The Readmission of Asylum Seekers under International Law

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5

Pre-Arrival Maritime Interception, Push-Backs and Agreements for Technical and Police Cooperation

I. INTRODUCTION

In the context of the pro-active management of European frontiers, diverse bilateral strategies have been devised to keep migrants and refugees away from the EU's territory, or to rapidly remove them. These strategies have been attempted through various types of agreements linked to readmission between European States and third countries of origin or provenance of migrants. While both standard readmission agreements and diplomatic assurances are being used to remove foreigners who have already crossed the EU borders, agreements for technical and police cooperation are being negotiated to set up joint patrols for the pre-emptive containment of unwanted arrivals in Europe.

Drawing a line of demarcation between pre-arrival and post-arrival removals, this chapter focuses on readmission performed before individuals enter into the territory of a European State, bearing in mind that during interdiction and diversion manoeuvres outside of the territorial jurisdiction of the European destination country, the phases of arrival (or non-admission) and removal overlap. The arrangements used for preventing access to Europe may be deemed an underlying component of the progressive externalisation of migration controls – either in the territorial waters of a third country or on the high seas,[1] with the expectation of diluting State responsibilities by letting refugees 'fall into a gaping crack in the human rights system.'[2] Since refugees often travel in mixed flows, crossing the sea by boat together with other migrants, restrictive external migration controls can also end up affecting the rights of people genuinely in need of protection.[3]

[1] Art 86 of the UN Convention on the Law of the Sea (UNCLOS) defines negatively 'high seas' as 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.' UNCLOS, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

[2] J Dench and F Crépeau, 'Interdiction at the Expense of Human Rights: A Long-term Containment Strategy' (2003) 21(4) *Refuge – Canada's Periodical on Refugees* 1, 3.

[3] See BS Chimni, 'Aid, Relief, and Containment: The First Asylum Country and Beyond' (2003) 40 *International Migration* 75, 76.

According to available records, in May 2009, Italy embarked on a forcible and indiscriminate removal policy, deflecting hundreds of people towards North Africa before they could enter the territorial waters of any European State. The Italy–Libya push-back campaign is, therefore, a key case study to explore: (i) whether bilateral agreements for technical and police cooperation provide the legal framework for the diversion of intercepted refugees to countries of embarkation; and (ii) whether pre-arrival interceptions and push-backs can hamper refugees' access to protection in Europe.

It is worth noting that any enquiry into State practice is fraught with an unavoidable degree of uncertainty due to the inaccessibility of relevant information. For instance, in the case of interdictions on the high seas resulting in the hand-back of migrants and refugees to the country of embarkation, ambiguity and uncertainty are caused by the lack of transparency and the absence of monitoring mechanisms such as media, NGOs, and international organisations.[4] In order to compensate for such vagueness, this chapter has chosen to focus on the arrangements between Italy and Libya to better grasp the main functions of agreements for technical and police cooperation, whose content can vary from country to country.

The 2009 push-back campaign is, arguably, one of the most controversial policies ever adopted by a European government to directly combat irregular immigration by sea, and opened the way to the ongoing 'pull-back practice', which became systematic in 2017 thanks to revived cooperation between Italy and Libya. In February 2012, the ECtHR delivered a landmark judgment in the *Hirsi v Italy* case by holding that Italy had extraterritorial human rights obligations with regard to 24 refugees from Somalia and Eritrea handed over to Libyan authorities after being intercepted by Italian warships.[5] Italy exercised 'effective control and authority' over intercepted migrants, thus creating a 'jurisdictional link' between the State and the individuals concerned.

As a consequence of the events of 2011,[6] the bilateral agreements between Italy and Libya have been suspended. Despite the death of Colonel Gaddafi, this study remains relevant for the following reasons. First, there is still a need to establish whether or not there is a legal framework underpinning the 2009 push-back campaign. Second, southern European States continue to face influxes of seaborne migrants and refugees from North Africa, and need guidance about clear-cut extraterritorial human rights obligations, and the possible types of responsibility they could incur. Third, Italy and Libya are re-establishing

[4] B Miltner, 'Human Security and Protection from *Refoulement* in the Maritime Context', in A Edward and C Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP, 2010) 195, 215.

[5] *Hirsi Jamaa and others v Italy*, App no 27765/09 (23 February 2012).

[6] Reference is here made to both the indiscriminate lethal force used by the Gaddafi government to retain power, and the Italian involvement in the humanitarian intervention against the Libyan government.

cooperation within the field of migration control. This has led, for example, to the adoption of a new practice of pull-backs carried out by Libyan authorities with the technical, political and economic support of Italy, in particular through coordination of the rescue services. Fourth, sea routes constantly change and, in their attempts to reach Europe, people continue to opt for increasingly perilous and difficult journeys. Accordingly, new bilateral agreements might be negotiated. Therefore, the legal analysis of the Italy–Libya case is pertinent for other situations where refugees are found in extraterritorial settings by European States or third countries performing exit border controls in cooperation with European States.

To address what has been defined as a 'humanitarian refugee crisis' (2015–16),[7] the EU has opted for a strategy based on the full externalisation of migration and border controls aimed at eradicating (unauthorised) access to Europe, mostly through dedicated financial and technical support to third countries of origin or transit.[8] The so-called EU–Turkey deal to halt the flow of irregular migrants to Greece (as discussed in Chapter three), the EU–Libya cooperation at maritime and land borders, talks on extraterritorial processing camps in neighbouring States, information campaigns in third countries on the 'risks' of irregular migration, and the 2017 Italy–Libya Memorandum of Understanding (MoU) – reviving the 2008 Berlusconi–Gaddafi Treaty of Friendship – to train, equip and fund the Libyan Coastguard (partly through EU resources) are but a few examples of an outright containment scheme designed to completely outsource controls and thwart departures. The focus is no longer on preventing arrivals, impeding access to determination procedures, or deflecting flows to other destinations, but on forestalling exits. These are no ordinary measures of *non-entrée*. Instead, they are a targeted means of frustrating the exercise of the right to leave – nullifying the refugee's flight.

Given that migrants are consequently trapped in conflict-ravaged and/or unstable States and exposed to risks of ill-treatment, persecution and exploitation, the question arises over how far these newly fashionable policies can reasonably be pursued. These new forms of 'contactless control', practised on demand by partner countries, far outside the geographical European space, present novel problems of compliance with international human rights standards and determination of responsibility for non-compliance. Whilst offshore controls have been in existence in various guises for some time, the strategy

[7] E Guild and S Carrera, 'Rethinking asylum distribution in the EU: Shall we start with the facts?', *CEPS Commentary* (CEPS, Brussels, 17 June 2016).

[8] Sections on contactless controls and State responsibility, throughout this chapter, are partly taken from M Giuffré and V Moreno-Lax, 'The Raise 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); and M Giuffré, 'From Turkey to Libya: The EU Migration Partnership from Bad to Worse' (2017) *Eurojus*, http://rivista.eurojus.it/from-turkey-to-libya-the-eu-migration-partnership-from-bad-to-worse/.

launched by the EU in 2016 represents a powerful shift in asylum and migration policy and practice. By transferring the coercive management of exiles to third countries, it aims to eliminate any physical contact, direct or indirect, between refugees and the authorities of potential destination States. The ultimate goal is to sever any jurisdictional link with European countries, in an attempt to elude any concomitant responsibility.

In revealing the hidden objective of these new measures, this chapter will first investigate whether the implementation of transferred means of migration control may hamper refugee rights. It will then question whether these practices of 'contactless control' do indeed insulate EU countries from accountability for violations suffered by migrants and refugees in third countries, or rather whether they engage the international responsibility of European States for breaches of human rights obligations, such as the principle of *non-refoulement*, and the rights of access to asylum procedures and to an effective remedy.

A. Structure of the Chapter

Sections II and III provide an initial overview of State practice and the content of the agreements for technical and police cooperation. This background analysis offers a thorough portrayal of the plethora of bilateral arrangements between Italy and Libya, including the more recent accords through which Italy delegates push-back to its Libyan partner. Although the content of these accords and the practice of push-backs have sparked the interest of scholars and human rights practitioners, the subject has often been laden with confusion from both a terminological and substantive point of view – largely due to the fact that some agreements have not been published. However, only when the main terms of the accords at issue are clarified, including their purpose and the rules of engagement they set up, can the more complex issues be examined, such as: the legal basis underpinning the push-back campaign in 2009; whether access to protection is hampered by the implementation of these accords; the engagement of European States' jurisdiction and potential responsibility in cases of both direct push-backs and contactless control over migrants at sea. Section III also discusses the issues related to a thorough assessment of safety of the third readmitting country.

Through the scrutiny of the diverse motivations advanced by Italy to justify diversion operations at sea, Section IV investigates whether either the 2007 and 2009 Protocols or the 2008 Partnership Treaty (individually taken) stand alone as the legal basis for push-backs. It then illustrates the shift toward the more recent pull-back practice on the basis of which Italy, with the support of the EU, increasingly delegates to Libya rescue, interception, and disembarkation of boat migrants, thus preventing access to protection in Europe. Section V shows how the legal analysis of the Italy–Libya case is pertinent for other situations in which States within or outside Europe (*in primis* the US and Australia) entrust

or used to entrust third countries of provenance of migrants and refugees with the duty of patrolling both their territorial and international waters to deter unauthorised immigration. Sections V.A and V.B offer a brief assessment of the EU response to migration by sea and provide an overview of the main tasks of Frontex and the European Border Coast Guard Agency.

Section VI examines search and rescue duties and due diligence obligations which apply to anyone found in distress at sea. It also illustrates how refugees' access to protection – understood here as the combination of *non-refoulement* and access to asylum procedures and effective remedies – is undermined by the enforcement of maritime pre-arrival interception and rescue, resulting in removal to an unsafe country.

Section VII investigates whether European States could be held indirectly accountable, under Article 16 of the International Law Commission Articles on State Responsibility (ASR),[9] for an internationally wrongful act committed by a third country by means of its 'aiding and assisting' the third country in illicit operations. By depicting the main elements of the Italy–Libya cooperation, a possible reading of the State responsibility riddle in the case of violations of the principle of *non-refoulement* is offered. As a free-standing part, Section VII aims to examine whether State responsibility under general international law can be triggered in the case of joint operations of migration control. This issue emerges as a novelty if compared with previous chapters, which confined themselves to assessing whether States comply with primary obligations under international human rights and refugee law treaties by ensuring access to protection to refugees and asylum seekers.

One of the main problems in pronouncing on the responsibility of European States in cases of joint migration controls has been the lack of information about the relevant accords and their implementation. For example, whereas the engagement rules within the bilateral agreements normally entrust Libya with the enforcement of maritime patrols, the actual execution of the accords may give rise to more complex operational scenarios, where Italian authorities are also implicated to varying degrees (eg, through technical, economic and political support, but also coordination of rescue operations). In this regard, Section VII explores the issue of 'contactless' jurisdiction and independent responsibility of European States, *in primis* Italy, to shed light on the latest cases of migrant push-backs by proxy. Even in the absence of written agreements entrusting Libyans with the rescue of migrants at sea, recent pull-backs by Libyans and communication between competent State authorities reveal a clear collaboration between the Italian Maritime Rescue Coordination Centre (MRCC) and the Libyan Coastguard engaged in the patrolling of the Mediterranean.

[9] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts' (2001), UNGA A/56/10, corrected by A/56/49 vol I/Corr.4.

II. THE CHANGING READMISSION PARADIGM: FROM PUSH-BACKS TO PUSH-BACKS BY PROXY (PULL-BACKS)

According to available records, between 6 May and 6 November 2009, 834 persons were driven back to Libya and 23 to Algeria through the autonomous intervention of Italian vessels deployed in the course of nine different maritime operations run by Italian forces.[10] If history repeats itself, the relationship between Italy and Libya on migration control is no exception. Indeed, ahead of the EU Council summit, on 3 February 2017, the Italian Prime Minister and the Head of the National Reconciliation Government of the Libya State signed an 'MoU on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing the border security'.[11] The 2017 MoU also revives the full array of old agreements on migration control, which had seemingly been suspended during the Arab Spring and the escalation of the Libyan civil war.

The establishment of links with the UN-recognised government in post-Gaddafi Libya has taken time and it is only recently that the EU, both independently and through Italy, has resumed relations with its Southern neighbour. The renewed interest in Libya stemmed from the fact that, since the sealing off of the Aegean border after the EU–Turkey deal in March 2016, the Central Mediterranean route in 2017 again saw the highest volume of maritime traffic in terms of unauthorised arrivals.[12]

In January 2017, a European Commission Communication for the Southern Mediterranean set out the goals to both step up the training programme of the Libyan Coastguard to autonomously conduct search and rescue (including disembarkation) in Libyan waters and strengthen Libya's Southern border (in the Sahara Desert) to hinder irregular movements through Libya and into Europe.[13] The EU also started a programme to train Libyan Coastguard officers in the rescue and interdiction of migrant boats.[14] The training and assistance

[10] UNHCR, *Submission in the Case of Hirsi*, March 2010, para 2.1.3, http://www.unhcr.org/refworld/pdfid/4b97778d2.pdf. See also CPT, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009*, 28 April 2010, http://www.cpt.coe.int/documents/ita/2010-inf-14-eng.pdf (CPT Report). While these operations were generally conducted by the Coast Guard and the Revenue Police, the Italian Navy intervened only twice. The push-back issue has already been introduced in Chapter 2.

[11] To read more on the content of the Italy–Libya MoU, see Giuffré 2017, n 8 above.

[12] EUNAVFOR MED Op Sophia – Six-Monthly Report 1 January–31 October 2016, Council doc. 14978/16 (EU RESTRICTED), 30 November 2016, 4–5, http://statewatch.org/news/2016/dec/eu-council-eunavformed-jan-oct-2016-report-restricted.pdf.

[13] Joint Communication to the European Parliament, the European Council and the Council, Migration on the Central Mediterranean route: 'Managing flows, saving lives', JOIN(2017) 4 final, 25 January 2017.

[14] European Council, 'EUNAVFOR MED Operation Sophia: mandate extended by one year, two new tasks added' (20 June 2016), https://www.consilium.europa.eu/en/press/press-releases/2016/06/20/fac-eunavfor-med-sophia/.

offered by the EU, and Italy in particular, should enable Libya to autonomously conduct rescue and 'pull-back' operations of all migrants and refugees setting sail from Libyan shores toward Europe as part of mixed operations to control borders and 'rescue lives' at sea.

On a number of occasions, a clear operative involvement of Italian authorities can be recorded, particularly in the location of migrant boats and in the facilitation of the diversion of migrants to Libya.[15] For instance, in May 2018, an application was lodged to the ECtHR concerning events that unfolded on the morning of 6 November 2017. On the basis of a communication sent by the MRCC in Rome, both the Libyan Coast Guard and a rescue ship of the German NGO 'SeaWatch' were simultaneously sent to assist a migrant dinghy in distress. The uncoordinated and confrontational rescue process ended with 20 people drowning at sea, 59 persons being brought by SeaWatch to Italy, and 47 others being pulled-back by Libyan authorities.[16]

A. Assessment of Safety

Bilateral cooperation on readmission primarily purports to confront the 'humanitarian crisis' deepened by the flight of thousands seeking better living conditions in Europe. It is important to emphasise here that neither the denial of entry of a vessel into territorial waters, nor the refusal to allow disembarkation, amounts *per se* to a breach of the principle of *non-refoulement*. For such a violation to occur it is necessary that interdiction results in the physical removal/diversion of intercepted refugees to territories (either countries of origin or transit) where their life and liberty would be threatened.[17] The evaluation of a third country's safety is, therefore, a *conditio sine qua non* for European States to avoid responsibility both under human rights treaties and general international law. Especially in those instances where migrants and refugees are preventively interdicted on the high seas or in the territorial waters of a third country, 'the less one may rely on the *ex post* control by [EU] courts and tribunals (which is the very idea of outsourcing), the more we need to engage in an *ex ante* control [of the safety of the State].'[18]

[15] See Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, 11 December 2017, https://www.amnesty.org/en/documents/mde19/7561/2017/en/. See P Biondi, 'Italy Strikes Back Gain: A Push-Back Firsthand Account', *Border Criminologies*, 15 December 2017, https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/12/italy-strikes.

[16] S Kirchgaessner and L Tondo, 'Italy's deal with Libya to "pull back" migrants faces legal challenge', *The Guardian* (8 May 2018), https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations.

[17] GS Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd edn (OUP, 2007) 277–78.

[18] G Noll, 'Law and the Logic of Outsourcing: Offshore Processing and Diplomatic Assurances' *Refugee Protection in International Law, Contemporary Challenges Workshop*, (Oxford, 24 April 2006) 1.

At the same time, regardless of whether a country is considered generally safe because of the presence of adequate asylum procedures and judicial oversight, every individual should be entitled to rebut the presumption of safety of that State for him or herself in the particular case.[19] Even when States are faced with mounting pressure from mass flows of migrants and refugees by sea, their discretion in determining how to react is not absolute and a duty exists for contracting governments, not only under refugee and human rights law, but also under the law of the sea on search and rescue and, more particularly, under the UN Convention on the Law of the Sea (UNCLOS), to cooperate to assist ships' masters in delivering persons rescued at sea to a 'place of safety'[20] – meaning, in general terms, a location where basic human needs are met and where 'rescue operations are considered to terminate.'[21]

In the case of the 2009 push-backs, as with the push-backs by proxy in 2017, the Italian government has *de facto* considered Libya a reliable partner in migration control and rescue at sea. If abuses escalated further in early 2011, the Gaddafi regime's treatment of migrants had been known to undermine human rights for a long time.[22] The situation of migrants and refugees in Libya has dramatically worsened since Gaddafi was ousted, and even more so since 2015. People rescued in the Mediterranean report horrible conditions, including involvement of migrants in the slave trade.[23] They claim they would rather die at sea than go back to Libya.[24] Therefore even if the Libyan coastguard were well trained in search and rescue, the refugees on the boat would panic as soon as they realised their diversion to Libya. These situations can be very dangerous if we consider that more than 4000 deaths at sea in 2016 were caused through panic situations during rescue operations.[25]

In the failed State of Libya with no stable government in place, the situation on the ground is so chaotic that no clear-cut rules and consistent practices can be identified. Although Libya acceded to the SAR Convention, for a long time it

[19] T Spijkerboer, 'Stretching the Limits. European Maritime Border Control Policies and International Law' in MC Foblets (ed), *The External Dimension of the Immigration & Asylum Policy of the EU* (Bruylant, 2009).

[20] See amendments to both the International Convention on Maritime Search and Rescue (SAR) and the International Convention for the Safety of Life at Sea (SOLAS) (adopted May 2004, entered into force 1 July 2006). Amendment to ch V of SOLAS and to chs III and IV of the SAR. Resolutions MSC 155 (78) and MSC 153 (78), 20 May 2004.

[21] IMO Resolution 167 (78), Annex 34, Guidelines on the Treatment of Persons Rescued at Sea (adopted 20 May 2004) para 6.12.

[22] See Amnesty International Report 2017, above n 15.

[23] L Gouliamaki, 'Migrant slavery in Libya: Nigerians tell of being used as slaves', *BBC News*, 2 January 2018, https://www.bbc.com/news/world-africa-42492687.

[24] J Caye, 'Report of Libyan Coast Guards attacking migrants raises concerns – via ECRE', *Forumasile*, 11 November 2016, https://forumasile.org/2016/11/11/report-of-libyan-coast-guards-attacking-migrants-raises-concerns-via-ecre/.

[25] SeaWatch, 'Reply to the statement of the Commander of the European operation Sophia on the training of Libya's so called "coastguard"', 6 November 2016, https://sea-watch.org/en/a-safepassage-is-the-only-way-to-cut-migrants-deaths/.

has not provided the required notification regarding the limits of its search and rescue (SAR) region; nor has it designated a responsible rescue coordination centre, which is an essential requirement for international registration of the SAR zone. A rescue coordination centre must operate 24/7, its staff must speak English, and it should be endowed with both ambulance vehicles and relevant communication means. The lack of a proper coordination centre could be why the International Maritime Organization (IMO) declined, in December 2017, the Libyan request to have a SAR region, thus *de facto* entrusting the Italian MRCC with the full coordination of rescue missions on the high seas.[26] Between 2017 and 2018, Libya has frequently reportedly endangered rescue missions in the Mediterranean, in particular those conducted by lifeboats sent by the MRCC in Rome.[27] Only in June 2018 was the establishment of a Libyan SAR Region confirmed by the IMO.

III. OVERVIEW OF THE FIRST WAVE OF BILATERAL AGREEMENTS LINKED TO READMISSION BETWEEN ITALY AND LIBYA

States avail themselves of bilateral agreements for technical and police cooperation to combat irregular immigration and trans-border crimes, such as terrorism, illegal traffic of drugs, trafficking of human beings, and organised crime. For the purpose of this work, this wording is used to indicate arrangements between two States, Italy and Libya, which aim to establish a common action against unauthorised immigration by means of a programme of joint patrols or delegated patrols resulting in rescue/naval interdiction and deflection of intercepted people to their ports of departure.

Trying to analyse all the informal bilateral agreements, on the basis of which Libyan authorities both authorised Italian vessels to cross Libyan territorial waters and accepted readmission of intercepted migrants in each single operation, is a painstaking process. Moreover, the content of some of these instruments remains unpublished and detailed information is often missing.

On 13 December 2000, Italy and Libya initiated their bilateral cooperation on irregular migration.[28] A Memorandum was signed in January 2006

[26] See M Monroy, 'A seahorse for the Mediterranean: Border surveillance for Libyan search and rescue zone', https://digit.site36.net/2018/01/03/border-surveillance-technology-for-new-libyan-search-and-rescue-zone/.

[27] See, eg, the following incidents involving the rescue vessels Bourbon Argos, Sea-Eye, and Iuventa. Information can be retrieved, respectively, at: P Kingseley and C Stephen, 'Libyan navy admits confrontation with charity's rescue boat', *The Guardian*, 28 August 2016, https://www.theguardian.com/world/2016/aug/28/libyan-navy-admits-confrontation-charity-rescue-boat-msf; Statewatch, 'Deadly incident on the Mediterranean Sea: Rescue organisation accuses Libyan coast guard', 28 December 2016, http://www.statewatch.org/news/2016/dec/med-libya-rescues.htm.

[28] The Agreement in question concerned collaboration in the fight against terrorism, organised crime, illegal trafficking of drugs, and irregular immigration, on the basis of which the two countries exchanged information on irregular immigration and ensured reciprocal assistance to combat this

concerning the common engagement in the fight against irregular immigration, culminating in a Protocol[29] and an Additional Operating and Technical Protocol on cooperation in the fight against irregular immigration (Protocol and Additional Protocol), signed on 29 December 2007.[30] The 2007 accords assume great prominence because, for the first time, Italy and Libya concluded arrangements to ensure practical operability of the commitments made in the 2000 Agreement, which was limited to generically recommending that the parties exchange information and provide mutual assistance and cooperation.

A Treaty on Friendship, Partnership, and Cooperation (Partnership Treaty) was concluded in Tripoli on 30 August 2008.[31] This Partnership Treaty was followed by the negotiation of an Executive Protocol to the 2007 agreements, signed on 4 February 2009, which still remains unpublished.[32] The 2008 Partnership Treaty reshaped the system of legal sources by incorporating in Article 19 the commitments previously adopted by the parties – especially the 2000 Agreement and the 2007 Protocols – to intensifying bilateral cooperation in the fight against terrorism, organised crime, trafficking of drugs, and irregular immigration. For the purpose of this chapter, the arrangements under scrutiny are the 2007 and 2009 technical Protocols, as well as the 2008 Partnership Treaty.[33]

The content of the 2007 arrangements (Protocol and Additional Protocol) – which should be jointly examined – was disclosed only in 2009. Pursuant to Article 1(1) of the Additional Protocol, the parties agreed to establish joint missions whereby Libya committed to patrolling both its coastline and international waters while Italy agreed to supply its Southern-Mediterranean partner with six vessels on a temporary basis. Also, under Article 5 of the Protocol, Italy availed itself of the EU budget for the construction of a system to control Libyan territorial and maritime frontiers to combat the phenomenon of unauthorised

phenomenon. See *Accordo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista per la Collaborazione nella Lotta al Terrorismo, alla Criminalità Organizzata, al Traffico Illegale di Stupefacenti e Sostanze Psicotrope e All'Immigrazione Clandestina* (Rome, 13 December 2000). Another agreement was reached in July 2003 intended to define the modalities of cooperation between respective police authorities for the purpose of preventing unauthorised flows from Africa, but its content has not been published.

[29] *Protocollo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista* (Tripoli, 29 December 2007) (Protocol).

[30] *Protocollo Aggiuntivo Tecnico-Operativo al Protocollo di Cooperazone tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione Clandestina* (Tripoli, 29 December 2007) (Additional Protocol).

[31] *Trattato di Amicizia, Partenariato, e Cooperazione* (Bengazi, 30 August 2008) ratified by Italy with Law no 2009/7 (Partnership Treaty).

[32] *Protocollo Aggiuntivo Tecnico-Operativo concernente l'aggiunta di un articolo al Protocollo firmato a Tripoli il 29/12/2007 tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione clandestina* (Tripoli, 4 February 2009) (Executive Protocol).

[33] For further information on the content of the agreements, including translation in Italian, refer to M Giuffré, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-Backs to Libya?' (2013) 24(4) *IJRL* 692.

migration to Europe. For the first 90 days operations were to be conducted by a mixed crew, as a training period, after which the Italian personnel on board were to be progressively reduced (Article 1(4)).[34] A Joint Operations Command – under the responsibility of a representative appointed by Libya, and a vice-commandant appointed by Italy, with advisory tasks – was created with the purpose of arranging daily enforcement patrols.

Libyan authorities were, thus, totally entrusted with the command and responsibility for any initiative taken during operational missions.[35] Under Article 2 of the 2007 Protocol, Italian officials were employed on board vessels only to conduct training activities, to give technical assistance, and for maintenance of the vessels.

Neither the Protocols concluded in December 2007 nor the 2009 Executive Protocol expressly prescribed rules for the interception and deflection to Libya of seaborne migrants halted by Italian authorities in international waters or closer to the Italian territory.[36] Therefore, the legality of both the naval interdiction and bilateral readmission programmes will be mainly discussed in relation to their modalities of execution.

IV. IN SEARCH OF A LEGAL FOUNDATION FOR PUSH-BACKS TO LIBYA

The diverse legal bases put forward by the Italian government to justify its cooperation with Libya also show that Italy ought to know about the treatment of migrants and refugees in Libya. Sovereign discretion cannot warrant displacement of fundamental rights, first and foremost the principle of *non-refoulement*. European States have a duty to know, before removal, how migrants and refugees will be treated in the readmitting countries. They should abide by international refugee and human rights law, whether they are engaged in the implementation of search and rescue operations, anti-smuggling activities, or the performance of migration controls in tandem with another country.

Gaining knowledge of the rules of engagement and the subdivision of responsibilities under the agreements enables an assessment of both the different legal competences of the two States, and the degree of assistance provided

[34] The Italian government decided to put a stop to the presence of Italian personnel aboard Libyan vessels after an incident occurred on 12 September 2010. On this date, one of the vessels supplied by Italy to Libya and run by a mixed crew fired at a Sicilian trawler. See *Repubblica*, 'I libici mitragliano un peschereccio. Finanzieri italiani sulla nave di Tripoli' (13 September 2010), http://www.repubblica.it/cronaca/2010/09/13/news/i_libici_mitragliano_un_peschereccio_finanzieri_italiani_sulla_nave_di_tripoli-7043116/.

[35] See Art 1(5) of the 2007 Additional Protocol.

[36] See A Terrasi, 'I Respingimenti in Mare di Migranti alla Luce della Convenzione Europea dei Diritti Umani', (2009) 3 *Diritti Umani e Diritto Internazionale* 591; see also, generally, S Trevisanut, 'Immigrazione Clandestina via Mare e Cooperazione fra Italia e Libia dal Punto di Vista del Diritto del Mare' (2009) 3 *Diritti Umani e Diritto Internazionale* 609.

by Italy to Libya. It also contributes to better assessing which State would have primary responsibility in the case of human rights violations, and to what extent the other State could be indirectly complicit in the commission of an international wrongful act. Moreover, the analysis of an emblematic case study, such as the Italy–Libya cooperation, contributes to showing how *de-territorialised* State action can undercut the rights of refugees intercepted before entering the territorial jurisdiction of the European intercepting/delegating country. Finally, a comparison will be drawn between old practices of push-back and the new strategies of pull-back, designed to delegate even more to a third country the patrolling of the external maritime borders of Europe.

A purposive interpretation of some critical provisions of the 2007–09 bilateral accords for technical and police cooperation and the 2017 MoU – an interpretation that does not overstretch the literal reading of the text – reveals how removal to/retention on Libyan soil is the inevitable and foreseeable outcome of a cooperation policy that expressly pursues the goal of preventing and combating unauthorised arrivals to Europe by patrolling international waters and the Libyan coast.[37] The interception of ships and their diversion to a third country, or the act of handing migrants over to the authorities of a third State are not powers expressly prescribed in the 2009 Executive Protocol, in the 2007 agreements for technical and police cooperation, or in the most recent accords. Thus, the question as to whence this enforcement jurisdiction can be inferred remains open, and as such deserves further discussion.[38]

Nevertheless, a *bona fide* interpretation of a number of provisions implicitly entails recognition of the underlying purpose of these accords, namely, the restriction of unauthorised arrivals of migrants in Europe through a programme of technical and police cooperation with Libya.[39] This goal is also corroborated by the numerous statements of representatives of the Italian and Libyan governments.[40] With the EU Migration Partnership Framework, launched in 2016, the EU has even more explicitly supported Italy's collaboration with Libya, to the point of contributing also to part of the expenses for the patrolling of maritime borders. In the framework of the intensive technical, logistical and financial support crafted by these bilateral instruments of migration control,

[37] The removal/readmission-related purpose of the push-back policy has been confirmed by the CPT, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009*, 28 April 2010, http://www.cpt.coe.int/documents/ita/2010-inf-14-eng.pdf (CPT Report 2010) 11. See also, paras 1(1) and (3) of the Preamble to the 2007 Additional Protocol. For a broader discussion on treaty interpretation based on the 'ordinary meaning' of the text and its 'object and purpose', refer to Chapter 1 of this book.

[38] See, on this point, Section IV.C.

[39] The joint commitment to the struggle against illegal immigration is reiterated in the preambles of the 2007 Protocols and in Art 19 of the 2008 Partnership Treaty.

[40] See, *Hirsi v Italy*, above n 5, para 181. See also, the Statement by the Italian Ambassador to Libya, Trupiano, 5, http://www.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2009/1013&pagina=s020.

Libya undertook to readmit migrants and refugees intercepted by either Italian or Libyan authorities after transiting through Libya on their way to Europe.

However, it is likely that further instruments, which are not readily available, have played a role in shaping the push-back and pull-back campaigns: for instance, *ad hoc* notes exchanged by competent border authorities, or other informal accords, where consent is given by fax or telephone, on the basis of which Italian vessels were authorised to enter Libyan territorial waters, and Libya assented to the readmission of third-country nationals.[41] As far as the push-backs of 6 May 2009 are concerned, the Italian Ministry of the Interior declared that the authorisation by the Libyan government for the readmission of migrants was issued during the night, after long negotiations.[42] While this *ad hoc* consent between the States concerned constitutes the legal basis for the exercise of enforcement jurisdiction consisting in the transfer of migrants from one vessel to another with a view to readmission, the 2007 and 2009 technical Protocols, as well as the 2008 Partnership Treaty, taken as a whole, constitute the legal and political framework within which the 2009 push-backs were performed. Likewise, the plethora of accords negotiated by Italy and Libya under the aegis of the EU in 2017 constitutes the economic, technical, political, and logistical framework of support within which collaboration on push-backs by proxy could take place.

In its official response to the Council of Europe Committee on the Prevention of Torture (CPT) during its July 2009 mission to Italy, the Italian government put forward diverse and incongruous legal justifications for its push-back policy.[43] The main explanations advanced by the Italian government to validate push-backs were: SAR measures; migration control activities in pursuance of the Protocol on the Smuggling of Migrants;[44] and police operations carried out by Italy on behalf of Libya to push-back to the country of departure those who had irregularly evaded border controls. These arguments are analysed in one of my previous articles,[45] which underlines the existence of two different legal frames authorising, on the one hand, interception or rescue operations on the high seas, and, on the other hand, the removal of migrants and refugees to the country of embarkation. Without repeating the main passages, the next Section will summarise the primary findings.

[41] *Mutatis mutandis*, see *Medvedyev v France*, App no 3394/03 (29 March 2010) 97.

[42] See Meltingpot, 'Migranti riaccompagnati in Libia' (7 May 2009), http://www.meltingpot.org/articolo14467.html.

[43] Response of the Italian Government to the CPT Report, app I (Response Italian Government), https://rm.coe.int/16806ce533.

[44] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) (Protocol against Smuggling).

[45] M Giuffré, 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24(4) *International Journal of Refugee Law* 692.

A. Italy–Libya Push-Backs and 'International Cooperation Principles'

Although interdiction and deflection activities by Italian authorities went beyond the literal meaning of the Italy–Libya agreements, and the actual scope of Italy's maritime operations could not be foreseen, I believe the text of the bilateral Protocols is (perhaps purposely) somewhat vague. As a consequence, an ample margin of discretion for intervention is left to Italian authorities. At the same time, the push-back practice – involving a consistent sequence of acts and pronouncements – would have been impossible without the broader framework of interactions between Italy and Libya created by the 2007 and 2009 bilateral agreements for technical and police cooperation, and also by the 2008 Partnership Treaty.

The systematic character of Italy's push-back operations and the lack of protest by Libya should not be overlooked. Moreover, whereas the readmission of own nationals is by and large accepted as a customary obligation in international law,[46] readmission of third-country nationals is only possible on the basis of an agreement between two States. As a final avenue, by invoking generic 'international cooperation principles', the Italian government has justified redirection of intercepted ships as a response to Libya's request. Indeed, migrants and refugees in their attempt to reach Europe had infringed Libyan migration law by irregularly fleeing the country after eluding local border controls.[47] Due to the absence of a precise legal framework and a standardised readmission procedure, the agreements for technical and police cooperation concluded between Italy and Libya in 2007 and 2009 seem to embody these 'international cooperation principles'. However, it is possible that a more direct expression of these principles is contained in other classified and informal accords, on the basis of which Libya assented to the readmission of undocumented migrants in *ad hoc* notes during the course of the 2009 maritime interceptions.[48]

Article 2(1) of the 2007 Additional Protocol would explain Italy's participation in those activities of control of external maritime borders. It provides that the Joint Operations Command may request the intervention of Italian units, ordinarily deployed in the Italian island of Lampedusa, for conducting '*anti-immigration* activities', the *telos* of all agreements linked to readmission between Italy and Libya. Although nothing in the text specifies what exactly these 'anti-immigration activities' are, it is possible to infer that push-backs amount to a

[46] See, Chapter 3 of this book for an examination of the customary status of the obligation to readmit own nationals and third-country nationals, and the doubts concerning readmission of involuntary nationals.

[47] Response Italian Government, n 43 above, para c.

[48] For example, in *United States v Gonzalez*, a conversation by telephone was considered to be an 'arrangement' between governments. See Judge Kravitch, *United States v Gonzalez*, 776 F.2nd (11 Circuit, 1985) 936 as cited in Papastavridis, 'European Court of Human Rights: Medvedyev et al v France' (2010) 59 (3) *International Comparative Law Quarterly* 875 fn 55 (Papastavridis 2010a).

practice denoting the consensus of both parties to the Italian enforcement of police actions on behalf of Libya.

Push-backs would be, in other words, a procedure falling 'within specific agreements, aimed at "returning to requesting States those migrants, being intercepted in international waters, who had escaped the controls of the relevant authorities" of the countries from which shores they departed.'[49] This interpretation would also be consistent with the Preambles to the 2007 Protocol and the 2009 Executive Agreement, whereby Italy and Libya commit to intensifying their cooperation to combat unauthorised immigration.

In addition, the 2007 Protocols include provisions dealing with the common commitment to the restraint of irregular immigration to Europe through joint patrols in the Libyan territorial waters and in international waters under Libyan command and responsibility.[50] Coping with unauthorised immigration also subsumes the possibility of both sighting and halting any crafts with '*clandestine*' passengers on board, as Article 2(1)(d) of the 2007 Additional Protocol sets forth. Article 2 of the 2009 Executive Agreement provides, instead, that 'the two countries undertake to repatriate clandestine immigrants [from their territory] and to conclude agreements with the countries of origin in order to limit clandestine immigration.'[51]

Since freedom of navigation reigns on the high seas, vessels are subject – save in exceptional cases – to the exclusive jurisdiction of their flag State (Article 92(1)). Naval interdiction on the high seas is grounded in international agreements between two or more States aimed at exercising the right of visit to combat criminal activities not listed in Article 110 UNCLOS and performed by vessels without nationality or not sailing the flag of a State party to the agreement.[52] In particular, Article 110 requires that, '[e]xcept where acts of interference derive from powers conferred by treaty', States may exercise a 'right of visit' with regard to ships of uncertain nationality and flagless ships to verify the vessel's right to fly its flag. If, after document inspection, suspicion remains, the interdicting vessel 'may proceed to a further examination on board the ship, which must be carried out with all possible consideration.'

As stated above, the Italian government has also adduced the implementation of the Palermo Protocol on Smuggling of Migrants as one of the legal bases for push-backs. The Palermo Protocol entrusts States to stop and search vessels without nationality or flying a flag of convenience ensuring safety/humane

[49] Response Italian Government, n 43 above.

[50] Art 2 of the Protocol and Art 1 of the Additional Protocol.

[51] Translation supplied by the ECtHR in *Hirsi*, above n 5, para 19. See also, Tondini 2010, n 175 below, 4.

[52] See S Trevisanut, 'The Principle of *Non-Refoulement* at Sea' (2008) 12 *Max Planck UNYB* 205, 240. On the right of visit, see also E Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: *Mare Liberum* versus *Mare Clausum* Revisited (2011) 24(1) *Leiden Journal of International Law* 45–69.

treatment of persons on board, and taking due account of security of the vessel, its cargo, and legal and commercial interests of interested States.[53] Under Article 8(7) of the Protocol,

> a State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

While the Protocol allows a State party to request the assistance of other States parties in suppressing the use of a vessel without nationality that is suspected of engaging in the smuggling of migrants by sea,[54] it does not expressly prohibit coastal States from granting permission to receive intercepted migrants either. Moreover, the text of the Protocol only envisages the repatriation of migrants to countries of origin or permanent residence (Article 18(1)), not necessarily to countries of transit, such as Libya. Article 18(8) provides that its implementation shall not affect the obligations entered into under any other applicable bilateral or multilateral treaty, or any other applicable operational arrangement regulating, in whole or in part, the removal of unauthorised persons. Moreover, a saving clause plainly requires States conducting enforcement operations at sea to respect humanitarian law, human rights, and refugee law, in conformity with the principles of *non-refoulement* and non-discrimination (Article 9). The obligation to comply with these fundamental international rules imposes upon the intercepting State both the responsibility to act in the full observance of the principles in question, and the duty to ascertain whether these norms are respected *de jure* and *de facto* in the third cooperating country in order to prevent the commission of an international wrongful act.

In addressing the distinction between treaties and other international accords, the ICJ has clearly sustained that 'where … the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.'[55] On this view, it can be argued that the diplomatic note of 7 June 2002 between France and Cambodia – on the basis of which a Cambodian vessel was intercepted by French authorities – amounts to a binding agreement as it 'enumerates commitments … and thus create rights and obligations in international law.'[56]

[53] See Arts 8 and 9 of the Protocol against Smuggling.

[54] Art 8(1) of the Protocol against Smuggling.

[55] See *Temple of Preah Vihear case (Cambodia v Thailand), Preliminary Objections*, 26 May 1961, ICJ Rep 17, 31. *The Aegean Continental Shelf Case (Greece v Turkey)*, 19 December 1978, ICJ Rep 3, 38–44.

[56] See *Maritime Delimitation and Territorial Quest (Quatar v Bahrain)*, 1 July 1994, ICJ Rep 112, para 25. See also J Klabbers, *Developments in International Law: The Concept of Treaty in International Law* (Kluwer, 1996) 215; Papastavridis 2010a, n 48 above, 867, 874.

The right of visit on the high seas should not be conflated with the assertion of enforcement jurisdiction, which instead depends on the prior establishment of legislative jurisdiction and would enable the intercepting State to bring the vessel to the port of the boarding State, arrest and try the offenders, confiscate the vessels, etc.[57] While 'legislative jurisdiction' concerns the power to prescribe rules, enforcement jurisdiction concerns 'the power to take executive action in pursuance of the making of decisions or rules.'[58]

Redirection to a third country after interception either on the high seas or in the territorial waters of a coastal State is practically and legally possible only with the consent of the coastal State itself on the basis of either formal or informal accords.[59] This is true in particular when the readmitting State is different from the flag State of the intercepting vessel. In this case, diversions are executed on account of an accord between the State toward which the ship is redirected and the flag State of the interdicting vessel, which might perform, for instance, police actions on behalf of the former country.

On the high seas, enforcement jurisdiction can only be exercised with the consent of the flag State, which can be granted either by a pre-existing bilateral or multilateral treaty or by an *ad hoc* accord. In the context of control of irregular migration by sea, Italian authorities were potentially entitled, in keeping with Article 110(1) of the UNCLOS, to exercise a right of visit of intercepted flagless boats, even outside any specific bilateral or multilateral agreement. However, the legal framework authorising deflection of migrants and refugees is still not clarified, as uncertainty exists over whether a further power of seizure can be inferred from the right of visit. Neither general international law nor the UNCLOS explicitly confers other rights upon the intercepting State and any further assertion of jurisdiction.[60] It should be noted that the right to visit an intercepted vessel 'does not *ipso facto* entail the full extension of the jurisdictional power of the boarding States.'[61] If the vessel (regardless of whether it is loaded with migrants or not) is brought to a port for further investigation, the exercise of jurisdiction would be limited to inquiring as to the nationality of the vessel and intentions of the persons on-board.[62] Therefore,

> [s]uch actions as seizing the ship and apprehending the persons on board; ordering the ship to modify its course towards a destination outside the territorial waters or the contiguous zone; escorting the vessel or steaming nearby until the ship is heading

[57] E Papastavridis, 'Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas' (2010) 25(4) *The International Journal of Marine and Coastal Law* 569, 577 (Papastavridis 2010c).

[58] I Brownlie, *Principles of Public International Law*, 7th edn (OUP, 2008) 297.

[59] Trevisanut 2009, n 36 above, 614.

[60] MH Nordquist, *United Nations Convention on the Law of the Sea, A Commentary*, Vol III (Martinus Nijhoff, 1985) 127.

[61] Papastavridis 2010c, n 57 above, 583.

[62] ibid, 584.

> on such course; conducting the ship or the persons on board to a third country or handing them over to the authorities of a third State, do not readily follow from the terms of the [law of the sea] treaties.[63]

As every law enforcement operation at sea must be reasonable and must meet the principles of necessity and proportionality,[64] it cannot be taken for granted that powers of detention or removal to the country of departure are implicitly encompassed in this provision. Therefore, even if it is accepted that interception of migrants and refugees in international waters fell within Article 110(1) with regard to vessels without nationality, the initial aim of a maritime operation might shift to something different – for example, in the context of the 2009 Italy–Libya push-backs, from a SAR operation to a measure of border control and *vice versa*.[65]

The 2007 Protocols for the first time established maritime joint patrols, with six vessels temporarily rendered to Libya. Then, through the Bengasi Partnership Treaty in 2008, the two Contracting Parties renewed their common commitment in several fields of action, including the fight against unauthorised immigration. This led to the adoption of the 2009 Executive Protocol, which defines the organisation of the joint patrolling missions conducted by vessels operated by a mixed crew. The Executive Protocol, by supplying Libyans with six vessels on a permanent basis (replacing the Italian flag with a Libyan one), significantly shifted their control of unauthorised migration to Europe in a more pro-active direction. Although Italy had repeatedly solicited Libya's participation in joint patrols, Libya had always refrained from taking part in the operations. Indeed, until May 2009, Libya remained resistant to the idea of letting a military boat flying the Italian flag across Libyan territorial waters to drive migrants back to the North African coast.[66] The provision of vessels on a permanent basis and the operational definition of technical cooperation envisaged by the 2009 Executive Protocol changed the context of their collaboration, thus paving the way for the push-back practice (and, in 2017, for the push-back by proxy strategy).

The salience of the Italy–Libya agreements can be condensed into two principal points. First, the technical Protocols encapsulate those 'international cooperation principles' that aim to curtail irregular migration to Europe. Whether removal to the country of departure is deemed a police action of

[63] V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23(2) *International Journal of Refugee Law* 174–220 (Moreno-Lax 2011a) 188.

[64] See *The Arctic Sunrise Arbitration, Netherlands v Russia*, Award on the Merits, PCA Case No 2014-02, ICGJ 511 (PCA 2015), 14 August 2015, Permanent Court of Arbitration [PCA], para 326. See also, Guyana v Suriname, Award, ICGJ 370 (PCA 2007), 17 September 2007, Permanent Court of Arbitration [PCA], para 445.

[65] The possible change in the purpose of a maritime operation was also endorsed by S Trevisanut, '*Non-refoulement* at Sea' (*Governing Migration by Sea: a Legal Perspective Workshop*, Oxford, 17–18 November 2011).

[66] ibid.

Italy on behalf of Libya, or an autonomous Libyan initiative taken with Italy's support and assistance (as in the 2009 cases) or a practice entirely carried out by Libya with minimal physical intervention by Italian authorities (as in the 2017 cases discussed in the next Section) does not alter the ultimate goal of this plethora of bilateral arrangements. Secondly, such a vast range of accords encompasses the arsenal of incentives utilised by Italy to persuade Libya to more proactively cooperate in both curbing irregular migration, and in accepting the readmission of third-country nationals rescued/intercepted in their desperate flight to Europe. As such, the aggregation of all these accords constitutes the legal and political framework within which Italy–Libya cooperation on migration control (including the push-back and pull-back policy) was put into action.

B. Italy's Comprehensive Support to Libya and the Shift from Push-Backs to Push-Backs by Proxy ('Pull-Backs')

The reasons for a transit country, such as Libya, to accept the burden of thousands of readmitted migrants and refugees must be examined in order to uncover parallels between past and current practices of migration control at sea. The previous Sub-section shows that Italy and Libya do not have the same interest in the readmission of migrants who are not Libya's nationals, but foreign nationals passing through its territory on their way to Europe. Moreover, Libya does not have legal institutional capacity or adequate facilities to manage the massive presence of irregular migrants and refugees. Therefore, if it is willing to invest resources in patrolling its territorial and maritime borders, this was motivated by expected benefits. Technical cooperation and assistance in terms of training, consulting, exchange of intelligence information and supply of vessels and equipment are the most common incentives used by Italy to induce Libya to cooperate on prevention of unauthorised immigration under the 2007 and 2009 technical Protocols and, more recently, the 2017 MoUs signed with both the UN-backed government of Al-Sarraj and General Haftar.

The 2008 Partnership Treaty marks the first most significant step toward diplomatic normalisation and the creation of a favourable climate between these two countries, coupled with EU initiatives, such as the more recent EU Migration Partnership Framework, EUBAM and EUNAVFOR Med missions.[67] By cooperating with Italy and the EU in the fight against irregular migration, international terrorism, and the smuggling and trafficking of human beings, not only did Libya obtain political, economic, and technical benefits (eg, the lifting of the European trade embargo and the construction of a gas pipeline to Italy)

[67] For an overview of the Partnership Treaty, see N Ronzitti, 'The Treaty on Friendship, Partnership, and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean' (Institute of International Affairs, 2009), http://www.iai.it/pdf/DocIAI/iai0909.pdf.

but it also had a chance to improve its international standing.[68] It has therefore been argued that 'it is this whole bilateral cooperative framework which secures a minimum operability in the cooperation on readmission more than the "reciprocal" obligations contained in a standard readmission agreement.'[69] Since the 2007–09 accords for technical and police cooperation and the 2017 MoUs do not constitute standard readmission agreements and are quite vague in defining the scope of migration control activities and push-back procedures, the parties rely on having a wider margin of manoeuvre to respond to short-term security concerns and new situations fraught with uncertainties.[70]

As asserted by the Italian government, in its observations in the *Hirsi* case,[71] and iterated by a former Italian Minister of the Interior on several official occasions, the Protocols signed in 2007 and 2009 with Libya, as well as the 2008 Partnership Treaty, may constitute both the legal foundation for push-back missions, and crucial tools in the fight against 'clandestine' immigration.[72] Accordingly, the Italian vessels deployed in international waters, together with the vessels donated to Libya, were part of a wider surveillance and 'border control system aimed to strike migratory flows at the root.'[73] The accords signed with several Libyan authorities and militias in 2017, including for the provision of vessels and the training course for officers for coastal security are also part of this long-term cooperative strategy.

Although, in the complex contingencies of patrol operations, States authorise/coordinate interception/rescue/removals through telephone and/or unpublished and informal exchanges of notes, they generally prefer to secure operability of bilateral cooperation tools on highly sensitive issues, such as readmission (quite unpopular in countries of origin or transit of migrants) through flexible but still written (even if unpublished) documents.[74] These accords ensure, at least, more

[68] See JP Cassarino, 'Informalizing Readmission Agreements in the EU Neighborhood' (2007) 42 *The International Spectator* 183; E Paoletti, 'Relations among Unequals? Readmission between Italy and Libya' in JP Cassarino (ed), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (Middle East Institute, 2010) 70 (Cassarino 2010a).

[69] JP Cassarino, 'Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications', in Cassarino 2010a, n 68 above, 8.

[70] ibid. For an analysis of the evolution of Italy–Libya cooperation and the different types of agreements, see I Gjergji, *Sulla governance delle migrazioni. Sociologia dell'underworld del comando globale* (Franco Angeli, 2016), 114–22.

[71] See Italian Government Submissions in *Hirsi v Italy*, above n 5, para 65.

[72] R Maroni, Minister of the Interior, 'Resoconto. Sommario and Stenografico' 5 (Oral information at Senato della Repubblica, XVI Legislatura, 25 May 2009), http://www.senato.it/service/PDF/PDFServer/BGT/00424000.pdf. See also, *Adnkronos*, 'Immigrati, Maroni: "L'accordo con la Libia funziona. Avanti con i respingimenti." Bruxelles: chiarimenti da Italia e Malta' (31 August 2009), http://www.adnkronos.com/IGN/News/Politica/?id=3.0.3718416369.

[73] See M Nesticò, 'Immigrazione: Consegnate a Libia tre Motovedette GDF – D'Arrigo, Equipaggi Libici Addestrati da GDF' (Associazione Finanzieri Cittadini e Solidarietà, 17 May 2009), http://www.ficiesse.it/home-page/3065/immigrazione_-consegnate-a-libia-tre-motovedette-gdf---d_arrigo_-equipaggilibici-addestrati-da-gdf.

[74] Cassarino 2010a, n 68 above, 8.

credibility and predictability in terms of compliance with the commitments of, and responsiveness to, the expectations of the parties on a more regular basis. As Nolte pointedly observed, 'treaties are not just dry parchments. They are instruments providing stability to their parties and to fulfil the purposes which they embody.'[75]

The foregoing analysis demonstrates that Libya's cooperation on patrolling sea and land borders, and readmission of undocumented third-country nationals intercepted by Italian authorities, builds on a solid platform of costs–benefits analysis that started in early 2000 and continues today in different forms, resulting in push-backs by proxy (pull-backs) carried out directly by Libyan authorities. Although the only possible conclusion is that push-backs and push-backs by proxy do not find in treaties a clear legal basis, it can be argued that the wide-ranging series of written accords concluded between Italy and Libya, as well as those unpublished notes exchanged between national authorities in the course of patrol and rescue operations, constitute the multifaceted legal and political scaffold supporting the practice of interdiction, deflection and/or pull-back of undocumented migrants and refugees to the port of embarkation. Considering the high costs of readmission for Libya – in social, political, and economic terms – it is plausible that, beyond unilateral acquiescence, *ad hoc* consent is necessary for each and every maritime operation resulting in the actual disembarkation and readmission of third-country nationals. Authorisation on a case-by-case basis is, in contrast, not required in those situations in which search and rescue as well as disembarkation are outright delegated to a third country.

V. NOT AN ISOLATED CASE: OUTLINING FURTHER AGREEMENTS FOR TECHNICAL AND POLICE COOPERATION

Deflections to Libya – country of embarkation but not of origin of undocumented migrants heading to Europe – find a first precedent in the Italian interdictions at sea in response to the massive influx of migrants from Albania in 1997. Also, operations were authorised by a set of agreements concluded between the two countries.[76]

The cases briefly reviewed in this Section demonstrate that the analysis of the Italy–Libya case is pertinent for other situations in which countries within or outside Europe entrust or used to entrust third countries of provenance of migrants and refugees with the patrolling of both their territorial waters and

[75] ILC, *Report on the Work of its Sixtieth Session, Treaties over time in particular: Subsequent Agreements and Practice*, A/63/10, Annex A (2008) 365, http://untreaty.un.org/ilc/reports/2008/2008report.htm.

[76] While on 25 March 1997, an agreement was signed in the form of an Exchange of Letters, on 2 April 1997, the two States signed a Protocol encompassing all the technical enforcement measures Italy could adopt to hold back the masses of irregular migrants arriving by sea. Finally, in November 1997, a readmission agreement was signed that entered into force on 1 August 1998.

international waters in order to prevent unauthorised inflows to Europe. In the late 1990s, arrivals of migrants from North Africa 'threatening' to transgress the European border ceased as a consequence of the enhanced bilateral cooperation in the field of readmission and police cooperation between European States and Southern Mediterranean countries,[77] such as Tunisia,[78] Morocco,[79] Algeria,[80] and more recently Egypt and Libya.[81]

Spain, in its endeavour to contain irregular migration by sea set up joint patrols authorised by a host of bilateral agreements with several African countries, including Morocco in 2003, Senegal and Mauritania in 2006, Cape Verde in 2007, Gambia, Guinea Bissau, and Guinea Conakry in 2008.[82] These documents would constitute the legal basis for joint sea patrols between the Spanish Guardia Civil and African security forces aiming to decrease the number of arrivals of migrants and refugees from African countries of origin or transit.[83]

Because of the lack of public access to the text of these arrangements, it is not possible to inquire as to their exact content, the degree of involvement of Spanish authorities in the enforcement of maritime operations, and the legal safeguards applied by Spain to the passengers of detected vessels.[84] All in all, however, the rationale of the accords negotiated by Italy and Spain with African countries points to conditioning the transfer of technical equipment, vessels, funding, and the organisation of training courses to a more decisive engagement of countries of origin or transit in the prevention of irregular migration flows to Europe.

Without any claim of exhaustiveness, it is also worth observing that both the US and Australia have been particularly involved in interdiction and extraterritorial processing policies. The US has mainly targeted irregular boat arrivals from Haiti and Cuba. As provided by a bilateral agreement signed by the US and Haiti in September 1981, after intercepting and searching vessels suspected of transporting irregular migrants from Haiti, people transferred aboard US Coast

[77] See A Di Pascale, 'Migration Control at Sea: The Italian Case' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff, 2010) 296.

[78] On 6 August 1998, an agreement was signed in the form of an Exchange of Letters concerning the entry and readmission of people in an irregular position. Another agreement on police cooperation was concluded on 13 December 2003.

[79] Readmission agreement signed on 27 July 1998.

[80] Agreement on the movement of persons signed on 24 February 2000.

[81] The details of the Agreements between Italy and Libya have already been provided in Section III. With regard to Egypt, while an Agreement on police cooperation was concluded on 18 June 2000, a Readmission Agreement was signed only on 9 January 2007.

[82] For an analysis of all these agreements, see P Garcia-Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: a Spanish Perspective' in Ryan and Mitsilegas 2010, n 77 above, 311 ff; J Rijpma *Frontex: Successful Blame Shifting of the Member States?* (2010) *Elcano Newsletter*.

[83] See, for instance, the reply of Frontex to the NGO ILPA (Immigration Law Practitioners' Association).

[84] ibid, 321.

Guard cutters were subjected to a summary screening, and very few persons were provided with a full asylum hearing and taken to the US to pursue their claims.[85] With the exception of those Cubans intercepted by US authorities and transferred to Guantanamo Bay for extraterritorial processing after showing credible and genuine claims for protection to on-board adjudicators, all other arrivals were transferred to Cuba.[86]

As far as Australia is concerned, in September 2001, in the aftermath of the *Tampa* incident,[87] the Australian government launched the 'Pacific Solution'.[88] If the attempts to tow or escort these boats back to Indonesia failed, asylum seekers were transferred to Manus Island or Nauru for extraterritorial processing of their protection claims.[89] In September 2013, Australia inaugurated 'Operation Sovereign Borders'.[90] While the details of this operation have not been publicly disclosed, media reports indicate that intercepted people were transferred to lifeboats stocked with food, water and medical supplies, which were then towed back to the edge of, or into, Indonesia's territorial waters.[91] As of October 2018,

[85] Migrants Interdiction Agreement (23 September 1981) US–Haiti, 33 UST 3559, 3560. For an overview of the practice of interdiction on the high seas and extraterritorial processing at Guantanamo Bay, see D Ghezelbash, 'Shifting Sands and Refugee Boats: The Transfer of Migration Control Policies between the United States and Australia', in JP Gauci, M Giuffré and L Tsourdi, *Forced Migration(s): Critical Perspectives on Refugee Law* (Martinus Nijhoff Publishers, 2014). See also A Dastyari and E Libbey, 'Immigration Detention in Guantanamo Bay' (2012) 6(2) *Shima: The International Journal of Research into Island Cultures* 49. See also B Frelick, 'US Refugee Policy in the Caribbean: No Bridge Over Troubled Waters' (1996) 20(2) *Fletcher Forum of World Affairs* 67; SH Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18(3)–(4) *International Journal of Refugee Law* (*IJRL*) 677, 679.

[86] ibid 72. Interdiction and extraterritorial processing on Guantanamo Bay continue to this day. See D Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP, 2018) 74–77.

[87] For an analysis of the incident, see CMJ Bostock, 'The International Legal Obligations owed to the Asylum Seekers on the MV Tampa' (2002) 14(2)–(3) *IJRL* 279; M Crock and D Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorized Boat Arrivals' (2010) 19 *Griffith Law Review* 238.

[88] For an analysis of the Pacific Solution, see, *inter alia*, S Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* 696.

[89] See Migration Amendment (Excision from Migration Zone) Act 2001 (Cth), amending s 5(1) of Migration Act 1958 (Cth). See M Crock, 'In the Wake of *The Tampa*: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12(1) *Pacific Rim Law & Policy Journal* 49.

[90] On the recent Australian plan to 'tow back boats to Indonesia, see M O'Sullivan, '"Push backs" of Boats to Indonesia', Castan Center for Human Rights Law, 18 July 2013, http://castancentre.com/2013/07/18/push-backs-of-boats-to-indonesia/. On extraterritorial controls in Australia, see, *inter alia*, AL Hirsch, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36(3) *Refugee Survey Quarterly* 48; NF Tan, 'State responsibility and migration control: Australia's international deterrence model' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control* (Routledge, 2017); A Hirsch, 'The Extra-Territorialisation of Migration Control and the Right to Seek Asylum', *RightNow* (2018), http://rightnow.org.au/opinion-3/the-extra-territorialisation-of-migration-control-and-the-right-to-seek-asylum/.

[91] See B Doherty and H Davidson, 'Orange Lifeboats Used to Return Asylum Seekers to Be Replaced by "Fishing Boats"', *The Guardian* (4 March 2015), https://www.theguardian.com/australia-news/2015/mar/05/orange-lifeboats-used-to-return-asylum-seekers-to-be-replaced-by-fishing-boats.

Australia had interdicted and removed over 800 people as part of 'Operation Sovereign Borders'.[92]

In May 2011, a bilateral agreement was negotiated with Malaysia with the aim to deter asylum seekers from travelling by boat to Australia.[93] Under the terms of the arrangement, up to 800 asylum seekers, arriving in Australia by boat, would be removed to Malaysia where they would 'go to the back of the [asylum] queue.'[94] In return, Australia would commit to accepting the resettlement of 4000 UNHCR-recognised refugees from Malaysia over four years. Quite quickly however, the Australian High Court struck down the agreement on the ground that Malaysia did not provide sufficient safeguards regarding asylum seekers transferred from Australia.[95]

A. Introducing Frontex

The Lisbon Treaty regards the development of a 'common immigration policy' and the gradual introduction of an 'Integrated Border Management[96] as major political objectives.[97] According to the Council, Integrated Border Management encompasses, *inter alia*, border control, detection and investigation of cross-border crimes, migration control measures in third countries, cooperation with neighbouring countries, inter-agency cooperation for border management and coordination of the activities of Member States and the EU in the above-mentioned areas.[98]

Operational cooperation between the Member States, including cooperation under the aegis of Frontex is one of the main components of this strategy.[99]

[92] J Kelly and G Chambers, 'Operation Sovereign Borders block 33 boats', *The Australian* (24 October 2018), https://www.theaustralian.com.au/national-affairs/immigration/operation-sovereign-borders-block-33boats/news-story/71e6c8a3b7bf0e758da705c9e17df894.

[93] Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (25 July 2011) (Australia–Malaysia Arrangement).

[94] See Q&A, 'Gillard Reaches Asylum Agreement with Malaysia' (7 May 2011), http://www.abc.net.au/news/stories/2011/05/07/3210503.htm?site=qanda.

[95] *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Another; Plaintiff M106 (by his litigation guardian, Plaintiff M70/2011) v Minister for Immigration and Citizenship and Another*, [2011] HCA 32, 31 August 2011. For an analysis of the case, J McAdam and T Wood, 'Australian Asylum Policy All at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement' (2012) 61 *International and Comparative Law Quarterly* 274; S Lowes, 'The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the "Malaysian Solution" Case' (2012) 12 *Human Rights Law Review* 168; M Foster, 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 *Michigan Journal of International Law* 395.

[96] The Integrated Border Management concept was first established by the European Commission on the basis of the Laeken Conclusions of Dec 2001. See, 'Towards integrated management of the external borders of the EU member states', COM(2002) 233 final, 7 May 2002. See also Presidency Conclusions, Laeken 14–15 Dec 2001, Council Doc SN 300/1/01 REV 1, para 42.

[97] See Arts 77(1)(c) and 79(1) of the TFEU.

[98] EU Finnish Presidency, Council Conclusions of 4–5 December 2006, Press Release 15801/06, 27.

[99] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States

As a response to the annulment by the ECJ of the 2010/252/EU Council Decision,[100] in April 2013, the European Commission presented a proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex.[101] However, the Meijers Committee, in May 2013, issued a report pointing to the flaws of the new proposal,[102] and in May 2014 the Council eventually adopted Regulation (EU) No 656/2014.[103] This Regulation – which is based on the IMO Guidelines – replaces the 2010 Council Decision and aims to ensure the efficient monitoring of the crossing of external borders including through border surveillance, while contributing to ensuring the protection and saving of lives. According to the new Regulation, the responsible third-State Rescue Coordination Centre (RCC) can designate a place of safety. Moreover, Recital 1 of the Regulation states that:

> Border surveillance is not limited to the detection of attempts at unauthorised border crossings but equally extends to steps such as intercepting vessels suspected of trying to gain entry to the Union without submitting to border checks, as well as arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea and arrangements intended to bring such an operation to a successful conclusion.

of the European Union, [2004] OJ L349/1 (Frontex Regulation), as amended by Regulation (EU) no 1168/2011 of the European Parliament and of the Council of 25 October 2011. See also, Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, [2007] OJ L199/30 (RABIT Regulation).

[100] See *Parliament v Council*, Case C-355/10, ECLI:EU:C:2012:516.

[101] Proposal for a Regulation of the European Parliament and of the Council 'establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex' (COM(2013) 197 final), 12 April 2013. This Section will not provide a detailed examination of Frontex as burgeoning literature has already been produced on this EU Agency. See, *inter alia*, E Papastavridis, '"Fortress Europe" and FRONTEX: Within or Without International Law?' (2010) 79(1) *Nordic Journal of International Law* 75 (Papastavridis 2010b); A Liguori and N Ricciutti, 'Frontex ed il rispetto dei diritti umani nelle operazioni congiunte alle frontiere esterne dell'Unione Europea' (2012) 6(3) *Diritti Umani e Diritto Internazionale* 539; J Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: the Case of Frontex', in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester University Press, 2012); R Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (CUP, 2016); V Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017); M Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (OUP, 2018).

[102] To read the Meijers Committee Note, refer to 'Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (COM(2013) 197 final), 23 May 2013, http://www.statewatch.org/news/2013/may/meijers-committee-note-surveillance-external-sea-borders.pdf.

[103] Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the 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 EU (FRONTEX).

The Regulation – which, however, only applies in the context of Frontex operations – provides that States shall comply with the principle of *non-refoulement* and shall observe their obligation to render assistance to any vessel or person in distress at sea.[104] More specifically, Article 10 requires that a person intercepted or rescued in the territorial sea or the contiguous zone shall be disembarked in the coastal Member State.[105] If, instead, interception occurs on the high seas, disembarkation may take place in the third country from which the vessel is assumed to have departed, or, if that is not possible, in the host Member State.[106]

Regulation 656/2014 is complemented by Regulation 2016/1624 as part of the integrated border management system.[107] Building on the foundations of Frontex, on 6 October 2016, the EU officially launched the European Border and Coast Guard Agency (EBCG) designed to monitor the EU's external borders and work together with Member States to quickly identify and address any potential security threats to the EU's external borders.[108] The EBCG Agency, elaborated in Regulation 2016/1624, will continue to be referred to as Frontex. It has 'shared responsibility' with EU Member States in the implementation of European integrated border management.[109] In case of lack of compliance and if urgent action is needed, the Agency has a right to intervene (ie, send EBCG teams) to address 'migration pressures'.

The Regulation also provides the new Frontex with competence over search and rescue of persons in distress at sea,[110] and encompasses SAR operations 'in situations which may arise during border surveillance operations at sea' within the concept of European integrated border management.[111] As a last note, joint border operations always require the decision of the Member State in question to request assistance by the new Frontex. The Regulation envisages a new complaint mechanism in cases of alleged rights violations, and confers on the EBCG the power to conduct joint removal missions and to be involved in national removal operations, also in cooperation with third countries.[112]

[104] Art 9 para 1 Frontex Reg.
[105] Art 10(a).
[106] Art 10(b).
[107] Regulation (EU) No 2016/1624 on the European Border and Coast Guard of 16 September 2016, [2016] OJ L 251/1, 16.9.2016 (EBCG Reg).
[108] European Commission, 'Securing Europe's external borders: Launch of the European Border and Coast Guard Agency', http://europa.eu/rapid/press-release_IP-16-3281_en.htm.
[109] See Arts 4 and 5 of the EBCG Reg.
[110] Art 14(3) of the EBCG Reg. See D Ghezelbash, V Moreno-Lax, N Klein, B Opeskin, 'Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia' (2018) 67(2) *ICLQ* 315, 323–27.
[111] Art 4 of the EBCG Regulation.
[112] For an in-depth analysis of the new EBCG Agency, see S Carrera, S Blockmans, JP Cassarino, D Gros and E Guild, 'The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?' (CEPS Task Force Report) 30 July 2017.

The various *Hera* and *Nautilus* maritime operations constitute some of the joint missions that have been performed at the external borders of the EU Member States. Without going into the details of these missions, it is worth observing that *Hera* was first launched, on 17 July 2006, at the request of Spain engaged with the management of irregular migrant flows to the Canary Islands. Additionally, Frontex authorities attempted to prevent the departure of boats loaded with migrants heading to Europe by intercepting them directly in the territorial waters of the countries of embarkation and carrying them back to ports of departure – namely Senegal, Mauritania, and Cape Verde – with no screening of their protection claims.[113] With regard to the *Nautilus* operation, its main goal was 'to strengthen the control of the Central Mediterranean maritime border … and also to support Maltese authorities in interviews with the immigrants' who mostly came from Eritrea, Somalia, Ethiopia, and Nigeria.[114] First established in June 2007,[115] Nautilus 2008 followed the reach of an agreement between participating Member States whereby migrants rescued in the Libyan SAR Area would be removed to Libya, or to the closest safe port if readmission to Libya was not possible.[116] Lacking Libya's consent, intercepted migrants were all disembarked on Italian and Maltese soil.[117]

In the aftermath of the Arab Spring, the EU started both to earmark considerable sums of humanitarian aid for North African countries and to support the transfer of foreign nationals from Libya to their countries of origin.[118] Border control and surveillance policies were also reinforced through the mobilisation of Frontex. For example, on 20 February 2011, after a request from Italy, the EU Agency deployed the Joint Operation EPN *Hermes* aimed at 'assisting Italy in controlling vessels carrying immigrants and refugees'[119] and at 'detecting and preventing illegitimate border crossings to the Pelagic Islands, Sicily, and the Italian mainland.'[120] Frontex officials also carried out the pre-screening of intercepted migrants, interviewed migrants on travel routes, and gathered information on arrival numbers for the purpose of developing risk analyses.

[113] *BBC News*, 'Stemming the immigration wave', 10 September 2006, http://news.bbc.co.uk/2/hi/europe/5331896.stm.

[114] Frontex Press Release, 'Joint Operation Nautilus 2007 – the end of the first phase', 6 August 2007.

[115] To read more on Nautilus 2006 and Nautilus 2007, refer to the European Commission, SEC (2008) 150 final; for Nautilus 2008 and Nautilus 2009, see Frontex General Report 2008 and Frontex General Report 2009.

[116] Frontex Press Release, 'Go ahead for Nautilus 2008', 7 May 2008.

[117] Frontex Press Release, 'HERA 2008 and Nautilus 2008 Statistics', 17 February 2009.

[118] See Commission Press Release, 'The European Commission's humanitarian response to the crisis in Libya' MEMO/11/143, Brussels, 4 March 2011; Commission factsheet, 'Humanitarian aid and civil protection: Libya crisis', 25 October 2011, http://ec.europa.eu/echo/news/2011/20110823_02_en.htm.

[119] EU Commissioner Malmström, Statement announcing the launch of the Frontex operation 'HERMES' in Italy as of 20 February 2011, MEMO/11/98, Brussels, 20 February 2011.

[120] Frontex Press Release, 'HERMES 2011 running', 21 February 2011, 2.

Started in February 2011, the *Hermes* mission was then extended on several occasions,[121] and ran until the end of August 2012.[122] In the effort primarily to thwart unauthorised entries by strengthening Europe's border control response capability in the Central Mediterranean, Frontex, and the EU more broadly, have been criticised for not doing enough to prevent deaths at sea.[123] Although Regulation 2016/1624 reinforces Frontex and expands its level of autonomy, the main function of search, rescue and disembarkation remains in the hands of the Member States, and it does not have a more proactive role in protecting rights.[124]

B. The 'Humanitarian Refugee Crisis' and EU Response to Migration by Sea

Operation *Mare Nostrum* – an Italian military and humanitarian mission whose aim was to control migration flows by strengthening surveillance and SAR activities – was replaced, in November 2014, by Frontex Operation *Triton*.[125] While *Mare Nostrum* rescued thousands of lives in international waters, *Triton* – whose primary focus was border management – only operated within 30 miles off the Italian coast, with the risk that an increasing number of migrants and refugees could die during their passage to Europe.[126] As long anticipated, the number of victims in the Mediterranean has been rising dramatically following the end of the operation *Mare Nostrum*. In the first two months of 2015, the number of people arriving by sea was almost twice that in the same period of the previous year. Against this critical backdrop, the Italian government decided to informally propose to the EU new strategies to cope with such a huge humanitarian crisis.

[121] Frontex, 'Hermes Operation Extended', http://www.frontex.europa.eu/news/hermes-operation-extended-OWmwti.

[122] For an analysis of the Hermes operation, see S Carrera, L den Hertog and J Parkin, 'EU Migration Policy in the wake of the Arab Spring. What prospects for EU-Southern Mediterranean Relations?' *MEDPRO Technical Report no 15*, August 2012, pp 4–5.

[123] *Human Rights Watch*, 'EU: Put Rights at Heart of Migration Policy', 20 June 2011 http://www.hrw.org/news/2011/06/20/eu-put-rights-heart-migration-policy. See also, Parliamentary Assembly of the Council of Europe Report 'Lives lost in the Mediterranean Sea: Who is responsible?', Committee on Migration, Refugees and Displaced Persons, Rapporteur T Strik. See also J Shenker, 'Aircraft carrier left us to die, say migrants', *The Guardian*, 8 May 2011, http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants.

[124] For an analysis of Regulation (EU) No 2016/1624, see F Esteve i García, 'The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) Regarding the Surveillance of External Maritime Borders', in (2017) 5 *Paix et sécurité internationales: revue maroco-espagnole de droit international et relations internationales* 93–116. For an exhaustive examination of Frontex responsibility and human rights, see Fink 2018, n 101 above.

[125] See Council Conclusions on 'Taking action to better manage migratory flows', Justice and Home Affairs Council meeting Luxembourg (10 October 2014), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/145053.pdf.

[126] See Frontex, 'Frontex launches call for participation of the EU Member States in Joint Operation Triton', http://frontex.europa.eu/news/frontex-launches-call-for-participation-of-the-eu-member-states-in-joint-operation-triton-b9nupQ.

The underlying idea was 'to make all possible efforts to *prevent the departure of migrants* from the southern shores of the Mediterranean' (emphasis added)[127] through the 'direct involvement of reliable third countries in the maritime surveillance and rescue and search activity.'[128]

Whereas the only way to truly save migrants' lives is to address the situation at its roots and find durable solutions which eradicate poverty and conflicts in migrants' countries of origin, it is certain that people will continue to put their lives at risk as long as there is war and hardship in our neighbourhood near and far.[129] Nevertheless, following the Council conclusions of June 2018, the Commission has been exploring the possibility of 'Regional Disembarkation Platforms' (RDPs) in third countries. These externalised platforms would serve the purpose of outsourcing SAR services and shifting border management operations in the Mediterranean to third countries outside Europe.[130] It is here crucial to pinpoint the dangerousness of policies aiming to hold people back within territories where their life and liberty can be put at risk, either at the hands of human traffickers and government authorities in States of transit or at the hands of their original persecutors upon removal to their home countries.

Therefore, in line with their international human rights obligations, European States should refrain from the temptation to curtail migration flows by preventing refugees' passage through bilateral and multilateral cooperation instruments aimed at intercepting migrants before they are able to leave their countries of origin or transit. Such a practice would indeed *prima facie* frustrate Article 13(2) of the UDHR, Article 12(1) of the ICCPR, Article 5(d)(ii) of the ICERD,[131] and Article 2(2) of Protocol No 4 of the ECHR, which provide for the right to leave any country. The possibility of creating humanitarian channels and visa for refugees escaping international and internal armed conflicts, thus *a priori* avoiding dangerous journeys by sea, continues to be neglected by European Ministers as a concrete and safe solution to the 'crisis'.

From January 2014 to 20 May 2018, 15,438 people are reported to have lost their lives in the Mediterranean. At the informal Summit held at La Valletta

[127] See Statewatch, 'Italy's Non-Paper on Possible Involvement of Third Countries in Maritime Surveillance and Search and Rescue' (13 March 2015) para 6, http://www.statewatch.org/news/2015/mar/italian%20med.pdf.

[128] ibid.

[129] European Commission Statement, 19 April 2015, https://europa.eu/rapid/press-release_STATEMENT-15-4800_en.htm.

[130] F Maiani, '"Regional Disembarkation Platforms" and "Controlled Centres": Lifting the Drawbridge, Reaching Out Across the Mediterranean, or Going Nowhere?' (2018), http://eumigrationlawblog.eu/regional-disembarkation-platforms-and-controlled-centres-lifting-the-drawbridge-reaching-out-across-the-mediterranean-or-going-nowhere/; S Carrera and K Lannoo, 'We're in this boat together: Time for a Migration Union', CEPS Policy Insights No 2018/09, June 2018.

[131] While the right to life is not broadly analysed in this work, it is nonetheless important to stress the human rights implications of policies aimed at preventing departure and thus stemming migratory flows to Europe.

on 3 February 2017, the European Council agreed a Declaration (the Malta Declaration) concerning the external aspects of migration and the Central-Mediterranean route. It states that the EU primary goal is to train and equip the Libyan coastguard in order to bolster its capacity to stop people smugglers, increase search and rescue operations, and prevent departure of unseaworthy boats headed toward Europe.

To address the 'humanitarian refugee crisis', the EU has thus opted for an emerging strategy based on further externalisation of migration controls.[132] Quite questionably, the EU and Member States have made financial and political support, as well as cooperation on development, conditional on third countries' effective implementation of exit controls. As held by the European Council, the new EU Migration Partnership Framework (MPF) is based on 'effective incentives and adequate conditionality' [but] 'cooperation on readmission and return will be a key test of the partnership between the EU and [its] partners'.[133]

Beyond the EU–Turkey readmission programme,[134] questionable readmission agreements and enhanced cooperation on removals have also been proposed with refugee-producing countries, such as Mali, Afghanistan, Nigeria, Senegal, and Ethiopia with the objective of offering financial support in exchange for accepting readmissions from Europe. The EU and Member States also plan to expand their schemes of cooperation on management of migration to other countries, such as Egypt, Tunisia, and Sudan. The EU MPF also sets out the goals to both step up the training programme of the Libyan coastguard to autonomously conduct search and rescue (including disembarkation) and strengthen Libya's southern border to hinder migratory flows to Libya and from there into Europe.

The EU's direct involvement in these initiatives is also facilitated by the EU Border Assistance Mission to Libya (EUBAM),[135] which furnishes assistance related to 'border management' as well as targeted 'advice and capacity-building in the area of … migration [and] border security'.[136] The Common Security and Defence Policy EUNAVFOR MED *Sophia* mission has directly delivered training to the Libyan Coastguard since October 2016.[137] On 27 March 2019, the EU

[132] See, eg, the establishment of the EU Migration Partnership Framework (MPF), discussed in Chapter 3 of this book. To read more on this issue, see Giuffré 2017, n 8 above. See also, C Bauloz, 'The EU Migration Partnership Framework: An External Solution to the Crisis?' *EUmigration lawblog.eu*, 31 January 2017, http://eumigrationlawblog.eu/the-eu-migration-partnership-framework-an-external-solution-to-the-crisis/.

[133] Council of the EU, 'External aspects of migration – Monitoring results, 10822/16, 4 July 2016, http://data.consilium.europa.eu/doc/document/ST-10822-2016-INIT/en/pdf.

[134] See Chapter 3 of this book for an analysis of the 2016 EU–Turkey Statement.

[135] EU Border Assistance Mission in Libya (EUBAM), https://eeas.europa.eu/csdp-missions-operations/eubam-libya_en.

[136] 'EUBAM Libya: mission extended, budget approved', EC Press Release, 4 August 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/08/04-eubam-libya-mission-extended/.

[137] 'Operation SOPHIA: package 2 of the Libyan Navy Coast Guard and Libyan Navy training launched today', EEAS Press Release, 30 January 2017, https://eeas.europa.eu/headquarters/head

Political and Security Committee approved its extension for six months with a temporary suspension of the use of naval units as Member States were not able to reach an agreement on disembarking rescued people at ports other than Italian ones.[138] So, the Italian–Libyan cooperation should be inscribed within this wider, EU-backed framework, ultimately underpinned by the EU MPF and the Global Approach to Migration.[139]

This Section was instrumental to a broader understanding of the EU response to unauthorised arrivals by sea, land, and air, beyond the specificity of the Italian context. To conclude this first Part of the chapter – which rests on, as far as possible, precise illustration of facts and empirical material – the next Sections will critically assess Italy's cooperation on migration management with African countries (from push-backs to push-backs by proxy) against the backdrop of refugee rights analysed in Chapter two. State duties at sea under human rights law and law of the sea will also be expounded. This is to show the continued relevance of the legal analysis carried out throughout this chapter with regard to the role of bilateral agreements for technical and police cooperation in hampering refugees' access to protection, and the potential international responsibility of States engaged in extraterritorial migration controls.

VI. STATE DUTIES AT SEA

Section IV presented the whole spectrum of bilateral agreements for technical and police cooperation used by Libya to perform interception and readmission activities, regardless of Italian officials' presence on-board the interdicting crafts placed under Libyan command. Moreover, it showed how these bilateral accords, implemented beyond territorial frontiers, represent a key component of the legal and political framework within which the removal of refugees to the country of embarkation is made possible after interception either by European States or their proxies.

International responsibility for human rights violations may arise every time States exercise jurisdiction.[140] Such responsibility is closely related to the existence of a State's obligation, and is intended to verify whether a certain State is liable for the violation of the obligation in point. Mindful of the vastness of obligations incumbent upon States under both the law of the sea and international human rights law, focus is placed here on responsibility triggered by violations of the fundamental principle of *non-refoulement*, which is closely correlated to

quarters-homepage/19518/operation-sophia-package-2-libyan-navy-coast-guard-and-libyan-navy-training-launched-today_en. See also UNSC Res 2312 (2016), extending UNSC Res 2240 (2015).

[138] ANSA, 'Operation Sophia extended, but without naval support' (27 March 2019).

[139] Global Approach to Migration and Mobility, COM(2011) 743 final, 18 November 2011.

[140] M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411, 417.

the lack of access to asylum procedures and effective remedies for individuals intercepted at sea. Before delving into human rights obligations in a maritime context, the next Sub-section will offer an overview of search and rescue obligations which apply to anyone (not only migrants and refugees) found in distress at sea.

A. Search and Rescue

'Search and rescue' obligations require States to disembark rescued people to a 'place of safety', broadly defined as 'a place where the rescue operations are considered to have been completed.'[141] A 'place of safety', however, 'is not necessarily the closest one to the place where people were rescued.'[142] Pursuant to Article 98(1) of the UNCLOS,

> every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers … to render assistance to any person found at sea in danger of being lost [and] to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance.

Similarly, the SOLAS Convention provides that

> [t]he master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance ….[143]

No delimitation *ratione personae* is made, and 'any person' in distress at sea can benefit from the SAR duties falling upon States.[144] As Article 98(1) of the UNCLOS requires implementing legislation to acquire the force of law,[145] the obligation of the flag State is predominantly an obligation of conduct, and not an obligation of result (ie, not an obligation to ensure that all people in distress will be saved).[146] Additionally, the flag State has a due diligence duty to monitor whether the master of a vessel flying its flag properly discharges its duties under the UNCLOS and SOLAS Conventions.[147]

[141] The SAR Convention sets the duty to disembark the shipwrecked in a 'safe place.' See also, the IMO Resolution MCS 167/78 of 20 May 2004 and the amendments to the SAR and SOLAS Conventions.

[142] See Response Italian Government, para c.

[143] SOLAS, chapter V, reg 33(1).

[144] SAR Annex, chapters 2 and 3, para 2.1.10.

[145] See Papastavridis, 'Rescuing "Boat People" in the Mediterranean Sea: The Responsibility of States under the Law of the Sea', *EJIL Talk*, 31 May 2011, https://www.ejiltalk.org/rescuing-boat-people-in-the-mediterranean-sea-the-responsibility-of-states-under-the-law-of-the-sea/.

[146] On the distinction between obligations of conduct and obligations of result, see, R Ago, Special Rapporteur (1967) II-1 *Yearbook of the International Law Commission* 4, 20.

[147] Arts 98(1), UNCLOS and SOLAS, Chapter V, Regulation 33. While the flag State would be directly responsible for any omission of public vessels to discharge this duty of rescue, it would not be directly responsible for the actions of a master of a private vessel who does not comply with this

While the coastal State exercises full sovereign authority over territorial seas (up to 12 nautical miles from the baseline), an exception is provided in the right of innocent passage (continuous and expeditious) of surface vessels (Article 17 UNCLOS) and the right of safe haven/safe harbour for vessels/aircrafts in distress. Innocent 'passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress' (Article 18). Therefore, vessels flying the flag of a State other than the coastal State can enter the territorial waters or the SAR zone of the coastal State to offer humanitarian rescue and contribute to disembark people in a place of safety.[148] Nevertheless, in breach of international law, NGOs (and occasionally also the Italian Coastguard) operating at sea to save lives have been unlawfully attacked by Libyan authorities both in their territorial waters and on the high seas.[149] Moreover, vessels transporting hundreds of traumatised migrants rescued at sea have been denied access to ports for several days, despite the fact they were in a situation of distress.

The State holding primary responsibility for the delivery of the intercepted migrants to a 'place of safety' is the State responsible for the SAR region where assistance is rendered.[150] It should ensure coordination and cooperation among parties to the SAR and SOLAS Conventions so as to alleviate the burden imposed on ship-masters. This is a due diligence obligation to guarantee disembarkation in a place of safety and not an absolute duty (ie, an obligation of result) for the SAR responsible State to ensure disembarkation in its ports. However, the above-mentioned treaties do not require a State to accept rescued persons. A non-legally binding instrument such as the 2009 Circular adopted by the IMO's Facilitation Committee has indicated that the State responsible for the SAR region is the most likely location for accepting rescued migrants and refugees.[151] While a clear default obligation of disembarkation in the SAR

obligation. Nevertheless, the flag State may incur international responsibility for not acting with due diligence. For a discussion on due diligence, as well as obligations of conduct and obligations of result, see *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to the Tribunal)*, Advisory Opinion of 2 April 2015, ITLOS Rep 2015, 4. See also, D Guilfoyle and E Papastavridis, 'Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea', UNHCR *Background Paper* (2014), 12, https://www.refworld.org/pdfid/5346438f4.pdf.

[148] Under Regulation 33, Annex, SOLAS, 'The Government responsible for search and rescue region in which assistance is rendered shall ensure that survivors are disembarked and delivered to a place of safety as soon as reasonably practicable.'

[149] For an analysis of NGOs rescue activity at sea, see E Papastavridis, 'Recent *Non-Entrée* Policies in the Central Mediterranean and their Legality: A New Form of *Refoulement*?' (2018) 12(3) *Diritti Umani e Diritto Internazionale* 493–510.

[150] SAR Annex, para 3.1.9 and SOLAS, chapter V, reg 33 (1-1). On the latest amendments to the SAR Convention and its application in the Mediterranean, see S Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 *International Journal of Maritime & Coastal Law* 526–35.

[151] IMO, 'Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea', IMO Doc FAL.3/Circ.194 (22 January 2009) para 2.3 ('IMO Principles').

responsible State is lacking under the SAR and SOLAS Conventions, it could be argued that such default rule of disembarkation does exist for Italy with regard to the European Border and Coast Guard Agency (Frontex) coordinated maritime operations[152] for which Italy is the host Member State. Therefore, Italy must ultimately accept disembarkation in its territory as the host Member State in the context of *Joint Operation Themis* (operational since 1 February 2018).[153] Additionally, Italy is designated as the State of disembarkation in all interdiction and SAR activities conducted in the context of EUNAVFOR MED Operation Sophia, off the coast of Libya.[154]

Broadly speaking, under maritime law, only the flag State has jurisdiction over a vessel on the high seas but in the case of boat refugees, the flag State could be the very State from which they are fleeing. Although disembarkation in the next port of call is not a rule of customary law,[155] some scholars, and the UNHCR, maintain that the obligation on the coastal State to accept disembarkation may implicitly be inferred from the maritime conventions.[156]

The absence of a clear-cut definition of a 'place of safety' might not *per se* be damaging, since it would allow for a case-by-case approach which takes into account the particular circumstances of each rescue situation and the different categories of stowaways.[157] In this regard, the 'Guidelines on the treatment of persons rescued at sea', from the Maritime Safety Committee of the IMO, emphasise how 'the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.'[158] However, these Guidelines still fall short of a duty of disembarkation in any particular place, and a number of examples show how coastal States keep on bouncing responsibilities for disembarkation. In some circumstances, such uncertainty has led to episodes of non-rescue, delays, or the sinking of overloaded boats with the consequent death of the passengers on board.[159]

[152] See Papastavridis 2018, n 149 above.

[153] See Art 10(1) of Regulation (EU) No 656/2014.

[154] See E Papastavridis, 'EUNAVFOR Operation Sophia and the International Law of the Sea' (2016) 2 *Maritime Safety and Security Law Journal* 57 ff.

[155] RA Barnes, 'Refugee Law at Sea' (2004) 53 *ICLQ* 47, 63.

[156] UNHCR, *Problems Related to the Rescue of Asylum Seekers in Distress at Sea*, UN doc EC/SCP/18, 26 August 1981, paras 19–21. Similarly, a circular of the IMO Facilitation Committee recommends that '[i]f disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued … into a place of safety under its control …' See Circular FAL.35/Circ.194, 'Principles relating to administrative procedures for disembarking persons rescued at sea' (14 January 2009).

[157] V Moreno-Lax 2011a, n 63 above, 198.

[158] IMO, *Guidelines on the treatment of persons rescued at sea*, Resolution MSC 167(78), 20 May 2004, para 6.17, subsequently endorsed by the UN General Assembly in UN doc A/RES/61/222, 16 March 2007.

[159] On 3 October 2013, a boat carrying migrants and refugees to Italy sank off the Italian island of Lampedusa. While 155 people were rescued, the death toll reached 339. See also the *MV Salamis* incident on 4 August 2013. Further information can be retrieved in: JP Gauci and P Mallia, 'Access to Protection: A Human Right' (National Report – Malta, December 2013) 36.

While some authors suggest that the State coordinating the search and rescue has a residual obligation to allow disembarkation if no other place is found, the issue remains contentious.[160]

It is undeniable that the different bodies of law suggest contrasting ways to deal with the problem of irregular migration at sea. However, despite these ambiguities in the existing law, the humanitarian needs of migrants and refugees at sea should stimulate prompt practical responses.[161] For example, if rescue units or other suitable ships can temporarily be used to discharge initial succours in cases of distress, survivors must in the end be disembarked in a 'place of safety', which may only be on dry land.[162] As stated by the ECtHR – which broadly relied on reports of international human rights organisations – Libya could not be considered a 'place of safety' because of the well-documented inadequacy of its response to flows of migrants and asylum seekers.[163] Moreover, as provided by the IMO Guidelines, a vessel cannot be conceived of as a final 'place of safety.' The fact that a State is legally bound to disembark a person rescued at sea in a safe haven implicates the duty to collect thorough information on the conditions of reception and treatment of rescued migrants and refugees in the receiving country.

In accordance with the UNHCR's proposed definition, 'interception' embraces all those extraterritorial activities carried out by a State to keep undocumented migrants, including refugees, away from its territory, thus preventing entry by land, sea, or air.[164] At face value, 'rescue' and 'interception'

[160] S Trevisanut, 'Is There a Right to be Rescued at Sea? A Constructive View' (June 2014) *Questions of International Law* 1, 7 (Trevisanut 2014b).

[161] N Klein, 'A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants' (2014) 63 *International and Comparative Law Quarterly* 787, 804. See also M Di Filippo, 'Irregular Migration and Safeguard of Life at Sea: International Rules and Recent Developments in The Mediterranean Sea' in A del Vecchio (ed), *International Law of the Sea: Current Trends and Controversial Issues* (Eleven International Publishing, 2014) 9–20.

[162] Resolution MSC.167(78), 20 May 2004, n 158 above, paras 6.13–6.14. Indeed, 'an assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made' (para 6.13). Moreover, 'A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination' (para 6.14).

[163] *Hirsi v Italy*, above n 5, paras 123–126.

[164] UNHCR Executive Committee, *Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc EC/50/SC/CPR.17, 9 June 2000. Interception may encompass interdiction of boats ('active' or 'physical' interception) as well as 'passive' measures, such as implementation of restrictive visa requirements, carrier sanctions, and the establishment of airlines liaison officers in countries of origin or transit of immigrants to identify those possessing false or inadequate documentation and to prevent their departure to the destination country. On practices deterring asylum seekers, see B Gorlick, 'Refugee Protection in Troubled Times: Reflections on Institutional and Legal Developments at the

appear to be profoundly different, but examination indicates both their similarities and ambiguities in practice. As a general rule, when vessels respond to persons in distress at sea, they are not necessarily engaged in interception. 'Rescue' can, indeed, be described as 'an operation to retrieve persons in distress, provide for their initial medical or other immediate needs, and deliver them to a place of safety.'[165] However, problems arise when, for example, a State coast-guard encounters an unseaworthy boat allegedly transporting undocumented migrants.[166] Pull-backs carried out by Libyan authorities in 2017–18 have also been justified as search and rescue activities resulting in disembarkation in the coastal State.

It is important to note that the classification of push-backs and push-backs by proxy as either rescue measures or external maritime border control operations is immaterial for the purpose of establishing State responsibility under general international law and human rights law; in both cases what counts is whether human rights obligations have been violated as a consequence of the above-mentioned practices.[167] Nevertheless, this categorisation matters for the purpose of EU law. Indeed, assuming that 'search and rescue' missions do not fall under the Schengen Border Code (SBC), States generally prefer to deem their activities on the high seas to be 'rescue' missions rather than 'interceptions'.[168]

That said, Article 3(b) of the SBC sets forth that it is to be applied without prejudice to 'the rights of refugees and persons requesting international protection to EU Member State authorities, in particular as regards *non-refoulement*', while Article 5(4)(c) allows for derogation from normal entry criteria on account of humanitarian grounds or because of international obligations. Since the *ratione loci* of the Code exceeds the perimeter of EU Member States,[169]

Crossroads', in N Steiner, M Gibney, and G Loescher (eds), *Problems of Protection: the UNHCR, Refugees, and Human Rights* (Routledge, 2003) 86.

[165] SAR Annex, para 3.1.9; and SOLAS, chapter V, reg 33 (1-1).

[166] Miltner 2010, n 4 above, 220.

[167] See, eg, *Hirsi v Italy*, above n 5, para 81.

[168] Pursuant to Art 1, the SBC aims to establish rules governing the border control of persons crossing the external borders of the Member States of the European Union. As stated in recital 6 of the Code, border control is intended to 'help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.'

[169] Schengen Border Code, paras 2.1.3 and 2.2.1, Annex VI. While at sea, controls can be performed 'in the territory of a third country' (SBC, para 3.1.1, Annex VI), checks can be carried out also 'in [railway] stations in a third country where persons board the train' (SBC, para 1.2.2, Annex VI). For an analysis of the extraterritorial scope of the SBC, refer to Chapter 2 of this book. See also M den Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in Ryan and Mitsilegas 2010, n 77 above, 176–80 (den Heijer 2010a); V Moreno-Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) Non-refoulement' in P De Bruycker, D Vanheule, MC Foblets, J Wouters and M Maes (eds), *The External Dimension(s) of EU Asylum and Immigration Policy* (Bruylant, 2011) 444–47.

> both interdiction and search and rescue measures undertaken by EU Member States anywhere at sea with the purpose of border control, or in the course of a maritime surveillance operation, shall be considered as coming within the remit of the Schengen Border Code and subject to its provision on *non-refoulement*.[170]

According to the EU Commission tasked to elaborate on the material scope of application of the SBC, 2009 push-backs to Libya amounted to border surveillance operations falling within the purview of the SBC by virtue of Article 12, whereby border surveillance measures are aimed to prevent unauthorised border crossings.[171]

Therefore, by rejecting a fragmentary approach to maritime obligations, States should prioritise a systemic interpretation of their duties at sea, thus making their border control measures consistent with international human rights and refugee standards.[172] This means that the different bodies of law operating at sea (human rights law, refugee law, law of the sea, and search and rescue) should be harmonised taking into account the diverging policy interests that are at stake.[173] Indeed, as some argue,

> [States] cannot circumvent refugee law and human rights requirements by declaring border control measures – that is, the interception, turning back, redirecting, etc. of refugee boats – to be rescue measures. In the case of both rescue at sea and border control measures *vis à vis* migrants who are not in distress at sea, the following procedures are required: transfer of the protection seekers and migrants to a safe place on EU territory; conduct of proceedings in order to examine the asylum application; legal review of the decision.[174]

'Search and rescue' has often been adduced as the legal basis for both interception of shipwrecked flagless boats and the deflection of interdicted people to ports of embarkation.[175] Nevertheless, even portraying the 2009 Italy–Libya push-backs as 'rescue activities' only, it cannot be denied that – as a State party to the SAR and SOLAS Conventions – Italy failed to comply with its obligation to cooperate to assist ship masters in delivering persons rescued at sea to a 'place of safety.' A rescue operation can only be considered to be fully accomplished when survivors finally disembark on safe, dry land, and not when they are initially rescued. The same considerations also apply in those cases in which Italy cooperates with Libya in the location of migrants' boats, or is engaged in

[170] V Moreno-Lax 2011a, n 63 above, 211.

[171] Letter from ex-Commissioner Barrot to the President of the LIBE Committee of 15 July 2009. See *Hirsi v Italy*, above n 5, para 34. See also B Nascimbene, 'Il Respingimento degli Immigrati e i Rapporti tra l'Italia e l'Unione Europea' (Istituto Affari Internazionali, 2009) 1, 4.

[172] Moreno-Lax 2011a, n 63 above, 220.

[173] Klein 2014, n 161 above, 789.

[174] A Fischer-Lescano, T Lohr and T Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *IJRL* 256, 291.

[175] See, eg, the analysis conducted by M Tondini, 'Fishers of Men? The Interception of Migrants in the Mediterranean Sea and their Forced Return to Libya' (Inex Paper, 2010).

long-distance support of Libyan pull-backs by means of technical, economic, and logistical assistance, or even coordination of rescue operations.

Under Article 98 of the UNCLOS,

> every State shall … promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety … and, where circumstances so require, by way of *mutual regional arrangements co-operate with neighbouring States* for this purpose.

Therefore, while cooperation on search and rescue with third countries would in principle be possible, the delegating State (*in casu* Italy) should ensure that human rights of migrants and refugees are respected in the country of disembarkation in order to avoid incurring responsibility for violations of the duty to *non-refoulement* and breaches of their law of the sea obligations.

(i) Duty to Rescue and Right to be Rescued?

The duty to protect (for example, the duty to rescue those in distress on the high seas) might be considered to derive from the principle of 'effectiveness'.[176] The concept of due diligence – from which the positive effect of human rights is inferred[177] – requires thus States to be proactive for preventive and protective purposes.[178]

No consensus exists in scholarship on the existence of a right to be rescued under the law of the sea.[179] The main objective of the law of the sea and search and rescue rules under the UNCLOS and the relevant IMO instruments (SOLAS and SAR Conventions) is indeed the allocation of competences, and not the protection of human rights of individuals. Therefore, the duty to render assistance can be considered, as some argue, the operational obligation stemming from the application of the human right to life at sea.[180] While the existence of such an individual right under the law of the sea and other maritime conventions can be easily dismissed, it could instead be argued that the right to be rescued is part of the normative contours of the right to life under specific circumstances.[181]

[176] VP Tzevelekos and EK Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86(4) *Nordic Journal of International Law* 427.

[177] D Shelton, 'Positive and Negative Obligations' in D Shelton, A Goult (eds), *The Oxford Handbook of International Human Rights Law* (OUP, 2013) 562–83.

[178] See, eg, *Osman v UK*, App no 23452/94 (28 October 1998) before the ECtHR; and *Velásquez-Rodriguez v Honduras (Judgment)*, Series C no 4, 29 July 1988, para 172 before the IACtHR; J Coppens, 'The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v. Italy* Judgment of the European Court of Human Rights' in Y Haeck, E Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014) 186.

[179] See eg, Trevisanut 2014b, n 160 above, 5–8; E Papastavridis, 'Is There a Right to Be Rescued at Sea? A Sceptical View', (June 2014) 4 *Questions of International Law* 17–32.

[180] Trevisanut 2014b, n 160 above, 8.

[181] Papastavridis 2014, n 179 above, 19.

Tzevelekos and Proukaki suggest that the right to be rescued and the corresponding duty to rescue derive from the notion of positive obligations under international human rights law. In this view, the law of the sea offers the tools to reach the goals of human rights law,[182] but does not afford any legal avenue for the judicial redress of wrongs for the people in question. Such redress can indeed be provided, at an international level, only under the relevant human rights treaties. As already emphasised in the previous Section, law of the sea and human rights law do complement and reinforce each other and must be read as part of a comprehensive approach to State obligations toward migrants encountered at sea.[183] As Article 311(2) of the UNCLOS reads:

> This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Therefore, whilst UNCLOS does not contain human rights provisions, it does not explicitly exclude the application of human rights in certain contexts. In most cases, human rights obligations require States to do what they are already allowed to do under the law of the sea, 'turning the right to exercise jurisdiction into a duty to take measures to protect, ensure and fulfil human rights.'[184] According to the ECtHR, States should not only refrain from human rights violations, but also take steps to safeguard the lives of those within their jurisdiction,[185] in particular if the authorities in question knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual, and they failed to take measures, within the scope of their powers, that might have been expected to eliminate that risk.[186] The issue of whether SAR operations can be considered to involve the jurisdiction of the intervening State under human rights law is still debated. While it is doubtless that the jurisdiction of the flag State is engaged where people in distress are under the control of a rescuing State vessel, the same conclusion cannot be smoothly reached with regard to rescue operations carried out by private vessels.[187] In the *Hirsi* case, the ECtHR specified that Italy's responsibility was engaged from the moment people in distress were taken on board Italian warships.[188]

[182] Tzevelekos and Proukaki 2017, n 176 above, 4.

[183] For instance, Butler and Ratcovich argue that '[t]he duty to rescue everyone in distress at sea can … be seen as a natural corollary of the right to life.' G Butler and M Ratcovich, 'Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea' (2016) 85(3) *Nordic Journal of International Law* 235, 253.

[184] I Papanicolopulu, 'Human Rights and the Law of the Sea' in DJ Attard, M Fitzmaurice and NA Martinez Gutierrez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea* (OUP, 2014) 531.

[185] See, eg, *LCB v UK*, App no 23413/94 (9 June 1998) para 36.

[186] *Osman v UK*, above n 178, para 116.

[187] Papastravidis 2014, n 179 above, 27.

[188] *Hirsi v Italy*, above n 5, paras 76–78.

This would also be in line with Article 92 of the UNCLOS on the exclusive jurisdiction of the flag State.

In the *Xhavara* case, the ECtHR recognised that the jurisdiction of Italian authorities derived from both the existence of a bilateral agreement with Albania and the collision with the Albanian vessel transporting migrants.[189] Reasoning by analogy, it can be argued that jurisdiction under the ECHR is engaged also in cases where rescue operations are performed on the basis of a SAR agreement, and when there is a contact between the rescuers and the persons in distress. However, this conclusion would be more complicated in those instances in which rescued people are not taken on-board, or there is no involvement in a SAR operation. A coastal State has a duty to provide assistance if people in distress are within its SAR region, which is considered a non-jurisdictional area, namely a zone where States only have obligations, not rights.[190] More specifically, the coastal State holds here limited jurisdiction, which is solely functional to the performance of SAR services. Such *de jure* jurisdiction can be inferred from the obligation to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service' and to cooperate with other States to this end, as required by Article 98(2) of the UNCLOS. Loss of lives at sea can thus entail a violation of the State's due diligence obligation to provide *adequate and effective* SAR services in its SAR region.[191]

A breach of the right to life can also arise, in particular if the relevant authorities had knowledge of the peril. However, it would be difficult to establish a jurisdictional link between the coastal State and the endangered person if no distress call had been launched, and the State had no knowledge of the boat in distress. The negligence of the State could be nevertheless invoked by other States on the basis of the law of the sea treaties or by individuals contesting violations of the right to life, as recognised by the ECtHR in *Beru v Turkey*[192] and *Kemaloglu v Turkey*.[193] Having said that, the question remains whether the jurisdiction of the coastal State can be presumed in its SAR zone with regard to the application of human rights law.

According to Papastavridis, vessels in distress entering the SAR zone of a certain coastal State do not fall *ipso facto* under the jurisdiction of that State. As SAR regions are not maritime zones – but only functional zones, in accordance with Article 98(2) UNCLOS – States do not exercise sovereignty or sovereign rights. Therefore, it cannot be held that even if coastal States do not exercise *de jure* control over a vessel in distress, they may have *de facto* control over any vessels

[189] *Xhavara v Italy and Albania*, App no 39473/98, Admissibility Decision (11 January 2001).

[190] See Art 2(1) and Annex, Art 2(1)(7) of SAR Convention.

[191] C Pitea, 'Diritto alla Vita', in L Pineschi (ed), *La Tutela Internazionale dei Diritti Umani: Norme, Garanzie e Prassi* (Giuffré, 2006) 314, 318.

[192] *Berü v Turkey*, App no 47304 /07 (11 January 2011).

[193] *İlbeyi Kemaloğlu and Meriye Kemaloğlu v Turkey*, App no 19986/06 (10 July 2012). See also Trevisanut 2014b, n 160 above, 14.

entering their SAR zone. A certain level of effective control is needed, such as at least awareness of the location of the craft or the perilous situation.[194]

In line with Papastavridis, Trevisanut's argument is that a State *receiving a distress call* from a boat on the high seas has the duty to intervene even if the boat is outside its territorial or SAR waters. Such an obligation would derive indeed from a factual relationship that she defines as 'exclusive long distance *de facto* control'.[195] This coastal State may not be the one that is primarily responsible for the SAR zone where the vessel in distress is positioned. However, a jurisdictional link for the purpose of the right to life is created between the vessel and persons who have requested assistance, on one hand, and the recipient State, on the other hand, as soon as it acknowledges the distress call and acquires knowledge of the location and situation of distress. Once jurisdiction is established, a right to be rescued at sea, as a corollary to the right to life, will follow.[196] If then the State is unable to intervene due to geographical distance, it has still an obligation to take any measures to ensure protection of those in need by activating relevant SAR services.[197] In other words, the existence of a link between a State and a certain factual situation creates the law, in accordance with the principle *ex facto jus oritur*.[198]

The acknowledgement of such '*de facto* control' also finds support in other emergency cases (although not taking place at sea) in which the ECtHR recognises a positive obligation to provide emergency services 'where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an incident.'[199] In the context of SAR operations, this principle means that as soon as an endangered person, or a third party who notices the distress situation, sends a distress call (even from a location on the high seas outside the SAR zone of the recipient State), a jurisdictional link is created between the endangered person and State authorities receiving the call, thus creating an obligation for them to activate emergency services (either directly or indirectly, if geographical distance does not allow them to intervene in due time).[200]

Additionally, all States who are in chain involved with a migrant not only have an obligation to refrain from directly causing wrong, but they also have

[194] Papastravidis 2014, n 179 above, 27.
[195] Trevisanut 2014b, n 160 above, 12–13.
[196] Papastavridis 2014, n 179 above, 28–29.
[197] Trevisanut 2014b, n 160 above, 13.
[198] According to Di Stefano, 'Le principe de l'effectivité est le trait d'union entre le droit et le fait'. G Di Stefano, *L'ordre internationale entre légalité et effectivité. Le titre juridique dans le contentieux territorial* (Pedone, 2002) 257. *Contra*, see the sceptical approach by FC Matsumoto, *L'effectivité en droit international* (Bruylant, 2014).
[199] *Furdik v Slovakia* (Admissibility decision) App no 42994/05 (2 December 2008). On the knowledge element in the context of positive obligations, see V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18(2) *Human Rights Law Review* 309, 315.
[200] Trevisanut 2014b, n 160 above, 9, 13.

some responsibility to proactively offer the migrant in question some protection (according to their own capabilities). A duty to prevent or protect is triggered as soon as the State knows or foresees (or is reasonably expected to know or foresee) the existence of a threat/risk. Therefore, for instance, the flag State of a merchant vessel that spots a boat in distress and refuses to provide assistance would be responsible in two ways first, if it directly instructs the master of the private vessel not to render assistance – in this case the master could be deemed a '*de facto* organ' of the State in keeping with Article 8 of the ASR; secondly, for infringement of its positive obligations under the right to life, which prescribes both a duty to prevent and a duty to punish.[201] As the master of a merchant vessel should always record any reasons for failure to render assistance, the flag State has a positive obligation under Article 2 of the ECHR to take measures to both prevent the loss of lives and investigate any deaths potentially caused by both State agents and individuals.[202]

States might also engage concurrent liability for failure to protect.[203] Therefore, following a case-by-case approach, a State who hands over a migrant (either directly or indirectly) to a third country where her life and liberty can be threatened, in breach of the principle of *non-refoulement*, can be considered responsible just like the receiving State – ie, the latter for committing the actual wrongful act (a negative obligation), the former for failure to prevent the violation (even if extra-territorially), in accordance with the positive dimension of the same right. This also shows how migration management requires active cooperation between States as duty-bearers toward migrants and refugees on the move.[204]

[201] For a detailed account of relevant case law, see M Milanovic (ed), *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP, 2011); M Gondek, *The Reach of Human Rights in a Globalized World:* Extraterritorial Application of Human Rights Treaties (Intersentia, 2009); M Sheinin, 'Extraterritorial effect of the ICCPR', in F Coomans and MT Kamminga (eds), *Extraterritorial application for Human Rights Treaties* (Intersentia, 2004) 73.

[202] It is common bad practice, however, for commercial shipping not to inform flag State authorities when they identify the situations of danger at sea. For case law on the positive obligation under Art 2 of the ECHR, see, *inter alia*, *Gongadze v Ukraine*, App no 34056/02 (8 November 2005); and *Dink v Turkey*, App no 2668/07 (14 September 2010).

[203] On 'failure to protect' life as a ground for violation of Art 2 of the ECHR, see *Gongadze v Ukraine* and *Dink v Turkey*, n 202 above.

[204] On the duty to co-operate, see Art 7 Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime, above n 44. The Preamble to the Geneva Convention affirms that 'considering that the grant of asylum may place unduly heavy burdens on certain countries … a satisfactory solution … cannot … be achieved without international co-operation.' See also UNSC Res 2240, above n 137, in which the Security Council '[e]xpress[es] … strong support to the States in the region affected by the smuggling of migrants and human trafficking, and emphasiz[es] the need to step up coordination of efforts in order to strengthen an effective multidimensional response to these common challenges in the spirit of international solidarity and shared responsibility …' (Preamble). According to the Security Council, that task 'requires a coordinated, multidimensional approach with States of origin, of transit, and of destination.'

As the ECtHR held in *Hirsi*, 'treaties must be interpreted in good faith … and in accordance with the principle of effectiveness'.[205] Such a principle, which refers to the existence of factual links between the individual and the State (for example, geographical proximity) triggers the positive and (extraterritorial) duty to protect people in danger as long as the State of destination is aware of the situation (or could be reasonably expected to know) and is in a position to save lives.[206]

B. Hampering Access to Protection through Pre-arrival Interceptions

In some circumstances, national jurisprudence has adopted a restrictive interpretation of the *ratione loci* of the principle of *non-refoulement*. For example, in a case concerning the push-back of Haitians who attempted to flee their country and seek protection in the US, the US Supreme Court refused the extraterritorial relevance of *non-refoulement*, as codified in Article 33(1) of the Geneva Convention.[207] Nevertheless, the *Sale* case has been harshly criticised by the Inter-American Commission on Human Rights, which held that 'that Article 33 had no geographical limitations.'[208] Likewise, in the *Prague Airport* case, the English Court of Appeal concluded that *Sale* was 'wrongly decided' as it shall be 'impermissible to return refugees from the high seas to their country of origin.'[209]

Placing our attention on international human rights bodies, it is possible to observe that the jurisprudence of the HRC,[210] the Committee Against Torture,[211]

[205] *Hirsi v Italy*, above n 5, para 179.

[206] Tzevelekos and Proukaki 2017, n 179 above, 8.

[207] See the US Supreme Court, *Sale, Acting Commissioner, Immigration & Naturalization Service v Haitian Centres Council* 509 US 155; 113 S Ct 2549 (1993).

[208] Inter-American Commission on Human Rights, *The Haitian Centre for Human Rights et al v US*, Case 10.675, Report no 51/96, para 157. Among scholars, see eg, GS Goodwin-Gill, 'The Haitian *Refoulement* Case: A Comment' (1994) 6 *IJRL* 103; SH Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 *IJRL* 679; JY Carlier, 'Droit d'asile et des Réfugiés: de la Protection aux Droits' (2007) 332 *Recueil des Cours de l'Académie de Droit International* 107.

[209] *R (European Roma Rights Centre) and Others v Immigration Officer at Prague Airport*, 22 May 2003, [2003] EWCA Civ 666, paras 34–35.

[210] The HRC recognises the applicability of the *non-refoulement* obligation under the relevant Covenant where individuals are either within or outside the territory of a State party, as long as they are under the control of the State itself. See, eg, HRC General Comment no 31, 'The nature of the general legal obligation imposed on States parties' UN Doc CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 12); 'Concluding Observations on the United States of America' UN Doc CCPR/C/USA/CO/3Rev.1, 18 December 2006, para 16); *Mohammad Munaf v Romania*, Comm no 1539/2006 (21 August 2009) UN Doc CCPR/C/96/D/1539/2006, para 14.2; General Comment no 2, 'The prohibition of torture and cruel treatment or punishment (Art 7)' UN Doc HRI/HEN/1/rev.1, 28 July 1994, para 9; *Kindler v Canada*, Comm no 470/1991 (11 November 1993) UN Doc CCPR/C/48/D/470/1991, para 13.2.

[211] On the extraterritorial applicability of the Convention to any territory 'under the *de facto* effective control of the State party', see 'Conclusions and Recommendations on the United States of

and the ECtHR[212] – as examined in Chapter two – have increasingly confirmed the extraterritorial applicability of the relevant treaties when States deal with individuals who risk being subjected to torture or degrading treatment if handed over to the authorities of their countries of origin or transit. The ECtHR has also clearly emphasised States' duty to prevent *refoulement* from occurring, wherever jurisdiction is exercised.[213] While the applicability of the principle of *non-refoulement* in cases of expulsion and extradition has been recognised on several occasions, the applicability of this principle to people intercepted on the high seas during offshore migration operations has been less conclusive – at least this was so until the 2012 *Hirsi* decision.[214] In that judgment, the ECtHR held that there had been an extraterritorial violation of Article 3 of the ECHR on account of the fact that the applicants were exposed to the risk of ill-treatment in Libya, and to the risk of repatriation to Somalia and Eritrea.[215] According to the Court, Italy had exercised a 'continuous and exclusive *de jure* and *de facto* control' over the migrants found at sea,[216] thus upholding the same jurisdiction threshold applied in *Medvedyev*, where, however, the intercepted vessel was simply escorted from the international waters to France.

The Court's reasoning is not exhaustive on this point and the *Hirsi* case gives room to contend that also *minimal control* would be sufficient to engage the jurisdiction of the State exercising migration controls beyond borders.[217] Thus shifting emphasis from State action *per se* to the *consequences* of that action, physical contact does not amount to an essential requisite to engage jurisdiction. On this view, jurisdiction (and potentially responsibility) under international human rights law can also be engaged in those operations of looser-control at sea where State action falls short of arresting or detaining

America', 1–19 May 2006, CAT/C/USA/C/2, para 15; *JHA v Spain*, Comm 323/2007 (21 November 2008) UN Doc CAT/C/41/D/323/2007; see also General Comment 2 'Implementation of Article 2 by States parties', 24 January 2008, CAT/C/GC/2, para 6; *Sonko v Spain*, Comm 368/2008 (20 February 2012) UN Doc CAT/C/47/D/368/2008, para 10.3.

[212] See, eg, *Medvedyev v France*, above n 41; *Xhavara v Italy*, above n 189; *Women on Waves v Portugal*, App no 31276/05 (3 February 2009); *Hirsi v Italy*, above n 5; *Al Jedda v UK*, App no 27021/08 (7 July 2011); *Al-Skeini v UK*, App no 55721/07 (7 July 2011); *Al-Saadoon v UK*, App no 61498/08 (2 March 2010).

[213] See, eg, *Hirsi v Italy*, above n 5; *Xhavara v Italy*, above n 189, 5; *WM v Denmark*, App no 17392/90 (14 October 1992).

[214] For commentary on the *Hirsi v Italy* case and the application of *non-refoulement* on the high seas, see M Giuffré, 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v Italy*' (2012) 61(3) *International and Comparative Law Quarterly* 728; Moreno-Lax V, '*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) *Human Rights Law Review* 574; M den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case' (2013) 25(2) *IJRL* 695.

[215] For an analysis of the extraterritorial applicability of the principle of *non-refoulement* and the *Hirsi v Italy* case, see Chapter 2 of this book.

[216] *Hirsi v Italy*, above n 5, para 81.

[217] ibid, para 79.

the individuals concerned.[218] Physical contact or boarding of the vessel are not needed to engage *de facto* jurisdiction, as demonstrated in the *ND and NT* case.[219]

Likewise, the *Women on Waves* case is an example of engagement of jurisdiction despite the fact that the Portuguese Navy vessel did not have any physical contact with the Dutch vessel navigating outside the territorial waters of Portugal.[220] In the *Xhavara* case, collision between an Italian warship and the Albanian boat involved in migrant smuggling was sufficient to bring those people under Italian jurisdiction.[221] Actions such as forcing a boat to change its route by either closing access to ports, screaming, or steaming nearby until it is heading out of the territorial waters or the contiguous zone, as well as conducting or escorting the ship to a third country, can amount to 'effective control'. If preventing entry to territorial waters does not automatically amount to *refoulement*, violations of this principle arise if – as a consequence of these actions or omissions – the persons concerned are transferred to the frontiers of a territory where their life and liberty can be seriously threatened. Therefore, interdicting authorities shall always determine whether a specific third State is 'safe, accessible, and reachable for the boat in question.'[222]

The *Hirsi* ruling also confirms States' obligation to inform refugees about their rights, ensure access to asylum procedures and effective remedies, and assess the safety of the third country. Although the Geneva Convention does not expressly bind States to grant access to asylum procedures, such an obligation can be implicitly derived from the principle of *non-refoulement* (Article 33(1)) whose content and scope need to be shaped in good faith through the joint reading of international refugee and human rights law instruments, interpreted on the basis of their ordinary meaning in light of their object and purpose.[223] Therefore, not only should refugees be entitled to substantiate their protection claims before competent authorities onshore in order to dispel any risk of ill-treatment upon removal but, if intercepted on the high seas, they should also be disembarked in a safe place and receive access to fair and effective asylum procedures.[224] This would be in line with a harmonised approach to State

[218] R Bank, 'Refugees at Sea; Introduction to Article 11 of the 1951 Convention' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP, 2011), 841.

[219] *ND and NT v Spain*, App nos 8675/15 and 8697/15 (3 October 2017) para 54.

[220] *Women on Waves v Portugal*, above n 212, para 43.

[221] *Xhavara v Italy and Albania*, above n 189, para 1.

[222] Bank 2011, n 218 above, 849.

[223] See, in particular, Arts 3 and 13 of the ECHR, Art 3 of the CAT, and Art 7 of the ICCPR, which have been examined in Chapter 2 of this book. On the interplay between refugee law and human rights law, see T Clark and F Crépeau, 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) *Netherlands Quarterly of Human Rights* 389. The EXCOM Conclusion no 95 (LIV) on International Protection (10 October 2003) underlines the 'complementary nature of international refugee and human rights law.'

[224] For an analysis of the extraterritorial applicability of the right to access asylum procedures, see Chapter 3 of this book.

obligations toward migrants and refugees at sea. International courts have also emphasised the need to ensure considerations of humanity in the interpretation and application of the law of the sea.[225] Saving human lives can be understood to include not only prevention of loss of lives at sea, but also protection from persecution and other human rights violations as a consequence of disembarkation in an unsafe country. As saving human lives is a common theme of the law of the sea, this legal regime should be read together with other areas of law, such as search and rescue, human rights law, and refugee law, even in the face of contrasting policy imperatives.[226] It can thus be argued that States have 'a positive protection obligation, not immediately absolute in the sense of the prohibition of torture, but a positive due diligence obligation to save lives';[227] in other words 'an obligation to deploy adequate means to exercise best possible efforts, to do the utmost to obtain this result.'[228]

This chapter's main conclusion is that the implementation of bilateral agreements on technical and police cooperation can hamper refugees' access to protection – that is to say *non-refoulement* as well as access to asylum procedures and effective remedies. Indeed, as explained in Chapter two, the enforcement of *non-refoulement*, under international refugee and human rights law, has two procedural consequences: the duty of the State to advise the individual in question about her entitlement to obtain international protection, and the duty to provide access to fair asylum procedures and effective remedies.[229]

The jurisprudence of the ECtHR, more than other international bodies, has interpreted the prohibition of *refoulement* as requiring access to an effective and rigorous examination of protection claims,[230] even in extraterritorial contexts. To give an example, in *Hirsi v Italy*, for the first time, the Court recognises the

[225] See, eg, *Corfu Channel (UK v Albania) (Merits)*, 9 April 1949, ICJ Gen List n 1; *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea) (Admissibility and Merits)*, 1 July 1999, List of Cases no 2, para 155.

[226] Klein 2014, n 161 above, 813–14.

[227] GS Goodwin-Gill, 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action', Notes for a Presentation, Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean University of Naples 'L'Orientale' (11 May 2015). While people are not at the centre of the law of the sea, it can nonetheless significantly contribute to the protection of people in maritime contexts. For an extended analysis, see I Papanicolopulu, *International Law and the Protection of People at Sea* (OUP, 2018).

[228] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion*, International Tribunal for the Law of the Sea, Seabed Disputes Chamber, 1 February 2011, ITLOS Rep 2011, para 110.

[229] For the view that *non-refoulement* entails an obligation to ensure access to an effective remedy that is available in law and in practice, see W Kälin, M Caroni and L Heim, 'Article 33 para 1 (Prohibition of Expulsion and Return (Refoulement)' in Zimmermann 2011, n 218 above, 1395. See eg, *Agiza v Sweden*, Comm no 233/2003 (20 May 2005) UN Doc CAT/C/34/D/233/2003, para 13.8; *Jabari v Turkey*, App no 40035/98 (1 July 2000) para 50. For further case law, refer to Chapter 2 of this book.

[230] For instance, in the *Amuur v France* decision, the ECtHR asserted that effective access to asylum procedures must be ensured also to asylum seekers retained in the international zone of an airport. See *Amuur v France*, App no 19776/92 (25 June 1996) para 43.

duty of the intercepting State to guarantee access to asylum procedures when refugees are intercepted on the high seas.

Preventing people from lodging their protection claims would both heighten the risk of *refoulement* and indirectly lead to a violation of Article 3 of the European Convention.[231] Along the same lines, the Court found that the summary expulsion of interdicted refugees without access to an individualised status determination procedure and without a thorough and rigorous assessment of their requests, before the removal measure was enforced, amounted to a violation of Articles 3 and 13 of the Convention and Article 4 of Protocol 4.[232]

To sum up, since States must also fulfil these procedural guarantees (*non-refoulement*, access to asylum procedures, and effective remedies) in respect of migrants and refugees found at sea,[233] intercepting/rescuing migrants and refugees before they are able to enter the territorial jurisdiction of a European State, and pushing them back (whether directly or by proxy) to an unsafe third country undercuts the individual right to seek asylum and receive protection from *refoulement*.

VII. PUSH-BACKS AND PUSH-BACKS BY PROXY: STATE RESPONSIBILITY IN EXTRATERRITORIAL (AND EXTERNALISED) IMMIGRATION CONTROLS

A. Jurisdiction and Responsibility

This chapter could have stopped at Section VI, which sought to answer the key research question this work intends to tackle, namely whether the implementation of bilateral agreements for technical and police cooperation at sea may hamper refugees' access to protection. However, due to the sensitivity and complexity of the issue of extraterritorial migration controls, the following sections pursue the analysis further by exploring the debate on State Responsibility under general international law in situations of bilateral cooperation against irregular migration. As discussed in the previous Section, the implementation of agreements for technical and police cooperation beyond borders may *de facto* restraint the enjoyment of essential refugee rights. However, it cannot automatically be inferred that European States which cooperate with third countries in patrolling external maritime borders are internationally responsible under human rights law if intercepted migrants and refugees are removed to countries where their life is irremediably endangered.

[231] *Hirsi v Italy*, above n 5, paras 185, 201–205.

[232] ibid, paras 205–207. On the extraterritorial applicability of the right to an effective remedy under the ECHR, see Chapter 2 of this book.

[233] *Hirsi v Italy*, Concurring Opinion 44–45, above n 5. See also, the Parliamentary Assembly of the Council of Europe, 'Resolution 1821 (2011) on the Interception and Rescue at Sea of Asylum Seekers, Refugees, and Irregular Migrants', paras 9.3–9.6.

A prerequisite to engaging responsibility under human rights law is that States exercise jurisdiction over persons removed to unsafe ports of departure as a consequence of joint patrols carried out either on the high seas or in the coastal waters of the country of embarkation.[234] But let us assume that either it is difficult to establish whether or not a State exercises jurisdiction, or it can be shown that it did not exercise such effective control as demanded by human rights law to establish jurisdiction. At this point, reference to the ASR would enable identification of an internationally accountable actor, even if indirectly, whenever States engage in human rights violations with regard to people that do not fall under their effective control and authority.

The study of State Responsibility is not intended here to be comprehensive, but is limited to an overview of the kinds of liability a European State might incur in contexts of cooperative migration control. However, I then move more specifically into the subject of indirect responsibility under Article 16 of the ASR to investigate Italy's possible complicity with Libya for violation of the principle of *non-refoulement* while performing activities of migration control at sea. It would, moreover, exceed the scope of this chapter to proceed with a comprehensive analysis of concepts such as jurisdiction, attribution, the different conditions for asserting responsibility, and its legal consequences. Nevertheless, a number of specifications are needed.

In general international law, 'jurisdiction' points to the authority of the State to regulate the conduct of natural and legal persons by means of its domestic law.[235] Such authority, which is grounded in, and delimited by international law, includes both the power to prescribe and the power to enforce legal rules.[236] As discussed in Chapter two, 'jurisdiction' in human rights treaties is mainly understood as *factual power* that a State exercises over persons or territory.[237] Every time a State exercises this power – meaning effective control and authority over a territory or a person – it must protect and ensure the rights of the

[234] This point has already been examined in Chapter 2 of this book. See, as an example, the *Hirsi v Italy* case, above n 5.

[235] See Chapter 2 of this book for a broader discussion on 'jurisdiction.'

[236] On the issue of jurisdiction in international law, see C Staker, 'Jurisdiction' in Malcolm Evans (ed), *International Law* (OUP, 2018) chapter 10. See also M Shaw, *International Law* (CUP, 2008) 645.

[237] Milanovic 2011, n 201 above, 53. On a different view, Papanicolopulu argues that a State should not be completely relieved from its obligations under human rights law even if it does not exercise control over territory that is subject to its jurisdiction, for instance when territory is controlled by armed groups or is occupied by a foreign state. An example is the *Ilascu* case, where the ECtHR recognised the existence of (limited) positive obligations also for Moldova. I Papanicolopulu, 'A Response to Milanovic on Extraterritorial Application of Human Treaties: The significance of international Law Concepts of Jurisdiction' *EJIL Talk* (4 December 2011), https://www.ejiltalk.org/a-response-to-milanovic-on-extraterritorial-application-of-human-treaties-the-significance-of-international-law-concepts-of-jurisdiction/#more-4171. See also *Ilascu v Moldova and Russia*, App no 48787/99 (8 July 2004).

people concerned.[238] Moreover, doctrine,[239] as well as the jurisprudence of the International Court of Justice (ICJ)[240] and international human rights bodies, have been interpreting 'jurisdiction' as operating extraterritorially.[241]

Being a prerequisite for the human rights obligation to apply, jurisdiction is a condition for engaging potential State responsibility.[242] However, the two concepts should not be equated. Whilst 'State jurisdiction', in human rights law, is 'a question of a State's control over the victims of [human rights] violations … or, more generally, control over the territory in which they are located',[243] 'responsibility' is triggered by the breach of the obligation the State has to secure human rights to people within its jurisdiction. Jurisdiction in international law delimits municipal legal systems of States,[244] and is an emanation of one State's sovereignty; that is, the claim both to regulate its own public order, and exercise

[238] See, eg, *Delia Saldias de Lopez v Uruguay*, Comm no 52/1979 (29 July 1981) UN Doc CCPR/C/OP/1, para 12.1. On the application of the concept of 'functional jurisdiction' to activities taking place beyond territorial frontiers, see Gammeltoft-Hansen 2011, n 289 below, 124.

[239] See, eg, GS Goodwin-Gill, 'The Extraterritorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction' in L Boisson de Chazournes and MC Kohen (eds), *International Law and the Quest for its Implementation/Le Droit International et la Quête de sa Mise en Oeuvre: Liber Amicorum Vera Gowlland-Debbas* (Brill, 2010) 293; Milanovic 2011, n 201 above; S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) *Leiden Journal of International Law* 857; S Kim, '*Non-Refoulement* and Extraterritorial jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' (2017) 30(1) *Leiden Journal of International Law* 49.

[240] Relevant are the two judgments of the ICJ in the *Wall Advisory Opinion* and in the *Congo-Uganda* case where the Court held that State responsibility under human rights law may be engaged by States carrying out a military occupation of a foreign territory. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, ICJ Rep 136, paras 109–111; see also *Armed Activities on the Territory of Congo (Democratic Republic of Congo v Uganda)*, 19 December 2005, ICJ Rep 168, paras 216, 220. In the absence of a general rule imposing the respect of human rights obligations only within State territory, the ILC has affirmed that acts or omissions attributable to a State can engage its international responsibility, 'regardless of whether they have been perpetrated in national or foreign territory.' See 'Report of the ILC on the work of its twenty-seventh session', *Yearbook of the ILC 1975*, vol II, 84.

[241] See, eg, the HRC's oft-quoted case *Lopez-Burgos v Uruguay*, above n 238, paras 12.1–12.2. On a general note, the ECtHR has considered a decisive element for determining State jurisdiction (and, therefore, the application of the relevant treaty) whether a certain person falls within the effective control and authority of a contracting State, regardless of whether it is exercising public powers or not. See, eg, *Loizidou v Turkey*, App no 15318/89, Preliminary Objections (23 March 1995) paras 62–64; *Cyprus v Turkey*, App no 25781/94, Judgment – Just satisfaction (10 May 2001) paras 76, 80; *Ilascu v Moldova and Russia*, above n 237, para 384; *Ocalan v Turkey*, App no 46221/99 (12 May 2005) para 91; *Issa v Turkey*, App no 31821/96 (16 November 2004) paras 68–71; *Pad and Others v Turkey*, App no 60167/00 (28 June 2007) paras 53–55; *Al-Saadoon v UK*, above n 212, para 81; *Al-Skeini v UK*, above n 212, para 149; *Hirsi v Italy*, above n 5, para 81. See also, *WM v Denmark* (above n 213) concerning extraterritorial *non-refoulement* from an embassy in the territory of a non-Contracting Party to the ECHR.

[242] O De Schutter (ed), *International Human Rights Law: Cases, Materials, Commentary* (CUP, 2010) 124.

[243] Milanovic 2008, n 140 above, 446.

[244] ibid 447.

power *vis-à-vis* other States.[245] Unlike the human rights context – where jurisdiction is 'a question of fact, of actual authority and control'[246] – in general international law, this power relies on legal entitlements or competences.[247]

The rules of State responsibility concern 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.'[248] In Ago's words, 'it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.'[249] Therefore, it would be important to verify what kind of responsibility could be established, under general international law, when States commit an international wrongful act while carrying out external migration controls autonomously or in conjunction with another actor.

On a general note, States are responsible for any conduct of their organs whether they 'exercise legislative, executive, judicial, or any other functions.'[250] As outlined by Article 2 of the ILC Codification, the requirements for determining an international wrongful act are twofold: first, the conduct at issue must be attributable to the State; second, the conduct must consist of the infringement of an international legal obligation in force at that time for that State.

As interception and removal measures can assume various forms, identifying the exact scope of both States' obligations toward refugees in the context of controls at sea, and concurrent responsibilities in case of infringement of these obligations, could be complicated. In particular, the following Sub-sections concentrate on the police cooperation set up by the bilateral technical Protocols concluded between Italy and Libya in 2007 and 2009 (resulting in the 2009 push-backs); and on the pull-backs started in 2017 in the Central Mediterranean.

The patterns of State cooperation connected to readmission of unwanted migrants, who often travel along with refugees, are multifarious. European countries may train the border guards of a third State; supply them with patrol boats; exchange police and immigration officers; participate with their own

[245] ibid, 420; Brownlie 2008, n 58 above, 297.

[246] See *Al-Skeini v UK*, above n 212, paras 132–133 ff. See also Milanovic 2008, n 140 above, 447.

[247] F Berman, 'Jurisdiction: The State' in P Capps, MD Evans and S Konstadinidis (eds), *Asserting Jurisdiction* (Hart Publishing, 2003) xix.

[248] J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) 74.

[249] R Ago, 'Second Report on State responsibility, by Special Rapporteur – the origin of international responsibility', Extract from the *Yearbook of the ILC 1970*, vol II, doc A/8010/Rev.l, 178, para 7(c). The dichotomy between primary and secondary rules of international law is not defended as correct by part of the literature. Linderfalk, for instance, criticises the assumption that State responsibility can be described as separate from the ordinary rules of international law. See U Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System' (2009) 78 *Nordic Journal of International Law* 53, 72.

[250] Art 4(1) of the ASR. Additionally, under Art 5, States may engage responsibility even for '[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority …'

officials in mixed crews; coordinate rescue operations; send coordinates for the location of boats in distress; intercept boat migrants by means of their own vessels and hand them over to the authorities of the country of embarkation; or delegate such functions directly to the third State itself.

Since in joint migration controls, European States can attract either direct or indirect responsibility if they disregard refugee or human rights law, responsibility should be tackled on an *ad hoc* basis following rules on attribution of State conduct. For the purpose of this work, the conduct that should be attributable to a European State to establish the international wrongful act, and therefore its international responsibility, would be the removal of intercepted refugees 'to territories where their lives and freedoms would be threatened.'[251] State practice, since the adoption of the 1951 Geneva Convention, has provided persuasive evidence that the principle of *non-refoulement* has achieved the status of customary international law.[252] As a matter of human rights law, the principle of *non-refoulement* is a corollary of the prohibition on torture, cruel, inhuman and degrading treatment or punishments, as enshrined in several international instruments,[253] such as the ICCPR and the CAT, ratified by both Italy and Libya.[254]

B. Independent Responsibility and Attribution of State Conduct to Another State

Relying on the empirical material deployed in Sections II and III, this Sub-section sketches out two kinds of responsibility that a European State may incur where it is involved in a common action against irregular migration together with a third country. First, in the case of joint border controls – even when patrols have been moved to the territorial waters of a non-EU third country – States can be found independently responsible. In these circumstances, Article 47 of the ASR requires the conduct of State organs to be attributable to the two States and to entail a breach of their international obligations, *in casu* the principle of *non-refoulement*.[255]

[251] Goodwin-Gill and McAdam 2007, n 17 above, 277.

[252] See Chapter 2 of this book for further details. For an opposite view, see JC Hathaway, *The Rights of Refugees under International Law* (CUP, 2005) 363–70.

[253] In this vein, the *jus cogens* value of *non-refoulement* can be derived by the absolute prohibition on torture. Under Art 41(2) of the ILC Codification, 'No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.' Art 40(1) refers to the international responsibility 'entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.'

[254] See, Chapter 2 of this book for an analysis of *non-refoulement* under human rights law.

[255] Under Art 47 of the ASR: 'Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.' See also Arts 2 and 4. Pursuant to Art 2 of the ASR: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (*a*) is attributable to the State under international law; and (*b*) constitutes a breach of an international obligation of the State.' See also Art 4 of the ASR. For further analysis, refer to Crawford 2002, n 248 above, 145–46.

A second possible scenario exists where responsibility is assigned to a European State for the actions of the border guards of a third country. In this case, foreign border authorities should be conceived of as subsidiary organs of the EU country and executors of its immigration policies. Pursuant to Article 6 of the ASR,

> the conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Acting on instructions is not sufficient to attribute the conduct of a State organ to another State and it is necessary that the organs of the third country 'act in conjunction with the machinery of that [EU] State and under its exclusive direction and control, rather than on instructions from the sending State.'[256] It is likely that Italy would not be assigned separate responsibility for conduct attributable to it when interception is conducted by vessels under Libyan command in either Libyan territorial waters or on the high seas. In these circumstances, Libya would be fully competent to decide upon matters related to navigation, patrolling, and interception. By contrast, on 6 May and 30 August 2009, refugees intercepted on the high seas were transferred to Italian vessels, shipped to Libya, and handed over to Libyan authorities.

Independent responsibility might also be invoked *ex hypothesi* by a situation in which Libyan ships enter Italian territorial waters to rescue or interdict boat migrants and refugees and drive them back to North Africa's shores. Indeed, the coastal State – which holds primary responsibility both for addressing any protection claim and for transporting rescued migrants in a reasonable time to a 'place of safety'[257] – by authorising the third country to intervene, exercises its sovereign authority. Since, under Article 33(1) of the UNCLOS, a State retains jurisdiction over immigration matters in its contiguous zone, Italy would remain primarily responsible if it authorised Libya to intercept migrants, including refugees, in this area.

The application of Article 6 of the ASR should also be excluded in the case of Italy's push-backs and Libya's pull-backs. Indeed, in both circumstances, Libya operates within its own command on-board vessels supplied by the Italian government. Therefore, the argument that African border guards receive training, funding, technical equipment, and assistance cannot be utilised to consider

[256] Crawford 2002, n 248 above, ibid, 103.

[257] Pursuant to Art 2(1) of the UNCLOS, the sovereignty of a coastal State extends to the territorial sea. See, generally, Trevisanut 2008, n 52 above; E Turco Bulgherini, 'Acque Territoriali e Sicurezza Marittima' (2010) 3 *Online Gnosis Rivista Italiana di Intelligence* 30, http://gnosis.aisi.gov.it/Gnosis/Rivista24.nsf/servnavig/57. See also, UNHCR Executive Committee, 'Conclusion on Protection Safeguards in Interception Measures', UN doc no 97 (LIV) – 2003, 10 October 2003, para (a)(i), http://www.unhcr.org/496323740.html.

African border authorities as subsidiary organs of the Italian government.[258] It remains, thus, to be seen which alternative avenues can satisfactorily be pursued through the institution of State responsibility.

C. Indirect Responsibility for Aiding and Assisting Another State

A State could be held indirectly accountable for an internationally wrongful act committed by another State by means of its 'aiding and assisting' the third country itself in performing an illicit operation through supportive political statements, the provision of infrastructures, technical utilities, or financial support. Under Article 16 of the ILC Codification,

> a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

As indicated in the chapeau to Article 16, wrongful conduct refers to violations of international obligations by the assisted State, the 'latter', 'which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act.'[259] Therefore, Article 16 'establishes a distinct wrong of complicity, independent of the wrong committed by the perpetrating State,[260] which remains primarily responsible, while the assisting State has a purely supporting role.[261]

To give an example, a State may be liable for violation of the principle of non-*refoulement* where it knowingly assists another State to divert refugees to a place where their life or liberty might be threatened.[262] Even if the first State does not itself carry out the unlawful conduct, but supplies equipment with knowledge of the intentions of the assisted State, a strong enough link exists to establish complicity. Therefore, this Sub-section, slightly departing from the context of the 2009 push-backs, explores whether Article 16 of the ASR could be used to delimit State responsibility within the framework of the general cooperation between Italy and Libya established by the technical Protocols on migration control.

Italian jurisdiction was engaged, under human rights law, for sending refugees intercepted on the high sea (on 6 May and 30 August 2009) back to Libyan ports on its own vessels, in violation of the fundamental rights of individuals

[258] See den Heijer 2010a, n 169 above, 192–93.
[259] Crawford 2002, n 248 above, 148.
[260] ibid. Instead, for the issue of joint responsibility of several States for the same injury, see Art 47 of the ASR.
[261] ibid.
[262] M Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223, 263.

placed under its control. With regard to the push-backs of 6 May, the ECtHR found that Italy had jurisdiction and therefore responsibility for violations of the fundamental rights of removed persons. Diverse operational missions can, however, be performed. For instance, on the remaining occasions in 2009, migrants and refugees were interdicted by Italian authorities and transferred to Libyan vessels in charge of carrying them back to Tripoli. In many other cases, which obtained less public attention, Libyan authorities instead performed interceptions directly in their territorial waters or on the high seas, without the intervention of Italian warships.

Major attention rests on the modalities of collaboration and assistance deriving from the terms of the bilateral technical Protocols and the Partnership Treaty. For instance, under the terms of the 2007 and 2009 technical Protocols, Libya was autonomously committed to sea patrols, which may result in the diversion of migrants and refugees to the country of embarkation under the full command of Libyan authorities. Article 16 of ILC Codification does not tackle attribution or questions of joint and several liabilities, since the abetting State does not itself commit the internationally wrongful act but assists another State, which performs the illicit conduct. Thus, as Crawford explains, 'by assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which … flow from its own conduct.'[263]

Although, according to the text of the 2007 and 2009 technical Protocols, only Libyan authorities on board the military vessels were entrusted with the responsibility and the legal authority for the operational missions at sea, Italy has substantively supported its partner by providing funding, training, consultancy, as well as surveillance equipment. Therefore, the question is whether a certain threshold is reached to establish that Italy was aware that its assistance could be used to perform wrongful conduct.

Regrettably, there is little jurisprudence of help in defining the contours of 'aiding and assisting' responsibility.[264] This leaves ample room for interpretation. According to the ICJ, for example, it is not necessary that the assistance provided by the aiding State be essential to the commission of the international wrongful act, but it must at least have 'contributed significantly to that act.'[265] In addition, the violation constituting the internationally wrongful conduct must involve the infringement of a norm that would amount to wrongful conduct in both States.[266]

[263] Crawford 2002, n 248 above, 151.

[264] Although Art 16 of the ASR is not strictly relevant for the *Genocide Convention Case*, the ICJ takes the opportunity to make some observations on the concept of 'aid or assistance'. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, ICJ Rep 43, paras 420–424.

[265] Crawford 2002, n 248 above, 149.

[266] ibid.

A fairly wide category of actions can be encompassed within the reach of Article 16, such as training, economic assistance, the provision of confidential information,[267] as well as political or legal aid, even in the form of treaties employed to facilitate the performance of the illicit act.[268] As the scope *ratione materiae* of Article 16 is so vast, the mental element has been interpreted very restrictively.[269] If on the one hand, it can be presumed that a State is aware of the circumstances making the conduct of the assisted State internationally wrongful, it is also true that configuring such responsibility is not an easy task. Indeed, the threshold for establishing indirect responsibility is very high, and the process of proving that aid or assistance has been intentionally given 'with a view to facilitate the commission of the wrongful act' would be cumbersome.

The mental element requirement still remains a hotly debated issue because of the problems of representing a State as an entity able to formulate conscious decisions.[270] Moreover, in order to avoid responsibility, a State could intentionally avoid making public pronouncements stating its will.[271] Taking into account the difficulty in determining the state of mind of a State, such a strict mental requirement would also lead to the exclusion of those cases where States commit international wrongful acts not from a desire to violate human rights, but because they implicitly accept the risk that breaches of fundamental rights may occur while pursuing different and less harmful objectives.[272] Rather than focusing on the mental reasons driving State action, greater attention should be drawn on the assessment of whether the assisting State was aware that its assistance would be put to wrongful use.

Conversely, the ILC is very keen to emphasise that a high threshold must be met, otherwise international responsibility could be triggered anytime a State engages in bilateral cooperation with a third country.[273] It has, thus, stressed that the 'eventual possibility' that a wrongful act could derive from a State's assistance is not sufficient to establish the link between the facilitating act and the wrongful conduct.[274] Rather, it is to be proved that an accomplice State aided

[267] J Crawford, 'Second Report on State Responsibility' *Yearbook of the ILC 1999*, vol II (part I) 50, fn 349.

[268] B Graefrath, 'Complicity in the Law of International State Responsibility' (1996) 29 *Revue Belge de droit International* 370, 374. On the scope of 'aid and assistance', see HP Aust, *Complicity and the Law of State Responsibility* (CUP, 2011) 192–230.

[269] G Nolte and HP Aust, 'Equivocal Helpers-Complicit States, Mixed Messages and International Law' (2009) 58 *ICLQ* 1, 10.

[270] M den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012) 97.

[271] On the difficulty of inferring intention, and therefore complicity, from public statements, see Graefrath 1996, n 268 above, 375–76.

[272] K Nahapetian, 'Confronting State Complicity in International Law' (2002) 7 *UCLA Journal of International Law* 99, 126–27.

[273] Nolte and Aust 2009, n 269 above, 14.

[274] 'Report of the ILC on the work of its thirtieth session', *Yearbook of the ILC 1978*, vol II (Part II) 49–50, para 18.

another country by accepting, with knowledge of the facts, the serious risk that wrongful acts would be committed.[275]

(i) Italy's Responsibility for 'Aiding and Assisting' Libya? The Push-Backs Case

In light of the above, what remains to be explored is whether, by assisting Libya in patrolling its territorial and international waters to intercept and remove migrants and refugees to a territory where their life could be irremediably endangered, Italy acted with full knowledge of the circumstances in which its aid or assistance would be used. Providing assistance that facilitates only occasional wrongdoings should not be sufficient to raise the threshold of State responsibility to a level falling within Article 16 of the ASR.[276]

The case of Italy–Libya cooperation in migration control in 2009 raises a host of perplexities and questions in this regard. As discussed in Chapter two, 834 persons were pushed-back to the port of departure, within the framework of a well-organised policy, over the course of nine separate operations, during which migrants and refugees were handed over to the Libyan authorities after their interception on the high seas by Italian warships. Push-backs, frequently repeated over six months between 6 May and 6 November 2009, were carried out in a systematic fashion with the approval of both governments. On several other occasions, after the entry into force of the 2009 Executive Protocol, Libyan officials interdicted irregular migrants and refugees heading to Europe, in their territorial waters or on the high seas, without the intervention of Italian vessels. Unfortunately, keeping track of the number of people halted and removed to Libya before they could encounter the authorities of a European State is practically impossible.

Despite the transfer of the maritime operations to Libyan authorities, and the attempt to keep the details of 'anti-immigration activities' classified, a great deal of information on the treatment of migrants in Libya, and the form of its cooperation with Italy, is in the public domain. As explained in Section II, Italian officials were always on board the vessels used to ship migrants and refugees back to Libya, or to transfer passengers to Libyan crafts. They thus had full knowledge of the circumstances, and were fully aware that intercepted refugees were terrified of being returned to Libyan guardianship.[277] In this respect, there is room to presume not only that Italy was conscious of the 'eventual possibility'

[275] ibid. See also, *Genocide Convention Case*, above n 264, para 432.
[276] den Heijer 2012, n 270 above, 101.
[277] As Excerpts of an interview of a Lieutenant of the Italian Revenue Police involved in the maritime operations can be drawn from F Viviano, 'Noi Finanzieri Ostaggi di Tripoli Su Quelle Navi Non Vogliamo Salire', *Repubblica* (15 September 2010), http://www.repubblica.it/cronaca/2010/09/15/news/finanziere_mazara-7088107/.

of the harmful use of its aid but, more decisively, that it knew its aid would be put to wrongful use. Because of the lack of a clear-cut definition of 'aiding and assisting', the concept of 'complicity' is very controversial and is not a settled area of international law, in particular with regard to the different forms of complicity (ie, whether omission is also included), the nexus element (ie, whether active participation or mere contribution is required), and the subjective element of intent.[278]

The Italian overarching intent to outsource its responsibilities for migrants and refugees, by supporting Libya in its role of watchdog of Europe's gateways for the containment of irregular migration by sea, has been corroborated by the numerous public and official statements from both the Italian and Libyan governments.[279] It has also been confirmed by factual data and by the conclusion of bilateral agreements establishing a detailed framework for mutual cooperation.

For example, over the last decade, Italy has assisted Libya on a regular basis with the provision of funding, vessels, satellite devices, technical equipment for patrolling land and maritime borders, night-vision devices, binoculars, all-terrain vehicles (ATV), life boats, and sacks for the transportation of corpses.[280] It has also provided training for border officials, confidential information, consultancy, money for the construction of reception centres[281] and for charter flights both to deport irregular migrants from Libya to source countries,[282] and to transfer police officers stationed at Libyan diplomatic and consular offices to work on migration issues. Additionally, the 2009 Protocol explicitly requires Italy to assist Libya in boosting migrants' repatriation. Thus, Italy should also have known the risks migrants and refugees would be exposed to, even if the command and direction of the operations was entirely under Libya's authority.

In order to infer that the assistance provided by Italy to Libya falls under the scope of Article 16, it should be demonstrated that aid and assistance were intentionally given 'with a view to facilitate the commission of the wrongful act' by Libya, and that the accomplice State accepted, with full 'knowledge' of the facts, the serious danger that a wrongful act would be carried out.[283] Such conduct would include the violation of the customary principle of

[278] See M den Heijer, 'Europe beyond its borders', in Ryan and Mtsilegas 2010, n 77 above, 169; see also Aust 2011, n 268 above, 197, 219.

[279] See, eg, the communication published on the website of the Minister of the Interior, 'Contrasto immigrazione, Maroni: intesa firmata in Libia', http://www.governo.it/Notizie/Ministeri/dettaglio.asp?d=41871.

[280] See P Cuttitta, 'Readmission in the Relations between Italy and North African Mediterranean Countries' in Cassarino 2010a, n 68 above, 49.

[281] See Paoletti 2010, n 68 above, 59.

[282] See European Commission Report, 'Technical Mission to Libya on Illegal Migration' (27 November–6 December 2004) doc 7753/05, 59–61, http://www.statewatch.org/news/2005/may/eu-report-libya-ill-imm.pdf.

[283] For a comprehensive analysis of the subjective element, refer to Aust 2011, n 268 above, 230–49.

non-refoulement, which also enjoys a peremptory status as a corollary to the prohibition of torture.

Is it possible to assume that Italy knew or could reasonably expect – at that material time – that a real risk existed of migrants and refugees being removed to the territory of a country where they could suffer torture, or other inhuman and degrading treatment? Has Italy pushed back migrants with the intent to put their life at risk in Libya? If so, it could potentially be held accountable for assisting Libya in violating the principle of *non-refoulement*.[284] To establish complicity it should be proved that Italian authorities, in full knowledge of the facts, exposed intercepted refugees to inhuman and degrading treatment by removing them to Libya, which, *inter alia*, did not offer any guarantees against repatriation to Somalia and Eritrea.[285]

As confirmed by the ECtHR in the *Hirsi* judgment, Italy not only 'could not ignore' the treatment reserved by Libya to migrants and refugees, but it also had an obligation to proactively find out the real situation of migrants and refugees before proceeding with their expulsion.[286] Numerous reports by international organisations and NGOs depicted the grievous treatment of irregular immigrants in Libya at the material time in which push-backs took place.[287] According to the ECtHR, 'it was for the national authorities, faced with a situation in which human rights were being systematically violated … to find out about the treatment to which the applicants would be exposed after their return.'[288] This positive obligation to acquire knowledge before carrying out a certain action in tandem with a third State might also influence the way in which complicity can be established. Immediately after the first push-back operation, several human rights organisations raised concerns about such practice by both urging the Italian government to stop collective expulsions, and by highlighting the appalling conditions in which migrants and refugees were compelled to live once in Libya.[289]

[284] On violations of Art 16 of the ASR as a consequence of *refoulement*, see Nolte and Aust 2009, n 269 above, 17.

[285] ibid, para 137. On the existence of the 'knowledge' requirement in the Italy–Libya cooperation, see also T Gammeltoft-Hansen, 'The Externalisation of European Migration Control and the Reach of International Refugee Law' in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff, 2011) 295. Moreover, in 2004, the European Commission, after a technical mission to Libya, had collected and published statistics on removals.

[286] *Hirsi v Italy*, above n 5, para 133. The Court refers here to *Chahal v UK*, App no 22414/93 (25 October 1996/15 November 1996) paras 104–105; *Jabari v Turkey*, above n 229, paras 40 and 41; and *MSS v Belgium and Greece*, App no 30696/09 (21 January 2011) para 359.

[287] See *Hirsi v Italy*, above n 5, paras 123–126.

[288] ibid, para 133.

[289] See L Holmstrom (ed), *Conclusions and Recommendations of the UN Committee Against Torture: Eleventh to Twenty-second Sessions (1993–1999)* (Martinus Nijhoff, 2000) 133, section C, para 5; UNHCR, 'Follow-up from UNHCR on Italy's Push-backs' (Briefing Notes, 12 May 2009), http://www.unhcr.org/4a0966936.html; Amnesty International, 'Dichiarazione della Sezione Italiana di Amnesty International dopo i Nuovi Respingimenti di Migranti verso la Libia' (11 May 2009), http://www.amnesty.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/2007; *Human Rights Watch*,

In the circumstance of pre-border controls jointly carried out by Italy and Libya or by Libya alone in 2009, complicity could be considered established only if the conditions posed by Article 16 of the ASR are fully met. They are summarised as follows: first, however complicated the process of detecting what the intention of a State is, the mental element of the Italian government should reach a threshold sufficient to trigger its indirect responsibility. As required by paragraph (a) of Article 16, to be internationally responsible, an aiding State should have acted 'with knowledge of the circumstances of the internationally wrongful act.' Not only does Italy's intention to remove migrants and refugees to an unsafe country emerge from the pronouncements and practice of the Italian government,[290] but Italy was also able to base its safety appraisal upon an enormous variety of available information concerning the human rights situation in Libya. However, it can be more complicated to prove the existence of the mental element (ie, the intent to push-back in order to put refugees' lives at risk).

Second, an unequivocal link should be established between the facilitating act and the subsequent wrongful conduct. Paragraph (b) of Article 16 requires that 'the act would be internationally wrongful if committed by [the assisting] State.' Although the provision of training, technical equipment, and funding does not amount *per se* to an unlawful practice, Italy's indirect responsibility could, nonetheless, be inferred if it were proved that its assistance in refugees' removal to Libya occurred with full knowledge of the systematic human rights violations that migrants and asylum seekers would suffer in the recipient country. Libya is not a party to the 1951 Geneva Convention or to the ECHR, but is subject to the ICCPR and the CAT. Therefore, as far as the duty of *non-refoulement* is concerned, as accruing from the ICCPR – alongside customary international law/*jus cogens*, as the case may be – the second condition for the establishment of complicity for provision of aid and assistance should be fulfilled.

(ii) Italy's Responsibility for 'Aiding and Assisting' Libya? The Case of Push-Backs by Proxy

This Sub-section asks whether there is an autonomous basis in the law of international responsibility for holding European States accountable for complicity in human rights violations occurring in Libya even in those circumstances in which they do not directly exercise physical control over intercepted/rescued migrants. As discussed in previous Sections, the threshold for determining indirect responsibility, in particular with regard to the mental element, is significantly high.[291]

'Italy/Libya: Migrants Describe Forced Returns, Abuse: EU Should Press Italy to Halt Illegal Forced Returns to Libya' (21 September 2009), http://www.hrw.org/news/2009/09/17/italylibya-migrants-describe-forced-returns-abuse.

[290] See, eg, the Statement of the Ministry of the Interior, R Maroni.

[291] On complicity in cases of externalised migration controls, see Giuffré, 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-Back to Libya?' (2012) 24 *IJRL* 692. This Sub-section is mainly taken from the following chapter: Giuffrè and Moreno-Lax 2019, n 8 above.

Therefore, in order to avoid responsibility, a State could intentionally refrain from making public pronouncements stating its will.[292] Moreover, the proposition that the threshold should not be deemed met, unless 'the relevant State, by the aid or assistance given, *intends* to facilitate the wrongful conduct',[293] would raise the bar so much as to render recourse to Article 16 ASR very difficult (emphasis added). However, if we shift attention to the more recent practice of push-backs by proxy, the fact that the funds, training, and other capacity-building activities delivered by European States to Libya are for the *explicit* purpose of 'significantly reduc[ing] migratory flows', 'combat[ing] *transit*', and 'preventing departures' means that these activities appear, on the one hand, to meet this threshold (emphasis added).[294] On the other hand, it is unlikely that Italy supported Libya with the *specific intention* to facilitate the commission of torture or other similar crimes in the readmitting country. Indeed, according to the ILC ASR Commentary,

> a State is not responsible for aid or assistance under Article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.[295]

In any event, such a stringent approach on the mental element was expressly discussed in draft versions of Article 16 ASR, but failed to make its way into the final text.[296] So, in the absence of specific wording to that effect, following accepted rules of interpretation, it is posited that 'knowledge of' should not be confounded with 'intent to' within the ASR complicity framework. This does not amount to triggering international responsibility any time a State engages in bilateral cooperation with a third country.[297] The 'eventual possibility' that a wrongful act could derive from a State's assistance is not sufficient to establish the link between the facilitating act and the wrongful conduct.[298] Rather, in line with the ICJ's pronouncements in the *Genocide Convention Case*, it is to be proven that an accomplice State aided another country by accepting, with *knowledge* of the facts, the *serious risk* that wrongful acts would be perpetrated (emphasis added).[299] The Court ruled that

[292] On the difficulty of inferring intention, and therefore complicity, from public statements, see Graefrath 1996, n 268 above, 375–76.

[293] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC 2001*, vol II, Part II, 66, para 5 (ILC ASR Commentary).

[294] Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, paras 3, 5, 6(j).

[295] ILC ASR Commentary, n 293 above, 66, para 5.

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

[297] Nolte and Aust 2009, n 269 above, 14.

[298] 'Report of the ILC on the work of its thirtieth session', *Yearbook of the ILC 1978*, Vol II (Part II) 49–50, para 18.

[299] See *Genocide Convention Case*, above n 264, paras 432 and 420–424.

> there [was] no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide [could] not be treated as complicity in genocide unless at the least that organ or person *acted knowingly*, that is to say, in particular, was *aware of the specific intent* (*dolus specialis*) of the principal perpetrator (emphasis added).[300]

In the instances of the Italy–Libya MoU in 2017, the wealth of reliable sources available on the prevailing situation in this country, coupled with the specific demands placed on Libya to stop irregular migration, could be said to reach the benchmark of required knowledge. The issue is to ascertain whether the assisting (European) State(s) were/are aware that their assistance may, foreseeably, be used to perform wrongful conduct, but it is not necessary that the aid provided be specifically directed towards, or be essential to, the commission of the violation, provided that it 'contributed significantly to [it]'.[301] So, while it is not for the complicit State to assume *any* chance of the harmful use of its aid,[302] the plausible likelihood that the aid will be wrongfully utilised will activate Article 16 ASR. In our case, the fact that retention (or 'accommodation') of those concerned in Libya in sub-standard conditions is being presented as a life-saving mechanism sparing the dangers of maritime journeys is no excuse, where the dangerous situation which they (will) remain exposed to on dry land is 'well-known and easy to verify on the basis of multiple sources'.[303] In line with the Genocide case, it could be argued that Italy 'acted knowingly, that is to say, in particular, was aware of the specific intent (dolus specialis) of [Libya] the principal perpetrator.'[304] However, it cannot be neglected that the EU has also expressly condemned the human rights abuses taking place in Libya, thus sending an indication of the lack of specific intent on the part of the EU and its Member States to facilitate the commission of such crimes.[305]

The second condition foreseen in Article 16(b) ASR requires a commonality of obligations between both cooperating parties for complicity to be established, which may be problematic in certain respects. The point is to prevent the assisting State from 'do[ing] by another State what it cannot do by itself' without infringing international law.[306] Libya is not a party to the 1951 Geneva

[300] ibid, para 412.

[301] ILC ASR Commentary, n 293 above, 66, para 5. See also J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) 149.

[302] ibid, para. 4.

[303] *Hirsi v Italy*, above n 5, para 131.

[304] *Genocide Convention Case*, above n 264.

[305] Joint Statement on the Migrant Situation in Libya, issued by the African Union – EuropeanV Union Summit of 29 – 30 November 2017, http://www.consilium.europa.eu/media/31871/33437-prlibya20statement20283020nov2010. pdf, On lack of complicity by Italy, see A Skordas, 'A "blind spot" in the migration debate? International responsibility of the EU and its Member States for cooperating with the Libyan coastguard and militias', *EUMigrationLAwBlog.eu* (30 January 2018), http://eumigrationlawblog.eu/a-blind-spot-in-the-migration-debate-international-responsibility-of-the-eu-and-its-member-states-for-cooperating-with-the-libyan-coastguard-and-militias/.

[306] ILC ASR Commentary, n 293 above, 66, para 6.

Convention or to the ECHR. But, as Italy, it is subject to the ICCPR and the CAT.[307] Therefore, as discussed in the previous Sub-section, as far as duties of *non-refoulement* are concerned, the second condition for the establishment of complicity for provision of aid and assistance should be fulfilled.

D. Contactless Controls, Containment of Migratory Flows, and Independent Responsibility

European States may incur independent/principal responsibility for their own acts that are constitutive of a breach of international obligations. The general rule under international law (codified in Article 47 ASR) is that 'each State is separately responsible for the conduct attributable to it and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act'.[308]

Adopting an approach similar to that taken in the cases of *Ilascu* or *Catan* with regard to the sponsorship by Russia of the violations perpetrated by the local authorities of the separatist regime of Transnistria,[309] it is advanced that European countries remain accountable for their support to third countries of transit, such as Libya, in their actions of 'consensual containment'. The funding, training, and equipping dispensed under bilateral arrangements, expressly conditioned on the Mediterranean partner's 'managing' migratory flows and impeding exit for transit towards Europe, can be said to constitute a form of 'decisive influence' akin to that at play in *Ilascu* and *Catan*.[310] Moreover, the number of 'strategic priorities' which stem from the long list of agreements and MoU between Italy and Libya can be considered – using the words of the ECtHR – as 'the formulation of essential policy'.[311]

In *Ilascu*, the Court argued that – both before and after 5 May 1998 (when the ECHR came into force with regard to Russia), in the security zone controlled by the Russian peacekeeping forces – the Moldavian Republic of Transdniestria (the MRTegime, set up in 1991–1992) survived by virtue of the military, economic, financial and political support supplied by Russia.[312] Given that the applicants fell under the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, a continuous and uninterrupted link of responsibility on the part of Russia for the applicants' fate could be established. It was

[307] Libya is also party to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa – which commits Libya to guaranteeing protection to people undergoing persecution and fleeing from dangerous geographical zones. Also, several agreements had been concluded between Italy and Libya that commit them to act in compliance with the UN Charter and the Universal Declaration of Human Rights (UDHR).

[308] ILC ASR Commentary, n 293 above, 104, para 1.

[309] *Ilascu v Moldova and Russia*, above n 237; *Catan v Moldova and Russia*, Apps no 43370/04, 8252/05 and 18454/06 (19 October 2012).

[310] *Catan*, ibid, para 111; *Ilascu*, n 237 above, para 392.

[311] *Jaloud v the Netherlands*, App no 47708/08 (20 November 2014) para 63.

[312] *Ilascu v Russia and Moldovia*, above n 237, para 392.

therefore of little consequence that since 5 May 1998 the agents of the Russian Federation had not taken part directly in the actions complained of in the application. According to the Court, Russia not only made no attempt to put an end to the violations against the applicants, but it also did not take any measures to *prevent* such infringements of the Convention.[313]

While the influence exercised by European States falls short of military occupation or direct control, it is nonetheless decisive enough to determine the course of events to the extent that, without such massive support, the third country would not stop migrants on their way to the EU (to the EU's advantage). For example, the Libyan coastguard performed 19,452 pull-backs in 2017 on Italy's behalf.[314] Beyond the Libya case, the EU–Turkey deal, discussed in Chapter three, is a *sine qua non* for the sustained reduction of irregular maritime traffic through the Aegean border, without which we would predictably see a rise in flows through that route, like prior to March 2016. It is the continued support and commitment to the EU–Turkey deal by the EU Member States and Turkey that enables the significant reduction of arrivals witnessed in Greece through the Eastern Mediterranean from March 2016 onward, as per the Commission's own evaluation.[315] This 'decisive influence' would constitute, it is posited, a form of indirect but nonetheless effective control that amounts to 'jurisdiction' under Article 1 ECHR, thus triggering the responsibility of European States under the Convention in case of human rights violations.

The issue of jurisdiction and exercise of border controls outside the territory of the destination State is addressed in *Kebe and Others v Ukraine*.[316] The case concerns three individuals from Ethiopia and Eritrea who covertly boarded a commercial vessel flying the flag of the Republic of Malta with the intention to seek asylum abroad. On 24 February 2012, sometime before the vessel anchored in the port of Mykolayiv, in Ukraine, the head of the Border Control Service in the Southern Region of Ukraine was informed that there were two nationals of Eritrea and a national of Ethiopia on-board the vessel and that they might require international protection.[317]

On 25 February 2012, Ukrainian border guards boarded the Maltese vessel – in agreement with the captain – and met with the applicants. The Court decided to strike the case out of the list insofar as it concerned the second and the third applicants, as one died after lodging the application and the other voluntarily returned to his home country. It is here only worth noting that the border guards arguably tried to discourage the first applicant from applying for international

[313] ibid, paras 392–394.

[314] For updated figures on the number of rescued/intercepted migrants and bodies retrieved at sea, see https://www.iom.int/sites/default/files/situation_reports/file/IOM-Libya-Maritime-Update-Libyan-25Oct-28Nov.pdf.

[315] Fifth report on the Progress made in the implementation of the EU–Turkey Statement, 2 March 2017, COM(2017) 204.

[316] *Kebe and Others v Ukraine*, App no 12552/1 (12 April 2017) paras 75–77.

[317] ibid, paras 17–20.

protection in Ukraine. When carrying out border checks, Ukrainian border guards gave him no information about asylum procedures, and also told him that they could not accept asylum applications under domestic law, and that there was no impediment to removing him to any other country, including that of his origin, before an appeal was determined. As the risk of being brought back to a country where he arguably faced treatment contrary to Article 3 of the Convention was real, imminent and foreseeable, the Court found a violation of the right to an effective remedy in conjunction with Article 3.[318]

Ukraine therefore exercised jurisdiction under Article 1 of the Convention over the applicant from the moment the border authorities met him on-board a Maltese vessel, to the extent that the matter concerned his possible admission to Ukraine and the exercise of related rights and freedoms set forth in the Convention. In denying him leave of entry, Ukraine exercised, through State agents, its sovereign powers to control the entry of aliens into its territory, despite the fact that this occurred on-board a vessel flying a flag of another State.

Likewise, in *ND and NT v Spain*, the Court of Strasbourg confirms that if border guards prevent an individual from entering the State's territory, there is still an obligation upon the State to ensure access to asylum procedures and protection from collective push-backs.[319] Therefore, even if the border crossing had been placed at the Spanish frontier or on Moroccan territory, the applicants – who were trying to cross into Ceuta and Melilla – would still have fallen under Spain's jurisdiction as they were under the continuous and exclusive control of Spanish authorities.[320] As in *Amuur v France* – where the Court held that States cannot deny access to asylum in the international zones of airports[321] – the *ND and NT* case shows that States cannot instrumentally move their borders to address a particular situation.[322]

[318] ibid, paras 104–108.

[319] *ND and NT v Spain*, above n 219. For a note on the case, see A Pijnenburg, 'Is *ND and NT v Spain* the new *Hirsi*?' *EJIL Talk* (17 October 2017), https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/.

[320] ibid, para 51. An amendment to the Spanish Aliens Act, adopted in March 2015, provided the possibility of 'rejection at the border' for persons intercepted at the border between Morocco and the enclaves of Ceuta and Melilla, to avoid their irregular entry in Spain. While condemned by the ECtHR, Spain has restated that it would not revise its legislation, and appealed the decision before the Grand Chamber of the Court. See *ND and NT v Spain* (above n 219), 6 April 2018, Third party intervention: the AIRE Centre, Amnesty International, DCR, ECRE and ICJ, https://www.asylumlawdatabase.eu/en/content/nd-and-nt-v-spain-application-nos-867515-and-869715-third-party-intervention-aire-centre.

[321] *Amuur v France*, above n 230. Mutatis mutandis, the Court of Strasbourg has recognized the duty of States to apply the Convention, in particular the safeguard of Article 5, also in other cases concerning retention of foreign nationals in transit zones of airports. See, eg, *Riad e Idiab v Belgium*, App nos 29787/03 and 29810/03 (24 Apr 2008); *Nolan and K. c. Russia*, App no 2512/04 (12 February 2009); *Z.A. c. Russia ZA and others v Russia*, App nos 61411/15, 61420/15, 61427/15, 3028/16 (28 March 2017); *Shamsa v Poland*, App nos 45355/99 and 45357/99 (27 November 2003)

[322] *ND and NT v Spain*, above n 219, para 53. Nevertheless, it has been reported that in August 2018, Spain collectively expelled a group of 116 persons to Morocco within 24 hours, relying on a

What is more, 'it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention'.[323] And '[t]his principle carries all the more force [when] the absolute and fundamental nature of the right not to be subject to … grave and irreversible harm [is at stake]' – as is the case in Libya and Turkey.[324] But not only acts of (active/passive) wrongdoing are covered; also the 'power to prevent' the abuse in question may lead to responsibility being engaged in case of an omission to act.[325] Against a background of decisive influence, being in a position to avoid the possibility of ill-treatment from materialising is relevant under Article 1 ECHR.[326] In these circumstances, the Convention provisions apply 'to a State *wherever* it may be acting or *may be able to act* in ways appropriate to meeting the obligations in question' (emphasis added).[327] The duty to prevent is activated 'the instant the State learns of, or should normally have learned of, the existence of a serious risk' of a violation.[328]

Knowingly entering into an agreement with unsafe countries, such as Libya and Turkey (as discussed in Chapter three) where risks of (direct and indirect) *refoulement*, in both its material and procedural facets, are blatant and reliably documented, with the result of heightening the possibility of an Article 3 ECHR violation instead of diminishing or avoiding it, should be adjudged to trigger the action of the ECHR.[329] The eventual violation that may result from the combination of support delivered by European countries, on one hand, and direct action in contravention of the relevant standards by the third countries, on the other hand, will be *jointly* attributable to the third countries and the European State for their independent contributions to a single harmful outcome. This would be in line with the *Corfu Channel Case*, where the damage caused to British vessels ensued from the concurrent effect of a third State laying underwater mines (possibly Yugoslavia) and the omission of Albania, which failed to

1992 bilateral readmission agreement. See Spanish Commission of Aid to Refugees (CEAR), 'CEAR muestra su preocupación tras la expulsión "acelerada" de las 116 personas migrantes que llegaron ayer a Ceuta', 23 August 2018, https://bit.ly/2o2SgQf.

[323] *Al-Saadoon v UK*, above n 212, para 138.

[324] ibid.

[325] For this same approach, see The Hague Court of Appeal, *Mustafic-Mujic v The Netherlands*, [2011] LJN: BR 5386; and *Nuhanovic v The Netherlands*, [2011] LJN: BR 5388 (both confirmed by the Supreme Court, in *The Netherlands v Nuhanovic* and *The Netherlands v Mustafic-Mujic*, [2014] 53 ILM 512). For analysis, see Dannenbaum, 'Killings in Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct' (2012) 61 *ICLQ* 713, pointing out at 723 how the ICJ allows for such an interpretation in the *Genocide Convention Case*, above n 264, para 401.

[326] Brownlie speaks of 'the power to take executive action' in Brownlie 2008, n 58 above, 299.

[327] *Mutatis mutandis*, *Genocide Convention Case*, above n 264, 183.

[328] ibid, para 431. The rule has been endorsed by the ICJ on several occasions. Besides the *Genocide Convention Case*, above n 264, see also *Order on the Request for the Indication of Provisional Measures, Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)*, 15 October 2008, ICJ Gen List no 140.

[329] *Hirsi*, above n 5, para 131; *MSS v Belgium and Greece*, above n 286, paras 366–367.

warn about their presence and ended up being reponsible for the entirety of the composite wrongdoing.[330]

Several instances of cooperation between Italy and Libya have been recorded since 2017. Emblematic is the *SeaWatch* case, which was submitted to the ECtHR in May 2018.[331] The dangerous coordination between the two State authorities led to the death of a number of migrants at sea and the unsafe removal of some of the boat passengers to Libya on 6 November 2017. When interceptions and pull-backs were not carried out directly by Libyan authorities off African shores, Italy intervened by undertaking overall SAR control and delegating push-backs to Libya. Although Italy's involvement in the coordination of rescue operations in the Central Mediterranean has been explicitly encompassed in the MoU signed on 2 February 2017 with the Libyan Government of National Accord, such a practice has been known for long time, thus making Italy 'the only country that provides SAR to the area sitting next to territorial waters of Libya',[332] and coordinatesLibyan coastguard's operational response in Central Mediterranean. Practice shows that the Italian MRCC not only sends instructions to all vessels on the high sea that might potentially intervene in rescue operations, thereby producing 'effects outside [Italian] territory',[333] but it also intervenes directly by stationing its military and naval assets in Libya to both offer logistical support and coordination of the joint activities of the Libyan Coastguard and Navy and fight 'illegal migration'.[334] Therefore, Italy might be

[330] *Corfu Channel (UK v Albania) (Merits)*, 9 April 1949, ICJ Gen List no 1, 17–18 and 22–23. See also A Nollkamper, 'Introduction', in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP, 2014) 13; and M den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' *SHARES Research Paper 06* (2012) ACIL 2012-04, 18–19.

[331] *SS and Others v Italy*, App no 21660/18 (pending). To read more on the facts of this case, see, https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations.

[332] CILD, *Guidance on Rescue Operations in the Mediterranean*, https://cild.eu/wp-content/uploads/2017/07/KYR-Protection-and-Maritime-Safety_EN.pdf; see also *Human Rights Watch*, 'UE: delegare i soccorsi alla Libia significa mettere vite a repentaglio' (19 June 2017), https://www.hrw.org/it/news/2017/06/19/305148.

[333] *Drozd and Janousek v France and Spain*, App no 12747/87 (26 June 1992) para 91; *Al-Skeini v UK*, above n 212, para 133. On Italy's responsibility, see, *inter alia*, JP Gauci, 'Back to Old Tricks? Italian Responsibility for returning People to Libya?' *EJIL Talk* (June 2017), https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/#comments.

[334] The Italian mission in support of the Libyan Coastguard was approved by the Italian Parliament (Chamber of Deputies, 28 July 2017 and launched on 2 August 2017), http://www.camera.it/leg17/1132?shadow_primapagina=7161; See also, https://www.difesa.it/OperazioniMilitari/op_intern_corso/Libia_Missione_bilaterale_di_supporto_e_assistenza/Pagine/missione.aspx. See A Cammilli, 'La marina militare coordina la guardia costiera libica?', *Internazionale*, 28 March 2018, https://www.internazionale.it/bloc-notes/annalisa-camilli/2018/03/28/marina-militare-italiana-guardia-costiera-libica. On 25 July 2017, the Council of the European Union extended EUNAVFOR MED's mandate, while also amending its mandate to set up a monitoring mechanism of trainees belonging to the Libyan Coastguard. See, 'EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018'. Council of the European Union. July 2017, https://www.consilium.europa.eu/en/press/press-releases/2017/07/25/eunavformed-sophia-mandate-extended/

considered to exercise 'effective control and decisive influence' over Libyan SAR and interception operations.[335]

VIII. CONCLUDING REMARKS

Push-backs to Libya were conducted between May and November 2009 without serious consideration of both the risk of *refoulement* and the lack of effective asylum legislation in the readmitting country. Such a practice evolved in 2017 into an even more established policy of push-back by proxy through which Italy delegates to Libya the rescue/interception of migrants and refugees at sea with a view to their prompt diversion to the ports of departure. Whereas Section VII.C.(i) explores the possibility to invoke Italy's indirect liability for 'aiding and assisting' Libya, Section VII.D argues that independent responsibility under international law could potentially be invoked, especially in those cases where Italy executed interception and accompaniment operations using its own vessels, or when it exercised 'decisive influence' on Libya – via logistical assistance, coordination and instructions to facilitate push-backs by proxy. Externalisation of migration controls on the part of European States may generally entail a hazardous shift of responsibility to third countries, which are often mischaracterised as 'safe' without in fact offering asylum seekers safeguards comparable to those available within the EU.

This chapter primarily sought to demonstrate that, although 'readmission' of intercepted migrants does not readily follow from the text of bilateral agreements for technical and police cooperation or other accords on coordination of rescue operations at sea, these instruments are used to entrust a non-European third country with the command and responsibility of patrol, rescue, and removal operations, which are generally carried out in international waters or in the coastal waters of the third country itself. Since their purpose is to avoid arrivals by pushing back (either directly or indirectly) unauthorised/unwanted migrants back to the ports of departure, these activities of maritime border

In the *Chiragov v Armenia* case, the ECtHR held that 'the "NKR" and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention.' See *Chigarov and Others v Armenia*, App no 13216/05 (16 June 2015) paras 176 and 186.

The level of 'high degree of integration' between the authorities of the two States has also been confirmed by the judge of Catania adjudicating on a case concerning the rescue ship *Open Arms* of the NGO Proactiva. The judge clearly affirms that the interventions of Libyan vessels occur 'under the aegis of the Italian navy' to whom coordination of SAR missions is essentially entrusted. See *Decreto di convalida e di sequestro preventivo*, Tribunale di Catania, Sezione del Giudice per le indagini preliminari, 27 March 2018. See, F De Vittor, 'Soccorso in mare e favoreggiamento dell'immigrazione irregolare: sequestro e dissequestro della nave Open Arms', (2018) 2 *Diritti Umani e Diritto Internazionale* 443–452.

[335] On this point, see *Catan v Moldova and Russia*, above n 309, para 122.

control tend to prevent *ab initio* European States from exercising jurisdiction. However, jurisdiction has been established by the ECtHR in push-back cases on the high seas – because of *de jure* and *de facto* control exercised by Italy – and a number of arguments have been put forward in the previous Section to expound why Italian jurisdiction would be engaged also in cases of push-back by proxy. Italy indeed continues to exercise 'decisive influence and effective control' over both Libyan SAR and interception operations.

The 2009 push-backs of migrants and refugees do not have a clear legal basis, as can be seen in the incongruous arguments provided by the Italian government. Nonetheless, their content is vague enough to open the way to some kind of collaboration between Italy and Libya in what they call 'anti-immigration activity', or 'fight against illegal immigration'. This study has two main findings. First, it proves that the wide-ranging series of accords between Italy and Libya – including the 2007 and 2009 agreements for technical and police cooperation, the 2008 Partnership Treaty, and the 2017 accords and MoU – constitute the multifaceted legal and political scaffold supporting the practice of interdiction and deflection of undocumented migrants and refugees to their ports of embarkation. Second, the actual implementation of these arrangements can hamper refugees' access to protection – the overarching concept which includes *non-refoulement* and access to asylum procedures and effective remedies in the European State that the intercepted refugee strove to reach.

Bearing in mind that due diligence and the customary principle of safety of life at sea should always be respected, in both the push-back and pull-back cases, migrants and refugees interdicted/rescued either by Italian authorities or by Libyan vessels under Italian coordination were not granted the right to access onshore asylum procedures, or to challenge the refusal of entry, but were taken on-board in international waters in order to be removed directly to Libya, where well-founded reasons existed to presume that their life and liberty would be threatened.[336] The wide availability of reliable information describing the miserable human rights situation of migrants and refugees in the readmitting country, corroborates the view that Italy ought to know the conditions of migrants and refugees in Libya. When migration controls are entirely shifted to a third country, no chance exists for a European State to monitor the fate of intercepted migrants and refugees. Therefore, this chapter shows how international human rights law complements State obligations under the law of the sea by '[importing] an additional legal meaning to the term "place of safety" for the disembarkation of rescued migrants.'[337]

[336] Although States have the sovereign right to decide the forms of entry and stay in their territory, it is nevertheless important that stringent checks at the border and interception measures do not obstruct the identification of those with genuine international protection claims. See V Türk and F Nicholson, 'Refugee Protection in International Law: An Overall Perspective' in E Feller, F Nicholson, and V Türk (eds), *UNHCR Refugee Protection in International Law* (CUP, 2003).

[337] E Papastavridis, 'Rescuing Migrants at Sea: The Responsibility of States under International Law' (Academy of Athens, 27 September 2011) 38, http://papers.ssrn.com/sol3/papers.cfm?abstract_

International human rights bodies have made it clear that extraterritorial jurisdiction does not rely on competence and legal entitlements only, but on factual authority and control also,[338] even in cases where bilateral agreements tend to blur jurisdiction and responsibility by displacing the theatre of action beyond territorial frontiers. Considering that very complex operational situations may be put into motion, a case-by-case approach is the most suitable strategy to determine the degree of involvement of a European State in the performance of external migration controls. Core norms under the law of the sea, search and rescue conventions, international refugee and human rights law shall be applicable in every offshore operational context, regardless of whether third countries rescue, patrol, and divert intercepted migrants and refugees autonomously, or in conjunction with a European State.

id=1934352. To read more on the interplay between human rights law and law of the sea, see E Papastavridis, 'European Convention on Human Rights and the Law of the Sea: The Court of Strasbourg in Unchartered Waters?' in M Fitzmaurice and P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (Martinus Nijhoff, 2013).

[338] Milanovic 2008, n 140 above, 428.