ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

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EU MEMBER STATES' RESPONSIBILITY UNDER INTERNATIONAL LAW FOR BREACHING HUMAN RIGHTS WHEN COOPERATING WITH THIRD COUNTRIES ON MIGRATION: GREY ZONES OF LAW IN SELECTED SCENARIOS

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ABSTRACT: EU Member States are ever more involved in border management activities in cooperation with third countries. Such activities entail risks of violating various human rights of the people on the move, such as the right to leave any country, the principle of *non-refoulement*, and the prohibitions of ill-treatment and arbitrary detention. When Member States carry out various cooperative border control activities outside their sovereign territory, their responsibility is unclear. Under international law, responsibility may also arise when a State aids or assists another State to engage in conduct that violates international obligations (art. 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts – ARSIWA). Member States' responsibility can thus emerge via "derived responsibility" flowing from an internationally wrongful act committed by a third country. The *Article* seeks to discuss selected extraterritorial border management scenarios, which are in the "grey zone" in terms of State responsibility from the perspective

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of various human rights violations. More legal clarity is needed in such (and similar) concrete scenarios, especially when Member States "aid or assist" third countries in their efforts to manage migration flows. The *Article* submits that it is still debated whether related conduct entails State responsibility in such specific externalised border management situations, which involve activities carried out under the umbrella of international cooperation, but with the aim of preventing migrants from reaching the EU. Nevertheless, this piece argues that complicity of Member States under the ARSIWA can be established under certain circumstances as the presented scenarios demonstrate.

KEYWORDS: externalisation – EU migration law and policy – human rights – Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) – aiding or assisting – positive obligations.

I. SETTING THE SCENE

"Externalisation" of European Union (EU) policies on border management and migration has been a buzzword in discussions relating to the EU migration and asylum law and policy for almost two decades which does not seem to go out of style.[1] Of the multiple scholarly descriptions of this highly debated practice I find particularly fitting the below succinct one: "the term externalization refers to the shifting of responsibilities to third countries of origin and transit of migrants, as well as to the activities carried out by the EU and the Member States on the territory of third countries aiming to externalize the management of migration".[2]

Borrowing den Heijer's words, this phenomenon "entails both the geographical relocation of border controls (to the open seas and the territories of third countries) and the transfer (or sharing) of responsibilities for controlling the border to (with) States at the other side of the border".[3] The latter form is typical in the field of border management, where – following the concept of European Integrated Border Management, which in-

[1] For some key reference legal works on the phenomenon of the "externalisation" of EU migration policies, see *e.g.* A Geddes, 'Europe's Border Relationships and International Migration Relations' (2005) JComMarSt 787; E Guild and D Bigo, 'The Transformation of European Border Controls' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff Publishers 2010) 257; JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) European Papers europeanpapers.eu 571; V Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in J Santos Vara, S Carrera and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 290; V Moreno-Lax and M Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalisation' (2019) QuestIntlL 5; J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries' in W Th Douma and others (eds), *The Evolving Nature of EU External Relations Law* (TMC Asser Press/Springer 2021) 315; and D Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' (2022) IJRL 120.

[2] J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies' cit. 316.

[3] M den Heijer, 'Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff Publishers 2010) 169.

cludes the increased cooperation with third countries, as set out in art. 3 of the new European Border and Coast Guard (EBCG) Regulation (Regulation (EU) 1896/2019)[4] – Member States of the EU have been intensifying their cooperation *with* third countries; *under the authority* of third countries; or even operating *in* third countries.

As multiple scholarly writings[5] and a report published by the EU Agency for Fundamental Rights (FRA) in December 2016 outlined,[6] these diverse forms of cooperation include:

i) posting Member State document experts or immigration liaison officers at third country airports to assist airlines in checking passengers before embarkation;

ii) the presence of EU Member State officials on third-country vessels patrolling the sea;

[4] Regulation (EU) 1896/2019 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 1624/2016, art. 3(g). See also recital 85: "Member States should be able to cooperate at operational level with [...] third countries at the external borders, including as regards military operations with a law enforcement purpose, to the extent that that cooperation is compatible with the actions of the Agency."; recital 87: "Cooperation with third countries is an important element of European integrated border management. It should serve to [...] supporting third countries in the area of border management and migration, including through the deployment of the standing corps where such support is required to protect external borders and the effective management of the Union's migration policy."; and recital 91: "This Regulation includes provisions on cooperation with third countries because well-structured and permanent exchange of information and cooperation with such countries, including but not limited to neighbouring third countries, are key factors for achieving the objectives of European integrated border management". See also European Commission, Guidelines for Integrated Border Management in European Commission External Cooperation (November 2010) and J Wagner, 'The European Union's model of Integrated Border Management: Preventing Transnational Threats, Cross-border Crime and Irregular Migration in the Context of the EU's Security Policies and Strategies' (2021) Commonwealth & Comparative Politics 424.

[5] In addition to the academic commentary by JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) European Papers europeanpapers.eu 571-596; V Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in J Santos Vara, S Carrera and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 290; V Moreno-Lax and M Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalisation' (2019) Questions of International Law 5-33; J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries' in W Th Douma and others (eds), *The Evolving Nature of EU External Relations Law* (TMC Asser Press/Springer 2021) 315, see also M den Heijer, 'Europe Beyond its Borders' cit. 191; P García Andrade, I Martín, and S Mananashvili, *EU cooperation with Third Countries in the Field of Migration*. *Study for the LIBE Committe*e (European Parliament October 2015) section 1.3; S Trevisanut, 'The EU External Border Policy: Managing Irregular Migration to Europe' in F Ippolito and S Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016) 215-235; and N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) EJIL 610-613.

[6] European Union Agency for Fundamental Rights (FRA), 'Scope of the Principle of Non-refoulement in Contemporary Border Management: Evolving Areas of Law' (December 2016) fra.europa.eu.

iii) EU Member State vessels patrolling the territorial waters of a third country based on a bilateral agreement (*e.g.* Spain has concluded such agreements with Senegal and with Mauritania[7]);

iv) after identifying people approaching the other side of the green border, EU Member State authorities sharing information with the neighbouring third country and requesting the latter to intercept the people before they cross the border; as well as

v) EU Member States providing border management capacity building activities (*e.g.* training, technical assistance with equipment, intelligence, and even financing) in third countries (*e.g.* Italy supporting the Libyan Coast Guard and Navy under their bilateral Memorandum of Understanding[8]).

Such externalised, extraterritorial cooperative border control activities entail risks of violating various *human rights* of people on the move.[9] These include, but are not limited to, interferences with the right to leave any country including one's own – often amounting to "pull-backs"[10] –, the prohibitions of *refoulement*, torture and other forms of ill-treatment and arbitrary detention, and the right to seek asylum. These rights are firmly anchored in

[7] On these bilateral agreements, see *e.g.* P García Andrade, 'Extraterritorial Strategies To Tackle Irregular Immigration By Sea: A Spanish Perspective' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* cit. 305-340; and C González Enríquez and others, 'Italian and Spanish Approaches to External Migration Management in the Sahel: Venues for Cooperation and Coherence' (Working Paper 13-2018) media.realinstitutoelcano.org.

[8] Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic. Source of the English translation: eumigrationlawblog.eu.

[9] For instance, as the Parliamentary Assembly of the Council of Europe indicated the externalisation of the EU migration polices may negatively affect the following human rights: the right of asylum, the right to an effective remedy, the right to leave any country, human dignity and non-discrimination, and the obligation of non-refoulement (Parliamentary Assembly, Council of Europe, Human Rights Impact of the "External Dimension" of European Union Asylum and Migration Policy: out of Sight, out of Rights?, Report – Document n. 14575, 13 June 2018). See also similarly T Bachirou Ayouba and others, 'Asylum for Containment. EU arrangements with Niger, Serbia, Tunisia and Turkey' (March 2023) ASILE Project asileproject.eu section 5.1 'Contributing to violations of international law in third states'.

[10] Consider *e.g.* L Riemer, 'From Push-backs to Pull-backs: The EU's new Deterrence Strategy Faces Legal Challenge' (16 June 2018) FluchtforschungsBlog – Netzwerks Fluchtforschung blog.fluchtforschung.net; and V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) German Law Journal 385.

international law[11] and Council of Europe law,[12] hence EU Member States are legally bound to respect and protect them. The types of possible wrongdoings encompass breaches of negative obligations (*e.g.* not to engage in actions leading to *refoulement*, arbitrary deprivation of liberty, torture or other forms of ill-treatment etc. – "obligations of result") and positive obligations alike (requiring EU Member States to take all reasonable measures to prevent apparent human rights risks from materializing – "obligations of means").[13]

One thing is the legal qualification of a given (wrongful) conduct and applying to it, with great confidence and persuasive legal arguments, the relevant rules of State responsibility – another one is the *justiciability* of such claims before international *fora*. As per the latter, EU countries making the neighbouring third countries do the "dirty job" by using them as "proxies" in certain border management activities might avoid the jurisdiction of the European Court of Human Rights (ECtHR) within the meaning of art. 1 of the European Convention on Human Rights (ECHR).[14] In such cases of eventual human rights violations, *attribution* of a wrongful conduct to a State – which needs to be sharply distinguished from "*jurisdiction*" under art. 1 ECHR, although the ECtHR tends to mix up the two concepts[15] – is typically not contested, as it is clear in virtually all instances that officials of State organs have been involved in the allegedly wrongful conduct.[16] As a result, certain EU Member States

[11] See 1948 Universal Declaration of Human Rights, arts 13(2) and 14; 1966 International Covenant on Civil and Political Rights, arts 6, 7, 9, 12(2); and several other regional human rights instruments such as the 1969 American Convention on Human Rights; the 1981 African Charter of Human and Peoples' Rights; and the 2004 Arab Charter on Human Rights. On these rights' customary international law foundations, see *e.g.* V Chetail, *International Migration Law* (Oxford University Press 2019) 85-92; WA Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) 137-138, 148-154, 240-253.

[12] European Convention on Human Rights (ETS n. 5), arts 2, 3, 5 and Protocol n. 4 to the European Convention on Human Rights (ETS n. 46), art. 2(2), which has been several times interpreted by the European Court of Human Rights, including "interpreting in" the right to seek protection from harm, although these instruments do not contain the "right to asylum".

[13] For comprehensive treatises on the concept of positive obligations in human rights law, see *e.g.* V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (Oxford University Press 2023); X Dimitris, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012); and R Pisillo Mazzeschi, 'Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme' (2009) Recueil des Cours de l'Académie de Droit International de La Haye 175-506.

[14] See also N Markard, 'The Right to Leave by Sea' cit. 593. Other quasi-judicial bodies such as the Human Rights Committee set up by the ICCPR equally use a similar concept of "jurisdiction" in order for a state conduct to fall under their purview.

[15] See *e.g.* J Crawford and A Keene, 'The Structure of State Responsibility under the European Court of Human Rights' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 189-197; M Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 97-111; and M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

[16] See similarly G Kajtár, *Betudás a nemzetközi jogban. A másodlagos normák szerepe a beruházásvédelemtől a humanitárius jogig* (Orac 2022) 225.

endeavour to get off the hook of Strasbourg litigations by severing any meaningful jurisdictional links – even beyond territoriality[17]– with the persons concerned.

Against this backdrop, putting on the "*international law lenses*", in lieu of an EU law-driven scrutiny, serves to shed light on the power and potential of the general (customary) rules governing international responsibility in this specific and highly complex context of extraterritorial cooperative border management. The first steps of conceptualisation and rigorous legal inquiry into the ways relevant rules of State responsibility under international law – as "secondary rules" in Hartian terms[18] – operate in this specific area have been taken. The materials engaged with in this piece, including targeted monographic works by Liguori,[19] Pijnenburg,[20] and Heschl[21] have made crucial inroads into the topic, exploring more in-depth the implications on State responsibility of these cooperative migration management activities. Still, much more needs to be done to shine light onto the details as applied to specific real-life scenarios with the aim to understand – and ideally unpack – the real power, nuances and potential of international law on State responsibility.

More specifically, this *Article* primarily looks into the under-studied questions of *joint* (*shared)* and *ancillary (derivative) responsibility* of EU Member States under general international law[22] when the above-depicted cooperation forms with third countries end up in violating human rights of migrants and asylum seekers, as listed above. After outlining selected cooperative border management scenarios which are in a somewhat "grey zone" in terms of the general rules of State responsibility as codified in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[23] (Section II), this piece discusses

[17] See *e.g.* ECtHR *Hirsi Jamaa and Others v Italy* [GC] App n. 27765/09 [23 February 2012]; ECtHR *Khlaifia and Others v Italy* [GC] App n. 16483/12 [15 December 2016].

[18] HLA Hart, *The Concept of Law* (Oxford University Press 1994, 2nd edn).

[19] A Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility* (Routledge 2019).

[20] A Pijnenburg, *At the Frontiers of State Responsibility: Socio-economic Rights and Cooperation on Migration* (Intersentia 2021).

[21] L Heschl, *Protecting the Rights of Refugees beyond European Borders. Establishing Extraterritorial Legal Responsibilities* (Intersentia 2018).

[22] Using this term implies that the State responsibility-related jurisprudence of the ECtHR, including the latter's own inventions such as the concept of "acquiescence and connivance" – which does not exist in general international law and can be regarded either as an ECHR-specific rule of attribution of conduct, or a particular form of complicity – are, in principle, not discussed here. ECtHR case law is only relied on when it can shed light onto some details of ARSIWA rules and constructs. For more on the ECtHR's case law concerning "acquiescence or connivance" of States parties to the ECHR in the wrongful conduct of third states, see M Milanovic, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights' in G Kajtár, B Çalı, and M Milanovic (eds), *Secondary Rules of Primary Importance in International Law* (Oxford University Press 2022) 221-241.

[23] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/83 (2001) UN Doc A/RES/56/83 (12 December 2001) as the UN General Assembly took note of the articles. These rules explain when States incur international legal responsibility for their internationally wrongful acts, including those that are shared with, or delegated to, other States –

them from the perspective of possible breaches of human rights (Section III). Section IV formulates some conclusions and presents an outlook to the future.

As a preliminary remark, it needs to be stated at the outset that reliance on specific (derivative) forms of State responsibility under the ARSIWA rules is not necessary in situations where human rights violations occurred on the territory of a State which clearly engages its duty to protect, respect and fulfil them.[24] In this case, attribution of conduct and allocating responsibility (to the territorial State) does not cause a problem. However, forms of ancillary or derived responsibility become more pertinent and can represent the only legal accountability hooks when this "*territorial link*" is missing as the scenarios under scrutiny in Section III showcase. A further caveat is that this contribution exclusively focuses on the responsibility of EU Member States from the *international law* perspective – some scholars referred to it earlier as still a "blind spot" in the migration debate.[25] Therefore, the responsibility of the *EU itself* as in international legal person and that of its agencies (*e.g.* the European Border and Coast Guard Agency (Frontex) either under international law, within the meaning of the Articles on the Responsibility of International Organizations (ARIO);[26] or as such responsibility would flow from or can be adjudicated under *lex specialis* EU law instruments,[27] are *not examined* herewith. One might also add that

also encompassing externalisation measures. For a comprehensive analysis of outstanding quality, written by the last ILC Special Rapporteur on the matter, see J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press 2002). On the ARSIWA's applicability to human rights violations by States as the key duty-bearers, see concisely *e.g.* H Duffy, 'Articles on Responsibility of States for Internationally Wrongful Acts and Human Rights Practice' (5 August 2021) EJIL:Talk! ejiltalk.org.

[24] Consider *e.g.* ECtHR *El-Masri v The Former Yugoslav Republic of Macedonia* [GC] App n. 39630/09 [13 December 2012]; ECtHR *Al Nashiri v Poland* App n. 28761/11 [24 July 2014] paras 440-457, 509-519; and ECtHR *Husayn (Abu Zubaydah) v Poland* App n. 7511/13 [24 July 2014]. Also noted by N Markard, 'The Right to Leave by Sea' cit. 614. For more on States' obligations to "respect, protect and fulfil human rights", see *e.g.*, from a critical perspective, DJ Karp, 'What is the Responsibility to Respect Human Rights? Reconsidering the "Respect, Protect, and Fulfill Framework"' (2020) International Theory 83-108.

[25] A Skordas, 'A "Blind Spot" in the Migration Debate? International Responsibility of the EU and its Member States for Cooperating with the Libyan Coastguard and Militias' (30 July 2018) EU Immigration and Asylum Law eumigrationlawblog.eu; M Fink, 'A "Blind Spot" in the Framework of International Responsibility? Third-party Responsibility for Human Rights Violations: the Case of Frontex' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: transnational law enforcement and migration control* (Routledge 2017) 272-293.

[26] ILC, Draft Articles on the Responsibility of International Organizations UN Doc A/66/10 (2011). The UN General Assembly endorsed the text of the "articles on the responsibility of international organizations" in UN Res 66/100 (9 December 2011) UN Doc A/RES/66/100, Annex. On the ARIO's applicability to "human rights damages" cases against Frontex before the EU Courts, see *e.g.* T Molnár, 'The EU General Court's Judgment in WS & Others v Frontex: What Could International Law on the Responsibility of International Organizations Offer in Grasping Frontex' Responsibility?' (18 October 2023) EJIL:Talk! ejiltalk.org.

[27] See *e.g.* art. 263 (action for annulment), art. 265 (action for failure to act) and art. 340 (action for damages) of the Treaty on the Functioning of the European Union (TFEU), as well more specific provisions of the EBCG Regulation mirroring the aforementioned TFEU actions (arts 97-98 of the EBCG Regulation

practically speaking it is still the Member States that most of the time implement EU law on borders extraterritorially, even if Frontex' role is on the rise in this dimension with Status Agreements transacted with third countries[28] – thus far concluded with Western Balkan countries[29] plus Moldova[30] – and other bilateral working arrangements.[31] Therefore, the (international) responsibility of the EU as an entity does not emerge (yet) with the same intensity in these externalised cooperative border management situations.

II. Challenges of EU Member States' extraterritorial border management measures in select scenarios

When EU Member States carry out border control activities outside their sovereign territory, notably when they are engaged in joint extraterritorial immigration measures (some commentators call it "outsourcing"[32]), multiple challenges emerge. The subsequent analysis puts under scrutiny selected issues of allocating international responsibility of EU Member States in the following three particular cooperative migration control scenarios:

- Activities carried out by EU Member States *within third countries* for the benefit of the latter, such as Member State vessels patrolling in the territorial sea of the third country (typically based on a bilateral agreement); and capacity building activities for third countries implemented by EU Member States (*e.g.* providing training, technical assistance, funding).

governing non-contractual liability; actions for annulment; and failure to act in relation to the work of Frontex). For more on these otherwise salient legal issues, see *e.g.* M Gkliati, *Systemic Accountability of the European Border and Coast Guard: the Legal Responsibility of Frontex for Human Rights Violations* (2021) PhD dissertation, University of Leuven Department of Law.

[28] For good overviews, see L Letourneux, 'Protecting the Borders from the Outside. An Analysis of the Status Agreements on Actions Carried Out by Frontex Concluded by the EU and Third Countries' (2022) European Journal of Migration and Law 330-356; and J Santos Vara, 'The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls without Human Rights Limits' (2023) European Papers www.europeanpapers.eu 985.

[29] See *e.g.* Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania (2019); Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia (2020); and Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro (2020). More of such agreements are in the making, including with African countries.

[30] Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova (2022).

[31] For an overview, see European Border and Coast Guard Agency, *Beyond EU Borders: Working Arrangements* www.frontex.europa.eu.

[32] K Gombeer and S Smis, 'The Establishment of ETOs in the Context of Externalised Migration Control' in M Gibney and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) 169-181.

- Activities carried out by EU Member State officials *on board of vessels flying the flag of third countries* when these extraterritorial actions essentially aim at preventing irregular departures and thus people irregularly entering the EU.

- In case EU Member State border guards identify people moving towards the "green" (land) or "blue" (sea) border and suspect that they intend to cross the EU external border irregularly, these national authorities *share this information* and *request assistance* from the neighbouring third country to intercept these people before they cross the external border of the Union.

The key guiding line for the above selection was to present scenarios with "grey zones" owing to the derivative nature of EU Member State responsibility or the legal qualification of which is not yet settled. It is the multiplicity of States involved, and their nuanced cooperation patterns that may lead to a diffusion and dilution of responsibility. Therefore, arguably more straightforward situations, as stemming from either international case law[33] or research materials,[34] are *not discussed* in this piece. These encompass – but are not limited to – joint operations or joint patrolling in which several EU Member States and third countries equally take part by independently deploying their own patrol boats and other assets.[35] In such cases, all participating States are separately – or independently[36] – responsible for any international wrongful act in application of art. 4 (conduct of organs of a State) and art. 47 (plurality of responsible States) ARSIWA. Another delimitation is that the legal complexities arising out of the applicability of certain substantive human rights norms (see examples in Section I above) in extraterritorial cooperative border management situations are not discussed here due to the narrow, spot-on focus this piece has chosen to employ.

The different, sometimes even opposing, legal assessments of each scenario are hereunder presented, taking the general rules enshrined in ARSIWA – and to some extent the pertinent case law of the ECtHR – as the point(s) of reference in reaching conclusions on the question whether the international responsibility of a cooperating EU Member State is incurred.

[33] *E.g. Hirsi Jamaa and Others v Italy* cit.

[34] As depicted in, *e.g.* FRA, 'Fundamental Rights at Europe's Southern Sea Borders' (2013) Publications Office of the European Union 11, 45-46; and FRA, 'Scope of the Principle of Non-refoulement' cit. scenarios 5 and 9.

[35] See *e.g.* M den Heijer, 'Europe Beyond its Borders' cit. 191.

[36] The ILC pointed out in the ARSIWA commentaries that the principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned. The ILC added: terms such as "joint", "joint and several" and "solidary" responsibility derive from different (domestic) legal traditions and analogies must be applied with care (ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries UN Doc A/56/10 (2001), commentary to art. 47 para. 3.

III. Allocating international responsibility of EU Member States for their extraterritorial border management activities: twilight zone

It can be stated at the outset that in the above-described extraterritorial border management situations, the international responsibility of EU Member States for possible violations of the right to leave and other internationally protected human rights such as the prohibitions of *refoulement*, collective expulsion, torture and other forms of ill-treatment and arbitrary detention – as the case may be – remains unclear. The present section endeavours to shed light on why so.

III.1. First scenario: Activities carried out by EU Member States within third countries or for their benefit

Let us start with putting the ARSIWA rules into context in the *first scenario*. In this case, EU Member State officials carry out various border-management related activities in or for the benefit of a third country. For instance, when a *vessel of an EU country patrols in a third country's territorial sea*[37] and is involved in wrongdoings, the EU Member State's responsibility – and its nature – depends on the types of measures or the degree of control and on the fact whether or not its officials have been placed at the disposal of the host country within the meaning of art. 6 ARSIWA.[38] According to the ARSIWA Commentaries, triggering this latter form of responsibility requires that the organ acts "in conjunction with the machinery" of that State and under its exclusive direction and control, not on the basis of instructions from the home State.[39] In this specific scenario, the terms of a bilateral agreement – most typically constituting the legal background of such operations –, as well as the host country's relevant domestic legislation and operational plans can greatly inform the legal assessment and the conclusion reached thereof.

In order for these acts to be attributable to the host third country within the meaning of art. 6 ARSIWA, the threshold to reach is quite high – enough to mention here the requirement of exercising "elements of the governmental authority" of the host State. Next to the above-cited International Law Commission (ILC) commentaries unpacking the relevant ARSIWA rule, ECtHR case law in *X and Y v Switzerland*[40] and *Xhavara and Others v Italy and Albania*[41] equally illustrates that high threshold. The first case related to the delegation of

[37] As described in FRA, 'Scope of the Principle of Non-refoulement' cit. 28-31.

[38] Art. 6 ARSIWA (Conduct of organs placed at the disposal of a State by another State): "The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed".

[39] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 44 commentary to art. 6 para. 2.

[40] ECtHR *X and Y v Switzerland* App n. 7289/75 and 7349/76 [14 July 1977].

[41] ECtHR *Xhavara and Others v Italy and Albania* App n. 39473/98 [11 January 2001].

immigration law enforcement competences to Switzerland by Liechtenstein, with the question whether entry bans to Liechtenstein issued by Swiss authorities were attributable to Switzerland or Liechtenstein; whereas the second was about prevention of departure at sea by the Italian coastguard, which had been given the permission to operate in Albanian territorial waters and intercepted and sank a vessel with Albanian migrants heading to Italy. According to the Strasbourg Court, the mere exercise of some elements of public authority is not enough to attribute the conduct of a state organ (here: immigration authorities issuing entry bans; or military or law enforcement operating the vessel) to another State. If then art. 6 ARSIWA is not likely to "waive" the EU Member State's responsibility by way of shifting it to the host third country, unlawful action against people at sea (*e.g.* turning their boat back; excessive use of force against the people crossing the sea; not carrying out a search and rescue operation), over whom the Member State officials on board of the vessel thus exercise jurisdiction, is attributable to the EU country concerned and triggers its direct responsibility pursuant to the general rules embodied in arts 1-2, 4 and 12 ARSIWA.

Still remaining in the first scenario, another typical form of EU Member States cooperation with third countries of transit and origin is providing training, supplying equipment and other forms of *capacity-building activitie*s to increase the third country's capacity to prevent irregular (outward) migration (some scholars coin it as "contactless control"[42]). The legal appraisal of the consequences of providing training and capacity-building by an EU Member State to the third-country's border officials gets trickier. As mentioned above, resolving such instances via States' duty to respect, protect and fulfil human rights on its own territory is not an option,[43] due to the extraterritorial nature of the EU country's engagement. Arguably, undertaking these activities in itself does not constitute an internationally wrongful act, hence the EU Member State's direct responsibility is not incurred.

However, international responsibility may also arise when a State *aids or assists another State* to engage in conduct that violates international obligations. The applicable general rules of international law governing this form of derived responsibility are codified in art. 16 ARSIWA,[44] which arguably constitute the most controversial form of international responsibility of EU Member States for joint extraterritorial immigration measures. The International Law Commission explicitly acknowledged in the ARSIWA

[42] V Moreno-Lax and M Giuffré, 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows'" in SS Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 82-108.

[43] See also N Markard, 'The Right to Leave by Sea' cit. 615; M den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 99-100; and H Aust, *Complicity and the Law of International State Responsibility* (Cambridge University Press 2011) 401-412.

[44] Art. 16 ARSIWA (Aid or assistance in the commission of an internationally wrongful act) stipulates: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State".

Commentaries[45] that "material aid to a State that uses the aid to commit human rights violations" is one example of providing aid or assistance within the meaning of art. 16 ARSIWA. In fact, the support or contribution does not need to be essential to the commission of the act or be a *conditio sine qua non*. Nonetheless, it has to significantly contribute to it[46] (although the ILC did not provide examples as for what this "significant contribution" threshold actually means).[47]

Here, the responsibility of the EU Member State concerned is not triggered by its own unlawful action, but it arises in connection with an internationally wrongful act committed by another State. This is the case, for instance, when third-country border/coast guard officials who have been trained by or received funding or equipment from a Member State engage in human rights violations (*e.g.* obstructing the right to leave by intercepting people still in the territorial sea of that third country and thereby preventing their departure; subjecting the intercepted people to ill-treatment, arbitrary detention, slavery or forced labour etc.). Although some of the third countries concerned (*e.g.* North African countries) are not parties to the ECHR and the 1951 Geneva Refugee Convention, the right to leave, the prohibition of torture and other forms of ill-treatment, the prohibition of arbitrary detention, the principle of *non-refoulement* and the prohibition of collective expulsion stem from quasi universally ratified UN human rights conventions and they also have the character of general customary international law.[48] Scholars like Pascale,[49] Giuffré,[50] Moreno-Lax,[51] Staiano[52] and Liguori[53] have argued in this direction as concerns Italy's engagement with Libya by providing funding, equipment and training; and the for-

[45] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 67 commentary to art. 16 para. 9.

[46] *Ibid*. 66-67 commentary to art. 16 paras 1, 5.

[47] See also V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing 2016) 97, also citing Bruno Simma (an ILC member at that time) and his criticism about the absence of clarity and precision as concerns the "interrelationship between the aid… and the wrongful act…" (ILC, Summary Record of the 2578th Meeting UN Doc A/CN.4/SR.2578 (28 May 1999) para. 41.

[48] For the customary foundations of these core human rights norms protecting non-nationals, see *e.g.* V Chetail, 'The Transnational Movement of Persons under General International Law – Mapping the Customary Law Foundations of International Migration Law' in V Chetail and C Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 1-72; and WA Schabas, *The Customary International Law of Human Rights* cit. 137-138, 148-154, 240-253.

[49] G Pascale, 'Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?' (2019) Questions of International Law 35-58.

[50] M Giuffré, 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-Back to Libya?' (2012) IJRL 692-734.

[51] M Giuffré and V Moreno-Lax, 'The Raise of Consensual Containment' cit.

[52] F Staiano, 'Questions of Jurisdiction and Attribution in the Context of Multi-Actor Operations in the Mediterranean' in GC Bruno, F Palombino and A Di Stefano (eds), *Migration Issues before International Courts and Tribunals* (CNR Edizioni 2019) 25-43.

[53] A Liguori, *Migration Law and the Externalization of Border Controls* cit.

mer's ensuing derived responsibility for such assistance. Markard also concludes similarly as per the violation of the right to leave at sea in general.[54] This "derivative responsibility" or complicity – forming part of customary international law according to the International Court of Justice's pronouncement in the *Bosnian Genocide Case*[55] – "heralds the extension of legal responsibility into areas where States have previously carried moral responsibility but [international] law has not clearly rendered them responsible for the acts that they facilitate", as Professor Lowe aptly opined.[56]

Nonetheless, not all forms of cooperation amount to complicity. Taking it to the extreme, an expansive interpretation of art. 16 ARSIWA on aiding or assisting could have a chilling effect on international cooperation, as Nolte and Aust convincingly note.[57] Likewise, the whole concept of providing development aid would be made paralysed if lending financial loans by a donor State qualified unlawful in case, using den Heijer's words, "funds were to incidentally fall into the hands of state officials committing human rights violations".[58] Based on the examples the ILC enumerates in its Commentaries to the ARSIWA and concurring views of international law scholarship,[59] the connection between the aid or assistance and the commission of the internationally wrongful conduct must not be too remote, which also serves the interests of international cooperation. The ILC already highlighted the requirement of a certain link or nexus as long ago as at the end of 1970s by positing that the "eventual possibility" that an internationally wrongful act could derive from a State's assistance is not sufficient to establish the necessary link between the act of aid or assistance and the wrongful conduct.[60] Put differently, a sort of a "plausible likelihood"[61] that the aid or support will be unlawfully utilised is the trigger which will activate this form of derived or indirect responsibility within the meaning of art. 16 ARSIWA.

Against this backdrop, extraterritorial border management activities, such as training, funding and capacity building in third countries, could potentially fall under the scope of art. 16 ARSIWA if three requirements are fulfilled:[62]

[54] N Markard, 'The Right to Leave by Sea' cit. 615.

[55] ICJ *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.

[56] V Lowe, *International Law* (Oxford University Press 2007) 121.

[57] G Nolte and H Ph Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) International & Comparative Law Quarterly 1-30. See similarly V Lowe, 'Responsibility for the Conduct of Other States' (2002) Japanese Journal of International Law 5.

[58] M den Heijer, 'Europe beyond its Borders' cit. 195.

[59] V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* cit. 95.

[60] ILC, Report of the International Law Commission, Thirtieth session UN Doc A/33/10 (1978) para. 18.

[61] M Giuffré and V Moreno-Lax, 'The Raise of Consensual Containment' cit. 103.

[62] Following the ARSIWA commentaries, the same three-pronged categorisation is employed by V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* cit. 94.

1) the relevant state organ providing aid/assistance must have knowledge of the circumstances making the conduct of the assisted State internationally wrongful;

2) aid/assistance must be provided to facilitate that conduct which must indeed result in a wrongful act; and

3) conduct must be such that it would have been wrongful even if it had been committed by the assisting State itself ("a State cannot do by another what it cannot do by itself"' as the ILC put it in its Commentaries to ARSIWA[63]), also known as the requirement of "opposability".

The fulfilment of this latter condition under point 3) should not be a problem, since all EU Member States have ratified all the relevant UN and European human rights instruments – with some (notable) exceptions[64]– and all third countries concerned are bound by the 1966 International Covenant on Civil and Political Rights codifying pertinent human rights such as the right to leave, the prohibition of arbitrary detention, and the prohibition of torture and other forms of ill-treatment (let alone their customary international law equivalent). In this regard, there seems to be no formal leeway for EU Member States in circumventing their negative and positive obligations arising out of the respect of the aforementioned human rights (and beyond).

More problematic might be that the threshold to trigger State responsibility is high in these cases of complicity, hence it is necessary to establish a close causal connection between the EU Member State's act of aiding/assisting (here: providing training, supplying equipment and other forms of capacity-building activities) and the third country's internationally wrongful act, as the first and second criterion above dictate. As per the first criterion above under art. 16 ARSIWA, some authors argue that in the human rights context a lower threshold of *knowledge* on the part of complicit States, such as "constructive knowledge", suffices to incur their responsibility.[65] As per the second criterion above under the same ARSIWA provision, although the element of "intent" was dropped from the final version of art. 16 ARSIWA, the explanation of this condition in the Commentaries refers to some form of *intent*. The ARSIWA Commentaries qualify the mental element called "intent" as a constitutive factor in the legal construct under this provision as follows: "aid or assistance must be given *with a view to* facilitating the commission of the wrongful act" and "[a] State is not responsible for aid or assistance [...] unless the relevant State organ *intended*, by the aid or

[63] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 66 commentary to art. 16 para. 6.

[64] For instance, Protocol n. 4 to the ECHR, which guarantees to right to leave any country and prohibits collective expulsion, has not been ratified by Greece, and the ratification of the (revised) European Social Charter – namely the acceptance of its provisions due to its *à la carte nature* – also varies considerably among EU Member States, see coe.int.

[65] T Gammeltoft-Hansen and JC Hathaway, 'Non Refoulement in a World of Cooperative Deterrence' (2015) Columbia Journal of Transnational Law 280; M Jackson, *Complicity in International Law* (Oxford University Press 2015) 54.

assistance given, *to facilitate* the occurrence of the wrongful conduct".[66] Although the precise contours of the mental component of this complicity rule remain unclear,[67] the expressions "with a view to facilitating" and "intended [...] to facilitate" suggest that the standard of knowledge "is subsumed by one of wrongful intent".[68]

Scholars underscore the *difficulties in proving* that a State provided aid to a third country precisely with the aim of committing an internationally wrongful act,[69] such as violating migrants' rights. By the same token, in view of avoiding responsibility, a State can also intentionally refrain from making public pronouncements declaring its will.[70] Some academics claim that requiring that a State intends to facilitate the commission of a wrongful act "would raise the bar so much as to render recourse to art. 16 [ARSIWA] nearly impossible."[71] Other authoritative voices argue that compliance with the requirement to avoid knowingly assisting (well-documented) violations by another State of international obligations binding upon both States warrants adopting *effective mitigation measures* to meaningfully *reduce the foreseeable harmful impact* of the assistance. "The fact that a State has, or [...] has not, taken such mitigating measures may not in itself be determinative, but may be one indicator as to whether the aid or assistance [was] provided 'with a view to facilitating the commission of [internationally wrongful acts]'" – UNHCR submits.[72]

Be it as it may, if obstructing the right to leave – *i.e.* preventing departures – is concretely envisioned by EU Member States (*e.g.* in the bilateral cooperation agreement with a third country[73] or in other soft law instruments such as the 2017 Malta Declaration[74]), and if

[66] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 66 commentary to art. 16 para. 6.

[67] M Milanovic, 'State Acquiescence or Connivance' cit. 236.

[68] M Jackson, *Complicity in International Law* cit. 159; citing G Nolte and H Ph Aust 'Equivocal Helpers' cit. 14. International jurisprudence (notably the ICJ's ruling in the *Bosnian Genocide* case) does not seem to resolve either the ambiguity of the ARSIWA provisions and the Commentaries thereto.

[69] B Graefarth, 'Complicity in the Law of International State Responsibility' (1996) RBDI 375; M Gibney, K Tomasevski and J Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) HarvHumRtsJ 294; and more specifically in the migration context, J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies' cit. 326; M den Heijer, 'Europe beyond its Borders' cit. 194-195.

[70] B Graefrath, 'Complicity in the Law of International State Responsibility' cit. 375-376; V Moreno-Lax and M Giuffré, 'The Raise of Consensual Containment' cit. 101.

[71] V Moreno-Lax and M Giuffré, 'The Raise of Consensual Containment' cit. 102.

[72] UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of *S.S. and Others v Italy* (App n. 21660/18) before the European Court of Human Rights, 14 November 2019 refworld.org.

[73] Under art. 42 of the Regulation (EU) 399/2016 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[74] Council of the EU of 3 February 2017 Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, Statements and

equipment is provided and/or information is shared specifically for this purpose, then *intent is established* – and detailed knowledge of the concrete events or incidents (as in joint operations) is thus not required.[75] As an analogy, this was the conceptual line the ECtHR took in a case concerning CIA extraordinary renditions in Poland where the Polish government was found to have violated art. 3 ECHR (prohibition of torture and other forms of ill-treatment) by enabling and supporting these secret CIA operations in full knowledge of the high likelihood that the detainees would be tortured (as a form of complicity).[76]

In addition, the aforementioned first precondition under art. 16 ARSIWA concerning the knowledge of the circumstances making the conduct of the assisted State internationally wrongful is equally met by the EU Member States cooperating with certain third countries such as some North African countries and Turkey, since an ocean of reliable sources produced by international organisations, monitoring bodies and other key human rights actors are available documenting the serious human rights violations and/or the very dire, or even unbearable, human rights situation of people on the move in these countries.[77]

Another aid or assistance-related responsibility scheme which is worth mentioning in this context, at least *en passant*, is what art. 41(2) ARSIWA regulates under the aggravated form of responsibility for serious breaches of peremptory norms of international law (*jus cogens*). Particular consequences of serious breaches of *jus cogens* include that other States must not "render aid or assistance in maintaining that situation" which arose as a result of a serious breach of a *jus cogens* norm. This is thus a special, "after the fact"[78] type of derivative responsibility (as opposed to art. 16 ARSIWA addressing assistance prior to the commission of an internationally wrongful act). Compared to the general rule on aiding and assisting, aggravated responsibility in the sense of art. 41 ARSIWA requires that a serious breach of *jus cogens* occurred and that it resulted in a "situation" – although the ILC articles do not define what it means, only its commentaries give a few possible examples.[79] This aggravated form of complicity under art. 41(2) ARSIWA does not expressly require satisfying subjective elements: intent is certainly not needed, while knowledge of the commission of a serious breach by another State is implied.[80] Arguably,

Remarks 42/17 www.consilium.europa.eu paras 3, 5, and 6(j), which refer to "significantly reduc[ing] migratory flows", "combat[ing] transit" and "preventing departures".

[75] N Markard, 'The Right to Leave by Sea' cit. 615; T Gammeltoft-Hansen and JC Hathaway, 'Non Refoulement in a World of Cooperative Deterrence' cit. 235-284.

[76] ECtHR *Al Nashiri v Poland* App n. 28761/11 [24 July 2014]. See also ECtHR *Husayn (Abu Zubaydah) v Poland* App n. 7511/12 [24 July 2014].

[77] See similarly *e.g.* J Bast, F von Harbou and J Wessels, *Human Rights Challenges to European Migration Policy. The REMAP Study* (Hart Publishing/Nomos 2022, 2nd edn) 46.

[78] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit.115 commentary to art. 41 para. 11.

[79] *Ibid*. 114 commentary to art. 41 para. 5.

[80] *Ibid*. 115 commentary to art. 41 para. 11.

the horrible situation in Libya amounts to the violation of certain *jus cogens* norms, too[81] – enough here to refer to the prohibition of torture and other forms of ill-treatment or the prohibition of forcing people into slavery which qualify as peremptory norms of international law[82] and their flagrant breaches there. One can thus argue that EU Member States are under a clear duty of non-assistance, *e.g.* by not providing capacity building activities to Libyan authorities associated with committing torture or other forms of ill-treatment and/or forcing them into slavery, to avoid their aggravated complicity in maintaining such a grave situation.

Finally, a further possible line of argumentation submits that through funding, training and supplying technical equipment, border authorities of the third countries concerned (*e.g.* in North Africa) essentially function as *subsidiary organs* of the EU Member States in implicitly enforcing these countries' legislation on border controls and immigration.[83] One needs again to examine whether art. 6 ARSIWA is applicable in this context and whether it is arguable that such border authorities have been appointed to perform functions pertaining to the (EU Member) State at whose disposal they are placed. In view of the current frameworks and intensity of joint actions, the degree of cooperation between EU Member States and African countries – where the latter do not lose their command-and-control autonomy – would not satisfy the stringent requirements and not reach the elevated threshold to attribute the conduct of the border guards of these cooperating African countries to EU Member States under art. 6 ARSIWA.

III.2. Second scenario: Activities of EU Member State officials carried out on board of third country vessels with the aim to prevent irregular entry to the EU

As per the second scenario when Member State representatives are present *on board of vessels flying the flag of third countries* and patrolling the sea,[84] the legal qualification of their action revolves around the question whether or not their role played qualifies as "exercising effective control". In case they do not have law enforcement powers and essentially merely advise the third-country vessel crew to prevent boats carrying migrants from reaching the high seas or the territorial waters of an EU Member State, direct responsibility of that EU country is not engaged for human rights violations committed by

[81] For a recent overview of the human rights situation in the county, see *e.g.* Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, UN Doc A/HRC/50/63 (27 June 2022).

[82] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422; See also Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), UN Doc A/77/10 (2022), para. 43, Annex, para. (g).

[83] See *e.g.* M den Heijer, 'Europe beyond its Borders' cit. 192-193 who discusses this scenario.

[84] FRA, 'Scope of the Principle of Non-refoulement' cit. 27-28.

the third country officials. However, the former's derived responsibility can still be established under art. 16 ARSIWA if the above-mentioned requirements – setting a high threshold as the preceding analysis has shown – are met.

In case they do exercise law enforcement powers and hence they exercise *effective control* over the individuals stopped at sea, unlawful conduct such as violating these people's right to leave or subjecting them to ill-treatment or arbitrary detention most likely results in a "shared"[85] or "joint and several" responsibility of the EU Member State and the third country concerned in application of arts 4 and 47 ARSIWA, read in light of the ILC Commentaries thereto.[86] Joint and several responsibility of States under international law arises when two or more States commit in concert an internationally wrongful act.[87] This form of responsibility presupposing co-perpetrators needs to be distinguished from complicity. As the ILC Commentaries to the ARSIWA point out, in such collaborative conduct of States (here: mixed crew with law enforcement powers), responsibility is to be determined in line with the principle of "independent responsibility", which implies that each State is separately responsible for conduct attributable to it. Where a single course of action is attributed to two or more States, State responsibility is not diminished by the fact that other States are equally responsible for the same wrongful act: the conduct is attributable to all States concerned.[88] The ECtHR came to similar conclusions in cases concerning 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]"[89] and "[i]t would be incompatible with the purpose and object of the [ECHR] if Contracting States were to be absolved from their responsibility under the Convention [by concluding international agreements governing their co-operation]".[90] Hence, individual (parallel) responsibility of States continues to govern these cases. This type of responsibility serves as an important tool to discourage cooperation-based *non-entrée* practices.[91]

Given that two States which are jointly – or more precisely perhaps, in parallel but independently – responsible for wrongful acts need not be violating the same norms, pull-backs by a third country could, at the same time, constitute push-backs by an EU Member State (once the persons concerned are already on high seas, although some scholars see preventing migrants reaching the high seas as an infringement of good faith

[85] See *e.g.* A Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) EJIL 15-72, commentaries to Principle 7 (Shared responsibility in situations of concerted action) and Principle 10 (Reparation in situations of shared responsibility).

[86] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 124-125 commentary to art. 47.

[87] V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* cit. 147.

[88] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 124 commentary to art. 47 para. 1.

[89] ECtHR *Saadi v United Kingdom* App n. 37201/06 [28 February 2008] para. 126.

[90] ECtHR *KRS v United Kingdom* App n. 32733/08 [2 December 2008].

[91] T Gammeltoft-Hansen and JC Hathaway, 'Non Refoulement in a World of Cooperative Deterrence' cit. 276.

which is a foundational general principle of international law[92]). Even if the prohibition of *refoulement* is technically not in breach since the third-country patrol vessel with Member State law enforcement officials sails in the former's territorial waters, such an EU Member State can still violate the intercepted persons' right to leave[93] and right to asylum; or the excessive use of force by this Member State's officials can amount to ill-treatment.

III.3. Third scenario: EU Member States sharing information with neighbouring third countries

Turning to the third scenario under scrutiny in this *Article* (inspired by the above-cited 2016 FRA report[94]), an emerging practice followed by EU Member States located at the external borders is to have migrants and asylum seekers apprehended before they reach the land or sea border by *sharing information and intelligence* with the neighbouring third country. This allows the authorities of the third country concerned to stop the people before they actually reach the EU external (land or sea) border. Patrols carried out at the land borders by the neighbouring country may prevent people on the move from entering the EU territory via the green border, whereas patrols carried out at sea may prevent them from entering the territorial waters of the EU Member State concerned.[95]

As a preliminary remark, it should be noted that EU Member States have a duty to prevent unauthorised border crossings by virtue of the Schengen Borders Code.[96] To operationalise this obligation, some EU Member States explored new ways of cooperating with neighbouring third countries, notably by requesting the latter's authorities to intercept people while they are still in their territory, before reaching the EU external border. As FRA noted, depending on the terrain, vegetation and weather conditions, technical equipment often allows EU Member State border guards to spot people at a significant distance from the external border while they are still within the land territory or in the territorial sea of the third country[97] (when there is not much distance between the two shores, *e.g.* in case of the Greek islands in the Aegean Sea and the Turkish coast).

In this scenario, the crux of the matter is whether the EU Member State located at the external border exercises *effective control* over the detected people on the move when it shares information with, and requests assistance from, the neighbouring third country;

[92] See G Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press 2007, 3rd edn) 383; N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' cit. 616; and similarly, V Moreno-Lax and M Guiffré, 'The Raise of Consensual Containment' cit. 108.

[93] See *e.g.* M den Heijer, 'Europe beyond its Borders' cit. 192, and N Markard, 'The Right to Leave by Sea' cit. 616.

[94] FRA, 'Scope of the Principle of Non-refoulement' cit. 2, 37-38; and also, FRA, 'How the Eurosur Regulation Affects Fundamental Rights' (2018) Publications Office of the European Union 23-24.

[95] FRA, 'Scope of the Principle of Non-refoulement' cit. 36.

[96] Art. 13(1) of Schengen Borders Code cit.

[97] FRA, 'Scope of the Principle of Non-refoulement' cit. 37.

or whether effective control also requires physical action to stop the migrants as they approach the (land or sea) border. Sharing information on migrants and asylum seekers approaching the external border is usually based on bilateral or multilateral agreements.[98] As another possible legal basis, art. 75 of the EBCG Regulation also enables Member States to share information with third countries in the framework of EUROSUR (European Border Surveillance System) under certain conditions.[99]

Set against this background, one way of reasoning to allocate State responsibility for eventual rights violations as a result of people's interception is that these people are prevented from reaching the EU external border through the actions of the border guards of the neighbouring country. Put differently, the wrongful conduct, *i.e.* violating human rights, is attributable only to the third country concerned and *not the EU Member State* whose officials simply provided the information on the migrants' position to the former. Although this line of interpretation excludes an EU country's direct, stand-alone responsibility, such action – where the fulfilment of the knowledge/intent requirement, no matter how narrowly or extensively this mental element is construed,[100] is hardly contestable – clearly incarnates a form of aid or assistance to the commission of an international wrong pursuant to art. 16 ARSIWA. This can be thus associated, for instance, with the violation of these individuals' right to leave the neighbouring third country, or any forms of ill-treatment inflicted upon them. It is purported that the precondition of "with a view to facilitating the commission of the wrongful act" is clearly fulfilled in such a situation, at least in relation to the breaches of the right to leave: the very purpose of sharing information and intelligence with the authorities of the bordering third country is to prevent departures and to stop people crossing the EU external border. In addition, rendering aid or assistance under art. 41(2) ARSIWA which triggers an aggravated form of complicity can equally apply in relation to those wrongdoings, which qualify as serious breaches of *jus cogens* norms – consider *e.g.* the dire human rights situation of migrants in Libya and the role of local authorities therein (see also above under sub-section iii.1). To the author's best knowledge, no case law from international courts or quasi-judicial bodies is available yet on whether complicity could also consist of the sharing of information which enables a third country to take actions in violation of human rights of the people on the move.

[98] For an overview of such co-operation agreements with third countries, see FRA, 'How the Eurosur Regulation Affects Fundamental Rights' cit. Annex (List of bilateral and multilateral agreements reviewed).

[99] For an analysis of an earlier (draft) version of this provision, see European Council of Refugees and Exiles (ECRE), 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (Communication COM(2018) 631 final)' (2018) ecre.org 28-29, 34; and FRA, 'The Revised European Border and Coast Guard Regulation and its Fundamental Rights Implications – Opinion of the European Union Agency for Fundamental Rights', FRA Opinion – 5/2018 [EBCG] (27 November 2018) 45-46.

[100] R Mackenzie-Gray Scott, 'Torture in Libya and Questions of EU Member State Complicity' (11 January 2018) EJIL:Talk! ejiltalk.org.

An alternative, arguable standpoint is to claim that the authorities of the EU Member States *indirectly exercise effective control* when they activate the action (*i.e.* the apprehension of people on the move) by the authorities of the third country through the information exchange. Using the vocabulary of some leading scholars, this is a sort of a typical "contactless control" – meaning that the spatial element of control is absent – which can incur "contactless responsibility".[101] Art. 89(5) of the EBCG Regulation appears to support this view as it prohibits an information exchange with third countries if the information provided could lead to the identification of persons in need of international protection or those who are at serious risk of any other fundamental rights violations. In other words, this secondary EU law provision lays down a due diligence duty and obliges Member States to take into account the (human rights) situation in the third country and not to take action when they know, or should have known, that the individuals concerned face a risk of serious harm. In case the above human rights obligations are not honoured, the direct responsibility of the EU Member State concerned incurs in application of arts 4 and 12 ARSIWA – and can be invoked against it at least as a co-author of the wrongful act pursuant to art. 47 ARSIWA. Thus far, no case law of an international court (*e.g.* ECtHR) or quasi-judicial body (*e.g.* the UN Human Rights Committee, the Committee on the Rights of the Child, the Committee Against Torture etc.) is available to shine some light on the legal qualification of such a constellation and the attribution of responsibility in this setting.

IV. Assessment and outlook to the future

It is not contested that EU Member States' cooperation with third countries can lead to preventing migrants and protection seekers from reaching the territory of EU Member States and result in people on the move being stranded in third countries which seriously violate their human rights. Nevertheless, as the ECtHR underscored, "problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the [ECHR]".[102]

The foregoing analysis of selected cooperative border management scenarios aimed at demonstrating that EU Member States are not in a legal accountability vacuum when acting beyond their borders in cooperation with third partners. Mitsilegas aptly pointed out that "limiting responsibility only to third countries would create the very gaps in the rule of law that ECtHR attempted to address in *Hirsi*"[103] – and also in subsequent Strasbourg jurisprudence, this author would add.

EU Member States cannot thus "exonerate themselves from their international obligations by engaging [third] countries of origin and transit in migration control".[104] In

[101] V Moreno-Lax and M Giuffré, 'The Raise of Consensual Containment' cit.
[102] ECtHR *Hirsi Jamaa and Others v Italy* [GC] App n. 27765/09 [23 February 2012] para. 179.
[103] V Mitsilegas, *Extraterritorial Immigration Control* cit. 302.
[104] N Markard, 'The Right to Leave by Sea' cit. 616.

some cooperative migration control scenarios, EU Member States' participation in or support to a third country's internationally wrongful act (*e.g.* preventing departures) can make them complicit in or jointly liable for in the commission of the wrongful act.

The preceding legal analysis of selected scenarios showcases that a number of areas call for more legal clarity when it comes to determining EU countries' international responsibility along the lines of ARSIWA. There are several factors to consider in this regard. In particular, some grey areas remain which concern EU Member State operations in and with third countries, especially when they support or collaborate with them in their efforts to manage migration flows. Such involvement comes rather from the "background", without a direct or simultaneous engagement in the commission of unlawful acts such as violations of migrants' and asylum seekers' right to leave any country including their own; or their ill-treatment. I fully agree with Gammeltoft-Hansen and Hathaway who note that ARSIWA rules on aiding or assisting another State in breaching its obligations under international law have "enormous potential to close the accountability gaps that the new generation of *non-entrée* practices seek to exploit",[105] but they also acknowledged that this is not yet settled law – and this potential is yet to be realised. Other commentators expressed similar views on the role of the "secondary norms" – in Hart's terms – laid down in ARSIWA in ensuring "that both forms of direct and indirect responsibility are not evaded".[106] As of yet, there exists no specific international case law (be it at the universal or regional level) which would give guidance as to how States' derived responsibility under the complicity regime of ARSIWA would be applied in the context of border management, neither in general, nor in any of the particular scenarios presented herein. It is still debated whether the conduct of an EU Member State entails international responsibility in those situations which involve activities carried out under the umbrella of international cooperation but, in some cases, with the ultimate aim of preventing people from heading towards the EU. A broader scope of derived responsibility for complicity could lead to a greater respect for the international rule of law and the promotion of the legal interests of the international community in the observance of international (human rights) obligations.[107]

As the materials cited and engaged with in this piece demonstrate, the first steps of rigorous and profound legal investigation into State responsibility in this specific matter have been taken. This strand of State responsibility-focused legal research must go on, along with scrutinizing ECtHR case law on States' positive obligations to prevent human rights violations as a functional – somewhat overlapping[108] – alternative to the complicity

[105] T Gammeltoft-Hansen and JC Hathaway, 'Non Refoulement in a World of Cooperative Deterrence' cit. 283-284.

[106] R Mackenzie-Gray Scott, 'Torture in Libya and Questions of EU Member State Complicity' cit.

[107] V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* cit. 106.

[108] A Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility* cit. 29-32; A Liguori, 'Overlap Between Complicity and Positive Obligations: What Advantages in Resorting to Positive Obligations in Case of Partnered Operations?' (2022) Journal of Conflict and Security Law 229-252.

rules in ARSIWA;[109] with a view to shedding more light on the various forms of EU Member States' responsibility under international law for unlawful acts committed in externalized, cooperative border management scenarios with the involvement of third countries. More awareness about their possible legal responsibility can also have a preventive effect – hopefully resulting in EU Member States' better human rights compliance when engaging in actions outside their borders. The intentions of such a close scrutiny are indeed more *preventive* than punitive: scholarship of this kind hopes to contribute to the reduction of the likelihood of human rights violations by shattering the myth of non-accountability and depicting in detail the applicability of various responsibility schemes, including derivative responsibility under international law in the presented cooperative border management scenarios.

[109] On this avenue, see H Ph Aust, 'Equivocal Helpers' cit. In addition, there is a (communicated) pending case currently before the ECtHR the applicants of which argue for Italy's complicity for wrongful acts committed by the Libyan Coastguard (*S.S. and Others v Italy* App n. 21660/18 which concerns a rescue operation at sea of the NGO-operated "Sea Watch" rescue vessel hindered in November 2017 by the Libyan Coastguard through a patrol boat donated by Italy and with the coordination of the Italian Maritime Rescue Coordination Centre).