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Cooperation-based Non-entrèe. What Prospects for Legal Accountability?

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Cooperation-based Non-entrée:

What prospects for legal accountability?

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Abstract

In a bid to avoid the financial and political cost of processing growing numbers of asylum applications from 'irregular' migrants, European States have resorted to an array of different 'practices of non-arrival' designed to stem undesired migratory flows before they reach their borders. While more traditional 'non-entrée practices' such as visa regulations, carrier sanctions and maritime 'push backs' have already been thoroughly investigated, however, cooperative arrangements with third States involving the provision of financial and technical assistance to strengthen the latter's capacity to prevent unauthorised departures have so far received little attention. In order to address this gap, the paper sets out to investigate whether European States that facilitate third State migration control practices which result in foreseeable violations of human rights can be said to act consistently with their international refugee law and European human rights law obligations.

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Cooperation-based Non-entrée

What prospects for legal accountability?

Content

List of Acronyms

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
Eurosur	European Border Surveillance System
IBM	Integrated Border Management
ICC	International Cooperation Center for Frontext Operations in Spain
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
MS	Member States
TFEU	Treaty on the Functioning of the European Union

1. Introduction

From the perspective of European states, removing 'irregular migrants'[1] once they are already present within their jurisdiction is fraught with difficulties. In particular, in a context of 'mixed' migratory flows where 'genuine refugees' cannot be *prima facie* distinguished from 'bogus asylum seekers', the principle of *non-refoulement* entails a requirement to provide each and every irregular migrant who wishes to do so with the opportunity to apply for international protection before being returned to a third (i.e. non-EU) country – be it his/her country of origin or a 'transit' country that has agreed to readmit foreign nationals (Gammeltoft-Hansen, 2011: 13). With migrant-hostile sentiments running high among European electorates, governments have therefore a strong incentive to avoid the political and financial burden imposed by refugee status determination procedures (Gibney, 2004: 229). Next to restricting access to such procedures in various ways, 'destination countries' in Europe (as elsewhere) have therefore devoted ever growing efforts to preventing unauthorised migrants – indiscriminately including refugees and asylum seekers – from ever reaching their borders (Hyndman and Mountz, 2008; Sterkx, 2008).

This 'politics of non-entrée' (Hathaway, 1992) translates into various forms of 'extra-territorialised migration control' which appear "to evade not only the legal constraints imposed by human rights law, but also those of… the rule of law… [i.e.] the mechanisms that make it possible to ensure respect for rules and rights" (Rijpma and Cremona, 2007; see also Ryan, 2010). Some of these 'practices of non-arrival' (Gil-Bazo, 2006: 527), and the legal expedients which they employ to "*dis*claim responsibility over the polity or acts concerned" (Gammeltoft-Hansen, 2011: 41), have already been the object of sustained academic scrutiny. The practice of intercepting and 'pushing back' migrant boats in extra-territorial waters with a view to deny jurisdiction over affected individuals, for instance, was widely criticised even before the ECtHR conclusively ruled it to be unlawful (Gammeltoft-Hansen, 2011: chapter 4; Den Heijer, 2012: chapter 6; Gil-Bazo, 2006; Moreno-Lax, 2012). The issues raised by carrier sanctions requiring private companies to enforce visa regulations at the pre-boarding stage, and thus effectively precluding undocumented asylum seekers from reaching a place of safety, have also been extensively discussed (Gammeltoft-Hansen, 2011: chapter 5; Guiraudon, 2006; Nicholson, 1997; Scholten and Minderhound, 2008).

Gammeltoft-Hansen and Hathaway (2015: 236), however, have recently suggested that "[a]s the early generation of non-entrée practices… has proved increasingly vulnerable to practical and legal challenges, new forms of non-entrée predicated on interstate cooperation have emerged in which deterrence is carried out by the authorities of the home or a transit state", with various kinds of support from 'sponsoring' destination states (see also Geiger, 2016). The much publicised (and criticised) EU-Turkey joint action plan on migration, which includes a commitment to "[f]urther support Turkey to strengthen its capacity to combat migrant smuggling, notably by reinforcing the Turkish Coast Guard patrolling and surveillance capacity" (European Commission, 2015),

1 As noted by Baldaccini (2009: 14), "what constitutes irregular status remains subject to the vagaries of twenty-seven different national immigration systems". On this point, see also Guild (2004).

constitutes but the most recent and glaring instance of this trend. While inter-state cooperation in the area of migration management has widely been criticised for prioritising security concerns over respect for human rights, however, the hypothesis that providing certain forms of aid and assistance to third States with a poor record in terms of respect for migrants' rights may be sufficient to trigger some form of *legal responsibility* on the part of sponsoring European States has hitherto scarcely been entertained.

In order to fill this gap, the paper sets out to address the following research question: *Can European States that facilitate third State migration control practices which result in foreseeable violations of human rights be said to act consistently with their international refugee and human rights law obligations?* The paper is structured as follows. Section I sets out the scene by placing cooperation with third States in the context of the 'external dimension' of European migration and asylum policy, with a particular focus on the problematic human rights impact of the capacity-building and intelligence-sharing practices that have emerged in this field. In light of this empirical evidence, section II highlights the necessity and opportunity of a legal approach to the provision of aid and assistance for migration control, and offers a discussion of relevant substantive obligations under international refugee law and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as well as of the 'secondary rules' of international law that govern the allocation of State responsibility for wrongful acts. Having done that, section III concludes by analysing the challenges posed by the jurisdictional threshold enshrined in Article 1 ECHR vis-à-vis the prospect of holding European States accountable for their involvement in human rights violations committed by 'partner' third States. The paper closes with a discussion of promising avenues for further research.

Apart from engaging in the lively debate on the 'reach' of human rights law, it is hoped that, by clarifying the legal responsibilities potentially incurred by European States that establish cooperative arrangements for migration control with third States, the paper may contribute to highlight the need for a more honest political discussion on how to achieve a truly comprehensive, balanced and right-respecting approach to cross-border mobility governance. The findings of this study may thus be of interest to both EU and national policy-makers involved in the field of international cooperation on migration and asylum issues, as well as NGOs and legal practitioners devoted to protecting the rights of migrants and refugees beyond the borders of the EU.

2. Section I

2.1. Cooperation with third States in the field of migration control

While Gammeltoft-Hansen and Hathaway (2015) characterise it as a "new generation of non-entrée", transnational cooperation has become an increasingly central component of migration policy over the course of the last two decades. In the post-Cold War era, the traditional understanding of migration control as a reactive State function performed at the borders of sovereign territory has indeed gradually been complemented (if not supplanted) by a new 'migration management' paradigm according to which

spontaneous cross-border flows have to be disciplined through a diffuse and multi-layered system of governance predicated on notions of 'partnership', 'shared interests' and 'win-win solutions' (Geiger, 2013; Kunz, 2013). Crucially, international migration management is supposed to embody a holistic and comprehensive approach capable of balancing security (the 'fight' against unauthorised movements), development (sustainable economic growth for partner states) and humanitarian concerns (international protection of refugees) (Geiger and Pecaud, 2010). Beginning in the late 1990s, this approach has become the philosophical – or perhaps, rather, rhetorical – underpinning of the 'external dimension' of European migration policy (Lavenex and Stucky, 2011). In practice, early observers already noted that this policy area seemed prone to become dominated by security objectives "to the detriment of longer-term strategies of migration management, refugee protection concerns, and more constructive and mutually beneficial patterns of cooperation with third countries" (Boswell, 2003: 620).

Subsequent scholarship on the external dimension of European asylum and migration policy tends to concur that transnational cooperation has primarily been geared towards the 'externalisation' of migration management functions (Carrera, den Hartog and Parkin, 2012; Papagianni, 2013; Sorensen, 2012; Sterkx, 2008; Zaiotti, 2016), or, as some commentators have put it, the "outsourcing of control responsibilities" (Gammeltoft-Hansen, 2013: 16; Geiger, 2016) and the "sub-contracting of policing" (Andersson, 2014: 129) to third States. Part of the reason for this deep-seated 'security bias' lies in the complex institutional and legal setting of European migration policy (see Andrade, Martin and Mananashvili, 2015 for a fuller account). Under Article 4.2(j) of the Treaty on the Functioning of the European Union (TFEU), the area of freedom, security and justice, of which migration and asylum policy is a main component, is one of shared competences between the European Union (EU) and its Member States (MS). In so far as migration-related cooperation with third States is pursued and channelled through development policy (see below), this constitutes instead a field of 'parallel competences' (Article 4(4) TFEU).

As a result, MSs essentially have the opportunity to choose whether to pursue cooperation with third States at the bilateral or at the EU-level, depending on which avenue appears to offer the best prospects for advancing their securitised vision of migration governance (Reslow, 2012a; Reslow and Vink, 2015). The 'shifting out' entailed by enhanced cooperation with third countries has indeed been interpreted as a continuation of the inter-governmental logic of "vertical venue-shopping" (Guiraudon, 2000): whereas Interior Ministers had previously seen the Europeanisation of migration policy as a way to circumvent domestic constraints, internationalisation now offered the means to escape growing supranational interferences (Lavenex, 2006). Cassarino's (2011) thesis about the 'resilient bilateralism' of readmission-related cooperation – paradoxically the only respect in which the EU enjoys an explicit external competence in the field of migration (Article 79(3) TFEU) – certainly also applies to cooperation with third States aimed at preventing the departure of irregular migrants.

In this respect, it is important to emphasise that "[t]hird countries are actors in EU external migration policy, not merely passive recipients of policy proposals" (Reslow, 2012b: 414). Thus, the question arises why these countries agree to cooperate on issues

of migration control, given that such cooperation is widely perceived as entailing a risk of becoming 'accumulation places' (Zhyznomirska, 2013: 269) or 'dustbins' (Trauner and Deimel: 2013, 27) for undesired migrants. A burgeoning body of research on the negotiation of readmission agreements underscores the importance of conditionality mechanisms predicated on various kinds of political and financial incentives in return for a commitment to cooperate on migration control matters, including the offer of (bilateral or EU-wide) visa-facilitation and trade agreements, as well as development assistance (Reslow, 2012b; Trauner, 2009; Van Criekinge, 2010; İçduygu and Aksel, 2014). In some cases, strengthening migration controls may also fit the priorities of third State governments interested in buttressing their regulatory power and clamping-down on social discontent (Cassarino, 2014: 105-107; Czerniecka and Heathershaw, 2010). What is notably absent from the picture are any compelling incentives to adopt migration control measures that are consistent with respect for migrants' rights.

As noted by Czaka and de Haas (2013), migration policies can be conceptualised, and ought to be analysed, at various (and potentially discrepant) levels, including policy discourses, policies on paper, policy implementation, and policy outcomes. The existing literature on the external dimension of European migration policy, however, has predominantly focussed on the level of "talk and decision", while largely neglecting the "world of implementers" (Wunderlich, 2013: 422). Moreover, "[w]hile the development, composition and conceptual background of the EU's external migration policies have received a great deal of scholarly attention, research on the very effects of these policies… is still in its infancy" (Trauner and Deimel, 2013: 20). Attempting to avoid this pervasive "level of analysis-problem" (Wunderlich, 2012: 1417), the remainder of this section zooms in on concrete modalities of cooperation, namely capacity-building and intelligence-sharing arrangements intended to facilitate partner third States in containing irregular migrants transiting through their territories, and the repercussions that these activities have on the rights of affected migrants.

2.2. Capacity-building

'Capacity-building' has been described by Geiger and Pecaud (2010: 7) as "an obscure and technical term" whose seemingly "neutral connotation" in many cases conceals "highly political" material effects. Generally speaking, the term refers to the provision of financial and technical support to less institutionally developed states, with a view to enable them to play their part within the international migration management system. Considering that the notion of 'migration management' itself "functions as a kind of empty shell, a convenient umbrella under which very different activities can be regrouped and given an apparent coherence" (*ibid*, 3), it is not surprising that migration-related capacity-building covers a wide array of different activities. These include funding for awareness-raising campaigns by civil society organisations, technical assistance to third State governments in the drafting of new legislation or the implementation of administrative reforms, and the provision of funds, training and equipment intended to strengthen their law enforcement authorities' capacity to 'contain' irregular migrants transiting through their territory. It is with the latter kind of capacity-building that this paper is primarily concerned.

As already noted, in the European context, cooperation with third States occurs at both the EU- and the MS-level. With respect to the former, Samers (2004: 38) noted over a decade ago that EU development assistance might be increasingly co-opted to promote a process of "re-scaling of control to third states". A recent study commissioned by the European Parliament has indeed estimated that, between 2004 and 2014, more than EUR 1 billion EU funds – roughly half of which came from development policy-related instruments – have been mobilised in support of more than 400 projects in partner third States, with "a clear prevalence of the fight against irregular migration" (Andrade, Martin and Mananashvili, 2015: 55). Another study conducted on behalf of the European Commission suggests that EU aid delivery for 'integrated border management' (IBM) alone amounted to EUR 873 million between 2002 and 2013 (Johnson et al., 2013). EU support – which ranged from training of border guards, to construction of border posts and the provision of equipment for patrolling and detection of false documents – was said to be "particularly effective in security areas of IBM, where there was often strong political will from beneficiaries" (*ibid*, v), whereas other features of the framework, including respect for human rights, "appeared less attractive than others and were not always addressed by EU support" (*ibid,* vii). In particular,

> *criticism referring to the disregard of human rights for asylum seekers and refugees, still remains valid.... The need remains to assure that border authorities properly elicit information on asylum seekers and refer them to asylum authorities to examine their application in line with their international obligations and national asylum law. Moreover, a general lack of clear procedures was observed in the institutionally less developed countries. Very little evidence of EU support to establish co-operation mechanisms between border management staff and decision making bodies for travellers in need of protection was found (ibid, 51)*

Similar criticisms can be levelled against individual MSs, which, for their part, continue to develop a rather intense external action. On one hand, EU-funded projects follow a 'principle of subsidiarity' (Andrade, Martin and Mananashvili, 2015: 118) whereby responsibility for project-implementation is often left to competent MS authorities (or international and civil society organisations) with the required know-how. Thus, for example, the Italian Ministry of Interior acted as 'implementing partner' in the EU-funded 'Across the Sahara' project (budget: EUR 1.5 million under the AENEAS), whose specific objective was "to contribute to the enhancement of policies and practices to prevent and combat illegal migration, trafficking and smuggling of (transit) migrants in Libya and Niger", including through the provision of training and equipment (such as patrol vessels and vehicles) for border control, the fight against migrant smuggling, and maritime 'search and rescue' operations (EuropeAid, 2006: 5). On the other hand, MSs continue to develop independent bilateral relations with strategically important third States, especially "through informal arrangements or political agreements, mainly used to establish operational cooperation on border management" (Andrade, Martin and Mananashvili, 2015: 66). 'Frontline' MSs whose geographic location makes them particularly 'vulnerable' to external 'migratory pressures' have been particularly active in this respect.

Taking again the example of Italy and Libya, relations between the two countries steadily intensified from 2003, when a first bilateral agreement on joint efforts to combat irregular migration was signed, including the organization of training courses for Libyan

border police officers, and the provision of technical equipment to strengthen Libyan border controls (Lutterbeck, 2006: 72). Subsequently a variety of capacity-building activities were undertaken, including financing for the construction of several migrant detention camps in Libya, funding for flights to repatriate irregular migrants from Libya to third countries, and rendering of additional equipment and training (Paoletti, 2011: 274-276). In 2008, a Treaty of Friendship and Co-operation was also established, whereby Italy agreed to give Libya EUR 5 billion (ostensibly as a form of indemnification for the period of colonial occupation) in return for a commitment to tighten control of its territorial waters. The Italians were also to provide the necessary resources – including an "electronic security barrier" composed of "on-the-ground mobile detection devices (such as truck-mounted radar and infrared scanners) but also blimp-like patrol drones" – to control migrant flows through the southern borders of Libya (Bialasiewicz, 2012: 859). While the sudden fall of the Gaddafi regime prevented the latter plan from coming to fruition, cooperation with Libya has continued even as the country plunged into a situation of worsening political instability (Human Rights Watch, 2014).

The case of Italy's cooperation with Libya serves to illustrate the highly problematic human rights repercussions of capacity-building in the field of migration control. Firstly, Libya has still not ratified the Convention Relating to the Status of Refugees (Refugee Convention) and has never had a functioning asylum system. Secondly, throughout its cooperative engagement with Italy, the country's authorities were known to systematically conduct arbitrary deportations of irregular migrants and refugees (see Bonavita, 2015; Lutterbeck; 2006; Paoletti, 2011). Thirdly, irregular migrants were (and continue to be) systematically held in detention centres – including ones funded by Italy – where they are subject to torture and other kinds of proscribed cruel, inhuman and degrading treatment. Fourthly, irregular migrants in Libya faced (and continue to face) a well-known risk of discrimination, exploitation and abuse by the local population (*ibid*). The fact that, in spite of its decade-long cooperation with Italy, Libya's record on respect for migrant and refugee rights has not substantially improved suggests that capacity-building activities are characterised by a prevalence of 'strategic learning' over 'norm diffusion' dynamics (see Bürgin, 2014), with third States exploiting their strong bargaining position to obtain financial and material advantages without transposing human rights safeguards. Additionally, it epitomises a tendency on the part of European sponsors to "close their eyes" to human rights abuses in the name of security objectives (Amnesty International, 2006).

While Libya may be considered a somewhat 'extreme' case, other key partners in the European 'fight' against irregular cross-border mobility, and thus primary beneficiaries of European capacity-building assistance – from Ukraine, to Turkey, to Egypt, to Morocco, to Mauritania – display, albeit to varying degrees, a similar pattern of more or less systemic violations of irregular migrants' rights.[2]

2 See the respective country profiles at: http://www.globaldetentionproject.org/

2.3. Intelligence-sharing

Increasingly, cooperation in the field of migration control also involves the sharing of intelligence information with the law enforcement authorities of partner third States. In his ethnographic account of border control practices in the Spanish enclaves of Ceuta and Melilla, Andersson (2014: 164) reports a telling exchange with a Spanish Guardia Civil officer:

> *If the thermal cameras spotted an intruder at night, the Alis[3] would be contacted to scour the bushes with patrol dogs. Sometimes the Moroccan soldiers "pass right by without seeing them", he said. But the guardias guided the Alis with their night vision: "You have them at your feet now, you're almost stepping on them!*

As a migrant interviewed by Andersson (*ibid*: 159) recounts:

> *Forced expulsion awaited in one of the big buses he had seen leaving the forest in the aftermath of the attack [to the fences]. Activists and journalists trailed them, trying to record their forced removal. They were told to get off in the Sahara, and two pieces of cloth were laid on the ground. "Walk between them straight ahead", the soldiers said, "and you will get to Algeria". The sands to the sides were mined.*

Far from an isolated episode, summary arrest and deportation has been the systematic policy of the Moroccan security forces vis-à-vis irregular migrants, as repeatedly denounced by human rights NGOs throughout the last decade. In 2012, for example, Doctors Without Borders (MSF) (2013) recorded 191 incidents of summary expulsion, affecting a total of 6,000 individuals from Sub-Saharan Africa – including refugees, asylum seekers, pregnant women, minors, children and persons requiring urgent medical care. Expelled into the desert no-man's land separating Morocco and Algeria, deportees were often "caught in a sinister game of ping pong between the two security forces" (*ibid*: 13), or became prey of organised criminal groups operating in the area. In the same year, the MSF mobile clinic in Nador (a town near Melilla) assisted more than 600 people with violence-related injuries, about half of which were classified as intentional violence at the hands of Moroccan security forces (*ibid*: 15).

While the type of close operational-level cooperation between Spanish and Moroccan guards in Ceuta and Melilla has much to do with the specific geography of the enclaves (the only land frontiers between the European and the African continents), thanks to technological advances, intelligence-sharing with third States law enforcement authorities no longer depends on physical proximity.

In this respect, mention must be made of the recently established European Border Surveillance System (Eurosur), an information-exchange network enabling near real-time sharing of border-related information between Frontex and the national authorities of MSs (see Rijpma and Vermulen, 2015). From the early stages of its design, it was envisaged that Eurosur – which between 2014 and 2020 will receive EUR 244 million EU funds – "should improve the capacity to detect small boats in the open sea, leading to more search and rescue activities and thereby saving more lives at sea, while also monitoring third country coasts in order to prevent immigrants from using such boats" (European Commission, 2008: 11). To this end, Article 20 of the 'Eurosur Regulation'

3 Nickname for the Moroccan auxiliary forces active at the fences of Ceuta and Melilla.

(No 1052/2013) provides that "Member States may exchange information and cooperate with one or several neighbouring third countries". As noted by a study commissioned by the European Parliament, however, "[c]ooperation with several of these countries in areas as sensitive for fundamental freedoms and rights as border management is a troubling prospect, and even more so if this should lead, in the perspective of Eurosur's "common pre-frontier intelligence picture", to collaboration with intelligence services" (Jeandesboz, 2008: 15).

While Eurosur is still in its infancy, Andersson (2014: 92) reminds us that "[s]haring of information with African forces is already happening, of course. Spanish cameras spot a migrant boat setting off from Morocco and notify the Moroccan gendarmerie. Its surveillance systems locate a boat on open seas: the ICC (International Coordination Centre for Frontex Operations in Spain) calls the Algerians, who "rescue" the migrants if the boat is still close enough to its coasts". The 'Seahorse operations' – a series of successive projects implemented by Spain with funding from the EU – have gradually established an information-sharing network that creates a near-permanent link between the Guardia Civil and the gendarmeries of Mauritania, Cape Verde, Senegal, Guinea Bissau, Gambia, Guinea Conakry and Burkina Faso, enabling the former to monitor and coordinate maritime interception operations conducted by the latter (Casas-Cortes, Cobarrubias and Pickles, 2014; Andersson, 2016). In 2013, a twin 'Mediterranean Seahorse project' was launched with the aim of "increasing the capacity of North African countries to tackle irregular migration and illicit trafficking by strengthening their border surveillance systems" (European Commission, 2013: 5). More specifically, the project – implemented by the Guardia Civil with EUR 4.5 million EU funds – should "a) enhance the situational awareness of the authorities of Algeria, Tunisia, Libya and Egypt on the irregular migration flows and illicit trafficking originating in, transiting through or destined to their territories and in particular those taking place in their coastal regions and territorial waters, and b) to reinforce their reaction capacity to preventing and tackling these phenomena" (*ibid*, 2).

According to Andersson (2016: 4), "border workers have used technology to overcome various hurdles: not least to square the circle of policing migrants on the one hand and rescuing them on the other". Indeed, while intelligence-sharing between European and third State law enforcement authorities may enable the rescue of a boat in distress and thus contribute to 'save lives', the subsequent fate of the passenger intercepted thanks to that very same information gives cause for concern. To take but one example, even though irregular migration was not listed as a punishable offence under Mauritanian domestic law, many of those apprehended as a result of cooperation with the Spanish Guardia Civil in the context of the 'Seahorse operations' ended up being held without charges in 'Guantanamito', a former school turned 'reception centre' with Spanish funding, which Amnesty International (2008) described as a de facto prison characterised by overcrowding and poor hygienic conditions. Without having been given the opportunity to apply for international protection, detainees were subsequently deported to neighbouring Senegal and Mali.

3. Section II

3.1. The opportunity of a legal approach to aid and assistance for migration control

Provided that partner third States were able and willing to meet minimum standards of respect for human rights throughout the various stages of the migration 'management' process – from apprehension, to custody, to detention, to examination of asylum claims, to repatriation – capacity-building and intelligence-sharing would certainly be in line with an approach to trans-border mobility governance rooted in the principles of solidarity and fair burden-sharing. As shown in Section I, however, the third States enlisted in the trans-national 'fight' against spontaneous migratory flows waged by Europe cannot always be regarded as reliable partners when it comes to respecting the rights of irregular migrants – including, but not limited to, those of asylum seekers and refugees. Continuing to strengthen these countries' capacity to 'stem' unauthorised mobility flows therefore effectively exposes affected individuals to a foreseeable risk of abuse, and thus raises obvious ethical issues.

Critical voices have suggested that "human rights conditionality should be an essential element in the EU's strategy when engaging in cooperation with transit countries or countries of origin in the fight against irregular immigration" (Amnesty International, 2006). Commenting on the recent EU-Turkey negotiations on migration and refugee management cooperation, Amnesty International (2015) has even asserted that "the European Union is in danger of being complicit in serious human rights violations against migrants and asylum seekers". Yet, the notion of 'complicity' appeared to be used here in its moral or political – rather than strictly legal – connotation. In fact, whereas more traditional practices of non-arrival such as maritime push-backs and visa regulations have received a great deal of attention from human rights scholars, the hypothesis that providing funding, training, equipment and operational intelligence to third States known to systematically violate the rights of migrants and refugees may be sufficient to trigger some form of legal responsibility on the part of sponsoring European actors has scarcely been entertained.

As noted by Bonavita (2015: 30), conditionality "is of course no requirement for the legality of measures establishing cooperation with third countries". Nevertheless, confronted with a deliberate political choice to ignore the human rights impact of cooperation with third States on matters of migration control, the question arises "whether human rights oversight could bear out an alternative way to frame responsibility that would make room for some concept of guilt… [and thus] open the possibility of addressing the harm by drawing the ethical connection between past lapses and the commitment to better outcomes in the future" (Follis, 2015: 56). Taking up this line of enquiry, this section sets out to investigate the *lawfulness* of aid and assistance for migration control under two distinct international legal regimes. To begin with, the argument that certain forms of capacity-building and intelligence-sharing may trigger state responsibility for 'aiding and assisting' third States in the commission of international refugee law violations is critically reviewed. Building on this critique, the paper subsequently proceeds to consider whether the same conduct can be considered to be consistent with the substantive obligations enshrined under Article 3 of the ECHR.

3.2. State complicity in breaches of international refugee law

Under public international law, of which refugee law constitutes a branch, the dominant approach to the allocation of liability for wrongdoing is based on the principle of 'independent and exclusive responsibility' (Nollkaempfer and Jacobs, 2013: 381). Put simply, States are only responsible for their own conduct, and "conduct is commonly attributed only to one actor" (ibid: 383). From this perspective, holding European States accountable for their respective involvement in human rights violations resulting from the practices of partner third States would be simply impossible. For, as the notions of "outsourcing of migration control" (Gammeltoft-Hansen, 2010; 2013) or "sub-contracting of policing" (Andersson, 2014) imply, even though it is sponsored and supported by European actors, the concrete implementation of migration controls – and with it, supposedly, the entire responsibility for potentially ensuing human rights violations – ultimately rests with the authorities of partner third States. On a normative level, one can agree with Nollkaempfer and Jacobs' (2013: 390) point that "reducing situations of shared responsibility to individual responsibility may create an accountability gap that implies costs for the injured parties and the larger system". Yet, international law would appear to be simply incapable of ensuring a more satisfactory outcome. But is this 'accountability gap' really as unavoidable as it appears?

While Gammeltoft-Hansen and Hathaway (2015: 243) agree that the underlying raison d'être of cooperation-based non-entrée practices is "to insulate wealthier countries from liability by engaging the sovereignty of another country", they suggest that "states are mistaken in their assumption that international legal obligations… are not enlivened when a state sponsors deterrent actions in some other country" (*ibid*: 244). As they point out, Article 16 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ('ILC Articles') provides indeed that:

> *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.*

Considered by the International Court of Justice to reflect customary international law (*Bosnian Genocide,* § 420), this Article forms part of the 'secondary rules' of international law, that is, the principles which, given the existence of a 'primary rule' – i.e. a substantive norm of international law binding upon a State – govern the allocation of responsibility to that State for acts that are alleged to violate the obligation in question (ILC Articles [commentaries], 31). In particular, Article 16 deals with one of those "exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter" (*ibid*, 32). It constitutes in this sense the equivalent of the criminal law concept of (individual) 'complicity' within the law of state responsibility (for a fuller treatment of complicity in the law of state responsibility, see Aust, 2013).

The relevance of Article 16 for the provision of aid and assistance to third States in the field of migration control has been highlighted by several of commentators (Den Heijer, 2012; Gammeltoft-Hansen, 2010; Gammeltoft-Hansen and Hathaway, 2015; Giuffré,

2013). Reflecting the wider literature on the subject (see Aust, 2013; Jackson, 2015: chapter 7; Quigley, 1986), these authors have mostly focussed on paragraph (a) of Article 16, and the question whether the 'knowledge requirement' enshrined therein is met in scenarios of aid and assistance for migration control. Views in this respect appear to be somewhat divided. Den Heijer (2012: 101), for instance, maintains that

> *[a]lthough assistance in the form of the provision of patrol boats or money engaged in gross or systemic violations of refugee and migrant rights could be construed as giving rise to the facilitating state's responsibility (under the reasoning that the latter state knew or ought to have known that the aid would be put to unlawful use), it is less likely that assistance facilitating only occasional wrongdoings can also be brought under the ambit of Article 16 ILC Articles, Assuming that it must yet be proven that third states with whom European countries cooperate are engaged in systematic violations of migrants rights, it is henceforth problematic to label assistance rendered in the form of money, technical equipment or training as unlawful.*

According to Gammeltoft-Hansen and Hathawy (2015: 276-282) and Giuffré (2013: 725-732), on the other hand, at least in some cases, the knowledge requirement may not be so problematic after all. Taking the example of Italy's cooperation with Libya, involving, as previously discussed, the provision of funds, equipment and intelligence to halt and tow back migrant boats before they left its territorial waters, these authors argue that Italy knew, or should have known, that the operations that it was aiding and assisting exposed intercepted individuals to a concrete risk of abuse, as it was widely reported that irregular migrants in Libya were subject to systematic maltreatment and the threat of arbitrary deportation.

While an assessment of compliance with the knowledge requirement will turn on the specific factual circumstances of each case, however, there is in my view a more fundamental problem with these arguments, namely their cursory treatment of paragraph (b) of Article 16. Den Heijer (2012: 101) speaks vaguely of the possibility that aid may be put to "unlawful use". Giuffré's (2013: 732) treatment of this provision is limited to the following remark: "[c]onsidering that Italy is obliged under international law to abide by the fundamental principle of non-*refoulement*, cooperating with Libya in returning migrants and refugees to a territory where they would suffer inhuman and degrading treatments also satisfies paragraph (b) of article 16". In a similar vein, Gammeltoft-Hansen and Hathaway (2015: 282) suggest that even those partner third States that are not bound by the Refugee Convention are in many cases "nonetheless parties to other human rights instruments that contain a cognate duty of non-*refoulement*... thus providing the required basis for a finding of international wrongfulness". The issue, however, is that, *by containing migrants within their own territory*, a third State can hardly be construed as violating the principle of non-*refoulement*, which – as we shall see in more detail below – essentially prohibits *the return of (or refusal of entry vis-à-vis) individuals* who would thereby be exposed to a risk of ill-treatment *in another country*.

Does this mean that the arguments presented above have to be completely discarded? Here, one should be careful not to throw the baby out with the bathwater. While Article 16 does provide a powerful tool to hold European sponsors accountable for their involvement in the commission of human rights violations perpetrated by partner third States whom they aid and assist, the problem lies in the identification of the 'primary

rule', i.e. the substantive obligation, at stake. To reiterate, when third States intercept irregular migrants transiting through, or attempting to leave, their territory, they do not *ipso facto* violate the principle of non-*refoulement* (nor any other norm of international law), and no form of derived responsibility is therefore incurred by sponsoring European states. However, the situation differs when apprehended migrants are subjected to 'cruel, inhuman or degrading treatment', whether this occurs in the course of interception operations, during detention, or as a consequence of arbitrary deportation. It is in so far as European States support third State practices that result in foreseeable violations of the prohibition against this conduct that the form of derived responsibility codified in Article 16 ILC Articles is triggered. The remainder of this section consequently turns to investigate the consistency of European aid and assistance with the prohibition against cruel, inhuman or degrading treatment under Article 3 ECHR.

3.3. Substantive obligations under Article 3 ECHR

In attempting to identify substantive obligations under Article 3 ECHR that may be of relevance to scenarios involving the provision of aid and assistance for migration control to third States, it is instructive to begin with a foray into the ECtHR's jurisprudence on the prohibition against *refoulement*. Traditionally associated with international refugee law, a wider[4] prohibition on expulsions (and equivalent measures) that expose affected individuals to treatment proscribed under Article 3 in another country has been inferred by the ECtHR in its landmark *Soering* ruling. There, the Court held that "'while not explicitly referred to in the brief and general wording of Article 3", such acts would nevertheless "plainly be contrary to the spirit and intendment of the Article". Given its specific subject matter, a particularly interesting illustration of the Court's application of this principle is provided by *Hirsi*, which concerned a maritime push-back operation in the course of which Italian authorities intercepted a migrant boat, transferred its passengers on board of their own ship, and brought them back to Libya without giving them the opportunity to apply for asylum (see Den Heijer, 2013a and Costello, 2012 for a fuller discussion). Considering that the country's harsh migration policy was a matter of public knowledge (§§ 123-128), the Court unanimously concluded that "by transferring the applicants to Libya, the Italian authorities, in full knowledge of the facts, exposed them to treatment proscribed by the Convention" (§ 137), and thus violated their obligations under Article 3.

What is striking about this judgment is the ease with which the reasoning employed by the Court in determining whether a violation of Article 3 had occurred could be transposed to another migration control measure implemented by the Italian government more or less at the same time as its push-back policy to Libya, namely the decision to provide the latter country with aid and assistance intended to enable its law enforcement authorities to prevent unauthorised departures from its coasts. On the face

4 As noted by Den Heijer (2013a: 277), Article 3 "may be invoked by anyone who is returned to a potentially unsafe third country", including but not limited to refugees and asylum seekers. Moreover, the 'sources of risk' deemed to trigger a duty of non-refoulement under Article 3 ECHR are not strictly limited to existence of a "threat to life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion" (cfr. Article 33, Refugee Convention), but are the object of dynamic interpretation by the ECtHR (see Greenman, 2015).

of it, these capacity-building and intelligence-sharing activities too must be regarded as having deliberately exposed irregular migrants to a well-known risk of ill-treatment – indeed, the *very same risk* of ill-treatment faced by those individuals whom Italy had returned to Libya in contravention of its obligations under Article 3 ECHR. But if intercepting and returning migrants at sea, on the one hand, and providing transit countries with the means to do so themselves, on the other, are two *functionally identical measures leading to factually identical outcomes*, the question arises why the latter should be tolerated whereas the former is proscribed.

To be clear, the suggestion is not that the provision of aid and assistance for migration control can, or should, be construed as a violation of the principle of non-*refoulement*. As has already been emphasised, this principle (both under international refugee law and under Article 3 ECHR) concerns the expulsion of individuals who are already present within a State's territory, and is therefore of little use when it comes to preventive measures designed to block the inflow of irregular migrants. The claim presented here is rather that the *underlying logic* employed by the ECtHR to derive a duty of non-*refoulement* from the 'spirit and intendment' of Article 3 provides a basis to argue that the same Article may also entail a similar obligation not to provide aid and assistance for migration control to third States that are known to systematically violate human rights. Much as with the duty of non-*refoulement* (see Den Heijer, 2008: 291), this could be conceived of as a 'hybrid' obligation, involving both a positive duty to "make a meaningful assessment of the risk and severity of ill-treatment" faced by irregular migrants in the third States with which an ECHR Contracting Party intends to cooperate, and – depending on the findings of such an assessment – a negative duty not to provide aid and assistance that could contribute to the occurrence of human rights violations.

A very similar reasoning has in fact been relied upon by the ECtHR in adjudicating cases of extraordinary rendition, which do not concern the specific duty of non-*refoulement*, but the more general obligations – again, both negative and positive – flowing from Article 3 (see Shepson, 2015). In *El-Masri* and the joint cases of *Al-Nashiri* and *Husayn*, for instance, Macedonia and Poland respectively were found to have violated this Article due to their having knowingly exposed terrorism suspects to the risk of ill-treatment by handing them over to the CIA. Again, there is certainly what one could call a *difference of means* between exposing somebody to a risk of ill-treatment by (a) returning him or her to a third country widely reported to be unsafe for irregular migrants; (b) handing him or her over to agents of a foreign secret service known to illegally detain and torture terrorism suspects; or (c) providing migration control-related funding, training, equipment or intelligence to third States known to systematically or frequently violate the rights of irregular migrants. Yet, what all these types of conduct have in common is that they result in some affected individuals being knowingly exposed to a risk of ill-treatment at the hands of a third party. In essence, it is the latter factor that makes both (a) and (b) unlawful under Article 3 of the Convention. So why could (c) not be construed as a breach of that same Article?

One apparent difference between (a) and (b), on the one hand, and (c), on the other, may have to do with the degree of 'remoteness' between the conduct of the ECHR Contracting Party and the resulting violation of human rights. Here, it is interesting to

consider the case of *Tugar*, which concerned a claim against Italy for having failed to prevent the transfer of mines to Iraq, where the applicant had suffered grave injuries from the detonation of one of these devices. The application was dismissed by the then European Human Rights Commission as 'manifestly ill-founded' (a ground of inadmissibility contemplated in Article 35(3) ECHR) on the basis that

> *the applicant's injury cannot be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible "indiscriminate" use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered. It follows that the "adverse consequences" of the failure of Italy to regulate arms transfers to Iraq are "too remote" to attract the Italian responsibility... In conclusion, the Commission finds that the injuries suffered by the applicant are exclusively attributable to Iraq, and that the use of anti-personnel mines - even if delivered by Italy - made by Iraq can in no way engage any responsibility of the Italian Government (§ 85; emphasis added).*

Following this precedent, it could be argued that the harm suffered by irregular migrants as a result of third State practices sponsored by ECHR Contracting Parties is to be exclusively attributed to the former, and does not engage any responsibility on the part of latter. However, the notion that when a State's actions constitute the 'direct and decisive cause' of human rights violations other States are automatically relieved of any responsibility for their own involvement in such violations flies in the face of the Court's settled jurisprudence, including the case-law on *refoulement* and rendition discussed above. Moreover, even if one were to insist on the problematically vague concept of 'remoteness', it should be noted that, in comparison to *Tugar*, scenarios involving the rendering of aid and assistance for migration control arguably feature a more 'immediate relationship' between the conduct of ECHR Contracting Parties and violations of human rights perpetrated by partner third States. Sponsoring States do not merely *fail to prevent*, but rather *facilitate* the occurrence of such violations through the active provision of funding, training, equipment or intelligence.

This section has shown that the jurisprudence of the ECtHR on Article 3 does contain substantive obligations which – unlike the international refugee law principle of non-*refoulement* – appear to be relevant to scenarios of aid and assistance for migration control. Relying on Article 3 ECHR, however, creates specific procedural difficulties that do not arise so long as one considers the provision of aid and assistance through the lens of international refugee law. As illustrated by the discussion on expulsion and rendition cases, the ECtHR has never directly employed the principle of state responsibility for aid and assistance codified in Article 16 ILC Articles, preferring instead to focus on the protective duties of ECHR Contracting Parties vis-à-vis third State conduct. As pointed out by Den Heijer (2013b: 422), however,

> *[a]n important feature of expulsion and extradition cases is that the individual who may suffer an injury is at the material time within the state's territory and therefore indisputably within its jurisdiction. It may be more problematic to make protective duties operational in scenarios where the individual is not and has never been within the territory of the 'facilitating' state.*

The jurisdictional clause contained in Article 1 ECHR has indeed aptly been described as the "pivotal notion to understanding who the right-holders, but also the duty-bearers, of ECHR rights are" (Besson, 2012: 860). In order to determine whether scenarios of aid

and assistance for migration control could conceivably trigger the application of the Convention, it is therefore necessary to examine the 'admissibility threshold' imposed by this jurisdictional clause.

4. Section III

4.1. The jurisdictional threshold under Article 1 ECHR

Article 1 ECHR establishes that the Convention's Contracting Parties "shall secure to everyone within their jurisdiction the rights and freedoms" defined therein. As stated by the ECtHR in Issa (§ 66), "[t]he exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention". In light of this, the question arises whether victims of alleged human rights violations perpetrated by third States that receive aid and assistance from ECHR Contracting Parties can be considered to fall under the latter's jurisdiction, and thus be entitled to protection under the Convention. Judge Albuquerque's obiter *dictum* in his Concurring Opinion in *Hirsi* would seem to leave little room for doubt:

> *Immigration and border control is a primary State function and all forms of this control result in the exercise of the State's jurisdiction... Thus the full range of conceivable immigration and border policies, including... [the] provision of funds, equipment or staff to immigration-control operations performed by other States or international organisations on behalf of the Contracting Party, remain subject to the Convention standard. (§§ 75-77)*

While the substantive conclusion reached by Judge Albuquerque is correct, however, his pronouncement appears to be based on the 'wrong' notion of 'jurisdiction'. As a number of scholars have pointed out, "jurisdiction in general international law... differs from jurisdiction in human rights law: the former is concerned with delimiting State competences, whereas the function of the latter is delineating as appropriately as possible the pool of persons to which a State ought to secure human rights" (Ryngaert, 2013: 194; on this important point see also Lawson and Den Heijer, 2013 and Besson, 2012). Now, in a territorial context, both concepts of jurisdiction generally apply: the legitimate exercise of a State's territorial sovereignty entails that every individual within its borders is subject to its regulatory and enforcement powers, and thus falls within the scope of its human rights obligations. In extra-territorial contexts, however, the situation is less clear-cut. Here, "[i]t is not relevant whether a State has a legal title to act, but it is relevant whether the link between the individual affected and the State is sufficiently close as to oblige the State to secure that individual's rights" (Den Heijer and Lawson, 2013: 165). In other words, simply pointing to the fact that providing aid and assistance for migration control constitutes an exercise of State functions does not address the question whether victims of human rights violations perpetrated by third States that benefit from such aid and assistance can be considered to fall within the scope of the aiding state's human rights obligations under the ECHR.

Defining what constitutes a sufficient 'jurisdictional link' to trigger the extra-territorial application of the Convention is a matter that has vexed the ECtHR ever since its (in)famous ruling in Banković (§ 82; see Lawson, 2004), to which we shall return at the

end of this section. Most observers would indeed probably agree with Judge Bonello's assessment that

> *[t]he Court's case-law on Article 1 of the Convention (the jurisdiction of the Contracting Parties) has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies. Up until now, the Court has, in matters concerning the extra-territorial jurisdiction of Contracting Parties, spawned a number of "leading" judgments based on a need-to-decide basis, patchwork case-law at best. Inevitably, the doctrines established seem to go too far to some, and not far enough to others. As the Court has, in these cases, always tailored its tenets to sets of specific facts, it is hardly surprising that those tenets then seem to limp when applied to sets of different facts. Principles settled in one judgment may appear more or less justifiable in themselves, but they then betray an awkward fit when measured against principles established in another (Al-Skeini, Judge Bonello's Concurring Opionion, §§ 5-6)*

Keeping these cautionary notes in mind, this section explores the Court's case-law on Article 1 in search of a 'model' of jurisdiction that could be applied to scenarios of aid and assistance for migration control.

4.2. Jurisdiction as 'control'?

In an influential study of 'jurisdiction' in international human rights treaties including the ECHR, Milanovic (2011: 262) concluded that the term is best understood as meaning "state control over territory, and perhaps individuals". State control over territory has indeed found to be determinant for the establishment of jurisdiction in a number of cases concerning alleged breaches of the Convention in areas occupied by an ECHR Contracting Party (e.g. *Cyprus v. Turkey*; *Loizidou*). In other cases, the Court has appeared to use a "hybrid reasoning" (Milanovic, 2012: 130) that sees jurisdiction as arising from both the exercise of 'public powers' over a foreign geographic area and State agent control over individuals present in the area (e.g. *Al Sadoon*; *Al-Skeini*; *Jaloud*). Finally, there are also a few cases in which State agent control over persons without more was deemed to provide a sufficient jurisdictional basis for the extra-territorial application of the ECHR (e.g. *Öcalan*; *Medvedyev*; *Hirsi*). Applying this 'effective control' standard to the 'external dimension' of migration policy, Mc Namara (2013: 327) has contended that, since responsibility for the implementation of migration controls is left to the authorities of partner third States, the level of control involved is too "indirect and weak" to "conceivably give rise to Member State responsibility under the ECHR".

Employing a similar notion of jurisdiction as control/public power, Gammeltoft-Hansen and Hathaway (2015: 276) themselves concede that "states are clearly not exercising jurisdiction when they provide only training or material assistance to a partner state". While these authors go on to suggest (on the basis of Article 16 ILC Articles) that the absence of jurisdiction does not relieve sponsoring countries from all legal responsibilities for ensuing harms, however, such argument fails to recognise that, unless the jurisdictional threshold is met, an ECHR Contracting Party cannot even be said to have any obligations toward a given individual. As Mc Namara (2013: 335) suggests, a situation would thus arise in which "the Member State holds a considerable level of control over the access decision… but that Member State will not be responsible for ensuring rights normally assumed at a border". In fact, an insistence on control over individuals as a necessary precondition for extra-territorial jurisdiction to be triggered

would render the whole notion of state responsibility for aid and assistance in the commission of an internationally wrongful act entirely inapplicable under the ECHR system. Contracting Parties that knowingly aid and assist another state in committing human rights violations could never be construed as having effective control over the victims of such violations, which would therefore automatically fall outside the scope of the Convention.

Such an outcome would contradict not only the International Law Commission's view that Article 16 *is* applicable to international human rights obligations (ILC Articles [commentaries], 67), but also the ECtHR's own position that

> *principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law (Banković, § 57).*

Can these doctrinal quandaries be avoided?

4.3. Distinguishing between acts performed and acts producing effects abroad

In trying to de-couple the concept of jurisdiction from that of control over individuals, it is useful to go back to the dictum usually employed by the ECtHR when dealing with cases involving an extra-territorial element, namely that "[i]n exceptional circumstances the acts of Contracting States performed outside their territory *or which produce effects there* ("extra-territorial act") may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention" (*Issa*, § 68 ¸emphasis added). While the use of the umbrella term 'extra-territorial act' unfortunately tends to obscure this point, upon closer inspection it is clear that two quite different types of State conduct are at stake here: (a) acts *performed* abroad, and (b) acts which *produce effects* there. Now, while notions of extra-territorial jurisdiction based on control may be appropriate for the former category, it seems clear that they cannot be meaningfully applied to the latter. As already stated, when – as in the case of the provision of aid and assistance in the commission of an internationally wrongful act – the conduct of a State produces effects beyond its borders, these will generally fall short of establishing 'control' over territory or persons. Since the Court maintains that acts producing effects abroad too *can* trigger jurisdiction under Article 1, however, it follows that different criteria *must* (logically) be used to determine the circumstances under which this is so.

Here, a line of interesting cases is the one dealing with legislative or executive measures affecting individuals located outside of State territory. In *Zouboulidis*, for example, Article 1 of Protocol No 1 ECHR was considered to have been violated due to the Greek authorities' refusal to pay supplements to the expatriation allowance of a Greek diplomat living in Prague. In *Tarnopolskaya*, the ECtHR found a violation of the same Article in respect of twenty former Russian citizens who had resettled in Israel and whose old-age pensions were discontinued in accordance with new Russian legislation. In *Haydarie*, a claim filed by a Pakistani applicant concerning the Dutch authorities' refusal to grant her a provisional visa to visit her husband in the Netherlands was considered to be admissible, contrary to the respondent Government's claim that the applicant did not fall under its jurisdiction. What is remarkable about these rulings is that, even though the

(alleged) victims were located abroad and the respondent State could not be regarded as having exercised 'control' over them or the territory where they resided, the issue of jurisdiction was either not raised at all (*Zouboulidis* and *Tarnopolskaya*) or explicitly decided in favour of the applicants (*Haydarie*).

It is worth mentioning the argument that, unlike scenarios of aid and assistance, all of the cases cited above feature "some special relationship between the State and the affected individuals… other than the alleged human rights violation itself" (Lawson and Den Heijer, 2013: 186) – e.g. previous employment, nationality, or the presence of a family member in the territory of the respondent State. In response to this argument, however, one can point to the case of *Kovacic*, where, in deciding whether a group of Croatian applicants could be considered to be within the jurisdiction of Slovenia as a result of it having implemented a legislative measure with detrimental effects on their foreign-currency savings, the Court held that

> *[t]he applicants' position as regards their foreign-currency savings… was and continues to be affected by that legislative measure. This being so, the Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged (§ 5).*

Here, no 'special relationship' between the applicants and the respondent State existed prior to the implementation of the (allegedly) rights-infringing act, and yet jurisdiction did arise purely as a result the effects of that State's conduct. In Manoilescu and Dobrescu and in Treska, the Court has even expressly maintained that "even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention". How can we make sense of these rulings, and what do they tell us about 'jurisdiction' in scenarios of aid and assistance?

4.4. Jurisdiction as 'authority'?

Two competing interpretations may be advanced. On the one hand, it could be argued that in the cases discussed above the Court applied, without acknowledging it, a 'cause-and-effect' notion of jurisdiction underpinned by the principle that "facticity creates normativity" (Scheinin, 2004). On the other hand, it could be maintained that the apparently 'factual' approach adopted by the Court in these cases conceals the presence of an additional, and crucial, 'jurisdictional link' stemming from the exercise of 'authority'. Let us start with the latter view. According to Besson (2012: 864), "jurisdiction is best understood as de facto political and legal authority". From this perspective, human rights duties arise "from authority, rather than as a manifestation of power… human rights jurisdiction over (and thus duties towards) individuals obtains *only* if the political institution concerned can be described as governing them", that is, if it is capable of "creating or modifying their legal rights and duties" (Ganesh, 2015: 24; emphasis added). Thus, in a case like *Kovacic*, the jurisdiction of Slovenia was engaged because its conduct "created legal effects" abroad: "it did not merely affect the claimants, but governed them" (*ibid*: 41). In contrast, where – as in scenarios involving the provision of aid and assistance for migration control – State acts produce 'mere' effects

abroad, they do not bring (factually) affected individuals within its jurisdiction. Advocates of this 'authority-based' understanding of jurisdiction contend that it is preferable to rival accounts "both in terms of explanatory power, as well as its implications for the scope of human rights protections" (*ibid*: 30).

Both of these claims are highly questionable. Firstly, on a normative level, the implications of the authority-based concept of jurisdiction are rather problematic. As Ganesh (2015: 37) freely acknowledges, "the authority-based theory would not cover situations where it is impossible to locate even a scintilla of *de facto* authority: i.e. a pure *Issa*[5] or *Lopez Burgos*[6] situation, drone strikes, or the poisoning of an exiled ex-secret agent. As unsettling as this is, it is in perfect accordance with the result in *Banković*, which… would be decided the same way even today". Ganesh (*ibid*: 38) tries to minimise these 'unsettling' implications by proposing that "[w]e ought not to call such atrocities human rights violations… but something much, much worse: crimes… [which] fall to be dealt with under the laws of war and international criminal law". However, it is far from clear how the killing of civilians in the course of military operations or drone strikes conducted outside of a 'war zone', the kidnapping and torturing of a political dissident, the poisoning of an ex-secret agent or, for that matter, the provision of aid and assistance for migration control, could fall to be dealt with under the laws of war and international criminal law. The truth is in fact that, if such acts were not included in the purview of human rights law, they would in all probability not be dealt with at all. Once again, the threat of a vast accountability gap appears to loom large.

Secondly, with regards to the explanatory power of the authority-based theory of jurisdiction, it must be pointed out that a number of rulings concerning the extra-territorial application of the ECHR simply cannot be accommodated within this framework. In *Issa*, for instance, the reason why the Court decided that the jurisdiction of Turkey under Article 1 had not been enlivened was not because Turkey had not exercised even a 'scintilla' of authority, but because the available *factual* evidence was deemed to be insufficient to establish that the Turkish forces had conducted operations in the area where the violations had occurred (§ 81). Mutatis mutandis, in *Pad* the Court had no difficulty in reaching the conclusion that an extemporaneous Turkish military operation over the border with Iran did engage its jurisdiction because "the fire discharged from the helicopters had *caused* the killing of the applicants' relatives" (§ 54; emphasis added). Even in *Al-Skeini* – the ruling used by Besson (2012: 872) to illustrate her authority-based theory of jurisdiction – the Court seemed to accord at least as much weight to the *fact* that British soldiers had *caused* the death of the applicants' relatives as to the consideration that, *qua* occupying power in Iraq, the United Kingdom had "exercised all or some of the public powers normally to be exercised by that Government".

5 This ECtHR case concerned allegations that Turkish soldiers had carried out extra-judicial killings in the course of a military operation that took place beyond the country's border with Iraq.

6 This UN Human Rights Committee case concerned allegations that Uruguayan officials had kidnapped, detained and tortured a political dissident living in Argentina.

4.5. Jurisdiction and 'facticity'

Having laid out the shortcomings of both control- and authority-based models of jurisdiction, this section concludes by sketching an alternative approach based on 'facticity'. It is argued that this approach implicitly underpins the most 'inspired' ECtHR jurisprudence involving an extra-territorial element, and offers an adequate basis for judicial oversight vis-à-vis cooperation-based non entrée practices with a sensitive human rights dimension. As explained by Scheinin (2013: 212), "the establishment of State jurisdiction over an individual results from the *contextual assessment of the factual circumstances*, rather than from a quest for the essence in a normative concept of 'jurisdiction'" (emphasis added). In other words, "it is not the fact of the affected person having earlier been subject to the authority of a State, but rather the *relationship of the State with a particular set of circumstances* being of such a special nature, which is decisive in considering the State to be under an obligation" to secure those ECHR that are relevant to the situation (Den Heijer and Lawson, 2013: 190; emphasis added). Such an approach can fairly be characterised as a 'cause-and-effect' notion of jurisdiction that is "tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention" (*Banković*, § 75). The important caveat must be added that a 'reasonable' *factual* link has to exist between the conduct of the state and the harm suffered by the victim (see Ryngaert, 2013: 196-201).

To be sure, an unqualified 'cause-and-effect' notion of jurisdiction has been explicitly rejected by the ECtHR in its landmark *Banković* ruling, where it held that the NATO bombing of a radio-tower in Belgrade was not sufficient to bring the applicants under the jurisdiction of participating ECHR Contracting Parties. Before concluding from this that the facticity-based understanding of jurisdiction proposed here stands no chance of gaining recognition, however, it is worth noting that the reasoning that underpinned the relevant part of the *Banković* judgment has been substantially disavowed by the Court in its subsequent jurisprudence. As we have seen, the Court's insistence in *Banković* that the jurisdictional threshold and the victim requirement are "separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a Contracting State" (§ 75) does not reflect its own subsequent jurisprudence on cases concerning acts producing extra-territorial effects, where the question whether applicants located outside of the respondent state's territory could be considered to fall under its jurisdiction was indeed equated to the (factual) question whether they had been negatively affected by that state's conduct.

The flexible understanding of jurisdiction advocated here can be regarded as an 'expansive' one in the sense that it is derived from, and it strives toward, "the imperative to prevent the coming into being of so-called legal black holes in the system of human rights protection" (Den Heijer and Lawson, 2013: 191). This does not stem from some pre-reflexive appeal to the 'universality' of human rights law, but rather from the necessity of keeping up with an increasingly interdependent and interconnected world in which states can, and often do, affect individuals located outside of their borders. In

many instances, this happens in an 'indirect' manner, implying that other actors bear primary responsibility – both factual and legal – for the occurrence of human right violations. Thus, a state may *allow* another state to use one of its military bases to relay drone-signalling necessary to conduct extra-judicial killings in a third country (see Guardian, 2015). Or it may *authorise* another state to enter its airspace in the course of illegal terrorism rendition flights (see Open Society Foundation, 2013: 61-118). It may also *fail to appropriately regulate* corporate nationals involved in rights-violating business practices abroad (see McCorquodale and Simons, 2007). Or it may *task* international or inter-governmental organisations to carry out actions that have a negative impact on the rights of individuals in another country (see Ashutosh and Mountz, 2011). In all of these scenarios, a facticity-based approach to jurisdiction constitutes the only viable means of ensuring that ECHR Contracting Parties can be held accountable for their own degree of involvement in the occurrence of (putative) human rights violations.

5. Conclusion

The current 'refugee crisis' has come to be viewed as a "crash test for Europe" (European Commission, 2015b) and its avowed commitment to the protection of human rights. Calls for more 'solidarity' and fairer mechanisms of 'responsibility sharing' among MSs have become a ubiquitous refrain within the intra-EU political debate over the last year or so. The scarce progress achieved by the EU-wide resettlement scheme – with only 937 out of the envisaged 106,000 asylum applicants having so far been relocated from Italy and Greece (European Commission, 2016) – epitomises the difficulties that have so far beset any attempt to translate these calls into action. Much the same problems also affect, to an even starker degree, the interaction between Europe and its neighbours on matters of migration management. As shown by UNHCR data[7], while the number of Syrian refugees who have arrived in Europe seeking international protection between April 2011 and January 2016 has reached a staggering 935,008, this represents only slightly more than 10% of those who have fled the ongoing conflict, who remain by and large in neighbouring countries such as Turkey, Jordan, Lebanon, Iraq and Egypt. More generally, 86% of the 19.5 million global refugee population continues to be hosted by developing countries (UNHCR, 2014). In spite of these glaring disparities, however, inter-state cooperation on migration management remains primarily dominated by a securitised concern with the extra-territorial containment of undesired migratory flows.

In this paper I have argued that cooperation-based non-entrée practices raise moral, political and, above all, legal issues that deserve to be taken seriously. As shown in section I, although capacity-building and intelligence-sharing activities tend to be framed as purely technical and neutral forms of inter-state collaboration, they actually promote a process of 'outsourcing of migration functions' and 'sub-contracting of policing' to third States which has highly problematic human rights repercussions. Section II has demonstrated that this phenomenon calls for a legal approach. Whereas aiding and assisting partner third States in preventing irregular migrants from leaving their territory does not appear to violate the international refugee law principle of *non-*

7 UNHCR, Syria Regional Refugee Response: http://data.unhcr.org/syrianrefugees/regional.php

refoulement, when such aid and assistance facilitate systematic instances of cruel, inhuman or degrading treatment at the expense of affected migrants, the argument can be made that continued cooperation would breach Article 3 ECHR. For the obligations enshrined in the Convention to be made operational, however, the (unsettled) jurisdictional threshold imposed by Article 1 must be met. As contended in section III, an approach to jurisdiction based on 'facticity' would enable this type of scenarios to be brought under the scope of the Convention, and thus prevent the emergence of troubling accountability gaps.

By way of conclusion, two avenues for further research related to the subject of this paper are worth highlighting. Firstly, more empirically grounded research on cooperation with third States in the field of migration control is needed. As noted in section I, the existing literature on the external dimension of European migration policy has primarily focussed on policy discourses and policies on paper. The lack of more detailed information on concrete implementation dynamics and their actual human rights impact may partly account for the scarcity of legal scholarship on the subject. Encouragingly, security studies scholars of a sociological and anthropological bent have recently started to shed light on the everyday practices of 'remote' border control, which promises to open up new avenues for legal enquiry. Of course, researching this field presents considerable methodological difficulties. As noted by Andrade, Martin and Mananashvili, 2015 (2015: 66), due to their informality, cooperative arrangements for migration control lack "publicity and democratic legitimacy, which hinder monitoring of their design and impact". Heightened scrutiny remains nevertheless essential to ensure that the troublesome implications of such arrangements are not marginalised from the political discourse on migration-related cooperation.

Secondly, the role played by EU institutions and agencies, and the question of compliance with their own legal obligations, appears to deserve further investigation. As shown in section I, EU funds have been mobilised to support capacity-building and intelligence-sharing activities that have a highly problematic impact on the rights of affected individuals (e.g. the 'Seahorse operations'). Judging by the recent EU-Turkey agreement to contain unauthorised migratory flows, this trend appears to be gaining increasing impetus. Unlike the ECHR, the Charter of Fundamental Rights of the European Union, which is binding on all institutions, agencies and bodies of the EU as well as on its MSs "when they are implementing Union law" (Article 51(a)), does not contain a jurisdictional clause. Accordingly, commentators have argued that "the fact of extraterritoriality would seem to be immaterial to the question of the Charter's applicability… EU fundamental rights simply track all EU activities, as well as Member State action when implementing EU law" (Moreno-Lax and Costello, 2014: 1658). As noted by Den Heijer (2014: 541), there is consequently "ample potential for Article 18 [the right to seek asylum] to contribute to the continuing development of the European institution of asylum", particularly in the context of cooperation with third countries.

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