

The Raise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows

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1. Introduction: The fall of the ‘deterrence paradigm’?

The means through which migratory movements have been ‘managed’ since the fall of the Berlin wall have been mostly characterised by States of destination’s self-serving interpretation of sovereignty and national interest. Attempts at internationalising migration governance on a supra-national scale have failed.¹ And this affects also efforts to govern forced displacement and the administration of asylum and refugee protection at the global level. Cooperative initiatives geared towards the realization of the ultimate goals of the 1951 Refugee Convention (CSR51) have been tabled at different instances,² but, beside episodic exceptions, they have not crystallised in a new paradigm.³

The promotion of solidarity and responsibility sharing is one of the key tenets of the 2016 Agenda for Humanity,⁴ underpinning also the New York Declaration for Refugees and Migrants.⁵ The latter propounds a change towards a ‘people-centred’ system based on ‘shared responsibility’ to manage displacement, recognising that there are ‘varying capacities and resources to respond to these movements...among countries of origin or nationality, transit and destination’.⁶ The objective is to attain a ‘win-win-win’ solution, which benefits not only countries of destination, but also the other States in the displacement chain as well as the displaced themselves. But, for the time being, this is still aspirational. The definitive shape of

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¹ Gosh (ed.), *Managing Migration* (OUP, 2000); and Betts (ed.), *Global Migration Governance* (OUP, 2011).

² See, e.g., UNHCR, ‘Convention Plus’ initiative at: <<http://www.unhcr.org/uk/convention-plus.html>>. For commentary and further references, see Zieck, ‘Doomed to Fail from the Outset? UNHCR’s Convention Plus Initiative Revisited’ (2009) 21 *IJRL* 387.

³ See, e.g., Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General (A/44/523), 22 Sept. 1989; UNHCR EXCOM, The Comprehensive Plan of Action for Indo-Chinese Refugees (EC/46/SC/CRP.44), 19 Aug. 1996. For a recent analysis, see Ineliger, ‘An Examination of the Comprehensive Plan of Action as a Response to Mass Influx of “Boat People”: Lessons Learnt for a Comprehensive Approach to Migration by Sea’, in Moreno-Lax and Papastavridis (eds), *‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach* (Brill, 2016) 408.

⁴ One Humanity: Shared Responsibility, Agenda for Humanity, Annex to the Report of the Secretary-General for the World Humanitarian Summit (A/70/709), 30 Jan. 2016, p. 1, at: <<https://sustainabledevelopment.un.org/content/documents/2282agendaforhumanity.pdf>>.

⁵ New York Declaration for Refugees and Migrants (A/RES/71/1), 3 Oct. 2016, at: <<http://www.unhcr.org/uk/57e39d987>>.

⁶ *Ibid.*, para. 11.

the plan will be moulded into two Global Compacts, one on refugees and another one for safe, orderly and regular migration, the adoption of which has been deferred until 2018.⁷

Meanwhile, international cooperation regarding the movement of refugees has been piecemeal and *ad hoc*, especially on the cross-regional scene. Efforts have mostly been unilateral or intra-regional and concentrated on the preservation of sovereignty and national/regional interest in what some have called a ‘market of deflection’.⁸ So, to avoid becoming comparatively more attractive to protection seekers a form of negative regulatory competition has taken hold.⁹ This has been the prevailing approach, especially within the EU, where the Dublin regime has ignited a race to the bottom in protection levels across Member States,¹⁰ making domestic asylum systems just about (if at all) in line with international standards, to avoid creating a ‘pull factor’.¹¹

The stance is premised on the absence of an obligation on the part of countries of destination to allow entry into their territories for the purpose of seeking asylum and the lack of a correlative right benefiting the displaced to demand access.¹² As a result, States the world over, including in the EU, have erected barriers to (mixed) migration flows, encompassing measures of *non-entrée*,¹³ such as visas, carrier sanctions, extraterritorial patrolling of blue borders, ‘safe third country’ devices, and accelerated removal processing, impeding legal arrival, hindering access to status determination, and fostering return.¹⁴ Jointly, these measures have been deemed to coalesce in a model of ‘cooperative deterrence’,¹⁵ whereby countries at different points of the displacement line align their policies, more or less formally and directly, to repeal unwanted flows.

Against this background, this chapter will examine new and different forms of ‘contactless’ control of cross-border migration that are being employed, particularly by the EU and its Member States, during the so-called ‘refugee/migration crisis’, in seeking not only to deter, but also to pro-actively restrain the onwards movement of refugees and migrants to European territory. In so doing, it will assert the emergence of a novel variant of the

⁷ UNGA, High-Level Summit to Address Large Movements of Refugees and Migrants, Commitments, 16 Sept. 2016, at: <<http://refugeesmigrants.un.org/declaration>>.

⁸ Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill, 2000).

⁹ Barbou des Places and Deffains, ‘Cooperation in the Shadow of Regulatory Competition: The example of Asylum legislation’ (2004) 23 *International Review of Law and Economics* 345.

¹⁰ Barbou des Places, *Evolution of Asylum Legislation in the EU: Insights from Regulatory Competition Theory*, European University Institute Working Paper RSC n° 2003/16.

¹¹ The failings of the Dublin system have prompted several waves of reform. A new Dublin IV Regulation is currently under negotiation, which, if adopted, will mark a historic turn towards ‘normalised coercion’ within the Common European Asylum System (CEAS). See Guild et al., *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*, PE 509.989 (European Parliament, 2014); Guild et al., *Enhancing the Common European Asylum System and Alternatives to Dublin*, PE 519.234 (European Parliament, 2015); and Maiani, *The Reform of the Dublin III Regulation*, PE 571.360 (European Parliament, 2016).

¹² Hailbronner, ‘Comments on the Right to Leave, Return and Remain’, in Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff, 1996) 109.

¹³ Hathaway, ‘The Emerging Politics of Non-Entrée’ (1992) 91 *Refugee* 40.

¹⁴ Gammeltoft-Hansen, *Access to Asylum* (CUP, 2011); Den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012); Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017).

¹⁵ Hathaway and Gammeltoft-Hansen, ‘*Non-Refoulement* in a World of Cooperative Deterrence’ (2014) 53 *Columbia Journal of Transnational Law* 235.

‘deterrence paradigm’, dominating for the last thirty years,¹⁶ characterised by a return to strategies of outright containment—as witnessed after the Cold War years during the genocidarian conflicts in Rwanda and Yugoslavia¹⁷—but with a ‘deputational twist’, consisting in the inducement by countries of destination of countries of transit, so that the latter exert the necessary control in the former’s stead and/or for their benefit. It will be demonstrated how higher levels of sophistication in EU Member States’ responses to unwanted arrivals have given rise to a transition from the well-documented and thoroughly discussed model of unilateral/passive deterrence to orchestrated forms of consensual and proactive containment of trans-boundary flows. Persuasion, via political and financial promises of fund transfers, visa facilitation, or accession talks, has been mobilised on a grand scale by the EU Member States so as to ensure the commitment in exchange by key transit countries to the containment of potential asylum seekers within their jurisdictional domain. Thereby, the global South is being impelled to deal not only with ‘their own refugees’, but with those unwanted by the North as well—they are being financed for ‘pull-backs’, detention camps, and pre-emptive rescue at sea, which transform (pre-)entry controls (by destination countries) into exit vetting (by countries of departure) that negates the right to leave and forecloses *refoulement* responsibilities.¹⁸ Although this move has gained traction also in other parts of the world, space constraints dictate an exploration limited to the European context, as one key illustration of the wider trend.

Whilst in 2016 the number of refugees crossing the sea to reach Europe plunged to 364,000 (by contrast to the one million registered in 2015¹⁹), the number of those who died in the Mediterranean (7,495 persons) rose sharply.²⁰ A significant drop in arrivals to Greece outweighed record migration to Italy, as a consequence of the diversion effect to the Central Mediterranean route of the EU-Turkey Statement (March 2016) and tighter border controls in the Western Balkans.²¹ To address what has been defined as a ‘migration/refugee crisis’, the EU has opted for a strategy based on the full externalization of migration and border controls aimed to eradicate (unauthorised) access to Europe, mostly through dedicated financial and technical support to third countries of origin or transit. The so-called EU-Turkey deal to halt the flow of irregular migrants to Greece, the EU-Libya cooperation at maritime and land borders, talks on extra-territorial processing camps in neighbouring States, information campaigns in third countries on the ‘risks’ of irregular migration, and the Italy-Libya Memorandum of Understanding (MoU)—reviving the Berlusconi-Gaddafi Treaty of Friendship—to train, equip and fund the Libyan Coastguard (partly through EU resources) are but a few examples of an outright containment scheme designed to completely outsource controls and thwart departures. As pointed out above, the focus is no longer on preventing arrivals, impeding access to determination procedures, or deflecting flows to other

¹⁶ Cf. Gammeltoft-Hansen and Tan, ‘Beyond the Deterrence Paradigm in Global Refugee Policy’ (2016) 39 *Suffolk Transnational Law Review* 637; and Gammeltoft-Hansen and Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’ (2017) 5 *Journal on Migration and Human Security* 28.

¹⁷ Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11 *Journal of Refugee Studies* 350.

¹⁸ Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’ (2016) 27 *EJIL* 591.

¹⁹ UNHCR, ‘Over one million sea arrivals reach Europe in 2015’, 30 Dec. 2015, at: <<http://www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>>.

²⁰ DPA International, ‘2016 saw sharp drop in Mediterranean migrants, surge in deaths’, 6 Jan. 2017, at: <<http://www.dpa-international.com/topic/urn:newsml:dpa.com:20090101:170106-99-774948/amp>>.

²¹ EU-Turkey Statement, 18 March 2016, at: <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

destinations, but on forestalling exit. These are no ordinary measures of *non-entrée*. Instead, they are targeted means frustrating the exercise of the right to leave—nullifying the refugee’s flight.

Being often trapped in conflict-ravaged and/or unstable States and exposed to risks of ill-treatment, persecution, and exploitation, the question arises over how far these newly fashionable policies can reasonably be pursued. These new forms of ‘contactless control’, practiced on demand by partner countries, far outside the geographical European space, present novel problems of conformity with international human rights standards and determination of responsibility for non-compliance. Whilst offshore controls have been in existence in various guises for some time, the strategy launched by the EU in 2016 represents a powerful shift in asylum and migration policy and practice. By transferring the coercive management of exiles to third countries, it aims to eliminate any physical contact, direct or indirect, between refugees and the authorities of would-be destination States. The ultimate goal is thus to sever any jurisdictional link with EU countries, in an attempt to elude any concomitant responsibility.

In revealing the hidden objective of these new measures, this chapter will first investigate whether the implementation of transferred means of migration control may hamper refugee rights. It will then be questioned whether these practices of ‘contactless control’ do indeed insulate EU countries from accountability for violations suffered by migrants and refugees in third countries, or rather whether they do engage the international responsibility of European States for breaches of human rights obligations, such as the principle of *non-refoulement* and the right to leave any country. Section 2 will thus map out the different measures of contactless control, focusing on those instruments whose implementation raises particular concerns for the impact they might have on the rights of those in need of international protection. Attention will be placed particularly on the EU-Turkey deal, the Italy-Libya MoU, and the interrelation between information campaigns in third countries and readmission agreements. Section 3 will briefly analyse the two rights (*non-refoulement* and the right to leave) against which the compatibility of ‘contactless controls’ with refugee protection standards should primarily be appraised. Lastly, while Section 4 will engage in a critical assessment of the key measures of containment beyond borders, Section 5 will elaborate on extraterritorial ‘contactless jurisdiction’, the role of knowledge, and the extent of State responsibility under international law.

2. Instances of (externalized) ‘contactless control’

The European Commission proposal to set up, in June 2016, a new Migration Partnership Framework (MPF)²² was shortly thereafter endorsed by the European Council.²³ The proclaimed objective of the MPF is to strengthen relationships with third countries to better manage migration. Short-term actions are presumably directed to save lives at sea and in the desert; dismantle traffickers and smugglers’ networks; increase returns of those not entitled to stay; avoid dangerous journeys; and open up legal pathways to Europe for persons in need of

²² Establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, 7 June 2016.

²³ European Council Conclusions, 28 June 2016, at: <http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244643506_en.pdf>. On the EU Migration partnership Framework and EU cooperation with Turkey and Libya, see also Giuffré, ‘From Turkey to Libya: The EU Migration Partnership from Bad to Worse’, *Eurojus*, 20 Mar. 2017, at: <<http://rivista.eurojus.it/from-turkey-to-libya-the-eu-migration-partnership-from-bad-to-worse/>>.

protection. In the long-term, the main goal is to address the root causes of irregular migration and forced displacement by supporting the economic, social, and political development of third countries. However, the EU and its Member States also make cooperation on development conditional on third countries' effective implementation of exit controls to prevent departures to Europe and halt new arrivals on their own territory. As affirmed by the European Council, the new MPF is based on 'effective incentives and adequate conditionality'. So, 'cooperation on readmission and return will be a key test of the partnership between the EU and [its] partners'.²⁴

Building on the MPF, on 3 February 2017, the European Council has issued a Declaration (Malta Declaration) concerning the external aspects of migration policy and the Central-Mediterranean route.²⁵ It states that the EU primary goal is to train and equip the Libyan Coastguard in order to bolster its capacity to stop people smugglers, increase search and rescue operations, and prevent the departure of unseaworthy boats headed toward Europe. If implemented, migrants and refugees will be caught up in a web of 'consensual containment' performed by intermediary countries on behalf of (or, at least, to the advantage of) EU Member States.

The MPF and the Malta Declaration constitute the background against which the EU strategy of 'consensual containment' is taking shape, making financial and political support as well as cooperation on international development conditional upon third countries' effective implementation of exit controls and the acceleration of readmission and return schemes. On this basis, the following three sub-sections will analyse three main examples of externalized 'contactless controls', setting the scene for the assessment of the potential impact of these practices on the rights of those who intend to leave their countries to seek protection or a better lot abroad.

2.1. The EU-Turkey deal

On 18 March 2016, the EU and Turkey reached an agreement—taking the form of a press 'statement' intended not to produce legally binding effects—whereby Turkey accepted 'rapid return of all migrants not in need of international protection crossing from Turkey to Greece and to take back all irregular migrants intercepted in Turkish waters'.²⁶ The arrangement provides that migrants arriving in Greece will be duly registered and their asylum applications processed in accordance with the EU Asylum Procedures Directive 2013/32/EU.²⁷ Moreover, it establishes that for every Syrian being readmitted to Turkey from Greece, another Syrian will be resettled from Turkey to the EU, prioritizing those who have not previously entered or tried to enter the EU irregularly. However, what is highly relevant to our inquiry is that Turkey ought to take any measures necessary to prevent new irregular arrivals on Greek islands and to cooperate with the EU to this end. In turn, EU Member States will both accelerate the fulfilment of the visa liberalization roadmap in view to lifting visa requirements

²⁴ Council of the EU, External aspects of migration - Monitoring results, 4 Jul 2016, at: <<http://data.consilium.europa.eu/doc/document/ST-10822-2016-INIT/en/pdf>>.

²⁵ Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 Feb. 2017, at: <<http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/>>.

²⁶ EU-Turkey Statement (n 21).

²⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ('APD'), [2013] OJ L 180/60.

for Turkish citizens and speed up the disbursement of EUR 6 billion to Turkey under a dedicated Facility for Refugees.

A *EU Special Coordinator* has been nominated by the President of the European Commission (Director General Maarten Verwey) to ensure the effective implementation of the different commitments.²⁸ The EU Coordinator, together with Greece (as main EU country concerned), has put together a Joint Action Plan for the implementation of certain key provisions of the Statement with the objective of speeding up its application—insisting on shortening processing times, ‘limiting appeal steps’, increasing safety, security and ‘detention capacities’, accelerating relocation and returns, and sealing the Greek Northern borders to avoid secondary movements.²⁹ If fully implemented, Greece will become a pre-removal/return processing hub for the EU, with the ‘hotspots’ on the islands serving as mass detention sites within that scheme.³⁰

Turkey, from its part, has already accepted the return of 1,487 persons and blocked the exit of most migrants since the conclusion of the deal—going from a daily rate of nearly 3,500 arrivals to just 43—although only 3,565 Syrian refugees have been resettled under the ‘one for one’ formula over the same period.³¹ The presumption is that Turkey is a ‘safe third country’ for returns from Greece. Nevertheless, Turkey’s geographical limitation to the 1951 Refugee Convention denies any possibility to request and receive protection *qua* Convention refugees to those coming from non-European countries. These persons can only obtain a status of ‘conditional refugee’, granted on a temporary basis under the Turkish Law on Foreigners and International Protection,³² in effect since 2014. The Parliamentary Assembly of the Council of Europe,³³ as well as a number of scholars and NGOs,³⁴ have challenged the definition of Turkey as a ‘safe third country’.³⁵

²⁸ European Commission Fact Sheet, Implementing the EU-Turkey Statement – Questions and Answers, 28 Sept. 2016, at: <[http://europa.eu/rapid/press-release MEMO-16-3204_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3204_en.htm)>.

²⁹ Fourth report on the Progress made in the implementation of the EU-Turkey Statement, COM(2016) 792 final, 8 Dec. 2016, Annex I.

³⁰ Guild et al. *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece*, PE 583.132 (European Parliament, 2017).

³¹ Fifth report on the Progress made in the implementation of the EU-Turkey Statement, COM(2017) 204 final, 2 Mar. 2017, p. 2, 5 and 8.

³² See, *Law on Foreigners and International Protection*, Ministry of the Interior, Turkey, at: <http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf>.

³³ Parliamentary Assembly of the Council of Europe (PACE), Resolution 2109 (2016) on ‘The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016’, 20 Apr. 2016, at: <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22738&lang=en>>. In the aftermath of the failed military coup, Turkey declared a state of emergency and submitted a formal notice of derogation to the European Convention of Human Rights (ECHR). It also notified the UN Secretary General that it might take measures, which could entail derogations from obligations under the International Covenant on Civil and Political Rights (ICCPR).

While it should be emphasized that Turkey is currently host to more than 2.9 million registered Syrian refugees,³⁶ it has also been reported that migrants and refugees are often subject to arbitrary detention and mistreatment, including in pre-removal centres where they are detained to avoid their departure to Greece.³⁷ In addition, incidents of illegal mass returns to Syria are on the rise since the conclusion of the EU-Turkey deal.³⁸ Actually, Turkey has recently concluded 14 readmission agreements with countries of origin of migrants and asylum seekers, thereby increasing the risk of repatriation and *refoulement*. Indeed, Turkey is formally and informally returning people back to Afghanistan, Iraq, Pakistan, and Syria, where people may face persecution and run extreme danger to their life.³⁹ With Turkey restricting its entry visa requirements and negotiating readmission agreements with several refugee-producing countries, as a way to implement its commitments towards the EU to increase ‘border security’ and assist in the fight against smuggling/trafficking, it thereby decisively contributes to the policy of containment of migratory flows sponsored by the EU—despite blatant human rights risks.

2.2. The Italy-Libya MoU

Alongside the EU-Turkey Statement, the relationship with Libya represents another prime example of ‘contactless containment’ in the making. The establishment of links with the UN-recognised government in post-Gaddafi Libya has taken time and it is only recently that the EU, both independently and through Italy, has resumed relations with its Southern neighbour. The renewed interest in Libya stems from the fact that, since the sealing off of the Aegean border, the Central Mediterranean route now concentrates the highest volume of maritime

³⁴ See, e.g., Chetail, ‘Will the EU-Turkey migrant deal work in practice?’, 29 Mar. 2016, at: <http://graduateinstitute.ch/home/research/research-news.html/_news/research/2016/will-the-eu-turkey-migrant-deal>; Favilli, ‘La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?’ (2016) 10 *Diritti Umani e Diritto Internazionale* 405; Labayle and de Bruycker, ‘The EU-Turkey Agreement on migration and asylum: False pretences or a fool’s bargain?’, 1 Apr. 2016, at: <<http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/>>; Roman and Peers, ‘The EU, Turkey and the Refugee Crisis: What could possibly go wrong?’, 5 Feb. 2016, at: <<http://eulawanalysis.blogspot.co.uk/2016/02/the-eu-turkey-and-refugee-crisis-what.html>>. See also, Amnesty International, ‘Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal’, 1 Apr. 2016, at: <<https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>>; Human Rights Watch (HRW), ‘Turkey: Border Guards Kill and Injure Asylum Seekers’, 10 May 2016, at: <<https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>>.

³⁵ Pursuant to the Union’s own definition in the Asylum Procedures Directive (n 29), for a third country to be considered safe, the absence of *refoulement*/ill-treatment risks and, crucially, ‘the possibility...to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention’ is essential (Art. 38(1)(e) APD). Qualification of Turkey as ‘first country of asylum’ is unjustified as well, considering the situation of refugees there—far from amounting to ‘sufficient protection...including benefiting from the principle of *non-refoulement*’ in substantive and procedural terms (Art. 35 APD).

³⁶ Syrian Regional Refugee Response, Inter-Agency Information Sharing Portal, 16 Feb. 2017, at: <<https://data.unhcr.org/syrianrefugees/country.php?id=224>>.

³⁷ See, ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. 30471/08, 22 Sept. 2009.

³⁸ Amnesty International, ‘Turkey: Illegal Mass Returns’ (n 36); and Amnesty International, *A blueprint for despair: Human rights impact of the EU-Turkey deal*, (Feb. 2017), available at: <<http://www.statewatch.org/news/2017/feb/ai-eu-turkey-deal-briefing-blueprint-for%20disaster.pdf>>.

³⁹ See e.g., Siegfried, ‘What will happen to migrants returned to Turkey?’, *IRIN News*, 12 Apr. 2016, at: <<http://www.irinnews.org/analysis/2016/04/12/what-%E2%80%8Bwill%E2%80%8Bhappen-migrants-returned-turkey>>.

traffic in terms of unauthorised arrivals. The Mid-Term Report of the EUNAVFOR Med *Sophia* Operation confirms that, since the closure of the Greek-Turkish passage, most crossings take place via Italy-Libya.⁴⁰

In January 2017, a Commission Communication for the Southern Mediterranean set out the goals to both step up the training programme of the Libyan Coastguard to autonomously conduct search and rescue (including disembarkation) in Libyan waters and strengthen Libya's Southern border (in the Sahara desert) to hinder irregular movements through Libya and into Europe.⁴¹ The EU has already started a programme to train around 1,000 Libyan Coastguard officers. The training plan is expected to last 4 months and focus on rescue at sea and interdiction of migrant boats. Additionally, on 2 February 2017, the Italian Prime Minister and the Head of the National Reconciliation Government of the Libya State signed a 'MoU on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing border security'.⁴² The 2017 MoU also revives the full array of old agreements on migration control,⁴³ which had seemingly been suspended during the Arab Spring and the Libyan civil war.

Despite the chaotic and dangerous situation in Libya following the overthrow of Colonel Gaddafi in 2011, as per the EU's own account,⁴⁴ the parties to the MoU agree on the need to find a rapid solution to the problem of 'illegal' migration to Europe in full respect of international human rights treaties (Preamble and Article 5). Italy accepts to fund the establishment of 'reception' centres in Libya, where migrants and refugees will be detained while awaiting voluntary or forced return to their home countries (Preamble and Article 2). To this end, readmission agreements with States of origin will be concluded. Also relying on funds made available by the EU, Italy commits to provide (unquantified) technical and economic support to Libyan bodies and institutions in charge of the fight against 'illegal' immigration, including the Border Guard and the Coast Guard, attached to the Ministry of Defence (Article 1). The training and assistance provided by the EU and Italy, in particular, aim to enable Libya to autonomously conduct rescue and 'pull-back' operations of all migrants and refugees sailing off from Libyan shores toward Europe as part of mixed operations to control borders and 'rescue lives' at sea.

The EU's direct involvement in these initiatives will also be facilitated by the EU Border Assistance Mission to Libya (EUBAM),⁴⁵ whose mandate has been extended so that, beyond providing assistance related to 'border management' as originally envisaged, it also furnishes targeted 'advice and capacity-building in the area of...migration [and] border security'.⁴⁶ The

⁴⁰ EUNAVFOR MED Op *Sophia* – Six Monthly Report 1 January – 31 October 2016, Council doc. 14978/16 (EU RESTRICTED), 30 Nov. 2016, p. 3-4.

⁴¹ Joint Communication to the European Parliament, the European Council and the Council, Migration on the Central Mediterranean route: Managing flows, saving lives, JOIN(2017) 4 final, 25 Jan. 2017.

⁴² Unofficial translation of the Italy-Libya Memorandum of Understanding by Sandra Uselli, available at: <<http://www.statewatch.org/news/2017/feb/it-libya-memo-eng.htm>>.

⁴³ Giuffrè, 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-Back to Libya?' (2012) 24 *International Journal of Refugee Law* 692.

⁴⁴ EUBAM Libya Initial Mapping Report Executive Summary, Council doc. 5616/17 (EU Restricted), 25 Jan. 2017, at: <<http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>>. See also 'Internal EU report exposes Libya turmoil', *EUObserver*, 20 Feb. 2017, at: <<https://euobserver.com/migration/136973>>.

⁴⁵ EU Border Assistance Mission in Libya (EUBAM): <https://eeas.europa.eu/csdp-missions-operations/eubam-libya_en>.

⁴⁶ 'EUBAM Libya: mission extended, budget approved', EC Press Release, 4 Aug. 2016, available at: <<http://www.consilium.europa.eu/en/press/press-releases/2016/08/04-eubam-libya-mission-extended/>>.

extension of the CSPD EUNAVFOR Med *Sophia* mission is to a similar effect.⁴⁷ Operation *Sophia* has directly delivered training to the Libya Coastguard since October 2016, launching a second package in January 2017, upon the signature of a dedicated MoU between the EUNAVFOR Med Operation Commander and the Commander of the Libyan Navy Coast Guard and Port Security.⁴⁸ So, the Italian-Libyan cooperation should be inscribed within this wider, EU-backed framework, ultimately underpinned by the MPF and the Global Approach to Migration.⁴⁹

2.3. Information campaigns and readmission agreements

One of the key priorities of the EU externalization policy, as clearly put by the Heads of State and Government in the Malta Declaration, is the enhancement of information campaigns and outreach addressed at migrants in Libya and countries of origin and transit. These practices are part of the MPF and have already been used by European States in countries such as Afghanistan, Egypt, Tunisia, Morocco, Albania, Senegal, etc., to discourage would-be migrants from leaving their home and travel to Europe.⁵⁰ They rely on several media outlets (internet, print materials, billboards videos, special events) to reach potential migrants and their families to educate and inform them about the dangers associated with traffickers and smugglers, the risk of removal and deportation, the difficulties of settling in Europe, finding a job or obtaining asylum, as well as to encourage them to return home to rebuild their lives in their own countries.

In this line, the European Commission Statement of 3 March 2017 urges Member States to lower the number of irregular arrivals by making it clear to those not in need of protection and with no right to stay in the EU that they should not undertake the perilous journey to arrive in Europe ‘illegally’⁵¹—the implication seemingly being that only those in search of refuge are legitimized (if not forced) to leave and endure the conditions of unauthorised voyages. ‘The external and internal dimensions [of immigration and asylum policy and border control] go hand in hand if we want to improve return’, the Commission insists. And in so doing, it stresses the commitment to step up cooperation on return and readmission, address the root causes of irregular movements, and fight migrant smuggling.

Readmission agreements aim to create a legal framework for forced returns that allow border authorities to handle transfers of third-country nationals swiftly, without the involvement of diplomatic contacts. Beyond inter-State arrangements by EU Member States with third countries, Article 79(3) TFEU expressly gives authority to the EU itself to conclude agreements for the readmission of non-EU citizens who do not or no longer fulfil the conditions for entry, presence, or residence in one of the Member States either as self-

⁴⁷ UNSC Res. 2312 (2016), extending UNSC Res. 2240 (2015).

⁴⁸ ‘Operation SOPHIA: package 2 of the Libyan Navy Coast Guard and Libyan Navy training launched today’, EEAS Press Release, 30 Jan. 2017, at: <https://eeas.europa.eu/headquarters/headquarters-homepage/19518/operation-sophia-package-2-libyan-navy-coast-guard-and-libyan-navy-training-launched-today_en>.

⁴⁹ Global Approach to Migration and Mobility, COM(2011) 743 final, 18 Nov. 2011.

⁵⁰ Cf. Pécoud, ‘Informing Migrants to Manage Migration? An Analysis of IOM’s Information Campaigns’, in Geiger and Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan, 2010) 184.

⁵¹ Remarks by Commissioner Avramopoulos on the migration package adopted by the College ahead of the March European Council, 2 Mar. 2017, at: <http://europa.eu/rapid/press-release_SPEECH-17-425_en.htm>.

standing treaties or as ‘readmission clauses’ in other texts.⁵² Thus, today, EU readmission policy consists of a rich network of different interconnected instruments, ranging from development aid to visa facilitation, from technical cooperation for the externalization of migration controls to labour exchange.⁵³ And beside formal arrangements, the EU also favours cooperation through informal channels, taking the form of ‘working arrangements’ between Frontex and police corps of third countries, for instance, bolstering joint patrol operations and collaboration regarding pre-emptive controls.⁵⁴

As mentioned above, Member States are also directly funding a EU Border Assistance Mission (EUBAM) to Libya, for it to better secure and manage its borders (in line with Schengen/EU standards).⁵⁵ Therefore, it should come as no surprise that questionable readmission agreements and enhanced cooperation on return be already in operation with other transit States, including Turkey, and with refugee-producing countries, such as Mali, Afghanistan, Nigeria, Senegal, and Ethiopia,⁵⁶ with the objective of exchanging financial support for accelerated returns from Europe.⁵⁷ The message—conveyed through both actual deportations and information campaigns in those same countries of origin and transit—is clear: ‘if you come without permission, you will be deported’.

3. The continued relevance of international protection

The compatibility of the above measures of ‘contactless control’ with human rights is usually taken for granted. After all, EU countries are not directly performing any containment themselves, but requesting partner States to fulfil their commitments to control migration from and through their territories towards Europe in exchange for development aid and other advantages. There is no direct contact with those affected by pre-emptive rescues, denied exit, or pre-removal detention in Libya, Turkey and elsewhere. Nonetheless, considering that any action ‘the effect of which is to prevent migrants from reaching the borders of the [would-be host] State’ may trigger the action of the European Convention on Human Rights (ECHR) and related instruments,⁵⁸ it is worth recalling the basic content of the key protections at stake in situations of deputised containment: the right to protection against *refoulement* and the right to leave any country including one’s own.

3.1. The principle of non-refoulement

⁵² See, Giuffrè, ‘The Obligation to Readmit and the Relationship between Interstate and EU Readmission Agreements’, in Ippolito and Trevisanut (eds.), *Migration in Mare Nostrum: Mechanisms of International Cooperation* (CUP, 2015) 263.

⁵³ See Cassarino, *Inventory of the bilateral agreements linked to readmission*, available at: <<http://www.jeanpierrecassarino.com/datasets/ra/>>; and Cassarino, ‘A Reappraisal of the EU’s Expanding Readmission System’ (2014) 49 *The International Spectator* 130.

⁵⁴ For the list of 18 Frontex Working Arrangements, see: <<http://frontex.europa.eu/partners/third-countries/>>.

⁵⁵ EUBAM Libya (n 47).

⁵⁶ Second Progress Report: First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 960 final, 14 Dec. 2016.

⁵⁷ Giuffrè, ‘Readmission Agreements and Refugee Rights: from a Critique to a Proposal’ (2013) 32 *Refugee Survey Quarterly* 79.

⁵⁸ ECtHR, *Hirsi v. Italy*, Appl. 27765/09, 23 Feb. 2012, para 180.

The principle of *non-refoulement* is paramount to the international protection regime and remains the cornerstone of international refugee law.⁵⁹ According to Article 33(1) of the 1951 Refugee Convention (CSR51):

No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

It is the primary obligation that States have to fulfil when dealing with a refugee, both at the border and beyond. Without it, the international protection regime would become futile.

This chapter takes the principle of *non-refoulement* as an overarching standard, which does not exhaust its meaning in the CSR51. Rather, the principle is constructed and integrated also by means of other international human rights norms, which either explicitly or implicitly prohibit the return of a person to a territory where she risks torture or other inhuman and degrading treatment, and where her life or liberty may be seriously threatened. International human rights law provides further protection beyond (and in addition to) the one offered by international refugee law. Indeed, States are bound not to transfer any individual to another country where they may face serious harm—particularly, arbitrary deprivation of life, torture or other cruel, inhuman or degrading treatment or punishment—regardless of the limits of Article 33(2) CSR51.

The issue of the applicability *ratione loci* of the prohibition of *refoulement* has fuelled a vivid doctrinal debate, which cannot be fully addressed within the remit of this chapter. Although the CSR51 is silent about its extraterritorial application, scholars and the UNCHR agree that ‘the ordinary meaning of *refouler* is to drive back, repel, or re-conduct, which does not presuppose a presence in-country’, thereby supporting the view that Article 33(1) CSR51 encompasses rejection at the border, in transit zones, and on the high seas.⁶⁰ While specific territorial limitations have been set forth in other provisions of the Convention, no such restriction is found in paragraph 1 of Article 33.⁶¹ Accordingly, UNHCR has stressed that

⁵⁹ This section is based on Giuffrè, ‘Access to Asylum at Sea? *Non-refoulement* and a Comprehensive Approach to Extraterritorial Human Rights Obligations’ in Moreno-Lax and Papastavridis (eds), *Boat Refugees’ and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights* 248.

⁶⁰ See, e.g., Lauterpacht and Bethlehem, ‘The Scope and Content of the Principle of *Non-refoulement*: Opinion’, in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP, 2003) 87, 110; Kälin, Caroni and Heim, ‘Article 33 para 1 (Prohibition of Expulsion and Return (*Refoulement*))’, in Zimmermann et al. (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol - A Commentary* 1327 (OUP, 2011) 1361, 1367; UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) 12, para 24, at: <<http://www.refworld.org/docid/45f17a1a4.html>>. See also, Goodwin-Gill and McAdam, *The Refugee in International Law* (OUP, 3rd edn, 2007), 246; Hathaway, *The Rights of Refugees under International Law* (CUP, 2005), 339; Fischer Lescano and Lohr, *Border Control at Sea: Requirements under International Human Rights and Refugee Law* (European Centre for Constitutional and Human Rights, 2007), 14; Moreno-Lax, ‘(Extraterritorial) Entry Controls and (Extraterritorial) *Non-refoulement*’, in De Bruycker et al. (eds), *The External Dimension(s) of EU Asylum and Immigration Policy* (Bruylant, 2011) 411; and Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) ch 8.

⁶¹ See, Bank, ‘Refugees at Sea; Introduction to Art. 11 of the 1951 Convention’, in Zimmermann (n 63) 815, 833, 835.

Article 33(1) applies also beyond the territorial frontiers of a State party to the Convention.⁶²

In some circumstances, national jurisprudence has adopted a restrictive interpretation of the scope *ratione loci* of the principle of *non-refoulement*.⁶³ However, the jurisprudence of the ECtHR has in a number of cases confirmed the extraterritorial applicability of the relevant Treaty when States deal with individuals who risk being subjected to torture or degrading treatment if handed over to the authorities of countries of origin or transit.⁶⁴ It has also explicitly emphasized States' duty to prevent *refoulement* from occurring, wherever jurisdiction is exercised.⁶⁵ Likewise, the UN Human Rights Committee (HRC) recognizes the extraterritorial scope of Article 7 ICCPR and an implicit *non-refoulement* obligation therein, regardless of whether individuals are within or outside the territory of a State Party, provided they are under its control.⁶⁶ This implies a prohibition to 'extradite, deport, expel or otherwise remove' a person where sufficient grounds exist to believe that she will suffer irreparable harm, either in the readmitting country or in any other country to which she could subsequently be removed.⁶⁷ More explicitly, Article 3 CAT provides that no State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that she would be in danger of being subjected to torture.⁶⁸

3.2. The right to leave

The right to leave any country including one's own complements the right to protection against *refoulement* in several respects, as an (active) right of the individual to flee (to seek

⁶² Inter-American Commission on Human Rights, *Haitian Centre for Human Rights et al. v United States of America*, Decision of the Commission as to the merits of Case 10.675 United States 13 March 1997, para 157 ('Haitian Centre Case'). See also, UNHCR, *Gene McNary, Commissioner, Immigration and Naturalization Service, et al (Petitioners) v Haitian Centres Council, Inc et al (Respondents). Brief Amicus Curiae of the Office of the High Commissioner for Refugees in Support of Respondents*, October 1992, 85–102.

⁶³ See, *US Supreme Court, Sale, Acting Commissioner, ins v Haitian Centres Council* [1993] 113 (USSC) 2549.

⁶⁴ See, e.g., ECtHR, *Medvedyev and Others v France*, Appl. 3394/03, 29 Mar. 2010; *Women on Waves and Others v Portugal*, Appl. 31276/05, 3 May 2009; *Hirsi* (n 60). The responsibility of British authorities in Iraq for extraterritorial violation of the Convention was also recognized by the ECtHR in *Al-Skeini v UK*, Appl. 55721/07, 7 Jul. 2011; *Al-Jedda v UK*, Appl. 27021/08, 7 July 2011; *Al-Saadoon and Mufdhi v UK*, Appl. 61498/08, 2 Mar. 2010. See, also, *Jaloud v the Netherlands*, Appl. 47708/08, 20 Nov. 2014.

⁶⁵ See, e.g., *Hirsi* (n 60), which will be discussed in Section 3.2. See also, *Xhavara v Italy*, Appl. 39473/98, 11 Jan. 2001, p. 5; *WM v Denmark*, Appl. 17392/90, 14 Oct. 1992.

⁶⁶ Under Art. 7 of the ICCPR, 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

⁶⁷ See, HRC General Comment No. 31: *The nature of the general legal obligation imposed on States parties*, (CCPR/C/21/Rev.1/Add. 13), 26 May 2004, para. 12. See also, the HRC *Concluding Observations on the United States of America*, (CCPR/C/USA/CO/3Rev. 1), 18 Dec. 2006, para. 16); *Mohammad Munaf v Romania*, 21 Aug. 2009, (CCPR/C/96/D/1539/2006), para. 14.2; HRC General Comment No. 2: *The prohibition of torture and cruel treatment or punishment (Article 7)*, (HRI/HEN/1/rev.1), 28 Jul. 1994, para. 9; *Kindler v Canada*, Comm. 470/1991, 11 Nov 1993, para. 13.2.

⁶⁸ On the extraterritorial applicability of the Convention to any territory 'under the *de facto* effective control of the State party', see 'Conclusions and Recommendations on the United States of America', 1–19 May 2006, (CAT/C/USA/C/2), para. 15; *JHA v Spain*, 21 Nov. 2008, (CAT/C/41/D/323/2007); see also, General Comment No. 2: *Implementation of Article 2 by States parties*, 24 Jan. 2008, (CAT/C/GC/2), para. 6; *Sonko v Spain*, (CAT/C/47/D/368/2008), 20 Feb. 2012, para. 10.3. For a consolidation of these views, see *Draft Revised General Comment on the implementation of article 3 of the Convention in the context of article 22*, to be discussed on 28 Apr. 2017, available at: <<http://www.ohchr.org/EN/HRBodies/CAT/Pages/GCArticle3.aspx>>.

asylum or a better life).⁶⁹ This is not to say that the content or extent of the entitlement is uncontroversial. The final wording of Article 12 ICCPR—the first codification of the right to leave in legally-binding form—is the product of a compromise. The same can be said of Article 2 of Protocol 4 ECHR, drafted in a similar tenor.

While the provision recognises a right to leave, there is, however, no parallel entitlement to enter other countries, as control over admission is considered intrinsic to State sovereignty.⁷⁰ To compensate for the imbalance, a right to return to one's own country, as reflected in the UDHR, has been retained in Articles 12(4) ICCPR and 3(2) Protocol 4 ECHR. But this does not negate the independent substance of the right to leave.

The freedom of movement recognised in the ICCPR and the ECHR within which the right to leave is inscribed has been divided into several components. Articles 12(2) ICCPR and 2(2) Protocol 4 ECHR, as opposed to Articles 12(1) ICCPR and 2(1) Protocol 4 ECHR, proclaim a right of universal scope.⁷¹ Indeed, while liberty to come and go attaches only to those 'lawfully within' the territory of a State, freedom to leave any country and emigrate 'is available to everyone, *i.e.* to nationals and aliens alike, and is not conditioned on lawful residency within the territory of a State party'.⁷² The legal status of the person under national law is irrelevant. Yet, the right to leave has not been conceived of as an absolute entitlement. According to the final wording of Article 12(3) ICCPR, like that of Article 2(3) Protocol 4 ECHR, restrictions have to be 'provided by law, [be] necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and [be] consistent with the other rights recognised in the...Covenant'. Following the pronouncements of the HRC, 'the application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality'.⁷³ In practice, 'States should always be guided by the principle that the restrictions must not impair the essence of the right'.⁷⁴ Hence, while limitations are permissible, they must not render the right ineffective—neither in law nor in practice.⁷⁵

In light of this, measures of consensual containment shall be classified as direct interferences with the right to leave,⁷⁶ which, unless meeting the requirements for permissible restrictions, are incompatible with the Covenant/Convention.⁷⁷ These measures, imposing as

⁶⁹ On 'inherent obligations', see ECtHR, *Soering v. UK*, Appl. 14038/88, 7 Jul. 1989, deducing a duty on Contracting Parties not to extradite anyone to a country where there is a 'real risk' of exposure to serious harm as being implicit in Art. 3 ECHR. This section is based on Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) chs 8 and 9.

⁷⁰ On the power of exclusion as part of the reserved domain of domestic jurisdiction, see *Oppenheim's International Law*, Lauterpacht (ed.), (Longmans, 1955), at 692; Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, 1984), at 35; Jean, 'Le contenu de la liberté de circulation', in Flory and Higgins (eds.), (Economica, 1988), at 33; Plender, *International Immigration Law* (Kluwer, 1988), at 1-4.

⁷¹ Higgins, 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country' (1973) 49 *International Affairs* 341.

⁷² Nowak, *U.N. Covenant on Civil and Political Rights* (Engel, 1993), at 204.

⁷³ HRC, *General Comment No. 27: Article 12 (Freedom of Movement)*, (CCPR/C/21/Rev.1/Add.9), para. 16.

⁷⁴ *Ibid.*, para. 13.

⁷⁵ On this point, see Harvey and Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 *IJRL* 1, at 6.

⁷⁶ For a similar conclusion in the ECHR framework, see ECtHR, *Schmid v. Austria*, Appl. 10670/83, 9 Jul. 1985; *Baumann v. France*, Appl. 33592/96, 22 May 2001; *Napijalo v. Croatia*, Appl. 66485/01, 13 Nov. 2003; *Ignatov v. Bulgaria*, Appl. 50/02, 2 Jul. 2009; *Dzhaksybergenov v. Ukraine*, Appl. 12343/10, 10 Feb. 2011.

⁷⁷ Nowak, *UN Covenant on Civil and Political Rights* (Engel, 2nd edn., 2005), at 270.

they do a burden on the exercise of the right, must be established by laws (instead of non-legally binding ‘Statements’ or ‘MoUs’), which are accessible to all and foreseeable in their application, providing for adequate certainty and protection against arbitrariness.⁷⁸ They must pursue a legitimate objective (of those *explicitly* listed) and be proportionate in each individual case (not ‘generally’).⁷⁹ The measure must be objectively appropriate and be the least intrusive possible.⁸⁰ Its imposition should be the result of a balancing act between all interests at stake, without placing a disproportionate onus on the individual.⁸¹ In the words of the HRC, ‘[t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution’.⁸² National authorities must ‘take appropriate care to ensure that any interference with the right to leave one’s country remains justified and proportionate throughout its duration in the individual circumstances of the case’.⁸³

Otherwise, an interference that entails a complete inability to leave (as the aspiration in the EU-Turkey and EU-Libya contexts appears to be in the case of irregular migrants) is simply irreconcilable with the ICCPR/ECHR. Blanket restrictions, for indeterminate reasons or for an indefinite period of time amount to *de facto* punishment and are inadmissible.⁸⁴ Following the Strasbourg judges, ‘[t]he Court cannot consider such...blanket and indiscriminate measure[s] as being proportionate’; ‘the automatic imposition of such...measure[s] without any regard to the individual circumstances of the person concerned [cannot] be characterised as necessary in a democratic society’.⁸⁵

4. Preventing access to Europe: A critical assessment of ‘contactless controls’

So what is the red thread that ties in measures of ‘contactless control’ together? They are all oriented towards curbing migratory flows, reducing human trafficking, and combating migrant smuggling, *through* the prevention of departure to (search protection in) Europe. Whilst their indiscriminate nature hampers access to refuge for those in need of protection, their ignorance of the right to leave is of particular note.

Information campaigns, however, do not end up in the physical ‘pulling back’ of migrants onto the territories of the countries they wish to leave—at least, not directly or immediately. Regardless of warnings, people may still decide to go away. Decisions to emigrate account for innumerable reasons, including war, insecurity, and persecution or to escape the

⁷⁸ Generally on the principle of legality, see ECtHR, *Sunday Times v. UK (No. 1)*, Appl. 6538/74, 26 Apr. 1979, para. 49. In the specific context of Art. 2(3) Prot. 4 ECHR, see *Dzhaksybergenov* (n 80), paras. 57-62.

⁷⁹ ECtHR, *Riener v. Bulgaria*, Appl. 46343/99, 23 May 2006; *Bartik v. Russia*, Appl. 55565/00, 21 Dec. 2006.

⁸⁰ Partsch, ‘The Right to Leave and to Return in the Countries of the Council of Europe’ (1975) 5 *Israel Yearbook on Human Rights* 215, at 261.

⁸¹ HRC, *González del Río v. Perú*, Comm. 263/1987, 28 Oct. 1992, para. 5.3.

⁸² HRC, General Comment No. 27 (n 77), para. 13.

⁸³ ECtHR, *A.E. v. Poland*, Appl. 14480/04, 31 Mar. 2009, para. 49; *Bessenyei v. Hungary*, Appl. 37509/06, 31 Oct. 2008, para. 24; *Hajlik v. Hungary*, Appl. 41463/02, 31 Oct. 2006, para. 36.

⁸⁴ ECtHR, *Luordo v. Italy*, Appl. 32190/96, 17 Jul. 2003 (restriction of movement of a bankrupt beyond the period necessary to secure assets for creditors); *Federov and Federova v. Russia*, Appl. 31008/02, 13 Oct. 2005 (charge of fraud without prosecution for a prolonged period during which the applicants’ freedom of movement was restricted).

⁸⁵ ECtHR, *Stamose v. Bulgaria*, Appl. , Nov. 2012, paras 34 and 36.

‘stagnation’ of everyday life.⁸⁶ Whatever the impact of information campaigns on migrants’ decisions, they are unlikely to engage the responsibility of the would-be destination State for any potential human rights violations. On the contrary, they are designed to shift responsibility (at least rhetorically) to the migrants themselves who, despite well-advertised dangers, may still make ‘irrational choices’ by ‘knowingly’ deciding to undertake the perilous journey ‘at their own risk’.⁸⁷

But, despite the differences between information campaigns and other externalized migration measures, all ‘contactless controls’ are part of the new toolbox of ‘consensual containment’ practiced by third countries on behalf of or for the benefit of European States to reduce the number of arrivals in Europe, fomenting logics of migration pre-emption far beyond physical borders. More than any other externalized measure of ‘contactless control’, information campaigns reveal how EU Member States increasingly begin migration management ‘upstream’, by controlling migratory movements through dissuasion, even before they occur.

In a number of different ways, the practices discussed in Section 3 show how the EU is calling upon third countries to collaborate in discouraging departures, carry out effective exit controls, and halt new arrivals on their territory. While such a triple goal is not explicitly stated in the EU-Turkey deal, it is instead clearly put in the Italy-Libya MoU and the Malta Declaration, which purport to strengthen Libya’s capacity to manage its Southern borders. In any event, push-backs at the Syrian-Turkish passage have been documented since at least August 2015,⁸⁸ with Turkey making systematic recourse to violence against Syrian refugees attempting to cross the Turkish border, as pointed out above, following the deal with EU Member States in March 2016.⁸⁹

Another commonality of all these externalization policies is that they seem to deviate attention from their primary objective of ‘contactless control’ towards nobler goals, including the saving of lives, the prevention of dangerous journeys, or the dismantling of traffickers and smugglers networks. This is clear, especially, in the agreements between Italy, the EU and Libya on the training of the Libyan Coastguard as a way to reduce life loss at sea. The same applies to the choice to link readmission policy with access to protection in the approach of the European Council, when stating that reinforced cooperation with key countries of origin on ‘readmission and returns’ is a ‘necessary complement to enhancing legal avenues [to Europe]’.⁹⁰ Equally, by linking readmission of irregular entrants with resettlement, the EU-Turkey ‘one for one’ programme strives to (mis-)represent the return of asylum seekers to a transit country as facilitating refugees’ access to international protection in Europe. The end result is a conceptualisation of pull-backs, interdiction, and deportation as a (benign) pre-condition of a functioning asylum system, namely, as a prerequisite (in the logical and temporal line of policy design) of any measures of (*actual* access to) refuge in the EU.

The legal nature of ‘contactless controls’ appears to be of little consequence—regardless of rule of law implications and related human rights concerns. For instance, in March 2017, the

⁸⁶ Nieuwenhuys and Pécoud, ‘Human trafficking, information campaigns, and strategies of migration control’ (2007) 50 *American Behavioral Scientist* 1674.

⁸⁷ Oeppen, ‘Leaving Afghanistan! Are you sure?’ European efforts to deter potential migrants through information campaigns’ (2016) 9 *Human Geography* 59.

⁸⁸ HRW, ‘Turkey: Border Guards Kill and Injure Asylum Seekers’ (n 36).

⁸⁹ Spijkerboer, ‘Got the Picture?’, *Forced Migration Forum*, 7 Feb. 2017, at: <<http://thomasspijkerboer.eu/thomas-blogs/got-the-picture-2017/>>.

⁹⁰ Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final, 6 Apr. 2016.

General Court of the CJEU affirmed that it lacks jurisdiction to hear and determine the actions of annulment brought by three asylum seekers against the EU-Turkey Statement.⁹¹ In its Order, the General Court considered that the press release of 18 March 2016 is solely attributable to the Heads of State or Government of the Member States of the EU, who met with the Turkish Prime Minister, and not to the European Council itself. So, in the absence of an act of a European institution, the Court considered not to have competence to adjudicate the case. But, if this reading is correct, did Member States have the power in the first place to act in a matter, which was already thoroughly regulated by the EU-Turkey Readmission Agreement? Does the principle of pre-emption not impede a subsequent parallel regulation of the exact same subject matter by the Member States acting *qua* (independent) subjects of international law, as the General Court appears to imply? And, most importantly, were Member States in a position to commit the EU to reinvigorate accession negotiations, promise visa facilitation, or create a Refugee Facility out of EU funds, if they were indeed acting in their autonomous international law capacity?

Be it as it may, it seems that the EU itself is also trying to develop new agreements linked to readmission, whose negotiation and conclusion do not follow the procedural rules laid down in Article 218 TFEU for the conclusion of international agreements. For example, the *Joint Way Forward (JWF) Declaration* on migration issues with Afghanistan has been defined by Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, as a non-legally binding ‘informal agreement’, which aims ‘to establish a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals’ to their country of origin through informal means—dispossessing those concerned of the procedural and judicial protections inherent in legally-binding instruments governing expulsion.⁹² Likewise, the *EU-Mali Joint Communiqué* on the High-Level Dialogue on Migration affirms that ‘return of irregular migrants is a key aspect of managing migration and a way of discouraging people from embarking on a highly perilous journey’.⁹³ A similar approach might also be adopted with those countries identified as priority targets of the new EU MPF. While diluting responsibilities, the complexity of the EU readmission and return policy does not only bypass the democratic scrutiny of the European Parliament by short-circuiting Article 218 TFEU, but also enhances legal (un-)certainty on the terms of the accords and circumvents EU fundamental rights guarantees, thus heightening the risk of violations for the returnees.

The EU is displacing displacement ever closer to points of departure, impeding unwanted movement also through other means. The EU and its Member States have conditioned financial and technical support to third countries’ cooperation in proactively preventing irregular exit, to avoid unauthorised access to Europe—as if there were any means of *regular* entry for forced migrants to seek asylum in the Member States⁹⁴—which, in other words, means catching them up in a system of outright containment. Although the EU has announced

⁹¹ Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council* [2017] ECLI:EU:T:2017:128.

⁹² Joint Way Forward on migration issues between Afghanistan and the EU, 2 Oct. 2016, at: <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf>.

⁹³ Joint Communiqué on the High-Level Dialogue on Migration of 16 April 2016 in Côte d’Ivoire, at: <https://eeas.europa.eu/headquarters/headquarters-homepage/5178/joint-communication-on-the-high-level-dialogue-on-migration-of-16-april-2016-in-cte-divoire_en>.

⁹⁴ Cf. Case C-638/16 PPU *X and X* [2017] ECLI:EU:C:2017:173. For commentary, see Moreno-Lax, ‘Asylum Visas as an Obligation Under EU Law: Case PPU C-638/16 *X, X v État belge*’, *EU Migration Law Blog* (Feb. 2017), available at: <<http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/>> (Part I); and <<http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/>> (Part II).

a €200 million plan to finance migration projects in Libya, local authorities in Tripoli and other cities are mounting resistance to EU plans to curtail migration to Europe. Their main argument is that the EU should deal with the (forced/voluntary) migration issue themselves, without passing the burden to Libya, which does not have the capacity to manage all those who will remain on its territory.⁹⁵ If the EU and Italy are investing in the ambitious project of training and equipping the Libyan Coastguard, it should first be asked whether Libya is a safe place for migrants and refugees ‘pulled back’ there.

As concluded by the ECtHR—which broadly relied on reports of international human rights organizations and the UNHCR—Libya cannot be considered a ‘place of safety’ (for either search and rescue or human rights purposes) because of the well-documented inadequacy of its response to flows of migrants and asylum seekers.⁹⁶ The situation of migrants and refugees in Libya has dramatically worsened since Gaddafi was ousted. People rescued in the Mediterranean report inhuman reception conditions and ill-treatment.⁹⁷ They claim they would rather die at sea than go back to Libya. Thus, even if the Coastguard were trained in search and rescue, returns to Libya would remain inconsistent with international human rights. And this applies to any action ‘the effect of which is to prevent migrants from reaching the borders of the [would-be host] State’,⁹⁸ which, in the case of Libya, likely continues to amount to direct *refoulement*—as when *Hirsi* was decided—since there is a persistent ‘real risk’ of ill-treatment for migrants and refugees there.

The situation in Turkey is equally problematic. In fact, reliable sources have reported that ‘Turkish border guards are shooting and beating Syrian asylum seekers trying to reach Turkey’.⁹⁹ The Turkish-Syrian frontier is closed and there are plans for a new border wall to stop crossings.¹⁰⁰ Erdogan’s forces have allegedly contributed to the degradation of the situation in Syria by bombing Kurdish militia, disregarding risks for civilians,¹⁰¹ making Turkey’s consideration as a ‘safe third country’ for forced migrants unwarranted, given notorious risks of direct and indirect *refoulement*.

Action by Libya and Turkey under their respective deals with the EU is/will be (once capacitated) also at odds with the right to leave.¹⁰² As highlighted in the previous section, there are several permissible purposes for interference, but the lists in Articles 12(3) ICCPR and 2(3) Protocol 4 ECHR are exhaustive. Therefore, whether—as the British delegation

⁹⁵ See, ‘Libyan authorities oppose EU migrant plans’, *EUObserver*, 8 Feb. 2017, at: <<https://euobserver.com/migration/136837>>. At present, up to 2,000 militias, some of which involved in migrant smuggling and human trafficking, dispute the control of Libya’s coastline, while the UN-backed government has control only over the Eastern region of the country. See, ‘Guide to Key Libyan Militias’, *BBC News*, 11 Jan. 2016, at: <<http://www.bbc.com/news/world-middle-east-19744533>>.

⁹⁶ *Hirsi* (n 60).

⁹⁷ See Joint UNHCR and IOM statement on addressing migration and refugee movements along the Central Mediterranean route, 2 Feb. 2017, at: <<http://www.unhcr.org/news/press/2017/2/58931ffb4/joint-unhcr-iom-statement-addressing-migration-refugee-movements-along.html>>; ASGI, ‘the EU and Italy de facto violate the principle of non-refoulement’, 6 Feb. 2017, at: <<http://www.asgi.it/english/libya-eu-italy-asylum-migration/>>.

⁹⁸ *Hirsi* (n 60), para 180.

⁹⁹ HRW, ‘Turkey: Border Guards Kill and Injure Asylum Seekers’ (n 36).

¹⁰⁰ HRW, ‘UN: Press Turkey to Open Border’, 20 May 2016, at: <<https://www.hrw.org/news/2016/05/20/un-press-turkey-open-border>>; ‘Turkey’s new border wall to stop Syrian refugees’, *Politico*, 10 Oct. 2016, available at: <<http://www.politico.eu/article/turkeys-new-border-wall-will-stop-syrian-refugees-immigration-istanbul/>>.

¹⁰¹ ‘Turkey bombs Syrian Kurdish militia allied to U.S.-backed force’, *Reuters*, 20 Oct. 2016, at: <<http://www.reuters.com/article/us-mideast-crisis-syria-kurds-idUSKCN12K0ER>>.

¹⁰² Note that both countries have ratified the ICCPR and Optional Protocol. See UNHCHR, Status of Ratifications, at: <<http://indicators.ohchr.org>>. Turkey, in turn, has also signed Protocol 4 ECHR.

suggested during the ICCPR negotiations¹⁰³—States are allowed to restrict the right to emigrate with a view to assisting destination countries in controlling unauthorised immigration is doubtful. The proposal was specifically considered during the discussions in the Human Rights Commission and expressly rejected as being too far-fetched.¹⁰⁴ This does not mean that all measures of exit control constitute necessarily a violation of the right to leave, but it entails that they must be classified as an *interference* requiring specific justification to be lawful, bearing in mind that ‘[t]he restriction may be justified in a given case *only if* there are clear indications of a genuine public interest which outweighs the individual’s right to freedom of movement’.¹⁰⁵ Thus, ‘a *general* measure preventing almost the entire population of a State from leaving’ cannot be considered ‘necessary’.¹⁰⁶ Blanket pull-backs and retention based on nationality grounds—as those demanded by the EU—can hardly conform to the principles of proportionality and non-discrimination. Security and a putative protection of human life are no substitutes for detailed consideration of individual circumstances and other interests at stake.

Moreover, the crucial significance of the right to leave for protection seekers requires consideration of all Article 12(3) ICCPR/Article 2(3) Protocol 4 ECHR conditions, and especially of the clause on ‘other rights recognised in the... Covenant’—alongside the fact that legal restrictions must be narrowly construed.¹⁰⁷ Its intersection with the prohibition of ill-treatment renders the right of vital importance to those fleeing irreversible harm. Although neither the ICCPR nor the ECHR recognise a right of aliens to enter another country, in certain circumstances they may nonetheless enjoy the protection of the Covenant/Convention in relation to entry and residence, in particular when considerations of non-discrimination, family unity, or, indeed, *non-refoulement* are in issue.¹⁰⁸

The Refugee Convention is contingent upon the existence of the right to leave one’s own country, for without the person being ‘outside the country of his nationality’ she will not qualify as a refugee under that instrument.¹⁰⁹ The right to leave and the right to seek asylum are intertwined in the case of Convention refugees. As Hannum has noted, ‘[i]n order to “seek” asylum, a refugee must be able to present himself before the appropriate authorities of the country of refuge; by definition, this requirement presupposes that he must be able to leave his own country’.¹¹⁰ In this context, the denial of the right to leave will indirectly entail

¹⁰³ E/800, at 21 (Art. 11, para. 10).

¹⁰⁴ On the rejection of restrictions on grounds of ‘general welfare’ or the ‘economic and social well-being’ of a country, see Vasak, ‘Analytical Examination of Civil and Political Rights’, in Vasak and Alston (eds), *The International Dimensions of Human Rights*, Vol. I (UNESCO, 1982), 142, at 148.

¹⁰⁵ ECtHR, *Hajibeyli v. Azerbaijan*, Appl. 16528/05, 10 Jul. 2008, para. 63 (emphasis added). For commentary on ‘national security’ and ‘public order’ restrictions in this realm, see White and Ovey, *The European Convention on Human Rights* (OUP, 5th edn., 2010), at 533 ff.

¹⁰⁶ ECtHR, *Streletz, Kessler and Krenz v. Germany*, Appl. 34044/96, 35532/97 and 44801/98, 22 Mar. 2001, para. 100 (emphasis added).

¹⁰⁷ HRC, *Peltonen v. Finland*, Comm. 492/1992, 29 Jul. 1994; *Celepli v. Sweden*, Comm. 456/1991, 2 Aug. 1994; *Salah Karker v. France*, Comm. 833/1998, 30 Oct. 2000. See also General Comment No. 27 (n 77), para. 13, according to which ‘the relation between right and restriction, between norm and exception, must not be reversed’.

¹⁰⁸ HRC, General Comment No. 15: The Position of Aliens Under the Covenant, (CCPR/A/41/40), para. 5.

¹⁰⁹ Note, however, that Art. 14(1) UDHR does not limit its scope of application *ratione personae* to Convention refugees, according to its wording: ‘*everyone* has the right to seek and to enjoy in other countries asylum from persecution’ (emphasis added).

¹¹⁰ Hannum, *The Right to Leave and Return in International Law* (Martinus Nijhoff, 1987), at 50.

a denial of the right to seek asylum too.¹¹¹ The aggregate *right to leave to seek asylum* must thus be accounted for in this context.¹¹²

As the ECtHR noted in *M.S.S.*, ‘[t]he fact that...the applicant had been trying to leave Greece [irregularly] [could not] be held against him’. This was considered to be so, in particular, because ‘the applicant was attempting to find a solution to a situation the Court considere[d] contrary to Article 3 [ECHR]’¹¹³—like most of those trapped in Turkey and Libya. The link between the right to leave and the right to seek asylum from persecution was thereby established in passing, allowing for the conclusion that departure in order to avoid irreversible harm and seek protection—either through regular or irregular channels—shall be considered a legitimate ground for one to escape any country (including Libya and Turkey). While both States of departure and destination ought to take into consideration this element, States of destination (if Contracting Parties to the ECHR) need, in addition, also abide by the ‘right to gain effective access to the procedure for determining refugee status’ implicit in the ECHR, adding a procedural dimension to the right to flee (reuniting the right to leave with the right to *non-refoulement*).¹¹⁴

5. Instances of ‘contactless responsibility’: The role of knowledge

The EU and its Member States, when designing and operating strategies of contactless control, seem to understand that they are exonerated of all international legal responsibility. Yet, general principles of customary law appear to point in a different direction. There are, indeed, at least three instances in which EU countries may be said to incur responsibility of their own: (1) in situations of complicity; (2) through direction and control of the acts of third countries; and (3) independently, through actions attributable directly to them.

5.1 Complicity

Derived responsibility for aiding and abetting is regulated in Article 16 of the ILC Articles on State Responsibility (ASR)¹¹⁵ whereby a State that assists another in the commission of an international wrong is internationally responsible for doing so ‘to the extent that its own conduct has caused or contributed to the internationally wrongful act’.¹¹⁶ Two conditions must be fulfilled in this regard: First, the aiding State ‘must do so with *knowledge of the circumstances* of the internationally wrongful act’. Second, the act perpetrated by the aided

¹¹¹ On the importance of the right to seek asylum for refugees see UNHCR EXCOM Conclusions No. 53 (1988); No. 71 (1993); No. 75 (1994); No. 77 (1995); No. 82 (1997); No. 94 (2002); No. 97 (2003); No. 101 (2004); No. 103 (2005).

¹¹² Further on this aggregate right, see Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017) ch 9.

¹¹³ ECtHR, *M.S.S. v. Belgium and Greece*, Appl. 30696/09, 21 Jan. 2011, para. 315.

¹¹⁴ ECtHR, *Amuur v. France*, Appl. 19776/92, 25 Jun. 1996, para. 43. See also, Giuffrè (n 62).

¹¹⁵ ILC Articles on the Responsibility of States for Internationally Wrongful Acts (‘ASR’), [2001] YILC Vol. II (Part 2), Annex to UNGA Res. 56/83, 12 Dec. 2001 (A/56/49(Vol. I)/Corr.4).

¹¹⁶ ILC Commentary to ASR (‘ASR Commentary’), [2001] YILC Vol. II (Part 2), (A/56/10), at 66-67, paras 1 and 10.

State should have constituted an international wrong also ‘if committed by [the aiding] State’.¹¹⁷ But Article 16 ASR does not define any of the relevant terms.

A quite wide category of actions can be encompassed within the reach of Article 16 ASR, such as training, economic assistance, the provision of confidential information,¹¹⁸ as well as political or legal aid, even in the form of treaties employed to facilitate the performance of the illicit act.¹¹⁹ As the scope *ratione materiae* of Article 16 ASR is so vast, the mental element has been interpreted restrictively.¹²⁰ If, on the one hand, it can be presumed that a State is aware of the circumstances making the conduct of the assisted State internationally wrongful, it is also true that establishing such discernment is no easy task. In fact, the threshold for determining indirect responsibility is significantly high.¹²¹

The mental element requirement still remains a hotly debated issue, because of the problems of representing a State as an entity able to formulate conscious decisions.¹²² Moreover, in order to avoid responsibility, a State could intentionally refrain from making public pronouncements stating its will.¹²³ Taking into account the difficulty in determining the state of mind of a State, too strict a mental requirement would lead to the exclusion of those cases where States commit international wrongful acts not from a desire to violate human rights, but because they implicitly accept the risk that breaches thereof may occur, while pursuing different and less harmful objectives.¹²⁴

Therefore, the proposition that the threshold should not be deemed met, unless the relevant State, by the aid or assistance given, *intends* to facilitate the wrongful conduct,¹²⁵ would raise the bar so much as to render recourse to Article 16 ASR near impossible. For our purposes, however, the fact that the funds, training, and other capacity-building activities delivered by the EU Member States to Libya and/or Turkey are for the *explicit* purpose of ‘significantly reduc[ing] migratory flows’, ‘combat[ing] *transit*’, and ‘preventing departures’ appears nonetheless to meet this threshold.¹²⁶

In any event, such stringent approach was expressly discussed in draft versions of Article 16 ASR, but failed to make its way into the final text.¹²⁷ So, in the absence of specific wording to that effect, following accepted rules of interpretation, it is posited that ‘knowledge of’ should not be confounded with ‘intent to’ within the ASR complicity framework. This does not amount to triggering international responsibility any time a State engages in bilateral

¹¹⁷ Art. 16(a) and (b) ASR. See also ASR Commentary, at 66 ff.

¹¹⁸ Crawford, ‘Second Report on State Responsibility’ (1999) YILC Vol II (Part I), 50, n 349.

¹¹⁹ Graefrath, ‘Complicity in the Law of International State Responsibility’ (1996) 29 RBDI 370, 374. On the scope of ‘aid and assistance’, see Aust, *Complicity and the Law of State Responsibility* (CUP, 2011) 192-230.

¹²⁰ Nolte and Aust, ‘Equivocal Helpers-Complicit States, Mixed Messages and International Law’ (2009) 58 ICLQ 1, 10.

¹²¹ On complicity in cases of externalized migration controls, see Giuffrè, ‘State Responsibility beyond Borders: What Legal Basis for Italy’s Push-Back to Libya?’ (2012) 24 IJRL 692.

¹²² Den Heijer, ‘Europe and Extraterritorial Asylum’ (PhD Thesis, University of Leiden 2010) 94.

¹²³ On the difficulty of inferring intention, and therefore complicity, from public statements, see, Graefrath (n 123), 375–6.

¹²⁴ Nahapetian, ‘Confronting State Complicity in International Law’ (2002) 7 UCLA Journal of International Law 99, at 126–7.

¹²⁵ ASR Commentary, at 66, para. 5 (emphasis added).

¹²⁶ Malta Declaration (n 27), paras 3, 5, 6(j) (emphasis added).

¹²⁷ Draft Art. 25 referred to the intent element of the aiding State as ‘in order to enable’, while Draft Art. 27 spoke of ‘for the commission of’. But none of the formulas were retained in the end.

cooperation with a third country.¹²⁸ The ‘eventual possibility’ that a wrongful act could derive from a State’s assistance is not sufficient to establish the link between the facilitating act and the wrongful conduct.¹²⁹ Rather, in line with the ICJ’s pronouncements in the *Genocide Case*, it is to be proven that an accomplice State aided another country by accepting, with *knowledge* of the facts, the *serious risk* that wrongful acts would be perpetrated.¹³⁰

In the instances of the EU-Turkey deal and EU-Libya MoU, the wealth of reliable sources available to the EU Member States on the prevailing situation in both countries coupled with the specific demands placed on them to stop irregular migration can be said to reach the mark of required knowledge. The issue is to ascertain whether the assisting (EU) State(s) were/are aware that their assistance may, foreseeably, be used to perform wrongful conduct, but it is not necessary that the aid provided be specifically directed towards, or be essential to, the commission of the violation, provided it ‘contributed significantly to [it]’.¹³¹ So, while it is not for the complicit State to assume *any* chance of the harmful use of its aid,¹³² the plausible likelihood that the aid will be wrongfully utilised will activate Article 16 ASR. In our case, the fact that retention (or ‘accommodation’) of those concerned in Turkey and Libya in sub-standard conditions is being presented as life-saving mechanisms sparing the dangers of maritime journeys is no excuse, where the dangerous situation to which they (will) remain exposed to on dry land is ‘well-known and easy to verify on the basis of multiple sources’.¹³³

The second condition foreseen in Article 16(b) ASR requires a commonality of obligations between both cooperating parties for complicity to be established, which may be problematic in certain respects. The point is to prevent the assisting State from ‘do[ing] by another State what it cannot do by itself’ without infringing international law.¹³⁴

In the EU-Turkey case, with both the EU Member States and Turkey having ratified the ECHR and the ICCPR, obligations ensuing from those instruments would be covered—not so obligations flowing from Protocol 4 ECHR that neither Turkey nor several EU countries have ratified, or stemming from the CSR51, as Turkey maintains a geographical limitation to Article 1. A similar scenario applies to the EU-Libya cooperation. Libya is not a party to the CSR51 or to the ECHR. But both are subject to the ICCPR. Therefore, as far as duties of non-refoulement and the right to leave are concerned, as accruing from the ICCPR (and Article 3 ECHR in the EU-Turkey case)—alongside customary international law/jus cogens, as the case may be—the second condition for the establishment of complicity for provision of aid and assistance should be fulfilled.

5.2 Direction and control

¹²⁸ Nolte and Aust (n 123), 14.

¹²⁹ Report of the ILC on the work of its thirtieth session, (1978) YILC 1978, Vol II (Part II) 49–50, para 18.

¹³⁰ Although Art 16 ASR is not strictly relevant for the case, the ICJ takes the opportunity to make some considerations on the concept of ‘aid or assistance’. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (Judgment), [2007] ICJ Rep. 43, paras 432 and 420-4 (emphasis added).

¹³¹ ASR Commentary, at 66, para. 5. See also Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries*, (CUP, 2002) 149.

¹³² *Ibid.*, para. 4.

¹³³ *Hirsi* (n 60), para. 131.

¹³⁴ ASR Commentary, at 66, para. 6.

The existence of ‘direction’ or ‘control’ on the part of one State restricting the sovereign discretion of another State to the advantage of the directing/controlling party may trigger responsibility under Article 17 ASR. Such direction or control may be established *de jure* or *de facto*,¹³⁵ which makes immaterial the nature of the EU relationship with Turkey and Libya. Yet again, there are two additional conditions to fulfil. First, as in the case of complicity, the directing/controlling State needs do so ‘with *knowledge of the circumstances* of the internationally wrongful act’. Second, the act perpetrated by the directed/controlled State should constitute an international wrong also ‘if committed by [the directing/controlling] State’.¹³⁶

Following the ILC, the term ‘control’ refers to cases of domination over the conduct in question and not simply the exercise of supervision or oversight. It is necessary to prove that the controlling State held ‘effective control’ of the relevant operations.¹³⁷ That control must be ‘detailed control’, specifically related to the very actions entailing the international wrong. Similarly, ‘direction’ connotes a concrete order of an operative kind, not just abstract incitement or suggestion.¹³⁸ Thus, these conditions make the ‘control’ and ‘direction’ paradigms difficult to apply in practice.

On the other hand, the ASR Commentary observes that neither terms should be understood as entailing ‘complete power’,¹³⁹ which leaves the window open for *general* instructions, like those reflected in the EU-Turkey deal and the EU-Libya MoU as currently drafted (to ‘pull back’, readmit or retain/contain migrants and refugees within their own territories in exchange for funds and other facilities), to be possibly covered by Article 17 ASR as well.¹⁴⁰ Although the EU Member States may not exert minute control over the activities carried out by its Mediterranean partners on the ground, the *de facto* binding nature of reciprocal commitments does significantly restrict the discretion available to Turkey and Libya to fulfil their pledges in the terms mutually agreed, in such a way that compliance with the Statement or the MoU cannot be performed in accordance with the rights to leave and/or to *non-refoulement*. There is, currently, no human rights-conform formula for Turkey and Libya to systematically block the movement of asylum seekers (against their will) without infringing upon their entitlements—especially since neither State recognises the status of Convention refugees. How can they (forcibly) retain migrants and exiles without prolonged and widespread detention? And how can they ‘stop’ the flow without sealing off their borders to additional arrivals in disregard of *non-refoulement* standards?

Therefore, applying the reasoning deployed by the ILC in its commentary to Article 15 of the Articles on the Responsibility of International Organisations (ARIO)¹⁴¹—which is the parallel provision to Article 17 ASR applying to the conduct of international organisations and the possibility of committing a wrong through ‘direction’ or ‘control’—a better conclusion would be that a binding reciprocal commitment, such as that underpinning the EU-

¹³⁵ [1973] YILC Vol. II, pp. 171-172, (A/9010/ Rev. 1), para. 53.

¹³⁶ Art. 17(a) and (b) ASR.

¹³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, *Merits* [1986] ICJ Rep. 14, at 62 and 64–65. Cf. ITFY, *Prosecutor v. Duško Tadic*, Case IT-94-1-A-1999, (1999) 38 ILM 1518, at 1541. Cf. Judgment of the Trial Chamber, Case IT-94-1-T-1997, (1997) 112 ILR 1.

¹³⁸ ASR Commentary, at 69, para. 7.

¹³⁹ *Ibid.*

¹⁴⁰ *Mutatis mutandis*, Art. 8 ASR, covering the instances of ‘control’, ‘direction’ and ‘instructions’ given by a State to a person or group of persons acting on its behalf/for its advantage.

¹⁴¹ ILC Articles on the Responsibility of International Organisations [2011] YILC Vol. II (Part 2), (A/66/10) (‘ARIO’).

Turkey Statement and the EU-Libya MoU (directed towards ‘significantly reduc[ing] migratory flows’, ‘combat[ing] *transit*’, and ‘preventing departures’¹⁴²) can constitute a form of direction of the State concerned, which ‘is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act’.¹⁴³

The fact that the EU and its Member States cannot be ‘unaware’ of the dreadful circumstances awaiting migrants in both Turkey and Libya, their insistence in financing ‘reception’ centres, in training Coastguard officers to undertake ‘pull-backs’, and in subordinating (through ‘adequate conditionality’) fund transfers to effective ‘border control’ that impedes transit through their territories and exit towards Europe could, if the above is correct, meet the conditions of Article 17 ASR.

5.3 Independent responsibility for own acts (and omissions)

Finally, on top of instances of derivative responsibility, EU Member States may incur independent/principal responsibility for their own acts that are constitutive of a breach of international obligations. The general rule under international law (codified in Article 47 ASR) is that ‘each State is separately responsible for the conduct attributable to it and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act’.¹⁴⁴ As confirmed by the Strasbourg Court, in cases of inter-State cooperation, ‘[i]n so far as any liability under the [ECHR] is or may be incurred, it is liability incurred by the Contracting State[s]...’.¹⁴⁵ So, the EU-Turkey/EU-Libya agreements do not exonerate EU countries of their own obligations. Indeed, [w]here States establish...international agreements to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights’.¹⁴⁶ And, according to the ECtHR, ‘[i]t would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such [agreements].’¹⁴⁷ So, ‘responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the [ECHR]’.¹⁴⁸

Adopting an approach similar to that taken in the cases of *Illascu* or *Catan* with regard to the sponsorship of Russia of the violations perpetrated by the local authorities of the separatist regime of Transnistria,¹⁴⁹ it is advanced that EU countries remain accountable for their support to Libya and Turkey in their actions of ‘consensual containment’. The funding, training, and equipping dispensed under the EU-Turkey/EU-Libya arrangements, explicitly

¹⁴² Malta Declaration (n 27), paras 3, 5, 6(j) (emphasis added).

¹⁴³ See ILC Commentary to ARIO, [2011] YILC Vol. II (Part 2), (A/66/10) (‘ARIO Commentary’), at 38-39, para. 4.

¹⁴⁴ ILC, Commentary to the Draft Articles on State Responsibility, Special Rapporteur Crawford, Annual Report (2001), Chap. IV, at 314, available at: <<http://www.lcil.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>>. Applying this rule to inter-State cooperation in the context of extraterritorial maritime interdiction, see also, Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23 IJRL 174.

¹⁴⁵ ECtHR, *Saadi v. UK*, Appl. 37201/06, 28 Feb. 2008, para. 126.

¹⁴⁶ ECtHR, *K.R.S. v. UK*, Appl. 32733/08, 2 Dec. 2008, at 15; *T.I. v. UK*, Appl. 43844/98, 7 Mar. 2000, at 15.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Hirsi* (n 60), para. 129.

¹⁴⁹ ECtHR, *Illascu v. Moldova and Russia*, Appl. 48787/99, 8 Jul. 2004; *Catan v. Moldova and Russia*, Appls 43370/04, 8252/05 and 18454/06, 19 Oct. 2012.

conditioned on the Mediterranean partners ‘managing’ migratory flows and impeding exit for transit towards Europe, can be said to constitute a form of ‘decisive influence’ akin to that at play in *Illascu* and *Catan*.¹⁵⁰ While the influence exercised by the EU falls short of military occupation or direct control, it is nonetheless decisive enough to determine the course of events to the extent that, without the EU-Turkey deal, for example, Turkey would not stop migrants in their way to the EU (to the EU’s advantage), as was precisely the case in the past. This is so much so that the EU Member States had to commit, in exchange, to the liberalisation of visas for Turkish citizens, the re-opening of accession talks, and the transfer of EUR 6 billion to Erdogan’s government, to ensure Turkey would reciprocate. The EU-Turkey deal is a *sine qua non* for the sustained reduction of irregular maritime traffic through the Aegean border, without which we would predictably see a rise in flows through that route, like prior to March 2016. It is the continued support and commitment to the Statement by the EU Member States and Turkey what enables the significant reduction of arrivals witnessed in Greece through the Eastern Mediterranean after March 2016, as per the Commission’s own evaluation.¹⁵¹ This ‘decisive influence’ constitutes, it is posited, a form of indirect but nonetheless effective control that amounts to ‘jurisdiction’ under Article 1 ECHR, thus triggering the responsibility of Member States under the Convention in case of human rights violations.

Both Article 3 ECHR and Article 2 Protocol 4 ECHR (like their ICCPR counterparts) entail positive obligations of due diligence, enjoining State parties not to engage in action that imperils human rights. What is more, ‘it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention’.¹⁵² And ‘[t]his principle carries all the more force [when] the absolute and fundamental nature of the right not to be subject to...grave and irreversible harm [is at stake]’—as is the case in *Libya and Turkey*.¹⁵³ But not only acts of (active/passive) wrongdoing are covered, also the ‘power to prevent’ the abuse in question may lead to responsibility being engaged in case of an omission to act.¹⁵⁴ Against a background of decisive influence, being in a position to avoid the possibility of ill-treatment from materialising is relevant under Article 1 ECHR.¹⁵⁵ In these circumstances, the Convention provisions apply ‘to a State *wherever* it may be acting or *may be able to act* in ways appropriate to meeting the obligations in question’.¹⁵⁶ The duty to prevent is activated ‘the instant the State learns of, or should normally have learned of, the existence of a serious risk’ of a violation.¹⁵⁷

¹⁵⁰ *Catan* (n 156), para. 111; *Illascu* (n 156), para. 392.

¹⁵¹ Fifth report on the Progress made in the implementation of the EU-Turkey Statement (n 33).

¹⁵² ECtHR, *Al-Saadoon v. UK*, Appl. 61498/08, 2 March 2010, para. 138.

¹⁵³ *Ibid.*

¹⁵⁴ For this same approach, see The Hague Court of Appeal, *Mustafic-Mujic v. The Netherlands*, [2011] LJN: BR 5386; and *Nuhanovic v. The Netherlands*, [2011] LJN: BR 5388 (both confirmed by the Supreme Court, in *The Netherlands v. Nuhanovic* and *The Netherlands v. Mustafic-Mujic*, [2014] 53 ILM 512). For analysis, see Dannenbaum, ‘Killings in Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct’ (2012) 61 ICLQ 713, pointing out at 723 how the ICJ allows for such an interpretation in the *Genocide Case* (n 135), para. 401.

¹⁵⁵ Brownlie speaks of ‘the power to take executive action’, in Brownlie, *Principles of Public International Law* (OUP, 7th edn., 2008), at 299.

¹⁵⁶ *Mutatis mutandis*, *Genocide Case* (n 135), at 183 (emphasis added).

¹⁵⁷ *Ibid.*, para. 431. The rule has been endorsed by the ICJ on several occasions. Beside the *Genocide Case* (n 135), see also *Order on the Request for the Indication of Provisional Measures, Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, [2008] ICJ Gen. List No. 140.

Knowingly entering into an agreement with unsafe countries, such as Libya and Turkey, where risks of (direct and indirect) *refoulement*, in both its material and procedural facets, are blatant and reliably documented, with the result of heightening the possibility of an Article 3 ECHR violation, instead of diminishing or avoiding it, should be adjudged to trigger the action of the ECHR.¹⁵⁸ Equally, action that fosters the curtailment of the right to leave—which is the direct consequence of the EU-Turkey deal/EU-Libya MoU—is incompatible with Article 2 Protocol 4 ECHR and may lead to responsibility on the part of the EU Member States for unjustifiable/disproportionate interference with the freedom to exit Turkey and/or Libya of (forced/voluntary) migrants. The eventual violation that may result from the combination of support delivered by EU countries, on one hand, and direct action in contravention of the relevant standards by Turkey/Libya, on the other hand, will be *jointly* attributable to Turkey/Libya and the EU Member States for their independent contribution to a single harmful outcome—this would be in line with the *Corfu Channel Case*, where the damage caused to British vessels ensued from the concurrent effect of a third State laying underwater mines (possibly Yugoslavia) and the omission of Albania, which failed to warn about their presence and ended up responding for the entirety of the composite wrongdoing.¹⁵⁹

6. Concluding remarks: The persistence of responsibility

The technical and financial assistance supplied by the EU and Member States to Turkey, Libya, and other key countries of origin and transit is ostensibly designed to curtail migratory flows to Europe by entirely outsourcing migration controls to third States. The EU policy of contactless externalization sets a number of crucial goals, such as addressing the root causes of migration, preventing life loss, and dismantling the smugglers' networks. And no one would deny that there is, for example, a need for a comprehensive search and rescue mission in the Mediterranean. However, Libya, under the constant threat of violent and armed militias, needs stabilization and democratisation *before* any cooperation on the life of migrants and refugees can be set up. The same concerns apply to any cooperation initiatives designed to halt the movement of refugees by strengthening Libya's Southern border. If migrants and refugees will be rescued by a Libyan Coastguard and disembarked in Libya or if they are forcefully kept in detention centres in Turkey to prevent their departure to Greece, EU States may engage their international responsibility for breaching the rights of those thus rescued or retained against their will to leave any country and to *non-refoulement*.

The role of knowledge in these scenarios of 'consensual containment' through 'contactless control' must be carefully appraised by EU Member States *before* undertaking reciprocal commitments that disregard foreseeable consequences in contravention of international refugee law and human rights standards. Awareness of facts that are 'known or ought to have been known' at the time of engagement with Turkey, Libya or other third countries will be imputed by default, and possibly lead to the accrual of international responsibility¹⁶⁰—especially if the exertion of decisive influence amounting to effective control can also be established. The contrary would amount to allowing EU Member States 'to do by another

¹⁵⁸ *Hirsi* (n 60), para. 131; *M.S.S.* (n 123), para. 366-367.

¹⁵⁹ *Corfu Channel (UK v. Albania) (Merits)* [1949] ICJ Rep. 4, at 17-18 and 22-23. See also Nollkamper, 'Introduction', in Nollkaemper and Plakoefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 13; and Den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' SHARES Research Paper 06 (2012) ACIL 2012-04, 18-19.

¹⁶⁰ *Hirsi* (n 60), paras 121, 131, 137, 156; *M.S.S.* (n 123), paras 258-259, 263, 313, 358-359, 366-367.

State what [they] cannot do by [themselves]’,¹⁶¹ circumventing the negative and positive duties enshrined in their obligations to *non-refoulement* and respect of the right to leave.

While recognising the difficulties attached to global migration management, ‘problems with [administering] migratory flows cannot justify recourse to practices which are not compatible with the State’s obligations...’.¹⁶² EU Member States do have a sovereign right to control entry into their territories, but they ought to exercise it within the limits imposed by international refugee and human rights law.¹⁶³ Self-serving policies of deputised containment are incompatible with a good faith understanding of State obligations vis-à-vis migrants and those in need of international protection.

¹⁶¹ ASR Commentary, at 66, para. 6.

¹⁶² *Hirsi* (n 60), para. 179.

¹⁶³ ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, Appl. 9214/80, 9473/81 and 9474/81, 28 May 1985, para. 67: ‘...as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory’.