FRO-observations-HU-SR-border-October-2016-Redacted.pdf
[368] See, eg, Baranowska, note 6 above; Jolkina, note 6 above (all her works listed).
[369] Human Rights Watch, Bulgaria: Migrants Brutally Pushed Back at Turkish Border. The EU Should Act to Stop Illegal and Dehumanizing Pushbacks, 26 May 2022. Available at: https://www.hrw.org/news/2022/05/26/bulgaria-migrants-brutally-pushed-back-turkish-border#:~:text=At%20the%20end%20of%202021,November%202021%20and%20April%202022.
[370] Mitsilegas, note 58 above.
[371] Ibid., p. 9. See also: EU Commission, Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890 final, Strasbourg, 14 December 2021.
[372] CJEU, Case C-72/22 PPU, Valstybės sienos apsaugos tarnyba, 30 June 2022, ECLI:EU:C:2022:505
[373] Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece* (2016) Available at https://ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf; S Horii, 'Accountability, Dependence and EU Agencies: The Hotspot Approach in the Refugee Crisis' (2018) *Refugee Survey Quarterly* 204; S T, 'Fundamental Rights Violations in the Hotspots: Who Is Watching over Them?' (2022) 7(1) *European Papers* 215.

visas, leaving it to the entire discretion of the Member States.[374] In short, the EU does not offer any safe ways for people without a valid visa or who are not exempted from such a visa to reach EU soil safely, resulting in dramatic deaths.

The indifference of European leaders and ordinary citizens prevails and the dilution of responsibility to zero is assured while people are tortured and deprived of rights. Member States, the EU and the mass media – admittedly to a different degree from country to country – participate in this general complicit apathy, backed-up and organized by EU's lawless law. Bas Schotel explains that the fact that the EU lacks organization and significant capacity makes it even less accountable than Member States for what is happening on the ground and offers leeway for acting even more irresponsibly.[375] This is exacerbated by the simple fact that it is not Greece or Lithuania, but the Union as such which is the desired destination. Unaware of the technicalities of the operation of the passport apartheid inside the Union, hopefuls travel to the continent of opportunity, while the Union, which is a single working-living space by law only for its own citizens, construes arrivals at its borders as being located between Belarus and Lithuania or Turkey and Greece, rather than the EU and the rest of the world.

Beyond the fact that pushbacks and pullbacks are extremely difficult to challenge because of their informal character and the fact that the victims, even if they survive and are not imprisoned in Libya or stuck between two rows of soldiers in Belarus, have very little resources to do so. The issue of abusive interpretations of jurisdiction and extraterritoriality is also a sprawling chaos, where pushbacks and pullbacks purportedly occur outside Member State territory and are thus not under effective national control.[376]

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[374] C-638/16 PPU, *X and X v État belge*, ECLI:EU:C:2017:173.

[375] B Schotel, note 170 above, p. 87.

[376] *Bankovic and Others v. Belgium and 16 Other States* (Application no. 52207/99) (2001). Cf. H Battjes 'Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses' in M Kuijer and W Werner (eds.), *Netherlands yearbook of international law 2016* (2017); V Moreno-Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law', in M Maes, M-C Foblets and P De Bruycker (eds), *The External Dimensions of EU Asylum and Immigration Policy* (Brussels, Bruylant, 2011) 385; V Moreno-Lax and C Costello 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model' in S Peers et al. (eds), *Commentary on the EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2014) pp. 1657–1683; J Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and Its Inherent Tensions: The Case of FRONTEX' in M Busuioc, M Groenleer and J Trondal (eds.), *The Agency Phenomenon in the*

In the few cases where jurisdiction was recognized, both the ECJ[377] and ECtHR[378] have unequivocally condemned collective pushbacks by European countries. Such condemnations have not led to significant changes on the ground from the victims' perspective. For the authorities, however, quite the opposite is true: the EU and its Member States have developed and are constantly perfecting the strategies of detachment and externalization, with less direct involvement and control by Member States and EU agencies, raising further issues in terms of accountability before Courts.[379] In contrast to seeking to improve compliance with court decisions, all the powers behind the atrocities at the border perfect the daily business of avoiding any responsibility, rendering moot, if not futile, not only the Rule of Law – as in the case of the EU-Turkey deal – but also the most basic concepts of legality and the core idea of compliance with court decisions.

The deals between the EU and/or its Members States and third countries have a lot to do with this, playing an important role in ensuring that the EU's lawlessness law achieves its goals. Some of the 'countries' informed in fact appear to be EU-funded militias in a sea of lawlessness, as we have seen in the previous sub-part: its deeply legalistic approach has enabled the EU immensely in the export of lawlessness.

These deals have been complemented by the use of new technologies such as drones and satellites to inform third countries of the presence of migrants and to avoid any further

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European Union – Emergence, Institutionalization and Everyday Decision-making (Manchester University Press, 2012); E Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21(3) *GLJ* 417; More broadly for the question of extraterritorial jurisdiction see S Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 21(4) *EJIL* 1223 [discussing the four exceptions, namely extradition or expulsion cases, Extraterritorial effects cases, effective control cases and consular or diplomatic cases].

[377] *Commission v. Hungary*, note 215 above.

[378] *Hirsi Jamaa and others v. Italy* (Application no. 27765/09) (2012); *Safi and others v. Greece* (Application no. 5418/15)(2022); Eight Refoulement cases against Greece are currently pending: applications no. 42429/21, 4177/21, 22146/21, 1712/21, 15067/21 and 24982/21, 10258/21, 4034/21 and 15783/21, 6923/21 and 16802/21.

[379] A Pijneburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?', (2018) 20(4) *European Journal of Migration and Law* 396; M Baumgärtel, 'Part of the Game': Government Strategies against European Litigation Concerning Migrant Rights, in: T Aalberts and T Gammeltoft-Hansen (Eds), *The Changing Practices of International Law* (Cambridge: Cambridge University Press, 2018); M Baumgärtel, *High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan 'Pullback' Policies to the European Court of Human Rights*, (2018) EJIL: talk!, Available at https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/.

direct intervention at sea,[380] participating in dehumanizing the borders.[381] Worse still, even when jurisdiction could possibly be found, the web of entities – state and non-state actors – involved in the ongoing pushbacks and pullbacks is so intricate that it becomes incredibly difficult to challenge these practices: delusions of responsibility while appealing to such complexity is another tool of the EU's lawlessness law. Even if some pieces of the accountability puzzle have been successfully challenged and some are still pending before the ECJ, as explained below, they seem powerless to denounce the whole immense edifice of lawlessness and impunity established by the Union through its lawlessness law. The European Border and Coast Guard Agency, FRONTEX, is at the heart of it.

FRONTEX shares responsibility for border management with the Member States. Member States, however, retain primary responsibility for the management of their sections of the external borders.[382] In fact, as Mariana Gkliati points out, 'it is often the responsibility of the host state that triggers that of the agency, that can incur responsibility not only as a result of its officers in Warsaw, but also for the conduct of its deployed teams on the ground'.[383] The absence of effective accountability mechanisms commanding the whole system results in the Agency's absolute impunity. The fact that FRONTEX is accountable to the European Parliament and to the Council does not help much to improve the situation.[384] The outright flawed accountability system, given the amount of grave violations known to have been committed, is not surprising. It is an example of the EU's lawless law operating *as designed*, which is designed to humiliate, strip of rights and to kill, if necessary, in an atmosphere of absolute impunity, to achieve the goal of harsh daily enforcement of the EU's passport apartheid at the borders of the Union. Starting with the history and core tasks of FRONTEX, we will proceed to analyse the lawlessness law underpinning it, looking the multiplicity of actors involved, the lack

[380] Statewatch, note 24 above; Sunderland and Pezzani, note 24 above.
[381] Rijpma and Vermeulen, note 24 above.
[382] Article 7, 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) 2016/1624, Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1896 (Hereinafter: The EBCG Regulation).
[383] M Gkliati, 'The Next Phase of The European Border and Coast Guard: Responsibility for Returns and Push-backs in Hungary and Greece', (2022) 7(1) *European Papers*, p. 186.
[384] Article 6, EBCG Regulation,

of transparency which is intrinsically linked to the absence of an external human rights monitoring body, and the inadequacies of the judicial remedies available for individual victims of FRONTEX's crimes.

a) The agency No. 1 of the EU's lawlessness law

The FRONTEX story has been told numerous times.[385] Created in 2004 to facilitate and render more effective the application of Community measures relating to the management of external borders, it has seen its mandate, funding and staff enormously extended over the years through four major amendments to the FRONTEX founding Regulation.[386] Today it is entrusted with ensuring European integrated border management at the external borders with a view to manage those borders efficiently and addressing migratory challenges and threats at the external borders.[387] Its tasks include supporting Member States in the management of external borders and participating in joint operations at the borders with them,[388] cooperating with third countries by providing them with technical and operational assistance within the framework of the external action policy of the Union,[389] and it can develop joint operations with them upon the request of one or several Member States and deploy staff outside the EU, even beyond

[385] E.g., see literature on note 20 above.
[386] Article 1(1) and (2), 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, 25.11.2004, pp. 1–11 modified by 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, 22.11.2011,* pp. 1–17; and then repealed by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 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, 16.9.2016, pp. 1–76); Regulation(EU) 2016/1624 was itself repealed by 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) 2016/1624 (pp. 1–131*)* (The EBCG Regulation). The EBCG Regulation is currently 131 pages long (it was 11 pages in 2004).
[387] Article 1 and 2 EBCG Regulation, For the evolution of the mandate between 2016 and 2019, see European Court of Auditors, *FRONTEX's support to external border management: not sufficiently effective to date* (2021), p. 46.
[388] Article 7(1), (3), (4) and Article 10(1)(d), (h), (i) EBCG Regulation; also Article 36 and seq. (section 7) EBCG Regulation.
[389] See Articles 10 (1) (k) and 71 and 73 EBCG Regulation.

countries neighbouring the EU,[390] to provide support for border management. It also assists Member States at all stages of the return process,[391] monitors migration flows and carries out risk analysis at the external borders for irregular migration and cross-border criminal activity,[392] trains border guards across Europe, and evaluates the capacity[393] and readiness of Member States to meet the challenges at external borders (the so-called vulnerability assessments).[394]

FRONTEX is endowed with important tools to perform its tasks. The 2019 Regulation provides that the Agency shall include the European Border and Coast Guard, to number up to 10 000 operational staff by 2027.[395] It means that FRONTEX now has its own standing corps with executive powers composed of FRONTEX and EU Member States officers authorized to carry and use weapons as well as lethal and non-lethal equipment.[396] Its budget has grown steadily since its creation, starting at EUR 6 million,[397] reaching EUR 754 million in 2022, and to reach an average of EUR 900 million per year for the 2021–2027 period.[398]

With the 2019 reform of FRONTEX, its responsibility shifted from complicity to direct responsibility. This is due, as Mariana Gkliati observes, precisely to the expansion of the powers and competences of the agency, through the standing corps of 10 000 border guards (including FRONTEX statutory staff), the increased use of its own equipment, and its increased role in return operations, not to mention the joint operations in third countries.[399]

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[390] Article 37 EBCG Regulation.
[391] Articles 7(2), (3), (4) and (10)(1), (n), (o), (p) EBCG Regulation; See also Articles 48 et seq. (section 8) EBCG Regulation.
[392] Articles 10(1)(a) and 29 et seq. EBCG Regulation.
[393] Article 10(1)(w) EBCG Regulation.
[394] Article 10(1)(c) EBCG Regulation.
[395] See Article 5(2) and Annex I EBCG Regulation. It is constituted by the national authorities of Member States responsible for border management, including coast guards to the extent that they carry out border control tasks, the national authorities responsible for return and the European Border and Coast Guard Agency. See also Articles 54 et seq. (Section 9) EBCG Regulation.
[396] See Articles 55(5) and 82 and Annex V EBCG Regulation.
[397] For an overview of FRONTEX Budget throughout the years, see: Statista, Annual budget of FRONTEX in the European Union from 2005 to 2021, (2021) Available at https://www.statista.com/statistics/973052/annual-budget-FRONTEX-eu/.
[398] Court of Auditors, note 401 above.
[399] Gkliati, note 383 above.

Finally, FRONTEX's intelligence tasks have also grown tremendously, to the point where it is becoming 'an intelligence actor'.[400] It benefits from an extensive near-time exchange[401] of information with Member States regarding border-related data through the European border surveillance system (EUROSUR), a mass surveillance and data exchange programme which it coordinates (but also played a decisive role in its adoption).[402] More importantly, as Jorrit Rijpma and Mathias Vermeulen convincingly demonstrate, saving lives is only a secondary goal of EUROSUR, which is in fact 'first and foremost an instrument for the gradual establishment of an integrated system for the management of the external borders',[403] with issues likely to arise in terms of data protection.[404] On top of this, FRONTEX is also in charge of collecting information in third countries for operational and strategic use, as well as identifying third-country nationals in third countries to fight against irregular immigration, through the EU Network of Immigration Liaison Officers.[405]

The cherry on the cake is that FRONTEX is responsible to establish and operate the European travel information and authorization system (ETIAS) Central Unit,[406] which brings with it a new form of arbitrariness, because power and discretion are delegated to an algorithm without sufficient specification and limitations by the legislators, as

[400] Rijpma and Vermeulen, note 24 above.
[401] S Pollozek, 'Turbulences of speeding up data circulation. FRONTEX and its crooked temporalities of 'real-time' border control', (2020) 15(5) *Mobilities* 677.
[402] The framework for information exchange and cooperation between the Member States and the European Border and Coast Guard Agency. Articles 18-19(1), Article 10 (1) (f) EBCG Regulation; Rijpma and Vermeulen, note 24 above.
[403] Rijpma and Vermeulen, note 24 above.
[404] S Tas, 'FRONTEX and Data Protection: Another Rule of Law Challenge in Sight?', (2022) *VerfBlog* 2022/9/09, Available at https://verfassungsblog.de/FRONTEX-and-data-protection/; Deibler, note 172 above.
[405] Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast) PE/50/2019/REV/1 OJ L 198, 25.7.2019, pp. 88–104. See also articles 10(1) (d) and 77 EBCG Regulation; They also operate within Member States where they have a monitoring-like function: E Tsourdi, 'Beyond the "Migration Crisis": the Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies' in J Pollak and P Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan, 2021), p. 184 et seq.
[406] Article 67 EBCG Regulation.

demonstrated by Amanda Musco Eklund.[407] As summarized by Florin Coman-Kund, in just a few years, 'FRONTEX made a "quantum leap" from a rather traditional EU agency equipped with lighter supporting and coordination tasks, to a much stronger EU administrative body entrusted with quite significant and controversial operational capacities and enforcement powers, including on the territories of third countries'.[408] However, neither its accountability safeguards nor an adequate level of human rights protection and Rule of Law compliance have been developed in proportion to the expansion of its mandate and tools.

Scholars,[409] NGOs,[410] journalists[411] and the European Parliament[412] have vehemently criticized the way the Agency uses its powers and carries out its activities. More specifically, despite the denunciation of its participation in serious and systemic violations of human rights at the borders – and notwithstanding the fact that being bound by fundamental rights even constitutes one of its tasks in border management[413] – its responsibility has never been legally recognized, so far. In fact, the agency is failing even in achieving the main purposes for which has been established: in 2021, the European Court of Auditors found that 'FRONTEX's support for Member States/Schengen associated countries in fighting against illegal immigration and cross-border crime is not sufficiently effective'.[414] The figures tell us that irregular crossings of the EU borders (along the Central and Western Mediterranean Route) have increased 'despite the

[407] AM Eklund, 'FRONTEX and 'Algorithmic Discretion' (Part I): The ETIAS Screening Rules and the Principle of Legality', (2022) *VerfBlog* 2022/9/10, Available at https://verfassungsblog.de/FRONTEX-and-algorithmic-discretion-part-i/.
[408] F Coman-Kund, 'Hybrid EU External Border Management: FRONTEX, the Rule of Law and the Quest for Accountability', (2022) *VerfBlog* 2022/9/06, Available at https://verfassungsblog.de/hybrid-eu-external-border-management/.
[409] For a recent and up-to-date criticism, see also the contributions in the Verfassungsblog's debate on FRONTEX and the Rule of Law available at note 20 above. See also R Mugianu, note 23.
[410] See literature in note 25 above.
[411] Joint investigation conducted by Bellingcat et al., note 21 above.
[412] See the report of the European Parliament FRONTEX Scrutiny Working Group: European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs, *Report on the fact-finding investigation on FRONTEX concerning alleged fundamental rights violations* (2021). Available at https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf
[413] Article 10(1) ad) EBCG Regulation.
[414] Court of Auditors, note 401 above.

mobility restrictions and enhanced border controls adopted to contain COVID-19',[415] leaving the migration industry growing in the face of the Agency's failure and feeding the appetite for anti-migrant politics.[416] Make no mistake, the EU's lawlessness law has not failed at all, as no one is held responsible for the thousands of deaths and gruesome human rights abuses which occur, while the budget for more has only grown, by more than 100 times in recent years if one considers FRONTEX on its own: the orgy of the EU's law-backed violence only intensifies.

Currently, the Agency is on the spot following the leak in July 2022 of some parts of an OLAF report[417] showing that the Agency had knowledge of pushback operations by Greece and other Member States, experienced fraud in public procurement, and tolerated serious internal malfeasance, including harassment. The scandal pushed FRONTEX's controversial former Executive Director, Fabrice Leggeri, to resign.[418] However, not much has changed on the part of the Council and the Commission since then: the system built to achieve human rights abuses keeps on functioning as designed.

b) The multiplicity of actors

One of the major elements which help dilute FRONTEX responsibility to nothing is the involvement of many state and non-state actors in border management, amply characterized by André Nollkaemper as the problem of many hands:[419] accountability and

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[415] *EU emergency trust fund for Africa: 2020 annual report* (Publications Office of the European Union, 2021) Available at https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf-report_2020_eng_final.pdf., p. 11.

[416] T Gammeltoft-Hansen 'The rise of the private border guard: Accountability and responsibility in the migration control industry' in T Gammeltoft-Hansen & NN Sørensen, *The migration industry and the commercialization of international migration* (Routledge, 2013).

[417] Lüdke, note 24 above; FRONTEX refused to disclose it: see https://FRONTEX.europa.eu/media-centre/management-board-updates/management-board-conclusions-from-the-extraordinary-mb-meeting-of-28-29-april-2022-nr08YV.

[418] Statewatch, *FRONTEX Investigations: What changes in the EU border agency's accountability*, (2021) Available at https://www.statewatch.org/analyses/2021/FRONTEX-investigations-what-changes-in-the-eu-border-agency-s-accountability/; Lighthouse Reports, *FRONTEX Chapter III: Agency in Turmoil*, (2021) Available at https://www.lighthousereports.nl/investigation/FRONTEX-chapter-iii-agency-in-turmoil/.

[419] A Nollkaemper, 'The Problem of Many Hands in International Law', (2015) 72 *SHARES Research Paper, ACIL 2015-15;* See also Gkliati and Kilpatrick, note 23 above; This expression was coined by D Thompson,

responsibility are in a grey zone when it comes to concerted and complex actions, where it becomes very difficult for individuals and professional lawyers to practically and legally identify the accountable actors. It becomes even more difficult with the introduction of remote management techniques and proxy third actors.[420] As Mélanie Fink underlines, the multiplicity of actors has several serious consequences, including a negative impact to the performance of obligations and undermines the position of the victim because of lack of clarity in the allocation of responsibility.[421] Several elements contribute to multiplying hands in such cases.

The first is the hybrid nature of EU agencies – in between EU institutions and Member States – which has been widely commented on and researched.[422] FRONTEX is one such and serves both the EU, especially the Commission, and the Member States.[423] This hybrid nature is also reflected in its mandate as the agency in charge of a 'multi-actor' European Border and Coast Guard composed of FRONTEX and national competent authorities 'often interacting in convoluted ways, subject to heterogenous legal frameworks combining EU and national law'.[424] In addition, the joint operations between FRONTEX and the Member States – part of what is called 'Joint implementation patterns'[425] – are also paradigmatic of the superposition and complexity of multi-actor actions.[426] Joint operations are achieved when one or more Member State supports in the management of borders areas under pressure through joint border control or joint return operations and involves the deployment of additional border guards, experts and

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'Moral Responsibility of Public Officials: The Problem of Many Hands', (1980)74(4) *American Political Science Review* 905.

[420] However, it has been convincingly argued by Violeta Moreno Lax that mechanisms of 'contactless control' exercised via remote management techniques and/or through a proxy third actor can trigger human rights obligations: V Moreno-Lax, note 164.

[421] Fink, note 23, pp. 3–4. Fink discusses at length the question of responsibility of multi-actor situation involving FRONTEX (the joint operations more specifically). See also Mugianu, note 23 above.

[422] M Chamon, *EU agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016); See also, F Coman-Kund, *European Union Agencies as Global Actors. A Legal Study of the European Aviation Safety Agency, FRONTEX and Europol* (Routledge, 2018)

[423] Coman-Kund, note 422 above.

[424] Ibid.

[424] Ibid.

[425] Tsourdi, note 405 above.

[426] For an overview of these joint operations, see Fink, note 23 above; See also Mugianu, note 23 above, p. 37 and seq.

equipment, which makes the identification of the responsible actor between Member States and FRONTEX even more obscure.[427] FRONTEX takes a leading role in these operations,[428] while its growing mandate is not always clearly translated in terms of tasks.

This multiplicity of actors in the EU's border management is reinforced by the fact that operations increasingly involve, directly or indirectly, private actors,[429] such as private military and security companies[430] or carriers,[431] to perform many activities related to border controls, including those which entail a high risk of gross human rights abuses.[432] The question of 'hidden coercion' through carrier sanctions, let alone[433] the privatization of such activities implies a vast increase in often opaque expenditure.[434] Most of the contracts concluded with private companies (e.g. Airbus and Elbit) related to aerial surveillance (to track vessels in distress and forward the relevant information to the Libyan Coast Guard which hunts and imprisons people under the pretext of saving them)[435] and amounted to over EUR 100 million between 2014 and 2020, as reported by Statewatch.[436] Against this background, the use of new technology has made it increasingly difficult to engage the responsibility of state and non-states actors in pushing and pulling back migrants. The example of drones and satellites as new tools of

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[427] Ibid (Fink) at p. 4; Ibid (Mugianu), p. 3.
[428] Ibid (Mugianu), p. 47.
[429] E.g. Gammeltoft-Hansen, note 416 above, p. 128.
[430] D Davitti, 'Beyond the Governance Gap: Accountability in Privatized Migration Control', (2020) 21 *German Law Journal* 487; Gammeltoft-Hansen, note 416 above, p. 152.
[431] T Bloom, 'The Business of Migration Control: Delegating Migration Control Functions to Private Actors', (2015) 6(2) *Global Policy* 151.
[432] Statewatch, *Funds for Fortress Europe: Spending by FRONTEX and EU-LISA*, (2022) Available at https://www.statewatch.org/analyses/2022/funds-for-fortress-europe-spending-by-FRONTEX-and-eu-lisa/.
[433] T Bloom and V Risse, 'Examining Hidden Coercion at State Borders: Why Carrier Sanctions Cannot Be Justified', (2014) 7(2) Ethics and Global Politics 65; T Rodenhauser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control', (2014) 26 *International Journal of Refugee Law* 223.
[434] Statewatch, note 346 above; On the privatization of the asylum systems, see more generally: T Kritzman-Amir, 'Privatization and Delegation of State Authority in Asylum Systems', (2011) 5(1) *Law and Ethics of Human Rights* 191; See also Bloom, note 445 above.
[435] Sea-Watch, *Crimes of the European Border and Coast Guard Agency FRONTEX in the Central Mediterranean Sea. Insights into their ongoing and unpunished aerial complicity in human rights violations,* (2021) Available at https://sea-watch.org/wp-content/uploads/2021/05/FRONTEX-Factsheet_Airborne_Sea-Watch_May-2021.pdf
[436] See note 434 above (Statewatch); and Statewatch, *FRONTEX: Big Spending on Aerial Surveillance,* (2022) Available at https://www.statewatch.org/news/2022/june/FRONTEX-big-spending-on-aerial-surveillance/.

surveillance – allowing 'touchless' and remote management – is paradigmatic: pushbacks and pullbacks to Libya have been carried out mainly through the transmission of data to the Libyan coastguard for instance. They allow the identification of suspect boats in the Mediterranean and signaling third country partners.[437] On top of the imbrication between the Member States, FRONTEX and private partners, FRONTEX's operational role abroad has increased in the field of cooperation between the Agency and third countries[438] and assistance to third countries.[439] This cooperation has mainly developed through the use of 'working arrangements', twenty of which have been concluded since 2006.[440] In addition to the exchange of information and practices, these arrangements imply the possibility for FRONTEX to second national officers from the third country's authorities competent in border management, promoting improvement of the technical and organisational cooperation between the competent border management authorities on both sides etc.

Since 2016,[441] FRONTEX has the possibility to launch joint operations with third countries, going beyond its initial mandate of international cooperation. Concretely, this means that FRONTEX, on the basis of a Status Agreement (and Operational Plan),[442] can operationally assist third states on the ground with EU personnel operating under third-state command, with important legal and practical implications.[443] As rightly underlined by Narin Idriz and Mélanie Fink, 'in the case of operations in third states, the human rights risks are compounded by the fact that there is much less control over border management standards in third states than in EU Member States. In addition, the already

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[437] European External Action Service (EEAS), *Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell*, (2018), available at https://www.statewatch.org/media/documents/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf
[438] Article 73 EBCG Regulation.
[439] Article 74 EBCG Regulation.
[440] They specify the scope, nature and purpose of the cooperation and be related to the management of operational cooperation (Article 73(4) EBCG Regulation). The list of working Agreements is available on FRONTEX webpage: https://prd.FRONTEX.europa.eu/.
[441] See Article 54, Commission Implementing Regulation (EU) 2016/162 of 28 January 2016 entering a name in the register of protected designations of origin and protected geographical indications, (2016) Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0162 (repealed).
[442] Article 73(3) EBCG Regulation. The status agreement shall cover all aspects that are necessary for carrying out the actions.
[443] Fink and Idriz, note 182 above, p. 135.

existing unclarities in the allocation of responsibility for human rights violations during joint operations are further complicated by the involvement of third states and the applicability of their own legal systems'.[444]

In short, the multiplicity of actors involved in these complex collective activities – also implying many layers of legal authority[445] – between FRONTEX and the Member States, and with the implication of private actors, makes it extremely laborious to solve the factual question of attribution for unlawful conduct but also the legal problem of individual and collective responsibility. In this context, the imbrication of state and non-state actors is such that it becomes 'impossible to find one actor that is entirely and independently responsible for the outcome, since the outcome is a collective one. It also becomes practically difficult to distinguish and prove who has contributed, and to what extent, to which particular part of the outcome, and should thus be held responsible for it'.[446]

c) Lack of transparency and accountability

Public accountability implies that the agent has to provide information about his or her conduct, including the performance of tasks, the procedures applied and outcomes achieved, and when necessary the agent should be in a position to be asked to explain its conduct.[447] In other words, accountability requires transparency.

Without transparency, it is difficult or impossible to provide accountability safeguards, as in the case of FRONTEX. Transparency is an EU fundamental right[448] and FRONTEX, as an EU Agency, is subject to it, including Regulation (EC)1049/2001 on access to documents,

[444] Ibid, p. 133.
[445] Ibid, p. 136.
[446] Gkliati and Kilpatrick, note 23 above.
[447] M Bovens, T Schillemans and R E Goodin, 'Public Accountability' in M Bovens, T Schillemans and R E Goodin (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) pp. 1, 9; See also p. 95; T (L) Evangelia, A Ott and Z Vankova, 'The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration', (2022) 7(1) *European Papers* 87.
[448] Article 42, EU Charter of Fundamental Rights enshrined the right to access to documents

and reliable and easily accessible information with regard to its activities.[449] Transparency is even one of the tasks of the Agency.[450] However, the lack of transparency constitutes a structural problem for FRONTEX: without crucial information on its internal functioning and activities – which the Agency is solely able to provide – it is simply impossible to assess the Agency's respect of its mandate its performance in terms of fundamental rights. Only through whistleblowers, leaked reports and individual testimonies have NGOs been able to unveil the abuses and impunity in that regard.[451] Even the OLAF report, made available to MEPs months after it was written, has still not been officially disclosed, which does not appear to be justified in light of the ECJ's case law, as explained by Laura Salzano.[452] The broad acceptance of the emergency ('crisis') and securitisation narratives – which has become constant – is key in justifying the absence of transparency and thus accountability.[453] This lack of transparency has important consequences for FRONTEX's accountability, especially when it comes to its operational role in joint operations, where accountability is already very hard to identify due to the accountability dilution mechanisms explained above.

Transparency is also linked to accountability safeguards which ensure that Agencies operate according to the paradigm of limited government, to prevent discretion devolving into arbitrariness. There is a problem with the FRONTEX legal design in that regard.[454] Indeed, from an internal perspective, the FRONTEX Management Board has not been able to ensure that FRONTEX, and especially its executive Director, do not abuse their powers, especially when it comes to accountability regarding human rights, as

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[449] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43–48, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32001R1049

[450] Article 10(1) (ad) EBCG Regulation.

[451] M Gkliati, 'What's in a Name?: Fragments of Accountability and the Resignation of the FRONTEX Executive Director', (2022) *VerfBlog*, 2022/9/06, available at https://verfassungsblog.de/whats-in-a-name/.

[452] L Salzano, 'The Secretiveness over the OLAF Report on FRONTEX Investigations: Rule of Law Fading into Arbitrariness?', (2022) *VerfBlog*, 2022/9/09, available at https://verfassungsblog.de/the-secretiveness-over-the-olaf-report-on-FRONTEX-investigations/.

[453] Gkliati and Kilpatrick, See note 23 above. See also: D. Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"', 29(4) *The European Journal of International Law* 2018, 1173.

[454] Marin, note 20 above

documented by the relevant OLAF report.[455] This is not surprising if we consider that the Management Board is composed solely of the Commission and the Member States, represented by the head of the border authorities,[456] without any other representation to indicate a sensitivity to the need for respect for human rights.[457] In fact, the growth of FRONTEX's powers was simply not accompanied by adequate accountability mechanisms.[458] Even the European Parliament is excluded from the Management Board. If the role of the European Parliament in the discharge of FRONTEX budget has been very important democratically speaking,[459] and the European Parliament has recently used this power to its full potential,[460] the discharge has no legal impact for FRONTEX and its activities: it still benefits from its budget and mandate.[461] More importantly, there is no external control or supervision of FRONTEX activities in terms of human rights performance (as opposed to its financial performance, for instance).[462] The Management Board is mainly in charge of these aspects of its activities and it has been rather silent on the question and quite reluctant to commission any kind of independent investigation into the matter. Even the function of the Fundamental Rights Officer introduced in 2011 and mandated with monitoring FRONTEX's implementation of its fundamental rights

[455] OLAF, note 21 above.
[456] See the composition of the Board on FRONTEX website: https://FRONTEX.europa.eu/about-FRONTEX/who-we-are/management-board/
[457] Marin, note 20 above.
[458] Gkliati, note 451 above.
[459] T Strik, 'European Oversight on FRONTEX: How to Strengthen Democratic Accountability, (2022) *VerfBlog*, 2022/9/08, available at https://verfassungsblog.de/european-oversight-on-FRONTEX/. See Articles 6 and Article 106(2) EBCG Regulation (among others). See also Articles 260 and seq. of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012OJ L 193, 30.7.2018, pp. 1–222.
[460] In 2021, the European gave the discharge but asked for part of 2022 budget to be frozen: European Parliament resolution of 21 October 2021 on the Council position on the draft general budget of the European Union for the financial year 2022 (11352/2021 – C9-0353/2021 – 2021/0227(BUD)). In May 2022, the European Parliament withheld FRONTEX discharge until full OLAF investigation report becomes available: https://www.europarl.europa.eu/news/en/press-room/20220429IPR28235/discharge-meps-delay-signing-off-on-accounts-of-FRONTEX.
[461] M Gigli, 'Financial Scrutiny of FRONTEX as a Political Accountability Tool', (2022) *VerfBlog*, 2022/9/08, Available at https://verfassungsblog.de/financial-scrutiny-of-FRONTEX-as-a-political-accountability-tool/.
[462] Marin, note 20 above.

obligations is internal to FRONTEX and dependent on the Executive Director.[463] In fact, it was shown that the 'Executive Director completely disregarded all opinions and recommendations from the Fundamental Rights Officer (FRO), including seven expressions of concern about fundamental rights related situations, inter alia related to FRONTEX's operations in Hungary and Evros',[464] even though the preservation of fundamental rights is one of FRONTEX's missions.[465] Of course, in addition to the European Parliament, some accountability 'sticking plasters' such as the European Ombudsman, the Fundamental Rights Agency and the agencies' internal monitoring mechanisms could always be explored. However, as Sarah Tas explains in the context of the hotspots where FRONTEX plays a key role – including in the violation of fundamental rights – these mechanisms are simply insufficient to monitor the complex environment of the hotspots.[466]

d) Scarcity and inadequacy of judicial remedies

The multiplicity of actors on top of the lack of transparency and the absence of external human rights monitoring, makes it extremely difficult for individuals, NGOs and lawyers to challenge FRONTEX's responsibility. What is more, even when these challenges can be overcome, judicial remedies for individuals before the ECJ are scarce and inadequate,

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[463] Gkliati, note 451 above. Although this external control exists for financial and certain administrative matters as explain by Gkliati: OLAF investigates illegal reception, allocation of funding, corruption and serious misconduct (Article 117 EBCG Regulation), the European Court of Auditors exercises control over the budgetary and financial management of the agency (Article 116 EBCG Regulation) and the European Ombudsman can also receive complaints regarding denied requests for access to documents or other types of maladministration against the agency (Article 228 TFEU, Article 43 Charter, Article 114(5) EBCG Regulation).

[464] T Strik, note 459 above. See the report of the European Parliament FRONTEX Scrutiny Working Group: European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs, *Report on the fact-finding investigation on FRONTEX concerning alleged fundamental rights violations* (2021). Available at https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf

[465] Article 10(1) (ad) EBCG Regulation. Interestingly, Elspeth Guild points out that the Surveillance Regulation of the external sea borders fails to impose the legal requirement in terms of fundamental rights required by the Schengen Border Code. More importantly, 'although the Regulation requires observance of the international law non-refoulement requirement, there are no apparent procedural duties on border police, which an individual can rely upon to claim said rights': E Guild, 'What Monitoring for Fundamental Rights at EU Borders?: FRONTEX and Rule of Law', (2022) *VerfBlog*, 2022/9/07, Available at https://verfassungsblog.de/what-monitoring-for-fundamental-rights-at-eu-borders/.

[466] See also, S Horii, note 373.

contributing to the dilution of FRONTEX's responsibility. It should be recalled that the ECJ has exclusive competence over the liability of EU agencies and as a result, its responsibility cannot be challenged before national courts,[467] greatly limiting the available judicial remedies for applicants, although international Courts remain available.[468]

Two main avenues have been explored by lawyers so far: the action for failure to act[469] and the action for damages.[470] The former has been unsuccessful (so far) while the second is pending before the ECJ.

Recently, the General Court found inadmissible an action for failure to act,[471] where the applicants denounced FRONTEX wrongdoing during Joint Operation Poseidon in the Aegean Sea, which included physical violence, detention and pushbacks.[472] In this case, the applicants, Front-Lex and the Legal Centre Lesvos, invited FRONTEX, in accordance with Article 265 TFEU, to suspend or terminate its activities in the Aegean Sea region.[473] FRONTEX rejected the request, arguing that the conditions to adopt such a decision were not met, considering that none of the incidents mentioned by the applicants were capable of demonstrating the existence of infringements of fundamental rights.[474] The General Court found that FRONTEX defined its position within the meaning of Article 265 TFEU, and therefore judged the action inadmissible, 'irrespective of whether the applicants' plea is well founded'.[475] The General Court further specified that the 'complaint that FRONTEX's position lacks clarity, is not sufficiently detailed and does not provide duly

[467] Gkliati, note 383 above, p. 184; See also, joined *Asteris and Others v Greece and EEC*, C-106/87 and C-120/87, ECLI:EU:C:1988:457.
[468] See for instance: O Shatz and J Branco, *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome Statute on EU Migration Policies in the Central Mediterranean and Libya (2014–2019)* (2019), Available at https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf.
[469] Article 265 TFEU. See also Article 98 EBCG Regulation.
[470] Article 340(2) TFEU, which stipulates that an EU institution or agency shall make good any damage caused by its servants in the performance of their duties. See also Article 98 EBCG Regulation.
[471] Case T-282/21 *SS and ST v European Border and Coast Guard Agency* (2022).
[472] See: FRONTEX, Joint Operation Poseidon (Greece), (2016), Available at https://FRONTEX.europa.eu/media-centre/news/focus/joint-operation-poseidon-greece--3ImFxd.
[473] *SS and ST*, note 485 above, paragraph 24
[474] Ibid. paras 25 and 29.
[475] Ibid paras 32 and 33.

substantiated reasons, could, where appropriate, have formed the basis of an action for annulment under Article 263 TFEU'.[476] This suggestion brings only perplexity since the traditional limits for an action of annulment makes it particularly cumbersome, as rightly pointed out by Salvo Nicolosi: '[t]he nature of FRONTEX's activities, however, is problematic from the perspective of an action for annulment, because the execution of border management tasks often manifests itself in the form of *de facto* conduct that does not involve the adoption of legally binding acts'.[477] Moreover, even when legally binding acts are at stake, such as the Status Agreements and Operational Plan in the context of joint operations, applicants can encounter significant challenges to proving their standing and sufficient legal interest.[478]

Finally, several actions for damages have been lodged before the ECJ against the Agency for the collective expulsion from Greece conducted in April 2020 in the Aegean Sea.[479] All of them are still pending, meaning that no violations have been found so far and individual victims of FRONTEX actions have not received any kind of reparations. Moreover, these actions imply identifying the actor behind the wrongful conduct and to determine whether FRONTEX had any legal responsibility – which is some case is almost impossible because of the multiple actors involved and the lack of transparency discussed above – and if so, what. As a consequence, the absence of relevant and effective remedies for individuals who seeking to challenge wrongful FRONTEX conduct has been very limited so far because of the way the whole system is organized, based on the EU lawlessness law. In short, as put by Gkliati, 'the ECJ alone cannot provide stable and authoritative answers to questions of attribution and the liability of agencies, especially in regard to multiple actors (joint liability)'.[480] This is the (lawlessness) law.

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[476] Ibid para 33.
[477] S Nicolosi, 'FRONTEX and Migrants' Access to Justice: Drifting Effective Judicial Protection?', (2022) *VerfBlog*, 2022/9/07, Available at https://verfassungsblog.de/FRONTEX-and-migrants-access-to-justice/.
[478] See note 182 (Fink and Idriz), p. 139.
[479] *Hamoudi v FRONTEX* (Case T-136/22) (2002); *WS and Others v FRONTEX* (Case T-600/21) (2021). For an overview of the question, see: M Fink, The Action for Damages as a Fundamental Rights Remedy: Holding FRONTEX Liable, (2022) 21(3) *GLJ* 532.
[480] Gkliati, note 383, p. 183.

CONCLUSION

The EU is an atypical legal system in that it treats non-citizens very differently to its own citizens, unlike other constitutional systems in the world. Not only are the rights which the two categories enjoy different, which is not so unusual, but the differences go still further, as the EU disappears entirely in law as a single working-living space, a space of rights, for the majority the holders of non-EU nationalities. The very existence of the Union and its core achievements: free movement in the territory of all the Member States and non-discrimination on the basis of nationality, thus depends on the citizenship of the person asking. The scope of EU law is always personal, which is at the core of the classical Balibarian critique of the Union as a system of *apartheid européen*: the Union discriminates much more than any of its component parts would find tolerable. Denying the law's generality as it applies to the territory creating and safeguarding rights entails the outright deprivation of dignity. A foreigner, often born in the Union but for whom the Union has nothing to offer, deserves no respect from its law: a blind spot.

This has been the story of the EU vis-à-vis the individual virtually since the inception of the EU legal system. As this paper demonstrated, the situation has become much worse over the last decade. Built on the starting assumption of the inherent value of the passport apartheid, the mistreatment of non-citizens from the former colonies and other spaces of no opportunity has significantly intensified. The passport apartheid has grown into a complete denial of rights to the racialised post-colonial others, granted no possibility to enter the EU lawfully. Building on its whole history of denying foreigners the very existence of the internal market within the Union, the *apartheid européen* Balibar warned about has been transposed into the liminal border areas, marking absolute denial of any rights on the books to the former colonials. As thousands of people are killed by proxies and dozens of thousands more are imprisoned with no charge or held for ransom by the thugs equipped and funded by the EU and its Member States as part of a concerted effort to export lawlessness as a tool of attacking any migration from the poorest spaces, no one has been punished and the lawlessness practices grow, get better funding and end up being exported further afield. The Court of Justice and other actors either look the other way or take a firm position that the EU is usually not to blame. In those rare cases where the outcome is different fail to emerge as causes for celebration, as each condemnation de

facto leads to the further improvement of the coherent system of lawlessness that the EU has erected at its borders.

This system of lawlessness emerges as being almost impenetrable, as any responsibilities are diluted and funding for further lawlessness – either granted to the EU actors involved or the private parties and third countries – is abundant and growing, as we have seen. As thousands are killed in the process, we found that an array of legal techniques is deployed by the European Union to make sure that the whole spectrum of denying non-citizens rights – from dignity to the right to life – is never presented as a violation of EU law, even in the cases where tens of thousands are hunted and detained by proxy and the Mediterranean is turned into a mass grave by EU's efforts. These techniques vary from the abuse of soft law to unpublished international agreements stripping persons of primary law rights and the use of new technologies at the borders. Making this sea of lawlessness possible is the work of what we call 'EU lawlessness law'. We explained how EU lawlessness law operates, who pays for it, how it passes legal scrutiny and what its objectives are. We outlined why it is a grave violation of EU values and why deploying legality to ensure that the most significant rights are turned into fiction is an affront to the Rule of Law.

To present a complete picture of the EU lawlessness law, we looked at the treatment of non-Europeans both inside and outside the Union. The core principle is always there and it is the principle of passport apartheid. Its starting point is that citizenships, blood-based statuses of attachment to public authority distributed at birth, are among the most significant building blocks of the EU's world-making by law. In the EU, there is usually no need to break the law to deny the foreigner crucial rights: the *apartheid européen* works well from the internal market to the Belarusian forest and the Mediterranean Sea.

In this article we elaborated on this starting point using two main contexts: the near complete exclusion of non-EU citizens from the fundamental freedoms in the EU and the proactive stance of the Union and the Member States in ensuring that the right to seek protection in the EU is turned into an unworkable proclamation. The EU's lawlessness law is always on the side of the Union and we outline a spectrum of injustice to showcase different instances of how the EU's legality enters into direct conflict with the Rule of Law to denigrate non-Europeans. Money matters – and the EU Emergency Trust Fund for

Africa emerged as a reliable and unaccountable purse for operationalizing the lawless law. EU can torture, kill, imprison and enslave and it does so mostly targeting the people from its former colonies. It is not about 'Europeans' vs abstract 'non-Europeans', we argue: the lawlessness law is de facto racist. While this usually happens by proxy, this is not always so, as FRONTEX, an EU agency, is at the forefront of stripping non-Europeans of rights. The atypical nature of the Union as an ideal type of passport apartheid served well by its own lawlessness law is significantly undertheorized and this paper aims to start bridging the gap between the day-to-day reality of the EU's incessant efforts to promote lawlessness and the lack of accountability on the one hand, and the numerous proclamations about the Union's equitable value-laden nature on the other.