Conclusion

1 Doctrinal Analysis in a Politicised Context

This study has shown that applying the CJEU's doctrine on EU public liability leads to the conclusion that Frontex, the EUAA, and the Commission incur liability under Art. 340 para 2 TFEU for systemic fundamental rights violations in the EU hotspots.[1] This includes in particular, liability for reception-related violations of Art. 4 and 6 ChFR and procedure-related violations of Art. 41, 24 and 4, 18, 19 ChFR.

Yet, it would be naïve to ignore that the topic of EU hotspots is a highly politicised one and that politicisation is an important factor in determining the outcome of court proceedings, including before the CJEU.[2] In the context of externalization policies more broadly, the CJEU has so far tended to shy away from confronting the EU's own administrative bodies. In similarly politicised cases, the CJEU has adopted a very restrictive stance, bringing its approach closer to that of the ECtHR. Prominent examples include the cases of *NF et al. v Council* concerning the legality of the EU-Türkiye Statement and of *X and X v Belgium* concerning the denial of humanitarian visas to Syrian war survivors.[3] In both cases, the CJEU refrained from making substantive decisions and instead argued that the EU was not involved or that EU law was not applicable and, on this basis, dismissed the actions. Crucially, the CJEU decided to proceed this way, although the claims in both cases were based on a doctrinally sound and constitutionally convincing argument, and although the individuals concerned were left with no avenue to enforce their fundamental rights in both cases. To avoid judgments on politically contentious matters, it hence appears that the

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[1] And respectively under the corresponding provisions in the agencies' Regulations, see chapter 3, 4.3.

[2] For different perspectives see Carolyn Moser, Berthold Rittberger, „The CJEU and EU (de-)constitutionalization: Unpacking jurisprudential responses“, *International Journal of Constitutional Law* 20 (2022), p. 1038-1070; Michael Blauberger, Dorte Sindbjerg Martinsen, „The Court of Justice in times of politicisation: 'law as a mask and shield' revisited“, *Journal of European Public Policy* 27 (2020), p. 382-399.

[3] CJEU, General Court (First Chamber, Extended Composition), order of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16; Court (Grand Chamber), judgment of 7 March 2017, X and X v Belgium, C-638/16 PPU.

CJEU has not only been willing to compromise its role as a supranational constitutional court but also to sacrifice the doctrinal coherence of its own case law.

2 Why WS et al. vs. Frontex *Should Not Discourage*

In the specific context of EU liability for fundamental rights violations at the EU's external borders, however, the CJEU's approach has so far been more ambivalent. As mentioned, the only such case that has been decided so far is *WS et al. v Frontex.*[4] To briefly recall: the case concerned an unlawful pushback from Greece to Türkiye with Frontex involvement. The applicants' claim for damages against Frontex was based on the argument that Frontex's contribution was causal for the resulting violation of their fundamental rights. The General Court, which decided the case in September 2023, has found that the claims under Art. 340 para 2 TFEU were admissible – but argued that causation was not established and, on this basis, dismissed them as unfounded. The applicants' appeal before the Court of Justice is still pending.[5]

As established in more detail above, the General Court's argument has confirmed one major point of this study, namely that the action for damages under Art. 340 para 2 TFEU is a suitable remedy to address the EU's factual conduct at external borders, including when it results in fundamental rights violations.[6] On another major point of this study, namely the question of causation, however, the General Court disagreed. While this study has argued that the EU's factual contribution is causal for a resulting fundamental rights violation when it is *de facto* binding upon the national authorities that are responsible for issuing the formally-binding decision, i.e. when the EU *determines* the formally-binding decision, the General Court denied the causal link with simple reference to the fact the EU's conduct lacks formal bindingness, thereby ignoring long-standing case law of the CJEU itself.[7]

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[4] CJEU, General Court (Sixth Chamber), judgement of 6 September 2023, WS et al v Frontex, T-600/21.

[5] Appeal brought on 14 November 2023 by WS et al. against the judgment of the General Court (Sixth Chamber) delivered on 6 September 2023 in Case T-600/21, WS and Others v Frontex, Case C-679/23 P.

[6] See chapter 3, 3.4.

[7] Chapter 5, 1.b.

Against this background, it is not unlikely that the General Court would dismiss an action construed along the proposal of this study – even if this would come at the cost of departing from established case law. Potential applicants who wish to ascertain their fundamental rights against the EU itself should be aware that there is a certain risk that the CJEU, and especially the General Court, would not hold Frontex, the EUAA or the Commission responsible. The actors driving forward such actions, most likely international networks of NGOs and scholars, should be aware that convincing legal arguments will perhaps not suffice to hold the EU responsible for its misconduct at the EU's external borders.

Assuming that the CJEU would not entirely refrain from engaging with its own case law, the easiest way for it to dismiss an action for damages in the context of the EU hotspots would probably be a return to its earlier *Sucrimex* doctrine.[8] Such a reversal of established case law could be done either silently or expressly. Alternatively, the CJEU could establish an exception from its *KYDEP* doctrine,[9] e.g. by arguing that the context of the European asylum system is particular and hence requires an exception from general doctrinal principles. Of course, such an argument would openly embrace the idea of immigration law exceptionalism and, as such, be not only anachronistic but also entirely unconvincing in constitutional terms.[10] Still, it cannot be entirely ruled out that the CJEU would take this route.

3 Why Claiming Damages From the EU is Worth a Try

Nevertheless, or precisely because of this, the approach developed in this study should be put to the test. It is not only worth a try but urgently necessary. Three points might help convince the sceptics. First, the CJEU's case law has almost never developed straightforwardly. Losing a case such as *WS et al.* in the first instance should certainly not discourage. It is very usual for the CJEU's case law to develop slowly and incrementally, with one step backwards every here and then. Examples include the CJEU's progressive extension of its jurisdiction in the context of the EU's Foreign and Security Policy and its progressive conceptualisation of the action for

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[8] See chapter 5, 2.1.

[9] See chapter 5, 2.2 and 2.3.

[10] See chapter 2, fn. 262.

damages as a form of declaratory relief.[11] Against this background, there can be no doubt that bringing several similar cases concerning the EU's involvement in fundamental rights violations at external borders before the CJEU is important. Otherwise, the CJEU would not even have the opportunity to overthink and potentially overrule its approach to causation in this context.

Second, the overall risk is manageable. Losing a case before the CJEU would have three types of consequences. Doctrinally, an overturn of long-established doctrine would certainly be a loss. A decision according to which the EU cannot incur liability for factual misconduct would be a clear step backwards; the EU's system of legal protection would become less complete than it already was, and the guarantee of Art. 47 ChFR would become even more fragmentary. Politically, a ruling stating that the EU is not responsible for its own misconduct in the EU hotspots – or that the EU's conduct in the EU hotspots is not reviewable before the CJEU – would be a major discursive defeat. But in terms of the situation on the ground, in terms of hard facts affecting the people concerned, things would most likely not get worse than they already are. There is no risk that strategic litigation could be perverted. Litigation, as proposed in this study, cannot become an end in itself, nor can it go to the detriment of those affected.

Third, the price for not trying to hold the EU responsible before the CJEU is simply too high. In a Union founded on the rule of law, it cannot be tolerated that the EU systemically disregards its own law and violates individual rights without being held responsible. If one decides not to take the risk of losing some cases, this would mean giving up and abandoning the understanding of the EU as enshrined in Art. 2 TEU. If the relevant actors, including NGOs, lawyers and other strategic litigators, decided not to even try to support those affected by the EU's externalisation policies in their legitimate wish to hold the EU responsible, this would be tantamount to admitting that the EU itself is de facto not bound by the rule of law. The EU's approach of creating overly complex administrative structures to evade judicial responsibility would have been successful. This, of course, would be a great loss for the affected asylum seekers, who would be permanently denied their rights under the Charter of Fundamental Rights. It would also be a loss for EU citizens – at least for those among them who

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[11] See chapter 3, 3.4.

still consider the EU's 'rule of law' to mean something other than closing borders, building walls and tacitly approving illegal pushback practices. In short, litigation, as proposed in this study, is worth a try from the perspective of all those who believe that the promise enshrined in Art. 2 TEU should be more than just empty words.[12]

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[12] On the transformative potential of EU law, especially of Art. 2 TEU, see Armin von Bogdandy, *The Emergence of European Society through Public Law. A Hegelian and Anti-Schmittian Approach*, Oxford University Press 2024, p. 3 et seq., p. 78 et seq., p. 157 et seq., p. 242 et seq.