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Controlling immigration beyond the External Borders of the EU

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Policy Brief

Controlling Immigration at and beyond the External Borders of the EU

By Efthymios Papastavridis*

I. Introduction

Long before the eruption of the 'refugee crisis' in Europe in 2015, European States and the European Union (EU) itself have taken a host of measures with a view to responding to the influx of migrants in Europe: *from* sending immigration liaison officers to the countries of origin or transit of migrants and imposing sanctions on private carriers who transfer undocumented migrants *to* engaging in interception operations on the high seas and outsourcing to third States the responsibility of either containing migrants or processing asylum claims.[1] Such 'preventive' means have served and still do a twofold purpose: on the one hand, they thwart people from leaving their places of origin and by this they deny their access to protection or settlement. Immigration liaison officers, carrier sanctions and maritime interception operations obviously serve this purpose. On the other hand, a second set of 'preventive' measures comes into play when these people manage, at last, to arrive at the borders of their 'Promised Land'. These measures aim either to deny their claims of protection or their claims for settlement as such or shift the responsibility of handling these claims to other States.

This policy has been enhanced in recent years by a mixture of several 'push-back' and 'pull-back' policies. It is noteworthy that up to very recently the scholarly discussion on migration control had mainly focused on the illegality of 'push-backs' of migrant boats by EU Member States to their point of departure.[2] By contrast, today, the

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[1] See in general M. den Heijer, Europe and Extraterritorial Asylum (Hart, 2012); V. Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017).

[2] See, e.g., G. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement'*, (2011) 23 *International Journal of Refugee Law*, 443–457; J. Koppens, 'Interception of Migrant Boats at Sea' in V. Moreno-Lax & E. Papastavridis (eds.), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights* (Leiden: Martinus Nijhoff Pub. 2016), 199-221; Th. Gammeltoft-Hansen and Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', (2015) 53 *Columbia Journal of Transnational Law* 235.

increasing incidence of departure prevention or 'pull-backs' by third countries in the service of EU Member States has vehemently come to the fore.[3] In particular, such measures raise grave concerns with respect to the right to leave any country, including one's own, as well as the prohibition of refoulement and the right to life, especially in the context of Search and Rescue (SAR) activities.

Of central importance in these policies is the EU; indeed, the organization—via the European Border and Coast Guard Agency (FRONTEX),[4] the *EUNAVFOR Med Operation Sophia* and now *Irini*,[5] and individual Member States—orchestrates the relevant action, such as the deployment of a standing corps at the EU borders, the establishment of joint operations at land, air, and sea, the adoption of working arrangements with third countries and the dispatch of EU immigration liaison officers to those countries, the funding and the provision of assets for pull-backs and border-enforcement capacity of transit countries etc.[6] Such policies may also assume another institutional mantle when the EU Pact on Migration and Asylum, currently under negotiation, is finally adopted.[7]

This Brief aims to provide a short overview of the key measures employed by the EU and its Member States to counter irregular migration and control the borders of the Union, with emphasis placed upon extraterritoriality, i.e. measures tailored to apply beyond EU borders. In so doing, the Brief sets out the main legal challenges that these measures pose and considers their legality under international law.

Accordingly, the remainder of this Brief is structured as follows: Section II discusses the new developments concerning the European Border and Coast Guard Agency (FRONTEX) and its new role in the European integrated border management.

[3] See inter alia N. Markard, The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries(2016) 27 *EJIL* 591-616; V. Moreno-Lax and M. Giuffré, "The Rise of Consensual Containment: From "Contactless Control" to 'Contactless Responsibility' for Migratory Flows", in S. Juss (eds), *The Research Handbook on International Refugee Law* (Edward Elgar Publishing, 2019), 82-108; D. Ghezelbash et al. 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67 *International and Comparative Law Quarterly*, 315–351.
[4] See more information at <https://frontex.europa.eu/>
[5] See https://www.operationirini.eu/ and for scholarly commentary on *EUNAVFOR Sophia* see inter alia E. Papastavridis, 'EUNAVFOR *Operation Sophia* and the International Law of the Sea', (2016) 2 *MarSafeLaw Journal* (2016), 57-72.
[6] See inter alia V. Moreno-Lax, D. Ghezelbash, and N. Klein, 'Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia' (2019) 32 *Leiden Journal of International Law,* 715–740
[7] For more information see at <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en>

This is followed in Section III by an analysis of the measures that aim at controlling or 'containing' immigrants at the States of origin or transit (e.g. carrier sanctions, visa codes, immigration liaison officers, EU-Turkey statement), outsourcing thus the responsibility for immigration and asylum to third States or private entities. The next Section (Section V) concerns the ever-more challenging matter of search and rescue at sea, including the criminalization of the NGOs rescuing migrants in the Mediterranean Sea. Section VI examines the current and future developments related to maritime domain awareness and the use of earth observations tools to this end. Section VII offering some tentative remarks and ideas for further research concludes.

II. European Border and Coast Guard Agency: A shift towards a shared responsibility for integrated border management

Evidently, the main Agency, through which the EU regulates border management and the control of immigration in the Member States, is the European Border and Coast Guard Agency (FRONTEX).[8] In 2004, the EU established the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)[9] with the view to ensuring Member State operational cooperation at the EU's external borders and curbing flows of irregular migrants in the framework of an EU common policy. Frontex's initial mandate was that of a specialist EU body responsible for managing operational cooperation at the EU's external borders. It supported Member States' border control activities. According to the relevant Frontex Regulation, Frontex must carry out risk analysis so that the EU and its Member States can improve the management of the external borders; provide training at the EU level for national

[8] Scholarly literature on FRONTEX and its activities abounds. See inter alia J. J. Rijpma, Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union, Doctoral Dissertation, EUI Florence (2009), R. Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU* (Cambridge: Cambridge University Press, 2016)); A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in B. Ryan and V. Mitsilegas (eds.), Extraterritorial Immigration Controls: Legal Challenges (Leiden: Martinus Nijhoff, 2010), pp. 229–256; M. Fink, *FRONTEX and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford: Oxford University Press, 2018); E. Papastavridis, 'Fortress Europe and FRONTEX: Within or Without International Law?' (2010) 79 *Nordic Journal of International Law,* 75.

[9] See Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union (FRONTEX) (26/10/2004), OJ L 349, 25/11/2004 (hereinafter: FRONTEX Founding Regulation).

instructors of border guards; develop relevant scientific research; manage lists of technical equipment provided by the Member States; provide assistance in organising joint return operations; and facilitate operational cooperation between Member States and third countries. In 2011, the Frontex Regulation was amended by Council Regulation (EU) 1168/2011 so as to enhance the role of Frontex and bring it into line with a policy objective of introducing an integrated management of the external borders of the Member States.[10]

In the immediate aftermath of the 2015 'refugee crisis' , amongst the measures decided by the EU was the increase of the resources and the enhancement of the operational capabilities of FRONTEX.[11] Hence, the Agency was renamed as European Border and Coast Guard Agency by Regulation (EU) 2016/1624 of 14 September 2016, which significantly broadens up its mandate. The latest amendment of the Frontex mandate occurred when the Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard came into force.[12]

Under the new regime, the mandate of FRONTEX is inexorably linked with the concept of 'European integrated border management'. As Article 1 of the EBCGA Regulation sets out, '[t]his Regulation establishes a European Border and Coast Guard to ensure European integrated border management at the external borders with a view to managing those borders efficiently in full compliance with fundamental rights and to increasing the efficiency of the Union return policy'.[13] In short, 'European integrated border management' consists of the following components: border control; search and rescue operations; risk analysis; information exchange and cooperation between Member States and between Member States and FRONTEX; inter-agency cooperation among the national authorities in each Member State which are responsible for border

[10] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European agency for the management of operational cooperation at the external borders of the Member States of the European Union OJ 2004 No. L349, p. 1 as amended by Regulation (EC) 863/2007 of the European Parliament and the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers OJ 2007 No. L199, p. 30 and by Regulation (EU) 1168/2011 of the European Parliament and the Council of 25 October 2011 amending Council Regulation (EC) 2007/2004 establishing a European agency for the management of operational cooperation at the external borders of the Member States of the European Union OJ 2011 No. L304, p. 1.

[11] See Conclusions of the Special Meeting of the EU Council of 23 April 2015 at <http://www.consilium.europa.eu/en/meetings/european-council/2015/04/23/>

[12] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 PE/33/2019/REV/1 OJ L 295, 14.11.2019, p. 1–131 (hereinafter: EBCGA Regulation).

[13] Ibid, Article 1(1).

control; cooperation among the relevant Union institutions, bodies, offices and agencies; cooperation with third States; technical and operational measures within the Schengen area which are related to border control; the return of third-country nationals who are the subject of return decisions issued by a Member State; the use of state-of-the-art technology including large-scale information systems; solidarity mechanisms et al.[14]

Illustrative of the current enhanced role of FRONTEX is the following: while the older FRONTEX Regulations explicitly acknowledged that the responsibility for the control and surveillance of external borders lies with the Member States, and the Agency was established just to facilitate and render more effective the application of existing and future Community measures relating to the management of external borders,[15] Article 7 EBCGA Regulation enunciates that 'the European Border and Coast Guard *shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management,* including coast guards to the extent that they carry out maritime border surveillance operations and any other border control tasks. Member States shall retain primary responsibility for the management of their sections of the external borders'.[16]

It readily appears that when it comes to integrated border management, predominantly for immigration purposes, there is a marked shift from FRONTEX having 'complementary responsibility' to FRONTEX having 'shared responsibility' or, under exceptional circumstances, 'primary responsibility'. The 'shared responsibility' is reflected in the provisions concerning the establishment and implementation of joint operations,[17] while the 'primary responsibility' is manifest in Article 42 EBCGA Regulation, entitled 'Situation at the external borders requiring urgent action'. The latter provision stipulates that: '[w]here control of the external border is rendered ineffective to such an extent that it risks jeopardizing the functioning of the Schengen area, either because a Member State does not take the necessary measures in line with a vulnerability assessment or because a Member State facing specific and disproportionate challenges at the external borders has not requested sufficient support from the Agency or is not implementing such support, *a unified, rapid and effective*

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[14] Ibid, Article 3 (1).
[15] See e.g. Article 1 (2) of the FRONTEX Founding Regulation.
[16] Article 7 (1) of the EBCGA Regulation (emphasis added).
[17] Ibid, Articles 36 et seq.

response should be delivered at Union level. The Member State shall comply with the relevant Council Decision'.[18] Practically, this entails circumventing the sovereignty of the Member State concerned, since the decision for the deployment of the border guards will be unilaterally made at the EU level. Although this seems a very remote possibility, the point is that the European border management becomes increasingly a matter of EU competence.

In this vein, FRONTEX soon will be in a position to have its own standing corps as well as its own major technical equipment such as aircraft, service vehicles or vessels. It was in his 2018 State of the Union Address when the then President of European Union (EU), Jean-Claude Juncker, presented 3 new proposals to ensure full EU solidarity on migration and better protection of Europe's external borders. Amongst them, the Commission proposed to reinforce FRONTEX in order to correspond to the common challenges Europe is facing in combatting illicit migration and managing its borders. Such reinforcement includes the establishment of a standing corps of 10,000 operational staff by 2020, with enhanced executive powers, and the ability to rely on its own equipment, such as vessels, planes and vehicles. To this end, the Commission pledged €1.3 billion for the period 2019-2020, while under the next EU budget period 2021-2027, a total of €11.3 billion is proposed.[19] This extraordinary amount will mainly be used to purchase and operate the above-mentioned equipment as well as to increase the operational autonomy of FRONTEX to counter illicit migration and secure the EU borders, mostly EU maritime borders.

Both ideas, namely that of standing corps and of the acquisition of private assets, have been incorporated in the EBCGA Regulation, However, the time frame has been adjusted: under Annex I, the standing corps to be deployed during joint operations, rapid border interventions, return operations and return interventions, shall be up to 10,000 beyond 2027, whilst the acquisition of the technical assets[20] has been significantly delayed due the COVID-19 pandemic.

In any event, FRONTEX continues to deploy joint operations, including *Operation Poseidon* hosted by Greece and *Operation Themis in* the Central Mediterranean Sea, hosted by Italy. In so doing, both the EU and the EU Member States

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[18] Ibid, Article 42 (1) (emphasis added).

[19] EU, State of the Union 2018 Address; available at <https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf>

[20] See in this regard Article 63 EBCGA Regulation.

are obligated to adhere to rules of international as well as European Union law, including human rights law. Suffice it to say, that as provided by Article 80 EBCGA Regulation, the Agency 'shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter [of Fundamental Rights of the European Union], and relevant international law, including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child and obligations related to access to international protection, in particular the principle of *non-refoulement*'.[21] In particular, it is provided that 'in the performance of its tasks, the European Border and Coast Guard shall ensure that no person, in contravention of the principle of *non-refoulement*, be forced to disembark in, forced to enter, or conducted to a country, or be otherwise handed over or returned to the authorities of a country where there is, inter alia, a serious risk that he or she would be subjected to the death penalty, torture, persecution, or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a risk of expulsion, removal, extradition or return to another country in contravention of the principle of *non-refoulement'*.[22] This is, indeed, a broad reading of the principle of *non-refoulement,*[23] underscoring that, at least, in principle, the EU is 'taking human rights seriously'.[24]

Other applicable rules of international law in the course of joint operations at sea are those under the law of the sea, including the United Nations Convention on the Law of the Sea (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS Convention) and the International Convention on Maritime Search and Rescue (SAR Convention).[25] In accordance with Union law and those instruments, FRONTEX

[21] Ibid, Article 80 (1).
[22] Ibid, Article 80 (3).
[23] See also S.Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea', (2014) 27 *Leiden Journal of International Law*, 661,
[24] On the international responsibility of EU in the context of joint operations see inter alia E. Papastavridis, 'The EU and the Obligation of *Non-Refoulement* at Sea', in S. Trevisanut & F. Ippolito (eds.), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press: Cambridge, 2016), 236-262, Mungianu (n 8), M. Fernandez, 'The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts' in V. Moreno-Lax & E. Papastavridis (eds.), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights* (Leiden: Martinus Nijhoff Pub. 2016), 381-407.
[25] See REGULATION (EU) No 656/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 establishing rules for the surveillance of the external sea borders in the

is called to assist Member States in conducting search and rescue operations in order to protect and save lives whenever and wherever so required.

That said, it is true that often FRONTEX operations have elicited harsh criticism for its adherence to human rights standards,[26] while, very recently, FRONTEX established an evaluation committee to consider legal questions related to the Agency's surveillance of external sea borders and allegations concerning violations of human rights in the context of Joint Operation Poseidon.[27]

It is certainly interesting to see how FRONTEX will make use of these powers and whether the latter will extend further in the future, which currently appears very likely. Crucial will be the consistency of FRONTEX measures with international law, in particular international human rights law, not only 'on paper', but in practice.

III. 'Containment Measures'

EU and its Member States have employed a wide variety of measures to curb the flow of irregular migrants or asylum seekers in Europe. In addition to ensuring an 'integrated border management', as discussed above, through enhancing border controls or establishing operations on the high seas, they have incrementally resorted to 'non-entrée' or 'containment' measures, i.e. measures that aim at controlling or 'containing' future migrants at the States of origin or transit prior to arriving in Europe. In the words of Moreno-Lax and Giuffré, 'States over the world, including in the EU, have erected barriers to (mixed) migration flows, encompassing measures of *non-entrée*, such as visas, carrier sanctions, extraterritorial patrolling of blue borders, 'safe third country' devices, and accelerated removal processing, impeding legal arrival, hindering access to status determination, and fostering return. Jointly, these measures have been deemed to coalesce in a model of 'cooperative deterrence', whereby countries at different points of the displacement line align their policies, more or less

context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Preamble.

[26] See inter alia M. Gkliati Frontex Systemic Accountability in Practice - pilot: Open Society Initiative for Europe (2020); V. Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-through-Interdiction / Rescue-without Protection" Paradigm', (2018) 56 *Journal of Common Market Studies* 119-140, and 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 & J. Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (London: Routlegde, 2017), 272-293.

[27] See at <https://frontex.europa.eu/media-centre/news-release/frontex-calls-for-committee-to-consider-questions-related-to-sea-surveillance-BMieC8>

formally and directly, to repeal unwanted flows.'[28] Amongst the non-entrée measures that the authors enumerate as establishing a form of 'contactless control',[29] this Brief succinctly discusses the EU visa requirements, carrier sanctions, immigration liaison officers, and the EU-Turkey statement.

1. Visa Requirements

Visa requirements are a long-standing strategy of destination States, including EU States, to proactively prevent migration and keep certain would-be migrants far from the physical border. They have been a key instrument, alongside the passport, in controlling movement and migration by modern states since around World War I, though earlier versions exist.[30] Preventing migration at the source became the chosen approach of many States, particularly, in the 1980s and 1990s due to increased migratory pressures related to the fall of Iron Curtain, unfolding civil wars, and greater air travel.[31] As Hathaway describes the phenomenon, visas are a classic, albeit relatively *invisible*, mechanism of *non-entrée* adopted by states to prevent irregular migration.[32]

There are various types of visas worldwide, allowing states to select *who* can move.[33] Visa categories benefit different travelers: the majority are for temporary stays, some for work and study, with minimal settlement routes since the decline of settlement immigration and move towards hard-line immigration policies.

1.1. EU Visa Policy

In 1987, the European Community agreed to list fifty countries whose nationals must possess a visa when crossing the external border (the so-called 'blacklist'), aimed at curbing cross-border movement, including of asylum seekers.[34] The first unofficial

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[28] V. Moreno-Lax and M. Giuffré (n 3), 83. See also Hathaway and Gammeltoft-Hansen, '*Non-Refoulement* in a World of Cooperative Deterrence' (2014) 53 Columbia Journal of Transnational Law 235.

[29] Moreno-Lax and Giuffré, ibid, 83.

[30] For example, already in the 1920s, the US required tourists and immigrants to apply for visas at consular posts. See J. Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (2nd edn, CUP 2018), Ch. 3.

[31] D. S FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019), 59.

[32] Th. Gammeltoft-Hansen and J. C Hathaway (n 28), 244-46.

[33] See H. de Haas, K. Natter and S. Vezzoli, 'Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies' (2018) 52 *International Migration Review* 324.

[34] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340, Art 73j. See also V. Moreno-Lax, *Accessing Asylum in Europe* (n 1) 90-94.

blacklist was circulated in 1995, requiring the nationals of 73 States to obtain short-stay visas. There was no 'whitelist' of exempt States and presumably, non-listed States were deemed low risk. The lists have seen several iterations. In 1995, the blacklist increased to 110 States, to 134 in 2001, before dropping to 104 in 2018.[35] The present blacklist includes every state in Africa and most of the Middle East, Asia, Caribbean and Pacific. The current whitelist includes 63 States, made up primarily of states in the Americas, Europe, Antipodes, some Pacific islands, and wealthy parts of Asia.[36]

In 2009, the EU adopted a common visa policy (the Visa Code), which established uniform and mandatory procedures and conditions for the issuance of visas to third-country nationals for transit or short stays in the Schengen Area not exceeding mandatory procedures and conditions for the issuance of visas to third-country nationals for transit or short stays in the Schengen Area not exceeding three months in any six-month period (the so-called Schengen Visas).[37] According to 2009 Visa Code, the concept of "visa" is defined as "an authorisation issued by a Member State" with a view to, respectively, "transit through or an intended stay in the territory of the Member States and "transit through the international transit areas of airports of the Member States".[38]

The Visa Code applies to any person who must possess a visa to cross the EU's external border, except certain nationals deemed exempt, such as diplomatic passport holders. All EU states (except Ireland which has opted out) and Iceland, Liechtenstein, Norway and Switzerland have adopted these uniform requirements. Notably, the 2009 Visa Code covers temporary visits and transit. Long-term visas fall within the competence of states. As for seeking asylum, states could issue a visa with limited territorial validity (LTV) under the Visa Code on humanitarian grounds.[39]

[35] Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States [1995] OJ L 234; Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 081; Council Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2018] OJ L 303.
[36] See further information at < https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy_en>
[37] Council Regulation (EC) No 810/2009 of the European Parliament and of the Council of July 13, 2009 establishing a Community Code on Visas [2009] OJ L 243 (2009 Visa Code).
[38] See Article 2 (2) (a) and (b) of the 2009 Visa Code, ibid.
[39] Ibid, Article 25.

To facilitate the procedure and avoid gaps, the Code envisages several forms of cooperation, including one Member State representing another for collection and biometrics or also examining and issuing visas, common application centres, recourse to honorary consuls, and cooperation with an external service provider or accredited commercial intermediaries.[40]

1.2. Carrier Sanctions

Carriers are also crucial private actors in enforcing visa regimes through pre-entry checks on behalf of the State. Carrier sanctions have been codified as a compulsory control mechanism for all Schengen States since the 1990 Schengen Convention.[41] A 2001 Council Directive requires all Member States to introduce carrier sanctions legislation, specifying that fines must be minimum 3,000 and maximum EUR 5,000 per undocumented passenger, or the maximum amount of the penalty imposed as a lump sum for each infringement is not less that EUR 500 000.[42] Member States can also impose 'penalties of another kind, such as immobilisation, seizure and confiscation of the means of transport, or temporary suspension or withdrawal of the operating licence'. If they transport a migrant without the requisite documents, they are obligated to remove them and bear all expenses (until their removal).[43]

Evidently, the combination of visa requirements and carrier sanctions has a potential disproportionate impact on asylum seekers and would-be migrants, as well as stateless individuals and those without secure nationality documentation. Indeed, there is little doubt a carrier preventing a person boarding an airplane or ferry may amount to an interference with human rights law, including the right to leave, as will be subsequently discussed. Carriers not only prevent the person effectuating an illegal entry, but also obstruct their ability to leave the country they are in. Even more worrisome is the fact that these persons may fall within the definition of refugee under

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[40] Ibid, Articles 5(4), 8, 40-43, 45.
[41] See Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239 (CISA), Art 26.
[42] Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L 187/45 (Carriers Liability Directive) arts 4, 5. See Theodore Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' (2017) 19 *European Journal of Migration Law 307*; Moreno-Lax (n 1), ch 5.
[43] Carriers Liability Directive, art 3.

the 1951 Refugee Convention,[44] or of the beneficiaries of complementary protection under the EU law,[45] but due to the carrier sanctions in place they often will be denied boarding an airplane or ferry, and thus the opportunity to effectively seek and receive international protection.

That said, it must be noted that in the Preamble of the Carriers Liability Directive there is a savings clause, i.e. it is stated that 'the application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967'.[46] There are no records, however, how this works in practice. In any case, in implementing this Directive, EU Member States shall abide by the Charter of the Fundamental Rights of the European Union and, in particular, Article 18 on the Right to Asylum,[47] as well as their individual human rights obligations (e.g. under ECHR).

A significant consideration, however, here is that the acts of private carriers are not attributable to the EU Member States under international law,[48] and, unless the private carriers are not acting under the instructions, direction or control of the State concerned,[49] the latter's responsibility cannot be established for acts, such as denial of boarding in an airplane. Nevertheless, this is without prejudice to the parallel responsibility of that State for any ostensible failure to meet its positive obligations under international law in this regard.[50]

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[44] Article 1 A (2) Refugee Convention defines the notion 'refugee' as a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it; see Convention Relating to the Status of Refugees, 189 UNTS 150, entered into force 22 April 1954.

[45] See Council 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), OJ 2011 No. L337/9.

[46] Carriers Liability Directive, Preamble.

[47] '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 establishing the European Community', Article 18 of the Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1 [hereinafter: EUCFR]. For commentary see S. Peers et al. (eds.), The EU Charter of Fundamental Rights: A Commentary (Oxford: Hart Publishing, 2014).

[48] See Articles 4-12 of ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Official Records; 56th Session, Supp No 10 at UN Doc A/56/10 at 31 (hereinafter: ARSIWA).

[49] Ibid, Article 8.

[50] Arguably, States are not only under a negative obligation not to 'refouler' a person to a territory that he/she will face persecution, torture et al, but also under a positive obligation to ensure that the person will not be subjected to any *refoulement* practice. Thus, if EU Member States by their conduct knowingly

1.3.Immigration Liaison Officers

The EU has also recently created a network of Immigration Liaison Officers (ILOs) deployed by Member States and other EU institutions to third states to engage in a range of migration activities, including working with carriers at major airports.[51] Their mandate is determined by national laws and agreements concluded with third states.

These ILOs will also cooperate with the respective FRONTEX ILOs. As provided in Article 77 of the EBCGA Regulation, '[w]ithin the framework of the external action policy of the Union, priority for the deployment of liaison officers shall be given to those third countries which, on the basis of a risk analysis, constitute a country of origin or transit regarding illegal immigration. The Agency may receive liaison officers posted by those third countries on a reciprocal basis […] The tasks of the Agency's liaison officers shall include establishing and maintaining contacts with the competent authorities of the third country to which they are assigned with a view to contributing to the prevention of and fight against illegal immigration and the return of returnees, including by providing technical assistance in the identification of third-country nationals and the acquisition of travel documents. Such tasks shall be carried out in compliance with Union law and shall respect fundamental rights. The Agency's liaison officers shall coordinate closely with Union delegations, with Member States in accordance with Regulation (EU) 2019/1240 and, where relevant, with CSDP missions and operations as set out in point (j) of the second subparagraph of Article 68(1)'.[52]

As a matter of international law, the exact authority and powers of the ILOs will heavily depend upon the agreement with the third State concerned, since the latter's consent is *sine qua non* for the exercise of any enforcement action in its territory. Yet, in cooperating with the private carrier involved, and with the connivance of the authorities of the territorial State, the ILOs may effectively deny the protection of the persons concerned, including the right to leave their country or even the principle of

allow private carriers to engage in such practice, there is room for an argument of a violation of international law. On positive obligations and the concurrent responsibility of the EU for refoulement see E. Papastavridis, 'The EU and the Obligation of *Non-Refoulement* at Sea' (n 24), 257 et seq.

[51] Council Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers [2019] OJ L 198 (ILOR). See Commission Staff Working Document, Evaluation of the Council Regulation (EC) 377/2004 on the Creation of an Immigration Liaison Officers Network SWD(2018) 197 final, 7-9. See Moreno-Lax (n 1) 133-142.

[52] Article 77 (2) and (3) EBCGA Regulation.

non-refoulement under international human rights law. In such cases, these acts shall be directly attributable to the States concerned in accordance with Article 4 ARSIWA,[53] or even the EU in respect of the FRONTEX ILOs.[54] Also, in these scenarios, the shared responsibility of other actors should not be precluded:[55] first, the responsibility of the territorial State for violation of positive obligations under international human rights law, and second, the derivative responsibility of the EU under international law, in case the ILO's conduct is attributed to the State of its nationality, but its actions are effectively coordinated by the EU.[56]

1.4. Containment Measures under International Law: The Right to Leave and the Principle of *Non-Refoulement*.

Visa refusals and conduct of ILOs or private carriers may give rise to various international legal questions, especially with respect to the right to leave one's country and the principle of *non-refoulement* under international human rights law.

Shortly, the right to leave applies to everyone and is a right to leave any country, including one's own.[57] It falls within the broader right to freedom of movement, which

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[53] 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 aterritorial unit of the State'; Article 4 ARSIWA.

[54] Should the conduct in question be committed by the FRONTEX ILOs, operating in the third State pursuant to an arrangement between FRONTEX and that State, Article 6 of the ILC Articles on the Responsibility of International Organizations may find application: 'the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization'; see Article 6 of the Draft Articles on the Responsibility of International Organizations (2011); ILC Report, Sixty-Third Session, UNDoc. A/66/10 (2011), pp. 50–170 (hereinafter: ARIO); available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20Articles/9_11_2011.pdf.

[55] On shared responsibility under international law see A.Nollkaemper and I. Plakokefalos, *Principles of Shared Responsibility in International Law: an Appraisal of the State of* Art (CUP, 2014).

[56] In casu, EU may incur responsibility for aiding or assisting the wrongful conduct of its Member States in accordance with Article 14 ARIO, which provides that [a]n international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization'; ibid.

[57] On the right to leave see in general: R. Higgins, 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country' (1973) 49 International Affairs 341; H. Hannum, *The Right to Leave and Return in International Law and Practice* (Nijhoff 1987); L. B Sohn and Th. Buergenthal, *The Movement of Persons Across Borders* (American Society of International Law 1992); G. S Goodwin-Gill, 'The Right to Leave, the Right to Return and the Question of the Right to Remain' in V. Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1996); C. Harvey and R. P Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 International Journal of Refugee Law 1; J. McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011)

includes three distinct rights: the right to move freely within a country and choose one's place of residence therein; right to leave any country; and right to return to one's own country. The right to leave any country including one's own is enshrined in most major human rights instruments, having its origins in Article 13 (2) of the non-binding 1948 UN Declaration on Human Rights.[58] Amongst them, reference should be made to Article (2) of the International Covenant on Civil and Political Rights (ICCPR), which sets out that 'Everyone shall be free to leave any country, including his own'.[59] This right is also enshrined in Article 2(2) Protocol 4 of the European Convention on Human Rights, which provides: 'Everyone shall be free to leave any country, including his own';[60] as well as in Articles 22(2) and (3) of the American Convention on Human Rights;[61] Article 12(2) of the African Charter on Human and Peoples Rights[62] *et al.*

Significantly, the right to leave in all the above instruments is not absolute; for example, Article 12(3) ICCPR provides: 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'. Similar restrictions on the right to leave are found in many other international conventions.

As accepted by the ICJ, the General Comments of the Human Rights Committee (HRC) have great weight in the interpretation of the rights under the ICCPR.[63] Thus, according to General Comment No. 27 on the Right to Leave, '[f]reedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country … Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the

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12 *Melbourne Journal of International Law* 27; D. Kochenov, 'The Right to Leave Any Country Including Your Own in International Law' (2012) 28 *ConnJInt'l* L 43; M. Paz, 'The Incomplete Right to Freedom of Movement' (2017) 111 *American Journal of International Law* 514; M. Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 *MichJInt'l* L 21.

[58] Article 13(2) Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

[59] Article 12 (2) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[60] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[61] American Convention on Human Rights (Pact of San José) (entered into force 18 July 1978) OAS Treaty Series No 36 (1969)

[62] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

[63] ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) Case 103, Judgment, 30 November 2010* at para 66.

scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State'.[64]

Given the potentially far-reaching scope of restrictions, the Comment underscores: '[r]estrictions must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed. The laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution'.[65] It goes on to provide: [I]t is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[66]

This makes clear that restrictions must be based in law and meet the proportionality test, The HRC reiterates that States are obligated to report on restrictions, drawing attention to carrier sanctions for transporting undocumented individuals. Indeed, the HRC has expressed concern about the effect of carrier sanctions and pre-frontier arrangements on the right to leave, requesting state parties include information in their reports on carrier sanctions and other rules and measures adversely affecting the right so it can assess compatibility.[67]

In the ECHR context, the right is protected under Article 2 (2) Protocol 4, ratified by the majority of the Member States of the Council of Europe -not Greece- and has given rise to numerous cases before the European Court of Human Rights (ECtHR). The leading case on the right to leave is *Stamose v Bulgaria*, where for the first time the ECtHR considered a travel ban designed to prevent breaches of foreign immigration laws.[68] The applicant, a Bulgarian national, had been banned from leaving Bulgaria for two years and had to surrender his passport due to breaches of US immigration laws. The prohibition was requested by the US embassy. The ECtHR did

[64] Human Rights Committee 'General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, p. 8.
[65] Ibid, 13/
[66] Ibid, 14.
[67] ibid [10]. See also HRC 'Concluding Observations: Austria' (19 November 1998) UN Doc CCPR/C/79/Add.103 [11] where th
[68] *Stamose v Bulgaria* App no 29713/05 (ECtHR, 27 November 2012).

not make a finding on whether these objectives pursued the legitimate aims of maintenance of *ordre public* or the protection of the rights of others, named by the Court. Rather, the Court held that 'even if it were prepared to accept' that the interference pursued these aims, the travel ban failed the 'necessary in a democratic society' test and its proportionality requirement.[69] A blanket and indiscriminate measure preventing 'the applicant from travelling to any and every foreign country on account of his having committed a breach of the immigration laws of one particular country' could hardly be proportionate.[70] The Court held that while it may in *compelling* situations accept restricting the right to leave to prevent breaches of foreign immigration laws as legitimate, such restrictions will not be necessary where they are automatic and disregard individual circumstances.

Also, as has already been mentioned, such containment practices may also interfere with the principle of *non-refoulement* under international law. The principle of *non-refoulement* is regarded as one the fundamental principles of international law, both treaty and customary.[71] It was primarily enshrined in Article 33(1) of the Refugee Convention (1951),[72] which prescribes that '[n]o 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'.[73]

It is evident that in order to ensure compliance with the obligation of *non-refoulement*, a State party is under the obligation to establish an adequate method of ascertaining to whom it owes protection obligations.[74] The UNHCR has suggested that

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[69] Ibid, para 32.
[70] Ibid, para 33.
[71] On this principle see the excellent treatise on the issue by Sir E Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller *et al* (eds), *Refugee Protection in International Law* (2001) 87 [hereinafter: Lauterpacht & Bethlehem] and C Wooters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009). See on the customary nature of the principle in UNHCR, *Note on International Protection,* UN Doc A/AC.96/951 (2001), at 116.
[72] On the principle of non-refoulement under refugee law in particular, see R.M. Wallace, The Principle of Non-Refoulement in Refugee Law', in V. Chetail & C. Bauloz (eds.), *The Research Handbook on International Law and Migration* (Edward Elgar, 2014), 417 and W. Kälin *et al,* 'Article 33 para. 1' in A. Zimmerman (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP, 2011).
[73] See Article 33 (1) of the 1951 Refugee Convention (n 44).
[74] As the UNHCR explains, '[f]air and efficient procedures are an essential element in the full and inclusive application of the Convention. They enable a State to identify those who should benefit from international protection under the Convention…, UNHCR, Global Consultations on International Protection, 2nd Mtg, 'Asylum Processes (Fair and Efficient Asylum Procedures)', EC/GC/01/12 (31 May 2001).

this would require *inter alia* that a refugee claimant be afforded ‘the opportunity to present evidence’,[75] ‘receive guidance and advice on the procedure and have access to legal counsel’, have access to ‘qualified and impartial interpreters where necessary’,[76] receive a written decision[77] and ‘have the right to an independent appeal or review against a negative decision’.[78]

The obligation of *non-refoulement* has also found expression (either explicit or implicit) in a number of international human rights treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[79] the ICCPR,[80] and the ECHR.[81] Noteworthy is that, apart from the ECHR, all EU Member States have signed and ratified both the ICCPR and the CAT.

In the context of human rights law, the principle of *non-refoulement* is absolute and non-derogable. It prevents extradition, expulsion, or removal in any manner whatsoever.[82] Moreover, in contrast to the principle in the refugee law context, which is focused on asylum-seekers, *non-refoulement* in the human rights law context is not predicated on any given status of the individuals at risk or more importantly, whether these individuals have crossed a border.[83] Therefore, it applies to all persons compelled to remain or return in a territory where substantial grounds can be shown for believing

[75] *Ibid.,* 12 (h)
[76] *Ibid.,* 12 (g).
[77] *Ibid.,* 13 (o).
[78] See Executive Committee of the High Commissioner’s Programme (ExCom) Conclusions Nos. 8, 28, 85 and UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (1979, reedited 1992), HCR/IP/4/Eng/REV.1; available at http://www.unhcr.org/3d58e13b4.html>. See also UNHCR, *Fair and Efficient Asylum Procedures: A Non- Exhaustive Overview of Applicable International Standards*, (Geneva: UNHCR, 2 Sept. 2005), available at: <www.unhcr.org/refworld/pdfid/432ae9204.pdf> and A. Francis, ‘Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing’ (2008) 20 *International Journal of Refugee Law* 273-313.
[79] See article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 *U.N.T.S.* 85; See also with respect to migration and the application of the CAT extraterritorially the very interesting case of Committee against Torture, J.H.A. v. Spain (Marine I), No. 323/2007, 21 November 2008, par. 8.2 and for a comment see K. Wouters, M. Den Heijer, ‘The Marine I Case: A Comment’, (2009) 21 *International Journal of Refugee Law* 31.
[80] See articles 6 and 7 of the ICCPR.
[81] See article 3 of the ECHR. See *inter alia Soering v UK* (1989) 98 ILR 270, para 88; *Ahmed v Austria* (1997) 24 EHHR 278, paras 39–40 *Saadi v Italy* (Appl. No. 37201/06), Grand Chamber, Judgment of 28 February 2008 and M. Den Heijer, ‘Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights’ (2008) 10 *European Journal of Migration and Law* 277-314.
[82] See Lauterpacht & Bethlehem, at 162.
[83] Ibid, at 158. *Cf.* the *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport (UNHCR Intervening)* [2005] 2 AC 1 [2004] UKHL 55

that they would face a real risk of being subjected to torture or cruel, inhuman, or degrading treatment.

In light of the foregoing, the principle of *non-refoulement* under international human rights law finds application to all ‘containment’ measures taken in the States of origin and transit, notwithstanding that on some occasions the persons concerned would not qualify as ‘statutory refugees’, i.e. as falling within the ambit of the 1951 Refugee Convention, since they would not have crossed an international boundary.

In any case, a preliminary yet fundamental question would be whether the persons concerned were within the ‘jurisdiction’ of the State,[84] since only then the latter State would have been under an obligation to secure their rights under the relevant instrument. In other words, the issue of jurisdiction is a threshold requirement in the ECHR or the ICCPR; the question of State responsibility would arise only after the ECtHR or the HRC respectively is satisfied that the matters complained of are within the jurisdiction of that State.[85]

Accordingly, the term jurisdiction under ECHR ‘has been understood in the extraterritorial context as a connection between the State, on the one hand, and either the territory in which the relevant acts took place—referred to as a *spatial or territorial* connection—or the individual affected by them—referred to as a *personal or individual,* or because of the type of State action involved, *State-agent-authority* connection’.[86] In the same vein, the ECHR Guide to Article 1 acknowledges that a State’s jurisdiction outside its own border can primarily be established on the basis of the power (or control) actually exercised over the person of the applicant (*ratione personae* control) or on the basis of control actually exercised over the foreign territory in question (*ratione loci* control).[87]

The spatial model of jurisdiction was famously articulated in the *Loizidou* case dealing with Northern Cyprus,[88] and applies to situations in which, as a consequence of

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[84] See e.g. Article 1 ECHR: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.

[85] *I. Karakaş and H. Bakırcı,* ‘Extraterritorial Application of the European Convention on Human Rights’, in A. van Aaken and I. Motoć (eds), *The European Convention on Human Rights and General International Law* (2018), 112, 113

[86] R. Wilde, ‘Compliance with Human Rights Norms Extraterritorially: Human Rights Imperialism?’, in L. Boisson de Chazournes and M. Kohen (eds), *International Law and the Quest for its Implementation, Liber Amicorum Vera Gowlland-Debbas* (2010), 319, 324

[87] ECHR, Guide on Article 1 of the European Convention on Human Rights (Updated on 31 August 2019), p. 13, available at https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf.

[88] *Loizidou v. Turkey*, App. No. 15318/89 (preliminary objections) para. 62 (Feb. 23,1995): ‘Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise

lawful or unlawful military action, a State exercises effective control of an area outside that national territory. 'The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration'.[89] This notion of jurisdiction has similarly been applied in the contexts of Transnistria (Moldova),[90] and Nagorno-Karabakh (Azerbaijan).[91]

With respect to the personal model, it is widely acknowledged that the exercise of control of a State official over a person abroad—usually in the form of abduction or detention—brings the person concerned under the jurisdiction of the State of nationality of the official. In an early and still frequently quoted case, *Lopez Burgos v. Uruguay,* the HRC considered the applicability of the ICCPR to the abduction, arrest, secret detention and torture of a Uruguayan citizen by Uruguay agents outside State territory. Interpreting Article 2(1) of the ICCPR, the Committee said that, 'the reference to "individuals subject to its jurisdiction" is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred...'.[92] This interpretation has been confirmed in its General Comment No. 31.[93]

Noteworthy is that recently, in its General Comment No. 36 (2018) on the right of life, the Human Rights Committee seems to go a step further and espouse an 'impact approach' as a complement to the 'personal model'. In interpreting the term 'jurisdiction' under article 2 in connection with the right of life under article 6 of the ICCPR, the Committee opined that 'this includes persons located outside any territory

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when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration'. See also *Cyprus v Turkey*, App no 25781/ 94, Grand Chamber, para 77 (May 10, 2001) http://hudoc.echr.coe.int .

[89] See *Catan and Others v. Moldova and Russia* (App. Nos. 43370/04, 8252/05 and 18454/06), Grand Chamber, 19 October 2012 supra note 25, para 106.

[90] See *Ilaşcu and Others v the Republic of Moldova and Russia*, App No 48787/ 99, Grand Chamber, paras 377-294 (July 8, 2004), http://hudoc.echr.coe.int; *Catan case*, ibid, paras 116-123 and *Mozer v. the Republic of Moldova and Russia*, App. No 11138/10, Grand Chamber, paras 109-11 (Sept. 23, 2016), http://hudoc.echr.coe.int.

[91] *Chiragov and Others v Armenia*, App no 13216/ 05, Grand Chamber, paras 169-186 (June 16, 2015), http://hudoc.echr.coe.int, and *Sargsyan v Azerbaijan*, App. No 40167/06, Grand Chamber, paras. 14-28 (June 16, 2015), http://hudoc.echr.coe.int.

[92] *Lopez Burgos v. Uruguay*, Human Rights Committee, UN doc. A/36/40, 29 July 1981, 176, para. 12.1. See also Celiberti de Casariego v. Uruguay, UN Doc. CCPR/C/13/D/56/1979, 29 July 1981; para. 10.3.

[93] Human Rights Committee, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 10, 11.

effectively controlled by the State, whose right to life is nonetheless *impacted by its military or other activities in a direct and reasonably foreseeable manner'*.[94] The Committee against Torture has also adopted the personal model.[95]

In the ECHR context, the 'personal model' has been very often upheld, inter alia, in *Öcalan v. Turkey* (2003), where the Grand Chamber found that Turkey had exercised extraterritorial jurisdiction when detaining and abducting the applicant from Kenya,[96] in *Pad and others v. Turkey* concerning the killing of the applicant's relatives by firing from a helicopter,[97] in *Al-Saadoon and Mufdhi v. UK (2009*) in relation to the imprisonment of the applicants in a British-run military prison in Iraq.[98] In the famous *Al-Skeini v. UK case* (2011) the Court reaffirmed the validity both of the spatial model and the personal model, concluding with regard to the latter that: 'it is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual'.[99]

In the case of visa refusals, and in particular in respect of the question whether a visa refusal brings an individual within a State's jurisdiction was the subject of the recent ECtHR *M.N. and Others v Belgium case,* decided by the Grand Chamber of the ECtHR, which made it clear that individuals who apply for visas at embassies with the intention to seek protection, do not fall within the jurisdiction of the ECHR State Parties

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[94] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36 (30 October 2018), para 63; https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (emphasis added). For commentary see D. Møgster, 'Towards Universality: Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR' (27 November 2018); http://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/

[95] Committee against Torture, General Comment No. 2, 'Implementation of article 2 by States parties': UN doc. CAT/C/GC/2, 24 January 2008; see also' Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland': UN doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b). For the extraterritorial application of the EU Charter on Fundamental Human Rights see V. Moreno-Lax and C. Costello, The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity – the Effectiveness Model' in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (2014), 1657

[96] See: *Öcalan* v. *Turkey* (App. No. 46221/99) (Merits) Grand Chamber, Judgment of 12 March 2003, para 91.

[97] See *Pad and others v. Turkey* (App. No. 60167/00), Judgment of 28th June 2007, para 53.

[98] See Al-Saadoon and Mufdhi v. United Kingdom, App. No. 61498/08, (June 30, 2009), paras 88-89. See also *Hassan v The United Kingdom* (App. no 29750/ 09) (Grand Chamber) Judgment of 16 September 2014, paras 75-80.

[99] *Al-Skeini and Others v. United Kingdom*, b(App. No. 55721/07), Grand Chamber, para 143 (July 7 , 2011), para 137.

in the sense of Article 1 ECHR.[100] The applicants in *M.N. and Others v Belgium* were a married couple and their two minor children, all Syrian nationals, who travelled to the Belgium Embassy in Beirut to submit applications for visa with limited territorial validity on the basis of Article 25 of the EU Visa Code. These were refused since the applicants had the intention to lodge asylum applications on arrival and, as the national administrative body reasoned, they could accordingly not make use of this type of visa. The applicants complained to the Strasbourg Court that the visa refusal has exposed them to a situation incompatible with Article 3 ECHR. They also argued that Belgium was in violation of Article 6 (the right to fair trial) since they could not pursue the execution of the national court's judgment that instructed Belgium to issue them with visas. Not surprisingly, the Grand Chamber found that Article 6 was not applicable since issues of entry, residence and removal of aliens, as 'every other decision relating to immigration' do not engage civil rights within the meaning of Article 6.[101]

On the crux of the matter, that is the issue of jurisdiction, it must be recalled that in *Al Skeini v. UK,* the Court explained that 'it is clear that acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others'.[102] *M.N. and Others v Belgium* confirmed this, but also introduced a distinction and an important clarification in this respect: the distinction is between 'State's nationals or their property', on the one hand, and 'certain persons' over whom a State exercises *physical* power and control, on the other. As the Court highlighted, the applicants did not belong to the first group (i.e. they were not Belgium nationals). Neither did 'the diplomatic agents exercised *de facto* control' over them. which ultimately made impossible for jurisdiction to arise from the actions or omissions of Belgium diplomatic or consular officials. The mere 'administrative control' of Belgium over its embassies was found insufficient.[103]

The mere fact that the applicants brought proceedings at domestic level to ensure their entry in the country, was also found insufficient to bring them within the Belgium jurisdiction.[104] On this point, the Court had to distinguish the case from other

[100] ECtHR, *M.N. and Others v, Belgium* (Application no.3599/18), Grand Chamber, Decision on Admissibility of 5 March 2020.
[101] Ibid, para.137.
[102] *Al-Skeini and Others v. United Kingdom*, para 134.
[103] *M.N. and others v. Belgium,* para 118.
[104] Ibid, para 121-123.

judgments where 'procedural' control was found sufficient. The basis for the distinction was that, as opposed to other judgments where 'procedural' control triggered Article 1, an application for a visa is a unilateral choice of the individual. As the Court, noted such a choice cannot create a jurisdictional link.

In concluding, the Court accepted the Belgian jurisdictional objection that 'simply walking into an embassy' and making an application cannot trigger Article 1, for the applicants were never under Belgium's authority or control; coming and going as they pleased. Noteworthy, the Court of Justice of the EU ruled in a case similar to the M.N. one that, as EU law currently stands, the issuing of long-stay visas falls solely within the scope of the Member States' national law.[105]

It follows that the jurisdictional bar in such cases seem difficult to surmount, and thus the possibility of successfully bringing claims before the ECtHR and the HRC for violation of the relevant instruments for visa refusals and carrier sanctions appears remote.

1.5. Outsourcing Arrangements: Australian Practice and the EU-Turkey Statement (2016)

One of the most effective 'containment' or 'non-entrée' measures is the adoption of bilateral or other arrangements, pursuant to which States contain refugees or migrants, having arrived either from their countries of origin or readmitted there from third States, in their territory, or even process their asylum claims. Such outsourcing arrangements have 'worked' very well in the Pacific Ocean. Indeed, Australia has had success in outsourcing elements of its international responsibilities, particularly where it has been unable to successfully push back asylum seekers at sea. Under Australian law, persons that attempt to reach Australia by boat are barred from applying for asylum or ever settling in Australia.[106] They have been, instead, transferred to facilities in Manus Island, Papua New Guinea (PNG) or Nauru, to have their protection claims assessed under the domestic laws of those countries.[107] Cooperation from PNG and Nauru was secured through substantial cash inducements delivered through Australia's

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[105] *X and X v. Belgium*, C-638/16 PPU.

[106] Migration Act 1958 (Cth) section 46A; Under section 46A(2) the Minister has discretion to exempt an applicant in the public interest.

[107] Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, signed 3 August 2013; Regional Resettlement Arrangement between Australia and Papua New Guinea, signed 19 July 2013, as cited in D. Ghezelbash et al. 'Securitization of Search and Rescue at Sea', (n 3), 345.

aid programme, and payments covering the costs of building and running the detention centres where rescued/intercepted asylum seekers are placed on arrival.[108] Notably, the facility on Manus Island was decommissioned on 31st October 2017, pursuant to a decision of the Supreme Court of PNG declaring the detention of asylum seekers illegal.[109]

In the European context, there have long been talks for the establishment of offshore processing centers in neighboring countries, mainly Libya,[110] which however have not officially come to fruition. Instead, there has been another very effective arrangement to curb the unprecedent mass influx of refugees and migrants in Europe, mainly from Syria and Iraq, that is the (in)famous EU-Turkey Statement of March 2016.[111]

In short, as reported, the EU and Turkey concluded the EU-Turkey Statement in March 2016, with a three-fold aim to: end irregular immigration flows from Turkey to the EU; to enhance reception conditions for refugees in Turkey; and offer safe and legal pathways for Syrian refugees from Turkey to the EU. To achieve these ends, one of the provisions requires that all new irregular migrants crossing from Turkey into the Greek islands would be returned to Turkey. In addition, a resettlement scheme stipulates that for every Syrian returned to Turkey from the Greek islands, another Syrian would be resettled from Turkey to the EU, taking into account the UN Vulnerability Criteria. The statement also specifies that Turkey would take necessary measures to prevent the emergence of new sea or land routes for illegal migration from Turkey to the EU, in cooperation with neighbouring states and the EU. [112]

According to the Report published in March 2020 by the European Commission, as a result of the 4 years of the implementation of the agreement, irregular arrivals from Turkey to the EU were 94 % lower than before its implementation. The number of deaths in the Aegean Sea also decreased from 1 175 in the 20 months prior

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[108] See inter alia B. Opeskin and D Ghezelbash, 'Australian Refugee Policy and Its Impacts on Pacific Island Countries' (2016) *Journal of Pacific Studies* 73

[109] Namah v Pato [2016] PGSC 13; SC1497 (26 April 2016). For analysis, see A Dastyari and M O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in PNG and the Decision of the PNG Supreme Court in Namah (2016)' (2017) 42 *Monash Law Review* 308.

[110] See inter alia G. Noll, "Visions of the exceptional: legal and theoretical issues raised by transit processing centres and protection zones", (2003) 5 *European Journal of Migration and Law* 303-341.

[111] EU-Turkey Statement, EC Press Release 144/16 (8 March 2016) http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

[112] See at <https://easo.europa.eu/asylum-report-2020/23-eu-turkey-statement>

to the implementation of the statement to 439 since the statement became operational.[113] The resettlement of Syrian refugees under the statement continues with a cumulative total of about 27 000 who were resettled from Turkey to an EU Member State by March 2020. To help refugees and host communities in Turkey, a total of EUR 6 billion has been allocated through the Facility for Refugees for the period 2016-2025, focusing on humanitarian assistance, education, health, municipal infrastructure and socio-economic support.[114]

As reported, 'more progress is needed in implementing returns from the Greek islands to Turkey. The pace has been slow with only 2 735 returns concluded since the agreement came into force. Another 4 030 migrants have returned voluntarily from the islands since June 2016, supported by the Assisted Voluntary Return and Reintegration Programme (AVR)'.[115]

The EU-Turkey deal has triggered severe criticism as to its conformity with international law, mainly international human rights law, the major concerns being whether Turkey is a 'safe third country' as well as the dire detention conditions in the 'hotspots' established in Greek islands pursuant to the Statement.[116] Also, an interesting scholarly discourse has concerned its legal status following the Judgment of the Court of Justice of the European Union (CJEU), which held that the 'EU-Turkey' Statement is as not an "agreement concluded between the European Council and the Republic of Turkey".[117]

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[113] See European Commission. (2020). EU-Turkey Statement: Four Years On. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf

[114] Ibid.

[115] Ibid.

[116] See *inter alia* Amnesty International, A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal (2017) <https://www.amnesty.org/en/documents/eur25/5664/2017/en/>. Moreno-Lax, 'The Migration Partnership Framework and the EU-Turkey Deal: Lessons for the Global Compact on Migration Process?' in T Gammeltoft-Hansen et al., What Is a Compact? Raoul Wallenberg Institute Working Paper (10 October 2017) 27 http://rwi.lu.se/app/uploads/2017/10/RWI_What-is-a-compact-test_101017.pdf. On the EU-Turkey Statement see also M. Inel-Ciger, 'How Have the European Union and the EU Asylum Acquis Affected Protection of Forced Migrants in Turkey? An Examination in View of the Turkish Law on Foreigners and International Protection and the EU-Turkey Statement of March 2016', in V. Stoyanova and E. Karageorgiou (eds), *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (Brill, 2020), 115.

[117] See CJEU, Orders of 28 February 2017, Cases *NF v European Council*, T-192/16; *NG v European Council*, T-193/16; *NM v European Council*, T-257/16. See comments by C. Danisi, 'Taking the 'Union' out of 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law' (20 April, 2017); at https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>.

According to the CJEU, it is a *European* agreement between EU Member States and Turkey, which was made *at the margins* of the European Council's meeting held in March 2016. As such, according to Article 263 of the Treaty on the Functioning of the European Union (TFEU), the CJEU lacks jurisdiction to review its legitimacy, especially in relation to the provisions set out for the conclusion of international treaties by the EU.[118] Notwithstanding this Judgment, it is submitted that since the EU-Turkey Statement enumerates international commitments for subjects of international law, it falls squarely within the definition of a treaty under general international law. Suffice it here to note that the ICJ had found in the *Qatar v. Bahrain case* that signed minutes of a discussion could constitute an agreement if they "enumerate[d] the commitments to which the Parties ha[d] consented" and did not "merely give an account of discussions and summarize points of agreement and disagreement".[119]

Overall, the EU-Turkey Statement and its legal and political ramifications have been at the centre of the EU-Turkey relations, including the Greek-Turkish relations, in the recent years, and will remain to be, since there are ongoing discussions concerning the amendment of this Statement.[120] In any case, the question whether such outsourcing arrangements leading to 'containment' of refugees and migrants meet international legal standards remains very controversial.

IV. Search and Rescue Regime and EU policies

Rescue at sea involves a range of actors including States, international organisations, NGO rescue vessels, and merchant vessels. States' involvement may take a number of forms – whether as coastal States, States closest to the point of rescue, as search and rescue coordination centres, as flag States of vessels, as home State for shipowners or as States from where people are departing or to where seeking are seeking to arrive. International organisations such as EU, though FRONTEX, increasingly find themselves involved in maritime patrols and, as a result, in rescue operations. NGO Rescue Vessels are a relatively new, but increasingly key, player in

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[118] Similarly, CJEU, 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91.

[119] ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain) Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 121, para. 25. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018,* p. 507, para 116.

[120] See at <https://eeas.europa.eu/headquarters/headquarters-homepage/90861/way-ahead-after-difficult-2020-eu-turkey-relations-%C2%A0_en>

this field seeking to fill a gap left in the rescue framework by States reducing their search and rescue (SAR) capability.[121]

Since the majority of immigration to Europe is sea-borne, and the vessels used by migrants and asylum-seekers to cross the Mediterranean are frequently unseaworthy, it is inevitable that SAR becomes a core issue in EU migration management. Besides the humanitarian imperative to save lives at sea, EU and its Member States have approached SAR as a convenient means to engage in both 'push-back' policies, namely interdiction of vessels coming to the European shores, and, more recently, in 'pull-back' policies, i.e. policies aiming at keeping the persons concerned in States of transit, be it Libya or Turkey.[122]

Indeed, notably, FRONTEX and Member States used to often 'baptize' an interdiction operation as a SAR operation in order to find a legal basis to board vessels carrying migrants on the high seas.[123] Moreover, as was analysed above, FRONTEX plays a leading role in initiating, planning and managing joint activities, including activities in the context of which SAR is often its main function.[124] And while the primary responsibility rests with the Rescue Coordination Center of the State responsible for the SAR region, FRONTEX assets will actively participate in SAR activities.[125]

On the other hand, it is true that the SAR regime is closely intertwined with various 'pull-back' and 'non-entrée' policies of European States and the EU itself, including the cooperation with Libyan authorities, the closing of ports by EU States to NGO vessels having rescued migrants at sea, and lastly, the criminalization of NGOs for 'facilitating illegal entry into the EU.

In short, there have been accusations that particularly Italy is materially assisting Libyan authorities in 'rescuing' or 'pulling back' people leaving the shores of Libya by which has led to their detention and maltreatment. In a Report as early as December 2017 on the situation in Libya Amnesty International noted with concern that '[r]efugees and migrants in Libya are exposed to horrendous human rights

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[121] See BIICL, When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations (2020); at <https://www.biicl.org/newsitems/16432/biicl-publishes-new-report-when-private-vessels-rescue-migrants-and-refugees>

[122] On the characterization of 'take backs' or 'pull backs', see N Markard, 'The Right to Leave by Sea' (n 3) 591.

[123] See inter alia E. Papastavridis, *Interception of Vessels on the High Seas* (Hart, 2013), 288et seq.

[124] See Section II.

[125] See Article 9 of the EU Regulation 656/2014 (n 25).

violations in a country where institutions have been weakened by years of conflict and political division',[126] and at the same time decries European States for being accomplices in abuses in Libya. According to Amnesty International, 'despite being fully aware of the serious violations to which refugees and migrants are subjected in Libya, European governments have decided to implement migration-control policies that, by reinforcing the capacity and commitment of Libyan authorities to stop sea crossings, are trapping thousands of women, men, and children in a country where they are systematically exposed to abuse and where they have little chance to seek and obtain protection.'[127] Indeed, since late 2016, Italy and other European Union (EU) Member States have implemented a series of measures aimed at closing off the migratory route through Libya and across the central Mediterranean, including providing Libyan Coast Guard with training and equipment, i.e. boats, as well as technical assistance to Libyan authorities responsible for the management of refugees and migrants' detention centres.[128]

In addition, in concert with Libyan authorities, Italy is accused of interfering with the work of several non-governmental organizations (NGOs), which since the outbreak of the 'refugee crisis' in 2015 have been locating and assisting migrant boats in the Central Mediterranean.[129]

First, the Italian Ministry of Interior signed with several NGOs active in the Central Mediterranean a Code of Conduct in August 2017 in order to regulate rescue at sea. The Code introduced 13 provisions to be followed by NGOs operating search and rescue operations including amongst other things, allowing police officers to board rescue vessels to conduct "investigations related to migrant smuggling and/or trafficking in human beings", and requiring vessels to take migrants, refugees, ad asylum seekers to a safe port themselves rather than transferring them to other vessels.[130] Four of the eight NGOs that had active search and rescue operations (SOS

[126] Amnesty International, Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants (11 December 2017), p. 7, available at www.amnesty.org
[127] Ibid, p. 8.
[128] See Memorandum of Understanding of 2 February 2017 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; available at http://itra.esteri.it. See also comments in D. Ghezelbash et al, (n 3), 347.
[129] See inter alia Moreno-Lax et al, 'Between Life, Security, and Rights' (n 6), 727 et al.
[130] Full text of the Code of Conduct is available at: <http://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-forngos-involved-in-migrant-rescue>

Mediterranee, Doctors Without Borders (MSF), Sea-Watch and Jugend Rettet) during the time refused to sign the Code.[131]

Also, States have proceeded with criminalizing such rescues, without though drawing the necessary distinction or balance between dismantling smuggling rings and complying with relevant human rights obligations. Suffice it to mention incidents such as the seizure of the vessel *Iuventa*, registered with the NGO Jugend Rettet, by the Italian authorities on 2 August 2017 on allegation of cooperation with migrant smugglers and the encouraging of illegal immigration.[132] Overall, NGOs rescue ships have been either impounded, seized, or otherwise restrained or penalized.

It must be noted that the UN Protocol against the Smuggling of Migrants (2000) identifies the smuggling of migrants as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".[133] The Protocol further details that criminal offences for smuggling (facilitation of entry and stay) can be established when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit. For the UN, a for-profit element is thus required to qualify for smuggling and to establish a criminal offence - a requirement intending to exclude the assistance provided to migrants by family members and support groups. On the other hand, the EU legislative package on smuggling fails to reflect the UN Smuggling Protocol and leaves Member States a wide room of discretion to implement laws whose side effects can threaten acts of solidarity towards migrants. In addition, it remains silent on the international obligation to rescue people at distress at sea and on SAR operations. The 2002 Facilitation Directive defines smuggling as the facilitation of unauthorised entry, transit and residence. It obliges Member States to provide sanctions for: 1. intentional assistance to enter or transit a territory irregularly (without specifying that this assistance is carried out on a for-profit basis as the UN Protocol does); 2. assistance to reside illegally on EU territory (this time specifying the financial gain purpose). The non-binding "humanitarian

[131] Which NGOs have signed the Italian code of conduct? (August 2017) available at: <http://www.infomigrants.net/en/post/4529/which-ngos-have-signed-the-italian-code-of-conduct>

[132] See inter alia at <https://www.reuters.com/article/us-europe-migrants-italy-ngo-idUSKBN1AI21B>

[133] UN Protocol against the smuggling of migrants by land, sea and air, supplementing the UN convention against transnational organised crime, 2000, <https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf.>

exemption" (art 1.2) allows but does not oblige Member States to exempt humanitarian assistance (without defining it) from sanctions in the case of facilitation of entry and transit (but not for the facilitation of residence).[134] Thankfully, in July 2018, the European Parliament formulated guidelines for Member States to prevent humanitarian assistance from being criminalized.[135]

More importantly, the much-anticipated proposal for the new EU Pact on Migration and Asylum announced in September 2020 sets out that guidance on the effective implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence,[136] and how to prevent the criminalisation of humanitarian actors[137] will be part and parcel of the Pact.

Moreover, several incidents have been reported in which Italy's Maritime Rescue Coordination Centre (Rome MRCC) instructed the Libyan authorities to take charge of the situation and to take those rescued back to Libya, while simultaneously instructed NGO rescue vessels to stand down. For example, on 11 May 2017 various news outlets reported a maritime operation by the Libyan authorities, in coordination with the Italian MRCC, in which 500 individuals were intercepted on high seas and returned to Libya. According to reports, the migrant and refugee boat called Rome MRCC, whilst it was still in Libyan territorial waters. MRCC contacted both the Libyan coastguard and an NGO vessel, *Sea Watch-2*, with the latter sighting the boat after it had left Libyan waters and was in international waters. During preparations for the rescue, the NGO boat was informed by the Italian authorities that the Libyan coastguard boat which was approaching had assumed the "on scene command" of the rescue operation. The Libyan Coastguard proceeded instead to cut the way of the *Sea Watch-2* at high speed. It then intercepted the migrant boat and towed it back to Tripoli with the migrants and refugees being disembarked in the Abu Sita Naval Base and transferred to detention centres.[138]

[134] Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, 28 November 2002; <https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090&from=EN>

[135] European Parliament, "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update", <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf>

[136] Commission Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, C(2020) 6468 of 23 September 2020.

[137] Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, C(2020) 6470 of 23 September 2020.

[138] See J-P Gauci, 'Back to Old Tricks? Italian Responsibility for Returning People to Libya' in in *EJIL: Talk!*, 6 June 2017, available at www.ejiltalk.org.

Similarly, in the morning of 6 November 2017, a migrant dinghy in distress off the Libyan coast was simultaneously approached by the Libyan coastguard and a rescue ship of the German NGO 'Seawatch'. As reported, a messy and partly confrontational rescue process ensued, with the result of more than 20 persons being drowned before and during the operation. 47 others were 'pulled back' by the Libyan coastguard, allegedly experiencing human rights violations including torture and inhumane and degrading treatment upon their return in Libya.[139] This incident led to an application by a broad-based coalition consisting of NGOs and scholars, led by the Global Legal Action Network (GLAN) filed an application before the ECtHR against Italy (S.S. v Italy).[140]

Few months later, in August 2018, another application was brought against Italy before the same Court for alleged violations of the ECHR arising from the Aquarius incident. On June 10, 2018, Italy refused Aquarius—a rescue vessel operated by the German NGO SOS Méditerranée and flagged to Gibraltar—access to its ports and the disembarkation of more than 600 rescued migrants on Italian territory. Eventually, Aquarius arrived safely in Valencia a week later and disembarked the migrants.[141] Two of the rescued persons that ended up in Libya, however, brought a case against Italy.

Also, reference could be made to the *MV Lifeline*, flying the Dutch flag and operated by the German SAR NGO Mission Lifeline.[142] The vessel was carrying 234

[139] See inter alia M. Baumgartel, 'High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan 'Pullback' Policies to the European Court of Human Rights' in *EJIL: Talk!*, 14 May 2018, available at www.ejiltalk.org.

[140] *See* Stephanie Kirchgaessner & Lorenzo Tondo, *Italy's Deal with Libya to 'Pull Back' Migrants Faces Legal Challenge*, THE GUARDIAN (May 8, 2018), https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations. *See also* Moritz Baumgärtel, *High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan 'Pullback' Policies to the European Court of Human Rights*, EJIL: TALK! (May 14, 2018), https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights. On 11 November, 2019, written submissions on behalf of the Aire Centre, the Dutch Refugee Council (DCR), the European Council on Refugees and Exiles (ECRE), and the International Commission of Jurists (ICJ) were submitted to the ECtHR in relation to this case. S.S. and Others v. Italy, App. No. 21660/18 (Nov. 11, 2019), https://www.icj.org/wp-content/uploads/2019/11/ECtHR-SS_v_Italy_final-JointTPI-ICJECREAIREDCR-English-2019.pdf. See also V. Moreno-Lax, Moreno-Lax V., The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and others v. Italy, and the "Operational Model", (2020) 21 *German Law Journal* 385-416

[141] *See* Mark Stone, *Migrants from Aquarius Rescue Convoy Arrive in Port of Valencia*, SKY NEWS (June 17, 2018), https://news.sky.com/story/hundreds-of-migrants-on-aquarius-rescue-ship-set-to-arrive-in-spain-11407196. For a law of the sea commentary, see Efthymios Papastavridis, *The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?*, EJIL: TALK! (June 27, 2018), https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules.

[142] See Moreno-Lax et al, 'Between Life, Security, and Rights' (n 6), 725-7.

migrants rescued between Libya and Lampedusa on 20 June 2018. Apparently, the captain intervened of his own motion, responding to a distress situation he had witnessed and then informing the Italian MRCC of the rescue. Rome assigned a SAR case number and initially co-ordinated the operation, but it soon informed the captain that the Libyan Coast Guard had 'taken over' and assumed responsibility for the indication of a 'place of safety'. Considering Tripoli an unsuitable port of disembarkation, in line with the widely documented cases of persecution, ill treatment, and enslavement of migrants throughout Libya, the captain headed north instead to Malta. However, the latter's response waw negative: it considered itself non-responsible for the SAR case, 'having been carried out within the Libyan SRR' and 'with MRCC Rome being the first to intervene'. Ultimately, at an emergency summit, an ad hoc agreement was reached for the survivors to be distributed among eight EU Member States, with the ship being permitted to dock in Valetta.

As a result of this SAR saga, on 23 September 2019, in Valletta, Germany, France, Italy and Malta signed an agreement, entitled "Joint declaration of intent on a controlled emergency procedure – voluntary commitments by Members States for a predictable temporary solidarity mechanism", known as "the Malta agreement".[143] The main commitment stated in the agreement (paragraph 1) is to "set up a more predictable and efficient temporary solidarity mechanism in order to ensure the dignified disembarkation of migrants taken aboard, on the high seas, by vessels in a place of safety". Member States may also "offer an alternative place of safety on a voluntary basis and inform the European Commission". If rescue is carried out by a state-owned vessel, disembarkation will take place in the territory of their flag State. If migrants rescued are eligible for international protection in the EU, according to paragraph 2 of the declaration, following disembarkation, participating Member States shall provide for "the swift relocation, which should not take longer than 4 weeks", under the European Commission's coordination. The intent is "to tackle the possible uncertainties regarding the disembarkation reception and swift relocation of those on board" in order to prevent migrant boats from waiting too long before they are given a safe port where they can disembark while countries bicker over who should help, as happened too many

[143] Joint Declaration of Intent on a Controlled Emergency Procedure—Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism (Malta declaration) (23 Sept 2019). http://www.statewatch.org/news/2019/sep/eu-temporary -voluntary-relocation-mechanism-declaration.pdf, accessed 18 Nov 2019

times in the past few years. There are also some requirements for all vessels engaged in rescue operations, amongst which one is "not to obstruct the Search and Rescue operations by official Coast Guard vessels, including the Libyan Coast Guard, and to provide for specific measures to safeguard the security of migrants and operators".[144]

Undoubtedly, the above-described incidents and the overall policy of States like raises a host of interesting legal issues concerning, inter alia, the law of the sea, maritime law, international refugee and human rights law, the law of international responsibility. It is beyond the scope of this Brief to explore all these issues in detail; only few points are in order:

First, on the question whether there is an obligation of States like Italy to disembark recued migrants in their territory. As the author has argued elsewhere,[145] a major shortcoming of the relevant treaty regime is that it does not formally obligate the coastal State responsible for the Search and Rescue Area to disembark rescued persons on its own territory, but only impose rather an obligation of conduct, i.e. to ensure swift disembarkation on a place of safety.[146] The term 'place of safety' is not defined by the 1979 IMO Search and Rescue Convention, but by the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea as 'any place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met'.[147] Even though an interpretation of the relevant provision of the SAR Convention based on the principle of the effectiveness would readily lend support to a default obligation of disembarkation on the SAR responsible State, the divergent practice of the States concerned warrants that this is still a matter of contention.[148]

However, such default rule of disembarkation does exist for Italy with respect to the FRONTEX coordinated maritime operations, for which Italy is the host Member

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[144] See inter alia J. van Berckel Smit, 'Taking Onboard the Issue of Disembarkation The Mediterranean Need for Responsibility-Sharing after the Malta Declaration', (2020) 22 *European Journal of Migration Law* 492, and further commentary in the following blogposts: <https://respondmigration.com/blog-1/the-so-called-malta-agreement> and <http://eumigrationlawblog.eu/the-malta-declaration-on-search-rescue-disembarkation-and-relocation-much-ado-about-nothing>/.

[145] See E. Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility', in T. Gammeltoft-Hansen & J. Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control,* London, 2017, 161, at p.166.

[146] See International Convention on Maritime Search and Rescue, adopted 27 April 1979, entered into force 22 June 1985, (1405 *UNTS* No. 23489) Annex, para 3.1.9. as amended in 2004 (SAR Convention).

[147] Resolution MSC. 167(78), adopted 20 May 2004; available at <http://docs.imo.org.>

[148] See also E. Papastavridis, *Interception of Vessels on the High Seas* (n 123), 299-300.

State, namely currently *Joint Operation Themis* (operational since 1 February 2018).[149] According to Article 10 (1) of Regulation (EU) No 656/2014, if it is not possible to arrange for the participating unit to be released of its obligation referred to in Article 9(1) as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the participating unit itself, it shall be authorised to disembark the rescued persons in the host Member State.[150] Thus, as far as *Joint Operation Themis* is concerned, Italy must ultimately accept disembarkation in its territory as the host Member State.

It follows that in the cases in which Italy is the 'government responsible for the search and rescue region' or when it assumes responsibility as the first Rescue Coordination Centre to be notified of a distress signal and in absence of other Centres available to take action (*in casu,* Libya or Malta), it is Italy which has the 'primary responsibility' to coordinate disembarkation, for example in Spain, as happened with *Aquarius.* Save in cases that Italy acts as the host Member State of EU operations, in all other SAR situations Italy is under a due diligence obligation to ensure the disembarkation in a place of safety and not an absolute duty, i.e. an obligation of result to provide for disembarkation in its ports. Having said that though, the onus will rest with Italy to substantiate that not accepting the rescued persons in its territory is in conformity with its above-mentioned due diligence obligation.

Second, it is questioned whether are Libya or Italy allowed to order NGOs not to rescue people at sea? In the course of the SAR operations, the competent Coordination Center may designate an 'on-scene commander',[151] i.e. a rescue boat in the vicinity, which has, inter alia, the authority to designate 'appropriate units to effect rescue when the object of the search is located'; and co-ordinate 'on-scene search and rescue communications'.[152] The rescue unit that is designated as 'on-scene commander' could be a rescue unit of a third State, for example, Libya, participating in the SAR operation, as in the case of *Sea-Watch 2.* This does not mean, however, that the responsibility for the SAR operation changes hands; the Rome MRCC continues to be

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[149] See more info at <https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7>; accessed 25 October 2018.
[150] See Regulation (EU) No 656/2014 (n 25).
[151] SAR Convention sets forth that: 'When rescue units are about to engage in search and rescue operations, one of them should be designated on-scene commander as early as practicable and preferably before arrival within the specified search area…The appropriate rescue co-ordination centre or rescue sub-centre should designate an on-scene commander…'; Annex, 5.7.1. and 5.7.2.
[152] Ibid, 5.7.4.

overall responsible for the operation, and, according to SAR Convention, should receive periodic reports from the on-scene commander in this regard.[153]

It follows that in the case of *Sea Watch-2,* the Libyan coastguard unit was lawfully designated as 'on-scene commander' and opted to proceed itself to rescue the persons in distress. That said, the question persists: was the *Sea-Watch 2* obligated to abide by the instructions of the on-scene commander? Quite the contrary; the *Sea-Watch 2* or any other vessel in the vicinity are under no strict obligation to obey to the orders of the on-scene commander, or even the MRCC, who are there only to coordinate the rescue operation and 'direct', but not 'order', the vessels participating in the operation to conduct the rescue and provide assistance.[154] There is no command and control type of relationship; and there could have been no such relationship, since the vessels are on the high seas and thus subject to the exclusive jurisdiction of the flag State (Article 92 LOSC). In case of disobedience or recklessness of the Master of the vessel concerned, the responsibility may rest with the flag State for ostensibly a violation of the SOLAS Convention. In no case, however, the on-scene commander is allowed to forcefully to intercept the other rescue units or order them to save people at sea.

Third, another question is whether these non-policies amount to a violation of the prohibition of *refoulement* under international law. The finding of such violation however is contingent upon the finding of the application of ECHR to such incidents, i.e. that the rescued persons had been within the jurisdiction of the State concerned, e.g. Italy, under Article 1 of the ECHR. imposes an obligation on state parties 'to secure to everyone in their jurisdiction the rights and freedoms defined in' the Convention. In other words, it should be established that the coastal State, Italy, that coordinates the rescue operation or does not allow the NGO vessel to call at its ports are bound by human rights obligations, even though these acts do not take place in their territory.

It must be made clear that such jurisdictional link is not easy to establish in the present milieu.[155] Without dwelling much upon this issue, suffice it to say there was neither interdiction nor rescue operation by Italian warships or other duly authorized

[153] Ibid, 5.7.5.

[154] 'When the search has been successful the on-scene commander or the co-ordinator surface search should direct the most suitably equipped units to conduct the rescue or to provide other necessary assistance' ibid, Annex, 5.12.1.

[155] See detailed discussion of the issue of 'jurisdiction' in the maritime context in E. Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 *German Law Journal* 417–435.

organs and thus no factual control by Italy over the persons rescued. Indeed, neither in the case of *Aquarius* nor in the cases involving the NGO *Sea-Watch,* Italy exercised such control. Nor it is tenable to hold that the Libyan authorities were at the disposal of the Italian government and thus their conduct attributable to Italy. Suffice to say that in order an organ of one State to be considered at the disposal of another State under Article 6 of the ARSIWA,[156] 'not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State'.[157] It is highly unlikely that this was the case with the Libyan authorities.

Arguably, in cases of rescue operations in which Italy coordinated the operations, a claim could, however, be made that the coordination services by the Rome MRCC sufficed to bring the rescued persons within Italy's jurisdiction. Indeed, coastal States do exercise certain functional jurisdiction when coordinating rescue operations in accordance with the SAR Convention. However, even if the Court were satisfied that such jurisdiction fit squarely within the personal test control, it is unlikely that the Strasbourg Court would find a violation of the negative obligation of *refoulement* in the present context. It would need to prove that Italy not only appointed the Libyan rescue unit as 'on-scene commander', but also instructed Libyan authorities to take back these people, while being aware that they face a serious risk of persecution or torture and inhumane and degrading treatment. This is not impossible to prove, but in the view of the author, there are many jurisdictional and substantial hurdles for the applicants to overcome in the pending application before the ECtHR as well as in similar cases.

V. Eyes at Sea: Maritime Domain Awareness

A principal concern and a key action of the new EU policy on migration and asylum, underscored also by President Juncker in his 2018 State of the Union Address,[158] is to promote a coherent regime for maritime surveillance across the EU by fostering better complementarity of information exchange between the EU agencies and

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[156] Article 6 of ARSIWA.
[157] ILC, Commentary to Article 6 of ARSIWA, in *Yearbook of the International LawCommission, 2001*, vol. II, Part Two, p. 44.
[158] See n 19.

between Member States authorities themselves. At the core of this endeavour rests the European Border Surveillance System (EUROSUR),[159] a multipurpose system for cooperation and exchange of information among all Member States, which is crucial for swift and exhaustive situational awareness of incidents and migration flows and provides shared risk analysis as well as a response mechanism at local, regional, national or EU level.[160]

Indeed, EUROSUR is necessary for EU Agencies, like FRONTEX, to be able to provide a framework for the exchange of information and the operational cooperation between Member States' national authorities and with the Agency. EUROSUR provides national authorities and the Agency with the infrastructure and tools needed to improve their situational awareness and to increase reaction capability at the external borders for the purpose of detecting, preventing and combating illegal immigration and cross-border crime, thereby contributing to saving the lives of migrants and ensuring their protection

Additionally, the EU is called to implement by 2021 the Common Information Sharing Environment (CISE) enabling enhanced interconnection and exchange of classified and non-classified information between civil and military authorities, across sectors and across borders. CISE is currently being developed jointly by the European Commission and EU/EEA members with the support of relevant agencies such as the European Fisheries Control Agency (EFCA). It integrates existing surveillance systems and networks and gives all those authorities concerned access to the information they need for their missions at sea. The CISE makes different systems interoperable so that data and other information can be exchanged easily through the use of modern technologies.[161]

In this vein, a key development appears to be the use of new technologies, including satellite technology and other earth observation systems, with a view to consolidating maritime domain awareness.[162] FRONTEX has already been employing unmanned air vehicle to monitor vast maritime areas off the coast of Libya for counter-

[159] Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) (OJ L 295, 6.11.2013, p. 11).
[160] See C. Ellebrecht, 'The European Border Surveillance System EUROSUR: the Computerization, Standardization and Virtualization of Border Management in Europe', (2013) 19 *OSCE Yearbook*, 231-243.
[161] See further information at <https://ec.europa.eu/maritimeaffairs/press/cise-common-information-sharing-environment-new-era-maritime-surveillance_en>
[162] See inter alia A. Završnik A. (ed.), *Drones and Unmanned Aerial Systems: Legal and Social Implications for Security and Surveillance*, Cham: Springer, 2016.

smuggling of migrants purposes.[163] Moreover, using state of the art satellite technology, the EU and Member States are able to identify vessels in distress at sea and thus save lives; oil spills from tankers (satellites are already used in the context of EU CleanSeaNet project service, offering a near real time satellite based oil spill monitoring and polluter identification service); or illegal fishing activities.[164] Also, satellite imageries may provide valuable evidence for the prosecution of illegal activities before international and domestic courts.[165]

On the other hand, such uses of novel technologies as well as the exchange of sensitive information among law enforcement, military and civil authorities, as envisaged by CISE, may pose significant challenges to human rights law, including the right to privacy, and the relevant EU legislation, including legislation on data protection.[166] A pertinent question which also comes to the fore is to what extent the current regulatory and judiciary framework allows for the use of satellite evidence before internationals and national courts.

VI. Epilogue

This Policy Brief set out the main facets of the current immigration policy of the EU and its Member States with the focus being on measures tailored at controlling immigration extraterritorially, i.e. beyond the borders of the EU Member States. Accordingly, measures such as the joint operations of the competent EU Agency on migration, namely FRONTEX, 'containment' measures in the States of origin or transit, pull-back practices in the context of search and rescue at sea, and the use of new technologies, were canvassed. A common feature of all is the simple fact that in one way or another States are exercising powers inherent in the sovereignty, albeit for current purposes these powers are exercised beyond their physical borders. In so doing,

[163] See inter alia https://frontex.europa.eu/media-centre/news-release/frontex-begins-testing-unmanned-aircraft-for-border-surveillance-zSQ26A and M. Monroy, Drones for Frontex: unmanned migration control at Europe's borders, Statewatch (February 2020); at < https://www.statewatch.org/media/documents/analyses/no-354-frontex-drones.pdf>

[164] E. Molenaar and M. Tsamenyi, Satellite-Based Vessel Monitoring Systems for Fisheries Management: International legal aspects', (2000) 15 *International Journal of Marine and Coastal Law 65*.

[165] See R. Purdy R and D. Leund (eds) *Evidence from Earth Observation Satellites*, (Brill, 2012).

[166] See inter alia C. Bourcha, M-D. Deftou, A. Koskina. 'Data Mining of biometric data: revisiting the concept of private life?', Ius et Scientia, 2017) Vol.3 No.2: Convenrgences and Divergences in International Biolaw pp. 37-62.

States are functionally moving their 'borders', for example, on the high seas, when interdicting migrant vessels; in their Consulates in foreign States, when denying visas; at foreign airports, when their immigration liaison officer, in concert with their national airline, denies boarding to a potential asylum-seeker et al. This functional shift of the national borders marks also a 'paradigm shift' concerning State sovereignty in the 21st century, which forms main theme of our current research project.

In the context of migration, the present Brief highlighted the main tendencies in this regard and flagged up the most pressing legal challenges that this 'paradigm shift' entails. Challenges such as the shared responsibility of actors, like EU, States of destination or States of origin or transit, for human rights violations; the question of 'jurisdiction' as applicable in this extraterritorial setting; or the protection of fundamental rights in the era of modern earth observation systems, merit close scrutiny and research. Key to all these would be the new EU Pact on Migration and Asylum and the manner in which FRONTEX will exercise its ever-increasing budget and powers. Regrettably, there is no room for much optimism for a ground-breaking pro-human rights policy in this regard, but this remains to be seen.