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Policy Brief on Migration

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POLICY BRIEF # 1 – Migration

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Abstract:

Policy Brief #1 (PB1) sets the discussion framework on challenges to sovereignty arising from EU outsourcing policies on migration and asylum. EU and its Member States have developed over the years an extensive network of cooperation with third countries of origin and/or transit with the aim to combat irregular migration and prevent exits of migrants seeking to reach EU territory. More specifically, EU states have opted for the use of proxies (third states) in the Mediterranean to engage in joint or individual border control activities of dubious legality to combat smuggling of migrants. In fact, they have transferred migration control outside their physical borders into the hands of another State. Do States opt for this kind of overseas arrangements in order to circumvent their obligations under human rights law? What is the role of the EU and can the organization also be held accountable for possible wrongful acts on the part of its Members? PB1 analyzes the nature and scope of protection of the principle of *non-refoulement* which binds all States (both EU and third states) as a customary rule. Furthermore, PB1 identifies the legal bases for States and the EU's individual or shared responsibility in extraterritorial immigration activities. Following the 2015 refugee crisis in Europe, EU States have intensified their bilateral cooperation with third countries for the containment of migration flows by providing not only development assistance (financial aid) but also other forms of aid, such as equipment (vessels) and capacity building to third countries' authorities/ border guards etc. Civil society has reacted to the lack of transparency and accountability for outsourcing policies. The European Court of Human Rights in the *Hirsi Jamaa v. Italy* case (2012) ruled that Italy had full and effective control over refugees on high seas and therefore *non-refoulement* obligations applied. However, more recently, there has been a shift of jurisprudence of the European Courts of Strasbourg and Luxembourg restricting their jurisdiction and/or interpretation of human rights obligations of States from their activities conducted at or beyond borders.

Keywords:

state responsibility, sovereignty, outsourcing, borders, migration policy

A. The issue at stake

The Project's core theme is 'Redefining Sovereignty' through the study of recent trends in State practice regarding the exercise of sovereign functions beyond borders or regardless (physical) borders.

However, there is no single or common definition of 'sovereignty' to serve as a starting point for the discussion. According to the Max Planck Encyclopedia of Public International Law, although the principle of sovereignty is of pivotal importance in modern international law, "its meaning has been changing across historical and political contexts and has also been heavily contested at any given time and space.".

Westphalian sovereignty (Peace of Westphalia 1648) or state sovereignty which reflects the modern concept of sovereignty and is often a reference point in academic discussions, dictates that each state has exclusive sovereignty over its territory, and all the people and property within that territory (internal sovereignty). On the other hand, State sovereignty also includes the idea that all states are equal and that there shall be no interference with domestic affairs. Sovereignty has mutated over the years from the idea of an 'unlimited, undivided, and unaccountable locus of authority' (Bodin) to a concept of a 'limited, divided and accountable sovereignty'. The Butterworths Australian Legal Dictionary states: "Sovereignty is an attribute of statehood from which all political powers emanate […] However sovereignty is rarely absolute; it is generally limited by duties owed to the international community under international law".

In the post-Westphalian era, international law has been acknowledged as an inherent component of sovereignty. In the famous *Wimbledon case,* sovereignty has been defined as the liberty of a State within the limits of international law (The Wimbledon case 1923, Permanent Court of International Justice).

Attributions of State sovereignty is when States enter into international agreements or delegate powers to international organizations. However, international law has evolved towards imposing obligations on States and thus limiting their sovereignty without their consent (customary rules, general principles, *jus cogens*). Furthermore, new fields of international law requiring a stronger interstate cooperation such as climate change, migration and technology have defeated the notion of *'domaine réservé'* and transcended physical borders.

Whereas sovereignty is willingly ceded by States to gain economically from increased trade and capital mobility, public concern over the social, political, and economic effects of high levels of international migration indicate a growing sensitivity to the maintenance of internal sovereignty. At a time when borders become less restrictive in terms of movement of goods, services and communication, they become more

important politically. They establish the categories of citizen and alien, which is a fundamental element of sovereignty. The desire to reduce, monitor and police who comes into the country, though underpinned in large part by economic factors, is increasingly being presented as a matter of 'security'; from concrete walls and barbed wire fences to so called 'e-borders', countries seek to close off entry points. National security—whether defined as political, economic, social, or cultural —underlies the decisions of sovereign states with regard to border control. Borders serve an increasingly important symbolic function in maintaining stable conceptions of national identity that constitute the cornerstone of the nation-state. The control of migration enabled the importance of territoriality as central component of sovereignty, and as an ordering principle in world politics (Christopher Rudolph, "Sovereignty and Territorial Borders in a Global Age" *International Studies Review*, vol. 7, no. 1, 2005, pp. 1–20). In the European system of nations-states, sovereignty, people, and territory were intrinsically bound together. (See also Martin, S. and E. Ferris (2017) 'Border Security, Migration Governance and Sovereignty', in McAuliffe, M. and M. Klein Solomon (Conveners), *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration*, IOM Geneva, 2017).

While illegal migration is considered as a threat to sovereignty, States exercise sovereign powers beyond their borders to halt migration or sing international agreements with third countries. According to the Court in its 1923 *Wimbledon* decision, far from being an abandonment of sovereignty, 'the right of entering into international engagements is an attribute of State sovereignty'. A strong security rationale has underpinned the development of EU immigration and asylum policy. External border surveillance is, according to the European Commission, a necessity because of the relaxed internal borders within the Schengen region.

However, although states have the power to manage migration flows into, through and from their territory, they are obligated by international law to do so in such a way that upholds the rights of individuals within their territory and under their jurisdiction. States are not above international law and thus sovereignty may not be used as a trump card against the law. In other words, sovereignty is responsibility, not merely control over the territory of a State.

B. Setting the framework

1. The obligation not to expel or return ('refouler')

The right of states to admit or exclude aliens of their territory is one of the main features of the concept of national sovereignty. States are obliged to allow the entrance of aliens only in cases where non admission to the territory of the State would constitute a breach of international law. The most significant legal principle which is likely to be infringed is the principle of *non-refoulement*.

The *non-refoulement* principle is the cornerstone of the international protection of refugees as well as a fundamental principle of international human rights law.

Several treaties of general or specific character acknowledge the prohibition imposed on States from returning a refugee to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

The *principle of non-refoulement* emanates from Article 33 par. 1 of the Convention relating to the Status of Refugees adopted in Geneva on 28 July 1951 (189 UNTS 137) which reads as follows:

"*No Contracting State shall expel or return ('refouler') 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.*" [*Note*: see also Article 1 par. 1 of the Protocol 1967 relating to the Status of Refugees]

The 1951 Geneva Convention is widely ratified among States of the international community. According to the official UN records, 146 countries have adhered so far to it. The definition of a 'refugee' in Article 1 as well as the principle of *non-refoulement* in Article 33 have acquired a customary status, binding States irrespectively of whether they have ratified the Convention and/or Protocol or not. The 1951 Geneva Convention has proven to be a living and dynamic instrument, and its interpretation and application has continued to evolve through practice of States and international organisations such as the UNHCR and the ICRC, academic literature and judicial decisions at national, regional and international levels. All subsequent international or regional texts on refugee protection are based on the text of the 1951 Geneva Convention. Likewise, supervisory judicial or non-judicial bodies of human rights conventions interpret the obligations of States towards asylum seekers and refugees in light of their obligations under the 1951 Geneva Convention.

Subsequently to the adoption of the 1951 Geneva Convention, **other international or regional instruments on refugee issues** reiterated the principle of *non-refoulement* in a similar wording.

- The Declaration on Territorial Asylum adopted by the UN General Assembly on 14 December 1967 (A/RES/2132(XXII) provides in Article 3 par. 1 that: "*No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution*".
- The Convention Governing the Specific Aspects of Refugee Problems in Africa adopted by the Organization of African Unity on 10 September 1969 (1001 UNTS 45) provides in Article II par. 3 that: "*No person may be subjected by a member State to measures such as rejection at the frontier, return or expulsion, which should compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.*".
- The American Convention on Human Rights adopted by the Organization of American States on 22 November 1969 (OAS Treaty Series No. 35, 9 ILM 673) provides in Article 22 par. 8 that: "*In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions*."
- The Resolution (67) 14 on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers, Council of Europe on 29 June 1967 provides that: "[The Committee of Ministers] *Recommends that member Governments should be guided by the following principles: 1. […]; 2. They [States] should in the same spirit ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to or remain in a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.*".
- The Cartagena Declaration on Refugees adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984 mentions that the Colloquium reiterated "*the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees*".

- The Bangkok Principles on Status and Treatment of Refugees of the Asian-African Legal Consultative Committee (31 December 1966) as adopted by the Asian-African Legal Consultative Organization on 24 June 2001 provide in Article III par. 3 that: "*No-one seeking asylum in accordance with these Principles should, except for over-riding reasons of national security or safeguarding the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory*." (See also Resolution 40/3, 24 June 2001).

In the context of the European Union, the European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the 1951 Geneva Convention, as supplemented by the 1967 New York Protocol, thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution. Article 18 of the EU Charter of Fundamental Rights guarantees the Right to asylum which is not explicitly contained in the 1951 Geneva Convention. Article 18 reads as follows: "*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')*." The text of this Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the 1951 Geneva Convention. Article 78 (ex Articles 63, points 1 and 2, and 64(2) TEC) par. 1 provides that: "*The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties*.".

Article 19 of the EU Charter of Fundamental Rights provides in paragraph 1 that collective expulsions are prohibited in accordance with Article 4 of Protocol 4 to the ECHR concerning collective expulsion. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State (see also Article 13 of the Covenant on Civil and Political Rights). Paragraph 2 incorporates case law from the European Court of Human Rights regarding Article 3 of the ECHR (see *Ahmed v. Austria*, judgment of 17 December 1996, [1996] ECR VI-2206 and *Soering v. the UK*, judgment

of 7 July 1989) and reads as follows: "*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*."

An explicit reference to the 1951 Convention and the 1967 New York Protocol providing the cornerstone of the international legal regime for the protection of refugees is stipulated in the Preamble of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). Reference to the 1951 Geneva Convention is also made in paragraphs. 3, 18, 22, 23, 24, 29 and 33 of the Preamble and in Articles 2 (Definitions), 5 (International protection needs arising sur place), 9 (Acts of persecution), 12 (Exclusion), 14 (Revocation of, ending or refusal to renew status), 20 (General rules), 25 (Travel document). The qualification of beneficiaries of international protection according to the EU law is regulated in accordance with the 1951 Geneva Convention by providing for a common interpretation for all EU Member States. For issues that fall outside the scope of the Convention, their regulation is made without prejudice to the 1951 Geneva Convention.

More recently, the New York Declaration for Refugees and Migrants adopted by the UN General Assembly on 19 September 2016 (A/RES/71/1) underlines the commitment of States to respect for and adhere to the fundamental principle of *non-refoulement* in accordance with international refugee law (par. 67). The Global Compact on Refugees adopted by the UN General Assembly on 17 December 2018 (A/RES/73/151) is grounded in the international refugee protection regime, centred on the cardinal principle of *non-refoulement* and at the core of which is the 1951 Geneva Convention and its 1967 New York Protocol (Chapter B Guiding Principles par. 5).

However, it is important to note that the principle of *non-refoulement* through its generalized practice with an *opinio juris* by the States has been universally accepted as a **customary rule**. According to the Cartagena Declaration on Refugees, "*this principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens*" (Section III par. 5). While not legally binding, the Cartagena Declaration has been incorporated into the legislation of numerous States in Latin America. However, it is still debatable whether the principle of *non-refoulement* is a peremptory norm of international law from which no derogation is permitted. In this regard, the Executive Committee has also emphasized in 1982 that the principle of *non-refoulement* has progressively acquired the character of a peremptory rule of international law (General Conclusion on International Protection

No. 25 (XXXIII) – 1982). Academics also support the *jus cogens* character of the principle (Jean Allain, The *jus cogens* Nature of *non-refoulement*, *International Journal of Refugee Law*, Volume 13, Issue 4, October 2001, pp. 533-558; Cathryn Costello, Michelle Foster, Non-refoulement as custom and jus cogens? Putting the prohibition to the test, Netherlands Yearbook of International Law 2015, Volume 46, pp. 273-327; Evan J. Criddle and Evan Fox-Decent, The Authority of International Refugee Law, 62 William & Mary Law Review, forthcoming in 2021), however no judicial organ has pronounced on the imperative character of the *non-refoulement* principle as such.

The **United Nations High Commissioner for Refugees** acts as the 'guardian' of the 1951 Geneva Convention. Under its Statute (Annex to the UNGA Resolution 428 (V) of 14 December 1950), the High Commissioner's primary responsibility is to provide 'international protection' to refugees and, by assisting Governments, to seek 'permanent solutions for the problem of refugees'. Its protection functions specifically include "*promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto*" (paragraph 8 (a) of the Statute). Under the 1951 Geneva Convention, the UNHCR is charged with the task of supervising international conventions providing for the protection of refugees. States undertake the obligation to cooperate with the UNCHR in the exercise of its functions and shall in particular facilitate its duty of supervising the application of the provisions of the 1951 Geneva Convention. Moreover, States undertake to provide information and statistical data on the condition of refugees, the implementation of the 1951 Geneva Convention and law, regulations and decrees relating to refugees (Article 35).

According to a *Note on Non-Refoulement* submitted by the UNHCR to the UN Sub-Committee of the Whole on International Protection in 1977, the principle of *non-refoulement* applies irrespective of whether or not the person concerned has been formally recognized as a refugee. This is of particular relevance to asylum-seekers. As they may be refugees, asylum-seekers should not be returned or expelled pending a final determination of their status. The UNHCR has accordingly clarified that the recognition of a person as a refugee is only of a declaratory nature (see UNCHR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 4th edition, 2019 whereas "*a person does not become a refugee because of recognition, but is recognized because he is a refugee*", par. 28). The scope of the protection of the *non-refoulement* principle has evolved in time. More recently, the UNHCR clearly stated that the prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or 'renditions', and non-admission at the border (see 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, par. 7). It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx (*Note on International Protection* of 13 September 2001, A/AC.96/951, par. 16). Therefore, it applies not only with respect to a refugee's country of origin but any other country where he or she has reason to fear persecution related to one or more of the grounds set out in Article 1A (2) of the 1951 Convention, or from where he or she could be sent to a country where there is a risk of persecution linked to a Convention ground (UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008, par. 12). The return to countries where individuals would be exposed to a risk of onward removal to such countries (indirect, onward or chain *refoulement*) is also prohibited under international law (James C. Hathaway, The rights of refugee under international law, Cambridge University Press, 2005, p. 233; Executive Committee, Conclusion on Protection Safeguards in Interception Measures No. 9 (LIV) - 2003, A/AC.96/987, par. (a) (iv); ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011, par. 293).

It should be also noted that while the principle of *non-refoulement* does not entail as such a right to asylum, States are required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures (see also Article 31 of the 1951 Convention on the non-penalisation of entry). In many ways, the principle of *non-refoulement* is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights and it has come to be considered a rule of customary international law binding on all States (*Note on International Protection* of 13 September 2001, *op. cit*). Finally, the *non-refoulement* principle is not subject to territorial restrictions but applies wherever the State exercises jurisdiction and is binding on all State organs or any other person or entity acting on their behalf (for more information on extra-territorial application see 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, op. cit).* A state's responsibility to protect persons from *refoulement* is regardless of whether the person has entered the country in a legal sense and has passed immigration control, was authorized to enter, or is located in the transit areas or 'international' zone of an airport. It is not possible for States to divest themselves of their *non-refoulement* obligations through the provisions of their domestic (immigration or border control) laws and excising parts of their territory for asylum-related purposes (UNHCR, *Legal*

considerations on state responsibilities for persons seeking international protection in transit areas or 'international' zones at airports, January 2019, par. 5). For more analytical information on the scope of the principle of *non-refoulement,* see Sir Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion" in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, pp. 87–177.

Under **international human rights law** the prohibition of *refoulement* is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

Article 3 par. 1 of 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 he would be in danger of being subjected to torture*."

Article 16 par. 1 of ICPPED provides that: "*No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance*."

However, even if not explicitly mentioned in other human rights conventions, the principle of *non-refoulement* has been interpreted by the supervisory judicial or non-judicial organs to apply to incidents of torture, cruel, inhuman or degrading treatment or punishment (Article 3 ECHR, *Soering v. the UK*, 98 ILR 270, par. 86-88, *Cruz Varas v. Sweden*, 108 ILR 283, par. 69, *Chahal v. the UK*, 108 ILR 385, par. 73-74 and 79-8, *T.I. v. the UK*, Application No. 43844/98, Decision on Admissibility, 7 March 2000, 2000 INLR 21, *Hirsi Jamaa v. Italy*, Application No. 27765/09, 23 February 2012 par. 134; Article 3 CAT, *Njamba and Balikosa v. Sweden*, No. 322/2007, 3 June 2010, paras. 9.3-9.5; Article 7 ICCPR, HRC, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, par. 9: "*In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end*."; HRC, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, par. 12: "*Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from*

their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.") and other gross violations of human rights such as flagrant denial of the right to a fair trial (Article 6 ECHR, *Othman (Abu Qatada) v. the UK*, No. 8139/09, 17 January 2012, par. 258), violation of the right to life (Article 6 ICCPR**,** HRC, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, par. 12, *op. cit*), sexual and other forms of gender-based or violence (CEDAW, General Recommendation No. 32, par. 23: "*The Committee is therefore of the view that States parties have an obligation to ensure that no woman will be expelled or returned to another State where her life, physical integrity, liberty and security of person would be threatened, or where she would risk suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence. What amounts to serious forms of discrimination against women, including gender-based violence, will depend on the circumstances of each case*."). Some courts and some international human rights mechanisms have further interpreted severe violations of economic, social and cultural rights to fall within the scope of the prohibition of *non-refoulement* since they would represent a severe violation of the right to life or freedom from torture or other cruel, inhuman or degrading treatment or punishment. For example, degrading living conditions, lack of medical treatment, or mental illness have been found to prevent return of persons.

It should be noted that the scope of protection of the principle of *non-refoulement* under general human rights law is broader than the ambit of the application of the principle of *non-refoulement* under refugee law. Article 33 par. 2 of the 1951 Geneva Convention introduces an exception to the respect of the principle of *non-refoulement* for security reasons ("*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.*). In addition, in order for an individual to benefit from the *non-refoulement* principle, he/she needs to qualify for a refugee (a 'refugee profile'). On the other hand, the protection afforded to individuals under human rights treaties not to be expelled, returned or in other way being subjected to *refoulement* back to a country where they may face a risk of torture or other forms of severe ill-treatment reaching the threshold of cruel, inhuman or degrading treatment or punishment is absolute, meaning that there are no exceptions,

even for security reasons and no derogations, even in times of war or other public emergencies.

In the context of the Global Compact on Migration, the Office of the High Commissioner for Human Rights examined *The principle of non-refoulement under international human rights law* concluding that it forms an essential protection under international human rights, refugee, humanitarian and customary law applicable to all migrants at all times, irrespective of migration status.

The definition adopted by the OHCHR is the following:

"*The principle of non-refoulement prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill treatment or other serious human rights violations*".

2. Responsibility of states for breaches of the *non-refoulement* principle

Under *Articles on State Responsibility for International Wrongful Acts*, there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State (Article 2 Elements of an internationally wrongful act of a State). These two elements are distinct but interconnected. To identify the precise act or omission that can be imputed to a state, one has to examine the scope and content of the international obligation allegedly breached. This question has been answered in Chapter 1 above.

With regard to the question who is bound by the legal obligation of *non-refoulement*, the answer is all the organs of the State or other persons or bodies exercising governmental authority. **Articles 4-11 of ASRIWA** elaborate further on the element of 'attribution' providing for the circumstances under which a conduct of an organ is considered an act of the State able to trigger the latter's international responsibility.

- Article 4 (Conduct of organs of a State): "*1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State*."
- Article 5 (Conduct of persons or entities exercising elements of governmental authority): "*The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance*."
- Article 6 (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*."
- Article 7 (Excess of authority or contravention of instructions): "*The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions*."

- Article 8 (Conduct directed or controlled by a State): "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*."
- Article 9 (Conduct carried out in the absence or default of the official authorities): "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority."*
- Article 10 (Conduct of an insurrectional or other movement): "*1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9*."
- Article 11 (Conduct acknowledged and adopted by a State as its own): "*Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own*."

Given the above, *a prior*i the prohibition on *refoulement* applies to circumstances in which organs of other States, private actors (such as carriers, airlines, and private military personnel) or other persons act on behalf of a State or in exercise of the governmental activity of that State.

Articles 16-18 of ASRIWA outline circumstances under which one State may assume responsibility for the internationally wrongful acts of another State ('**derived responsibility'**). These constitute exceptions to the general principle of independent state responsibility and the threshold for state responsibility is therefore high. It is necessary to establish a close connection between the State's act of assisting (Article 16), directing (Article 17) or coercing (Article 18) another State, and the other State's internationally wrongful act.

- Article 16 (Aid or assistance in the commission of an internationally wrongful act): "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."

- Article 17 (Direction and control exercised over the commission of an internationally wrongful act): "A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act 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."
- Article 18 (Coercion of another State): "A State which coerces another State to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) the coercing State does so with knowledge of the circumstances of the act."

Following the above, aside from being responsible for their own breaches of *non-refoulement*, States can be held accountable for aiding and assisting, directing, or coercing such violations by another country.

Academia has argued that Article 16 is more likely to be applicable if prohibited acts of *refoulement* are taking place by a State with the aid or assistance of another State (Thomas Gammeltoft-Hansen and James C. Hathaway, Non-Refoulement in a World of Cooperative Deterrence, *Columbia Journal of Transnational Law* 53(2), January 2015, pp. 235-284; Annick Pijnenburg, Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?, *Human Rights Law Review* 20 (2), June 2020, pp. 306-332; Dastyari and Hirsch, The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy, *Human Rights Law Review* 19 (3), November 2019, pp. 435-465; Anna Liguori, Migration Law and the Externalisation of Border Controls – European State Responsibility, Routledge, 2019; Mariagiulia Giuffré, State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?, *International Journal of Refugee Law*, Volume 24, Issue 4, December 2012, Pages 692–734). According to the official commentary to ARSIWA, Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually

do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself. Although it does not define the notions 'aid' or 'assistance' one may argue that interception policies, pull back operations, training activities and secondments of border officials, material assistance (patrol vessels, border control equipment, intelligence) or funding to third states may fall within the ambit of aiding or assisting. Article 16 was described as 'reflecting a customary rule' by the International Court of Justice in its judgment on the merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, I.C.J. Reports 2007, par. 420).

What is more, sometimes States act together with international organizations (IOs), such as EU/FRONTEX in immigration control, raising questions whether IOs can also be held accountable for international wrongful acts under international law (Maarten den Heijer, Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control*, Martinus Nijhoff Publishers, 2010, pp. 169; Efthymios Papastavridis, Fortress Europe and FRONTEX: Within or Without International Law? (2010) 79 *Nordic Journal of International Law* 75).

Articles 14-17 and 58-60 of *Articles on the Responsibility of International Organizations* run parallel to the Articles 16-18 of ARSIWA. The question of an international organization's international responsibility in connection with the act of a State has been discussed in several cases before international tribunals or other bodies, but has not been examined by those tribunals or bodies because of lack of jurisdiction *ratione personae* (*M. & Co. v. Federal Republic of Germany*, Application no. 13258/87, Decision of 9 February 1990, European Commission of Human Rights, Decisions and Reports, vol. 64, p. 138; *Cantoni v. France*, Judgment of 15 November 1996, Application no. 17862/91, European Court of Human Rights, Reports of Judgments and Decisions 1996-V, p. 1614, *Matthews v. the United Kingdom*, Judgment of 18 February 1999, Application no. 24833/94, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 1999-I, p. 251, *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Application no. 56672/00, Decision of 10 March 2004, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 2004-IV, p. 331 and Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, Application no. 45036/98, Decision of 13 September 2001 and Judgment of 30 June 2005, European Court of Human Rights, Reports of Judgments and Decisions 2005-VI, p. 107; and *H.v.d.P. v. the Netherlands* Communication No. 217/1986, Decision of 8 April 1987, Report of the

Human Rights Committee, Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), p. 185).

The relations between an international organization and its member States or international organizations may allow the former organization to influence the conduct of members also in cases that are not envisaged in the Articles on the responsibility of States for internationally wrongful acts. Some international organizations have the power to take decisions binding their members, while most organizations may only influence their members' conduct through non-binding acts. The fact that an international organization is a subject of international law distinct from its members opens up the possibility for the organization to try to influence its members in order to achieve through them a result that the organization could not lawfully achieve directly, and thus circumvent one of its international obligations. Article 17 of ARIO addresses the particular situation of Circumvention of international obligations through decisions and authorizations addressed to members and reads as follows: "*1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization. 2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization. 3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed*.". According to the official Commentary of the ARIO, the term "circumvention" implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation. The situation of a State acts in compliance with a binding decision of the international organization is more clear than the situation where the State acts upon authorization by the international organization. The International Law Commission explains in the Commentary that "*while paragraph 2 uses the term 'authorization', it does not require an act of an international organization to be so defined under the rules of the organization concerned. The principle expressed in paragraph 2 also applies to acts of an international organization which may be defined by different terms but present a similar character to an authorization as described above*.".

Article 61 address the analogous situation of circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an

international organization of which it is a member. Article 61 (Circumvention of international obligations of a State member of an international organization): "*1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation. 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization*. " The jurisprudence of the European Court of Human Rights provides a few examples of dicta affirming the possibility of States being held responsible when they fail to ensure compliance with their obligations under the European Convention on Human Rights in a field where they have attributed competence to an international organization (*Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of 18 February 1999, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 1999-I, p. 393, at p. 410, para. 67, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgment of 30 June 2005 (see footnote 184 above), para. 154).

See also: Ian Brownlie, "The responsibility of States for the acts of international organizations", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden/Boston, Martinus Nijhoff, 2005, p. 355, at p. 361 and Olivier De Schutter, "Human rights and the rise of international organisations: the logic of sliding scales in the law of international responsibility", in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations*, Antwerp, Intersentia, 2010, p. 51.

However, the International Law Commission in its work on ARSIWA (2001) and ARIO (2011) has not covered all possible situations of shared responsibility for internationally wrongful acts between States and/or international organizations. Professor Andre Nollkaemper noted that in international practice (e.g. in situations of climate change and other environmental disasters, joint military activities and cooperation actions aimed at stemming migration) it is common that several States and/or international organizations contribute together to the indivisible injury of a third party. For instance, in the migration context, if two States exercise joint FRONTEX missions to control the external borders of the EU, and the rights of persons seeking asylum are violated, the question will arise whether the EU, and/or one or both of the States are responsible and, if so, how responsibility is shared among them. Such situations are hardly captured by the existing rules of the law of international responsibility and therefore, he drafted along with a research team a text of '**Guiding Principles on Shared Responsibility in International Law**' (André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn,

Berenice Boutin, Nataša Nedeski, Ilias Plakokefalos, collaboration of Dov Jacobs, Guiding Principles on Shared Responsibility in International Law, *European Journal of International Law*, Volume 31, Issue 1, February 2020, pp. 15–72). Apart from aid or assistance, direction or control, coercion and circumvention (addressed in the ARSIWA and ARIO by the ILC), Nollkaemper addresses the situation of international persons acting in concert in the commission of a wrongful act thus engaging their shared responsibility.

- Principle 7 (Shared responsibility in situations of concerted action): "*1. An international person shares responsibility when it knowingly acts in concert with another international person that commits an internationally wrongful act, and the conduct of each of those international persons contributes to the indivisible injury of another person. 2. International persons act in concert when each of them participates in a course of conduct with a view to achieving agreed goals. 3. The requirement of knowledge in paragraph 1 is satisfied when an international person knew or should have known the circumstances of the internationally wrongful act. 4. An international person shares responsibility pursuant to paragraph 1 if the act would have been internationally wrongful if committed by that international person*.".

Principle 7 also covers situations that fall within the scope of Articles 17 and 61 of the ARIO on the circumvention of international obligations. Like in the situations of circumvention as understood in Articles 17 and 61 of the ARIO, Principle 7 allows for the allocation of responsibility to international persons that try to circumvent their international obligations by working with or through others. It extends the principle of circumvention, as stipulated in the ARIO, to a wider group of international persons, including states. The main novelty of Principle 7, thus, is that it applies not only to states acting through international organizations and *vice versa* but more broadly to all international persons attempting to evade their international obligations by working with or through other international persons.

C. Circumventing international obligations by delegating immigration control to third countries

1. Outsourcing activities on migration: mapping out

The Area of Freedom Security and Justice (AFSJ) remains a shared competence between EU and its Member States (see Article 4 of the Treaty on the Functioning of the European Union). According to Art. 67 (2) (ex Article 61 TEC and ex Article 29 TEU): "It *[the Union]* shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. […]". Moreover, according to par. 2 of Article 78 (ex Articles 63, points 1 and 2, and 64(2) TEC): "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: […] (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection."Attempts to externationalise border controls through outsourcing migration and asylum policies is not a new concept at EU level. Partnerships and cooperation with third countries (of origin or transit) has been institutionalized at the EU in different forms:

In December 2005, the Commission published its '**Global Approach to Migration**' (GAM). It aimed to present a comprehensive strategy to address irregular migration and human trafficking on the one hand, and to manage migration and asylum through cooperation with third countries (origin and transit) on the other. Activities were initially focused on Africa and the Mediterranean, which were identified as the main regions of origin of migrants in Europe. The GAM linked migration management and development policies and introduced the 'more for more' principle, by offering visa facilitation for third-country nationals originating from countries that cooperated with FRONTEX on border control and have concluded a readmission agreement with the EU.

The '**Global Approach to Migration and Mobility**' (GAMM) adopted by the Commission in 2011 establishes a general framework for the EU's relations with third countries in the field of migration. It is based on four pillars: (1) regular immigration and mobility; (2) irregular immigration and trafficking in human beings; (3) international protection and asylum policy; and (4) maximising the impact of migration and mobility on development. It has further developed 'Mobility Partnerships' with specific countries. The GAMM also provided for externalization of asylum policy through regional protection programmes and resettlement schemes from third countries to Europe. Regional Protection Programmes (RPP)/ Regional Development and

Protection Programmes (RDPP), capacity building projects in the area of asylum and migration, and other migrant and refugee assistance projects, funded through geographic and thematic instruments. RPP/RDPPs have taken the form of projects implemented primarily by UNHCR, together with local NGOs. Human rights in the GAMM are seen as a cross-cutting dimension. The GAMM foresees that respect for the EU Charter for Fundamental Rights should be a key component of EU policies on migration and that the impact on fundamental rights of initiatives taken in the context of the GAMM should be assessed.

In response to the unprecedented refugee crisis in Europe in 2015, the Commission published the '**European Agenda on Migration**'. The Agenda proposes immediate measures to cope with the crisis in the Mediterranean and measures to be taken over the next few years to manage all aspects of immigration more effectively. Immediate measures included: activation of an emergency relocation mechanism within Europe; the introduction of the 'hotspot' concept whereby EU agencies would work together in EU Member States affected by large scale arrivals to register, identify and fingerprint those arriving; a strengthened role for Europol as an intelligence hub for dismantling smuggling networks and the launching of CSDP operations in the Mediterranean to capture vessels; more funding for Regional Development and Protection Programmes and for a joint resettlement scheme, and the setting up of a multi-purpose centre in Niger, in cooperation with UNHCR and IOM. EASO and FRONTEX's work in the external dimension will also be strengthened. As regards the medium and long term, the Commission proposes guidelines in four policy areas: (1) Reducing incentives for irregular immigration; (2) Border management, saving lives and securing external borders; (3) Developing a stronger common asylum policy; and (4) Establishing a new policy on regular immigration, modernising and revising the 'blue card' system, setting fresh priorities for integration policies, and optimising the benefits of migration policy for the individuals concerned and for countries of origin. The 'European Agenda on Migration' puts an emphasis on cooperation with third countries in the management of migration, borders and asylum but is still based on the global approach to migration and mobility and on readmission agreements as a central instrument of the external dimension of EU migration policy. The most significant change concerned a progressive extension of the number of people covered by these readmission agreements, which is not only 'nationals' of the readmitting State, but also 'third country nationals' to be readmitted to transit countries. In 2016 a 'Partnership Framework' for a new comprehensive cooperation with third countries on migration came into play. It provided for the singing of compacts to save lives in the Mediterranean sea, to increase the rate of returns to countries of origin and transit and to enable migrants and refugees to stay close to home and to avoid taking

dangerous journeys (European Commission, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank, 7.6.2016).

In November 2015, the Union launched a negotiating process at the EU-Africa Summit in Valletta on Malta (the so-called **Valetta process**) to strengthen efforts to prevent irregular migration and increase mobility, using readmission as a main tool in country cooperation in an attempt to outsource the policing of its southern border and the containment of would-be migrants to African countries. The Joint Valletta Action Plan (JVAP) became the regional framework to address migration policy and it is built around five domains: (1) develop benefits of migration and addressing root causes of irregular migration and forced displacement; (2) legal migration and mobility; (3) protection and asylum; (4) prevention of and fight against irregular migration, migrant smuggling and trafficking in human beings; and (5) return, readmission and reintegration. With the Valetta Action Plan, the EU also launched the EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa. This channel has been criticized for lack of transparency providing African governments with development aid to accept the European externalisation agenda. The Khartoum process and the Rabat Process were identified as suitable existing mechanism to monitor the implementation of the Joint Valetta Action Plan.

In September 2015, the Commission published the **EU action plan on return**, which was followed by the adoption, in October 2015, of the Council conclusions on the future of the return policy. In March 2017, the Commission supplemented the Action Plan with a communication on 'a more effective return policy in the European Union – a renewed action plan' and a recommendation on making returns more effective. In September 2017, it published its updated 'Return Handbook', providing guidance relating to the performance of duties of national authorities competent for carrying out return-related tasks. Additionally, in 2016, Parliament and the Council adopted Regulation (EU) 2016/1953 on the establishment of a European travel document for the return of illegally staying third-country nationals. The recently revamped and strengthened European Border and Coast Guard Agency (FRONTEX) increasingly assists Member States in their return-related activities. In September 2020, the Commission proposed in the New Pact on Immigration and Asylum an effective return policy and an EU-coordinated approach to returns, reiterating on its previous 2018 Proposal to amend the Return Directive and produce a forthcoming Strategy on voluntary return and reintegration. The Commission proposes to appoint a Return Coordinator within the Commission, supported by a High Level Network for Returns and a new operational strategy. Also the Commission proposed that FRONTEX should

fully operationalise the reinforced mandate on return and provide full support to Member States at national level and appoint a Deputy Executive Director for Return.

On 18 March 2016, the European Council and Turkey reached an agreement aimed at stopping the flow of irregular migration via Turkey to Europe (Eastern Mediterranean Route). According to the EU-Turkey Statement, all new irregular migrants and asylum seekers arriving from Turkey to the Greek islands after 20th March 2016 and whose applications for asylum have been declared inadmissible on the basis that Turkey is a 'safe third country' should be returned to Turkey. The agreement followed a series of meetings with Turkey since November 2015 dedicated to deepening Turkey-EU relations as well as to strengthening their cooperation on the migration crisis, with notably the EU-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March 2016 EU-Turkey statement.

For that purpose, the EU Member States and Turkey agreed that:

(1) All new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey;

(2) For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU;

(3) Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU;

(4) Once irregular crossings between Turkey and the EU are ending or have been substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated;

(5) The fulfilment of the visa liberalisation roadmap will be accelerated with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016. Turkey will take all the necessary steps to fulfil the remaining requirements;

(6) The EU will, in close cooperation with Turkey, further speed up the disbursement of the initially allocated €3 billion under the Facility for Refugees in Turkey. Once these resources are about to be used in full, the EU will mobilise additional funding for the Facility up to an additional €3 billion by the end of 2018;

(7) The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.

(8) The accession process will be re-energised, with Chapter 33 opened during the Dutch Presidency of the Council of the European Union and preparatory work on the opening of other chapters to continue at an accelerated pace;

(9) The EU and Turkey will work to improve humanitarian conditions inside Syria.

Turkey furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece, and to take back all irregular migrants intercepted in Turkish waters. Turkey and the EU decided to continue stepping up measures against migrant smugglers and welcomed the establishment of the NATO activity on the Aegean Sea.

Moreover, the European Union has begun disbursing the 3 billion Euros of the Facility for Refugees in Turkey for concrete projects; work has also advanced on visa liberalisation and in the accession talks, including the opening of Chapter 17 last December 2015. In September 2016, the European Commission announced the creation of an 'Emergency Social Safety Net' of 348 million Euros starting from October 2016. Up to one million of the most vulnerable refugees will be able to meet their basic needs by receiving monthly cash-transfers via an electronic card.

(Source: European Parliament, Legislative Train – Towards a new policy on migration: EU-Turkey Statement & Action Plan).

The EU-Turkey Statement was met with sharp criticism from human rights organisations who argued that Turkey was not deemed a safe country for migrants to be returned to. Regardless, the EU-Turkey cooperation scheme succeeded in dramatically reducing the migratory flows to Europe.

Lately, following the signing of a bilateral Memorandum of Understanding on the delimitation of maritime jurisdiction areas between Turkey and Libya in 2019 which ignored sovereign rights of Greek islands and the crisis situation at the Greek-Turkish land borders at the end of February 2020 when Turkey actively encouraged migrants to cross the borders to Europe, there have been some tensions in the EU-Turkey relations (For a thorough analysis on latest developments see European Commission, Country Insights: Key findings on the 2020 Report on Turkey, 6 October 2020). In addition, due to the Covid-19 pandemic, all returns to Turkey from the Greek Aegean Islands by virtue of the EU-Turkey Statement have been suspended so far.

EU's institutionalized cooperation with Libya on migration management dates back to 2011. Until 2014, according to official data from the EU Commission, Libya received 42.7 million Euros from EU funded migration projects on three sectors: human rights based migration management; countering irregular migration; and assistance to people in need of international protection. After the deterioration of the security situation last year and in order to respond to the needs of people fleeing fighting areas in Libya, EU migration support has been refocused to guarantee emergency care and support for stranded migrants, refugees, asylum seekers and displaced people in Libya and in the neighboring countries. In 2015, the EU support limited to training activities for the Libyan Coastal Gard (SeaHorse Programme,4.5 million Euros) (European

Commission, The European Union's cooperation with Africa on migration Questions and Answers: Facts and Figures on cooperation with Africa, 22 April 2015). In the same year the North of Africa window of the EU Emergency Trust Fund for Africa was created and with a total funding of 455 million Euros so far, the EUTF Africa supports migrants, refugees, asylum seekers, IDPs and host communities with protection and direct emergency assistance in Libya. It also provides, as essential life-saving measures, voluntary humanitarian repatriation for migrants and humanitarian evacuations for people in need of international protection. It contributes to improve the daily life of Libyans themselves through its community stabilisation programmes, by supporting the delivery of basic services to local communities including IDPs affected by the conflict, as well as migrants living in host municipalities. Finally, it continues to strengthen the capacity of the relevant Libyan maritime border management authorities in the field of search and rescue through the provision of lifesaving equipment and training along international standards and in respect of human rights, aimed to prevent further loss of lives. In 2017, a Joint Communication to the European Parliament, the European Council and the Council on Migration '*On the Central Mediterranean route – Managing flows, saving lives'* was issued. One of key actions addressed is 'Stepping up support to the Libyan Coast Guard': "*To effectively cope with this current situation, part of the answer must lie in the Libyan authorities preventing smugglers from operating, and for the Libyan Coast Guard to have the capacity to better manage maritime border and ensure safe disembarkation on the Libyan coast. Of course, the Libyan authorities' effort must be supported by the EU and Member States notably through training, providing advice, capacity building and other means of support*." While EU did not finance European Union Naval Force – Mediterranean (EUNAVFOR MED Operation Sophia) directly, it has funded: (a) the Seahorse Mediterranean Network programme, aiming to strengthen Libyan border surveillance which was implemented by seven Member States with the Spanish Guardia Civil in the Lead; (b) the Italian Ministry of Interior for supporting sea rescue and training of the Libyan Coast Guard (implemented by the IOM) and for capacity building of the Libya authorities and assistance to refugees and asylum seekers in Libya (implemented by the UNCHR); (c) the Italian Coast Guard to assist the Libyan Coast Guard in establishing a Maritime Rescue Coordination Centre, a prerequisite for efficiently coordinate search and rescue within Libyan search and rescue zone, in line with international legislation; (d) the provision to the Libya Coast Guard of additional patrolling assets and ensure their maintenance; and (e) the Mediterranean Coast Guard Functions Forum that will help the Libya Coast Guard to develop mutual knowledge, share experience and best practices and to identify areas for further cooperation with Coast Guard Functions in Member States and in other third countries bordering the Mediterranean Sea.

In addition to the institutionalized outsourcing activities of the EU towards third States, EU Member States have proceeded to **bilateral outsourcing arrangements** with third countries with the approval by the EU.

After the entering into force of the EU-Turkey Statement, migration flows shifted their route and increased flows were recorded in Central Mediterranean Route to Europe through Libya and Italy. In 2017, Italy, which had already bilateral agreements with Libya on prevention of irregular migration (e.g. Treaty of Friendship, Partnership and Cooperation, 2008) singed with Libya (in fact with the President of the Council of the Libyan Government of National Accord) a '**Memorandum of Understanding** (MoU)' in the Field of Development, Fight against Illegal Immigration, Trafficking in Human Beings and Smuggling and on Enhancement of Border Security. By virtue of this Agreement, Italy agreed to assist the Libyan border guard, providing them with equipment, training and technology. Also, the operation of temporary camps in Libya was agreed. However, reports from NGOs underlined that these camps have been transformed into unlawful detention centres, controlled by armed militias and clans in which severe violations of human rights occur, such as torture, beatings, sexual violence, trafficking and forced labor. In 2012 the European Court of Human Rights ruled in the landmark case *Hirsi Jamaa v. Italy* that Italy had violated the principle of *non-refoulement* when the Italian coastguard stopped a ship of migrants on the high sea hailing from Somalia and Eritrea and summarily returned it to Libya. According to various reports, during that period no rule governing the protection of refugees was complied with by Libya and given that the situation was well known and easy to verify on the basis of multiple sources, the Italian authorities knew or should have known that irregular migrants would be exposed in Libya to treatment contrary to the ECHR (par. 131). The MOU was tacitly renewed in 2020.

In 2018, another shift on migration flows took place whereby the Western Mediterranean Route through Morocco and Spain became the primary point of entry to European territory. Spain reactivated its readmission agreement with Morocco (signed in 1992 but not fully implemented) and EU provided more funds to Morocco directly and Rabat process to curb illegal migration. In addition, Spain has a barbed-wire fence around Ceuta and Melilla, the Spanish enclave cities in North Africa. In 2014, a group of several hundred migrants from Sub-Saharan Africa scaled the fences surrounding the city of Melilla where they were apprehended by the Guardia Civil who handcuffed them and took them back to the other side of the border. In 2020, the Grand Chamber of the ECtHR ruled that the above situation constituted a collective expulsion under Protocol 4 to the ECHR, however there was no breach of the Convention from the Spanish authorities since the deportees have caused the attributable conduct by their own

culpable conduct while they did not make use of the official (legal) entry procedures offered by Spain (*N.D. and N.T. v. Spain*).

2. Questions open for discussion [to be potentially addressed in the Workshop]

Externalisation is currently at the top of the EU agenda on migration. In the new EU Pact on Migration and Asylum the reinforcement of border controls and securitization of EU external borders is a key priority in order to secure the Schengen acquis. Cooperation with third states is a key component. However, EU's outsourcing policy has serious implications on human rights of migrants who remain trapped in a factual and legal limbo. The Project will likely shed some light on existing loopholes.

a) Financial assistance and capacity building in third countries: what is the level of control over third states' migration policies?

The proliferation of different types of support offered to third states on migration control by EU States complicates issues of accountability for international wrongful acts. In 2020, Germany has decided to financially support Turkey in restoring the operational capability of its coast guard. When States provide financial or material assistance or training to third states they do not exercise jurisdiction in accordance with international human rights law. Even when immigration officers or other officials are posted to another country as advisers, there will be no exercise of jurisdiction unless the authorities of the territorial state can be shown to act under the direction and control of the sponsoring state. Does it follow that the sponsoring country bears no responsibility for ensuing harms? A state which takes steps such as providing maritime patrol vessels or border control equipment, which seconds border officials, or which shares relevant intelligence or directly funds migration control efforts that assist another country to breach its *non-refoulement* or other protection obligations is taking action that can fairly be characterized as within the ambit of aiding or assisting which raises issues of responsibility.

b) T-193/16 - NG v European Council Order of the General Court (First Chamber, Extended Composition) of 28 February 2017: a non-liability disclaimer by the EU for human rights violations arising under the EU-Turkey 'Agreement'?

On 18 March 2016 in Brussels, while the Heads of the European States were present for a meeting of the European Council, they had a meeting with the Turkish President

to discuss within the EU-Turkey Joint Action Plan further steps for active cooperation concerning migrants who were not in need of international protection, by preventing them from travelling to Turkey and the European Union, by ensuring the application of the established bilateral readmission provisions and by swiftly returning migrants who were not in need of international protection to their countries of origin. At the end of the meeting, a press release was uploaded on the European Council's website with the text of the EU-Turkey Statement enumerating actions agreed between the EU and Turkey. In the whole document, there was a clear reference to the EU as the first party of this 'Agreement' and Turkey as the counterpart. In the Press, it was presented as an 'EU-Turkey Agreement'. However, for the conclusion of this 'Agreement, none of the procedures established in the Treaty on the Functioning of the European Union (TFEU) for the conclusions of agreements have been followed. On 22 April 2016, a Pakistani national who entered Greece after the entry into force of the EU-Turkey Statement and risked to be returned to Turkey where he claimed he will be detained and sent back to Pakistan filed an application before the General Court asking for the annulment of the EU-Turkey Agreement concluded between European Council and Turkey. His application was dismissed as inadmissible due to the lack of jurisdiction of the Court to rule on the lawfulness of an international agreement concluded by the Member States. The Court accepted that he Heads of State of the EU Member States conferred upon the President of the European Council a task of representation and coordination of negotiations with the Republic of Turkey in their name and that the term 'EU' in the Press Release must be understood in this journalistic context as referring to the Heads of State of the EU Member States (Order of the General Court of 28 February 2017, NF v. the European Council, ECLI:EU:T:2017:128).

Given the above, EU has subsequently exonerated itself from liability for any harm caused under the EU-Turkey Statement. Therefore, EU Member States bear responsibility in the event of international wrongful acts. But what is the nature and the legal effects of this 'Agreement' if it is not a proper international agreement between an IO and a State in order to engage responsibility of the parties? International rules on treaty interpretation (Article 31 of the Vienna Convention on the Law of Treaties) are applicable. Irrespectively of the CJEU ruling, academics have argued that the EU-Turkey Statement is indeed an international agreement given its content, the intention of the parties and the legal effects deriving from its signing.

Another aspect to be taken into consideration is the Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement. The issue in this case was

whether the European Commission should carry out a human rights impact assessment in the context of an agreement signed between the EU and Turkey on 18 March 2016. The Commission argued that such an assessment is not required for the agreement because of its political nature. The Ombudsman took the view that the political aspect of the Agreement does not absolve the Commission of its responsibility to ensure that its actions are in compliance with the EU's fundamental rights commitments. The Ombudsman believes that the Commission should do more to demonstrate that its implementation of the agreement seeks to respect the EU's fundamental rights commitments and suggested that the Commission explicitly refers to human rights implications in its future reports on the Agreement.

c) Frontex return flights: who is monitoring and who is to blame?

Frontex, the European Border and Coast Guard Agency, has become an essential actor in migration enforcement on the European level, taking on new responsibilities and tools related to returns of people who have exhausted all legal avenues to legitimise their stay within the EU. Frontex assists Member States upon their request or on the agency's proposal in carrying out return operations through: (1) organising or coordinating both national and joint return operation; (2) assisting Member States in both forced return operations and in voluntary departures; and (3) organising or coordinating collecting return operations. Based on its new Regulation 2019/1896, the agency's mandate expanded significantly to include all aspects of return procedures. Frontex is able to technically and operationally support Member States in certain pre-return and return-related activities e.g. identification, interpretation services, acquisition of travel documents, advice on the implementation of the Return Directive. For this purpose, the agency will deploy its own staff, comprising return escorts, return specialists and return monitors from the ranks of a 10.000 standing corps by 2027. It will also establish liaison officers in third countries, with priority being awarded to the "fight against illegal immigration and the return of returnees" to those states. The recruitment by Frontex of its own statutory staff that will also be deployed in extraterritorial operations (outside the EU) makes accountability issues more complicated.

All return operations must be monitored in accordance with EU law, and a forced-return monitor is present to monitor compliance with fundamental rights (Article 50(3) of Regulation 2019/1896). In a case of an irregular situation that potentially involves the violation of fundamental rights, the FRM should file a Serious Incident Report to the Agency. Additionally, the FRM delivers a report to Frontex and to all Member States

involved. These monitors so far came from a pool of forced-return monitors and were recruited from Member States.

This monitoring system has received much criticism as not meeting the requirements of an effective monitoring system according to Article 8 par. 6 of the Return Directive 2008/115. Frontex operations being monitored by Frontex staff itself cannot be considered as an independent external monitoring mechanism. To boost transparency, the new Regulation provides for an annual report of the Fundamental Eights Officer who has the power to conduct investigations into any of Frontex activities to monitor their compliance with fundamental rights, including the power to carry out on-the-spot visits to return operations (Article 109(2)). The Fundamental Rights Officer will be supported by a corps of 40 Fundamental Rights Monitors to enhance his/her capacity (ongoing recruitment).

Regarding Frontex's own accountability, some progress is made based, among others, on European Ombudsman's recommendations. In compliance with the European Ombudsman's recommendation (Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex), Frontex has set up a Complaints Mechanism for dealing with individual complaints about infringements of fundamental rights in all Frontex-labelled joint operations**.** Frontex's Fundamental Rights Officer is in charge of the mechanism. In November 2020, the European Ombudsman has opened an inquiry to look into assessing the effectiveness and transparency of Frontex's Complaints Mechanism for those who believe their rights have been violated in the context of Frontex border operations, as well as the role and independence of Frontex's Fundamental Rights Officer. With respect to return flights, the European Ombudsman had already addressed specific recommendations to Frontex for improvements regarding the transparency of the Joint Return Operations work, its Code of Conduct in areas such as medical examinations and the use of force and the promotion of an independent and effective monitoring of Joint Return Operations that by their very nature, have the potential to involve serious violations of fundamental rights (Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

At the EU political level, the debate on a revised Common European Asylum System has reached a dead-end lately. The European Commission by its recent proposal on a New Pact on Migration and Asylum underlined the security pillar in order to reach consensus among Member States. Frontex has a key role to play in the EU regaining credibility over an integrated border management. The European Commission in its

Communication on a New Pact on Migration and Asylum (COM/2020/609 final) stated that Frontex will help the EU return policy and cooperation with third parties becoming operational. "*A common EU system for returns is needed which combines stronger structures inside the EU with more effective cooperation with third countries on return and readmission. It should be developed building on the recast of the Return Directive and effective operational support including through Frontex*.".

d) Legal pathways to migration exonerating a state from responsibility

In the ECtHR case *ND and NT v. Spain*, the applicants contended that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance. In their view, this situation reflected a systematic policy of removing migrants without prior identification, which had been devoid of legal basis at the relevant time. They specified that the present applications did not concern the right to enter the territory of a State but rather the right to an individual procedure in order to be able to challenge an expulsion. They relied in this regard on Article 4 of Protocol No. 4 to the Convention, which provides: "Collective expulsion of aliens is prohibited." The ECtHR noted that in this case it is called upon for the first time to address the issue of the applicability of article 4 of Protocol 4 to the immediate and forcible return of aliens from a land border, following an attempt by a large number of migrants to cross that border in an unauthorised manner and *en masse*. Pursuant to its judgments in *Hirsi Jamaa*, *Sharifi*, and *Khlaifia*, the ECtHR noted that the decisive criterion for art. 4 of Protocol 4 is the absence of a reasonable and objective examination of the particular case of each individual alien of the group. Article 4 of Protocol 4, in this category of cases, is aimed at maintaining the possibility, for each of the aliens concerned, to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3 – in the event of his or her return and, for the authorities, to avoid exposing anyone who may have an arguable claim to that effect to such a risk. For that reason, article 4 of Protocol 4 requires the State authorities to ensure that each of the aliens concerned has a 'genuine and effective possibility of submitting arguments against his or her expulsion'. In fact, the availability of genuine and effective access to means of legal entry satisfies the above criterion. Spain provided two legal pathways: humanitarian visas for third country nationals at Spain's diplomatic and consular representations in the applicants' country of origin or transit or else in Morocco and applying for international protection at the Spanish border post of Melilla (Beni Enzar border crossing point). The Court did not find that the applicants had any "cogent reasons" not to use these border procedures, noting that the applicants also had access to Spanish

embassies and consulates to have their file examined under a specific procedure for international protection or to apply for a visa. What is more provocative is that the Court shifted the responsibility from the State to individuals who are found 'guilty' for using force to cross borders and therefore, the lack of an individual removal decision by the Spanish authorities can be attributable to their own culpable conduct.

Another important dictum of the Court regarding exoneration of States responsibility from outsourcing activities is the opinion of the Court that "even assuming that difficulties existed in physically approaching this border crossing point on the Moroccan side, no responsibility of the respondent State for this situation has been established before the Court" (par. 221). The relevant conduct was exclusively attributable to Moroccan authorities and Spain could not bear any responsibility for their conduct, despite the fact that the two States officially cooperate in migration control.

In a nutshell, the judgement in the case of *N.D. and N.T. v. Spain* raised more questions than answers to legitimate concerns of both States and individuals regarding accountability for human rights violations during border control activities. The judgement failed to consider that contemporary bordering policies and practices by States may be found anywhere, irrespective of where the actual territorial border and dedicated 'crossing points' may actually supposed to be. 'Borders' are not so much about specific physical places or clearly demarcated territorial lines or points. Bordering practices are increasingly aimed at re-territorialising, delocalising, externalising or outsourcing the management and surveillance of mobile individuals profiled as risky or qualified as undesirable. One of the most decisive challenges pertaining to these changing borders is the right of individuals to know where these borders are and have access to effective remedies when their human rights are at stake (Sergio Carrera, The Strasbourg Court Judgment N.D. and N.T. v Spain – A Carte Blanche to Push Backs at EU External Borders?, European University Institute Working Paper RSCAS 2020/21).