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From Internal to Extra-Territorial  
Administrative Detention of Migrants:  
Profiles of State Responsibility

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# From Internal to Extra-Territorial Administrative Detention of Migrants: Profiles of State Responsibility \*

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## **1. Introduction**

The great flux of migrants and asylum seekers towards and across the European frontiers is one of the highest debated issues nowadays. The fear of an alien “invasion”, intolerance and xenophobia in Europe have all been amplified by the perceived economic stagnation and eventually exploited for far-right political parties’ agenda. Protective policies in matter of immigration have been adopted and border control has been intensified, especially in the most vulnerable frontiers like the Mediterranean and the Balkans routes.

It is for this reason that European States engaged in cooperation with non-European countries considered “secure”, charging them with the responsibility of handling the migratory movements in exchange of financial and material support. While the declared intent is to stop human smuggling and trafficking and prevent transnational crimes, the concrete effect is that the number of migrants who manage to reach the European coasts has been considerably reduced. The adoption of this policy of “cooperation” resulted in the creation of makeshift camps in some countries of transit, where migrants live in precarious conditions. In the worse cases, they are constrained in internment camps for an undefined amount of time and are subject to any form of abuse and human right violations.

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The above considerations pose some sound doubts about the level of involvement, and therefore liability, of the European States. Supposedly, European States cannot be held responsible for such violations since those operations are totally external to their direct sphere of control. Nevertheless, the general impression is that theirs is just an attempt to escape legal responsibility for these breaches, in particular under the European Convention of Human Rights (ECHR) in virtue of alleged lack of jurisdiction of the European Court of Human Rights (ECtHR) in the non-European countries. It may be held that a deliberate circumvention of human rights obligations is nevertheless capable of triggering responsibility under international law.

The following paragraphs will analyse the obligations of European States under international law and the norms of the ECHR in respect to administrative detention of migrants. Then, an overview will be provided on the agreements between the European Union (EU) and its Member States (MS) and third countries, with a particular *focus* on the 2017 Italian-Libyan pact. In the last two sectors an attempt will be made to establish the possible profiles of responsibility of the MS of the EU for the actions perpetrated outside their territory, both under international law and under regional human rights law.

For matters of simplicity, this contribution will focus primarily on refugees and asylum seekers, while issues relating to economic immigration will be left apart. However, since the recognition of the refugee *status* has a merely declarative nature, the principle of non-refoulement is applicable both to refugees and asylum seekers, even before the formal recognition of the *status*.<sup>1</sup> In this respect it is impossible to make an *a priori* distinction among immigrants, at least until it is clear who has the intention to submit an application for asylum and who declares that he or she is migrating merely for economic purposes. It is also worth noticing that the principles discussed below entail to fundamental human rights that must be recognised to every person without discrimination, thus in abstract they are applicable to all cases.

## 2. Administrative detention of asylum seekers in Europe

Seeking asylum is a universal human right. Under current international law, individuals have no right to be granted asylum *vis-à-vis* the State of refuge, which maintains a margin of appreciation on the conditions for recognition of the *status* of refugee.<sup>2</sup> However, in the words of Article 14 of the Universal Declaration

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<sup>1</sup> F. ZORZI GIUSTINIANI, *Divieto di Non-Refoulement e Tortura. Osservazioni in Margine al General Comment n. 4 alla Convenzione ONU Contro la Tortura e Altre Pene o Trattamenti Crudeli, Inumani o Degradanti del 1984*, in *Federalismi - Focus Human Rights*, 29 October 2018, p. 4.

UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007.

<sup>2</sup> *Inter alia*, R. BOED, *The State of The Right of Asylum in International Law*, in *Duke Journal of Comparative & International Law*, Vol. 51, 1994, pp. 8-14; F. RESCIGNO, *Il Diritto di Asilo*, Roma, 2011, pp. 33-35; M. UDINA, *L'asilo politico*

of Human Rights (UDHR), “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.<sup>3</sup> This means that individuals have a subjective right to leave their country of origin in order to ask for asylum elsewhere and States hold a correspondent duty to allow access to the country with the view of requesting protection. From this right-duty dichotomy derives the **principle of non-penalisation**, according to which the unauthorised immigration of asylum seekers should not be considered a criminal offence by the country of entry nor should be subject to sanctions or criminal penalties.<sup>4</sup> In the due balance between individual and public interests, it is generally agreed upon that criminalisation of irregular migration always exceeds the legitimate interest of States to protect their territories and it is therefore unproportionate.<sup>5</sup> As a consequence, migrants seeking for asylum should not be treated as criminals even if they enter the State’s territory irregularly and without previous authorisation.

Nonetheless, the contemporary political view is that the of necessity of effective borders’ control prevails over the right to personal freedom,<sup>6</sup> and detention of asylum seekers in the form of “administrative detention” has become a key strategy in the management of migratory flows. Under a number of national legislations migrants can be deprived of liberty on several grounds, such as unauthorised entry, irregular residence (which happens *e.g.* when the authorisation or permit to stay has expired), when a deportation or expulsion decree is issued. Political agents even consider necessary and legitimate the deprivation of liberty while the request for asylum has been submitted and is under scrutiny. This normalisation of detention creates a double legal standard: while European citizens enjoy a large freedom of movement

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*territoriale nel diritto internazionale e secondo la Costituzione italiana*, in *Diritto Internazionale*, Y. XXI n. 3, 1967, pp. 261-262.

<sup>3</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 14.

See also Article 22, in particular comma 7, of the *San José Declaration on Refugees and Displaced Persons*, adopted by the International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees", San José, 5-7 December 1994.

<sup>4</sup> “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who ... enter or are present in their territory without authorization” (UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, Article 31).

<sup>5</sup> “Seeking asylum is a universal human right, the exercise of which must not be criminalized. The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows. Migrants must not be qualified or treated as criminals or viewed only from the perspective of national or public security and/or health.” (UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, Adopted on 23 November 2017 and Revised on 7 February 2018, paras. 9 and 10).

<sup>6</sup> O. LOPEZ CRUZ, *Administrative detention of migrants in Europe and the danger of a double standard in the protection of personal liberties*, in *Open Migration*, 8 June 2016.

and which only be limited if they are charged with a criminal offence or they pose a grave threat to public order and safety, migrants can be detained for mere administrative purposes.<sup>7</sup>

As said, this kind of imprisonment is usually deemed to be administrative in nature, and therefore the prohibition of criminalisation of irregular entry under international law is not directly violated. Nonetheless, often this practice has punitive effects and recipients perceive it as a criminal punishment. Not only it is highly discriminatory, but it is also likely to pose serious human rights concerns about the actual condition of detention. Even if detaining migrants in entry points or in reception, accommodation and relocation centres is usually considered legitimate under national legislations, it can be unlawful depending on factors such as the intensity, the length, the nature or the conditions of such detention.<sup>8</sup>

### **3. Lawfulness and unlawfulness of detention: principle of legality, prohibition of arbitrary detention and the standard of human treatment**

International law and International Human Rights Law (IHRL) provide for a first set of rules that can be helpful in placing the line between lawful and unlawful detention. Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR) designs the human right to liberty and security and affirms the principle of legality in matter of deprivation of liberty as well as the prohibition of arbitrary detention.<sup>9</sup>

The **principle of legality** aims at providing predictability and legal certainty of the penalty and requires that the procedure as well as the substantive reasons of detention are governed by a legal act which is accessible to the public and sufficiently concrete to guide individual conduct.<sup>10</sup>

The **prohibition of arbitrary detention** is considered an absolute, non-derogable norm of customary international law (*jus cogens*),<sup>11</sup> under which arrest or detention must not be discriminatory nor manifestly

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<sup>7</sup> Political view on the matter is that the mere lack of authorisation for presence on a national territory constitutes a legitimate ground for the use of ‘State violence’ (G. CORNELISSE, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*, Leiden, 2010, p. 4).

<sup>8</sup> Y. KTISTAKIS, *Protecting Migrants Under the European Convention on Human Rights and the European Social Charter*, Strasbourg, February 2013, p. 23.

<sup>9</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

<sup>10</sup> N. PETERSEN, *Liberty, Right to, International Protection*, in *Max Planck Encyclopedia of Public International Law* [MPEPIL], October 2012.

<sup>11</sup> UN Human Rights Committee (HRC), *General Comment No. 35*, 16 December 2014, CCPR/C/GC/35, para. 66.

disproportionate.<sup>12</sup> The Human Rights Committee (HRC) of the United Nations (UN) has interpreted Article 9.1 of the ICCPR as requiring that any measure imposing a restriction on the right to liberty “must be justified as reasonable, necessary and proportionate in light of the circumstances”.<sup>13</sup> Pursuant to the UN Working Group on Arbitrary Detention, deprivation of liberty must be regarded as arbitrary, *inter alia*, “[w]hen asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy”.<sup>14</sup>

At the regional level, the ECHR provides for an additional legal framework for European States to comply with in order to avoid infringing their obligations under IHRL in matter of detention. Article 5, paragraph 1 of the ECHR sets forth a peremptory list of circumstances under which restriction to liberty is allowed, mainly linked to the criminal responsibility of the detainee. Under the terms of letter f) of the same article, “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country...” is permitted. This provision seems to create a friction with the abovementioned principle of non-criminalisation and the general principle of non-refoulement and it has been invoked by European States to justify their policy of taking immigrants into custody.<sup>15</sup> However, it can be argued that the ECtHR has implicitly stipulated that this provision shall not be referred to in cases of detention of asylum seekers.<sup>16</sup>

In addition, the following paragraphs of Article 5 ECHR offer a catalogue of rights to be granted in case of restrictions on liberty and the case law of the ECtHR developed a range of limitations to the possibility of resort to confinement, particularly in relation to migrants.<sup>17</sup> Accordingly, detention must be compatible

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<sup>12</sup> HRC, *van Alphen v. the Netherlands* (Communication No. 305/1988), CCPR/C/39/D/305/1988, 23 July 1990. See also N. PETERSEN, *Liberty, Right to, International Protection*, 2012, cit. note 10. According to him, arbitrariness has a broader sense than illegality and covers certain substantive criteria, such as elements of injustice, unreasonableness, capriciousness, and disproportionality.

<sup>13</sup> HRC, *General Comment No.35*, cit. note 11, para. 18.

<sup>14</sup> UN Human Rights Council Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its 68<sup>th</sup> session*, 13–22 November 2013, A/HRC/WGAD/2013/, p. 2.

<sup>15</sup> If this provision, on the one hand, seems in contrast with the general prohibition to criminalise illegal entry, on the other hand, it seems to exclude lawfulness of detention of asylum seekers, once the request has been advanced, and therefore it cannot be used by States as a justification for detention of people while their request of asylum is pending.

<sup>16</sup> European Law Institute (ELI), *Statement of the European Law Institute: Detention of Asylum Seekers and Irregular Migrants and the Rule of Law*, 2017, pp. 40-41. For example, ECtHR, *S.D. v. Greece*, Application no. 53541/07, Judgement of 11 June 2009, para. 62; ECtHR, *Abmade v. Greece*, Application no. 50520/09, Judgement of 25 September 2012, paras. 139, 143; ECtHR, *R.U. v. Greece*, Application no. 2237/08, Judgement of 7 June 2011, paras. 94-95.

<sup>17</sup> ECtHR Press Release, *Factsheet – Migrants in detention*, April 2018 (available at [www.echr.coe.int/Documents/FS\\_Migrants\\_detention\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf), accessed on 13 November 2018).



with the overall purpose of Article 5, which is safeguarding the right to liberty and ensuring no one to be dispossessed of his or her liberty in an arbitrary fashion. Therefore, deprivation of liberty shall not be arbitrary, automatic nor collective; on the contrary, it should be exceptional, proportionate and strictly necessary. It should only be a measure of last resort, applied only after a careful examination of the individual circumstances on a case by case basis, and alternative, non-custodial measures should be employed wherever possible. Lastly, it should be subject to periodic review. Whenever a State fails to comply with these standards, a breach of Article 5 ECHR occurs.

Inappropriateness of places of detention combined with long deprivation of liberty may also violate the **prohibition of torture and inhuman or degrading treatment** under Article 3 ECHR.<sup>18</sup> European States are required to comply with the principles of strict necessity, proportionality and legality, as established also under Article 5; in addition, they must grant access to remedies, access to healthcare, adequate and decent living conditions, special care for vulnerable people and the respect of other basic human rights.<sup>19</sup> The prolonged detention itself in absence of a time limit and with unclear prospects for release, could easily be considered as amounting to inhuman treatment under Article 3 ECHR, even without any further consideration on material conditions of detention.<sup>20</sup>

ECtHR jurisprudence has been consistent in condemning States for migrants' imprisonment on the basis of violations of Articles 5 and 3 ECHR.<sup>21</sup> The Court notably applies also other IHRL instruments in its decisions, the most prominent being the 1951 Geneva Convention relating to the Status of Refugees, which is a bounding treaty for all European States and introduced the **principle of non-refoulement** under its Article 31.<sup>22</sup>

In *M.S.S. v. Belgium and Greece*, the ECtHR held that “the confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, in particular under the 1951 Geneva Convention relating to the Status of Refugees and the ECHR. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions... The States must have particular regard to Article 3 of

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<sup>18</sup> Y. KTISTAKIS, *Protecting Migrants*, 2013, cit. note 8, p. 34.

<sup>19</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Factsheet on Immigration Detention*, March 2017, CPT/Inf(2017)3 (available at [www.rm.coe.int/16806fbf12](http://www.rm.coe.int/16806fbf12), accessed on 13 November 2018).

<sup>20</sup> *Ibid.* p. 2.

<sup>21</sup> ECtHR, *Factsheet – Migrants in detention*, 2018, cit. note 17. In particular, ECtHR GC, *Kblajfia and Others v. Italy - holding of irregular migrants on Lampedusa and Palermo*, Application no. 406/2016, Judgement of 15 December 2016.

<sup>22</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 1951, cit. note 4.



the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct".<sup>23</sup>

Lastly, European States' obligations in the light of human rights standards may arise also under internal constitutional and statutory provisions as well as under the law of the EU. The Charter of Fundamental Rights of The European Union establishes at its Article 6 the right to liberty and security, which must be read in combination with the procedural rights of Articles 47 (right to a fair trial and effective remedy) and 49 (principle of legality) of the Charter.<sup>24</sup> Specific requirements for reception and accommodation are set out also in some *ad hoc* Regulations and Directives of the EU, giving indications on the standards MS must comply with in order to ensure respect for human dignity.<sup>25</sup> Importantly, in accordance with the principle of *non-refoulement*, Article 4 of [Frontex Regulation 656/2014](#)<sup>26</sup> provides that no person shall be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where his or her life can be put at risk, where he or she can be persecuted, and "from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*". Not only EU secondary laws with an impact on human rights are significant under the jurisdictional authority of national courts and of the European Court of Justice (ECJ), but they may have further consequences for the responsibility of a contracting State to respect human rights contained in

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<sup>23</sup> ECtHR GC, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement 21 January 2011, paras. 216-218.

<sup>24</sup> European Union, *Charter of Fundamental Rights of The European Union (Nice Charter)*, 18 December 2000, 2000/C 364/01.

<sup>25</sup> E.g. Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013; Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU; Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU; Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU.

For an extensive overview on European Law on detention in matter of asylum, European Union Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, 2015, pp. 141-169.

<sup>26</sup> Council of the European Union, *Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 24 June 2014, OJ L. 189/93, 27.6.2014, p. 93-107, 2014/656/EU.

the ECHR.<sup>27</sup> In the already mentioned *M.S.S. v Belgium and Greece*, the legal obligations under the Reception Directive were recognised by the ECtHR as a decisive factor for the establishment of a level of protection of human dignity of an asylum seeker against degrading treatment and living conditions during detention.<sup>28</sup>

Hence, the prohibition of torture and inhuman and degrading treatment, the forbiddance of arbitrary detention, the principle of non-refoulement and the right to seek asylum must be read in combination as an intersection of rights that imposes a duty for States to avoid violations. In other words, in order to grant the full enjoyment of the right to seek asylum, States must apply the principle of non-refoulement and make sure they do not repulse, expel or extradite migrants in countries where their rights are at stake, particularly in relation to the right to be free from torture and from arbitrary detention.

#### **4. From internal administrative detention to external border control. The Libyan case**

As a response to the many condemnations by the ECtHR, European States are making efforts to preserve a surface of compliance with the human rights standards contained in the ECHR, in the 1951 Geneva Convention and in all the other relevant human rights instruments imposing obligations upon States to respect basic human rights of refuge seekers. One of the strategies to circumvent the risk to be sentenced by the ECtHR for breaches of IHRL is typically the adoption by the MS of the EU of the policy of externalizing migration control and the consequent **externalization of the responsibility** for violations of human rights. This practice consists in outsourcing border control to third neighbour countries, delegating to them the administration of migratory fluxes and then shifting the duty to protect to States outside the EU.<sup>29</sup> It has been noted that those States that would have been able to avail themselves of asylum procedures, social support, and decent reception conditions relegate responsibility to countries of first arrival or transit that have comparatively less capacity to ensure protection of human rights in accordance with international standards.<sup>30</sup>

As an example, one alternative to inter-State detention facilities has been the creation of detention camps in border areas, the s.c. “transit zones” (e.g. what happened in the edge territory between Hungary and Serbia). States concerned have repeatedly argued that migrants kept in transit zones are not deprived of

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<sup>27</sup> ELI, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law*, 2017, cit. note 16, p. 40.

<sup>28</sup> ECtHR, *M.S.S. v Belgium and Greece*, 2011, cit. note 23, paras. 231, 233, 250, 263.

<sup>29</sup> J. BAST, F. V. HARBOU, J. WESSELS, *Human Rights Challenges to European Migration Policy (REMAP) Discussion paper*, in *Forschungsgruppe Migration & Menschenrechte*, August 2018, pp. 2-3.

<sup>30</sup> B. FRELICK - I. M. KYSEL - J. PODKUL, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, in *Journal on Migration and Human Security*, Vol. IV, No. 4, 2016, pp. 190-220.

their liberty because they are free to leave, and anyway the States consider themselves exonerated from responsibility because people are not properly on their territory yet.<sup>31</sup> Nevertheless, the inhuman and degrading conditions of migrants in such areas, combined with the lack of any basic guarantee as access to justice and remedies or to decent facilities, has once again proved these States *de facto* responsible for human rights infringements.<sup>32</sup>

Outside Europe, an eminent example of discharge of accountability with regard to immigration control is the Australian model,<sup>33</sup> under which all asylum seekers arriving in Australia by boat are intercepted and transported to detention centres in the Pacific island States of Nauru and Papua New Guinea, financed by the Australian government, allegedly for health and security assessments. Even if migrants are found to have the right to be accorded the *status* of refugee, they never have the chance to be permanently resettled in Australia, unless they are minors. This controversial policy is justified as a means of reducing the number of casualties at sea and combat human trafficking, but it clearly breaches Australia's international obligations under the 1951 *Refugee Convention*, notably the mentioned principles of non-*refoulement* and non-penalization for irregular entry.

European States have started to apply this model in their foreign policies concerning migrants and asylum seekers, involving third countries into the EU's migration control. Since the 2004 with the Hague Program, the EU has increasingly "externalized" its borders, especially through remote control policies and entering into immigration agreements with third countries. In February 2009, the Italian and Libyan Governments signed a Technical Protocol establishing an agreement providing for the push-backs of refugees to North Africa. The Protocol was suspended in 2012 following the landmark ECtHR's *Hirsi Jamaa v. Italy* case<sup>34</sup> where the Court found Italy responsible for violations of Articles 3 (prohibition of torture and inhuman or degrading treatment) and 13 (*nulla poena sine lege*) of the Convention as well as Article 4 of Protocol 4 (prohibition of collective expulsion).<sup>35</sup> Nonetheless, this practice has revitalised in recent years with new pacts with extra-European countries deemed to be "safe and secure", most notably

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<sup>31</sup> G. CORNELISSE, *Immigration Detention and Human Rights*, 2010, cit. note 7, pp. 6-7.

<sup>32</sup> For example, it is still pending under the scrutiny of the ECtHR the case *Ilias and Ahmed v. Hungary* on the conditions and duration of detention in border-zones (ECtHR, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, pending).

<sup>33</sup> The "Pacific Solution" (2001-2008) and "Operation Sovereign Borders" (since 2013).

For an in-depth analysis, B. FRELICK - I. M. KYSEL - J. PODKUL, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 2016, cit. note 30, pp. 203-206.

<sup>34</sup> ECtHR, *Hirsi Jamaa et al. v. Italy*, Application no. 27765/09, Judgment of 23 February 2012.

<sup>35</sup> Council of Europe, *Protocol N. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already in the Convention and in the First Protocol thereto, as amended by Protocol N. 11*, Strasbourg, 16.IX.1963.

with the EU-Turkey Pact of February 2016<sup>36</sup> and, more importantly, the 2017 *Memorandum of Understanding* (MoU) between the Italian and the new Libyan governments.

#### 4.1. The Italian-Libyan MoU on immigration control: a focus

The aim of the agreement was to “combat illegal immigration, human trafficking and contraband and [...] reinforc[e] the border security between the Libya State and the Italian Republic”.<sup>37</sup> Libya would host the migrants temporarily in camps until they return to their countries of origin and Italy would train personnel working in the hosting centers.<sup>38</sup> In addition, relying on funds made available by the EU, Italy committed to provide technical and economic support to Libyan bodies and institutions in charge of the fight against “illegal immigration” (Article 1 of the MoU). It is also worth noting that after few days from the MoU with Libya, Italy has signed another similar framework agreement with Tunisia which, while more stable than Libya, still is a fragile State with weak government institutions, whose [law criminalises irregular entry, stay, and exit](#) and lacks any adequate protection for refugees.<sup>39</sup> The UN Committee Against Torture expressed concerns that the agreement did not contain any particular provision that may render cooperation and support conditional on respect of human rights,<sup>40</sup> and the MoU was successfully challenged by a group of Libyan human rights defenders in the Libyan Supreme Court, which suspended its application on technical grounds in March 2017. However, despite this decision, Italy has assisted in the maintenance of Libyan Coast Guard vessels and provided technical support and training.

The next day after the signing of the MoU with Libya, on February 3<sup>rd</sup> 2017, the European Council adopted the [Malta Declaration](#),<sup>41</sup> encouraging individual MS to directly engage with Libya for border

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<sup>36</sup> European Council, *EU-Turkey Statement*, Press release, 144/16, 18 March 2016.

<sup>37</sup> *Italian-Libyan MoU on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing the border security*, 3 February 2017.

<sup>38</sup> Article 2.3 and Preamble of the MoU: “The Parties commit to undertake actions in ... adaptation and financing of the above-mentioned reception centres already active compliance with the relevant provisions, making recourse to funds made available by Italy and the European Union. The Italian party contributes, through the delivery of medicines and medical equipment, to the improvement of the illegal immigrants’ medical needs in the centres, in the treatment of communicable and serious chronic diseases ... training of the Libyan personnel within the above mentioned reception centres to face the illegal immigrants’ conditions, supporting the Libyan research centres operating in this field so that they can contribute to the identification of the most adequate methods to face the clandestine immigration phenomenon and human trafficking”.

<sup>39</sup> M. G. GIUFFRÈ, *From Turkey to Libya: The EU Migration Partnership from Bad to Worse*, in *Eurojust*, 20 March 2017.

<sup>40</sup> CAT, *Concluding observations on the combined fifth and sixth periodic reports of Italy*, CAT/C/ITA/CO/5-6, December 2017, para. 22.

<sup>41</sup> Council of the European Union, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 3 February 2017.

management and welcoming the MoU. The purposes of the MoU and the Malta Declaration were confirmed during the Paris meeting of the Heads of State and Government of France, Germany, Italy, Spain, the High Representative of the EU for Foreign Affairs and Security Policy, Niger, Chad, and the Chairman of the Presidential Council of Libya.<sup>42</sup> In a [Joint Statement](#) on ‘Addressing the Challenge of Migration’ of 28 August 2017, they agreed to pursue the return of irregular migrants to the countries of origin, in particular to Niger and Chad, and welcomed “the Italian project to cooperate with 14 communities along migration routes in Libya”.<sup>43</sup>

Apparently, no concerns at the European level have been posed about the fact that Libya, a State which is not party to the 1951 *Refugee Convention* and has no domestic law or procedure for considering asylum claims, regularly perpetrates gross violations of human rights. Migrants reaching Libya without valid entry documents are forcibly placed in detention camps, where are usually subject to torture, harassment, violence, sexual exploitation and forced labour. The conditions in the detention centers have been extensively described by Reports from international organisations, European institutions and NGOs, all of which acknowledge the gross human rights violations and extreme abuse of detainees, including sexual violence, slavery, forced prostitution, torture, maltreatment, human smuggling and trafficking of migrants for organs, lack of judicial review, poor sanitary conditions.<sup>44</sup>

The Office of the High Commissioner for Human Rights of the United Nations (OHCHR) reported that migrants in Libya are “vulnerable to unlawful killings, torture and other ill-treatment, arbitrary detention and unlawful deprivation of liberty, rape and other forms of sexual and gender-based violence, slavery and forced labour, extortion and exploitation by both State and non-State actors”.<sup>45</sup> Malnutrition, starvation, gang-rape, use of lethal force and extrajudicial executions, deaths in captivity, arbitrary and

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<sup>42</sup> [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*, in *EU Migration Law Blog*, 30 January 2018 (available at [www.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/](http://www.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/), accessed on 13 November 2018).

<sup>43</sup> *Joint Statement: Addressing the Challenge of Migration and Asylum*, Paris, 28 August 2017.

<sup>44</sup> Amnesty International, *Libya’s Dark Web Of Collusion: Abuses Against Europe-Bound Refugees And Migrants*, 11 December 2017; A. SKORDAS, *Violations of Human Rights of Migrants in Libya*, University of Copenhagen, 1 February 2018; Report of the United Nations High Commissioner for Human Rights, *Situation of Human Rights in Libya, and the Effectiveness of Technical Assistance and Capacity-Building Measures Received by the Government of Libya*, 21 February 2018; European External Action Service, *EUBAM Libya Initial Mapping Report Executive Summary* (EEAS(2017) 0109), 25 January 2017; Human Rights Watch, *World Report 2018, Libya – Events of 2017*, January 2018; [Global Detention Project](#), *Country Detention Reports, Immigration Detention in Libya: “A Human Rights Crisis”*, 30 August 2018.

<sup>45</sup> OHCHR, *Support Mission in Libya, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018, Executive summary.



indefinite detention, torture, smuggling and trafficking, including of children, are also reported, and there are “credible information on the complicity of some State actors, including local officials, members of armed groups formally integrated into State institutions, and representatives of the Ministry of Interior and Ministry of Defence”. The OHCHR portrays the “climate of lawlessness” and describes Libyan authorities, including the judiciary, as weak institutions that are “unable, if not unwilling, to address the plethora of abuses and violations committed against migrants and refugees by smugglers, traffickers, members of armed groups and State officials, with near total impunity”.

Furthermore, the same national Courts are starting to acknowledge the grave human rights breaches committed in Libya, uncovering the brutal, cruel and inhuman treatment migrants are exposed to in the Libyan detention camps. A landmark example is the Sentence n. 10/2017 of the Assize Court of Milan, in which the judges and the popular jury sentenced the accused, a 24 year old Somalian, to life imprisonment for a series of crimes perpetrated in Libya, notably: kidnapping and abduction of some hundreds of victims, aggravated by the death of some of the victims due to the poor conditions of detention and the abuses endured; facilitation of human smuggling and human trafficking, aggravated by the factor of being part of an international criminal organisation; aggravated violence and sexual assault, also towards minors.<sup>46</sup> This case illustrates that sometimes the action of the judiciary compensates for the aberrations of the executive power and shows that States and people cannot turn a blind eye on the Libyan humanitarian disaster anymore.

## **5. The problem with externalised responsibility**

European States regard the delegation of borders control to third countries as a sort of ‘safe harbour’ to limit immigration and the consequent obligation to grant decent reception standards compliant with their human right duties under international law, and consequently to avoid accountability for such breaches externalising the responsibility. However, MS’ obligations under international, European refugee law and IHRL do not stop at the territorial boundaries of the EU.

### **5.1. International human rights instruments and Extraterritorial Responsibility**

MS can be held accountable under a number of international human rights instruments for actions executed outside their boundaries. For instance, the ICCPR,<sup>47</sup> the Convention Against Torture (CAT),<sup>48</sup>

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<sup>46</sup> Assize Court of Milan, I Section, sent. 10/2017, 10 October 2017.

<sup>47</sup> Human Rights Committee (HRC), *Lopez Burgos v. Uruguay*, 29 July 1981.

<sup>48</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

the Convention on the Elimination of Racial Discrimination,<sup>49</sup> the 1951 Refugee Convention and the same ECHR,<sup>50</sup> all refer to “jurisdiction” rather than “territory” in order to determine the limit of State responsibility. Whenever a State exercises its extraterritorial jurisdiction – understood as control over actions taking place on another State’s territory – to control or prevent migration, such State is still bound by the relevant provisions of IHRL, IHL and International Criminal Law (ICL), even when the actions are materially carried out by a third party.

In fact, it is uncontroversial that responsibility may arise either by act or omission, since in some cases, the failure to act can constitute a breach of an international obligation.<sup>51</sup> To be legally significant an omission must be more than simple inaction, since it requires the existence of an unfulfilled legal duty to act.<sup>52</sup> Although there is no general duty to prevent, there is a growing list of treaties, Security Council resolutions and judicial decisions where a specific duty to act is articulated or a particular due diligence in external actions is required. This way the prohibitions of torture and of arbitrary detention conducted by third party can be applied to the extra-territorial violation of principle of non-refoulement.

For example, under the CAT a duty is imposed upon States to actively take effective measures to prevent torture and other acts of cruel, inhuman or degrading treatment or punishment,<sup>53</sup> and according to Article 11 CAT States must have a particular diligence in case of detention and “shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture”. This “**responsibility to prevent**” goes far beyond the territorial borders of the State. First, it is worth noticing that the forbiddance of torture is a norm of *jus cogens* valid *erga omnes* and enjoys universal jurisdiction *per se*. Second, Article 5 of the CAT extends the applicability of the Convention to “any territory under [the MS’s] jurisdiction” (as well as to other cases of connection between the State and the offence *i.e.* actions committed on a ship or aircraft registered in that State, when there is national link with the alleged offenders or the victims or

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<sup>49</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

<sup>50</sup> ECHR, Article 1 (*infra*).

<sup>51</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Article 2: “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”.

<sup>52</sup> J. CRAWFORD, *State Responsibility: The General Part*, Cambridge, 2013, p. 218.

<sup>53</sup> CAT, respectively Articles 2 and 16.



simply when the alleged offender is present in the State's territory), thus implying a notion of "jurisdiction" broader than the territorial delimitation. Lastly, the Committee Against Torture corroborated this interpretation in the *Marine I case* ruling that "the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control",<sup>54</sup> confirming its previous statement in General Comment No. 2 that "the concept of 'any territory under its jurisdiction', linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the *de jure* or *de facto* control of a State party."<sup>55</sup>

Analogously, also the obligation of non-refoulement arises when a refugee is under its effective or *de facto* jurisdiction outside a State's territory; this, to some extent, includes jurisdiction in international waters as well as in the territorial waters and the territory of another State.<sup>56</sup> The Torture Committee further confirmed the **extraterritorial application of the principle of non-refoulement** in its recent General Comment No. 4: "Each State party must apply the principle of non-refoulement in any territory under its jurisdiction or any area under its control or authority".<sup>57</sup> It is interesting to note that the wording of the General Comment No. 4 marks a distinction between "control" and "authority", where the latter appears to be a weaker type of power which still does not absolve from responsibility. Importantly the Committee specifically includes also the threat of acts of torture by non-State actors, when the group has a *de facto* control comparable to the State's power,<sup>58</sup> in the scope of the ban of refoulement, and prevents States "from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities".<sup>59</sup> The Committee even affirms that "Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or

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<sup>54</sup> UN Committee Against Torture (CAT), *J.H.A. v. Spain (Marine I case)*, CAT/C/41/D/323/2007, 21 November 2008, para. 8.2.

<sup>55</sup> UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para. 7.

<sup>56</sup> B. VANDVIK, *Extraterritorial Border Controls and Responsibility To Protect: A View from ECRE*, in *Amsterdam Law Forum*, Vol. 1, No. 1, September 2008.

<sup>57</sup> UN Committee Against Torture (CAT), *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, para. 10.

<sup>58</sup> Committee Against Torture (CAT), *Sadiq Shek Elmi v. Australia*, CAT/C/22/D/120/1998, UN 25 May 1999, para. 6.5.

<sup>59</sup> CAT, *General Comment No. 4*, cit. note 55, par. 30.

inaction provides a form of encouragement and/or *de facto* permission”,<sup>60</sup> thus introducing the positive duty upon States to actively impede actions of torture if they do not want to be held accountable for actions committed by a third party.

Lastly, the Working Group on Arbitrary Detention clarified that the prohibition of arbitrary detention is an absolute, non-derogable norm of customary international law that “can never be justified, including for any reason related to national emergency, maintaining public service, public security or the large movements of immigrants or asylum seekers”, and above all this prohibition “extends both to the territorial jurisdiction and effective control of a State”.<sup>61</sup>

In conclusion, it is undeniable that current IHRL is developing a practice on extraterritorial State responsibility, but the issue arises whether the concept of “jurisdiction” may extend to extra-territorial actions when the oversea territory is not subject to direct control of the State (in our case, the EU and its MS) and the perpetrators are not nationals of such State, but nonetheless there is a functional link between the State and the violations.

## 5.2. Theories of State responsibility under International Law

As a general rule, under international customary law a State can be held responsible for a breach of international law (including IHRL, IHL and ICL), when it commits, gives instructions, exercises direction or control or provides aid or assistance over the commission of an internationally wrongful act by another State.<sup>62</sup>

Article 1 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission (ILC) stresses that “Every internationally wrongful act of a State entails the international responsibility of that State”. The problem arises on how to ascribe a conduct to a State (**problem of attribution**). The direct responsibility of States is enshrined in Article 4 of the Draft Articles and relates to the actions of the State organs and representatives (“*de jure* organ test”).<sup>63</sup> As a subsidiary

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<sup>60</sup> CAT, *General Comment No. 2*, cit. note 52, par. 18.

<sup>61</sup> Working Group on Arbitrary Detention, *Revised Deliberation No. 5*, 2018, cit. note 5, para. 8.

<sup>62</sup> ILC, *Draft Articles on State Responsibility*, 2001, cit. note 41.

<sup>63</sup> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State”.

test, Article 8 entails State responsibility for actions “in fact” carried out under the State’s instructions, direction or control (“*de facto* organ test”).<sup>64</sup>

The jurisprudence of the International Court of Justice (ICJ) helps to determine the scope of State responsibility beyond the letter of the Draft Articles and contributes to the definition of the “control” involving acts of non-State entities. This applies to the indirect attribution of acts of irregular groups, individuals or entities that are not formally part of the State but still act under its direction, control, instructions or influence. Since the concept of “instructions” refer to situations where State organs supplement their own action by recruiting or instigating private persons or groups who act as auxiliaries outside of the official State structure,<sup>65</sup> it can be linked to the current situation in Libya where informal groups are empowered of functions that usually fall under the governmental prerogatives, such as the cooperation with European States and the direct management of detention facilities.

The ICJ has identified the necessary threshold of State control over non-State actors to ascertain a State’s responsibility in the 1986 *Nicaragua case* and the following paramount decisions on the 2005 *Armed Activities case*<sup>66</sup> and the 2007 *Bosnian Genocide case*.<sup>67</sup> The standard reflects the so called “**doctrine of effective control**”, which requires evidence of specific conduct over operations. In the *Nicaragua case*,<sup>68</sup> the Court stated that when the relationship between a State and a non-State actor comprises dependence on the one side and control on the other, the latter should be equated with a *de facto* State organ acting on behalf of that Government, even though it does not enjoy that *status* under internal law; all the actions performed in such capacity would be attributable to the State for purposes of international responsibility.<sup>69</sup> The Court proceeded delimitating the application of the effective control doctrine, clarifying that the responsibility of a State arises if it is proved that it had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law”.<sup>70</sup> Although the issues before the Court were framed in the context of IHL, the ICJ’s wording suggested a general application. To prove

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<sup>64</sup> “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.

<sup>65</sup> J. CRAWFORD, *State Responsibility*, 2013, cit. note 50, p. 145.

<sup>66</sup> ICJ, Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*); Request for the Indication of Provisional Measures, Judgment of 1 July 2000.

<sup>67</sup> ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, I.C.J. Reports 2007.

<sup>68</sup> ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment of 27 June 1986, I.C.J. Reports 1986, pp. 62-64.

<sup>69</sup> *Id.*, para. 109.

<sup>70</sup> *Id.*, para. 115.

effective control, the claimant must show direct interference, such as financial assistance, military assistance, intelligence sharing, selection, support and supervision of the leadership.<sup>71</sup> However, the control must be not only over the entities as such, but also over the activities or operations giving rise to the internationally wrongful act.<sup>72</sup> This standard goes beyond equipping and financing a group and involves participation in the planning and supervision of the operations as well.<sup>73</sup>

This quite strict interpretation of the “control” required by Article 8 finds a more lenient application in the 1999 *Tadić case* by the International Criminal Tribunal for Yugoslavia (ICTY),<sup>74</sup> which introduced the “**doctrine of overall control**”. In that case the ICTY did not follow the jurisprudence of the Court in the *Nicaragua case*. On the contrary, the Court held that the appropriate criterion was that of the “overall control” (applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to impute the acts committed by Bosnian Serbs to the Former Republic of Yugoslavia under the law of State responsibility). In other words, the Appeals Chamber took the view that acts committed by a non-State entity could give rise to international responsibility of the State on the basis of the overall control exercised by the latter over the former, without any need to prove that each operation during which acts were committed in breach of international law was carried out under instructions or effective control.

In its Commentary, the ILC did not specify the level of control required for attribution, but quoted the *Tadić* decision indicating that “it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that conduct controlled should be attributed to it”<sup>75</sup> and that the “full factual circumstances and particular context” need to be assessed.<sup>76</sup> Despite the absence of a clear threshold, the principle is that private entities can act on behalf of a State as an “extended arm”. As such, a flexible and fact-based view of what falls within a State’s control is

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<sup>71</sup> *Id.*

See also ICJ, *Bosnian Genocide case*, 2007, cit. note 65.

<sup>72</sup> This level of control is to be contrasted with overall control, which is generic, flows from a general mandate and is based on a legal relationship.

<sup>73</sup> K. BOON, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, in *Melbourne Journal of International Law*, 2014, p. 329.

<sup>74</sup> ICTY, *Prosecutor v. Dusko Tadić* (Appeal Judgement), Judgment of 15 July 1999, IT-94-1-A.

<sup>75</sup> ILC, *Draft Articles on State Responsibility*, 2001, cit. note 41, p. 48.

<sup>76</sup> International Law Commission, *Draft Articles on the Responsibility of International Organizations, with Commentaries*, Supplement No. 10 (A/66/10), *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, Ch. V(E), p. 88.

required.<sup>77</sup> Then the control criterion under Article 8 could be applied, in abstract, to evaluate the State responsibility for actions perpetrated by non-State entities on a case-by-case basis.

However, the jurisdiction of the ICTY relates to personal criminal responsibility and does not extend to questions of State responsibility, and thus it does not fall under its competence to rule on that. Moreover, the ICJ never supported the overall control test, and in the two subsequent decisions on the *Armed Activities case* of 2005 and the *Bosnian Genocide case* of 2007, the ICJ reaffirmed the effective control test. Therefore, it cannot be stressed that the doctrine of overall control has risen to the rank of international customary law already. Moreover, in the case *de quo* it would be difficult to hold in a Court that a responsibility may arise under Article 8 on the EU and its MS for the acts of Libyan groups, since the link between the two is not direct but it is mediated by the Libyan government. For this reason, bearing in mind the not-binding standards developed on the overall control requirement, accountability for European States must be tracked in other norms of international law.

In this context, Article 16 of the Draft Articles on Responsibility becomes relevant, which reads as follows: “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”. The Commentary of the ILC on Article 16 clarifies that **aid or assistance** in the commission of a wrongful act occur when “a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question”.<sup>78</sup> The mere funding of actions can thus entail responsibility, provided that the two sub-conditions (a) and (b) are fulfilled.

In this respect, some authors argue that the massive human right violations by Libyan authorities and militias are at least facilitated by the financing and delivering of material and help from the EU States and therefore the EU’s and its MS’ migration management policies in support to Libya amount to “assistance” in the commitment of wrongful acts under the international law of State responsibility.<sup>79</sup> According to

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<sup>77</sup> J. CRAWFORD, *State Responsibility*, 2013, cit. note 50, p. 141.

<sup>78</sup> ILC, *Commentary of the International Law Commission on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, p. 66.

<sup>79</sup> R. MACKENZIE-GRAY SCOTT, *Torture in Libya and Questions of EU Member State Complicity*, in *EJIL: Talk!*, 11 January 2018; B. FRELICK - I. M. KYSEL - J. PODKUL, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 2016, cit. note 30, p. 197; [A. SKORDAS, A ‘blind spot’ in the migration debate?](#), 2018, cit. note 41; N. FREI, *Circumventing Non-Refoulement or Fighting “Illegal Migration”?*, in *EU Immigration and Asylum Law and Policy*, 15 June 2018, p. 4 (available at [www.eumigrationlawblog.eu/circumventing-non-refoulement-or-fighting-illegal-migration/](http://www.eumigrationlawblog.eu/circumventing-non-refoulement-or-fighting-illegal-migration/), accessed on 13 November 2018).

this view, there is substantial evidence for the EU's and its MS's responsibility in the Libyan events, since there is a sufficient nexus between this “aid or assistance” of EU States, and its contribution to the acts of torture in Libya,<sup>80</sup> and the three conditions of Article 16 (assistance; knowledge; violation of an international obligation of the assisting State) are fulfilled.

This view is partially supported by the findings of the OHCHR, whereas it noted that the new Italian government has implemented measures that, according to statistics and fact-findings, “have contributed to the increased death rate of migrants and refugees at sea and impacted the life-saving work of defenders of the human rights of migrants and refugees”.<sup>81</sup> Examples of these measures are the legal and practical restrictions of lifesaving search and rescue activities of humanitarian NGOs, including spreading false accusations of collusion with smugglers and prohibiting rescue ships from docking in Italian ports. The result is a vertiginous increase in the number of migrants pushed back to and detained in Libya and the consequent surge of human rights abuses and crimes. Moreover, the UN Special Rapporteur on torture, specifically addressing the issue of Libya, stressed that “when “pullbacks” forcibly retain migrants in situations where they are exposed to a real risk of torture and ill-treatment, any participation, encouragement, or assistance provided by destination States for such operations would be irreconcilable with a good faith interpretation and performance of the prohibition of torture and ill-treatment, including the principle of non-refoulement”.<sup>82</sup>

However, according to the ILC Commentary and international law, State responsibility can only be established if the requirement of the “knowledge of the circumstances” satisfies two cumulative conditions: 1) the assisting State knows the facts linked to the commission of the wrongful act; and 2) the assisting State acts with a view to facilitate the commission of the wrongful act (mental element of a specific purpose or *dolus specialis*).<sup>83</sup> This strict interpretation has been confirmed by the ICJ, which followed a restrictive meaning of “intent” in Article 16 of the Draft Articles in the *Genocide case* of 2007. The Court, equating the content of Article 16 to the concept of “complicity”, stressed that “the conduct of ... a person furnishing aid or assistance to a perpetrator of the crime [of genocide] cannot be treated as complicity [in genocide] unless at the least that organ or person acted knowingly, that is to say, in

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<sup>80</sup> Amnesty International, *Libya's Dark Web of Collusion*, 2017, cit. note 43, pp. 42-50.

<sup>81</sup> OHCHR, *Desperate and Dangerous*, 2018, p. 17.

<sup>82</sup> Human Rights Council, Thirty-seventh session, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, paras 56-59.

<sup>83</sup> “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”.



particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator”.<sup>84</sup> If these strict conditions are applied, it is difficult to maintain European States’ responsibility. If it is undeniable that the MS know and cannot ignore the perpetration of gross human right violations by Libyan authorities and groups, it is hardly proved that their cooperation is specifically aimed at facilitating such infringements.

Nevertheless, Article 41 of the ILC Articles on State Responsibility stresses that “No State shall recognize as lawful a situation created by a serious breach [of an obligation arising under a peremptory norm of general international law]... nor render aid or assistance in maintaining that situation”, introducing a direct **prohibition to cooperate** at any title to serious violations of *jus cogens*. A breach of *jus cogens* is “serious” if it involves a gross and systematic failure by the responsible State to fulfill its obligations under peremptory norms of international law,<sup>85</sup> and, as said, it can consist of an action or an omission. The scope of this Article is then broader than the applicability of Article 16 and it is more relevant to the current EU-Libya situation. Particularly, it has already been noted that the actions perpetrated by Libya amount of grave and widespread violations of well-established norms of *jus cogens* such as the prohibitions of torture and of arbitrary detention, the right to seek asylum and the principle of non-refoulement.

This prohibition to cooperation under international law is further strengthened the UN’s “global human rights due diligence policy”, aiming at “ensuring that the UN system does not provide any support to non-UN security forces where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law, and that its support contributes to strengthening the rule of law and respect for human rights”.<sup>86</sup> Although soft-law norms with no-binding nature, these due diligence guidelines are a clear evidence of the trend toward growing *usus* and *opinio juris* in matter of responsibility for indirect involvement in human rights abuses.

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<sup>84</sup> ICJ, *Bosnian Genocide case*, 2007, cit. note 65, para. 421.

It can be argued this reasoning applies only to those crimes and violations of IHRL and IHL where the specific intent is a constitutive element of the crime. And in fact, the Court, once established the lack of the *dolus specialis* required for genocide, deliberately refrained from ascertain whether in general complicity presupposes that the accomplice shares the specific intent of the principal perpetrator.

<sup>85</sup> Article 40 of the ILC Draft Articles, cit. note 41.

<sup>86</sup> UNGA, Sixty-seventh session, and UNSC, Sixty-eighth year, *Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council*, A/67/775-S/2013/110, 5 March 2013.



It is evident that the system of norms listed above, and in particular Article 41 of the ILC Articles on State Responsibility, may be invoked to prove the responsibility of European States for their involvement in the Libyan events. Of course, the problem with State responsibility is that it falls under the jurisdiction of the ICJ, and individuals do not have *locus standi* before the Court. It is therefore highly unlikely that a State, after proving to have a direct interest, will refer to the ICJ another State from the EU for these actions. Moreover, the competence of the ICJ does not extend to human rights violations, and as a consequence, protection must be sought under a different jurisdictional system.

Nevertheless, in its recommendations concerning Libya of December 2018, the UN OHCHR required the European Union to ensure respect of human rights law wherever “European Union Member States **exercise jurisdiction or effective control, including extraterritorially**”.<sup>87</sup> This is an undisputed step toward recognition of external responsibility and extraterritorial jurisdiction of the EU in Libya. The OHCHR also indicated that “Any future support should be contingent upon the Libyan authorities showing progress in upholding human rights law and standards”.<sup>88</sup> Failure to comply with this recommendation could entail liability of the MS under the UN system.

Importantly, voices have been raised also by the civil society, that claims accountability for the clear complicity of the EU in this outrage to humanity. In the words of Human Rights Watch:

EU institutions are aware of the mistreatment and inhumane detention conditions in Libya for those intercepted. Indeed, the EU provides support intended to ameliorate these conditions in detention. However, even though that support has had minimal impact on the situation, the EU continues to pursue a flawed strategy to empower Libyan Coast Guards to intercept migrants and asylum seekers and take them back to Libya. Where the EU, Italy and other governments have knowingly contributed significantly to the abuses of detainees, they have been complicit in those abuses.<sup>89</sup>

### 5.3. Profiles of responsibility under the ECHR system

The mentioned norms under international law and the growth of an *opinio juris* on external State responsibility can be used as parameters to develop and apply analogous standards within the European regional human rights system.

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<sup>87</sup> OHCHR, *Desperate and Dangerous*, 2018, p. 59.

<sup>88</sup> OHCHR, *Desperate and Dangerous*, 2018, p. 7.

<sup>89</sup> Human Rights Watch, *No Escape from Hell. EU Policies Contribute to Abuse of Migrants in Libya*, 21 January 2019.

As already mentioned, some authors convincingly hold that the financing and the assistance from the EU States contribute or at least facilitate the massive human right violations by Libyan authorities and militias, thus the prohibitions of refoulement, torture, inhuman or degrading treatment and arbitrary detention incumbent on EU and its MS as part of the ECHR, are violated.<sup>90</sup> If European MS cannot be held responsible directly for actions perpetrated by Libyan actors in violation of their duties under ECHR, they can nevertheless incur in legal responsibility for their failure to prevent of such breaches.

We have already examined the major human rights instruments providing for the extraterritorial application of the human rights standards under a wide conception of jurisdiction. In the European system, this broad interpretation of jurisdiction relies firstly on Article 1 of the ECHR, which imposes a positive obligation upon States to grant everyone under their jurisdiction with respect for the human rights contained in the Convention.<sup>91</sup> This wording finds a confirmation in the ECtHR's jurisprudence,<sup>92</sup> which recognises States accountable for the effects of any act carried out within their jurisdiction, even if they take place outside their territory.<sup>93</sup> In particular, the Court specified in various decisions relating to asylum seekers that the EU's legal responsibility does not stop at the EU's physical borders, and that MS must bear their own responsibilities towards asylum seekers contracted under the ECHR and the other relevant human rights instruments even if they try to outsource their obligations.<sup>94</sup> Moreover, the threshold of "control" adopted by the Court is significantly lower than "effective control", and a State can be held responsible for actions of armed groups (or other actors) in an external territory, if the State has provided financing and material support to such group, even if the State itself does not have the intent nor is fully aware of the human rights violations.<sup>95</sup>

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<sup>90</sup> N. FREI, *Circumventing Non-Refoulement or Fighting "Illegal Migration"?*, 2018, cit. note 77, p. 4; M. G. GIUFFRÉ, *From Turkey to Libya*, 2017, cit. note 39; A. SKORDAS, *A 'Blind Spot' in the Migration Debate?*, 2018, cit. note 41; M. JACKSON, *Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction*, in *European Journal of International Law*, Vol. 27, Issue 3, 1 August 2016, pp. 817–830; B. FRELICK - I. M. KYSEL - J. PODKUL, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 2016, cit. note 30, pp. 197-199.

<sup>91</sup> ECHR, Article 1: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

<sup>92</sup> E.g. ECtHR, *Ocalan v. Turkey*, Application no. 462211/99, Judgment of 12 March 2003; ECtHR, *Issa v. Turkey*, Application no. 31821/96, Judgment of 16 November 2004; ECtHR, *Amuur v. France*, Application no. 17/1995/523/609, Judgment of 25 June 1996; ECtHR, *Loizidou v. Turkey*, Application no. 15318/89, Judgment of 18 December 1996.

<sup>93</sup> B. VANDVIK, *Extraterritorial Border Controls and Responsibility To Protect*, 2008, cit. note 54.

<sup>94</sup> D. NAKACHE - J. LOSIER, *The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?*, in *E-International Relations*, 25 July 2017.

<sup>95</sup> For example, see the case ECtHR, *Catan and Others v. Moldova and Russia*, Application nos. 43370/04, 8252/05, and 18454/06, Judgement of 19 October 2012.

The principle of non-refoulement prohibiting the expulsion or a return of a person to a State in which the fundamental human rights are threatened following from Article 33 of the 1951 Refugee Convention has been interpreted by the Court in the light of a very broad notion of the States' duties under Article 3 of the ECHR and entails responsibility for European States also when they fail to prevent violations committed by third countries to happen.<sup>96</sup> In the paramount *Hirsi Jamaa case* the Court maintained that Libya itself could not be considered a “place of safety” because of the well-documented inadequacy of its response to flows of migrants and asylum seekers: “problems with managing migratory flows cannot justify recourse to practices which are not compatible with the State’s obligations... Therefore, any action ‘the effect of which is to prevent migrants from reaching the borders of the [would-be host] State’ may amount to *refoulement* if there is a *foreseeable* ‘real risk’ of ill-treatment in the countries where migrants and refugees are trapped”.<sup>97</sup>

The procedural dimension of the ban of refoulement, strengthened by the ECtHR in the *N.D. and N.T. v. Spain* decision of October 3<sup>rd</sup> 2017,<sup>98</sup> also suggests that the measures taken in cooperation with third countries would be lawful only when compliant with the human rights standards enshrined in the 1951 Convention and other instruments of international, European and national law.<sup>99</sup> Similarly, as already mentioned, the European Working Group on Arbitrary Detention specified that prohibition of arbitrary detention extends both to the territorial jurisdiction and to the territories under the effective control of a State. In its words, the standards settled out “apply to migration detention facilities maintained by a State in the territory of another State, with both States jointly responsible for the detention”.<sup>100</sup> Finally, the already reminded Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, includes an obligation to actively prevent torture in all cases (universal jurisdiction).

In conclusion, as it has convincingly been said, there is material support in the principles embedded in the ECHR and the ECtHR case-law for a broad interpretation on the concept of “jurisdiction” contained in Article 1 ECHR so that States are prohibited from facilitating acts of torture both at home and abroad (“extraterritorial State complicity”); in other words, a new principle is arising under the ECtHR

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<sup>96</sup> ECtHR, *Soering v. The United Kingdom*, Application no. 14038/88, Judgment of 7 July 1989; ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, Judgment of 17 January 2012.

<sup>97</sup> ECtHR, *Hirsi Jamaa et al. v. Italy*, 2012, cit. note 34, paras. 179-180.

<sup>98</sup> ECtHR, *N.D. and N.T. v. Spain*, Application Nos. 8675/15 and 8697/15, Judgments of 3 October 2017.

<sup>99</sup> “Every person was registered, protected from refoulement and had access to a procedure including a full examination of international protection needs and to the respective rights enshrined in the 1951 Convention and other instruments of international, European and national law” (N. FREI, *Circumventing Non-Refoulement or Fighting ‘Illegal Migration’?*, 2018, cit. note 77, p. 6).

<sup>100</sup> Working Group on Arbitrary Detention, *Revised Deliberation No. 5*, 2018, cit. note 5, para. 48.



jurisprudence as to which States have a complementary positive obligation to prevent together with a negative obligation to refrain from commission of gross human right violations (“**preventive complicity rule**”).<sup>101</sup> As a result, by signing migration control agreements with third countries and actively engaging in those actions, European States may trigger indirect responsibility before the ECtHR. The auspicious is that States will recognise their responsibility to protect and to ensure respect for human rights, and will undertake all the necessary measures in order to ensure that their cooperation partners are compliant with the fundamental norms.

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<sup>101</sup> M. JACKSON, *Freeing Soering*, 2016, cit. note 82.

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