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EU and States' responsibility for the consequences of externalisation policies

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Table of Contents

Table of figures

Acronyms

AFSJ	Area of Freedom, Security and Justice
AGAMI	Niger: Strengthening governance of migration and the response to mixed migration flows in the region of Agadez
ARIO	Articles on Responsibility of International Organisations
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CACs	Common Application Centres
CAMMs	Common Agendas on Migration and Mobility
CJEU	Court of Justice of the European Union
CSOs	Civil Society Organisations
EBCG	European Border and Coast Guard
EBGT	European Border Guard Team
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIBM	European Integrated Border Management
EP	European Parliament
EU	European Union
EUAA	European Union Agency for Asylum
EUBAM	European Union Border Assistance Mission
Europol	European Union Agency for Law Enforcement Cooperation
EUTF for Africa	European Union Emergency Trust Fund for Africa
Frontex	European Border and Coast Guard Agency
GC	General Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IDPs	Internally Displaced Persons
ILC	International Law Commission
IO	International Organisation
IOM	International Organisation for Migration
LoN	League of Nations
MoU	Memorandum / Memoranda of Understanding
MPs	Mobility Partnerships
MRRM	Migration Resource and Response Mechanism
MS	Member State
NGOs	Non-Governmental Organisations
OAU	Organization of African Unity

OHCHR	Office of the United Nations High Commissioner for Human Rights
O-I-T	Orchestrator-Intermediary-Target
P-A	Principal-Agent
RABIT	Rapid Border Intervention Team
RDPP	Regional Development and Protection Programme
RLI	Refugee Law Initiative
RPAs	Regional Protection Areas
RPPs	Regional Protection Programmes
SAR	Search and Rescue
SURENI	Sustainable Return from Niger
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPCs	Transit Processing Centres
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNSMIL	United Nations Support Mission in Libya

Introduction

The present research investigates the responsibility of the European Union ('EU') and its Member States ('MSs') for consequences of externalisation policies adopted with the aim of controlling immigration. In this context the term responsibility refers to international responsibility, which pertains to the legal relations that come into existence as a consequence of the commission of the wrongful act[1]. The Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission ('ILC') in 2001, specify in Article 1 that "every internationally wrongful act of a State entails the international responsibility of that State"[2]. Similarly, the Draft Articles on the Responsibility of International Organisations of 2011 in Article 3 affirm that "every internationally wrongful act of an international organization entails the international responsibility of that organization"[3]. Therefore, international responsibility encompasses the entirety of the consequences arising from the violation of a legal obligation under international law incumbent on the violating State or International Organisation ('IO'). On the other hand, this work considers externalisation as "the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory", implemented by states, IOs, third entities and private actors[4]. Externalisation policies that will be analysed in the present research imply a common aim for every receiving country, that is to not allow aspiring migrants or asylum seekers to reach and enter its territory[5], as well as prevent their access to legal international protection. A more detailed definition of externalisation will be given in the first chapter.

Another point to consider while speaking of migration is terminology. An inclusivist definition of this term[6] needs to be used. This view considers that the term migrant encompasses all categories used in the context of migration and displacement, such as forcibly displaced persons, refugees, asylum seekers, voluntary migrants, economic migrants, and so on. Inclusivist interpretation contrasts with the residualist understanding of the term, which considers migrants as the residual group of people on the move, who cannot be qualified as refugees. It is fundamental to be aware that the categories just mentioned are not exclusive and that may overlap on the basis of the reasons behind migration. Nonetheless, this inclusivist perspective is not easy to maintain while speaking of international or EU law, where a distinction between

[1] RONZITTI (2019: 399).
[2] Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001.
[3] Draft Articles on Responsibility of International Organisations, International Law Commission, 2011.
[4] REFUGEE LAW INITIATIVE (2022: 114).
[5] GUIRAUDON AND JOPPKE (2001: 13-15).
[6] CARLING (2023: 399-400).

migrants, refugees and asylum seekers is always made. Despite this complexity, the present study will try to use this understanding of migration.

Immigration is a phenomenon that has been affecting the European continent in the recent decades in an ever increasing way[7], in line with global and regional trends regarding migration and forced displacement. Indeed, such phenomenon is part of the global trend of migration increase, as a normal consequence of conflicts' enhancement causing displacement. Another point to consider, to give an idea of the scale of the issue, is also that the greatest part of migrants within the EU territory is European[8]. Nevertheless, this increase in human movement across borders has presented a dilemma, as it risks making effective migration control more difficult for hosting countries[9]. Several issues arise from growing migration influxes, specifically regarding the reception, assistance, and integration of migrants. Security concerns have become the primary focus of migration management and control[10], especially when dealing with the group of displaced persons, who are most of the time arriving to the European border from Africa and the Middle East without any legal document, thus engaged in a problematic form of international mobility, and tend to be considered as a concern both at political and economical level by certain governments[11]. For several years, controlling and reducing migration flows from these regions has been a priority for EU MSs. The importance of achieving these goals is accentuated for the states that manage the EU's external borders, such as Italy, Grece, Spain, Hungary and others. This is the reason why the EU has adopted a series of policies against migration originating in Sub-Saharan Africa, North Africa and the Middle East[12], aimed at preventing people on the move from reaching its borders[13].

As shown by recent European practices, one of the most preferred strategies to prevent this kind of immigration is through externalisation policies[14]. However, these policies may be the source of some controversies in the field of international responsibility. Identifying responsible actors for violations of international law resulting from the implementation of externalisation policies can be challenging, particularly in cases of human rights violations such as those affecting migrants, due to the involvement of multiple actors and the blurred relations between them. Externalisation could ease the burden on states and, consequently, their responsibility of migration procedures, since they cede a part of their authority to increase the effectiveness of immigration flows' limitations[15]. Furthermore, by relinquishing control to third-party agents, outsourcing states may circumvent responsibility for human rights

[7] Centro Studi e Ricerche IDOS (2021a: 36-44).
[8] *Ibidem*.
[9] Spijkerboer (2018: 454-455).
[10] Infantino and Sredanovic (2022: 9-11).
[11] Anderson (2017: 1530-1531).
[12] Pascale (2018: 413-416).
[13] Finotelli and Ponzo (2023: 1-14).
[14] Cantor et al. (2022: 121-123).
[15] Guiraudon and Joppke (2001: 1).

violations and elusion of law that externalisation policies may often cause[16]. Are externalising actors, such as the EU and its MSs, also responsible for actions under review, or is responsibility limited to the actors who directly perform these actions? Consequently, can the outsourcing of migration control be seen as a way of circumventing the responsibility that would arise if the same activities were conducted directly by the EU and its MSs? Thus, have the EU and its MSs circumvented their legal responsibility for migration control and extraterritorial human rights violations through the implementation of externalisation policies in the 2000s as a means of preventing migratory flows? These are the main questions this paper will attempt to answer in the following pages. Furthermore, in case of a positive outcome, it will be explained how it has been possible for the EU and its MSs to circumvent their legal obligations, by an analysis of political strategies and especially of the gaps in international law, represented by the inaccessibility to most international fora by individuals, thus the compression of the right to appeal, the accession only by States to most international courts, and the immunities enjoyed by IOs and States.

In order to conduct such research, a legal analysis will be supported by a conceptual analysis drawn from political science. By applying the legal framework of international responsibility – and in particular indirect responsibility – of states and IOs, externalisation policies, where documented human rights violations have occurred, will be studied. Given the complex structure of externalisation policies, analysing their legal infrastructure can provide an answer on who bears responsibility for the consequent violations of human rights. Nonetheless, for this purpose it is necessary to understand the relations that such policies establish among the involved actors. Political theories can assist legal approaches in order to give a clearer image of the objects of the analysis[17]. This research will try to complement legal norms with political theories, by using the latter as a tool to facilitate legal reasoning. Indeed, to discuss questions on international responsibility, theories on sovereignty shifting and indirect modes of governance will be applied. This fusion of approaches and methodologies will become clearer after a thorough description of the relevant theories and norms, and in the analysis of specific case studies.

The following pages will be structured in three chapters. In the first chapter, an introductory overview of statistics, policies and laws concerning migration in Europe will be given. Registered data on immigration towards the European territory will allow to better delineate the picture of migration affecting the EU, and, then, to understand the political and legal decisions made by MSs to face this phenomenon throughout the last decades. In the second chapter, the legal framework and the political theories relevant for this research will be presented. An explanation of indirect forms of states and IOs' responsibility under international law, together with a description of indirect forms of governance, applicable to externalisation policies, will be provided. In the third chapter, a concrete analysis of externalisation policies and

[16] ARDALAN (2020).
[17] BASARAN (2010: 8).

responsibility attribution in case of human rights violations will be conducted. Three case studies – three externalisation policies for migration control implemented by the EU or its MSs – will be examined, namely the Memorandum of Understanding ('MoU') between Italy and Libya, the Statement between the EU and Turkey, and Frontex joint operations. Such investigation will allow to answer the research questions just presented, thus, to understand whether externalising actors, such as the EU and its MSs, are responsible for violations of international law resulting from the implementation of externalisation policies.

CHAPTER I – Migration in the European Union: data, laws and policies

In order to fully comprehend externalisation policies for migration control it is necessary to carefully depict the migration phenomenon affecting Europe through available data, to describe what response has been given to such issue since the formation of the EU through the adopted policies and the enacted laws. Therefore, this first chapter will give an introductory overview of statistics, policies and laws concerning migration. First, the chapter analyses the data recorded so far concerning immigration towards Europe; second, it is going to describe the European institutional framework and the legal background in the migration area; third, it will explain the shift of sovereignty States have accomplished to control migration; fourth, by analysing the different academic views on externalisation and concrete examples of this phenomenon, it will then give a definition of this term.

1. Immigration towards Europe: data in an analytical overview

1.1 Which migrants?

Before going into the heart of the research, it is worth analysing the data recorded so far concerning immigration towards Europe. In European Union law, Article 2(1)(b) of Regulation 862/2007 defines immigration as "the action by which a person establishes his or her usual residence in the territory of a Member State for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another Member State or a third country"[18]. This definition comprehends both European migrants, moving inside the Schengen area, and migrants who arrive to the EU from the rest of the world[19]. The present research will consider these extra-Schengen migrants, and in particular extra-European migrants. Indeed, migration towards the territory of the EU is generally identified with both the legal and illegal entry and residence of citizens of states that are not part of this organisation. However, these states may be located on other continents, such as Africa or Asia, as well as be part of the so-called Greater Europe, comprehending countries geographically close to the EU, being on European territory, but not part of the Union, such as Switzerland, Turkey or Russia[20]. This distinction is fundamental, especially while speaking of statistical data. Migrants entering the EU territory can be either European, but not citizens of the Union – such

[18] Regulation (EC) of the European Parliament and of the Council, 11 July 2007, 862/2007, *Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers*.
[19] CHERUBINI (2023: 263).
[20] CHERUBINI (2019: 59).

as Ukrainians fleeing their country after the outbreak of the war – or nationals of other continents – such as forced migrants coming from Somalia.

The geographical scope of this research – mentioned few lines above – is explained by the fact that externalisation policies are usually implemented for migrants of non-European origin, although coming from European countries, as the case of Syrians coming from Turkey. Furthermore, these migrants are mostly forcibly displaced. There is no official legal definition of this category of migrants under international law, but the United Nations High Commissioner for Refugees ('UNHCR') provides a list of persons considered forcibly displaced. Among them, there are refugees and asylum seekers[21], people in refugee-like situation[22], other people in need of international protection[23], internally displaced persons ('IDPs')[24], individuals under UNHCR's

[21] In this regard, it is useful to specify that under Article 1A of the 1951 Convention (Convention of the UN General Assembly, 28 July 1951, *Relating to the Status of Refugees*), asylum seekers are defined as those seeking international protection and refugees are defined as beneficiaries of such protection. According to the 1951 Convention and the 1967 Protocol thereto (Protocol of the UN General Assembly, 31 January 1967, *Relating to the Status of Refugees)*, which removed limitations on the application of the 1951 Convention in terms of both time and place, a refugee is someone "who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". Throughout the years, some extended definitions have been created, such as the one of the 1969 Organization of African Unity ('OAU') Convention on Refugees (Convention of Organization of African Unity, 10 September 1969, *Governing the Specific Aspects of Refugee Problems in Africa)*, and the one provided by the 1984 Cartagena Declaration (Declaration of the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, *Cartagena Declaration on Refugees*). The EU, for its part, has adopted a complementary definition of a refugee in Article 2(d) of the Qualification Directive (Directive of the European Parliament and of the Council, 13 December 2011, 2011/95/EU, *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*) that strongly refers to the one included in the 1951 Geneva Convention, although it makes reference to 'third country national', leaving the EU citizens out of the scope of this definition. Furthermore, UNHCR includes in the definition of refugee, also all persons outside their country of origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and who, as a result, require international protection. These are considered as refugees under UNHCR's Mandate. See more in EUROSTAT (2018).

[22] Persons in refugee-like situation is a descriptive category that includes persons who are outside their country or territory of origin and who have protection needs similar to those of refugees, but for whom, for practical or other reasons, refugee status has not been determined. See UNHCR (2024a).

[23] This category includes persons who do not belong to any other category (asylum-seeker, refugee, person in a refugee-like situation), but who have been forcibly displaced across international borders and may be in need of international protection, including protection against forcible return and access to basic services. See UNHCR (2024a).

[24] IDP is the term used to describe any individual or group of individuals forced or obliged to flee or abandon their home or usual place of residence, especially because of or to escape the effects of armed conflict, situations of generalized violence, violations of human rights, or natural or human-caused catastrophes. This population includes only conflict-related IDPs to whom UNHCR provides protection and/or assistance for the purposes of UNHCR statistics, See UNHCR (2024a).

statelessness mandate[25]. As regards EU law, the Directive on temporary protection gives a quite wide, although not comprehensive, definition of displaced persons as

> "third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection"[26].

Following these definitions, this study will take into consideration only forcibly displaced persons, who try to reach the EU territory, for whom legal access is becoming more and more difficult due to the adoption of restrictive migratory policies, as the ones that will be analysed in the subsequent sections.

1.2 Historical and current data

Data should help politicians and researchers having a clear understanding of the migratory phenomenon affecting their country and region. An objective picture of migration, forced displacement and asylum should be drawn by statistics, however, it is extremely hard to delineate the actual immigratory situation of the EU – area of interest of this research. Organisations do not agree on definitions, hence, the absence of fixed and internationally recognised statistical categories leads to a very heterogeneous and quite confusing landscape of data on migration. Furthermore, data collection is also influenced by the interests of single organisations and agencies gathering and producing statistics. For instance, from the UNHCR's perspective, Europe is not the continent facing the worst immigration crisis in the world[27]. On the other hand, Frontex – the European Border and Coast Guard Agency – is interested in measuring detections so as to show the activity of its border guards. Therefore, it is difficult to objectively draw conclusions on the real scale of the migratory phenomenon without clear data. Once explained this, nonetheless, the following paragraphs will try to describe as accurately as possible the image of migration worldwide and specifically in Europe from a statistical point of view, by considering data on international migrants, forcibly displaced people, asylum applicants, irregular migrants, dead and missing

[25] Persons covered by UNHCR's statelessness mandate are defined by the 1954 Convention Relating to the Status of Stateless People as those who are not regarded as nationals by any State under the law of that State. In other words, they do not have the nationality of any state. See UNHCR (2024a).

[26] Article 2, letter c), Directive of the Council of the European Union, 20 July 2001, 2001/55/EC, *Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*.

[27] UNHCR (2023: 16).

migrants. Main sources of these information are UNHCR, Eurostat, Frontex and Missing Migrants Project.

As documented by the UNHCR, since 2006 there has been an exponential increase of forced migrants worldwide, and in these seventeen years there has never been a decrease in this number. At the end of 2022, due to persecution, conflict, violence, human rights violations and events that seriously disrupted public order, 108.4 million people worldwide were forcibly displaced. This represents an increase of 19 million people from the end of 2021. It is also the largest increase between years ever recorded in UNHCR's statistics on forced displacement. Ongoing and emerging conflicts have led to forced displacement around the world. The Russian Federation's invasion of Ukraine, for instance, created the fastest and one of the largest displacement crisis since the Second World War. Nonetheless, conflict and insecurity continued or flared up in other parts of the world, including the Democratic Republic of Congo, Ethiopia and Myanmar[28]. Similarly, refugees and asylum seekers globally have been steadily increasing until 2019, showing a slight decrease in the first year of the Covid-19 pandemic: the latest figures recorded in December 2020 put the number of global refugees in the first year of the pandemic at 26.1 million[29]. A rapid increase in the number of refugees was registered between 2020 and 2021 – 27.1 million – and an higher rise the year after – 35.3 million in 2022. In terms of asylum seekers, nearly 2.9 million individual asylum applications were registered by states or UNHCR worldwide in 2022. This represents a 68% increase from 2021 and almost 30 per cent more than in 2019, before the COVID-19 pandemic, and is the highest number of individual asylum applications ever recorded[30]. The latest data available in March 2024 – the moment in which these pages have been written – are the ones of the end of June 2023, when 110 million people were displaced worldwide, including 36.4 million refugees[31].

The number of forcibly displaced and stateless people in Europe increased from 12.1 million in 2021 to 25.5 million in 2022, including 12.4 million refugees, 1.3 million asylum-seekers[32]. However, these data comprehend what has been indicated before as the Greater Europe[33], as well as all the IDPs that are not considered in this research. The same data on forcibly displaced people is not provided by the EU, but it is possible to find data on immigration, residence permits and asylum, as well as distribution of forcibly displaced people by the UNHCR. Narrowing the circle to the European Union, the two

[28] UNHCR (2023: 7-10).
[29] UNHCR (2021: 12).
[30] UNHCR (2023: 14).
[31] EUROPEAN COMMISSION (2024).
[32] UNHCR (2023: 16).
[33] Greater Europe refers to the concept of an expanded Europe that goes beyond traditional geographic boundaries, including countries close to Continental Europe with strong political, economic, or cultural ties. Greater Europe is normally identified with the members of the Council of Europe: the 27 of the EU plus 20 other European countries, making a total of 47 members. In addition to these, Belarus and Kosovo are considered part of it, although not being members of the Council of Europe.

peaks in terms of immigration from non-EU countries were reached in 2015 and 2019, respectively with 2.6 and 2.7 million individuals. After a great decrease in 2020 – 1.9 million arrivals – due to COVID-19 pandemic, in 2021 non-EU immigrants grew up to 2.6 individuals[34]. Non-EU nationals are eligible to remain in the EU if they acquire a residence permit. In 2022, EU MSs collectively granted nearly 3.5 million first residence permits to non-EU nationals, representing an 18% increase from 2021 and a 14% rise from the pre-pandemic level in 2019[35]. Most of these permits were granted to citizens of European – part of the Greater Europe – or Asian countries – such as Ukraine, Belarus and India. This is the reason why for the scope of the present research data on non-EU arrivals or on residence permits, that are the ones more diffused by Eurostat and the European Commission, are not explanatory enough and may give a distorted picture of the migration phenomenon that certain European policies are attempting to stem.

As briefly explained before, part of the people coming from the African and the Middle-Eastern region are forcibly displaced. Data on this general category are not available, especially with specific information regarding areas of origin and of arrival. Consequently, the only available data on asylum seekers and refugees arriving in the EU could try to give a clearer, although not complete, illustration of migratory flows from these regions. In the EU, from 2008 to 2015 there was a growth in asylum applications, peaking between 2015 and 2016 with 1.32 and 1.26 million applicants respectively. While from 2016 to 2020 there has been a decline in applicants, reaching 472,210 in 2020, decreasing more than 30% compared to 2019[36]. At the end of 2022, less than 7% of the world's forced migrants was living in one of the EU MSs. In the same year, a total of 965,665 asylum applications were filed – 884,630 first applications – with an increase of 52.7% compared to 2021. This was the highest number since the peak of the refugee crisis associated with the war in Syria in 2015 and 2016. Most asylum applications in 2022 were made by Syrians (136,065), Afghans (124,925), Turks (52,740) and Venezuelans (50,730)[37]. 47% of first-time asylum applicants held Asian citizenship, while 22% held African citizenship[38].

The data just presented above only refer to individuals in need of protection who have managed to reach Europe in order to apply for asylum. Thus, they do not include neither people who were unable to access the limited legal channels available[39], as those who entered the territory of the EU irregularly, nor all those migrants who are missing or have found death on their way to Europe. For this reason, another relevant category of migrants to analyse is irregular migrants. Irregular migration refers to the act of non-EU citizens attempting to enter or reside on EU territory without fulfilling legal

[34] EUROSTAT (2024).
[35] *Ibidem*.
[36] CENTRO STUDI E RICERCHE IDOS (2021: 44).
[37] CENTRO STUDI E RICERCHE IDOS (2023: 45).
[38] EUROSTAT (2024).
[39] CENTRO STUDI E RICERCHE IDOS (2023: 46).

requirements. This group includes individuals who are refused entry to the EU, those who are illegally present in the EU, and those who are returned[40]. In 2022, 143,000 non-EU citizens were refused entry into the EU at one of its external borders. Of these, 62% were stopped at external land borders, 34% at air borders, and 4% at sea borders. The most common reasons for denying entry into the EU were either unjustified purpose and conditions of stay (24% of all refusals) or lack of a valid visa or residence permit (23%)[41].

When speaking of irregular migrants, it is fundamental to make a focus on the Mediterranean Sea. The Mediterranean has a long history of migration. Since the mid-1990s, thousands of people have crossed it by boat from the northern coasts of Africa and Turkey to seek asylum or migrate to Europe if they lack the required documentation. On the one hand, the Mediterranean Sea is the most visible location for irregular migration to Europe. On the other hand, other routes are also used, such as sea crossings from Africa to the Spanish Canary Islands and from Comoros to French Mayotte, as well as the land route across the Turkey-Greece border and through the Balkans[42]. The Central Mediterranean Route, comprehended between North Africa and Italy, is the most covered sea route to irregularly cross EU borders. According to Frontex in the peak years 2014-2016 this route was under intense migratory pressure. From that moment on a slow decrease in the number of irregular migrants has been registered every year until 2019, when the lowest yearly number of irregular migrants since before the Arab Spring was recorded (14,874). In 2020 and 2021, the Central Mediterranean route became the most-used path to Europe, registering respectively 36,435 and 67,724 detections. In 2022, with well over 100,000 detections, the number increased by more than 50%[43]. Another extremely important data point is that the Central Mediterranean route is the riskiest path for migrants who want to arrive to the EU. Missing Migrants Project by the International Organisation for Migration ('IOM') has recorded 29,228 missing migrants in Mediterranean since 2014, including 23,046 dead or missing in the Central Mediterranean. Mirroring all the data described so far, once again, after the peak reached in 2016, there had been a decrease of missing people until 2020, and from 2021 to 2023 a further frightening increase in deaths and missing persons was recorded [44].

Despite the reduction in immigration, asylum applications, irregular arrivals and deaths of migrants trying to enter the EU over the period 2018-2020, the numbers remained considerable, and, after the end of the pandemic crisis, a rebound effect has been recorded. The drop in asylum applications in the EU over the past four years is certainly also the result of the increasingly restrictive policies adopted by the EU as a whole and by individual MSs in this field. The first effect of these policies has been to reduce the possibilities of legal access to the Union. Among these policies, the introduction of the

[40] EUROSTAT (2024).
[41] *Ibidem*.
[42] MISSING MIGRANTS PROJECT (2024).
[43] FRONTEX (2024).
[44] MISSING MIGRANTS PROJECT (2024).

common visa policy and the Schengen *acquis* must be mentioned[45]. In addition to this first package of rules that made it difficult for non-EU citizens to legally enter the EU territory, further policies have been implemented over the years to make also irregular entry extremely difficult, such as the criminalisation of carriers who take on board and facilitate the entry of undocumented persons as provided for in Directive 2001/51[46]. Another example is the sanctioning of those who intentionally help a third-country national to enter or transit the territory of a Member State, provided for in Directive 2002/90/EC[47], criminalising the solidarity of non-governmental organisations ('NGOs') and associations. Finally, the cooperation between the Union and third actors to prevent departures – as the policies that will be analysed later – can also be considered as a cause of these reductions[48]. Nevertheless, as proved by recent data, these restrictive policies have not achieved the objectives for which they had been created. Indeed, since 2021 the EU has witnessed an exponential increase in migrant arrivals, forced migrants and asylum seekers. Although the war in Ukraine is complicit in this, the number of migrants from Africa and the Middle East is continuing to grow, posing a challenge to the entire EU and the southern border states.

According to some political scientists[49], the real objectives of these policies are not even the same as those being publicly stated. Migration control policies are not only policy instrument to deter illegal crossings, but also symbolic representations of state authority. As Andreas affirms, policies generally defined as inefficient because failing in their instrumental purpose can thus be "highly successful in their expressive function"[50]. Border enforcement and migration control have an audience-directed nature, where audience's perception is more significant than the actual dissuasion of illegal border crossing. Therefore, an effective performance is what is desired by States in border policing, because in this way they shift the audience's attention from more

[45] They, first, established the principle of fulfilling the entry conditions for applying for international protection and, second, provided for the drawing up of two lists of countries: one is the list of third countries whose nationals must be in possession of a visa in order to cross the Schengen external borders, the other includes all the states whose nationals are exempt from this obligation. The inclusion of a country in the first list is based on criteria related to illegal immigration, public order and security. Therefore, in the event of conflicts or generalised violence, which are typical causes of an increase in forced migration flows, the Schengen states may impose a visa requirement on the citizens of these countries. By doing this, they further complicate access for persons in need of international protection, as it has already happened in the case of Syria, Afghanistan, Iran, Iraq, Somalia and others.

[46] Directive of the Council of the European Union, 28 June 2001, 2001/51/EC, *Council Directive Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985*. This directive leads transport companies to avoid taking on board their vehicles migrants without entry authorisation, and migrants to seek illegal and dangerous alternative means.

[47] Directive of the Council of the European Union, 28 November 2002, 2002/90/EC, *Council Directive Defining the Facilitation of Unauthorised Entry, Transit and Residence.*

[48] DEL GUERCIO (2021: 129-137).

[49] DE HAAS (2008); ANDREAS (2009).

[50] ANDREAS (2009: 11).

complex and politically divisive challenges to easily solvable issues and particular interests. In the case of African migration towards Europe, according to De Haas, it is driven by a structural demand for inexpensive migrant labour in informal sectors. Therefore, restrictive immigration policies have consistently failed to stem migration, because European states lack interest in stopping migration[51]. This is a way, based more on sociological and strategic reasoning, of interpreting the ineffectiveness of Europe's restrictive policies and the data just presented. Despite what has been described, individual European states continue to implement restrictive policies, sometimes resulting in human rights violations to the detriment of migrants trying to reach their territory. This will be the focus of the present research and, in order to better understand the functioning of this policy area within the EU, the next section will outline the legal and institutional framework behind migration policies in the EU.

2. Legal background

Before analysing externalisation policies, it is necessary to understand how migration policies are managed within the European legal framework. This section will explain, first, how migration policy management has evolved within the EU in parallel with European legal and institutional development. Subsequently, a brief outline of the competences the EU has in the field of immigration and asylum and of the norms and instruments adopted to control its borders and their crossings will be shown. Finally, an overview will be given of the fundamental principles that the EU and its MSs must observe in the formation and implementation of their policies, especially when dealing with migrants. The objective of such a detailed description is to provide an understanding of the legal basis on which externalisation policies for migration control are based and have developed over the years.

2.1 Migration and asylum in the European legal and institutional framework

In the founding treaty of the European Economic Community, the Treaty of Rome of 1957, free movement of goods, people, services and capital was established as a basis of the common market. However, no mention was made of migration control and internal security. The Single European Act of 1986, amending the Treaty of Rome, provided for the abolition of controls at the internal borders[52]. Yet, it did not introduce neither new competences nor

[51] DE HAAS (2008).

[52] Article 13 "The EEC Treaty shall be supplemented by the following provisions: 'Article 8a. […] The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'".

an institutional framework for achieving this new objective[53]. In fact, the abolition of internal border controls meant that monitoring had to be shifted to the external borders in order to ensure the security of internal freedom of movement. Thus, new legal instruments were needed[54]. The question of whether the intergovernmental or supranational method should be used to achieve this objective became, therefore, a legal dispute between institutions. First with the Schengen Agreement of 14 June 1985[55] and then with the Schengen Convention of 19 June 1990[56], classic intergovernmental instruments were used, outside the EEC framework[57]. In 1992, the Treaty of Maastricht institutionalised the EU cooperation in the fields of justice and home affairs. Nevertheless, due to the limitations of the intergovernmental process used, few legally enforceable actions were implemented. As a result, it soon became clear that it was insufficient to support EU immigration and asylum policies. The conflict in Yugoslavia and the fall of the Berlin Wall, which resulted in hundreds of thousands of refugees reaching the EU, demonstrated the increasing urgency of cooperation in the areas of migration and asylum[58].

These events brought to a reform and the gradual acceptance of the supranational approach to migration and asylum. The Treaty of Amsterdam of 1997 represents a turning point for EU's policy in this area. This new treaty established EC's competence to legislate on migration and asylum and integrated the Schengen *acquis* – which includes the foundational Convention and Agreement as well as some additional acts and instruments that had been added in the meantime – was integrated into EC/EU law[59]. Furthermore, the European Council's 1999 adoption of the Tampere Conclusions[60] defined more specific policy objectives and provided the political motivation for the creation of new policies. The Treaty of Amsterdam only outlined the gradual implementation of the supranational approach, in spite of these significant institutional modifications. As a result, it projected a five-years transition period, from May 1999 to May 2004, during which the intergovernmental mechanism would continue to be used. The foundations of EU immigration and asylum policies were indeed created in the intergovernmental framework, such as the 2003 adoption of the Dublin Regulation[61] on the identification of the

[53] De Bruycker (2003: 3-4).
[54] Villani (2015: 13-16).
[55] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, 14 June 1985, *on the gradual abolition of checks at their common borders, Schengen Agreement.*
[56] Convention, 19 June 1990, *Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement").*
[57] Tsourdi and De Bruycker (2022: 1-3).
[58] Tsourdi and De Bruycker (2022: 1-3).
[59] Villani (2015: 13-16).
[60] Conclusions of the European Council, 16 October 1999, *Tampere European Council Presidency Conclusions*.
[61] Regulation of the Council of the European Union, 18 February 2003, 343/2003, *Regulation establishing the criteria and mechanisms for determining the Member State responsible for*

responsible MS for the review of asylum requests and the Directive[62] on Family Reunification[63]. However, even today, this intergovernmental origin of European discipline affects its characteristics. First of all, the only two MSs that had not joined the Schengen Agreements, the United Kingdom and Ireland, remained outside the Union's regulation – as well as Denmark which has a different position on the asylum and immigration *acquis*. Secondly, from a political point of view a heavily intergovernmental approach is clearly visible. States often focus on their own national interests, rather than on the principles on which the EU is founded and on the extremely pressing problems concerning the rights and lives of migrants[64].

The Treaty of Amsterdam was followed by the Treaty of Lisbon of 2007, in force since December 2009. It amended the Treaty on European Union ('TEU') and the Treaty Establishing the European Community, and renamed the previous Treaties as consolidated versions of the TEU and the Treaty on the Functioning of the European Union ('TFEU'). Moreover, it made the Charter of Fundamental Rights of the European Union[65] legally binding. Nowadays, policies on border checks, asylum and immigration are regulated in Chapter 2 – Articles 77-80 – of Title V of the TFEU on the Area of Freedom, Security and Justice ('AFSJ'). Here the Union's competence to regulate the conditions of entry, residence and movement of third-country nationals on the territory of MSs is granted. This authority helps to realise the EU's primary objective of establishing an area in which European citizens are allowed to move freely[66]. In order to achieve this objective, Articles 77-79 TFEU provide for the possibility of developing common policies concerning border control (Art. 77); the granting of an appropriate status to third-country nationals in need of international protection within the framework of the Common European Asylum System (Art. 78); the regulation of legal immigration and the fight against illegal immigration and trafficking of human beings (Art. 79). Articles 77-79 TFEU are legal bases, which merely grant the institutions the power to adopt acts of secondary legislation. Therefore, these articles are lacking any direct effect. The programmatic nature of the primary rules entrusts the Union legislature with the implementation of the objectives of

examining an asylum application lodged in one of the Member States by a third-country national.

[62] Directive of the Council of the European Union, 22 September 2003, 2003/86/EC, *on the right to family reunification*.

[63] TSOURDI AND DE BRUYCKER (2022: 1-3).

[64] VILLANI (2015: 13-16).

[65] Charter of the European Union, 26 October 2012, 2012/C 326/02, *Charter of Fundamental Rights of the European Union*.

[66] Article 3, para. 2, TEU: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Article 67, para. 2, TFEU states that the Union "shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals".

immigration and asylum policy and the balancing of the conflicting interests underlying it[67]. From a strictly legal point of view, the policies under consideration are decided by the European institutions under the ordinary legislative procedure, i.e. the co-decision between the European Parliament ('EP') and the Council of the European Union, adopted on a proposal from the Commission[68] – although there are exceptions where only the Council has decision-making power[69].

Policies on border controls, asylum and immigration are shared competences of the Union with those of the MSs (Art. 4, para. 2, letter j, TFEU). Thus, under Article 2, para. 2, TFEU, both the Union and the MSs may legislate and adopt legally binding acts, but the latter can exercise their competence to the extent that the Union has not exercised its own. Moreover, in accordance with the duty of sincere cooperation, MSs shall always respect the obligations resulting from their membership in the Union when adopting their own laws. With the entry into force of the Lisbon Treaty, the legislative competence granted to the Union in the field of immigration and asylum has considerably increased. While the former Title IV of the Treaty establishing the European Community ('TEC') generally allowed for the adoption of minimum standards, Articles 77-79 TFEU now allow for the adoption of detailed measures as well. At the same time, a more relevant role is given to the European Parliament and to the Council of the European Union through the ordinary legislative procedure. Conversely, the Council of the EU's pre-eminent role is now confined to the adoption of measures dealing with emergency situations caused by the sudden influx of third-country nationals or to decisions on passports, identity cards, residence permits and other similar documents, in cases where Union action is necessary to facilitate the exercise of the rights of free movement and residence of EU citizens. In the area of immigration and asylum, a key role is played by the European Council that, according to Article 68 TFEU, defines the strategic guidelines for legislative and operational planning in the Area of Freedom, Security and Justice[70].

European provisions do not prevent MSs from exercising their responsibilities for maintaining public order and safeguarding internal security. Accordingly, a MS could adopt stricter rules than those of the Union, as far as they are justified for reasons of public order or internal security. Similarly, each MS remains free to determine the volume of third-country nationals seeking employment into its territory. This is confirmed by Protocol No. 23 on external relations of the MSs with regard to the crossing of external borders, according to which MSs are free to negotiate or conclude agreements with third countries on these issues, provided that they comply with Union law and other relevant agreements. In relation to what has just been said about the role of MSs, it should be recalled that the European Council – thus, the heads of state or government of every MS – establishes the strategic guidelines for

[67] AMADEO ET AL. (2022: 1-2).
[68] As provided by Article 289 TFEU.
[69] VILLANI (2015: 13-16).
[70] AMADEO ET AL. (2022: 1-12).

legislative and operational planning in the Area of Freedom, Security and Justice. Therefore, MSs are the ones who determine the major decisions, especially in the area of migration policy[71].

As just said, the policy planning is a European Council duty. It accomplishes this by adopting not-legally binding conclusions, even so, highly politically binding within the institutional framework of the EU. Therefore, on the basis of Article 68 TFEU, almost six different programmes regarding migration and asylum policies have been adopted since 1999. The first policy programme on this issue is represented by the aforementioned Tampere Conclusions (1999), which provided policy objectives for migration and asylum, later included in the founding treaty[72]. In 2005 the Hague Programme[73] was adopted, followed by the Stockholm Programme[74] of 2010 and the Ypres Guidelines of 2014. But, in the 2015 turning point, the European Council stopped adopting programmes and the Commission presented the European Agenda on Migration[75], a strategic document addressing the challenges associated with migration and asylum, that specifies actions to be taken to ensure strong borders, fair procedures, and a sustainable system that can foresee future issues in this context. Nevertheless, this project failed, due to the impossibility to introduce solidarity in the Dublin system for the examination of asylum applications. Therefore, on 23 September 2020 the Commission presented the New Pact on Migration and Asylum[76], including a number of legislative proposals. This new communication of the Commission represented a means of leverage towards, on the one hand, the lack of progress in the work of the Parliament and the Council of the European Union, on the other hand, the inability of the European Council to reach consensus and adopt conclusions or programmes on the matter[77]. The actions planned in 2015 and 2020 pursued four main objectives. First, they aimed at intensifying political dialogue and cooperation with third countries to foster the fight against illegal migrant smuggling and the readmission of overstayers. Second, they sought to manage and strengthen the security of external borders. Third, they pursued the improvement of the Union's international protection policy, with actions aimed at reducing the regulatory fragmentation of the Common European Asylum System, combating asylum abuse and promoting greater

[71] VILLANI (2015: 13-16).
[72] DE BRUYCKER (2003: 18-25).
[73] Communication from the European Council, 3 March 2005, 2005/C 53/01, *The Hague Programme: strengthening freedom, security and justice in the European Union*.
[74] Information from the European Council, 4 May 2010, 2010/C 115/01, *The Stockholm Programme — An open and secure Europe serving and protecting citizens*.
[75] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13 May 2015, COM (2015) 240, *A European Agenda on Migration*.
[76] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 23 September 2020, COM (2020) 609, On A New Pact On Migration And Asylum.
[77] THYM AND ODYSSEUS ACADEMIC NETWORK (2022: 34-38).

responsibility sharing among MSs in the Dublin system. Fourth, they encourage legal migration in order to attract the most qualified foreign workers[78].

After this description of the evolution of migration and asylum law in the EU, alongside the European institutional development, it is clear how policies in this field are adopted. In the following subsection, a brief outline of the competences the EU has in the field of immigration and asylum and of the norms and instruments adopted to control its borders and their crossings will be given.

2.2 Border and migration control in the European Union

Since externalisation policies are mainly used to control the borders of the EU and its MSs, and, above all, to prevent the illegal entry of migrants into European territory, a small focus on external border control is necessary. As affirmed by Article 77 TFEU (para. 1, letters b) and c)), the primary purpose of the common policy on external border control is "carrying out checks on persons and efficient monitoring of the crossing of external borders; the gradual introduction of an integrated management system for external borders". This is motivated by the fact that the internal libertarian dimension, i.e. the safeguarding of internal freedom of movement, is inextricably linked to the dimension of external security. The intensive harmonisation of the conditions for crossing the external borders and of the border controls applied by the MSs was necessary to ensure the security of the external borders, to prevent illegal immigration and combat human trafficking networks. This harmonisation concerned the definition of the conditions to be met by third-country nationals in order to cross the external borders for the purpose of residence and short-term movement within the territory of the Union; the checks to which all persons crossing the external borders are subject; the gradual establishment of an integrated management system for external borders; and the absence of any controls on persons crossing internal borders between the MSs of the Union, regardless of their nationality[79]. In the following paragraphs a brief outline of the main legal instruments adopted to control EU borders and migration will be given.

In the first place, the Schengen Borders Code[80] specifies the procedures and authorities that regulate individual rights of movement at the EU's external borders[81]. It establishes the conditions of entry of third-country nationals and provides for the exceptions granted to MSs for the exercise of their competences in the area of immigration. Furthermore, it explains which are the consequences for not fulfilling the conditions of entry and of non-entry.

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[78] AMADEO ET AL. (2022: 1-12).
[79] AMADEO ET AL. (2022: 13-82).
[80] Regulation of the European Parliament and of the Council, 9 March 2016, (EU) 2016/399, *on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*.
[81] RYAN AND MITSILEGAS (2010: 199-211).

This code regulates the procedures for crossing and controlling the external borders, depending on the means used and the types of border crossed. Finally, it stipulates the conditions under which police checks conducted within MSs' borders are admissible, the removal of border controls with regard to the crossing of internal borders by persons, and the circumstances under which temporary reintroduction of internal border controls is allowed[82]. MSs' obligations for human rights are clearly emphasised by the Schengen Borders Code. Border controls must be implemented in a way that fully respects human dignity, and the Regulation guarantees the respects of fundamental rights by observing the principles recognised by the Charter of the Fundamental Rights of the European Union. Moreover, it specifies that the Regulation must be implemented in compliance with MSs' commitments to non-refoulement and international protection. An interesting point is Article 6, dealing with the conduct of border inspections, which mandates that border guards respect human dignity in the course of their work and that any action they take must be appropriate to the objectives they are trying to achieve[83].

In the second place, the Schengen Borders Code provides for the possession of a visa for third-country nationals who want to cross the external borders of the Schengen area. A visa is an authorisation or a decision of a MS necessary for transit or entry into the territory of MSs. This is a very important entry requirement that is the subject of a common European policy[84]. The development of a common visa policy dates back to the Schengen Agreement of 1985 and the Schengen Implementing Convention of 1990, when MSs agreed to create two lists, the blacklist composed of countries whose citizens need a visa in order to enter the EU, and the white list of countries whose citizens do not require it[85]. These decisions were defined by one of the first measures adopted on visas, Regulation 539/2001[86], then codified by Regulation 2018/1806[87]. The rationale behind requiring visas for citizens of some third countries includes, among other things, the purpose of preventing illegal immigration; improving public policy and security; promoting economic benefit, particularly with regard to tourism and foreign trade; developing EU's external relations with third countries, including special considerations of human rights and fundamental freedoms; and working on regional coherence and

[82] European Union Agency for Fundamental Rights and Council of Europe (2020: 32-48).
[83] Ryan and Mitsilegas (2010: 199-211).
[84] Amadeo et al. (2022: 13-82).
[85] Guild and Grundler (2022: 390).
[86] Regulation of the Council of the European Union, 15 March 2001, 539/2001, *Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*.
[87] Regulation of the European Parliament and of the Council, 14 November 2018, 2018/1806, *listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification), that amends Council Regulation (EC) No 539/2001 of 15 March 2001*.

reciprocity[88]. Furthermore, Regulation 810/2009[89] harmonised the visas issued by MSs for the purpose of a short stay in the Schengen area. This Regulation has been amended several times, in particular by Regulation 2019/1155[90]. Preventing potential irregular migrants from entering the Schengen area and remaining there irregularly is the primary purpose of the EU's visa policy. In this way, Schengen borders are externalised, since visa applicants must apply through consulates and may be denied while being still in their home countries, and carriers will not embark those people who do not have the required visa, due to the risk of financial sanctions. Visas are divided into two categories. On the one hand, short-stay visas – C visas – which authorise a stay of 90 days per period of 180 days. On the other hand, long-stay visas – D visas – which permit a stay of more than 90 days. Given that the latter are connected to either the immigration policies of individual states or other sections of EU law regarding migration, they are national visas rather than Schengen visas. Once an individual has entered into the country with the D visa, the holder should obtain a residence permit unless he or she has the permission to remain on the basis of the D visa[91]. Long-term visa holders are also entitled to enter the Schengen area for a limited period of time. Long-term visas, subject to national regulations, also include visas for international protection or humanitarian reasons requested from MSs' representations to third countries. These visas authorise the entry of foreigners into the Schengen area so that they can apply for international protection. The issuance of such a visa, in accordance with the Dublin regulations, establishes the MS's authority to examine the request for protection[92]. In 2006, the European Commission proposed the concept of Common Application Centres ('CACs') in light of the advancements in biometrics and their use in visa and residency permits. The idea was to strengthen local consular cooperation while also avoiding every MS having to install the necessary equipment for collecting biometric identifiers in its consular office. The creation of CACs offers the opportunity to collaborate with other service providers and outsource the handling of visa applications[93]. However, these centres are not designated consular representations[94].

In the third place, the European Border and Coast Guard ('EBCG') Regulation[95] is one of the most important pieces of legislation on the control

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[88] GUILD AND GRUNDLER (2022: 390).
[89] Regulation of the European Parliament and of the Council, 13 July 2009, 810/2009, *Regulation establishing a Community Code on Visas (Visa Code)*.
[90] Regulation of the European Parliament and of the Council, 20 June 2019, 2019/1155, *Regulation amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code)*.
[91] GUILD AND GRUNDLER (2022: 396-397).
[92] AMADEO ET AL. (2022: 13-82).
[93] RYAN AND MITSILEGAS (2010: 199-211).
[94] GUILD AND GRUNDLER (2022: 404-405).
[95] Regulation of the European Parliament and of the Council, 13 November 2019, 2019/1896, *Regulation on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*.

of external borders. It was introduced in response to the refugee crisis of 2015, replacing and improving the Frontex Regulation of 2004[96]. The 2019 Regulation pursues the objectives set out in Articles 77 and 79 TFEU, namely, the integrated management of the external borders, the control of persons at the external borders and the fight against illegal immigration and illegal residence, as well as the removal and repatriation of persons residing irregularly. These tasks are carried out in particular through the coordination and operational assistance by the European Border and Coast Guard Agency[97]. The EBCG is composed by two distinct components, on the one hand, national border authorities, on the other hand, Frontex. Instead of merging national border agencies, the EBCG combines them under a single organisational and conceptual framework and imposes more European control and guidance on them[98]. The European Border and Coast Guard Agency, namely Frontex, is a Union body with its own legal personality and statutory independence, including financial independence, and its own governing bodies, based in Warsaw[99]. European integrated border management is a shared responsibility of the national border management authorities and Frontex[100] according to functional criteria. The Regulation specifies in detail the activities into which integrated European border management consists, that are: border control; search and rescue ('SAR') operations for persons in distress at sea; analysis of internal security risks and analysis of threats which may undermine the functioning or security of the external borders; cooperation with third countries; return of third-country nationals subject to return decisions taken by a MS. Within this framework, national authorities have the primary responsibility for managing national borders and executing returns. Responsibility for decisions on these issues is in some cases exclusive to MSs. Conversely, in the operational activities related to border control and return there is an overlap of competences between the national authorities and Frontex. The Agency is entrusted with tasks related to transnational management and coordination of external border controls, and provides support to national authorities. Frontex has a permanent corps, consisting of statutory personnel and operational contingents seconded or provided by MSs. Members of the permanent corps are deployed as members of the border management teams, migration management support teams and return teams in joint operations, in rapid border interventions. The intervention in support of MSs or third countries by members of this team is only possible prior authorisation[101]. In accordance with national law, the host MS is generally responsible for the civil liability of team members, including statutory

[96] Regulation of the Council of the European Union, 26 October 2004, 2007/2004, *Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*.
[97] AMADEO ET AL. (2022: 13-82).
[98] GUILD AND GRUNDLER (2022: 410).
[99] AMADEO ET AL. (2022: 13-82).
[100] EBCG Regulation, Article 7.
[101] AMADEO ET AL. (2022: 13-82).

personnel, for any damage caused during operations[102]. Whereas, the principle of national treatment governs the criminal liability of team members, including statutory personnel. Therefore, team personnel are treated as personnel of the MS[103]. The Agency's operations may also occur in third countries outside the Union's external borders, giving them an extraterritorial component. Such activities are framed legally by unilateral programmatic acts of the Union, by genuine international agreements concluded between the Union and the relevant third country, or by administrative cooperation or operational arrangements between the Agency and the authorities of third countries[104]. Therefore, four fundamental roles were assigned to Frontex, namely, a regulatory role, an operational role, a supervisory role and a role in EU's external relations[105]. For this reason, it is relevant to talk about the involvement of third states in the control of migration and borders.

In the fourth place, immigration and asylum policies are implemented both through internal EU legislation and through diversified interventions at the international level, such as political dialogue, political and technical cooperations, partnerships and international agreements of the Union with third countries, all of which are different in nature and legal effectiveness[106]. The idea of integrated border management specifically includes collaboration between the EU and third countries. This cooperation is deemed vital for the surveillance of EU's external borders, for the return policies and for the preservation of internal security. Yet, cooperation is also accomplished by individual MSs who sign agreements with third countries on migration flows and border controls, such as the ones between Libya and Italy. These agreements result in exchanges between economical and development assistance on the one hand, and cooperation at the sea borders and activities preventing people from leaving within the third state on the other hand[107]. Thus, the external competence of the EU provided for in Article 78, para. 2, letter g), TFEU[108] and Article 79, para. 3, TFEU[109] is also concurrent with that of the MSs. Instead, the Union's external competence is exclusive when it is established by a legislative act of the Union and when the exercise of the MSs power to conclude agreements affects or interferes with the common rules already adopted by the EU internally. Aware of the ineffectiveness of measures not set in cooperation with third countries, the European Union and its MSs are building – supported by

[102] EBCG Regulation, Article 84.
[103] EBCG Regulation, Article 85.
[104] AMADEO ET AL. (2022: 13-82).
[105] GUILD AND GRUNDLER (2022: 418-425).
[106] AMADEO ET AL. (2022: 13-82).
[107] RYAN AND MITSILEGAS (2010: 199-211).
[108] Article 78, para. 2, letter g, TFEU is on "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection".
[109] Article 79, para. 3, TFEU affirms: "The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States".

Frontex and EUAA – an impressive network of relations with third countries of origin and transit of migratory flows and with IOs involved with asylum and immigration issues. This external action is carried out through numerous instruments, whose diversity and unclear legal effects underline the variability and uncertainty of such policies. First, it is done through conferences and summits to discuss the causes of migration, to promote new joint strategies or to propose new initiatives. Second, policy dialogue can take place at regional level, with groups of third countries in a given geographical area, or at bilateral level with Mobility Partnerships ('MPs') or Common Agendas on Migration and Mobility ('CAMMs'), or also within the framework of broader international partnership agreements using the bodies established by these international partnership agreements. Third, political dialogue can lead to the conclusion of international agreements, such as readmission agreements, visa facilitation agreements and status agreements, that the EU can conclude according to Article 218 TFEU. Fourth, as mentioned above, there are also operational arrangements that EU bodies conclude with third countries or IOs, as Frontex or EUAA operational agreements. Political dialogue, regional and bilateral, and international agreements are the instruments through which the EU and its MSs implement external policy on migration and asylum. Nevertheless, the legal nature and accountability of some agreements and projects remains uncertain, such as regional development and protection programmes, and non-binding readmission agreements. Some of these policies and agreements will be analysed in the present research in order to better understand the responsibility issues connected to them[110].

Responsibility is connected to all the obligations a state has to comply with, in particular, in the migratory field, human rights and fundamental principles are of great importance. For this reason, in the following subsection, an overview will be given of the fundamental principles that the EU and its MSs must observe in the formation and implementation of their policies, especially when dealing with migrants.

2.3 Fundamental principles to be observed

The European Treaties lay down certain fundamental principles to which the Union's action must conform, and this also applies to migration policies. First of all, EU and MSs' actions must respect human rights. These are founding values of the European Union – Article 2 TEU – and are recognised both in Article 6 TEU[111] and in the Charter of Fundamental Rights of the

[110] AMADEO ET AL. (2022: 13-82).

[111] It states that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. […] Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

European Union – also called Charter of Nice – considered at the same legal level of the Treaties. The importance of human rights – together with the rule of law – as the fundamental principles of the EU legal order was reaffirmed when they were included in the Copenhagen criteria, that laid down conditions for EU membership[112]. The European Court of Justice ('ECJ') has made extensive use of fundamental rights as parameters for the validity of acts of secondary legislation, as criteria of interpretation, in particular to integrate gaps in the acts of the institutions, and as parameters for the compatibility of legislation adopted in this area by the MSs. Also secondary law acts confirm the obligation to interpret and apply the relevant provisions in accordance with fundamental rights and the principles recognised by the Charter of Fundamental Rights of the European Union[113]. Certain international treaties that are binding on all MSs have played a pivotal role in the formulation and interpretation of secondary legislation. Since the primary or secondary law refers to them, they have legal effect within the Union's legal system. In this regard, mention must first be made of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), to which the ECJ constantly refers for the interpretation of fundamental rights. Indeed, in Article 6 TEU, fundamental rights included in the ECHR are recognised as general principles of EU law[114], as already affirmed by the Court. The fundamental freedoms and rights outlined in the EU Charter of Fundamental Rights are applicable to both EU citizens and non-EU citizens, with the exception of a set of rights that are exclusive to EU citizens. Therefore, also while adopting or putting into practice EU immigration and asylum law policies, both MSs and EU institutions must respect the fundamental freedoms and rights enshrined in the EU Charter and the European Convention on Human Rights[115]. In the Area of Freedom, Security and Justice, Article 67 TFEU recognises the need to respect fundamental rights also in this field of policies[116]. In particular, in the management of external borders, asylum and immigration, fundamental rights are specifically relevant during policy making and enforcement when dealing with weak and vulnerable individuals, such as refugees, persons in need of international protection, migrant children and women[117]. Other conventions of particular relevance in the migration and asylum field are the Geneva Convention of 1951 and the Protocol of 1967 relating to the Status of Refugees, which represent the minimum standard inspiring the related secondary legislation within the Union, although they are not sources of EU law. Further conventions to which all MSs are parties include, for example, the United Nations

[112] RYAN AND MITSILEGAS (2010: 211-213).
[113] AMADEO ET AL. (2022: 1-12).
[114] *Ibidem*.
[115] RYAN AND MITSILEGAS (2010: 211-213).
[116] In the first paragraph affirms that: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".
[117] VILLANI (2015: 16-19).

Convention on the Rights of the Child[118] (1989) and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[119] (1984)[120].

Second of all, another fundamental principle to which the Union's action must conform is the principle of solidarity between MSs. Article 67, para. 2, TFEU [121] provides for a general direction on it, while Article 80 TFEU [122] specifies the need of solidarity in the area of border control, asylum and immigration, as well as of the immediately related fair sharing of responsibility among MSs, including in financial terms. Border MSs particularly rely on these provisions and on other MSs' cooperation, given the direct impact migration movements have on them. Indeed, solidarity may also imply procedures for the relocation of asylum seekers and beneficiaries of subsidiary protection among MSs. Furthermore, another point referred to these principles is Article 78, para. 3, TFEU[123], according to which temporary measures can be adopted for the benefit of a MS facing an emergency situation caused by a sudden influx of third-country nationals. Nonetheless, the impact of the principles of solidarity and fair sharing of responsibility is limited by the lack of an immediate prescriptive power. Implementation depends on measures enacted by the Union only when deemed necessary[124].

Third of all, the basic principle that the Union and the MSs must respect with regard to third-country citizens is that of fair treatment, set out in Article 67, para. 2, TFEU, which varies according to the matter in question and the status of those citizens. The principle of fair treatment in immigration law only applies to citizens of third countries who are legally residing in the EU. For these individuals, the Union seeks to support and encourage MSs' efforts to ease their integration[125]. On the contrary, the EU has an extremely closed attitude towards illegal immigrants. As a matter of fact, its main goal

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[118] Convention of the UN General Assembly, 20 November 1989, *Convention on the Rights of the Child*.

[119] Convention of the UN General Assembly, 10 December 1984, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

[120] AMADEO ET AL. (2022: 1-12).

[121] Article 67, para. 2, TFEU states that the Union "[…] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals".

[122] Article 80 TFEU "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle".

[123] Article 78, para. 3, TFEU affirms "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

[124] VILLANI (2015: 16-19).

[125] As indicated in Article 79, para. 4, TFEU.

is to ensure the prevention of illegal immigration and human smuggling. In order to accomplish this, the EU adopts measures of removal and repatriation of illegal residents, makes readmission agreements with the origin countries, and conducts maritime patrolling operations through Frontex. Despite this harsh attitude towards irregular migrants, the EU is however bound to respect fundamental human rights, as previously said, while adopting and enforcing certain measures. On the other hand, the fair treatment of asylum seekers and beneficiaries of subsidiary or temporary protection is indicated, first, in Article 78, para. 1, TFEU[126], which states that the EU must offer appropriate status to any person in need of international protection and must respect the principle of *non-refoulement*; second, in Article 18 of the Charter of Nice[127], which guarantees the right to asylum in accordance with the Geneva Convention of 1951 and the Protocol of 1967; third, in Article 19 of the same Charter[128], which prohibits collective expulsions and the removal, expulsion or extradition of anyone to a State where there is a serious risk that they would be suffer from torture, death penalty or other inhuman or degrading treatment or punishment[129].

Lastly, a focus on the fundamental principle of *non-refoulement* is necessary, given its primary importance in the migration field and its tight connection with some externalisation policies. As already mentioned, the 1951 Geneva Convention relating to the Status of Refugees defines the principle of *non-refoulement* in Article 33, para. 1: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". This Article primarily stipulates the State's obligation to refrain from sending any individual or particular group of individuals who are on its territory to a country where they would be persecuted. *Refoulement* is broadly defined as expulsion, extradition, pushback, on state territory or at the border, and forced removal in any form. Being it the only guarantee that asylum seekers and refugees will not be subjected to the persecution that led to their departure and giving them the possibility to enter the asylum nation, the principle of *non-refoulement* is the foundation of asylum seekers' protection.

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[126] Article 78, para. 1, TFEU "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties".

[127] Article 18, *Charter of fundamental rights of the European Union*, "Right to asylum. The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community".

[128] Article 19, *Charter of fundamental rights of the European Union*, "Protection in the event of removal, expulsion or extradition. 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

[129] VILLANI (2015: 16-19).

Nonetheless, this obligation does not assure neither the entry into the destination State's territory nor the admission to the process for the refugee status. In spite of the support of some authors to the existence of such an obligation, State practice does not corroborate these views[130]. An exception is the Italian jurisprudence example, judgement n. 22917/2019 of the Court of Rome[131], which interprets this principle as implying both a negative obligation of *non-refoulement* to a territory where a person's life and freedom may be threatened, and a positive obligation to ensure access to the territory in order to grant the right to apply for asylum[132]. The prohibition also applies when an individual is removed or pushed back towards an intermediate country, *i.e*. a country that could in turn return the person to a territory where he or she could face similar treatment. Moreover, as also part of humanitarian law, the principle of *non-refoulement* is now recognised by part of the doctrine, jurisprudence, and various bodies of IOs as a norm of customary law – *jus cogens* – binding every State, even those who have not ratified the conventions that expressly prescribe it[133]. Other international human rights standards, which either expressly or implicitly forbid returning a person to a place where he or she runs the risk of torture or other inhuman and degrading treatment and where his or her life or liberty may be gravely threatened, are also used to construct and integrate this principle[134]. Examples, indeed, are the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the

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[130] TREVISANUT (2008: 208).

[131] Judgment of the Court of Rome, 28 November 2019, 22917/2019.

[132] GIUFFRÉ (2020: 193).

[133] Although there are some doubts on the *jus cogens* nature of the *non-refoulement* principle, in particular on the derogability of the norm, the UNHCR Executive Committee in its General Conclusion on International Protection No. 25 of 1982 "(b) Reaffirmed the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law". Furthermore, in the General Conclusion No. 79 of 1996 the Executive Committee, first, affirmed the non-derogability of non-refoulement: "(i) Distressed at the widespread violations of the principle of non-refoulement and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been refouled and expelled in highly dangerous situations; recalls that the principle of non-refoulement is not subject to derogation". Then, it defined the content of the norm, which reproduces the whole Article 33, para. 1, of the Geneva Convention, but is even more specific compared to the conventional norm, since it adds reference to the status of the people concerned and to the risk of torture: "(j) Reaffirms the fundamental importance of the principle of *non-refoulement*, which prohibits expulsion and return of refugees, in any manner whatsoever, to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted refugee status, or of persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment". Nonetheless, the Executive Committee does not mention the exceptions to the *non-refoulement* principle, provided for in Article 33, para. 2, and Article 1. letter f), of the Geneva Convention. See also ALLAIN (2001).

[134] MORENO-LAX AND GIUFFRÉ (2017: 11-12).

International Covenant on Civil and Political Rights ('ICCPR')[135], the UN Convention on the Law of the Sea ('UNCLOS')[136], the Universal Declaration of Human Rights[137]. This happened also within the EU legal framework.

Non-refoulement is one of the core principles of the EU asylum policy, and is the subject of a right expressly enshrined in the Charter of Fundamental Rights of the European Union, as previously explained, in Articles 18 and 19[138]. Notwithstanding, the implementation of the common asylum policy in the EU has sometimes broadened, other times restricted, the scope of the principle of *non-refoulement* in this region. Starita[139] makes a clear and deep analysis of all the features acquired by this principle in EU law and case law. He firstly affirms that the principle of *non-refoulement* has been incorporated into the acts of EU institutions in a particularly broad form for three reasons. First, the asylum seeker who is already on Union territory is accorded a higher level of protection than that granted by the Geneva Convention, thanks to the development of EU law and ECJ's jurisprudence[140]. Second, the sphere of beneficiaries of the principle is broader than that of the Geneva Convention[141]. EU legislative evolutions have been prompted by the need to fulfil obligations incumbent on MSs under human rights treaties and to respond to fundamental rights problems raised by supervisory bodies for rights protection created by these treaties[142]. In this context a clear example is the European Court of Human Rights' ('ECtHR') prohibition to expel or return from the territory any person who runs the risk of being exposed to violations of the right not to be subjected to torture or inhuman or degrading treatment, regardless of whether or not that person is recognised as a refugee under the Geneva Convention. Such prohibition, derived from Article 3 of the ECHR, has inspired the creation of two other forms of international protection within the EU legal framework, namely temporary protection[143] and subsidiary protection[144]. Third, the grounds for suspending the application of the principle or justifying its violation are interpreted restrictively. For instance, the mass and/or sudden influx of migrants is not taken into account in EU law as a cause for suspending the application of the principle of *non-refoulement*, or for excluding the

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[135] Covenant of the UN General Assembly, 16 December 1966, *International Covenant on Civil and Political Rights.*
[136] Convention of the UN General Assembly, 10 December 1982, *Convention on the Law of the Sea.*
[137] Declaration of the UN General Assembly, 10 December 1948, *Universal Declaration of Human Rights*. GIUFFRÉ (2020).
[138] STARITA (2020: 141-143).
[139] *Ibidem*.
[140] Regulation, 343/2003, *Member State responsible for examining an asylum application;* Directive of the European Parliament and of the Council, 26 June 2013, 2013/32/EU, *Directive on common procedures for granting and withdrawing international protection*.
[141] STARITA (2020: 143-152).
[142] MORENO-LAX AND GARLICK (2015: 133)
[143] Directive, 2001/55/EC, *Temporary protection.*
[144] *Qualification* Directive, 2011/95/EU.

unlawfulness of the conduct of the state that does not respect it[145]. The ECtHR[146] and the ECJ[147] have indeed confirmed that the extraordinary influx of asylum seekers affecting one MS's asylum system should be taken into account only with regard to other MSs' obligation to activate the so-called 'sovereignty clause'.

Nevertheless, in some cases, the common asylum policy interprets the principle of *non-refoulement* restrictively. These interpretations come from the consideration of the principle as an exception to the sovereign power of States to control access to the territory and risk undermining respect for the fundamental rights of people seeking international protection. It is possible to observe three different examples of this in European Union law: certain restrictive interpretative practices; ambiguities of interpretation by MSs in conflict with the prohibition of *refoulement*, such as the concept of 'safe country'; regulatory, institutional or procedural gaps that render the principle of *non-refoulement* ineffective, such as the absence of a resettlement policy among MSs, or of a common policy on humanitarian visas[148]. As concerns the ambiguity on the concept of safe country – safe country of origin, safe third country, European safe third country and first country of asylum – also the ECtHR endorses its use by European MSs. Despite this, in order to guarantee the compatibility of these presumptions with Article 3 of the ECHR and with the principle of *non-refoulement*, the ECtHR clarified how this concept should be applied[149], although there has not already been a complete adaptation of the common asylum policy to the ECtHR's indications[150].

A lively doctrinal debate has arisen on the question of the applicability *ratione loci* of the prohibition of refoulement. As written before, scholars and the UNHCR concur that the ordinary meaning of *refouler* is to drive back, repel, or re-conduct, which does not require a presence in-country. This supports the idea that Article 33, para. 1, of the Geneva Convention includes rejections at the border, in transit zones, and on the high seas too, despite the fact that the Convention does not explicitly state it. The scope *ratione loci* of the *non-refoulement* principle has been interpreted narrowly in some national case law. Nonetheless, the ECtHR has supported the extraterritorial applicability of the principle, by highlighting states' duty to prevent *refoulement* from

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[145] STARITA (2020: 143-152).

[146] Judgment of the European Court of Human Rights, 21 January 2011, application no. 30696/09, *M.S.S. v. Belgium and Greece*.

[147] Judgment of the Court of Justice of the European Union, 21 December 2011, C-411/10 and C-493/10, *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform.* Here the ECJ complied with the jurisprudence of the ECtHR.

[148] STARITA (2020: 152-161).

[149] It affirmed that the presumption cannot be absolute, but must always allow for contrary evidence from the individual seeking protection. Furthermore, the state must conduct a careful examination of the political situation and the conditions existing in the third country. Finally, the state must take into consideration authoritative reports of IOs and NGOs.

[150] STARITA (2020: 152-161).

occurring[151]. In the well-known *Hirsi Jamaa* judgment[152], the ECtHR recognises that the principle of *non-refoulement* must be respected not only in the case of *refoulement* at the border, but also in the case of *refoulement* on the high seas, where states cannot be deemed exempt from their legal obligations, including those arising from international human rights and refugee law[153]. Furthermore, also the European Commission has agreed on the ECtHR's view of the application of the principle of *non-refoulement.* A further practice related to the extraterritorial applicability of the principle of *non-refoulement*, and also closely linked to externalisation policies, is that of indirect refoulement or pushbacks by proxy. This practice is implemented by some MSs in cooperation with third state authorities in order to delegate to them the interception and/or rescue – mainly at sea – and the return of migrants to their countries of origin, such as those irregularly crossing the Mediterranean Sea to reach Europe. Pushbacks by proxy take place without an individual assessment of the individual legal positions of the persons rescued and without any guarantee of the possibility to apply for asylum[154], violating all the standards mentioned so far for the protection of fundamental rights, including the right to an effective remedy[155].

After this description of the legal background of EU migratory policies, of the competences of the EU and MSs in this field and of the fundamental principles to respect, a clear picture is provided of the legal basis on which externalisation policies for migration control are based and have developed over the years. The following section will explain, using political science theories, how governments and politicians in general tend to deal with migration and border control. A tendency to shift sovereignty in three different directions has been observed.

3. Shifting sovereignty upwards, downwards and outwards (remote control)

According to some political scientists, one of the state's main objectives is to take into account all constraints related to migration and border control in the policy-making process[156]. These constraints are control dilemmas to face when deciding on border and migration control. Control dilemmas rise from underlying conflicts between capitalism and democracy, along with tensions between democracy and liberal norms[157]. Therefore, these dilemmas

[151] Moreno-Lax and Giuffré (2017: 11-12).
[152] Judgment of the European Court of Human Rights, 23 February 2012, 27765/09, *Hirsi Jamaa and Others v. Italy*.
[153] Giuffré (2020: 192).
[154] Giuffré (2020: 191).
[155] Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights.
[156] Baumgartner and Jones (2009).
[157] Guiraudon and Joppke (2001: 8-11).

concern politics, economy and law, and the state tries to respond to this triangle of constraints, which affects its capacity of control[158]. Depending on the institutional framework of receiving states, the effects of these constraints vary across national boundaries, but understanding migration policy's complex and contradictory objectives is made easier by thinking about control dilemmas that it aims to solve[159]. An example of trying to find a balance between several constraints while dealing with migration control is shifting sovereignty. Migration control is emblematic of state sovereignty, as "the very stateness of States"[160], yet, in order to circumvent constraints in cost-effective ways, States have shifted the level at which policy is elaborated and implemented, fostering a proliferation of actors involved in migration control. As it will be explained, the strategy employed keeps open desired economic, labour, and tourism flows while simultaneously reducing public concerns about migration and circumventing legal restrictions on immigration control[161].

While the European liberal democracies differ substantially in terms of immigration challenges, political systems, and policy formulation; all migrant control strategies share some characteristics. Although they started from different starting points, the majority of EU countries have been moving towards more restrictive policies since 1980s. The level of decision-making, regulation and implementation has been shifted in three different directions, namely upwards, downwards and outwards. The upward shift has involved intergovernmental fora, such as Schengen; the downward shift has been towards local authorities, through a decentralisation; and the outward shift has included non-state actors, specifically, private companies such as security services, airline carriers, travel and transportation companies[162], although throughout the years this outward shift has involved also other external actors, as IOs, NGOs and third states. These situations truly represent delegation, in which entities other than the national government are assigned the duties of managing migration, and a principal – the national government – with exclusive control over an area assigns a portion of it to an agent – third entities – in order to achieve specific objectives[163]. Principal-Agent ('P-A') theory and transaction costs economics are the sources of this paradigm that will be better explained in the second chapter. A vertical chain of policy making is created by moving policy instruments up, down, and out of their original position. This has been considered as a kind of venue-shopping, looking for venues that will facilitate the achievement of State's desired results[164].

Firstly, national governments participate in international fora, shifting their sovereignty upwards, in order to regain some of the authority that they have lost due to national jurisprudence and the development of international

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158 GUIRAUDON (2002).
159 GUIRAUDON AND JOPPKE (2001: 8-11).
160 TORPEY (1999: 240).
161 GUIRAUDON AND JOPPKE (2001: 8-11).
162 GUIRAUDON AND LAHAV (2000: 175-178).
163 GUIRAUDON AND LAHAV (2000: 175-178).
164 GUIRAUDON (2000: 257-259).

human rights norms[165]. Migration policy has a transversal character, since it affects a number of policy sectors, including labour, economics, foreign affairs, and social affairs, therefore, it has never been limited to a single national ministry. As a consequence, from the beginning of 1980s other ministries reduced the leeway of interior and justice personnel in charge of migration control. Similarly, national jurisprudence limited the restrictive objectives of migration control policies through domestic constitutional principles, national laws, and increased protection of certain migrants, reducing the arbitrary and discretionary powers of bureaucracies. Conversely, international cooperation on migration and asylum has moved the decision-making process away from national judiciaries[166]. Thus, by giving a vertical dimension to migratory decision-making and getting engaged at international level, national governments have been able to accomplish objectives that they would not have been able to reach otherwise. This has resulted in a proliferation of intergovernmental cooperation groups on immigration, asylum, law enforcement and border control. For instance, this upward shift is well represented by the constitution of the Schengen area. This international cooperation, aiming at creating a more effective migration control regime, has allowed EU states to strengthen and expand their borders both before and after the arrival of immigrants, by circumventing more liberal national jurisprudence[167]. Indeed, the lack of transparency of these groups' activities make the supervision of international processes difficult for some national actors. Furthermore, this upward shift has been progressing in the EU, as it was explained in the previous section, through the description of the development of the European institutional and legal framework related to the migration and asylum area. In order to improve state efficiency in managing migration, the European regional integration has increased coordination and devolution of decision-making authority to supranational institutions[168]. To sum up, shifting sovereignty upwards in the field of migration and asylum can give three advantages to national governments. First, they can avoid national judicial constraints; second, they can exclude possible adversaries; third, they can find new allies[169]. Another point to consider is, indeed, that, shifting-up, by seeking international leverage and European legitimacy, enhances freedom and legitimacy of national policy-makers back home, allowing them to justify their decisions[170].

Secondly, delegating monitoring and implementation powers to local authorities is another way that states have been using to respond to constraints on migration on a national and international scale. This shift of sovereignty downwards is a kind of decentralisation. National governments have given local elected officials significant decision-making authority through decentralisation initiatives. The reason why local venues appear to be places where

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[165] GUIRAUDON AND LAHAV (2000: 178).
[166] GUIRAUDON (2000: 257-259).
[167] GUIRAUDON AND LAHAV (2000: 178).
[168] GUIRAUDON AND LAHAV (2000: 180).
[169] GUIRAUDON (2000: 257-259).
[170] GUIRAUDON AND LAHAV (2000: 181).

to effectively circumvent constraints is the electoral success of anti-immigrant right parties. When local elected authorities are struggling financially and/or are under pressure from radical right-wing parties, they may try to draw attention by taking exceptionally harsh measures against immigrants in order to get more fundings or votes[171].

Lastly, the shift outwards of migration control involves third parties in burden sharing. According to Guiraudon and Lahav[172], states have transferred the powers for regulating migration to non-state actors, such as private, societal and business actors, by means of sanctions and a reallocation of responsibilities. Main examples of shifting out sovereignty towards private entities are visas and carrier sanctions. Carrier companies, particularly airline companies, are involved in document checking, also before people may arrive to the desired territory, and are fined if they bring people without the required documents. The multiplicity of entities involved in migration regulation implies a reallocation of responsibilities and implementation venues for external and internal controls. As regards the new venues, governments establish international zones, such as airports or detention centres, where it is nearly impossible for lawyers and human rights organisations to intervene. As a result, there is a lower probability that foreigners' civil rights will be protected in these "juridical 'no man's lands'"[173]. Furthermore, the involvement of non-state actors in migration management does not only concern the entry of people in the territory of the arrival state, but also the employment, the stay and the deportation of foreigners. Therefore, transport companies, security services, employers' groups are all part of this enlarged mechanism of control as state officers[174]. In this way, states push their border outward, by creating the so-called borders of paper – through visas – and enlarging their external borders – through controls in the country of origin of individuals – thus, they multiply their borders[175] and gain control at distance.

The outward shift of sovereignty and the control at distance of migration are comparable to what Aristide Zolberg coined as 'remote control'[176]. Remote control consists in the delegation of control to third parties[177], which manage prospective migrants' journeys before their actual arrival on the territory of receiving countries. In this manner, unwanted migrants and the groups of individuals that states want to admit can be separated, so as to avoid the situation in which migrants in need of protection cannot be expelled[178]. According to some scholars, remote control policies can be defined also as policies of *non-entrée*, deterritorialized control, outsourcing and

[171] GUIRAUDON AND LAHAV (2000: 181-184).
[172] GUIRAUDON AND LAHAV (2000: 184-188).
[173] GUIRAUDON AND LAHAV (2000: 185).
[174] GUIRAUDON AND LAHAV (2000: 188).
[175] PARKER AND VAUGHAN-WILLIAMS (2009: 583).
[176] ZOLBERG (1998).
[177] GUIRAUDON AND JOPPKE (2001: 13-16).
[178] GUIRAUDON (2000: 257-259).

externalisation[179]. Remote control includes not only carrier sanctions and visa policies, but also cooperation with third countries – of transit or of origin – and external institutional actors – such as IOs[180]. These cooperations may be bilateral or multilateral, and may be concluded in order to run joint paramilitary patrols, readmit irregular migrants, impede the continuation of certain migrants' journey, or detain irregular migrants[181]. In the words of some scholars, remote control might include also the delegation of powers to local actors; thus, every kind of delegation of control away from the central state institutions, either downwards, upwards or outwards, may be included[182]. Although this view is not easily agreeable, it is nonetheless true that the common feature of all these policies, in addition to the delegation of control power, is also the states' initial objective. The aim of receiving states is always the same, namely to keep away undesired migrants and asylum seekers from entering their borders. Once in a liberal state, immigrants would have the right to access legal protection[183]. Indeed, even states that adhere to the principle of *non-refoulement* attempt to prevent asylum seekers from access their territory, where they could ask for protection[184]. Whereas, by using remote control, states can circumvent these national and international legal constraints. Furthermore, it allows them to facilitate the entrance of first world travellers, such as tourists and businesspeople[185]. As a matter of fact, remote control is a strategy that allows states to circumvent all the three constraints of migration control – legal, economical, and political. Some academics see this shift of sovereignty as the first symptom of loss of state control over movement of people. On the contrary, this delegation of authority increases the capacity of states to control movements towards their territory[186].

Outward shift of sovereignty and remote control are strictly linked to externalisation. For this reason, after their delineation, it is possible to better define externalisation and externalisation policies, as it will be done in the following section.

4. Externalisation policies

A "New Vision for Refugees", a policy paper issued in 2003 by the Home Office and cabinet of British Prime Minister Tony Blair, suggested that the European Union create Regional Protection Areas ('RPAs') close to countries of origin of refugees. These RPAs would have been used to deport asylum seekers who have arrived in Europe as well as to house refugees in countries

[179] FitzGerald (2019).
[180] Guiraudon and Joppke (2001: 13-16).
[181] FitzGerald (2019).
[182] *Ibidem*.
[183] Guiraudon and Joppke (2001: 13-16).
[184] FitzGerald (2019).
[185] Guiraudon and Joppke (2001: 13-16).
[186] *Ibidem.*

of first arrival. At the same time, Transit Processing Centres ('TPCs') would have handled refugees and returned asylum seekers looking for a resettlement in the EU. Due to the lack of support, the proposal was never formally debated. Nonetheless, a variation of RPAs, Regional Protection Programmes ('RPPs'), was proposed by the European Commission in 2005[187]. This was one of the first attempts of the EU to externalise migration control. Furthermore, over the course of the following years, the EU and single MSs have worked jointly with migrant transit nations in order to carry out externalisation, with bilateral or multilateral partnerships, readmission and return agreements, and the formulation of the highly debated concept of 'safe third country'[188]. Then, the migration crisis of 2015 and 2016 has led the EU to create policies aimed at eradicating unauthorised access to Europe, through the support of third actors and a dedicated financial and technical support to third countries of origin or transit, thus, by preventing the exit from these countries[189].

Once understood how externalisation has become a key policy for the control of migration and borders in the EU, it is fundamental to comprehend what externalisation actually means. The term externalisation, which first appeared in the early 2000s, seems to have transformed into an umbrella term for any migratory measure, implemented unilaterally or multilaterally, extraterritorially or with extraterritorial effects. Still, this term has rarely been defined, leading to the emergence of related and overlapping notions[190]. Indeed, as indicated in the previous section, the concept of externalisation is comparable to the ones of remote control, *non-entrée*, deterrence, outsourcing, offshoring, and even extra-territorialisation. There are several reasons behind the confusion on this term's definition. First, it is not always clear where externalisation practices are implemented. Some definitions have a narrow geographic scope, focusing only on extraterritorial practices, such as pushbacks and extraterritorial asylum processing. Other definitions incorporate actions taken after migrants reach the destination state, but having an externalising effect, such as the notions of safe third country or of first country of asylum. Second, the term externalisation tries to comprehend the wide variety of State policies discouraging and redirecting asylum seekers. For example, boat pull and pushbacks, visa restrictions, carrier sanctions, extraterritorial processing and protection, international deployment of immigration agents, and the financing, supply, and instruction of migration management in third countries are a part of such activities[191]. Despite this large scope, in some definitions, it is still unclear whether policies intended to create complementary pathways, legal ways of access to the territory and resettlement procedures may be included under the term externalisation. Last, the lack of a definition of externalisation in

[187] Communication from the Commission to the Council and the European Parliament, 1 September 2005, COM (2005) 0388, *On Regional Protection Programmes*.
[188] FRELICK ET AL. (2016: 206-209).
[189] MORENO-LAX AND GIUFFRÉ (2017: 3).
[190] TAN (2021).
[191] *Ibidem*.

international law makes even more difficult to understand if and which activities are lawful or unlawful[192]. Given all the gaps and difficulties involved in formulating a clear definition of externalisation, it is necessary to identify a clear denotation of this term, at least for the purposes of this research. Before that, it is useful to analyse the already existing definitions of externalisation.

The notion of externalisation has its roots in the economic sciences and describes the practice of companies resorting to other companies to complete certain stages of their production process or support activities. States sometimes employ this model when they entrust the management of certain public services to private enterprises. In international migration law, the practice of shifting the control and management of migration flows from states of desired destination to states of transit has been inspired by the economic externalisation model[193]. Pascale uses the term externalisation of migration control referring to the externalisation of the borders of receiving states into states of transit or origin[194]. Other authors differentiate between the term externalisation and the term outsourcing. Pacciardi and Berndtsson, for example, define externalisation as a shift of migration management beyond the state by "relocating the border outside the state territory" [195], similarly to what Pascale suggests, focusing on the geographic feature of this phenomenon. Whereas, they define outsourcing as a shift of migration management through a delegation of border control functions to non-state and third-state actors[196], emphasising the role of actors involved in the activities. There are some who, on the other hand, equate the concept of externalisation with that of outsourcing, as mentioned above. For instance, Cherubini explains that migration outsourcing is a shift in the fight against irregular migration from the external borders of a state to the territory of third transit states[197]. However, what many of these definitions have in common is the emphasis on the objectives behind externalisation. Crisp affirms that externalisation is defined as "measures taken by states in locations beyond their territorial borders to obstruct, deter or otherwise avert the arrival of refugees, asylum seekers and other migrants who do not have prior authorization to enter their intended country of destination"[198]. Therefore, the aim of obstructing, deterring and protecting borders from irregular entries[199], preventing migrants from acceding to the legal jurisdiction or the territory of destination states[200], is the root of externalisation. As a consequence, states are relieved of duty for the management of all those matters arising from the entry of migrants into their territory. They do not have to

[192] *Ibidem*.
[193] PASCALE (2018: 416-417).
[194] *Ibidem*.
[195] PACCIARDI AND BERNDTSSON (2022: 4010).
[196] *Ibidem*.
[197] CHERUBINI (2019: 69).
[198] CRISP (2019).
[199] PACCIARDI AND BERNDTSSON (2022).
[200] FRELICK ET AL. (2016: 193).

examine the applications for recognition of international protection status, to manage reception, to integrate individuals to whom such status is granted, to repatriate individuals without a valid residence permit[201].

The Refugee Law Initiative ('RLI'), adopted at its 6th Annual Conference on 29 June 2022 a Declaration on Externalisation and Asylum. Specialised refugee law researchers and practitioners from across the world have agreed on some international law standards that regulate the legitimacy of externalisation policies. Furthermore, here they have given a definition of externalisation

> "as the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory. Such externalised functions might be implemented by a State unilaterally, jointly with other States and/ or entities – including International Organisations (IOs) and private actors – or through partially or wholly delegating the functions to other States and/ or entities".

In contrast to the previous definitions, here the idea that externalisation activities can be implemented also partially outside the territory of the externalising state is introduced. Furthermore, here it is specified that externalised functions can be implemented by a variety of actors, including states, individually or jointly, or third actors, such as IOs and private entities. Finally, such functions can be delegated either in full or only in part[202]. Cantor *et al*. have given a quite comprehensive definition of the term under exam, following the model of the RLI. They consider externalisation as an umbrella concept, not limited to migration only, but including every kind of state function, similarly to Pascale. In this sense, they believe that externalisation can comprehend both policies that restrict access to the territory for migrants, and measures that relocate abroad the processing of asylum claims. Moreover, they highlight the connection between the shift of some state functions abroad and the shift of responsibility for the externalised measures to the actors involved, although they do not consider this to be a necessary characteristic of externalisation[203].

As briefly explained in the previous paragraphs, depending on the type of definition used, some policies, measures and actions are included and others excluded from the concept of externalisation. As a matter of fact, there is a huge variety of policies that can be traced back to this notion. If externalisation is understood as a simple transfer of power in migration management, it is possible to include within it also all those projects aimed at encouraging legal and safe migration. For instance, private sponsorships or community-based programmes are protected entry mechanisms developed thanks to the help of private actors. Here the state cedes power to civil society actors who take care of the organisation of the process, reception and integration of refugees, even financially[204]. An example of community-based sponsorships are the humanitarian corridors, a project born from the collaboration among the

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[201] CHERUBINI (2019: 69).
[202] REFUGEE LAW INITIATIVE (2022: 114).
[203] CANTOR ET AL. (2022: 123).
[204] DE DONATO CORDEIL AND CHRISTOPHER (2015: 58-59).

Community of Sant'Egidio, the Federation of Evangelical Churches, the Waldensian Church and the Italian Episcopal Conference – through the Italian Caritas and Migrantes Foundation – the Ministry of Foreign Affairs and the Ministry of the Interior[205]. If externalisation is aimed at improving rights protections and development in countries of origin of migrants, it might comprehend all those funds created by the EU in order to provide aid to these countries. An example is the European Union Emergency Trust Fund for Africa ('EUTF for Africa'), that financed projects in Morocco[206] and Libya[207], in order to foster stability and address root causes for irregular migration and displaced persons, as well as reinforce the repressive capacity of these states. Even these policies with a humanitarian end have, nonetheless, the fundamental objective of controlling migration and preventing arrivals in the European territory[208]. This goal is pursued, indeed, by several policies of border and migration control, yet it is achieved in different ways, and not always considering the sake of migrants and the protection of their rights.

When thinking of examples of externalisation whose objective is merely the reduction and control of people arriving or only travelling to Europe, different entities may be involved. First, the aforementioned visa controls and carrier sanctions affect private actors, such as transport companies and airlines, which have become the first private actors to whom migration control powers have been externalised[209]. Additionally, also the Maltese decision to employ private vessels to conduct operations aimed at impeding the arrival of migrant boats into the Maltese SAR zone and in international waters can be included in externalisation policies involving private actors[210]. Second, NGOs and Civil Society Organisations ('CSOs') have supported some states in their policies of externalisation, through information and awareness campaigns on the feasibility of migratory projects and the risks of starting a journey to Europe in countries of transit and origin, such as Tunisia and Egypt, that are intended to prevent people from crossing the Mediterranean Sea[211]. Third, also IOs are entrusted by states with control powers in migration management. As a case in point, the IOM and UNHCR are main actors in some policies of externalisation conducted by the EU in Niger to filter and restrict migration from the Sahel region. These IOs have the duty to improve the regional management of migration flows, enhance the protection opportunities in that region and keep migrants far from the territory of the financer of these activities, namely, the EU and its MSs[212]. Forth, main actors cooperating with externalising states in migration control and management are third states. Among the several activities carried out by third states there are policies

[205] CARITAS ITALIANA (2020).
[206] FINOTELLI AND PONZO (2023: 69-85).
[207] PACCIARDI AND BERNDTSSON (2022: 4016-4017).
[208] *Ibidem*.
[209] CANTOR ET AL. (2022: 132).
[210] CANTOR ET AL. (2022: 135).
[211] CUTTITTA (2020: 6-10); *ID.* (2022: 1-10).
[212] VAN DESSEL (2019).

discouraging migration through both incentives for would-be migrants and physical or legal barriers; enhanced apprehensions of migrants through interdiction, interception and pushbacks with the logistical, financial or political support of externalising states; detention or interdiction of migrants thanks to financial and political support by states of desired arrival; policies addressing irregular migration[213] and readmission agreements that could result in a delegation of the examination of asylum applications[214]. As just mentioned, these practices are possible thanks either to financial incentives and practical support provided by States who externalise – and the EU – or to legal provisions deeming the transit or first arrival state as a safe third country or as first country of asylum[215]. Concrete examples of externalisation towards States are the cooperations on migration between Italy and Albania, and Italy and Southern Mediterranean Countries, developed already since 1990s[216].

Among the wide variety of outsourcing policies involving third states, mention should be made particularly of externalised asylum systems and pushbacks and pullback practices. Externalised asylum systems or third country processing entail a State externalising to another State its own asylum system obligations concerning refugees and asylum seekers beyond its territory, after they arrived in its jurisdiction. Use of offshore processing, exclusive jurisdiction zones in third states and safe third country principle allow the development of such procedures. The operations consist in a post-arrival transfer of asylum seekers and the examination of asylum requests intended to recognise asylum in the third state, prohibiting migrants from entering the intended country of asylum[217]. Outside of the EU, the UK and Rwanda negotiated an Asylum Partnership Arrangement in April 2022 to process and safeguard asylum seekers who enter the UK illegally, in Rwanda[218]. More recently, also Italy has concluded a protocol of enhanced cooperation with Albania[219], providing for the Albanian management of a quota of migrants rescued in the Mediterranean Sea by Italian military vessels and the establishment of two centres in Albania for border and repatriation procedures of migrants[220]. The practice of pushbacks, which entails intercepting and immediately sending back people who arrive at the border without considering their requests for entry or protection, is another border control tool that has become increasingly common in recent years, despite its unlawfulness. States conduct pushbacks, also outside their own territories, in order to prevent any irregular movement in

[213] FRELICK ET AL. (2016: 194-196).
[214] OTTAVIANO (2015: 125-126).
[215] OTTAVIANO (2015: 134-136); FRELICK ET AL. (2016: 194-196).
[216] RYAN AND MITSILEGAS (2010: 289-300).
[217] CANTOR ET AL. (2022: 149-150).
[218] Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda, 13 April 2022 *Memorandum of Understanding for the Provision of an Asylum Partnership Arrangement*.
[219] Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania, 6 November 2023, *Protocol for the strengthening of cooperation in migration matters.*
[220] RIJTANO (2023).

entrance and to avoid fulfilling its own legal obligations towards migrants. In doing so, they also cooperate with third states that force individuals back to their territories through pullback procedures or the so-called pushbacks by proxy. This is what happens in the Central Mediterranean Sea through the work of Libyan coast guards and at the border between Spain and Morocco[221]. In addition to the states, other actors are also involved in such actions of *refoulement*, such as private vessels, as said above. Yet, the most known contributor to these activities within the EU is Frontex, which has supported EU MSs in conducting pushbacks at the borders with Greece and Turkey, Croatia, and North Africa[222]. Frontex takes part in the externalisation process both by supporting the MSs in their activities and by cooperating with third states in joint operations[223].

After this analysis of how externalisation has been defined and what it can include, it is time to identify the definition that will be used in this research. In light of the complexity of this phenomenon, the definition of the Refugee Law Initiative seems the most complete, clear and all-encompassing. Its broad scope, indicating externalisation as a process of shifting functions in general, allows to use this term also in other States' control spheres. Furthermore, it takes into account the possibility that the externalising state might keep a part of control or partly fulfilling the same externalised activities. Lastly, this definition includes every single actor towards which states' functions can be shifted, namely, third States, other entities, IOs and private actors. Henceforth, when the term externalisation will be used, reference will be made to this definition. Moreover, here the term externalisation will be considered as a synonym of outsourcing and remote control, because connected to the concept of contactless control[224] that most externalisation policies imply. Despite the broad scope of the definition used, the present research will focus only on a specific group of externalisation policies. Precisely, the following analysis will focus on policies aimed at curbing migratory flows, reducing smuggling and irregular entries in the EU territory, and preventing access to legal international protection. This decision is driven by the human rights implications that this kind of policies may have and by the possible controversies that may rise in terms of responsibility in case of human rights violations. The following chapters will research on who can be deemed responsible for such violations and whether outsourcing states try to circumvent legal responsibility through externalisation.

[221] Cantor et al. (2022: 133-135).
[222] Cantor et al. (2022: 135).
[223] Cherubini (2019: 73-74).
[224] Moreno-Lax and Giuffré (2017: 14-19).

CHAPTER II – Responsibility of States and the European Union

The previous chapter has outlined the migration phenomenon affecting Europe from a statistical point of view; has introduced the institutional, legal and political background where migration policies have been developed in the EU; and has clearly defined what is meant by externalisation and what will be considered as externalisation policies in this research. This second chapter will focus on the concept of responsibility. In the first section, it will be explained why externalisation policies entail reflection on the responsibility of actors involved in them. In the second section, attention will be brought to the indirect forms of governance, namely the Principal-Agent theory and the theory of orchestration, to which externalisation can be assimilated, and that may imply a shift of responsibility. In the third section, an analysis will be made of what is meant by responsibility of states and IOs under international law; furthermore, an in-depth study of indirect forms of responsibility applicable to externalisation – complicity, direction and control and circumvention of international obligations – will be presented. In the fourth and last section, a brief outline will be drawn of how indirect forms of governance can be applied to norms on indirect responsibility as a useful instrument for a case-by-case analysis of responsibility attribution in externalisation policies.

1. The issue of responsibility in externalisation policies

As explained in the previous chapter, externalisation can take different forms, and in most cases it becomes a kind of 'contactless control', in which outsourcing states eliminate any physical contact between their authorities and the migrants, yet keeping control on migrations. In this way, jurisdictional links with these states and their responsibility for actions undertaken in the implementation of externalisation policies could theoretically be severed[225]. Indeed, states are not directly engaged, but ask third actors to fulfil their obligations to control and contain migration[226]. Nonetheless, in the actuation of such policies, third-party actors may incur the violation of certain norms of international law, and especially the violation of human rights. This research aims to find out to whom these breaches of the law are attributable. In particular, it is not clear whether they are attributable only to the actors who commit them, or also to those who control or assist them without any physical contact; and in what situations and to what extent responsibility can be attributed to the outsourcing state.

Shifting state functions to other entities implies also the attempts to shift responsibility for externalised activities, by adding legal complexity to

[225] Moreno-Lax and Giuffré (2017: 4).
[226] Moreno-Lax and Giuffré (2017: 10).

such policies[227]. By delegating the implementation of measures to prevent migratory flows from reaching their borders, outsourcing states evade any possible control over their actions[228]. Consequently, they feel entitled to do outside their territory and through others' actions what they prohibit domestically in accordance with international human rights and refugee law[229]. Externalisation is inextricably linked to the growing refusal of states to respect fundamental rights of migrants[230], since it can directly or indirectly cause several types of rights violations. For instance, it can affect migrants' right to life or the prohibition of inhuman and degrading treatments, which may be put at risk during transit, expulsions, deportations or imprisonments, such as in the perilous journeys migrants are forced to undertake, or in the detention centres created in European and third states[231]. Another example may concern the visa regime and carrier sanctions, when measures are implemented on a discriminatory basis[232], or asylum claims processed in zones with a special or extraterritorial status, where a lower standard of rights applies and these practices tend to be at odds with international law[233]. Furthermore, externalisation can also affect rights to leave a country, to apply for and enjoy asylum, by preventing migrants' arrival under a desired state's jurisdiction. Moreover, externalization can also affect prohibitions against *refoulement*, as it was explained in the previous chapter. The principle of *non-refoulement* is at the grounds of the right to seek and enjoy asylum, by guaranteeing access to screening and examination of any asylum claim. Most externalisation measures, in addition to preventing the movement of migrants towards Europe, often send individuals back to their point of departure. This practice of *refoulement* is commonly forbidden, since migrants are usually returned to a third territory where they face persecutions, harm or the serious threat of being returned to their country of origin. Therefore, *refoulement* is implemented indirectly, by proxy, by third actors involved in externalisation policies[234]. These pushbacks or pullbacks tend to breach the prohibition on collective expulsion, and the rights to a due process for each individual and to an effective remedy too. Whether they are extraterritorially carried out in another state's land or maritime territory or on the high sea, pushbacks are likewise illegal. *Refoulements* at sea raise further questions concerning legality in accordance with the law of the sea. Moreover, externalization measures at the basis of pushbacks can lead to the violation of established positive obligations of search and rescue by states involved[235]. These are only some of the violations of human rights and international norms which can be caused by the implementation of outsourcing policies, since each

[227] CANTOR ET AL. (2022: 123).
[228] CHERUBINI (2019: 81).
[229] GAMMELTOFT-HANSEN AND TAN (2017: 40-42).
[230] FLYNN (2021).
[231] FRELICK ET AL. (2016: 196-199).
[232] CANTOR ET AL. (2022: 135).
[233] GARLICK (2021: 7).
[234] FRELICK ET AL. (2016: 196-199).
[235] CANTOR ET AL. (2022: 135-141).

specific circumstance may vary in the actions perpetrated and their legal consequences.

When controlling borders and migration, balance must be found between states' desire not to allow third-country nationals into their territory, the obligation to safeguard those who need international protection and, in general, the obligation to respect fundamental rights of migrants[236]. Under international law, externalisation is *prima facie* neither lawful nor unlawful. The legality of a given policy is ascertained by its form and effect, which must conform to international legal norms that regulate treatment of individuals[237]. Then, once the violation of the law and thus the illegality of the action perpetrated has been determined on the basis of the form and effects produced by the latter, it is difficult to identify the responsible party in the framework of outsourced measures. Externalisation can bring up challenging questions about responsibility for both third actors and outsourcing states. According to some authors, not only actors who actively violate international law can be held responsible for such violations, but also states that support the internationally wrongful act of such entities. As a result, externalising states may be deemed responsible under international law for human rights breaches that occur at the hands of third parties, even outside of their borders, due to the support given[238]. Such support can take different shapes, depending on the level of assistance, on the degree of involvement, and on the level of control the outsourcing state has on the third actor. These variables, which will be better explained in the following sections, make the identification of liability even more complex.

In addition to this complexity, the location in which such breaches of law occur can make the attribution of responsibility even more arduous. In this regard, some courts[239] have recognised the extraterritorial applicability of human rights law, condemning states that had violated these rules outside their territory, but through their own authorities[240]. Two main trends prevail in the jurisprudence on extraterritorial jurisdiction. First, treaty bodies generally agree that, wherever a state exercises 'effective control' over a territory or 'authority and control' over an individual, it continues to have extraterritorial jurisdiction for the enforcement of human rights law[241]. Second, when determining extraterritorial jurisdiction, United Nations' ('UN') human rights treaty bodies are progressively agreeing on the 'direct and foreseeable effects' test. According to this functional approach, if a state knows at the time of action that there is a chance that its activities would result in an extraterritorial

[236] RYAN AND MITSILEGAS (2010: 300-301).
[237] CANTOR ET AL. (2022: 135).
[238] FRELICK ET AL. (2016: 196-199).
[239] Judgment of the European Court of Human Rights, 16 November 2004, 31821/96, *Issa and Others v. Turkey*; Judgment of the European Court of Human Rights, 7 July 2011, 55721/07, *Al-Skeini and Others v. the United Kingdom*; Judgment *Hirsi Jamaa and Others v. Italy*.
[240] GAMMELTOFT-HANSEN AND TAN (2017: 40-42).
[241] CANTOR ET AL. (2022: 123-129).

infringement of protected rights – 'foreseeable consequence' – the mere fact of being "a link in a casual chain that makes possible" the violation suffices to establish jurisdiction[242]. In the first case, there is no direct reference to outsourcing, but a link can be created when analysing externalisation policies where the outsourcing state exercises a certain power over the actions of third parties, although extraterritorially. In the second case, the concept of 'foreseeable consequences' can be directly applicable to extraterritorial violations of human rights as a consequence of externalisation, considering that the outsourcing state does not need to control either people or territory.

These few considerations, on the applicability of human rights obligations *ratione loci* and on the identification of liability for violations of international law when implementing externalisation policies, only partly depict the complexity of the subject under discussion. International law is not entirely clear in this respect, and there are various interpretations of the responsibility of states and IOs in these situations. This is also explained by the fact that externalisation policies are developed in such varied and diverse ways that it is not easy to find an unambiguous doctrine that can explain who, when and how can be held liable for violations caused by them. In fact, the following sections will analyse some of the theories used to interpret the indirect governance as a delegation of authority, in order to see whether these theories can also be used in situations of remote control. Furthermore, it will be necessary to understand what international norms underlie the responsibility of states and IOs, so as to provide a starting point for examining the responsibilities of the actors involved in human rights violations as a consequence of externalisation policies implemented in Europe. Then, an analysis of how to apply indirect governance theories to international norms on responsibility will be conducted.

2. Modes of indirect governance and responsibility

The shift of sovereignty and authority described in the previous chapter represents a form of governance executed indirectly. Abbott *et al*.[243] identify four different modes of governance on the basis of their directness or indirectness, and of their softness and hardness. From the intersection of these characteristics, 'hierarchy', 'collaboration', 'delegation' and 'orchestration' can be distinguished. As indicated by the following table, two of them are indirect modes of governance, namely delegation and orchestration. Externalisation can be connected to them.

[242] Communication of the United Nations Human Rights Committee, 21 August 2009, CCPR/C/96/D/1539/2006, *Mohammad Munaf v. Romania*, para. 14.2.
[243] ABBOTT ET AL. (2015).

	Direct	Indirect
Hard	Hierarchy	Delegation
Soft	Collaboration	Orchestration

Table 1: Four modes of governance.

Hierarchy is the typical mode of governance used by the nation-state domestically, being it direct and hard, accomplished through mandatory rules directly addressing citizens. Whereas, collaboration is used by national governments to apply softer means. It depends on the voluntary cooperation of target actors, and remains direct because governments directly interacts with them. On the other hand, indirect forms of governance rely on third actors, and can change depending on the level of control the state has on these intermediaries. Delegation is an hard indirect form of governance, because the governor has formal legal control over the third actor, supervising its activities, and conferring and withdrawing its authority. Orchestration is a soft indirect form of governance, due to the lack of strong control over third actors by the governor[244] and the use of soft inducements to mobilize them. The first mode is based on the P-A theory, according to which the governor is a 'principal' who delegates authority to a third part called 'agent'. While, the second mode involves an orchestrator who enlists an intermediary to govern a target by proxy[245].

Mode	**Governor**	→	**Third party**	→	**Target**
Delegation	Principal	→	Agent	→	Target
Orchestration	Orchestrator	→	Intermediary	→	Target

Table 2: Actors involved in indirect modes of governance.

These two forms of indirect governance are opposed to hierarchy, called by Hawkins *et al*. unilateralism, and to collaboration, also called international cooperation, where states, although making agreements with third parties, themselves implement policies agreed, without shifting their authority[246]. Nonetheless, these four ideal types of governance in the reality are most of the times mixed and blended into hybrid forms. Therefore, it is appropriate to consider the distinctions direct-indirect and hard-soft as the extremes of a *continua*, which includes all the degrees of directness and indirectness, as well as of softness and hardness. Hence, some direct collaborations may blend into indirect orchestration if third actors are more involved in the implementation

[244] ABBOTT ET AL. (2015: 18).
[245] ABBOTT ET AL. (2016: 719-721).
[246] HAWKINS ET AL. (2006: 10-12).

of policies, such as in cases of political dialogue leading to collaboration in the area of migration, which may then result in international agreements or MoU shifting governance to third parties through orchestration. In the same way, as orchestrators acquire more control over intermediaries, orchestration melds with delegation; or delegation blends into orchestration when principals relinquish control over agents[247]. This may happen in externalisation policies, which are not always easy to categorise within rigid models, as it will be explained in the next chapter. Another point to consider is also the connection that there could be between different modes of governance. Indeed, it is possible to link forms of governance in chains, such as in the cases where intermediaries of an orchestration process involve sub-intermediaries to whom they entrust part of their authority, becoming themselves orchestrators[248]. Another quite common example is also what happens in the delegation processes between states and IOs. IOs are usually considered agents of their MSs, who are collective principals who delegate their authority to them. However, in order to accomplish their objectives, IOs may enlist some intermediaries, thus entering into an orchestration relation. Simultaneously, the IO becomes both an agent and an orchestrator, integrating the P-A and the Orchestrator-Intermediary-Target ('O-I-T') models, as illustrated in the following table[249]. An example of this situation is the delegation relationship between MSs and the EU, and the orchestration the EU may develop involving other intermediaries, such as Turkey and Afghanistan, for migration control.

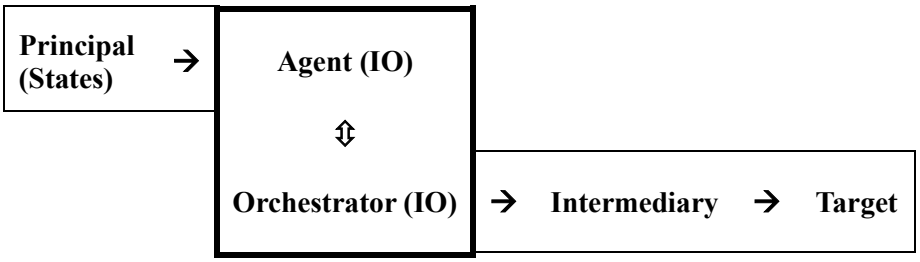

Table 3: IOs as agents and orchestrators.

An extremely important issue to consider concerning indirect governance lies in the reason behind states shifting their authority to other actors, and, in the present research, behind externalisation. A common view, based on a functional problem-solving approach, affirms that states or IOs entrust certain tasks to third parties who can perform them more effectively, efficiently or legitimately. Therefore, by employing external capabilities, principals or orchestrators can improve their own ability for governance[250]. They can assign powers in order to lower the transaction costs of policy-making and policy implementation, thus, maximising the gains and minimizing the losses this

[247] ABBOTT ET AL. (2015: 5-7).
[248] *Ibidem*.
[249] ABBOTT ET AL. (2015: 18).
[250] ABBOTT ET AL. (2016: 719-721).

shift of authority may cause[251]. The larger the benefits of indirect governance, compared to the classical direct one, the grater the number of circumstances states and IOs may decide to rely on third parties[252]. Nevertheless, these benefits may transcend the ones commonly studied and agreed regarding the enhancement of efficiency, effectiveness, cheapness, credibility, legitimacy and acceptability. As a matter of fact, externalisation policies sometimes entrust tasks to not credible actors, or entities who do not always implement policies more effectively than the same externalising actor. Thus, a new approach needs to be used to interpret actual reasons behind the choices of delegation and orchestration by states and IOs. Müller and Slominski propose a new interpretation of orchestration as a way of externalising[253], that will be used in the present research while analysing indirect forms of governance, thus will be applied to the delegation theory too. Müller and Slominski's argument is based on the idea that political actors may have recourse to indirect governance in order to avoid legal constraints. Thus, according to them, externalisation is a means to avoid legal constraints in the field of migration control. Their study affirms that there had not been a thorough investigation into the role of law in indirect governance. Yet, they clearly explain that this mode of governance can be employed as a strategy to circumvent legal responsibility[254]. Given the extensive use of orchestration and delegation in migration control, it is deemed appropriate to devote a more in-depth analysis to these two instruments in the following pages. In this way, it will be possible to understand whether and how to link externalisation policies to the concept of responsibility and to the circumvention of responsibility, by applying Müller and Slominski's reasoning.

2.1 Delegation: the Principal-Agent theory

P-A theory or agency theory was formulated by organisational economists in the 1960s and 1970s[255] in order to address problems related to risk sharing among multiple agents with different objectives and to division of labour[256]. It was used then in accounting, finance, marketing, organisational behaviour and sociology[257]. Also political scientists have largely embraced P-A theory to study authority delegation both at local and international level[258]. In particular, in domestic politics it has been adopted to model the double P-A interaction between, first, the electorate and political agents, second, the

[251] POLLACK (2006: 165-166).
[252] HAWKINS ET AL. (2006: 13-15).
[253] MÜLLER AND SLOMINSKI (2021).
[254] MÜLLER AND SLOMINSKI (2021: 801-803).
[255] WILLIAMSON (1975).
[256] VAN DESSEL (2019: 446-447).
[257] EISENHARDT (1989: 57-58).
[258] VAN DESSEL (2019: 446-447).

governments and agents providers of public services[259]. In international relations P-A theory has been adopted to analyse the phenomenon of delegation to IOs[260]. Furthermore, few authors have employed this theory to study delegation to other actors for migration control[261]. According to P-A theory "Delegation is a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former. This grant of authority is limited in time or scope and must be revocable by the principal"[262]. This relationship starts with an implicit or explicit contract, which established the powers the principal delegates to the agent to achieve certain objectives[263] and the degree of discretion – room of manoeuvre – the agent enjoys[264]. Such discretion refers to the possibility that in delegation contracts the principal specifies how exactly the agent should complete its tasks – 'rule-based contracts' – or gives a larger grant of authority to the agent – 'discretion-based contracts'. The first kind of contract reduces flexibility, not allowing an adequate response by the agent on the basis of the actual circumstances faced, and the advantages of specialisation an agent could guarantee if not forced to follow strict guidelines. The second kind of contract allows agents to use their level of expertise more freely, resulting in grater effectiveness, and is therefore preferred by most principals[265]. Hence, the grater the discretion given to the agents, the greater the autonomy they usually tend to have. Autonomy is the breadth of possible independent action that an agent may undertake once the principal has set up control mechanisms[266]. The principal role consists, indeed, in monitoring the agent's performance, rewarding it for its efforts, taking action against it when it is found to be underperforming or shirking[267]. The range of action, left to the agent once the principal has chosen the procedures for monitoring, screening and punishing it to limit its behaviour, represents the agent's autonomy[268]. Thus, at its core, delegation is hierarchical, due to the principal's strict control over the agent and its powers[269].

In P-A models, principal and agent preferences play a significant role in determining the results. However, the P-A approach makes no specific assumptions regarding the desires of involved actors. This theory is compatible with both theories that assume rational altruistic actors and theories supposing rational, egoistic, wealth-maximising actors. This is because, actors do not need to be fully aware or driven by material interests to use the P-A approach[270]. However, in cases where both partners in the relationship prioritise

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[259] LANE (2013: 85-86).
[260] VAN DESSEL (2019: 446-447).
[261] GUIRAUDON AND LAHAV (2000: 175-178).
[262] HAWKINS ET AL. (2006: 7).
[263] ABBOTT ET AL. (2016: 721).
[264] VAN DESSEL (2019: 446-447).
[265] *Ibidem*.
[266] HAWKINS ET AL. (2006: 7-9).
[267] ABBOTT ET AL. (2016: 721).
[268] HAWKINS ET AL. (2006: 7-9).
[269] ABBOTT ET AL. (2016: 721).
[270] HAWKINS ET AL. (2006: 7-9).

maximising their utility, there is the reason to suspect that the agent may not always behave in the principal's best interests[271]. As a matter of fact, delegation can produce cases of agency loss, namely situations in which the agents act against principal's interests. Kiewiet and McCubbins[272] distinguish between three categories of agency loss. First, hidden actions, which indicate the principal's inability to know every agent's action, may be a problem in the case of agency slacks, that is when an agent shirks[273]. Second, hidden information represents the principal's impossibility of knowing all that an agent knows. Third, according to the so-called Madison's dilemma, the principal must be sure that an agent it grants authority to perform a task does not turn that authority against it[274]. Therefore, a principal main issue is to make the delegate not only independent, but also accountable[275]. Another problem related to P-A relationship is agency costs. All the operations required to keep a safe relation between the two actors have an expensive cost[276]. Agency costs are the sum of principal's monitoring expenses, agent's bonding expenses and the remaining loss[277].

These costs and losses usually depend on the reason behind the choice of delegation. In the literature, several reasons for delegating powers have been discussed. The most commonly described are the aim of reducing decision-making costs, and the objective of enhancing the credibility of policy commitments[278]. Therefore, a functional interpretation has always been applied, because functions that agents are expected to perform and effects that policies are thought to have are used as explanations of institutional choices[279]. However, as previously explained, the present research firmly disagrees with this view of delegation in the field of migration control. An innovative conceptualisation should be used to analyse delegation, according to which, the reason behind delegation is not always grounded on functional reasonings, but in some cases lays on the desire to escape legal constraints. This might be true in the case of externalised migration control, whose aim may be to circumvent international responsibility. It has not yet been studied whether this objective has been achieved through externalisation, thus, this is what the following chapter of this research will try to understand.

Another point to consider when dealing with P-A theory is that there is not a single logic of delegation[280]. Apart from the motivation for delegating, also the degree of delegation may vary. Delegation can be represented as a variable D ranging more or less continuously between 0 and 1, where zero

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[271] Jensen and Meckling (1976: 308).
[272] Kiewiet and McCubbins (1991).
[273] Hawkins et al. (2006: 7-9).
[274] Kiewiet and McCubbins (1991: 23-26).
[275] Majone (2001: 119).
[276] Eisenhardt (1989: 57-58).
[277] Jensen and Meckling (1976: 308).
[278] Majone (2001: 103-104).
[279] Pollack (2006).
[280] Majone (2001: 103-104).

stands for no delegation, and one indicates full delegation[281]. Complete delegation entails giving the delegate total authority over a certain area[282]. Yet, there are variations in the degree of delegation towards agents, ranging from no delegation to higher degrees of power entrusting but not total. These variations change the kind of autonomy, independence and discretion delegates have. Furthermore, variations can be found in the level of monitoring and controlling of principals too[283]. Therefore, large divergences from the classic definition of delegation may be encountered in the reality, and could also come close to orchestration model. An example may be the case of discretion-based delegation contracts, where more autonomy is left to agents and, if no strong control is exercised by the principal, the relation could turn into a type of orchestration. Full delegation is usually what happens in MSs and EU relations on certain political fields. P-A approach is what characterises MSs-IOs relations, but the level of delegation to the European institutions is not the same as that granted to other IOs in their mandate.

Examples of externalisation for migration control that can be traced back to the P-A model are the projects developed by IOM and UNHCR – agents – in Niger with the support of the European Commission ('EC') – principal. From 2015, the IOM implemented three projects titled 'Niger: Strengthening governance of migration and the response to mixed migration flows in the region of Agadez' ('AGAMI'), 'Migration Resource and Response Mechanism' phase II ('MRRM') and 'Sustainable Return from Niger' ('SURENI')[284], while UNHCR worked for the 'Regional Development and Protection Programme' ('RDPP')[285]. Each of these projects established a specific delegation relation between the IO – IOM or UNHCR – and the EC. According to van Dessel, all the relationships created are illustrative of discretion-based delegation contracts, thus, contracts that outline principal's objectives, but give the agents the freedom to choose the most effective way to achieve them. Agents face few constraints from their principal, who gave to IOM and UNHCR a high level of discretion, lowering the costs of delegation for it[286]. Therefore, this is one type of externalisation policy that can be attributed to the indirect governance model of delegation and P-A theory. In the following sub-section a description of orchestration mode of governance will be given.

2.2 Orchestration

Orchestration is explained by the O-I – or O-I-T – theory, according to which an orchestrator mobilises and works through a second actor, called

[281] HORN (1995: 27).
[282] MAJONE (2001: 112-114).
[283] HAWKINS ET AL. (2006: 4-6).
[284] VAN DESSEL (2019: 448-449).
[285] VAN DESSEL (2019: 450-452).
[286] *Ibidem*.

intermediary, to govern a target[287], pursuing a joint governance objective[288]. This indirect mode of governance is soft in the sense that the orchestrator should facilitate the voluntary cooperation with the intermediary and has no strong control over it. The supportive system created by the orchestration makes it possible to achieve shared objectives, which neither the orchestrator nor the intermediary could achieve alone[289]. Intermediaries are usually NGOs and civil society actors, trans-governmental networks, business organisations, transnational partnerships, but also IOs, and in few cases states[290]. Since intermediaries voluntarily cooperate with the orchestrator, the last one must look for an actor that adequately sympathise with its goals. Orchestrator's material and moral support provides a modest leverage over the intermediary, who can materially strengthen its operational capacities, and enhance its effectiveness and legitimacy towards the target. Thus, orchestration empowers intermediaries while also giving the orchestrator soft control over them. However, the orchestrator cannot force or coerce intermediaries if they deviate from initially planned objectives. Consequently, this theory grounds on a more horizontal relationship of mutual dependency between the two actors involved, as opposed to the hierarchical relationship of P-A theory[291]. Moreover, just as in some contexts an agent – in a P-A relationship – can be at the same time an orchestrator – in a second O-I relationship; in the same way, the orchestrator of one relationship can be an intermediary in another situation and vice versa. Furthermore, in some circumstances, intermediaries become orchestrators of sub-intermediaries, forming in this way chains of orchestration[292].

The commonly agreed reason for the deployment of orchestration is the lack of competences by the orchestrator. Orchestrators, such as states and IOs, may need certain capabilities to achieve their objectives, including expertise, credibility, legitimacy and operational capacity[293]. In many cases, they lack these capabilities, thus they resort to orchestration as a substitutive instrument. Even more commonly, despite the existence of competences, these are insufficient to achieve certain goals, hence, this mode of indirect governance acquires a substitutive role[294]. In particular, IOs tend to have less powers than states to adopt and enforce mandatory and directly applicable rules, consequently, for them orchestration is the easiest mode of governance to overcome these limitations[295]. Lacking the ability to delegate, to strongly monitor and to enforce, these governance actors will prefer orchestration to attain their objectives, if suitable intermediaries are available[296]. A concrete example of orchestration chosen by an IO is the EU externalisation of crisis management

[287] ABBOTT ET AL. (2015: 2-3).
[288] ABBOTT ET AL. (2016: 722).
[289] ABBOTT ET AL. (2015: 2-3).
[290] ABBOTT ET AL. (2015: 7-9).
[291] ABBOTT ET AL. (2016: 722).
[292] ABBOTT ET AL. (2015: 13).
[293] VICERÉ (2021: 503).
[294] TALLBERG (2015: 166-167).
[295] ABBOTT ET AL. (2015: 7-9).
[296] ABBOTT ET AL. (2016: 727-728).

towards non-EU actors. Due to European problems of internal capacity-building, the EU has used orchestration in this policy field. This has allowed European institutions to rapidly create competences and filling capacity gaps. Nonetheless, in the long run this solution can prove to be unreliable, given the lack of hard control over intermediaries[297].

Another point to consider also in the case of orchestration is that reasons behind its choice can lay on the desire to circumvent legal constraints. Specifically, escaping international responsibility may be identified as the rationale for some cases of orchestration in the migration control field. There are several areas of EU's external migration policy where orchestration is visible, such as in the case of non-hierarchical and soft agreements between the EU and third countries as Turkey or Afghanistan[298]. Müller and Slominski in their seminal work *Breaking the legal link but not the law*[299] accurately study the EU migration governance in Libya, which, according to them, provides evidence of legal orchestration dynamics. They shed new light on the legal explanations and strategies behind the EU's – and Italian – shift from direct to orchestrated governance, and affirm that the EU has outsourced maritime border management and SAR operations in the Mediterranean Sea, diminishing its direct engagement, in order to circumvent legal responsibility deriving from the 2012 *Hirsi* judgement[300]. Here the EU and its MS did not need to compensate a lack of competences to regulate external borders effectively, otherwise they would not have engaged an intermediary that lacks the necessary capacity, legitimacy and credibility such as Libya. Instead, the aim of this orchestration was to continue pursuing *non-entrée* migration policies, while complying with legal constraints[301]. This is a form of externalisation policy that will be better analysed in the third chapter, where a more comprehensive idea of possible application of responsibility will be given. In the following sub-section, a comparison between the two modes of indirect governance will be done.

2.3 P-A and O-I models: divergences, similarities and their problematic nature

Delegation and orchestration have, therefore, some features in common, being two forms of indirect governance, but also some divergences connected to the relation established between the two actors involved. Firstly, the main difference between P-A and O-I theories is the level of control the principal or the orchestrator has over the agent or the intermediary. In the P-A model, the principal empowers and disempowers the agent by a contract, and has control over its activities. This is the reason why delegation is considered a hard mode of governance, where the agent needs to be motivated and

[297] GENSCHEL AND JACHTENFUCHS (2018: 190-191).
[298] MÜLLER AND SLOMINSKI (2021: 803-806).
[299] MÜLLER AND SLOMINSKI (2021).
[300] Judgment *Hirsi Jamaa and Others v. Italy*.
[301] MÜLLER AND SLOMINSKI (2021: 813-814).

incentivized to pursue principal's governance objectives. Whereas, in the O-I model, which is a soft form of indirect governance, the orchestrator does not command and control the intermediary, who voluntarily contributes to the joint activities[302]. Secondly, the level of control over the second actor is connected to the kind of relationship instituted. In the theory of orchestration, the voluntary cooperation of the intermediary depends on the goals shared with the orchestrator. Correlated goals consolidate the relationship between orchestrator and intermediary, overcoming conflicting interests. Determining the genuine objectives of a potential intermediary is hence the orchestrator's first challenge. In contrast, delegation does not pay attention to the presence of correlated goals. Having the principal hard control over the agent, complementary capabilities are the delegator's main concerns when establishing a P-A relationship. Thus, the principal's primary challenge is to supervise the agent's actions[303]. Thirdly, both delegation and orchestration are based on the need of complementary capabilities, however, the second model emphasises much more the importance of joint inputs from the two actors. Orchestrators usually lack capabilities for direct governance, consequently they rely on intermediaries to fill these gaps. At the same time, they use their competences to support intermediaries' activities, so as to improve intermediary performance when this is unable to accomplish the required tasks. Therefore, in orchestration there is a division of governance responsibility. On the other hand, in the P-A model there are situations when the principal is unable to complete required duties without the agent's expertise, nonetheless, the principal frequently employs an agent only to save money and time[304]. Fourthly, the main correspondence between P-A and O-I theories is the goal-seeking assumption. All the actors involved in indirect governance engage in it to achieve their goals. These goals may be either material or ideational, as well as either self-serving or altruistic. Not everyone can accomplish its objectives, and the two theories agree on the fact that there is neither perfect information nor perfect rationality when pursuing them, although in P-A model information asymmetry is fundamental for the establishment of such a relationship[305].

Given the differences and similarities between delegation and orchestration, and the extensive use of both, it is interesting to wonder what drives the choice between one mode of indirect governance and the other. This choice depends on three elements. First, the identity and the interests of governors, namely the future orchestrators or principals. Some governors prefer and are able to powerfully control, others may to be influenced by some veto players. Furthermore, if governors wish to earn political legitimacy from indirect governance, they will prefer delegation that allows them to closely hold an agent, instead of cooperating with a largely independent intermediary. Conversely, if governors' aim is to deny responsibility for indirect governance, they will lean towards orchestration where they can disclaim close association with the

[302] ABBOTT ET AL. (2015: 11-12).
[303] ABBOTT ET AL. (2015: 12-13).
[304] ABBOTT ET AL. (2015: 12).
[305] *Ibidem*.

intermediary. Additionally, salience can influence this choice, because the higher it is the more likely governors will be willing to bear the costs of delegation[306]. Second, third parties can have an effect on the decision between orchestration and delegation. Both forms of indirect governance function properly when there is a plentiful supply of third actors. This is because, easy replacement of agents is available as a threat in delegation, thus hard control is compelling; whereas, for orchestration there is a higher probability to find a both willing and competent intermediary. In the case of limited supply of third parties, the hierarchy of delegation is undermined by the lack of substitute agents, and this increases the principal's dependence on existing agents. Therefore, the only viable possibility is orchestration[307]. Last, the governance functions to be performed can have influence over the preference between P-A and O-I. Certain governance activities are best handled via orchestration, while others are performed more effectively by delegation. When governance duties imply high risks of large losses, intermediaries are not as incentivized as agents to accept such tasks, because intermediaries act more voluntarily than agents, who are encouraged by compensation and hard threats[308].

Despite the characteristics that conceptually differentiate orchestration and delegation, in practice these two models often overlap. On the one hand, when principals find it hard to threaten to revoke the power of their agents in a credible way, delegation merges with orchestration. On the other hand, when orchestrators acquire more authority over intermediaries, orchestration blends into delegation. Hence, in the reality the line separating orchestration and delegation becomes less as a boundary and more as a continuum. Another concrete element to consider is that governors frequently combine orchestration and delegation techniques. They sometimes use delegation contacts to give agents authority, but then they use soft means of orchestration to guide and encourage their behaviour, such as in the case of trusteeships. Inversely, they can also employ soft official acts to establish orchestration, yet hard control is used *ex post*[309]. This heterogeneity and complexity of real policies compared to models needs to be taken into account when analysing externalisation policies from these lenses.

As already explained, the present research sustains Müller and Slominski's argument according to which states and IOs resort to indirect governance, particularly in the field of migration, in order to circumvent responsibility. As a matter of fact, the possibility to shift responsibility attribution to other actors can be a strong motive for delegating authority[310]. However, thus far the literature has not systematically investigated the role of law as a motivation to make use of indirect governance and the relationship between indirect governance and international legal responsibility. Avoiding legal responsibility is different from breaking the law to achieve self-serving agendas. A

[306] ABBOTT ET AL. (2016: 724-726).
[307] *Ibidem*.
[308] *Ibidem*.
[309] ABBOTT ET AL. (2016: 722).
[310] BARTLING AND FISCHBACHER (2012).

strategic comprehension of the law is required to do it. Direct participation has repercussions on liability, but when a governor is not directly involved, it could try more easily to achieve its objectives while escaping responsibility[311]. Nonetheless, each indirect governance model has different legal implications[312]. When hard and legally-binding instruments are used to establish indirect governance, such as in delegation, a closer involvement is created with the agent's actions and, consequently, it is more likely that legal responsibility is assigned to the principal too. Whereas, when a relation is voluntary or non-hierarchical, the legal link between the two actors can be easily blurred or broken[313]. Nevertheless, once again, since in reality orchestration and delegation are rarely used as pure models, the attempt to escape international responsibility in migration control through indirect governance, whatever it may be, is always present. Indirect governance makes responsibility harder to assess, due to the presence of a mediator that separates the delegating actor – the state or the IO – from the eventually illegal action[314]. This represents the very problematic nature of indirect governance. Shifting liabilities away from the central actor while controlling migration can be problematic from a legal point of view[315]. For this reason, although states and IOs may try to circumvent responsibility through orchestration and delegation, a deep legal analysis is needed to understand who is actually assigned responsibility for unlawful acts performed indirectly. The models of indirect governance just described can be useful to better delineate the kind of relation intertwining externalising actors and implementing entity and to compare this relation to what provided for by legal norms on responsibility. Yet, before this comparison, a clear understanding of the main rules on international responsibility is needed. In the following chapter, the legal basis of responsibility will be examined, and a research of what can be called indirect responsibility will be conducted.

3. International Organizations and States' responsibility under international law

A clear legal definition of responsibility is needed to understand whether and in which circumstances states and international organizations, who make use of externalisation, can be deemed responsible for violations of human rights perpetrated by third actors while implementing externalising policies. In this section, an analysis of the codification of IOs and states' responsibility under international law will be made. Then, instances in which externalising actors can be said to incur indirect or secondary responsibility will be presented.

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311 MÜLLER AND SLOMINSKI (2021: 801-803).
312 ABBOTT ET AL. (2020: 621-623).
313 MÜLLER AND SLOMINSKI (2021: 801-803).
314 ABBOTT ET AL. (2015: 21-22).
315 LAHAV AND GUIRAUDON (2006: 211-212)

3.1 International legal responsibility: codification and conditions

In international law, responsibility is the legal relation created when a subject of the law violates the legal rights of another subject[316]. Therefore, responsibility is a natural consequence of obligation, or better, of a breach of an international legal obligation[317]. Depending on the relevant legal framework, the relation arising from the wrongful act can be either bilateral or multilateral, *vis-à-vis* a plurality of subjects or the entire international community[318]. The law of responsibility deals with the occurrence and effects of illegal activity, especially with regard to the ways in which losses are compensated[319]. A difference between contracts and delicts – or torts – or between delicts and international crimes committed by states is not acknowledged by case law[320]. Whilst in domestic law a distinction is made between civil and criminal liability, in international law liability is unique. It may be considered more akin to civil liability because it involves the obligation to make reparation for the wrongful act and not the imposition of a penalty, although the punishment of the agent who materially caused the wrongful act may sometimes constitute reparation[321]. Instead, a distinction between responsibility and liability has been suggested by NATO's practice, according to which responsibility is an abstract category comparable to the term blame, while liability indicates a need to compensate[322].

The general regime on states and IOs' responsibility is codified by the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') of 2001[323], and the ILC Draft Articles on Responsibility of International Organisations ('ARIO') of 2011[324]. These two projects are part of secondary rules, that influence the formulation and application of primary rules[325], as suggested by Special Rapporteur Roberto Ago[326]. He affirms, indeed, that norms on responsibility determine the consequences of failure to fulfil obligations established by primary rules[327]. These Articles are not yet part of any treaty, nonetheless, they have received an ample amount of attention and authority as an expression of the customary law before, and

316 CRAWFORD (2019: 523).
317 CANTOR ET AL. (2022: 129).
318 RONZITTI (2019: 399).
319 CRAWFORD (2019: 524-526).
320 *Ibidem*.
321 RONZITTI (2019: 399).
322 KLABBERS (2015: 318-325).
323 Report of the International Law Commission on the work of its Fifty-third session, November 2001, Supplement N. 10 A/56/10, *Draft Articles on Responsibility of States for Internationally Wrongful Acts.*
324 Report of the International Law Commission on the work of its sixty-third session, August 20011, A/66/10, *Draft Articles on Responsibility of International Organisations.*
325 CANTOR ET AL. (2022: 129).
326 CRAWFORD (2019: 523-524).
327 Yearbook of the International Law Commission, 1970, II, *Documents of the twenty-second session including the report of the Commission to the General Assembly*.

particularly after, 2001. For this reason, several scholars and governments have come to the conclusion that a convention is unnecessary and could disturb the delicate balance that ARSIWA has managed to establish. On the other hand, others believe that some Articles, such as the ones on multilateral responsibility, should be better clarified[328].

The League of Nations ('LoN') had already identified in 1930 the topic of the international responsibility of states as an issue deserving codification. In 1949, it was included in the ILC's list of topics. Garcia Amador, the designated Rapporteur on the subject, starting from 1955 provided reports which served as the foundation for the first attempt of codification. The Commission produced six reports between 1956 and 1961, but only in 1963 and later in 1969 works on the subject started again, guided by the Special Rapporteur Roberto Ago. Subsequently, Willem Riphagen and Gaetano Arangio-Ruiz were appointed Special Rapporteurs, and in 1996, the Draft Articles were approved at first reading by the Commission and sent to the states for comments. In 1997, the ILC led by the new Special Rapporteur James Crawford, on the basis of input from the states, removed certain rules in order to simplify the Draft and adopted it at second reading on 9 August 2001[329]. In its Resolution 56/83 of 12 December 2001[330], the General Assembly merely took note of the Draft Articles and recommended them for the attention of governments, without impeding any future action that might be taken. This recommendation was reiterated by Resolutions 59/35 of 16 December 2004[331], 62/61 of 6 December 2007[332], 65/19 of 6 December 2010[333] and 71/133 of 15 December 2016[334]. Thus, the project has remained in a sort of limbo but, interest is still high on the subject, and certain provisions, as previously said, have been deemed declarations of customary international law by the International Court of Justice ('ICJ')[335].

The project adopted in 2011, which was preceded by a set of recommended rules and practices on accountability of IOs of the International Law Association[336], was based on the preparatory work of Special Rapporteur Giorgio Gaja. Nevertheless, the actual blueprint followed by the ILC in that occasion was the 2001 ARSIWA. As a consequence, some scholars affirm that this decision of following ARSIWA was a mistake, primarily due to the fact

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328 CRAWFORD (2019: 523-524).
329 RONZITTI (2019: 400).
330 Resolution of the UN General Assembly, 12 December 2001, 56/83, *Responsibility of States for internationally wrongful acts.*
331 Resolution of the UN General Assembly, 16 December 2004, 59/35, *Responsibility of States for internationally wrongful acts.*
332 Resolution of the UN General Assembly, 6 December 2007, 62/61, *Responsibility of States for internationally wrongful acts.*
333 Resolution of the UN General Assembly, 6 December 2010, 65/19, *Responsibility of States for internationally wrongful acts.*
334 Resolution of the UN General Assembly, 15 December 2016, 71/133, *Responsibility of States for internationally wrongful acts.*
335 RONZITTI (2019: 400).
336 INTERNATIONAL LAW ASSOCIATION (2004)

that states and IOs are distinct legal entities with different organisational structures. Secondly, there are differences between IOs in terms of structure, functions, activities and political impact. Thirdly, ARIO lack a solid normative foundation; they are not grounded on a vast available practice, thus, they should have been interpreted more in light of progressive development, instead of already existing law. ARIO created rules to employ when IOs breach obligations towards states or other IOs, but not when they exercise public powers, such as controlling asylum applications. This limited scope of ARIO is the most criticised problem[337].

Considering that these two projects are almost identical in each of their parts, it is possible to make a unique analysis for what they both define as international responsibility. Some conditions need to be met for international responsibility to exist. In the first place, to assign legal responsibility to an entity, this can be a legal or a moral agent. This is not as claiming that they possess moral or legal personality. Indeed, if an entity has not legal personality, but act outside the law, it must be able to be held responsible for it. Thus, some moral theorists identify moral or legal agents as those entities capable of deliberating[338]. In the second place, objective element[339] for responsibility under international law is that the state or the IO has committed an "internationally wrongful act"[340], that is an action or omission of a State or an IO constituting a breach of an international obligation[341] incumbent upon them[342]. This occurs when none of the circumstances precluding wrongfulness apply[343]. An internationally wrongful act may comprise violations of international law that can be attributed individually or jointly, or a combination of both[344], to a state or an IO[345]. In order to assign responsibility, the kind of wrongful act committed does not seem to be significant; a breach of a treaty, of customary law or of a general principle of law do not make any difference for this purpose[346]. Therefore, the origin of the obligation is irrelevant[347], but the obligation must be in force[348] and the breach of this obligation can extend over time and can consist of multiple acts[349]. In the third place, responsibility

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337 KLABBERS (2015: 315-318).
338 KLABBERS (2015: 309-312).
339 RONZITTI (2019: 401).
340 ARSIWA, Article 1; ARIO, Articles 1 and 3.
341 ARSIWA, Article 2, para. b; ARIO, Article 4, para. b.
342 PAPASTAVRIDIS (2016: 171).
343 ARSIWA, Articles 20-25; ARIO, Articles 20-25. Even when an act is internationally wrongful, there are six circumstances in which responsibility does not occur, which are consent, self-defence, countermeasures, force majeure, distress and necessity. However, Article 26 affirms that it is not possible to rely on any of these circumstances if doing so would violate a peremptory norm of general international law.
344 CANTOR ET AL. (2022: 129-130).
345 KLABBERS (2015: 318-325).
346 KLABBERS (2015: 325-327).
347 ARSIWA, Article 12; ARIO, Article 10.
348 ARSIWA, Article 13; ARIO, Article 11.
349 ARSIWA, Articles 14-15; ARIO, Articles 12-13.

requires also a subjective element[350], namely that the internationally wrongful act is attributable to the state or the IO concerned. Official actions and inactions of its *de jure* and *de facto* – i.e. completely dependent[351] – organs make a state responsible, regardless of the character of the organ and of the function exercised[352]. As stated by ARSIWA, Article 4, para. 1, "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State […]". This norm covers, but is not restricted to, law enforcement organs, such as police, coast guard, immigration officers and military forces, regardless of their role or the level at which they are engaged[353]. With regard to the status as an organ of the state, reference is made to the state's internal law[354], as indicated in Article 4, para. 2. Furthermore, states may be held responsible for *ultra vires* acts of their officials[355], but proving that these have acted as legitimate representatives or organs, or that they have taken actions consistent with their official status[356]. In this area, case law is particularly abundant, especially as regards wrongful acts towards private individuals, and the behaviour of police and consular officials. Nonetheless, personal acts of officials are not comprehended in state responsibility, except if the state is accessory or tolerates this behaviour, without taking the necessary measures to prevent it – omission[357].

The same features of the subjective element of international responsibility of states apply to responsibility of IOs. In cases where an official employed by the organisation or one of its organs commit a wrongful act, the organisation will bear the primary responsibility for that conduct. Regarding organs, it is true that even *ultra vires* activities of the organ can trigger the IO's international responsibility. However, the identification of a link between agents or officials and the IO is quite problematic, since sometimes it is unclear where the organisation starts and its MSs finish. Hence, even the attribution of the wrongful act to an organisation might be challenging[358]. Moreover, another frequent and unclear scenario is when an IO uses locally employed agents or assigns private companies to handle part of its obligations. Some IOs also make use of MSs' troops. Judicial evidence supports the argument that these soldiers continue to be part of the contributing governments'

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[350] RONZITTI (2019: 401).
[351] The ICJ in its 2007 Judgment in Bosnia and Herzegovina v. Serbia and Montenegro held that, for the purposes of international responsibility, it is possible to equate organs of the state with even persons who do not have that status under domestic law. Yet, it must be shown that the state exercises a significant degree of control over them, subjecting them to 'complete dependence'. Judgement of the International Court of Justice, 26 February 2007, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v. Serbia and Montenegro*, para. 393.
[352] CANTOR ET AL. (2022: 130).
[353] *Ibidem*.
[354] RONZITTI (2019: 401).
[355] CRAWFORD (2019: 533).
[356] ARSIWA, Article 7.
[357] RONZITTI (2019: 403).
[358] KLABBERS (2015: 318-322).

armed forces, thus are still subject to the disciplinary laws and policies of those states and their national courts can prosecute them in case of breaches of international humanitarian law. However, in cases where the organisation's operations are funded by MSs' contributions, it is possible that these states assume subsidiary responsibility for providing the means to the IO[359]. In this respect, an extremely relevant element of states' international responsibility connected to IOs is that judicial practice seems to have accepted 'dual attribution'. The courts have confirmed what provided by Article 48 ARIO[360], arguing that in the event that an organisation commits a wrongful act, it is possible that the MSs will also commit that wrongful act, in the sense that the organisation's wrongdoing does not absolve the MSs of responsibility, and *vice versa*. Thus, when an IO and a state or another IO are responsible for the same wrongful act, the responsibility of each state and organisation can be invoked separately[361].

Two relevant examples of recognition of the dual attribution principle are the cases *Mothers of Srebrenica and Others v. the Netherlands* of 2014[362], and *Former Yugoslav Republic of Macedonia v. Greece of 2011*[363]. In the first case, the District Court of The Hague dealt with the massacre in Srebrenica of 1995, where 8,000 persons lost their lives after Dutch forces, who were aiding the UN in maintaining peace in Bosnia, failed to thwart Serbian attacks on a designated protected area. Many of the families of the victims filed a lawsuit against both the UN and the Netherlands in a Dutch Court. The District Court of The Hague granted immunity to the UN, whereas it ruled that the Netherlands shared some of the responsibility for the removal of approximately three hundred refugees from the safe haven concerned, through a cooperation with the Serbs. This decision was reached by applying the dual attribution doctrine, since, although the Court had no jurisdiction over the UN conduct, it decided to judge the Netherlands' conduct[364]. Similarly, in the second example, the ICJ decided to address a state's conduct separately, although the relevant conduct could have been also attributed to the plenary organ of NATO. More specifically, the Former Yugoslav Republic of Macedonia had initiated a legal action against Greece, claiming that Greece had broken a bilateral agreement between the two countries[365] by impeding Macedonia's admission to NATO. Despite Greece's counterargument on NATO responsibility and the lack of

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[359] KLABBERS (2015: 322-323).
[360] ARIO, Article 48, para. 1, "Responsibility of an international organization and one or more States or international organizations. 1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act."
[361] KLABBERS (2015: 324-325).
[362] Judgment of the Hague District Court, 16 July 2014, C/09/295247/HAZA 07-2973, *Mothers of Srebrenica v. State of the Netherlands.*
[363] Judgment of the International Court of Justice, 5 December 2011, 2011/35, *Application of the Interim Accord of 13 September 1995. Former Yugoslav Republic of Macedonia vs. Greece*.
[364] KLABBERS (2015: 324-325).
[365] Interim Accord between Greece and the Former Yugoslav Republic of Macedonia, 13 September 1995.

jurisdiction of the Court over NATO, the Court argued that there was little interest in debating attribution disputes between Greece and NATO, given that Macedonia's lawsuit focused on Greece's actions. Therefore, based on dual attribution doctrine, the Court judged Greece's conduct separately, and claimed that it had violated the bilateral agreement concerned[366].

A principle akin to dual attribution is joint and several responsibility of states. ARSIWA Article 47 provides for the norm of plurality of responsible states, according to which in the case of several responsibility for the same internationally wrongful act, each state can be deemed responsible for the conduct attributable to it, and this cannot diminish or reduce responsibility of any of the states concerned[367]. This is possible as long as entire amount of compensation does not exceed the harm endured[368].

Another problem of IOs' responsibility is that in the situations where the organisation alone is found responsible, it is not totally clear if the MSs may still have a role in it. For this reason, two distinct forms of residuary responsibility have been developed in the literature. The first is 'subsidiary responsibility', already mentioned in previous paragraphs and scarcely used in case law[369]. According to Hirsch the harmed party must first present its claim to the IO, and only if the organisation fails to provide a suitable remedy, the party is permitted to take legal action against the members[370]. The second form of residuary responsibility is 'indirect responsibility', whose concept is very similar to what provided for in Article 40 ARIO. The idea of indirect responsibility describes how MSs are held accountable to the organisation in order to help it fulfil its duties towards other parties. For instance, if the organisation cannot afford to perform its responsibilities, MSs should provide extra funding. This view of indirect responsibility is strictly linked to the dependence of an IO on its MSs and to its inability to act[371]. However, another interpretation of indirect responsibility is referred to relations between states, and could also be extendable to the relation between states and third entities. From this point of view, indirect responsibility refers to the responsibility of the state for an act or omission committed by another state in violation of international law. Hence, three parties are present, namely, the injured subject, the actor who materially committed the offence and the state that is held responsible despite not having committed the offence[372]. The latter part depends on the type of relationship that binds all actors involved with each other and with the wrongful act. This is what the following section will examine in depth.

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366 KLABBERS (2015: 324-325).
367 MORENO-LAX AND GIUFFRÉ (2017: 23-25).
368 CRAWFORD (2019: 537).
369 KLABBERS (2015: 328-330).
370 HIRSCH (1995: 155).
371 KLABBERS (2015: 328-330).
372 RONZITTI (2019: 405-406).

3.2 Indirect responsibility applicable to externalisation

Indirect responsibility is the logical continuum of indirect governance. Shifting authority does not simply mean shifting responsibility[373], both of them depend on the type of relation established between actors involved. The principal/orchestrator can no longer be said to have no responsibility at all for the acts committed by the agent/intermediary, as well as it is not possible that the first actor is involved in the action in the same way as the second. Therefore, the basis for its responsibility needs to be found elsewhere[374]. Any activity undertaken by an actor empowered by the law of a state to exercise elements of governmental authority can be attributed to that state[375]. Just as externalisation leads to contactless control, in the same way one could speak of contactless responsibility[376]. In 2001, the ILC identified three cases in which the responsibility of a state, who does not materially violate international law, comes into consideration. These are, first, aiding and assisting in the commission of the wrongful act – ARSIWA, Article 16 – second, directing and controlling in the commission of the wrongful act – ARSIWA, Article 17 – third, coercion to commit the offence – ARSIWA, Article 18[377]. These Articles are referred to responsibility of a State in connection with the act of another State. The same circumstances are recognised by ARIO for the responsibility of an IO in connection with the act of a state or another IO[378] and for the responsibility of a state in the commission of an internationally wrongful act by an IO[379]. Furthermore, ARIO express the responsibility for circumventing international responsibilities in Articles 17 and 61, due to the unique nature of the interaction between states and IOs and the possibility that a state may make use of an IO to avoid responsibility and *vice versa*[380]. Externalisation can be connected to three of these four forms of indirect responsibility, which are aid and assistance, direction and control, and circumvention of international obligations. This is due to the assumption that externalisation policies are the result of non-coercive contracts, where both parties agree to the implementation of the planned activities. Therefore, for the scope of the present research, only the first three circumstances will be analysed.

3.2.1 Complicity: aiding and assisting

The concept of complicity is widely known and used in common language. It is essentially about an actor taking part in a misconduct that another

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[373] Gammeltoft-Hansen (2011: 16-21).
[374] Klabbers (2015: 309-312).
[375] Cantor et al. (2022: 129-131).
[376] Moreno-Lax and Giuffré (2017: 19).
[377] Ronzitti (2019: 405-406).
[378] ARIO, Articles. 14-16.
[379] ARIO, Articles 48-60.
[380] Lanovoy (2016: 140).

actor has committed. One typical method used in criminal law to address complicity is to outlaw specific behaviours that would be considered involvement in another person's criminal activity. Someone may be considered complicit if it aids, abets, counsels, commands, induces, procures, helps, gives comfort or assists the commission of an offence[381]. Other reference is made to advising, persuading, inducing and soliciting[382]. A lot of time could be spent on a literal interpretation of these terms, whereas, they could be simply interpreted as complicity modalities or forms. These concepts have the common aim of forbidding complicity as a means of contributing to the commission of a wrongful act. This contribution consists of two kinds of action, first, intentionally supporting another actor in committing a wrongful act, second, intentionally influencing its decision to commit that wrong[383]. Therefore, complicity may trigger a derived form of responsibility for taking part in a misconduct perpetrated by another actor[384].

In the *Bosnian Genocide* case, the ICJ affirmed that, even though the term complicity is not currently used in the international law of responsibility, it may be comparable to a category found in responsibility customary law, namely, the category of 'aid or assistance', provided by one state to another in order for the second to commit a wrongful act[385]. Therefore, complicity can be used as a synonym of aiding or assisting. When an organ of one state is made available to another and works only on its behalf, the second state alone is held responsible for the behaviour concerned. Nonetheless, if a state or an IO help someone else commit an international wrong, they would be deemed responsible to the extent that their own actions contributed to the international wrongful act[386]. Thus, the offence is committed by the second state, otherwise it would give rise to a joint commission of the violation and responsibility. Responsibility for complicity is 'derivative'[387] of the 'principal' responsibility of the perpetrator, whereas joint responsibility is equally 'principal' for both actors[388]. In complicity, the state or IO is considered responsible for the act performed, namely aiding and assisting – despite apparently lawful – the commission of an internationally wrongful act by another actor, and not for the violation committed by the latter[389].

Responsibility for complicity was first codified in 1978 by ILC and the Special Rapporteur Roberto Ago, who introduced this provision in his seventh report to ILC, Article 25 ("Complicity of a State in the internationally wrongful act of another State"). It stated:

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[381] JACKSON (2015: 10-11).
[382] KADISH (1985: 343).
[383] KADISH (1985: 342).
[384] JACKSON (2015: 10-11).
[385] Judgement *Genocide*, para. 217.
[386] CANTOR ET AL. (2022: 129-131).
[387] JACKSON (2015: 55).
[388] PASCALE (2018: 428-432).
[389] RONZITTI (2019: 406).

> "The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State constitutes an internationally wrongful act of the State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful"[390].

In the following discussions, Ago emphasised the need of intellectual courage by the Commission when addressing complicity, in order to be the first promoter of progressive development of the law. As an illustration of multilateralization of the relations of responsibility, codifying this type of responsibility meant going beyond the monolithic interpretation of the breach, and governing through international law the involvement of multiple entities in the wrongdoing[391]. Nevertheless, in response to objections raised by governments and certain ILC members about Ago's terminology, the term 'complicity' evolved into the more neutral definition of 'aid and assistance'[392]. As a consequence, significant revisions were introduced into the former draft of Article 27[393] on the first reading of the ARSIWA. Furthermore, the extent of the provision and its practical implications were changed by the time of the second reading of the ARSIWA[394]. The original draft Articles 25 and 27 contained a terminology that permitted the complicit state to be held responsible even if it was not under the same obligation as the aided state. Furthermore, they contained a strict cognitive prerequisite implying that the aid and assistance needed to be provided expressly for the perpetration of an international transgression[395].

Final article on aid and assistance in ARSIWA is Article 16 ("Aid or assistance in the commission of an internationally wrongful act"), providing for

> " 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".

This provision has a narrower reach compared to its preceding Articles. Moreover, the Commentary to this Article still makes reference to the term complicity, used as a synonym for aid and assistance, although the scope of this

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[390] Yearbook of the International Law Commission, 1978, Volume II part I, *Report of the commission to the General Assembly on the work of its thirtieth session*, p. 60.
[391] LANOVOY (2014: 137).
[392] PASCALE (2018: 428-432).
[393] Article 27: "Aid or assistance by a State to another State for the commission of an internationally wrongful act. Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute a breach of an international obligation." Yearbook of the International Law Commission, 1978, Volume I, *Summary record of the thirtieth session*, p. 269.
[394] Yearbook of the International Law Commission, 1999, Volume II part I, *Documents of the fifty-first session*, p. 45-57.
[395] LANOVOY (2014: 137-140).

kind of responsibility is different from its original meaning. Influenced also by other treaties prohibiting complicity, the current Article 16 suggests acknowledging the overall prohibition against aiding or assisting in another state's wrongdoing[396]. The same applies to ARIO's provisions on complicity. Indeed, ARIO totally modelled its two Articles on aid and assistance on the ARSIWA example. Article 14 ARIO is dedicated to aid or assistance by an IO in the commission of an internationally wrongful act of a state or another IO:

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

Whereas, Article 58 ARIO deals with aid or assistance by a state – member or not member – in the commission of an internationally wrongful act by an international organization:

> "1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) the 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.
> 2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article".

The lack of practice concerning international responsibility for assistance provided by or to an IO has led the ILC not to make any substantial differentiation in the terms used, in the conditions and in the circumstances described by Articles 14 and 58 of the 2011 Draft compared to the ones provided for by Article 16 of 2001[397].

Complicity can stem from different types of help and assistance. It can be military, economic or technical assistance; assistance provided due to an existing treaty, but aware that it is not used in line with the terms of the agreement anymore; cooperation established by less formal agreements or MoU. These kinds of cooperation might facilitate the unrestricted sharing of intelligence, joint training, operational collaboration, exchanges of technological equipment, and so on. The provision of funding to the organisation for its extrabudgetary technical cooperation operations or the hosting of its headquarters, offices or meetings are additional forms of aid or assistance[398]. Even political or legal aid can be encompassed in the particular cases of these three Articles[399]. Indeed, according to the ILC Commentary on Article 16, international responsibility arises for any kind of assistance, whether commercial,

[396] *Ibidem*.
[397] PASCALE (2018: 428-432).
[398] LANOVOY (2014: 140-150).
[399] MORENO-LAX AND GIUFFRÉ (2017: 19-21).

financial, logistical, military and political[400]. Apart from the object of the assistance, a discussion arose on the kind of involvement that the aid and assistance entail. Paul Reuter proposed excluding remote forms of aid from the scope of international responsibility during the debate over the ILC's provision on responsibility for complicity. Nikolai Ushakov, another ILC member, believed that involvement ought to be direct and active. However, it must not be extremely direct since doing so would make the participant a co-author of the misconduct, which surpasses mere complicity. On the other hand, if involvement is too indirect, there may not actually be any complicity[401]. As a result, there are no content-based restrictions on complicit behaviour stipulated in Article 16 of the ARSIWA and Articles 14 and 58 of the ARIO. Regarding the nature of the aid or assistance in general, the ILC Commentaries remain silent[402], as well as on the possibility to include omissions in the conduct concerned. Similarly, scholars still do not agree on whether omissions can be included or not[403].

Getting to the heart of the matter through an in-depth analysis of the rules described in Articles 16 ARSIWA and 14 and 58 ARIO, it is possible to identify four conditions and features of international responsibility for complicity. The first requirement is represented by the connection between the lawful act of the assisting actor and the unlawful act of the assisted entity. This connection is a kind of 'abetment', indeed, complicity is often referred to as 'aiding and abetting'[404]. Any contribution that is directly related to the performance of the principal wrongful act would constitute aid or assistance[405]. Therefore, any form of aid or assistance produces responsibility to the extent that it can be proven to have facilitated or contributed in another party's commission of an internationally illegal act. This causal link and the degree to which assistance facilitates this commission are central to the responsibility debate[406]. It is not necessary for the assistance provided to be essential for the commission of the wrongful act, since the assisted entity would be able to commit the offence in any event, but this assistance must contribute significantly thereto[407].

The second requirement concerns knowledge, as indicated by letters (a) of the Articles examined. Assisting actors must be aware of their role in contributing to the commission of the international wrongful act. In most cases, states and IOs are not held responsible for the ways in which another entity uses their aid and assistance, if they have provided it in good faith. However, if the state has specific knowledge suggesting that the aid may be

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[400] PASCALE (2018: 428-432).
[401] LANOVOY (2014: 140-150).
[402] *Ibidem*.
[403] PASCALE (2018: 428-432). For more on the matter and on the difference between omissions as aid and assistance and due diligence, see LANOVOY (2014: 140-150).
[404] PASCALE (2018: 432-433).
[405] LANOVOY (2014: 140-150).
[406] *Ibidem*.
[407] GAMMELTOFT-HANSEN (2011: 16-21).

used for illegal activities, responsibility for complicity can exist[408]. This mental element requirement is still highly debated, because, in general, ascertaining the knowledge of a state or an IO is challenging. As a matter of fact, the interpretation of the knowledge requirement is unclear, as the level of specificity required is not defined. The ICJ, for example, in the Genocide case, applied this requirement rigorously, as 'full knowledge'. Whereas, in less specific circumstances, knowledge might be considered present when the assisting actor should have been reasonably aware of facilitating the assisted entity's unlawful conduct by its assistance[409]. For instance, this may happen in the case of human rights violations. Certain scholars argue that in situations where human rights are involved, it is legitimate to hold complicit states responsible based on a lower threshold of knowledge[410]. In the literature, it has been suggested that the element of knowledge can be ascertained by applying a test that takes into account the assisted entity's – mostly states – known propensity to commit offences; the existence of documents concerning the assisted entity's past commission of offences; the interests of the assisting actor in the region where the assisted entity commits the offence; the geographic proximity between the assisting actor and the region in which the assisted entity commits the offence; the fact that the assisted entity's offence has not been previously established and is therefore still in progress when the other State provides assistance[411] – hence, differentiating between instantaneous or continuous breach of the law[412]. Effective proof of knowledge of the circumstances surrounding the wrongdoing could rely on both direct and indirect evidence in addition to material evidence[413].

The third requirement, indicated by concerned Articles in letters (b) deals with opposability. Opposability stands for a commonality of obligations between both cooperating parties[414]. Therefore, international responsibility for complicity can only arise in relation to wrongful acts violating international rules that are binding on both the assisted and the assisting entity[415]. This principle should be interpreted in accordance with the norms expressed in the Vienna Convention on the Law of Treaties, Articles 34 and 35[416], which say that no state is bound by another state's obligations towards third states – *pacta tertiis neque nocent neque iuvant.* Due to this requirement, it is unclear whether the ARSIWA and ARIO Articles under examination would apply where an act would violate treaty commitments owed by the assisting actor but not by the assisted entity. This might be represented by the situation of

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[408] *Ibidem*.
[409] PASCALE (2018: 432-433).
[410] CANTOR ET AL. (2022: 129-131).
[411] LANOVOY (2014: 150-156).
[412] If it is not presumed that the state knew it was aiding in the commission of the initial wrongful act in a chain of continuous breach, when the violation continues and the state does not cease providing aid or assistance, the requirement of knowledge is considered to be in place.
[413] LANOVOY (2014: 150-156).
[414] MORENO-LAX AND GIUFFRÉ (2017: 19-21).
[415] PASCALE (2018: 432-433).
[416] Convention of the United Nations, 23 May 1969, *Vienna Convention on the Law of Treaties*.

externalised migration control, such as in the case of Libya that is not a party of the Convention on the Status of Refugees of 1951. Nevertheless, if an assisting actor cannot be held responsible for breaches of human rights binding only upon the assisted state, this does not mean that an assisting actor cannot be held responsible for violations of obligations only owed by itself[417]. The objective of the opposability requirement is to avoid that the assisting actor uses complicity to enable another actor to do what it cannot do without violating international law[418]. Therefore, externalising governmental functions such as migration control to third actors cannot be used as a justification for avoiding commitments owed under human rights treaties[419], as it will be explained in the next chapter. Some authors consider this requirement to be superfluous[420], and maintain that the inclusion of opposability may offer a safety valve to the complicit state or IO, which can argue that they are subject to a norm different from the one that the assisted wrongdoer broke. Hence, according to them, opposability brings to recognise that there is nothing wrong with aiding or abetting a violation of an obligation not binding upon itself[421]. In Crawford's view, Article 16 ARSIWA without paragraph (b) may become a means by which the effects of bilateral obligations can acquire universal extension. Nonetheless, according to Lanovoy, this bilateral point of view can prevent the growth or extension of responsibility for complicity with entities other than states or IOs, which are almost never bound by the same obligations. Moreover, the same problem arises with the same IOs, which are rarely bound by the same obligations as their MSs. In fact, this criterion received harsh criticism throughout the ARIO discussion and has no strong foundation in practice and *opinio juris*[422].

The fourth and last requirement for responsibility for complicity is intent. Although connected, intent should not be confounded with knowledge[423]. Unlike knowledge, the requirement of intent is not expressly mentioned in Article 16 ARSIWA, nor in Articles 14 and 58 ARIO. Rather, it is the ILC that introduced it in the Commentary. For the applicability of Article 16, it is stated that aid and assistance must aim at facilitating the commission of the wrongdoing, thus, a state can be deemed responsible for complicity only if it intended to facilitate the commission of the wrongful act through its aid and assistance. This raises the question of the actual value of intent in the definition of international responsibility for complicity[424]. As a consequence, part of the doctrine has given different interpretations to the issue. Some scholars do not differentiate between knowledge and intent for the purpose of international responsibility for complicity, agreeing with what Special Rapporteur

[417] Gammeltoft-Hansen (2011: 16-21).
[418] Moreno-Lax and Giuffré (2017: 19-21).
[419] Gammeltoft-Hansen (2011: 16-21).
[420] Gutiérrez Espada (2005: 215-220).
[421] Lanovoy (2014: 156-161).
[422] *Ibidem*.
[423] Moreno-Lax and Giuffré (2017: 19-21).
[424] Pascale (2018: 433-434).

Ago affirmed, namely that complicity inherently requires knowledge of the precise purpose and the intent to collaborate[425]. Alternatively, other scholars consider that for the definition of international responsibility for complicity, intent must be established independently from knowledge, being it an extremely relevant requirement. The only two exceptions of the case are represented by circumstances in which a state assists another state in the commission of violations of international law affecting the entire international community, and when assistance is provided in violation of *jus cogens*[426]. In the majority of situations it is, nonetheless, challenging, and almost impossible, to prove that a state not only knew that its aid would have been used to violate an international obligation, but also that it provided that aid with that intent[427]. A too strict mental requirement could result in the exclusion of situations in which assisting actors are complicity of law violations, not because they want to violate human rights, but rather because they implicitly acknowledge the possibility that such violations may occur, while pursuing other, less harmful objectives[428]. Hence, according to Lanovoy, knowledge requirement appears to be a more objective and practical condition compared to intent, and seems sufficient to trigger responsibility for complicity, unless the substantive norm violated specifically requires evidence of intent[429]. Furthermore, the intent requirement could create a contradiction within the Commentary itself, where, with respect to Article 2 ARSIWA, it is clearly stated that, regardless of its purpose, a state's action is the only element that counts to trigger responsibility[430]. The reference to intent in the Commentary, despite the absence of an explicit indication of this requirement in the text of Article 16, probably represents a compromise reached as a result of the different positions expressed in this regard by states during the work on the codification of the Draft Articles. This point was neither clarified in subsequent years when the 2011 Project was drafted, despite the several requests. Special Rapporteur Gaja, in his eighth report, stated that he had deliberately chosen not to explore the issue in depth precisely because of the diverging positions of states and IOs[431].

As concerns the position of these norms in international law, the rule on the international responsibility of states for complicity, as codified in Article 16 of the 2001 Draft, can be considered in conformity with general international law. During the drafting process, a minority of States actually declared their support for the customary character of the norm contained in Article 16. Although the ILC reported the opinion of these states in the Commentary, it avoided taking a clear position on the point. Nevertheless, the ICJ later confirmed the compatibility of the text of Article 16 with customary international law in its judgment in the *Genocide* case, without, however,

[425] QUIGLEY (1986: 113).
[426] GRAEFRATH (1996: 378); AUST (2011: 235-249).
[427] LANOVOY (2014: 150-156)
[428] MORENO-LAX AND GIUFFRÉ (2017: 19-21).
[429] LANOVOY (2014: 150-156).
[430] PASCALE (2018: 436).
[431] PASCALE (2018: 433-434).

precisely specifying all the constituent elements of the customary norm. In spite of this, its conclusions were agreed by the doctrine that addressed the issue in subsequent years[432]. As for the aforementioned element of intention, it seems preferable to disregard it as a customary norm in the framework of international responsibility for complicity, as was also done in the ICJ's ruling in the *Genocide* case[433]. Furthermore, the same authors who consider the requirement of opposability superfluous, question its inclusion in the customary norm of international responsibility for complicity[434]. On the other hand, the Commentary to the 2011 Project does not mention the position of the ILC on whether Articles 14 and 58 ARIO correspond to general international law. The customary nature of these rules has not even been discussed in the ILC, probably due to the very little practice in this area. Therefore, it is likely that Articles 14 and 58 were included in the 2011 Draft with the purpose of advancing the development of international law[435].

When dealing with externalised migration control, some more issues arise in relation to responsibility for complicity. One legal challenge refers to knowledge and intent requirements again. These often set a high threshold for determining responsibility in cases of externalisation of migration control. A great part of these agreements is shrouded in secrecy, and assistance given for assuming migration control functions is frequently connected to broader frameworks of trade or development aid agreements. It might be claimed that general conditions to combat illegal migration in externalisation agreement usually fall below the requirements of the examined norms, because aid and assistance provided is sometimes not directly related to the migration control functions conducted by assisted actors. Additionally, when aiding and assisting entities just exhibit indifference to violations of human rights that arise from their support to third parties, it is even more challenging to prove their knowledge and especially intent of violating international obligations[436]. To conclude, another legal challenge in externalised migration control is that Articles on aid and assistance do not outline states or IOs' responsibility in situations where they aid or assist a non-state actors different from IOs in breaching the law. Drawing a parallel with the conclusions in the Nicaragua case[437], even a preponderant or decisive state's involvement in the financing, training, supplying, equipping, organising and planning of a non-state actor's operations is insufficient to assign responsibility to that state. This may absolve assisting states and IOs from responsibility as long as their support does not escalate to the level where they may be held responsible[438].

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[432] PASCALE (2018: 434-436).
[433] *Ibidem*.
[434] GUTIÉRREZ ESPADA (2005: 215-220).
[435] PASCALE (2018: 436).
[436] GAMMELTOFT-HANSEN (2011: 16-21).
[437] Judgment of the International Court of Justice, 27 June 1986, *Case concerning military and paramilitary activities in and against Nicaragua. Nicaragua v. United States of America*, para. 115.
[438] CANTOR ET AL. (2022: 139).

After this analysis of norms on responsibility for complicity, the other two forms of indirect responsibility applicable to externalisation policies will be examined. The following section will deal with direction and control circumstances.

3.2.2 Direction and control

Article 17 ASRIWA provides for the possibility of triggering responsibility in cases of 'direction' and 'control' by one state constraining another state's sovereign decisions for its own benefit[439]. More precisely, this article deals with direction and control exercised over the commission of an internationally wrongful act, affirming that:

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

In addition, Article 15 ARIO represents the parallel provision to Article 17 ARSIWA addressing behaviours of IOs and the potential wrongdoing via direction and control. It states that:

> "An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:
> (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that organization".

When crafting the 2001 provision, Special Rapporteur Ago considered the relationship of dependency of one state upon another and the possibility that the dominant state might be held responsible for an illegal conduct committed by the dependent state[440]. Therefore, the direction and control by one state must be over a wrongful act[441]. In the past, the relationship between states and their protectorates has been a commonly agreed as an illustration of this kind of connection, since the protected state acted under the direction and control of the protector. Nonetheless, this kind of relationship is almost non-existent in modern times[442]. On the other hand, military occupation scenarios can still involve instances of one state controlling and directing another, as well as other particular examples of influential relations for the implementation of specific policies. In these circumstances, both the directed (or

[439] Moreno-Lax and Giuffré (2017: 22).
[440] Lanovoy (2016: 141).
[441] Ronzitti (2019: 406).
[442] Lanovoy (2016: 141).

controlled) state and the directing (or controlling) state can be deemed responsible, since there is no higher order exemption in relations between states[443].

Both provisions identify two conditions to fulfil in cases of responsibility proceeding from direction and control. The first condition, as in the case of complicity, is knowledge. Directing and controlling entities must act knowing the circumstances of the internationally wrongful act. The second condition concerns the wrongful act itself. The act accomplished by the directed and controlled entity, if committed by the directing and controlling entity, shall be deemed internationally wrongful[444]. Here the term entity refers to IOs and states indistinctly, since, although ARSIWA speaks only of states and ARIO deals with IOs that direct and control states or other IOs, case law enlarges the potential exercise of direction and control by states towards IOs too[445]. These two conditions raise issues akin to the ones related to responsibility for complicity concerning knowledge and opposability. Contrary to Article 16, however, responsibility for direction and control may eventually lead to the directing or controlling entity's exclusive responsibility, as long as dependent entity has no autonomy left over its decision-making with regard to the commission of an internationally wrongful act. Indeed, when the dependent actor retains some degree of autonomy in the specific area of the obligation violated, it would be responsible for its own actions, even if the directing and controlling entity gave it instructions to violate the law[446].

As concerns the activities of directing and controlling, in accordance with the ILC, control refers to situations in which one party has dominance over the behaviour in question, rather than just exercising oversight and supervision. Hence, the effective control of the relevant operations must be demonstrated[447]. The theory of effective control grounds on the *Nicaragua-United States* case before the ICJ, and is opposed to the theory of overall control proposed by the International Criminal Tribunal for Former Yugoslavia, according to which an overall control on the conduct of the groups of individuals is sufficient for the conduct to be attributable to the state[448]. This criterion

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[443] RONZITTI (2019: 406).

[444] MORENO-LAX AND GIUFFRÉ (2017: 22).

[445] "This principle is fully transposable to cases where the power of direction or control is exercised not by another State but, as is the case here, by one (or two – since NATO is responsible for the "direction" of KFOR and the United Nations for "control" of it) – international organization(s)." Preliminary Objections of the French Republic before the International Court of Justice, 5 July 2000, *Legality of Use of Force. Serbia and Montenegro v. France*, p. 33, para. 46.

[446] LANOVOY (2016: 142-143).

[447] Judgment *Nicaragua v. United States of America*, paras. 109 and 115; Judgment of the International Criminal Tribunal for the former Yugoslavia, 15 July 1999, IT-94-1-A, *Prosecutor v. Duško Tadic*, p. 38.

[448] In the case of Nicaragua and the United States, the ICJ did not find any act of the Nicaraguan rebels – contras – to be in violation of humanitarian law and attributable to the US. This was because it was not proven that the US, as it was not proven that the US had effective and extensive control over contras actions while aiding them. Conversely, the Appeals Chamber of the Tribunal for the Former Yugoslavia determined that the actions of the Bosnian Serbs could be imputable to the Former Republic of Yugoslavia in the context of the Bosnian Serb conflict as

of overall control was rejected by the ICJ, reaffirming the concept of effective control in the case of *Genocide*[449], due to the tendency of the former to over-extend international responsibility far beyond the fundamental principle that the state is only responsible for the conduct of persons who, in whatever capacity, act in its name[450]. Furthermore, another element to consider is that control must be detailed, thus, particularly connected to the actions that constitute the international wrong[451]. In the same way, direction implies more than mere abstract incitement and suggestion; it also encompass a concrete order of an operational type[452].

The control and direction paradigms are therefore challenging to implement in real-world situations due to the aforementioned constraints[453]. As a matter of fact, both direction and control must be exercised over the misconduct by the dominating state or IO in order to trigger responsibility. Furthermore, the degree of control exercised need to be taken into account. Mere representation, or the relation established within federal states, do not reach the threshold needed for actual domination to exist. In fact, Articles 17 ARSIWA and 15 ARIO seem to have a rather limited area of applicability, since they assume the presence of dependence relationship and the actual power of the dominant actor to direct acts of the dependent entity[454]. Despite this, the ARSIWA Commentary notes that neither direction nor control should be interpreted as implying complete power, leaving room for general instructions. Consequently, a legally binding mutual commitment may serve a as a kind of direction of the involved entity, which is not granted discretion to behave in a legal way while complying with the decision[455]. This is what often happens in agreements aimed at reducing migratory flows, combating transit and preventing departures of migrants. Hence, also this kind of indirect responsibility can be applied to analyse real cases of externalisation policies where the externalising state or IO controls and directs activities of the third party involved in controlling migration. In the following subsection a presentation of the last indirect form of responsibility will be made, namely, the circumvention of international obligations.

3.2.3 Circumvention of international obligations

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an international armed conflict. This was based on the fact that their militias were armed and financed by Former Yugoslavia, which also exercised supervision and planning over their actions. Judgment *Nicaragua v. United States of America*, paras. 109 and 115; Judgment *Prosecutor v. Duško Tadic,* pp. 47-48.

[449] Judgement *Genocide*, paras. 399-402.

[450] RONZITTI (2019: 402-403).

[451] MORENO-LAX AND GIUFFRÉ (2017: 22).

[452] ASR Commentary, at 69, para. 7.

[453] MORENO-LAX AND GIUFFRÉ (2017: 22).

[454] LANOVOY (2016: 142).

[455] MORENO-LAX AND GIUFFRÉ (2017: 22-23).

ARIO introduced an element of novelty in the attribution of indirect responsibility of states and IOs compared to the previous Draft of 2001. It provided for two norms on the circumvention of international obligations, also called circumvention by induction, in Articles 17 and 61. In particular, Article 17 is on circumvention of international obligations through decisions and authorizations addressed to members, and affirms:

> "1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.
> 2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.
> 3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed".

Whereas, Article 61 shifts the focus towards circumvention of international obligations of a state member of an international organization, stating that:

> "1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
> 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization".

In the first situation, the norm deals with IOs circumventing their commitments under international law by requiring their MSs to implement decisions and authorizations that are against that law. The 'layered' nature of international organizations and the evolving body of international law are both reflected in this provision[456]. In order to avoid its international obligation, the organisation adopts a binding decision or an authorization towards a MS or IO. These documents represent the starting point of this responsibility, because, if the same act was committed by the former organisation, it would be internationally wrongful[457]. The possibility, that either a binding decision or an authorization can be used, determines the temporal distinction regarding the emergence of the internationally wrongful act. When an IO uses a binding decision, its responsibility begins the moment the decision is taken. When it comes to authorizations, an international organization's responsibility begins when a MS acts upon that authorization[458]. Difference between binding decisions and authorisations is also the legal obligation created by them. Indeed, the second do not create any obligation, but they are neither recommendations. An authorisation delegates, confers or provide certain functions and

[456] BRÖLMANN (2007: 2).
[457] LANOVOY (2016: 144).
[458] LANOVOY (2016: 144-145).

competences to actors which did not previously hold them, affecting the legal status of the addressee[459]. Another point to consider is that the terms of the decision taken can change the degree of discretion left to the MS or IO involved to implement that measure. Whether the responsibility is on the state or IO, on the circumventing IO, or both, depends in large part on the discretion granted to the third party[460]. This normative control exercised by the circumventing IO is a feature quite similar to the relationship established in the P-A model according to Lanovoy, and could shift the attribution of responsibility to the circumventing organisation or could prompt concurrent attribution to both IO and MS (or second IO) [461].

In the second circumstance, Article 61 covers an inverted scenario, in which a MS seeks to avoid its international obligations through an organisation that has competence on the subject-matter of the obligations. This norm is also used to guarantee the states' obligation to act to protect human rights. Indeed, states cannot transfer competence to act to an organization, because they need to ensure the respect of human rights[462]. This is what might happen when, for example, states externalise the control of their borders to other IOs and delegate the power to examine asylum applications, not guaranteeing on their own the respect of migrants' rights. As a matter of fact, to compare these norms with the ones already examined, Articles 17 and 61 ARIO cover conducts independent from the illegality of the principal wrongful act, in contrast to situations of complicity. Furthermore, unlike the responsibility for aid and assistance, the responsibility for circumventing international obligations is not subject to conditions of knowledge or opposability. For this reason, according to some scholars[463] this indirect form of responsibility adds another level of protection against the exploitation of IOs' distinct personality and expands the rules for indirect attribution compared to complicity[464].

Nonetheless, some doubts may arise from these two Articles and provisions. First problem is that, according to the ARIO Commentary, an intent of the IO or the state to exploit the second entity's independent legal personality to evade fulfilling its obligations under international law is needed[465]. As previously explained, also here the necessity of intent is problematic as it limits the extent of responsibility, needlessly according to some[466]. A second issue concerns the wrongful acts. The ILC did not clarify whether these Articles actually hold the circumventing actor responsible for its own actions or if they just reflect its responsibility for the actions of others. The idea that Article 17 and 61 imply responsibility even in the absence of wrongdoings is unconvincing and might jeopardise the core principles of international responsibility law.

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[459] VOULGARIS (2014: 46).
[460] LANOVOY (2016: 145-147).
[461] *Ibidem*.
[462] *Ibidem*.
[463] VOULGARIS (2014).
[464] LANOVOY (2016: 145-147).
[465] LANOVOY (2016: 144).
[466] NEDESKI AND NOLLKAEMPER (2012: 48).

A third concern regards the distinction in Article 17 of IOs' normative acts, which, according to Nedeski and Nollkaemper, is superfluous and may undermine the independence of an IO's internal legal system[467]. Lastly, most importantly, these two Articles have revealed fundamental contradictions in the concept of international responsibility, rising many questions. For instance, it is not yet clear if responsibility is determined by wrongfulness, involvement in harm or another factor. Moreover, uncertainties are still present on the basis for dividing remedies between IOs and states in case of joint responsibility, and thus also in examples of indirect responsibility. Given the dearth of practice, the ILC cannot be blamed for not conceptually developing these points. Practice might, indeed, provide more solutions to the questions raised both here and in the previous sections[468]. The ILC projects should be considered as normative lenses that can be used to evaluate such practices and driving forces to implement a change.

After having examined the main legal norms on international responsibility of states and IOs, and deepened the analysis on indirect forms of responsibility applicable to externalisation policies, the last section of this chapter will deal with the connection between indirect forms of governance and indirect forms of responsibility, and, in particular, with the way in which the first ones could facilitate the analysis of international responsibility in externalisation policies.

4. Indirect governance models applied to indirect responsibility norms

The objective of this chapter is to delineate useful guidelines to analyse the relations underpinning externalisation policies and the kind of responsibility applicable to specific cases. In other words, the modes of indirect governance described in section two can support the examination of single externalisation policies, by assessing the kind of relationship between externalising and implementing actors, the degree of autonomy left to the second ones and the level of contribution and involvement of the first ones to the violations of human rights taken into consideration. This assessment can help in the evaluation of which kind of responsibility norms can be applied to the specific policy and of whether some conditions required by these norms are fulfilled for responsibility to exist.

There are two possible parallelisms to draw between the models of indirect governance and the conditions for indirect responsibility. The first one relates to the contribution to the illegal act and the second one deals with the knowledge condition. In the first place, the three indirect forms of responsibility applicable to externalisation policies just analysed concern three different types of contribution to the illegal act by the state or IO who aids or assists,

[467] *Ibidem*.
[468] *Ibidem*.

directs and controls, adopts a decision or authorises, or causes the commission of a wrongful act. The placement of externalisation policies within the indirect governance categories, as well as the analysis of the relationship between the actors involved, would make it possible to understand what kind of contribution is provided by the externalising entity to the implementing entity for the fulfilment of the externalised activities. For instance, in the case of direction and control, where one party has dominance over the behaviour in question, the relation between the two actors involved should be traced back to the P-A model, that is an hard form of indirect governance, and would be less likely associated with orchestration, where the orchestrator mainly exercises oversight and supervision. Then, given the fact that control must be effective and detailed, and direction must consist in a concrete operational order, a ruled-based contract of delegation should be identified in the analysis of the externalisation characteristics, where the principal specifies how exactly the agent should complete its tasks. However, since direction and control should not imply complete power and leave room for general instructions, such dependence relationship might also be based on a more discretion-based contract, but always within the framework of delegation. As for complicity, both orchestration and P-A models can be applied to cases of aid or assistance, yet the delineation of specific features of the policies under review on the basis of these two models would help to understand what kind of assistance is provided and the level of contribution in the commission of the illegal act. Finally, the circumvention of international obligations provides for three different circumstances. In the case of circumvention by an IO through a binding decision (Article 17, para. 1, ARIO), a hierarchical relation is created through a legal obligation which can be compared to the P-A relation. When an authorisation is used (Article 17, para. 2, ARIO), the relation between the actors involved is less hierarchical and more autonomy is left to the MS or IO implementing the policy. Depending on the degree of discretion left and on the control exercised by the externalising IO, either a softer P-A model or orchestration can be associated to it. Lanovoy proposes a connection with the P-A model, due to the normative control exercised in some cases also through an authorisation[469]. However, also orchestration could be considered when more discretion is left and when the objectives set by the policies concerned cannot be achieved without the help of other entities, as frequently happens to IOs. On the other hand, Article 61 ARIO provides for such generic circumstances that both P-A and O-I-T models can be connected to it. The vague content of the rule might suggest that the relationship created in those cases must be soft as in orchestration, but it is precisely this lack of specific indications that may encompass different types of relationships. As a consequence, the application of indirect forms of governance during the analysis of single policies might be useful to better understand the relation between the actors involved.

In the second place, the study of externalisation policies through the lenses of indirect governance models can help in the evaluation of the

[469] LANOVOY (2016: 145-147).

knowledge condition, required by complicity and direction and control. Knowledge is strictly connected to autonomy, in the sense that the more autonomy is granted, the less likely it is that the externalising entity is aware of its contribution to the commission of the wrongful act. On the other hand, the less autonomy is granted, the more control is maintained by the outsourcing actor, the more likely it is that the knowledge condition is fulfilled. Therefore, in the P-A model, where the agent tends to be not autonomous and the principal exert a strong control over it, by also carefully monitoring the agent's actions, knowledge can be assumed to exist. On the contrary, cases of orchestration are unclear as regards this condition, since O-I-T implies more autonomy of the intermediary. An investigation on the degree of autonomy and the kind of orchestration might help in the understanding of knowledge presence. Furthermore, given that the level of specificity of knowledge requirement is not defined by legal norms and that this criteria can be considered fulfilled also when externalising entities should have been reasonably aware of facilitating the assisted or directed entity's wrongful act; in cases of larger autonomy, a double-check can be carried out using the previously described test for implicit knowledge.

To conclude, the forms of indirect governance should be used in the present analysis as a tool to better understand externalisation policies and to help assessing what type of legal norms on international indirect responsibility can be applied to specific cases. This is what the next chapter will try to do, using both international rules and indirect governance theories to study particular externalisation policies and understand, in each example, the level of contribution and involvement of actors, the degree of autonomy, and, thus, the fulfilment of criteria required by legal rules. This chapter has analysed the problems of externalisation in connection with international responsibility; has examined indirect forms of governance; has described international law on responsibility, with a focus on indirect forms of responsibility applicable to externalisation policies; and has explained how indirect forms of governance can be applied to norms on indirect responsibility as a tool in externalisation policies' analysis. The next chapter will delve into the concrete issue of responsibility avoidance through externalisation policies in the field of migration control. To this end, a more in-depth case-by-case analysis of selected policies will be conducted.

CHAPTER III – Externalisation of migration policies and circumvention of responsibility

This last chapter will be dedicated to the concrete analysis of externalisation policies and of responsibility attribution in case of human rights' violation during their implementation. Such investigation will allow to answer the research questions that were presented at the beginning of the thesis. In particular, a clearer image will be depicted on whether externalising actors, such as the EU and its MSs, are responsible for violations of international law resulting from the implementation of externalisation policies. As a consequence, it will be explained whether the EU and its MSs circumvented their legal responsibility for migration control and extraterritorial human rights violations through the implementation of externalisation policies as a means of preventing migration flows, and if these outsourcing policies can be considered an effective tool to circumvent international responsibility. To do this, first, an explanation of the legal and political analysis to conduct will be provided, and a categorization of externalisation policies will be described. Second, an in-depth analysis of three real case studies will be undertaken. These three externalisation policies for migration control are the MoU between Italy and Libya, the Statement between the EU and Turkey, and Frontex joint operations. Third, a conclusion will be drawn on whether externalisation is a tool to circumvent responsibility and on what allows such circumvention and human rights' violations.

1. Legal-political analysis and externalisation policies' categorization

Analysing the legal infrastructure of externalisation policies can provide an answer on which relations they create among the actors involved and who bears responsibility for the violations of human rights caused. As done by Basaran[470] in her work on security and borders, the objective of this research is to carry out such an analysis through a political and legal approach, so as to show how law is used in liberal democracies. Indeed, to discuss questions on international responsibility a reference to political theory concepts is necessary[471], as explained in the previous chapter. This research will try to complement political theory with legal norms, by using political theory as a tool to facilitate legal reasoning. Liberties can be easily limited, human rights can be violated, especially of non-citizens[472], and this is made easier if law can be circumvented. This research will explore specific instances of deprivation of

[470] Basaran (2010).
[471] Basaran (2010: 8).
[472] Basaran (2010: 104-105).

rights in migration control and responsibility attribution for such violations, as well as legal techniques for responsibility's circumvention.

Before proceeding to this case-by-case discussion, it is necessary to recall the definition of externalisation used in the present research and to define a categorisation of existing policies within the broad spectrum of externalisation, in order to motivate the choice of case studies that will be examined in the next section. As indicated in the first chapter, the present research considers externalisation as "the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory", implemented by states, IOs, third entities and private actors[473]. Furthermore, this study makes a focus on externalisation policies that aim at curbing migratory flows, reducing smuggling and irregular entries in the EU territory, and preventing access to legal international protection, because of the human rights implications this kind of policies may have and the possible controversies that may rise in terms of responsibility in case of human rights violations. Nonetheless, as explained in the previous pages, even such a precise definition has a broad scope. It comprehends externalisation policies involving different entities, as well as several ways of outsourcing. For this reason, a categorisation is needed to give an order to this set of policies and to understand how to select case studies.

In similar research, some authors have tried to categorise policies with their own criteria. For instance, Cantor *et al.*[474] distinguish between externalised border controls and externalised asylum systems. As already described, externalised asylum systems entail a State externalising to another State its own asylum system obligations concerning refugees and asylum seekers beyond its territory, after they arrived in its jurisdiction. Use of offshore processing, exclusive jurisdiction zones in third states and safe third country principle allow the development of such procedures. The operations consist in a post-arrival transfer of asylum seekers and the examination of asylum requests in the third state, prohibiting migrants from entering the intended country of asylum, and in some cases, providing them with territorial asylum in that third state[475]. From this category, Cantor *et al.* exclude more protective forms of externalised procedures, intended to expand legal access to international protection in the destination state[476]. Whereas, externalised border controls are remote systems that limit access to states' territories and restrict travel towards them by people who are moving irregularly. They comprehend pushbacks, directly carried out or assisted by the state of destination outside its territory; remote visa regimes; carrier sanctions and juxtaposed border controls, such as pre-embarkation checkpoints situated outside the state's territory[477]. A second example of categorisation is the one proposed by Mc Namara[478], who makes

[473] Refugee Law Initiative (2022: 114).
[474] Cantor et al. (2022).
[475] Cantor et al. (2022: 149-150).
[476] Cantor et al. (2022: 141).
[477] Cantor et al. (2022: 132-141).
[478] Mc Namara (2013).

a differentiation between external dimension and externalisation. According to him, on the one hand, the external dimension is the mobilisation of third states in the control of migration flows towards the externalising state, with a particular reference to the EU. The third state implements the policy decided by the externalising state, but the outcomes of this policy do not necessarily reflect the outsourcing state's objectives. Hence, this kind of policies are characterised by indirect and weak control. An example of external dimension are the readmission agreements[479]. On the other hand, externalisation is the partial export of border management to third countries. Moving the border outward and establishing a new imaginary border in a third state's territory allows a state to enforce direct border controls extraterritorially. Thus, externalisation entails direct and stronger control on externalising agents or through the use of its own officers. An example of this form of externalisation are carrier sanctions[480].

However, the criteria used in these categorisations do not seem helpful for the present analysis. Indeed, although Cantor *et al.* take into consideration only policies aimed at limiting access to a state's territory or asylum system, the distinction made cannot help in the reasoning on responsibility attribution that this research wants to conduct. Conversely, Mc Namara bases his distinction on the degree of control in order to understand which policies could give rise to state's responsibility under ECHR following the criterion of 'effective control'[481]. Yet, also in this case, such a differentiation does not seem to explain well if externalisation reaches the ECtHR's jurisdictional threshold of control, and it does not consider the possibility that other forms of responsibility may exist, such as complicity. For these reasons, a method of categorisation which follows the purpose of the research should be chosen. While reasoning about the forms of indirect responsibility described in the previous chapter, a categorisation based on the level of involvement of the externalising entity would be useful for the purpose of responsibility attribution. Therefore, a distinction is proposed between externalisation policies that are implemented entirely by third-party actors, without any interference from the externalising state, such as assistance, aid, control, and so on; and externalisation policies implemented with the support of the outsourcing state. For example, the first category may include carrier sanctions or readmission agreements. Whereas, the second category can comprehend any kind of policy implying pushbacks or pullbacks or creating externalised asylum systems; what is important is that it involves the support by the externalising state, which can be financial, operational, educational, and so on. These are the policies that will be studied in the following section for the analysis of responsibility attribution. However, despite this proposal of categorisation and the attempts of rationalising externalisation, the complexity of this phenomenon will show that only a case-by-case approach can be used to conduct a legal analysis on

[479] Mc Namara (2013: 326-328).
[480] *Ibidem*.
[481] *Ibidem*.

responsibility attribution. As a consequence, the following section will be devoted to the analysis of the three case studies selected on the basis of the criteria of outsourcing entity's involvement and of the type of actors involved.

2. International indirect responsibility applied to real case studies

The present section will analyse three case studies, first, by describing the specific situation in which externalisation policies were born; second, by discussing the similarities with indirect forms of governance; third, by examining the indirect form of responsibility applicable to each case. The case studies selected are instances of externalisation policies of the EU or its MSs where the externalising entities support the actions of third party actors in some form. Furthermore, they engage different third actors for their implementation, in order to consider different scenarios for responsibility attribution. The first case is the Italy-Libya MoU of 2017[482], an externalisation policy resulting from twenty years of agreements between the two countries on migration issues, involving an externalising MS and an implementing third state. The second case selected is the EU-Turkey Statement of 2016[483], involving the EU, namely an IO, as externalising actor, and a third state as implementing actor; although the analysis will show the lack of clarity of this document as regards the signing actors and its legal nature. The third case concerns joint operations of Frontex, a *sui generis* actor, but an external entity upon which states rely in order to outsource migration control practices, as well as an EU Agency which can be used by the Union to externalise towards MSs or third states.

2.1 Italy-Libya Memorandum of Understanding

2.1.1 The historical cooperation and the 2017 Memorandum of Understanding

The Italian decision to externalise border controls in the south of the Mediterranean began in the 1990s with the involvement of Northern African countries through bilateral Agreements. First examples of cooperation were on readmission and police cooperation in countries of origin and transit of migrants residing in Italy without authorization. Among these, cooperation with Libya has had strategic significance for Italy, being the main starting point for most of migrants heading towards Europe from Northern and Sub-

[482] Memorandum of Understanding between the State of Libya and the Italian Republic, 2 February 2017, *on cooperation in the field of development, fight against illegal immigration, trafficking in human beings, smuggling and on enhancement of border security.*
[483] Statement of the Council of the European Union, 18 March 2016, *EU-Turkey Statement*.

Saharan Africa[484]. The bilateral Agreement signed on 13 December 2000[485], which has been in effect since 22 December 2002, marked the start of Italy and Libya's cooperation in the fight against terrorism, organised crime, drug trafficking, and irregular migration. Practical modalities of cooperation to prevent irregular migration by sea and fight organised crime were then defined in the operational Agreement between police authorities of July 2003. The two countries seem to have reached a readmission Agreement in 2004, whose particulars have not been made public, but the large number of individuals who were returned in that year seems to attest to its existence. Conversely, no agreement has been made regarding the treatment of migrants, the protection of their human rights or their potential return to their country of origin[486]. An MoU outlining the governments' joint efforts to combat irregular migration was signed in January 2006, and in December 2007 a Protocol of cooperation[487], designed to address irregular migration, was concluded.

In 2008, one of the most contested Treaty was signed between the two countries, the so-called Benghazi Treaty[488]. Its goal was to resolve the disagreement over claims pertaining to Italian colonialism. In exchange, Libya was expected to make sure that the unauthorised migrants, who attempted to cross the Mediterranean and reach the Italian coast, were better contained[489]. In order to comply with previous Protocols, the two countries had decided to build up a border control system for Libyan land borders, overseen by Italian companies possessing the technological know-how and funded to the extent of 50% by Italy and 50% by the EU. Furthermore, they encouraged cooperation in the defence sector between their respective armed forces, through the exchange of experts, instructors and military information, and joint operations[490]. The dramatic increase in maritime arrivals in the first few months of 2009 strengthened the belief that Libya's cooperation in stopping irregular immigrant departures was essential, and the Treaty signed in 2008 created the impulse to conduct pushbacks of boat-refugees towards Libya[491]. These practices led to the already mentioned *Hirsi judgement*[492] of 2012[493], although the

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[484] DI PASCALE (2010: 296-300).

[485] Agreement between the State of Libya and the Republic of Italy, 13 December 2000, *Agreement between the government of the Italian Republic and the Great Libyan Arab popular socialist Jamahiriya for collaboration in the fight against terrorism, organised crime, illegal trafficking of drugs and psychoactive substances and illegal immigration.*

[486] FAVILLI (2005: 162).

[487] Protocol between the State of Libya and the Republic of Italy, 29 December 2007, *Additional Technical-Operational Protocol to the Cooperation Protocol between the Great Libyan Arab popular socialist Jamahiriya to fight the phenomenon of illegal immigration.*

[488] Treaty between the State of Libya and the Republic of Italy, 30 August 2008, *Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Libyan Arab popular socialist Jamahiriya.*

[489] DI PASCALE (2010: 296-300).

[490] *Ibidem*.

[491] LIGUORI (2019: 9-13).

[492] Judgment *Hirsi Jamaa and Others v. Italy*.

[493] The Italian Revenue Police (Guardia di Finanza) and the Coast Guard intercepted eleven Somalians and thirteen Eritreans at sea and pushed them back to Libya. The ECtHR found Italy

Treaty was suspended in 2011 after the fall of Gaddafi's regime and the start of the civil war. Moreover, the informal patterns of the cooperation between Libya and Italy, the modalities of conclusion of these Agreements, and the degree of publicity given to them raised some concerns in relation to Italian national law[494], legitimacy and transparency issues[495].

Also from the European point of view, Libya has been recognised as a key point of entry into its territory, hence, cooperation between these two actors started already in the last part of 1990s. Then, as the 2011 civil war caused an even greater displacement crisis, the EU launched several missions to train and strengthen the Libyan coast guard and navy. Among these there are the EU Border Assistance Mission in 2013, EUNAVFOR MED Operation Sophia in 2015 and its substitute Operation Irini in 2020[496]. In 2016, the Balkan route's closing and the implementation of the EU-Turkey Agreement brought to an increase in the number of people crossing the Central Mediterranean route to reach Italy. As a result, both Italy and the EU decided to strengthen their policy approach aimed at stopping sea arrivals[497]. The Commission, in its Communication on migration on the Central Mediterranean route of 25 January 2017[498], laid out the objectives of strengthening Libyan southern border to thwart unauthorised movements crossing Libya to reach Europe, as well as of training the Libyan coast guard to enable it to conduct SAR operations autonomously[499]. As a result, Italy concluded the 2017 MoU with Libya with the aim of preventing departure and managing returns, as a consequence of this two-decade-long strategy to limit immigration and as a crucial element in shaping the European migration strategy in Libya[500].

The MoU *on cooperation in the field of development, fight against illegal immigration, trafficking in human beings, smuggling and on*

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accountable for violating Article 3 of the ECHR, which forbids torture and inhuman or degrading treatment, as well as Article 4 of Protocol No. 4 (Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 16 September 1963, No. 4, *securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*), which forbids collective expulsions, and Article 13, which guarantees the right to an effective remedy.

494 The majority of Agreements were adopted by a simplified procedure without the approval or oversight of the parliament. Since political agreements must be authorised by the parliament in accordance with Article 80 of the Italian Constitution, a problem of legitimacy emerges. Even though political agreements cannot be clearly defined, it must be taken into account that migration is a salient issue in Italian foreign policy, thus a case-by-case evaluation of the need to ratify the Agreements concerned should have been done. In particular, considering Article 10, para. 2, of the Constitution stating that "The legal status of foreigners is regulated by law in conformity with international rules and treaties", the previous supervision by parliament was meant to prevent government discretion in managing the status of foreigners.

495 Di Pascale (2010: 296-300).

496 Pacciardi and Berndtsson (2022: 4016-4020).

497 Liguori (2019: 9-13).

498 Joint Communication of the European Commission to the European Parliament, the European Council and the Council, 25 January 2017, JOIN(2017) 4 final, *Migration on the Central Mediterranean route: Managing flows, saving lives.*

499 Moreno-Lax and Giuffré (2017: 7-9).

500 Pacciardi and Berndtsson (2022: 4016-4017).

enhancement of border security between the State of Libya and the Italian Republic[501] was signed on 2 February 2017. It is the main instrument for the externalisation of Italian borders in Libya. This bilateral international agreement was concluded in a simplified form, thus, it entered into force on the date of signature. The signatories were the Italian Prime Minister, Paolo Gentiloni, and the Head of the Libyan National Reconciliation Government, Fayez Mustafa al-Serraj, furthermore, the governors of the southern villages of Fezzan, where the Tuareg and Toubou tribes live, participated in the negotiations[502]. The MoU is composed of eight Articles and a Preamble. According to Article 8, it was meant to be in force for three years, with an implicit three-year extension if neither side objected before[503]. Indeed, the deal was first renewed in February 2020[504], and then in February 2023[505]. This Memorandum reintroduced all previous Agreements regarding migration control that seem to have been suspended during the Arab Spring and the civil war in Libya[506], thus, an enhanced commitment in borders control by Libya, and Italy's support to this end are foreseen[507]. Specifically, Articles 1 and 2 represent the core of the legal text, since they outline the obligations of the parties[508]. They stipulate that Italy should send coast guard and border guard trainers to Libya; support all Libyan entities responsible for combating illegal immigration; provide technical, technological and financial assistance for the completion of the southern Libyan border control system; finance the construction or adaptation of Libyan reception centres and the training of personnel employed there; start initiatives for the social development of Libyan regions traversed by migrant populations; allocate aid and support investments to promote Libyan growth through the Africa Fund[509]. As a component of hybrid operations to control borders and save lives at sea, Italy's training and assistance are intended to empower Libya to independently carry out rescue and pullback operations of all migrants and refugees travelling from Libyan coasts towards Europe[510]. Article 3 envisages the establishment of an Italian-Libyan Mixed Committee, which should be responsible for identifying priorities for action and monitoring the fulfilment of the obligations undertaken by two countries[511]. Article 4 refers to the financing of Italian activities in Libya[512]. The full respect of international human rights treaties is provided for in Article 5[513], whereas

[501] MoU Italy-Libya, 2 February 2017.
[502] PASCALE (2018: 416-422).
[503] *Ibidem*.
[504] PACCIARDI AND BERNDTSSON (2022: 4016-4020).
[505] CHERCHI (2023: 423).
[506] MORENO-LAX AND GIUFFRÉ (2017: 7-9).
[507] PASCALE (2018: 416-422).
[508] LIGUORI (2019: 9-13).
[509] PASCALE (2018: 416-422).
[510] MORENO-LAX AND GIUFFRÉ (2017: 7-9).
[511] PASCALE (2018: 416-422).
[512] LIGUORI (2019: 9-13).
[513] MORENO-LAX AND GIUFFRÉ (2017: 7-9).

Articles 6 and 7 deal with the amendment procedure and the settlement of disputes[514].

On 20 March 2017, the Libyan government presented a list of the most urgent requests to implement to Italy. In response to this, on 2 August 2017, the Italian parliament authorised the dispatch of Italian naval units to Libya's territorial sea and internal waters to carry out actions against irregular migration flows and human trafficking, adding a new element to the externalisation policy in this country[515]. Furthermore, throughout the years, the Euro-Libyan border has been secured by a complex network of private and public, local and international entities. Armed groups, smugglers and militias all play a similar role in border security operations compared to state bodies, due to Libya's fractured political landscape and the connections between the Government of National Accord and non-state actors. Similarly, Italy has involved private companies for the provision of material equipment and training services, raising concerns about the transparency of these policies[516]. In the meantime, it has adopted the Code of conduct for NGOs committed to rescuing migrants at sea[517], preventing NGOs from interfering in the process of externalisation of Italian borders in Libya[518].

The Memorandum adopted between Italy and Libya has been characterized by several problems according to scholars, jurists and humanitarian NGOs[519]. Firstly, the language used has been considered inaccurate both from a formal and substantial point of view, because instead of the internationally recommended terms 'undocumented' and 'irregular', the document uses the terms 'illegal' or 'clandestine' when referring to migrants[520]. Secondly, regarding the source and quantity of money, the Memorandum ambiguously affirms only that Italy will finance the projects and use EU funds without any financial commitment for the Italian state[521]. Probably such a vague clause was included to prevent accusations of violations of Article 80 of the Italian Constitution[522], stating that agreements involving costs that are not covered by the national budget cannot be signed in a simplified form without the parliament. Indeed, this is the third issue to consider. As previously mentioned for other international Agreements, also the 2017 MoU may be considered to violate Article 80 of the Italian Constitution, owing to the fact that it deals with relevant foreign policy decisions with significant implications for politics[523]. As a matter

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514 LIGUORI (2019: 9-13).
515 PASCALE (2018: 416-422).
516 PACCIARDI AND BERNDTSSON (2022: 4017-4020).
517 Code of conduct of the Italian Minister of Interior, 7 August 2017, *Code of conduct for NGOs engaged in migrant rescue operations at sea.*
518 PASCALE (2018: 416-422).
519 AMNESTY INTERNATIONAL ITALIA (2022); TRANCHINA (2023).
520 LIGUORI (2019: 9-13).
521 *Ibidem*.
522 Constitution of the Italian Republic, Article 80: "Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation".
523 LIGUORI (2019: 9-13).

of fact, four Italian deputies filed a claim before the Italian Constitutional Court in February 2018; nevertheless, without examining the recourse's merits, the Court ruled in July 2018 that it was inadmissible, because only the Assembly may assess whether to take action regarding possible violations[524].

Lastly, the main concern related to the MoU between Italy and Libya is the indifference to human rights violations perpetrated in the Libyan territory and by Libyan authorities. Not only is there no positive conditionality, meaning that Italian support cannot be provided unless human rights conditions are improved and the Geneva Convention is ratified, but the cooperation specifically aims to give Libyan authorities the power to send migrants back to the unsafe Libyan territory[525]. It is undoubtedly evident that the migrants detained in Libya are victims of significant and systematic human rights breaches[526]. Libya is not a party to the 1951 Geneva Convention, it has no domestic system in place for those in need of international protection, and most importantly, the ECtHR has already confirmed that there are widespread abuses and violations of migrants' rights in the aforementioned 2012 *Hirsi* judgement[527]. Since then, risk of migrant abuse has grown as attested by numerous documents published by various newspapers, NGOs and IOs. For instance, the 1 December 2016 report of the Secretary-General on the UN Support Mission in Libya ('UNSMIL') attested that migrants in Libyan Department detention centres face inhumane conditions, including poor ventilation, limited access to light and water, severe malnutrition, torture, and forced labour by armed groups[528]. Another report of the UNSMIL and the Office of the United Nations High Commissioner for Human Rights ('OHCHR') described human rights abuses against migrants in Libya few days after[529]. In January 2017, the Libya Initial Mapping Report by the European Union Border Assistance Mission ('EUBAM')[530] and the Human Rights Watch World Report 2017[531] denounced gross human rights violations and extreme abuse towards detained migrants. On the same day of the MoU's signing, UNHCR and IOM delivered a joint statement[532] addressing migration and refugee movements along the Central Mediterranean route, where they affirmed that Libya is not a safe third country. A UNICEF study also highlights the dramatic situation of

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[524] Order of the Italian Constitutional Court, 4 July 2018, n. 163/2018.
[525] LIGUORI (2019: 9-13).
[526] PASCALE (2018: 422-425).
[527] LIGUORI (2019: 9-13).
[528] Report of the United Nations Security Council, 1 December 2016, S/2016/1011, *Report of the Secretary-General on the United Nations Support Mission in Libya,* para. 41.
[529] Report of the United Nations Support Mission in Libya and the Office of United Nations High Commissioner for Human Rights, 13 December 2016, *"Detained and dehumanised". Report on human rights abuses against migrants in Libya*, p. 12.
[530] Review of European External Action Service, 15 May 2017, EEAS(2017) 530, *Strategic Review on EUBAM Libya, EUNAVFOR MED Op Sophia & EU Liaison and Planning Cell.*
[531] HUMAN RIGHTS WATCH (2017).
[532] Statement of United Nations High Commissioner for Refugees and International Organisation for Migration, 2 February 2017, 115361, *Joint UNHCR and IOM Statement on Addressing Migration and Refugee Movements along the Central Mediterranean Route.*

unaccompanied minors, who often remain trapped in Libya[533]. In the same year other reports have been published by the Panel of Experts on Libya[534], the UN Special Rapporteur on extrajudicial, summary or arbitrary executions[535], the UN Secretary-General[536]. An Oxfam report denounced situations of forced labour, arbitrary deprivation of liberty, abduction, torture and sexual abuse against migrants in Libya[537]. The OHCHR further denounced such violations also in other three different documents in 2017, namely, the opinion of 8 September 2017, the statement issued on 12 October 2017 at the end of the visit to Libya, and the press release of 14 November 2017[538], where it described as "inhuman" the Italian policy of assistance given to Libyan state bodies engaged in intercepting migrants, leading and detaining them in "terrifying" reception centres in Libya. A journalistic investigation of CNN showed in November 2017 the enslavement of some young migrants, released only after payment of a ransom or otherwise sold at auction, in a reception centre near Tripoli[539]. Amnesty International described the commodification of migrants in a report published on 11 December 2017[540]. In the following years, the situation has not significantly changed, as IOs and NGOs have continued attesting up to the present day.

Such gross violations of human rights imply the international responsibility of Libya[541], first, for its failure to comply with the general international law norm prohibiting them[542]; second, for violations of rights protected by specific customary international norms, such as the right not to be enslaved[543] or the right not to be subjected to acts of torture[544]; third, for violations of human rights enshrined in Conventions that Libya has ratified and by which is bound[545]. Gross violations of migrants' rights are materially committed

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533 UNICEF (2017).
534 Report of the United Nation Security Council, 1 June 2017, S/2017/466, *Letter Dated 1 June 2017 from the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011) Addressed to the President of the Security Council.*
535 Report of the UN General Assembly, 15 August 2017, A/72/335, *Unlawful death of refugees and migrants.*
536 Report of United Nations Secretary General, 7 September 2017, S/2017/761, *Report pursuant to Security Council resolution 2312 (2016).*
537 OXFAM (2017).
538 OHCHR (2017a); OHCHR (2017b); OHCHR (2017c).
539 ELBAGIR ET AL. (2017).
540 AMNESTY INTERNATIONAL (2017).
541 PASCALE (2018: 422-425).
542 Considered as *ius cogens* by DAMROSCH (2011).
543 LENZERINI (2001).
544 DE WET (2004).
545 Convention of the League of Nations, 25 September 1926, *Convention to Suppress the Slave Trade and Slavery*; Covenant, 1966, *International Covenant on Civil and Political Rights;* Charter of the Organisation of African Unity, 27 June 1981, *African Charter on Human and Peoples' Rights (Banjul Charter);* Convention, 1984, *Convention against Torture*; Protocol of the UN General Assembly, 15 November 2000, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*; Charter of the League of Arab States, 23 May 2004, *Arab Charter on Human Rights.*

mainly by people belonging to the Libyan coast guard and border guard or by employees of the Department to Counter Illegal Migration of the Libyan Ministry of Interior, which manages reception centres[546]. These state bodies' actions imply Libyan responsibility, even assuming that they act *ultra vires* when violating migrants' rights[547]. Only violations perpetrated by the guards controlling the southern borders appears problematic, since it is not clear whether they can be similarly attributable to Libya, being the officers often autonomous or working on behalf of the governors of Fezzan's towns and villages[548].

Despite the well-known problems characterising the MoU and this Italian externalisation policy, the EU supported the Italy-Libya Agreement through the Declaration made by the European Council at the end of the informal summit held in Valletta on 3 February 2017, i.e. the day after the signing of the MoU. At para. 6, letter i), of the Declaration MSs affirmed "the EU welcomes and is ready to support Italy in its implementation of the Memorandum of Understanding signed on 2 February 2017 by the Italian Authorities and Chairman of the Presidential Council al-Serraj"[549]. Nonetheless, another element to consider at this point is Italy's responsibility. Libyan responsibility for violations of human rights has been largely documented and has not changed throughout the years. The only difference compared to what happened in the *Hirsi* case concerns Italian activities. With the MoU, Italy has no more conducted direct pushbacks and has not directly violated the ECHR; it has instead started supporting technically, technologically and financially Libya, which now conducts similar operations, transforming pushbacks into pullbacks or *refoulement* by proxy[550]. The MoU has apparently given to Italy the possibility to shift responsibility towards another state, but an evaluation is needed for a possible Italian indirect responsibility. To do this, a brief analysis of the applicable indirect form of governance will be conducted.

2.1.2 Italian orchestration in Libya and its responsibility for complicity

The work by Müller and Slominski mentioned in the previous chapter focuses exactly on externalisation policies in Libya. Here, they explained that after the *Hirsi* judgement, Italy could not be involved directly in certain activities of migration control, thus, shifting power towards and developing capacities of Libyan actors acquired new salience[551]. Therefore, not only has Italy

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[546] PASCALE (2018: 422-425).
[547] ARSIWA, Article 7, on excess of authority or contravention of instructions, states that "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."
[548] PASCALE (2018: 422-425).
[549] Malta Declaration by the members of the European Council, 3 February 2017, *on the external aspects of migration: addressing the Central Mediterranean route*.
[550] LIGUORI (2019: 9-13).
[551] MÜLLER AND SLOMINSKI (2021: 809-812).

tried to avoid any direct involvement in external border management, but it also chose a soft relationship with the third actor involved. Indeed, the 2017 MoU, in contrast to the 2008 Treaty, was ratified without the official consent of the Italian parliament and is not legally binding[552]. Italy has established a cooperation with Libya not through hard delegation, but through a soft orchestration. Voluntary means both in terms of form and content have been employed to shift governance in the field of border and migration management, and no strong control is exercised by the orchestrator towards the intermediary[553]. Italy has conducted externalisation through orchestration using four different techniques, i.e. assistance, endorsement, convening and coordination. It has sought to enhance the status and the ability of Libya to conduct autonomous maritime border and SAR operations. It has provided technological, financial and material assistance, as well as endorsement to the Government of National Accord and its coast guard, by also giving support to establish a Libyan SAR zone. Furthermore, through coordination and convening power, Italy has also brought together different actors to reach its objective, otherwise unreachable alone[554]. It has engaged local authorities and non-state actors, including leaders of tribes and militias, in an attempt to fortify their support for the Libyan coast guard and to form a wide coalition for border management. Gatherings held in Libya and meetings held in Rome at the invitation of the Italian Ministry of Interior have been organised[555]. In exchange for their participation in a coordinated approach to border control, local Libyan actors were allegedly promised financial and other help by Italian officials, including access to the EU Trust Fund for Africa, hence bringing them in contact with the EU[556].

Despite the Libyan lack of competences, Italy chose to rely on its coast guard as a key intermediary in border management. Essential resources for the border oversight operations have come from Italy and the EU, such as vessels, equipment, information and surveillance infrastructure, and training programmes[557]. Therefore, here orchestration has not been chosen by Italy to compensate a lack of competences in the regulation of external borders, otherwise it would not have engaged an intermediary that lacks the necessary capacity, legitimacy and credibility such as Libya. Instead, the aim of this orchestration, according to Müller and Slominski, was to avoid direct contact with migrants crossing the Mediterranean, continue pursuing *non-entrée* migration policies, and comply with legal norms, or better circumvent them[558]. As a matter of fact, through this orchestration strategy, Italy has been able to deny any legal association with Libya's border control and SAR activities[559].

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[552] Reviglio (2020).
[553] Müller and Slominski (2021: 809-812).
[554] *Ibidem*.
[555] Amnesty International (2017: 49).
[556] Müller and Slominski (2021: 809-812).
[557] Müller and Slominski (2021: 807-809).
[558] Müller and Slominski (2021: 813-814).
[559] Müller and Slominski (2021: 809-812).

Furthermore, the vague and generic language used has made even more difficult to hold Italy legally responsible for violations of human rights[560]. Italy and EU's desire to distance itself from any possible international responsibility arising from human rights violations for migration control was confirmed by Italian Admiral Enrico Credendino, Operational Commander of Operation Sophia. In an interview for the Italian newspaper, *Internazionale*, he affirmed: "We will create a Libyan system capable of stopping migrants before they reach international waters, as a result it will no longer be considered a pushback because it will be the Libyans who will be rescuing the migrants and doing whatever they consider appropriate with the migrants"[561].

Italy denies any claim of international responsibility for the gross violations of human rights suffered by migrants stranded within the Libyan borders, since they are outside Italian jurisdiction. Moreover, it repeatedly emphasises that it has no longer carried out rejections towards Libya since the *Hirsi* judgement. Indeed, Libyan bodies are detaining or returning migrants to Libyan territory[562]. However, notwithstanding the fact that Libya is directly responsible for gross human rights violations perpetrated against migrants stranded within its borders, under international law, the support provided by Italy and the EU to Libya in the execution of externalisation policies with an anti-migratory purpose also seems relevant[563]. The analysis of the indirect form of governance applicable to this case study has shown that the MoU established a soft relationship between the two states, namely orchestration, where Italy does not harshly control Libya. Furthermore, the migration management activities conducted by Libya are not the product of precise Italian directives. Therefore, the soft connection between Italy and Libya is not comparable to direction and control circumstances described by Article 17 ARSIWA. On the other hand, the kind of support Italy has provided to Libya better falls within the circumstance described by Article 16 ARSIWA on aid and assistance[564]. Italian assistance alone does not appear contrary to international law, at least when it is conducted in cooperation with a safe transit state, i.e. a state that examines asylum applications received, does not violate the *non-refoulement* obligation and respects the rights of migrants. As just described, Libya does not meet these requirements. Thus, Italy's lawful conduct is linked to Libya's unlawful conduct[565]. By cooperating with an unsafe state through the implementation of its externalisation policy, Italy aids that state's authorities in carrying out serious and systematic violations of migrants' rights[566]. Furthermore, in some cases Italian aid has been essential for the

[560] PALM (2017).
[561] BRIGIDA ET AL. (2017).
[562] PASCALE (2018: 426).
[563] PASCALE (2018: 426-428).
[564] PASCALE (2018: 428-432).
[565] PASCALE (2018: 428-432).
[566] PASCALE (2018: 436-440).

execution of certain actions[567]. Consequently, in line with the objectives of this policy, Italy obtains migrants being apprehended in Libya[568].

Once determined the way in which Italy may contribute to the illegal act, and thus the international norm applicable to the case study, the fulfilment of the other three criteria for complicity must be confirmed. First, as regards the knowledge requirement, orchestration does not give a clear picture of whether Italy was and is aware of its role in contributing to the commission of the international wrongful act, since a high level of autonomy is left to Libya in the implementation of the externalisation practices. However, this criterion can be considered fulfilled also when externalising entities should have been reasonably aware of facilitating the assisted entity's wrongful act, and, in this case, it is possible to affirm that Italy holds such an implicit knowledge. The Libyan authorities violate migrants' rights in a notoriously generalised and systematic way, as confirmed by the previously mentioned institutional and private reports and investigations. At least since the *Hirsi* ruling, the Italian government must have been aware of this. Therefore, Italy must also be aware that the aid and assistance offered to Libya for the detention of migrants or for the construction and management of reception centres facilitates Libyan state bodies in committing gross violations of migrants' rights[569]. Furthermore, there is little doubt that Italy knew that cooperation in the field of migration with Libya would mean denying refugees access to asylum and thereby violating the *non-refoulement* principle, given the number of successful asylum seekers among those arriving at Lampedusa prior to the MoU's signing and the available information on Libya's lack of record regarding refugee protection[570]. As a result, the mental element of knowledge is met.

Second, although requirement of intent is not considered necessary to demonstrate the existence of responsibility for complicity by some scholars[571], others have proved that in this case study it is fulfilled. It is important to note that the Libyan authorities are specifically given financial, logistical, and technological support in order to "stem the flow of migrants"[572], namely to facilitate the return of migrants to Libya, where they would likely be subjected to torture and other cruel treatments[573]. Therefore, even though the financial aid to Libya is descripted as general investments in the country, the Italian authorities' secondment and the supply of patrol boats and other equipment were specifically meant for this use. If aid and assistance were provided in good faith – for instance, for development aid – and then utilised improperly by the recipient country to impose border controls, leading to torture and other cruel

[567] LIGUORI (2019: 25-27).
[568] PASCALE (2018: 436-440).
[569] PASCALE (2018: 436-440); LIGUORI (2019: 25-27).
[570] GAMMELTOFT-HANSEN (2011: 16-21).
[571] LANOVOY (2014: 150-156); PASCALE (2018: 436-438).
[572] MoU Italy-Libya, 2 February 2017, Preamble: "per garantire la riduzione dei flussi migratori illegali".
[573] LIGUORI (2019: 25-27).

treatment, the situation would have been different[574]. Yet, since the intent of the externalisation policy is explicitly stated in the MoU, it is possible to consider also the second criterion met[575].

Third, as concerns the criterion of opposability, the illegal acts committed by Libya consist in the violation of both customary norms, such as the prohibition of slavery and of torture, and conventional norms, which are equally incumbent on Italy[576]. Both States are parties to the 1926 Convention against Slavery[577], the 1966 Covenant on Civil and Political Rights[578], the 1984 Convention against Torture[579] and the 2000 Protocol on Trafficking in Human Beings[580]. As a consequence, the wrongful act committed by Libya would be internationally wrongful also if committed by Italy, as opposability requires[581]. To sum up, in the present case study, all the requirements provided for by Article 16 ARSIWA are fulfilled, hence, the MoU and the externalisation policy connected imply Italy's responsibility for complicity in the gross violations of human rights perpetrated by Libya.

Another point to consider is that, as previously said, the EU publicly supports Italian migration policy, and Italy implements its migration policy in close cooperation with the EU. The forms of assistance in the field of migration provided to Libya by the EU are less evident than those provided by Italy. These are mostly financial contributions, often simultaneously sent to other African states and described as promoting the EU's democratic values externally, facilitating economic recovery or stimulating development, and not as contributing to the management of migratory flows, although those objectives are also linked to migration. Other resources, allocated by the EU to counter migratory flows in the Mediterranean, arrive in Libya indirectly, via the MSs. An example is Italy, where European funds transit and are then used for national migration policies, therefore, also channelled towards Libya[582]. This can be considered as a chain of orchestrations, where Italy becomes both the intermediary of the EU and the orchestrator of Libya. However, from a legal point of view it is difficult to connect EU participation to Libya's violations of human rights. On the other hand, also the EU promotes its own policy of progressive externalisation of borders, for instance, through the EUNAVFOR MED Operations Sophia and Irini. With these missions, by training the Libyan coast guard, it has favoured the detention of migrants in Libya too. Therefore, it does not seem difficult to prove that the EU is also responsible for complicity in the serious and systematic human rights violations suffered by migrants detained in Libya. Firstly, the aid and assistance granted to Libya by the EU

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[574] GAMMELTOFT-HANSEN (2011: 16-21).
[575] MORENO-LAX AND GIUFFRÉ (2017: 19-21).
[576] PASCALE (2018: 436-440).
[577] Convention, 1926, *Convention to Suppress the Slave Trade and Slavery.*
[578] Covenant, 1966, *International Covenant on Civil and Political Rights.*
[579] Convention, 1984, *Convention against Torture.*
[580] Protocol, 2000, *Protocol to Prevent, Suppress and Punish Trafficking in Human Beings.*
[581] LIGUORI (2019: 25-27).
[582] PASCALE (2018: 439-440).

is connected to the massive violations committed by Libyan state bodies[583]. Second, the EU is or should be aware that its aid and assistance facilitates the gross violations of migrants' rights perpetrated in Libya[584]. Third, customary international norms establishing the prohibitions of slavery and torture should bind both Libya and the EU[585]. The fulfilment of these three requirements – without the intent criterion that is more complicated to prove – could establish the international responsibility of the EU for complicity in the wrongdoing of Libya, as indicated in Article 14 ARIO, the norm providing for responsibility for aid and assistance of IOs.

In conclusion, both Italy and the EU can be considered indirectly responsible – responsible for complicity – of human rights violations perpetrated by Libya through the implementation of Italian and European externalisation policies. In particular, in the case of Italy, the 2017 MoU has been taken into consideration more deeply. Similar forms of contactless migration control risk resulting in a form of indirect *refoulement* or pushback by proxy against vulnerable people already subjected to torture and inhuman and degrading conditions in Libya[586]. The following subsection will deal with another prior and controversial European policy of externalisation, the EU-Turkey Statement, and an analysis on international responsibility akin to the one just described will be conducted.

2.2 EU-Turkey Statement

2.2.1 The 2016 Statement: human rights violations and an unclear legal nature

The MoU between Italy and Libya is only an example of a bigger European scenario. The EU has been enforcing various externalised border control measures over the past few decades, including extraterritorial border patrols, carrier sanctions, visa restrictions, and safe third country protocols. Therefore, the concept of externalising border controls is not new in European discourse; rather, what is new is the repeated and methodical use of this strategy through various agreements with third parties, such as Turkey[587]. Turkey is a privileged but problematic place for European externalisation because of its location at the intersection between Europe and Asia and the turbulent history of its neighbours. Over the past ten years, Iraq, Iran, and Syria, as well as Pakistan and Afghanistan, have been major migratory sources for individuals travelling through Turkey to Europe[588]. Besides, Turkey has been highly

[583] Mackenzie-Gray Scott (2018).
[584] Amnesty International (2017: 7).
[585] Mackenzie-Gray Scott (2018).
[586] Giuffré (2020: 195).
[587] Liguori (2019: 52).
[588] Casaglia and Pacciardi (2022: 1660-1662).

affected by the 2015 migration crisis[589]. As a result, it has been the country receiving the highest number of refugees globally in the last years[590], and it currently is still the second country in terms of refugees after Iran[591]. Furthermore, Turkey's stance on migration has been greatly influenced by its status as a prospective EU candidate, in contrast to other EU neighbouring states, and it has always been considered as capable of mediating between the West and the non-West. Due to this particular status, Turkey has partially adjusted its migration policies according to European preferences, while taking advantage of its role, and of European fears of migration influxes, in negotiations with the EU regarding the financial support, the processing period for visa applications from Turkish citizens, and the resumption of accession talks – at least initially. This has resulted in a complicated interdependent relationship between the two entities[592].

The turning point in migration policies with Turkey has been reached with the migration crisis of 2015. Such crisis was mostly political, caused, indeed, by the EU's inability to address the migration issue in an effective and coordinated manner, and not by the number of individuals trying to reach Europe[593]. The Agenda on Migration[594] had envisaged internal solutions that actually strengthened the aspects of European law and policy that had initially sparked the crisis. Among these measures there were restrictions on entry into the EU for non-EU citizens and coercion towards asylum seekers, which proved to be ineffectual and even detrimental. As regards the external dimension, the strategy was more successful in achieving the goal of halting the migration flow, but at a great expense to the human rights of migrants and the EU's credibility[595]. A part of the European external strategy has been the intensification of the cooperation with Turkey through new deals[596]. In 2015, the EU and its MSs devised a financial and political Plan to help Turkey fortify its borders and serve as a gatekeeper[597], Turkey demonstrated its intention to cooperate with the European countries[598]. The EU-Turkey Joint Action Plan[599] was inked by the two parties at a summit in November 2015, and the same commitment outlined in this Action Plan was confirmed few months after through a new instrument. The Presidents of the European Commission and the European Council, along with members of the European Council, met with Turkey's President Erdoğan on 17 and 18 March 2016 to discuss the relations

[589] LIGUORI (2019: 52).
[590] CASAGLIA AND PACCIARDI (2022: 1660-1662).
[591] UNHCR (2024c).
[592] CASAGLIA AND PACCIARDI (2022: 1660-1662).
[593] LIGUORI (2019: 52).
[594] Communication, *A European Agenda on Migration*.
[595] LIGUORI (2019: 52).
[596] FREIER ET AL. (2021).
[597] CASAGLIA AND PACCIARDI (2022: 1660-1662).
[598] CHERUBINI (2017: 33).
[599] Joint Action Plan between the European Union and Turkey, 29 November 2015, *EU-Turkey Joint Action Plan.*

between the two parties and the migration crisis they were facing[600]. A Press Release named "EU-Turkey Statement"[601] was the primary result of that meeting, which was published on the European Council and Council of the EU website[602]. The main objective of the new Statement was to eliminate the motivation for migrants and asylum seekers to pursue unofficial routes to the EU, with Turkey agreeing to readmit individuals who had not requested asylum in Greece or whose application had been deemed unfounded or inadmissible[603] under the EU's Asylum Procedures Directive[604]. Despite some uncertainties about Turkey's eligibility to be considered a safe third country, the goal of the EU was to promptly relocate both migrants and asylum seekers to a transit nation under the pretext of a safe third country[605]. Both European Council and European Commission have frequently asserted their ownership of the Statement and praised its effectiveness in tackling the migration influxes towards Europe[606].

The Statement, apart from the Preamble in which it explicitly makes reference to the 2016 Joint Action Plan, is composed of nine points. The first two points include the main elements of the policy. Point 1 provides for the return of all irregular migrants – term comprehending the categories indicated in the previous paragraph – crossing from Turkey into Greek islands as from 20 March 2016. Such measure, which is temporary and extraordinary, must be carried out in full accordance with EU and international law, by guaranteeing the principle of *non-refoulment* and excluding any kind of collective expulsion[607]. According to the Statement, migrants will be properly registered in Greece and their requests for asylum will be processed in compliance with the Asylum Procedure Directive[608]. However, as indicated in the Preamble, Turkey accepted to take back all irregular migrants intercepted in Turkish waters – similarly to what was provided by Italy-Libya MoU. Point 2 stipulates that "For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria"[609], prioritizing those who have not previously entered or tried to enter the EU irregularly[610]. The third Point, then, establishes that Turkey should take all the required measures to prevent new irregular arrivals by sea or by land to the European territory and should cooperate with neighbouring states and the EU to this end[611]. According to Point 4, a Voluntary

[600] CARRERA ET AL. (2017: 1).
[601] Statement of the Council of the European Union, *EU-Turkey Statement*.
[602] CARRERA ET AL. (2017: 1).
[603] FREIER ET AL. (2021).
[604] Directive of the European Parliament and of the Council, 26 June 2013, 2013/32/EU, *Directive on common procedures for granting and withdrawing international protection (recast)*.
[605] LIGUORI (2019: 55-57).
[606] CARRERA ET AL. (2017: 1).
[607] AMADEO ET AL. (2022: 425-448).
[608] MORENO-LAX AND GIUFFRÉ (2017: 5-7).
[609] Statement of the Council of the European Union, *EU-Turkey Statement*, para. 2.
[610] MORENO-LAX AND GIUFFRÉ (2017: 5-7).
[611] *Ibidem*.

Humanitarian Admission Scheme should have been launched as soon as irregular crossings between Turkey and the EU ware eliminated or significantly and sustainably decreased. In exchange for Turkish activities, EU MSs would accelerate the completion of the roadmap for visa liberalisation in order to lift visa requirements for Turkish nationals (Point 5)[612] and the EU would expedite the disbursement of 3 billion euros to Turkey, for the financing of projects in favour of persons receiving international protection in that country, and would be ready to mobilise a further 3 billion euros (Point 6)[613]. Furthermore, the Statement deals with the upgrading of the Customs Union (Point 7)[614], the commitment to reinvigorate the accession process of Turkey to the EU (Point 8)[615], the joint endeavour to improve humanitarian conditions inside Syria (Point 9).

To guarantee the successful execution of the various obligations, the President of the European Commission has selected Director General Maarten Verwey as EU Special Coordinator[616]. In order to accelerate the application of the Statement, the EU Coordinator and Greece developed a Joint Action Plan for the implementation of the most important provisions, such as shortening processing times, reducing appeals, enhancing safety, security, and detention capacity, expediting relocation and returns, and sealing Greece's northern borders to prevent secondary movements[617]. Whereas, on the financial side, the European Commission created a special mechanism[618], called the Refugee Facility for Turkey[619], to collect contributions from the Union and the MSs and to coordinate their use. According to the Commission Decision creating the Facility[620], actions to manage the consequences of refugees' inflows in Turkey, which are financed with this instrument's funds, should be selected and coordinated by the Commission[621]. Besides, a steering committee, consisting of

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612 *Ibidem.*

613 AMADEO ET AL. (2022: 425-448).

614 LIGUORI (2019: 55-57).

615 GENSCHEL AND JACHTENFUCHS (2018: 190-191).

616 Fact Sheet of the European Commission, 28 September 2016, *Implementing the EU-Turkey Statement – Questions and Answers.*

617 Communication from the Commission to the European Parliament, the European Council and the Council, 8 December 2016, COM(2016) 792 final, *Fourth Report on the Progress made in the implementation of the EU-Turkey Statement. Annex I.*

618 The decision to set up the coordination mechanism Refugee Facility for Turkey was based on Article 210, para 2, and Article 214, para. 6 TFEU, which authorise the Commission to take any useful initiative to promote coordination between the Union's actions and those of the MSs in the field of development cooperation and humanitarian aid.

619 Decision of the European Commission, 24 November 2015, 2015/C 407/07, *on the coordination of the actions of the Union and of the Member States through a coordination mechanism — the Refugee Facility for Turkey*.

620 *Ibidem*.

621 Decision of the European Commission, *the Refugee Facility for Turkey*, Article 3, para. 2, affirm that "Through the Facility the provision of humanitarian, development and other assistance to refugees and host communities, national and local authorities in managing and addressing the consequences of the inflows of refugees will be coordinated". And Article 6, para. 2, "Priority will be given to actions providing immediate humanitarian, development and other assistance to refugees and host communities, national and local authorities in managing and

two representatives of the Commission and one representative of each MS, where Turkey participates in an advisory capacity, "shall provide strategic guidance on the coordination of the assistance to be delivered"[622]. The first 3 billion euro foreseen by the Statement and the Refugee Facility for Turkey were financed for one third from the EU budget and for the remaining two thirds by MSs, between 2016 and 2017. The second tranche of the financing has been mobilised starting from 2018, divided into 2 billion from the EU budget and 1 billion from MSs[623].

Many criticisms were raised concerning the EU-Turkey Statement from the moment it was signed. A unique aspect of the Deal is its 'biopolitical' nature[624]; in fact, no other formal deal exists wherein the EU expressly consents to an exchange of migrants. By essentially permitting a trade-off of human beings, the Statement separates migrants into individuals deserving entering Europe and undesired subjects to be returned to Turkey, objectifying them[625]. Despite its ethical and political implications, as well as the legal issues arising from this document – which will be soon analysed – the EU has reaffirmed its commitment to the Statement in March 2021, which has been deemed a success and a crucial component of the European migration management strategy[626]. Two other main issues regarding the Statement concern human rights' protection, on the one hand, and the legal nature of such a Deal[627].

In the first place, as regards human and refugee rights' issues, the first sentence of the Statement affirms "All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey"[628]. Such an affirmation could entail a violation of the prohibition of collective expulsion provided for in the Charter of Nice[629] and in the Protocol No. 4 to the ECHR[630], although afterwards reference to the specific provision for individual assessment, to the principle of *non-refoulement* and to the relevant international norms is made. Furthermore, the decision to return people in need of protection whose claims are considered inadmissible, without

addressing the consequences of the inflows of refugees. The Turkish authorities shall be consulted in respect to all actions other than those providing immediate humanitarian assistance. The Commission shall have regular meetings with the Member States competent authorities and the appropriate authorities in Turkey".

[622] Decision of the European Commission, *the Refugee Facility for Turkey*, Article 5.

[623] Communication from the Commission to the European Parliament and the Council, 22 September 2023, COM(2023) 543 final, *Seventh Annual Report of the Facility for Refugees in Turkey*.

[624] CASAGLIA AND PACCIARDI (2022: 1660-1662).

[625] *Ibidem*.

[626] ALBANESE (2021).

[627] LIGUORI (2019: 55-57).

[628] Statement of the Council of the European Union, *EU-Turkey Statement*, Point 1.

[629] Charter of fundamental rights of the European Union, Article 19.

[630] Protocol of the Council of Europe, 16 September 1963, No. 4, *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto,* Article 4.

considering their merits, is based on the idea that Turkey is a first country of asylum or a safe third country[631]. Therefore, rejection of applications would not be motivated by the fact that the applicant is not a legitimate refugee, but rather by the possibility that that person might have requested protection in Turkey – which is a safe third country[632] – or that he or she was already under protection there – as first country of asylum[633] – as provided for in the Asylum Procedures Directive[634].

Nevertheless, the Parliamentary Assembly of the Council of Europe[635] and several scholars and NGOs[636], have challenged the definition of Turkey as a safe third country. According to Article 38, para. 1, of the Asylum Procedures Directive:

> "Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:
> (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
> (b) there is no risk of serious harm as defined in Directive 2011/95/EU;
> (c) the principle of non-refoulement in accordance with the Geneva Convention is respected;
> (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
> (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention".

Letter e) is the most critical point in connection to Turkey, because even though the non-EU country is not required to have ratified the Geneva Convention, the applicant must have the opportunity to obtain refugee status and

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631 LIGUORI (2019: 57-63).

632 Directive, *Asylum Procedure Directive*, Article 38, para. 1 on the concept of safe third country.

633 Directive, *Asylum Procedure Directive*, Article 35 on the concept of first country of asylum "A country can be considered to be a first country of asylum for a particular applicant if: (a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or (b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*, provided that he or she will be readmitted to that country. In applying the concept of first country of asylum to the particular circumstances of an applicant, Member States may take into account Article 38(1). The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances."

634 Directive, *Asylum Procedure Directive*, Article 33, para. 2 estabilised that "Member States may consider an application for international protection as inadmissible only if: […] (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35; (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38; […]".

635 Resolution of the Parliamentary Assembly of the Council of Europe, 20 April 2016, 2109 (2016), *The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016.*

636 AMNESTY INTERNATIONAL (2016); FAVILLI (2016); HUMAN RIGHTS WATCH (2016); LABAYLE AND DE BRUYCKER (2016); PEERS AND ROMAN (2016).

receive protection in accordance with such Convention. Despite being part of the 1967 Protocol Relating to the Status of Refugees, Turkey maintains the geographical limitation that was part of the 1951 Convention, hence, it is only bound to recognise as refugees those people who have escaped form events occurring in Europe. In effect, this leaves out most of the people who are now requesting asylum in Turkey[637], denying any possibility to apply for and obtain protection under the Geneva Convention to individuals from non-European countries[638]. Only temporary protection is guaranteed to these asylum seekers by Turkey[639], under the Turkish Law on Foreigners and International Protection, in force since 2014[640]. As a result of the Deal, Turkey accepted to change some of the provisions on protection enjoyed by Syrians, enabling them to access protection[641], allowing those who had left Turkey to remain protected after their return and to be eligible for employment opportunities in the country[642].

Another relevant problem is the respect of human rights in practice, for which Turkey does not offer very solid guarantees[643]. Migrants and refugees are frequently the targets of arbitrary imprisonment and abuses, particularly in pre-removal camps where they are held to prevent their departure[644]. Furthermore, following the unsuccessful military coup, Turkey formally submitted a notice of derogation to the ECHR by declaring a state of emergency, and informed the UN Secretary General that possible actions taken by it could have involved derogations from obligations under the ICCPR[645]. Some NGOs denounced *refoulement* practices and violences against migrants at the southern border with Syria and Iraq[646]; the risk of execution, inhuman treatment or torture towards certain groups of refugees, such as Kurds; arbitrary detention without access to legal aid and international protection[647]. Moreover, also after the conclusion of the Deal, human rights violations continued through the suspension of new Syrian migrants' registration[648] – since the end of 2017 – and illegal mass returns to Syria[649]. In order to fulfil its obligations to the EU, Turkey has concluded readmission agreements with some refugee-producing countries. Thus, the risk of repatriation and *refoulement*, through formal and informal returns, towards dangerous countries such as Afghanistan, Iraq,

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637 FREIER ET AL. (2021).
638 MORENO-LAX AND GIUFFRÉ (2017: 5-7).
639 LABAYLE AND DE BRUYCKER (2016).
640 Law of the Republic of Turkey, 4 April 2013, No. 6458, *Law on Foreigners and International Protection*.
641 FREIER ET AL. (2021).
642 LIGUORI (2019: 57-63).
643 CHERUBINI (2019: 81-82).
644 Judgement of the European Court of Human Rights, 22 September 2009, 30471/08, *Abdolkhani and Karimnia v. Turkey.*
645 MORENO-LAX AND GIUFFRÉ (2017: 5-7).
646 AMNESTY INTERNATIONAL (2015); HUMAN RIGHTS WATCH (2015).
647 PAÇACI ELITOK (2019).
648 HUMAN RIGHTS WATCH (2018b).
649 CARRIÉ AND OMAR (2018); HUMAN RIGHTS WATCH (2018a).

Pakistan and Syria, has increased[650]. As a consequence of these circumstances, Turkey can neither be considered as a first country of asylum under the Asylum Procedures Directive, since refugees do not enjoy sufficient protection and the principle of *non-refoulement* is not respected[651]. Finally, the EU-Turkey Statement has been criticised for allegedly legitimising the detention of refugees in their country of asylum, violating both the principle of solidarity and the right to asylum[652].

In the second place, the legal nature of the Statement and to whom it may be attributable represent another issue concerning this cooperation[653]. In the text of the EU-Turkey Statement, the new commitments are presented as additional action points to the 2015 Joint Action Plan. This suggests that such an act could be considered as a political declaration, aimed at the preparation of a common strategy and joint initiatives for the coordinated management of the extraordinary influx of Syrian refugees that occurred between 2015 and 2016[654]. Whereas, some legal scholars affirm this is an international agreement[655], due to the presence of a contractual nexus – namely the payment by the EU for the implementation of non-entry measures by Turkey, and that this is a typical example of a mixed agreement, involving both EU and MSs competences[656]. However, should the EU-Turkey Statement be considered as a genuine international agreement concluded also by the EU, it would be invalid, since the stipulation did not comply with the procedure laid down in Article 218 TFEU[657] – although, according to Cherubini, this would not change the legal nature of the Agreement. In particular, the document does neither respect the requirement of approval by the European Parliament[658] nor of preventive control by the ECJ[659]. The issue of the nature of this act is at the centre

[650] MORENO-LAX AND GIUFFRÉ (2017: 5-7).
[651] LIGUORI (2019: 57-63).
[652] FREIER ET AL. (2021).
[653] CARRERA ET AL. (2017: 1-2).
[654] AMADEO ET AL. (2022: 425-448).
[655] CHERUBINI (2017); DEN HEIJER AND SPIJKERBOER (2016); FAVILLI (2016); GATTI (2016).
[656] CHERUBINI (2017: 40-41).
[657] AMADEO ET AL. (2022: 425-448).
[658] Article 218, para. 6, TFEU "The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement: (a) after obtaining the consent of the European Parliament in the following cases: (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent. (b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act".
[659] Article 218, para. 11, TFEU: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement

of three cases presented before the General Court ('GC') of the EU on 28 February 2017, namely *NF*[660], *NG*[661] *and NM*[662] *v. European Council*, where the Court rejected the request of annulment of the EU-Turkey Statement made by two Pakistani and one Afghan citizens located in Greece[663] and in the process of being returned to Turkey[664]. Similarly, the ECJ also dismissed the appeals presented by the three individuals as being manifestly inadmissible[665]. This could have been an opportunity for the Court of Justice of the European Union ('CJEU') to recall the legal guidelines that apply to the adoption of these kinds of agreements inside the EU, as well as their implications on human rights. Nonetheless, the Court did not go into the merits of the complaints, for the reasons that will be soon explained[666]. For the purpose of simplification only the *NF v. European Council* case will be discussed given the fact that the Court's methodology and reasoning are identical in all three cases[667].

The applicant, an asylum seeker from Pakistan, had arrived in Greece through Turkey. He requested asylum in Greece upon the insistence of the Greek authorities – incompatibility with EU fundamental rights, particularly Articles 1[668], 18 and 19 of the Charter of Nice[669] – since Greece was not his first asylum choice – fearing that he would be sent back to Turkey, where he would be imprisoned and ultimately forced to return to his home country[670]. Invoking both human rights violations and constitutional issues, he filed an application for annulment the EU-Turkey Statement under Article 263 TFEU of [671]. He argued that this Statement goes against the principle of *non-refoulement* and the prohibition of collective expulsion; he contested its legitimacy on the grounds that it illegally assumes that Turkey is a safe third country; he argued that the Statement constitutes an international Agreement that the European Council is responsible for, which is invalid due to the noncompliance with Article 218 TFEU[672]. Thus, the point highlighted was that the term Statement cannot *de jure* prevent this document from being regarded as a legally binding international Agreement, because the legal nature of an

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envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised".

[660] Order of the General Court of the European Union, 28 February 2017, T-192/16, *NF v. European Council*.

[661] Order of the General Court of the European Union, 28 February 2017, T-193/16, *NG v. European Council*.

[662] Order of the General Court of the European Union, 28 February 2017, T-252/16, *NM v. European Council*.

[663] FREIER ET AL. (2021).

[664] CHERUBINI (2019: 81-82).

[665] Order of the Court of Justice of the European Union, 12 September 2017, C-208/17, C-209/17, C-210/17, *NF, NG and NM v. European Council.*

[666] FREIER ET AL. (2021).

[667] LIGUORI (2019: 76-80).

[668] Article 1, Charter of fundamental rights of the European Union, on human dignity.

[669] For Articles 18 and 19 see notes 127 and 128.

[670] CARRERA ET AL. (2017: 3-7).

[671] LIGUORI (2019: 76-80).

[672] CARRERA ET AL. (2017: 3-7).

instrument is determined by its content and not by its form or arbitrary will of its drafters. Determining the authorship of the Statement based on its content and the circumstances surrounding its adoption was a crucial aspect of the case that the Court heard[673]. For this reason, the GC restricted its examination to the question of whether it had jurisdiction, hence on whether the Deal could be attributed to the EU[674].

Acknowledging the ambiguity of the Statement's wording, the court contacted the European Council, the Council of the EU and the Commission to enquire about who was responsible for the Deal, however, a barrage of denials of responsibility ensued[675]. Following the Statement's publication, the EU adopted a series of legal, political and financial actions that demonstrated its commitment to the real implementation of the measure. These actions demonstrate how the EU institutions and Turkey see the Statement as binding them to follow its provisions *bona fide* – in good faith. Despite this, the European institutions disassociated themselves from the Document's authorship and legal responsibility, claiming before the Court that they are not parties to such an Agreement[676]. According to the European Council, the Statement was not meant to have legally binding effects or to be constructed as a treaty or agreement, but rather as the result of an international dialogue between MSs and the Republic of Turkey. Therefore, the words used in the Press Release, such as allusions to the EU, must be regarded as journalistic. As concerns the Council, it informed the Court that it did not contribute to the writing of the Document, by denying any involvement in the structured interaction between MSs' representatives and Turkey. It also declared that it fully shared the stance of the European Council according to which no official agreement was reached regarding the migration crisis. In turn, the Commission supported this view as well, by contending that the EU-Turkey Statement is a political arrangement that the Heads of State or Government of MSs had concluded, as evidenced by the terminology used[677].

In its reasoning the Court reminded everyone that it lacks jurisdiction to rule on the legality of a measure adopted by a national government or MSs representatives who are physically gathered on the premises of an EU institution, acting in their respective capacities as Heads of State or Government of EU MSs, rather than as members of the Council or the European Council[678]. Yet, it is necessary to determine if a measure is not a decision of the European Council in order to consider this as a decision of MSs[679]. Then, the Court accepted the European Council's argument that separate meetings had taken place. Indeed, it emphasised that, before 18 March 2016, there had been two more meetings – on 29 November 2015, 7 March 2016 – where MSs'

[673] *Ibidem*.
[674] LIGUORI (2019: 76-80).
[675] FREIER ET AL. (2021).
[676] CARRERA ET AL. (2017: 3-7).
[677] *Ibidem*.
[678] Order, 28 February 2017, *NF v. European Council*, Point 44.
[679] Order, 28 February 2017, *NF v. European Council*, Point 45.

representatives participated in their capacity as Heads of State or Government of the EU MSs[680]. Furthermore, official documents provided by the European Council demonstrated that a separate international meeting was convened and that the European Council's involvement in the Statement's drafting cannot be inferred. The Court found that the Statement had been finalised during the international summit, even though it acknowledged that inaccuracies and ambiguity characterised the Press Release[681]. Therefore, the GC concluded that the terms "EU" and "Members of the European Council" in the EU-Turkey Statement should be interpreted as referring to the EU's Heads of State or Government[682] and that

> "independently of whether it constitutes […] a political statement or […] a measure capable of producing binding legal effects, the EU-Turkey statement […] cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure"[683].

Since the Statement had been ratified by each of the EU's MSs as well as Turkey, and is not attributable to the Union, the Court denied having jurisdiction to determine whether it was lawful[684].

The arguments used by the Court do not seem convincing. Numerous factors have led to criticism of the Order. The Court based its reasoning more on formal evidence than on the actual terms of the Deal[685], as other analyses do when examining the legal nature of the Statement[686]. The Court probably avoided on purpose the Statement's interpretation relying more on the explicit meaning of terms "EU" and "Members of European Council". In fact, if the Statement had been attributed to the EU institutions, the Court would have had to examine its compatibility with European and international asylum and refugee law. Thus, the GC would have either concluded that the EU-Turkey Statement did not comply with such norms, or chosen to interpret asylum and refugee law narrowly, fostering a tense political climate[687]. According to some authors, the Court's choice of action was a sort of judicial passivism, meaning that it intentionally withheld its authority, instead of using the occasion to convey a message to the EU institutions and MSs[688]. As a matter of fact, the Court endorsed, rather than criticising, the strategy used by MSs and EU institutions to elude political and judicial oversight through arrangements that do not fall under the purview of Article 218 TFEU. This instance demonstrates how

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680 LIGUORI (2019: 76-80).
681 Order, 28 February 2017, *NF v. European Council*, Points 54, 61, 62.
682 Order, 28 February 2017, *NF v. European Council*, Point 69.
683 Order, 28 February 2017, *NF v. European Council*, Point 71.
684 CHERUBINI (2019: 81-82).
685 CHERUBINI (2017: 45).
686 CHERUBINI (2017: 40-42).
687 LIGUORI (2019: 76-80).
688 GOLDNER LANG (2018); LIGUORI (2019: 79).

European checks and balances can be totally circumvented when EU institutions conspire with MSs to act outside the terms of the Treaty[689].

The unclear legal nature of the Statement and the ambiguity of its attribution at European level complicate the legal analysis for the imputation of indirect responsibility in the case of human rights violations committed by Turkey during the implementation of this externalisation policy. This is what the next subsection will try to explain.

2.2.2 Unclear patterns of orchestration and responsibility for complicity

Following the interpretation of some legal scholars according to which the EU-Turkey Statement is actually a legally binding Agreement[690], seen the evident contractual nexus between the two parties[691], it would be possible to consider the relationship arising from it a form of delegation. Therefore, such an Agreement, creating a hierarchical relation between the EU, and/or its MSs, and Turkey, could be compared to a discretion based contract of delegation where the principals shift some of their powers towards an agent who enjoys a bit of autonomy in the implementation of the concerned policy. At the same time, the principal, in this case the EU through the Commission, monitors and coordinates the actions of Turkey in the management of refugees, as provided for by the Commission Decision on the Refugee Facility for Turkey[692]. However, other scholars consider the EU-Turkey Statement as a political declaration, not intended to produce legally binding effects[693]. As regards forms of indirect governance, according to Müller and Slominski also this kind of EU externalisation policy can be referred to as orchestration, established by a non-hierarchical and soft arrangement[694]. Indeed, the Statement does not confer any strong control power to the orchestrators, especially the EU as IO[695], who cannot force or coerce the intermediary, Turkey, if it deviates from the initially planned objectives. The only form of control the EU and its MSs may have towards Turkey is a form of financial blackmail, creating conditions for the allocation of the funding. In this sense, in fact, the Commission monitors the contracted projects[696], but no formal control is provided for in the Statement. Furthermore, the two parties pursue a joint governance objective[697], which would be difficult to achieve not together. As concern the EU, the Statement and Turkey cooperation are instruments to eliminate the motivation for migrants and asylum seekers to pursue unofficial routes to the EU,

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689 IDRIZ (2017).
690 CHERUBINI (2017); DEN HEIJER AND SPIJKERBOER (2016); FAVILLI (2016); GATTI (2016).
691 CHERUBINI (2017: 41).
692 Decision of the European Commission, *the Refugee Facility for Turkey*.
693 MORENO-LAX AND GIUFFRÉ (2017: 5-7); AMADEO ET AL. (2022: 425-448).
694 MÜLLER AND SLOMINSKI (2021: 802).
695 ABBOTT ET AL. (2015: 7-9).
696 Communication from the Commission, *Seventh Annual Report of the Facility for Refugees in Turkey*, p. 13.
697 ABBOTT ET AL. (2016: 722).

thanks to readmissions to Turkey[698]. As for Turkey, the Statement allowed it to initially resume accession talks to EU, to shorten processing period for visa applications from Turkish citizens and to take financial advantages from the EU[699]. Therefore, orchestration in Turkey has empowered the intermediary, by strengthening its operational capacities, as later also occurred with Libya. Indeed, as happened with the Italy-Libya MoU, also the EU-Turkey Statement was not used to compensate a lack of competences to regulate external borders effectively. Instead, the aim of this policy was to continue pursuing *non-entrée* migration policies, while complying with legal constraints. Nonetheless, human rights advocates affirm that the Statement make Europe responsible for violations of migrants rights committed by Turkey[700].

Continuing the analysis from a legal point of view, it was acknowledged that the declaration and the ensuing actions on Greek territory led to the direct violation of human rights by Greece. Greek hotspots are now *de facto* unsafe detention centres where asylum seekers are subjected to accelerated processing for both asylum and deportation in an effort to bring them back to Turkey as soon as possible. Both governmental organizations and NGOs confirm dramatic conditions of physical violence, lack of legal advice and adequate health care in these places[701]. However, in addition to these direct violations by Greece, it is possible to make a study of indirect responsibility on the basis of what has been described so far. The analysis of the indirect form of governance applicable to this case study has demonstrated that the EU-Turkey Statement established a soft relationship between the two parties, where no strong control is exercised by the orchestrator towards the intermediary. Although the Commission has coordinated financed activities and has exercised more monitoring than Italy with Libya, the soft relation established between EU and Turkey is not comparable to a situation of direction and control, as provided for in Article 17 ARSIWA and Article 15 ARIO. Articles 17 and 61 ARIO can neither be applied to this case study, since they concern only the relation between an IO and its MSs, or another IO, and not third States.

Therefore, also in this case, the relation arising from a similar kind of orchestration falls within the scope of complicity. As a matter of fact, both the EU and its MSs support Turkey through aid and assistance, mainly financially. As indicated both in the Statement and in the Decision on the Refugee Facility for Turkey[702], 6 billion euro have been allocated for Turkey. Of these, three billion are financed by the MSs and the other three by the EU[703]. As a consequence, whether the declaration is a legally binding agreement or not, and despite what the GC affirmed in previously analysed Orders[704], responsibility for

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[698] FREIER ET AL. (2021).
[699] CASAGLIA AND PACCIARDI (2022: 1660-1662).
[700] TERRY (2021).
[701] LIGUORI (2019: 57-63).
[702] Decision of the European Commission, *the Refugee Facility for Turkey*.
[703] Communication from the Commission, *Seventh Annual Report of the Facility for Refugees in Turkey.*
[704] Order, 28 February 2017, *NF v. European Council*.

complicity can be attributed to both the MS and the EU, given the financial aid provided by both actors to Turkey. Furthermore, also the coordination support can be considered as a way of aiding and assisting Turkey, in this case only by the Commission. Hence, the EU-Turkey Statement is an instrument of cooperation with an unsafe country, through which both the EU and its MSs aid and assist Turkey in conducting serious and systematic violations of migrants' rights.

After the determination of EU and MSs contribution to the wrongful act and of the applicable international standard, also in this case study the satisfaction of the remaining three requirements for responsibility for complicity must be verified. Firstly, orchestration fails to provide a clear picture of whether the EU and its MSs are aware of their involvement in the international wrongful act committed. However, the knowledge criterion can be considered fulfilled, as it was in the Libyan case, since the externalising actors should have been reasonably aware of facilitating Turkey's wrongful acts. Public reports describe the systematic violations of human rights perpetrated in Turkey and the impossibility to define it as a safe third country[705]. The EU, through its financings, aids and assists Ankara in carrying out collective expulsions, violating the principle of *non-refoulement*, detaining migrants and subjecting them to inhuman and degrading treatments. Hence, an implicit knowledge of contribution to such breaches of the law by the EU and its MSs exists. As a result, the mental element of knowledge is fulfilled. Second, also in this case, the intent requirement is difficult to demonstrate. Nonetheless, financial support is provided to end or at least substantially reduce irregular crossings between Turkey and the EU[706], and "to prevent new sea or land routes for illegal migration opening from Turkey to the EU"[707], as explicitly affirmed in the Statement. The Refugee Facility for Turkey has financed 153 different projects in these years, in several areas of interest, such as education, health, protection, basic needs, livelihoods, municipal infrastructure, Turkish language and social cohesion, and migration management. In the last category, four main projects are included, which have supported the strengthening of border management[708], also in the Eastern and South-Eastern border with Syria, allegedly dangerous for migrants as described by several sources[709]. Therefore, the European funds, among others, have the aim to strengthen borders and border management practices, as explicitly indicated in the Statement.

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[705] AMNESTY INTERNATIONAL (2016); FAVILLI (2016); HUMAN RIGHTS WATCH (2016); LABAYLE AND DE BRUYCKER (2016); PEERS AND ROMAN (2016) for non institutional sources, and the aforementioned Resolution of the Parliamentary Assembly of the Council of Europe, *The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016,* as an institutional one.

[706] Statement of the Council of the European Union, *EU-Turkey Statement*, Point 4.

[707] Statement of the Council of the European Union, *EU-Turkey Statement*, Point 3.

[708] Monitoring Report of the European Commission, December 2023, No. 12, *EU support to Refugees in Türkiye. Results Framework Monitoring Report.*

[709] Where *refoulement* practices and violences against migrants have been denounced by AMNESTY INTERNATIONAL (2015); HUMAN RIGHTS WATCH (2015).

Although not necessary according to some authors[710], also the intent criterion can be considered met. Third, as for the opposability requirement, Turkey has violated the prohibition of torture and of *refoulement*, that are part of *jus cogens*; the right to a due process, considered part of customary law at European regional level by some legal experts[711]; and other conventional norms. Among these there are the prohibitions of arbitrary detention, indicated in the 1966 Covenant on Civil and Political Rights[712] of which all European MSs and Turkey are parties, in the ECHR[713] and the EU Charter of Fundamental rights[714]; of inhuman and degrading treatments, established by the 1984 Convention against Torture[715], ratified both by EU MSs and Turkey, by the ECHR[716] and by the EU Charter of Nice[717] as well[718]. As a result, the illegal acts committed by Turkey would be internationally wrongful also if committed by the EU and its MSs, hence, also the opposability criterion is fulfilled. In summary, the current case study satisfies all of the criteria outlined in Article 16 ARSIWA and Article 14 ARIO. The EU-Turkey Statement, as a European externalisation policy of migration and borders management, entails EU and European MSs indirect responsibility for complicity in human rights violations committed by Turkey.

In the next subsection an analysis of the last case study of the present research will be provided. Frontex joint operations will be described and a more general investigation of possible indirect responsibility attribution in these operations will be conducted.

2.3 Frontex joint operations

2.3.1 The complexity of joint operations and human rights' violations

As explained in the first chapter, Frontex – the European Border and Coast Guard Agency – coordinates and provides operational assistance in the integrated management of the external borders, the control of persons at the external borders and the fight against illegal immigration and illegal residence, as well as the removal and repatriation of persons residing irregularly in

[710] LANOVOY (2014: 150-156); PASCALE (2018: 436-438).
[711] GATTA (2023); SACCUCCI (2018).
[712] Article 9, *International Covenant on Civil and Political Rights.*
[713] Article 5, ECHR.
[714] Article 6, *Charter of fundamental rights of the European Union.*
[715] Convention, 1984, *Convention against Torture.*
[716] Article 3, ECHR.
[717] Article 4, *Charter of fundamental rights of the European Union.*
[718] Despite the *pacta tertiis* rule, James Crawford clarified that the opposability requirement does not make any reference to the identity of norms or sources. Rather, it only requires that the conduct under scrutiny constitutes a wrongful act for both the assisted and the assisting state – and IOs – regardless of the source of the international norm violated. CRAWFORD (2013: 410).

Europe[719]. This Agency represents one of the main actors involved in externalisation policies for migration control both by the EU and by European MSs. Such kind of externalisation is quite different from the ones described above. Indeed, Frontex activities can be the result of externalisation policies of the EU which involves other MSs or third States as implementing actors, but they can also be the outcome of MSs' externalisation policies where Frontex is the implementing actor. Although some of the activities carried out are comparable to the cases of Italy and Libya and the EU and Turkey, where Frontex had a role too, the externalisation policies that will be analysed in this subsection imply the creation of different relations depending on their object and form, and on the externalising actors.

The duty to monitor and manage external borders lies with MSs[720], as indicated by Article 1, para. 2, of Regulation 2007/2004, and Frontex should facilitate and render more effective the application of measures for border control[721]. Frontex was not intended to be a European border police with discretionary powers; rather, it is a system of national border agencies coordinated by a central organisation[722]. The main activities conducted by the Agency at the external border are indicated in Article 36 of the 2019 Regulation on the EBCG[723]. In particular, the most relevant instruments of strengthening of external borders for this study are the joint operations, pilot projects and rapid border interventions, organised and coordinated by the Agency to support MSs, and which can involve third states[724]. Joint operations can support MSs in border control and return operations, in both the Schengen area and third states' territory, and can become permanent activities of the Agency. Whereas rapid border interventions are triggered by situations necessitating immediate

[719] AMADEO ET AL. (2022: 13-82).
[720] BROUWER (2010: 206-207).
[721] Regulation, 2007/2004, *Regulation establishing Frontex.*
[722] FERNANDEZ (2016: 239-241).
[723] Regulation, 2019/1896, *on the EBCG,* Article 36 on actions by the Agency at the external borders affirms "1. A Member State may request the Agency's assistance in implementing its obligations with regard to external border control. The Agency shall also carry out measures in accordance with Articles 41 and 42. 2. The Agency shall organise the appropriate technical and operational assistance for the host Member State and it may, acting in accordance with the relevant Union and international law, including the principle of non-refoulement, take one or more of the following measures: (a) coordinate joint operations for one or more Member States and deploy the standing corps and technical equipment; (b) organise rapid border interventions and deploy the standing corps and technical equipment; (c) coordinate activities for one or more Member States and third countries at the external borders, including joint operations with third countries; (d) deploy the standing corps in the framework of the migration management support teams to, inter alia, hotspot areas in order to provide technical and operational assistance, including, where necessary, in return activities; (e) within the framework of operations referred to in points (a), (b) and (c) of this paragraph and in accordance with Regulation (EU) No 656/2014 and international law, provide technical and operational assistance to Member States and third countries in support of SAR operations for persons in distress at sea which may arise during border surveillance operations at sea; (f) give priority treatment to the EUROSUR fusion services.
[724] CHERUBINI (2019: 73-74).

intervention at a MS's border and are conducted for a limited period[725]. The main method of conducting both kinds of operations is the deployment of technical equipment and Frontex's standing corps, which includes statutory Frontex staff and officers seconded from MSs. A country receiving this aid is often referred to as a 'host MS', while countries providing operational resources are referred to as 'participating MSs'. Standard joint operations and rapid border interventions are often executed upon the request of the host MS. However, when border control becomes so inefficient as to jeopardise the Schengen area's ability to function, the Council may decide to initiate rapid interventions, acting on a proposal from the Commission[726].

Joint operations are executed following an operational plan, drafted by Frontex, under the direction of its executive director, and reviewed in the context of the European Integrated Border Management's ('EIBM') multiannual strategic policy cycle. The plan should be agreed to by participating MSs, third states and their bordering countries when the joint operation is carried out in the territory of a third state. Frontex, the host, and the participating MSs are bound by operational plans. The host MS gives instructions to all the European Border Guard Team ('EBGT') members, yet, following the specific operational plan of the joint operation. Hence, team members must perform their duties and powers in the presence and under the direction of the host MS's authorities, which can also authorise team members to act on its behalf[727]. Generally speaking, decisions on the actions of deployed people and aircraft or maritime assets are made by the international coordination centre – which coordinates each joint operation and is composed of the host MS authorities, Frontex coordinating officer and representatives of border guard authorities of the participating MSs[728]. However, the participating MS retains operational authority over major military equipment. The applicable operational plan contains more detailed guidelines on the command-and-control framework for every joint operation and on all the details considered necessary to execute it. Nonetheless, public access to Frontex's operational plans is not permitted[729].

Identifying, stopping, and managing irregular flow of migrants are the main goals of Frontex's joint operations. In terms of joint maritime operations, Frontex's mandate enables it to support MS and third states during SAR operations[730]; organise, coordinate and finance the return operations of MSs or joint return operations on its own initiative with the consent of the MS in question[731]; and conduct joint operations hosted by third states[732]. As concern the

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[725] RAIMONDO (2024: 51-52).
[726] *Ibidem*.
[727] RAIMONDO (2024: 52-53).
[728] Fact Sheet of the European Commission, 31 October 2014, *Frontex Joint Operation 'Triton' – Concerted Efforts for managing migrator flows in the Central Mediterranean.*
[729] RAIMONDO (2024: 52-53).
[730] Regulation, 2019/1896, *on the EBCG,* Article 3, para. 1, letter b), and Article 36, para. 2, letter e).
[731] Regulation, 2019/1896, *on the EBCG,* Article 50.
[732] Regulation, 2019/1896, *on the EBCG,* Article 73, para. 3, and Article 74, para. 3.

last type of operations, they can be conducted provided that: the operational plan is drafted jointly by Frontex and the third country in question; the bordering MS gives consent; a status agreement is signed between the EU and the third state, if members of the deployed team will be exercising executive powers[733]. The EU has concluded Status Agreements with Albania, Serbia, Montenegro and other Balkan countries based on the prior mandate of Frontex. These agreements are being renegotiated, others have been concluded in light of Frontex's expanded mandate, or are in the negotiation phase, such as the ones with Senegal and Mauritania[734]. Every status agreement grants team members extensive immunity from the host third state's jurisdiction, which can be waived by Frontex and MSs, yet border guards remain subject to jurisdiction of their home MSs. Since Frontex's team members lack a home MSs, the latter option appears to be restricted only to the ones seconded by MSs[735]. Furthermore, status agreements are frequently not available to the public, and paradoxically neither to Frontex, making it impossible to check if they comply with EU and international law[736]. The Agency may enable operational cooperation between MSs and third countries through the instrument of working arrangements, that it is authorised to conclude based on a mandate granted by the management board. Such bilateral cooperations are not considered legally binding and should not be regarded as international treaties. However, they are often seen as essential for the involvement of third countries in joint operations aimed at stemming the flow of irregular migrants, although, active involvement of the EU in providing sufficient incentives to third states is necessary, due to Frontex lack of proper resources[737].

The role of Frontex in joint operations is limited to coordination, since operations are placed under the command of at least one host MS; hence, executive powers are clearly allocated. Even though Frontex participates and is involved in every phase of the operations, its role is limited to supervising the implementation of joint operations by MSs. This is owing to the fact that operations require both a territory to operate from and the personnel and technological resources to support them. As a consequence, national administrations are apparently left in charge of making decisions and using coercive powers, namely of launching and approving operations, and of taking responsibility for these[738]. On the other hand, Frontex coordinates and prepares the actual deployment of EBGTs and technical equipment in the various operations, and MSs must provide access to their border guards. EBGTs act as 'guest officers', that are officers from MSs other than the host state, that work in border guard services. They are not Frontex staff, and are permitted to carry out all duties and exercise all powers for border checks and monitoring, including the use of force and carrying weapons when necessary, but under the instruction and

[733] *Ibidem*.
[734] RAIMONDO (2024: 56-58).
[735] *Ibidem*.
[736] BALDACCINI (2010: 251-254).
[737] *Ibidem*.
[738] FERNANDEZ (2016: 241-244).

in the presence of host authorities, as said above. Team members are also bound by the host MS's national laws and are subject to its criminal laws; consequently, the host state bears responsibility for any harm caused by guest officers. From a strictly legal perspective, participating MSs guarantee only national contributions and deployments they have agreed to; similarly, Frontex agents should only ensure that all organisational requirements are met and support the guest and host officers in their operational coordination; while, the host MSs continue to be in charge of conducting, leading, commanding, and controlling the overall border security measures reinforced by the joint operations[739].

Nonetheless, it has been argued that the legal framework of Frontex draws a more established chain of command than the actual one, which in reality appears to allow for extensive involvement by different players in potential abuses of human rights. As a matter of fact, despite the predominant role of the host MS, both Frontex and participating MSs have a significant influence over joint operations. As concerns Frontex, since coordination and facilitation by the Agency have no precise definitions, its role can be particularly complex, and it can influence the decision-making process in operations at many different levels of their implementation. On the one hand, Frontex plays a major role in the coordination and initialisation of joint operations, by evaluating and approving proposals of MSs, initiating joint operations itself, and financing or co-financing joint operations and pilot projects. Furthermore, it can also set priorities for EU integrated border management[740]. On the other hand, Frontex agents are used at every stage of operations' practical implementation. Frontex coordinating officers deployed to joint operations, in contrast to 'guest officers', are agency staff members who ensure the implementation of the operational plan by MSs during operations, arguably participate directly in the strategic command of operations influencing the host state, may assist in the resolution of disagreements on the operational plan's execution, and could have full access to EBGTs. Such quite open role of Frontex can also be seen in the activities of other Frontex staff, such as Frontex operational coordinators and Frontex support officers, who serve as intermediaries between the MSs and the Agency, and are often positioned at the frontline of the operational decision-making process, because of their experience[741]. As a result, some of Frontex's legal attributions are viewed by scholars and NGOs as having important operational and policy implications that go beyond providing the EU MSs with merely technical support or assistance[742].

As regards participating MSs, they exercise a similar power to interfere or exert influence in the chain of command. Indeed, their autonomy and input in joint operations appear to be quite essential, given their influence over the decision-making process. First, participating MSs keep the command of their aerial and naval assets deployed in joint operations and their discretion

[739] *Ibidem*.
[740] FERNANDEZ (2016: 245-247).
[741] *Ibidem*.
[742] GUILD ET AL. (2011: 12-13); RIJPMA (2014:92).

in the coordination activities remains expansive[743]. For instance, EBGTs are structured into a number of 'participating units', namely maritime, land or aerial units, which are under the responsibility of the host MSs or also of participating MSs taking part in a sea operation[744]. As a consequence, participating MSs deploy vessels and aircraft with a responsible officer and a team of national border guards, keeping the national chain of command in place[745]. Second, the exclusive control that host state authorities may have over patrols is called into question by their restricted capabilities. MSs, requesting assistance from a Frontex joint operation, cannot always oversee activities as effectively as they ought to, facing most of the times emergencies or excessive pressure at their borders[746]. Third, guest officers generally keep reporting to their home MSs throughout joint operations, allowing them to stay informed and potentially interfere with the chain of command[747]. Furthermore, the link between guest officers and their participating MS remains strong owing to the possibility home MSs have to take disciplinary measures against their officers and the control national authorities exercise over guest officers' remuneration[748]. As a result, home MSs appear to retain a considerable degree of discretion and control over their assets, as well as a substantial ability to impact operations, which calls into question the host state's exclusive control[749].

Such a contrast between law and practice is critical for a study of the actual international responsibility of actors involved[750]. As the ICJ affirmed in the Judgement on *Genocide* "it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State"[751]. These factual and legal components of the real executive authority structure and chain of command during Frontex-coordinated joint border control operations, which involve so many different actors, are essential for the attribution of wrongful conducts to MSs or the Agency. Indeed, as it will be shown, attribution seems to be problematic when a multiplicity of actors is involved[752]. Given the complex relations intertwining among the entities involved in Frontex joint operations, and the particularity of every single operation conducted until now, the present research will limit the analysis to a general description of them, without focusing on a particular case. This will allow the study to subsequently examine responsibility attribution in a broader and more comprehensive way.

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[743] FERNANDEZ (2016: 245-247).
[744] Regulation of the European Parliament and of the Council, 15 May 2014, 656/2014, *establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Article 2, para. 5.
[745] FERNANDEZ (2016: 245-247).
[746] MCDONOUGH AND TSOURDI (2012).
[747] FRELICK (2011: 38-54).
[748] FERNANDEZ (2016: 245-247).
[749] *Ibidem*.
[750] *Ibidem*.
[751] Judgement *Genocide*, para. 392.
[752] FERNANDEZ (2016: 245-247).

As regards human rights, the EBCG is bound to ensure full respect for fundamental rights in all its activities[753]. As stated in Regulation 2019/1896, this Regulation respects the fundamental rights and observes the principles recognised by Articles 2 and 6 TEU and by the Charter of Fundamental Rights of the EU[754]. Article 80 of the same Regulation provides for the legal sources of fundamental rights' protection that the EBCG must respect, recalling the Charter of Nice and relevant international law, including the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, the Convention on the Rights of the Child and obligations related to international protection, in particular the principle of *non-refoulement*[755]. The special needs of vulnerable persons are also recalled in the same Article. Then, the Regulation specifies who is bound to respect these norms, namely the Agency – Article 5, para. 4 – and specifically the members of the teams deployed in a host MS or in a third state – Article 43, para. 4 – as well as statutory staff – Article 55, para. 4. The duty to respect fundamental rights is particularly emphasised in situations or acts involving executive or coercive interventions by teams, including in MS or Agency activities or interventions conducted in the territory of third countries[756].

However, during Frontex operations there is the risk that some norms that are binding on the Agency or MSs will be breached[757]. Human rights may be violated by acts or omissions of border guards, and the abundance of overlapping executive competencies, together with the lack of information regarding the actual chain of command, create significant uncertainty in respect to responsibility attribution thereto[758]. Past and present Frontex operations, such as Hera operations – I, II and III – operations Triton, Poseidon, Sophia and Irini – EUNAVFOR MED – among the most known, have created the circumstances for several human rights violations, perpetrated by host MSs, participating MSs, Frontex or third states, either directly or indirectly[759]. In general, the risk to asylum, the *non-refoulement* principle, the prohibition on inhumane treatment of others, and the restriction against collective expulsions are all under risk during joint operations. This is because after the interception of migrants, their demands for international protection are not always individually assessed before sending them back to other countries. The deprivation of liberty is another category of human rights that could be violated in the context of joint operations[760]. It may happen that people who have been intercepted or apprehended will be detained by the host state's authorities, that could violate the right to liberty by disregarding procedural rights, such as the right to

[753] Regulation, 2019/1896, *on the EBCG,* Article 1.
[754] Regulation, 2019/1896, *on the EBCG,* Point 103.
[755] Regulation, 2019/1896, *on the EBCG,* Article 80, para. 1.
[756] AMADEO ET AL. (2022: 13-82).
[757] MAJCHER (2015: 57-58).
[758] FERNANDEZ (2016: 239).
[759] BALDACCINI (2010: 238-241); FRENZEN (2016: 294-301); CHERUBINI (2019: 73-74); GKLIATI AND KILPATRICK (2021: 16-18); GATTA (2023: 399).
[760] MAJCHER (2015: 57-58).

judicial review, the right to information about the reasons for detention, and compensation for unjustified detention, as confirmed by the ECtHR in its case law[761]. When dealing with joint return operations, such missions may imply the risk of infringing deportees' fundamental rights, owing to the use of coercion and force. During removals the right to life and protection from ill-treatment may be in danger, additionally, collective expulsions can be a risk associated to these operations[762]. Furthermore, joint operations on the territory of third countries give rise to grave concerns regarding their adherence to the right to leave, the *non-refoulement* principle and the right to seek asylum. The primary goal of these operations is to stop foreigners from entering the EU territory through third states, which are supported in the implementation of border control measures. In fact, to protect external border and effectively manage EU migration policy, joint operations in third states focus on preventing exits instead of putting emphasis on irregular entries. These activities, as described in the previous case studies, could lead to the circumvention of the *non-refoulement* principle in addition to the breach of the right to leave[763].

Some concrete examples of operations where human rights have been violated are, first, the Rapid Border Intervention Team ('RABIT') mission of 2010. In an attempt to assist the Greek government in controlling the influx of migrants into the North-Eastern region of Greece that borders Turkey, Frontex deployed 175 border guards through RABIT, with assistance from Norway and EU MSs. The assistance in border control activities was provided by Frontex to Greece with awareness of the conditions of Greek migrant detention centres, where apprehended irregular migrants where transferred to[764]. There they might have experienced ill-treatment and other serious violations of human rights[765]. Second, operation Hera is an operation that has been carried out also in third countries' territories, through a cooperation with transit states in order to prevent them from reaching the shores of EU MSs[766]. Hera operation, defined as "the foundation of all joint sea operations"[767], has been based in Spain since 2006 until 2018 and has been developed in three projects with slightly different focuses[768]. It consists of coordinating the activities of detecting vessels on which irregular foreigners are travelling to Spain in the waters bordering the coasts of Mauritania and Senegal, and handing them over to the

[761] Judgement of the European Court of Human Rights, 25 June 1996, 19776/92, *Amuur v. France*; Judgement of the European Court of Human Rights, 23 October 2008, 2440/07, *Soldatenko v. Ukraine*; Judgement of the European Court of Human Rights, 8 January 2009, 13476/04, *Khudyakova v. Russia*; Judgement of the European Court of Human Rights, 11 June 2009, 53541/07, *S.D. v. Greece*; Judgement of the European Court of Human Rights, 22 September 2009, 30471/08, *Abdolkhani and Karimnia v. Turkey*.
[762] MAJCHER (2015: 64-66).
[763] RAIMONDO (2024: 118-119).
[764] FRELICK (2011).
[765] KALPOUZOS AND MANN (2015).
[766] CHERUBINI (2019: 73-74).
[767] FRONTEX AND LODGE (2010: 37).
[768] EUROPEAN COURT OF AUDITORS (2021: 55).

authorities of the two third states[769]. Hera is certainly considered a success story in immigration control, but a great part of its success came from the breach of migrant rights[770]. Among the violated rights there is, first, the right to leave a country, which is affected by pre-departure arrests within Mauritania and Senegal occurred without any legal grounds[771], carried out by these third countries' authorities, but financially and materially supported by Spain and Frontex. Second, the principle of *non-refoulement* has been violated through the deployment of maritime patrols in Mauritanian and Senegalese territorial waters to conduct pushbacks or pullbacks of migrant boats. Both EU and third countries' vessels were deployed, with one official from Mauritania or Senegal or a Spanish Guardia Civil officer on board respectively. Whereas in international waters coercive tactics were used to either convince migrants to turn back or escort them back to Senegal and Mauritania. Such tactics resulted also in allegedly degrading and inhuman treatments[772]. Third, the prohibition to ill-treatment has been violated also in detention centres, where migrants intercepted at sea and those arrested before they departed where detained. A particular example is the migrant detention centre in the northern Mauritanian city of Nouadhibou, opened in 2006 thanks to Spanish fundings and closed in 2010, whose conditions have been described as appalling[773]. Finally, in Mauritania there is also an high risk of expulsion and the absence of a national asylum system. Therefore, it can neither be considered a safe third country[774].

These are only few examples of human rights' violation which can be committed by the various actors involved in Frontex joint operations. Another problem to consider with regards to these operation is transparency. The Agency operates on the ground with almost no transparency, making it difficult to access operational plans, which are largely blacked out when released[775]. As a result, local civil society is unable to properly oversee Frontex and advocate for human rights and local communities[776]. The opacity surrounding Frontex's daily activities and the limitations in accessing the operational plans exacerbate the difficulties in identifying who is responsible for what, especially for migrant rights' violations, among the various actors engaged in the Agency's joint operations. The cloak of secrecy surrounding Frontex's operations impedes both the *ex-ante* democratic overview of its actions and their *ex-post* judicial review[777]. Furthermore, vulnerable individuals affected by the aforementioned violations are not able to investigate the

[769] CHERUBINI (2019: 73-74).
[770] FRENZEN (2016: 294).
[771] Under some conditions, such as maintaining public order or national security, an individual's right to leave a country may be restricted. These restrictions must be specific and provided for by law. While, the UN Working Group on Arbitrary Detention determined that there was no legal basis for the arrests and detentions in Mauritania in its 2008 report.
[772] FRENZEN (2016: 296-301).
[773] *Ibidem*.
[774] UNHCR (2024: 4).
[775] CHERUBINI (2019: 73-74).
[776] GKLIATI AND KILPATRICK (2021).
[777] FRENZEN (2016: 308-309); RAIMONDO (2024: 65-68).

complex allocation of responsibility behind these operations[778]. Notwithstanding this, the next subsection will try to analyse such a complex scenario of responsibility.

2.3.2 A multiple-responsibilities analysis

In order to deal with responsibility attribution of human rights violations involving Frontex, first and foremost, a precise definition of the Agency's legal status is needed. International responsibility for the breach of international obligations can only be attributed to an organisation that has been endowed with international legal personality. Moreover, the identification of judicial fora competent to decide on responsibility directly depends on Frontex's legal personality. EU secondary legislation established Frontex as an Agency whose tasks are outlined in its constituent instrument. To enable it to operate autonomously from its political principals, while binding it with procedural and substantive constraints, Frontex has been provided with legal personality at the domestic level, according to some scholars. Nevertheless, this kind of legal personality does not automatically translate into international legal personality[779]. Frontex needs to be independent in order to be recognised as an international legal person, separate from the EU, albeit some authors even consider Frontex as an IO with its own international legal personality, due to its domestic legal capacity, specific functions and permanent organs[780]. Notwithstanding that Frontex operates autonomously in performing its technical and operational tasks, this does not prove that it is an independent legal person. Indeed, the Agency is functionally dependent on the EU and its political will. It is considered as the Union's executive branch in the implementation of the EIBM, thus, its international capacities depend on the normative powers of the EU. As a result, even the working arrangements concluded with third countries by Frontex, are finalised under the umbrella of the EU's international legal personality[781]. In brief, the Agency lacks distinct legal personality under international law, despite it may be considered to enjoy legal personality under national and EU law. The EU provides Frontex with its international legal capacities. Therefore, both primary rules on human rights obligations pertaining to its parent organization, and secondary norms regulating the attribution of responsibility for their violation, should be applied to Frontex[782]. Furthermore, its responsibility under EU law can be determined by applying norms outlined in the ARIO[783].

Once having defined Frontex's legal status, two other challenges to be taken into account regarding the applicability of human rights obligations are

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[778] RAIMONDO (2024: 65-68).
[779] RAIMONDO (2024: 47-51).
[780] MAJCHER (2015: 51).
[781] RAIMONDO (2024: 47-51).
[782] *Ibidem*.
[783] MAJCHER (2015: 51-52).

the multiplicity of actors involved in the implementation of joint operations, and the denial of jurisdiction, and therefore of legal responsibility by MSs, given the concurrent exercise of jurisdiction by different actors over the same situation or the absence of direct physical control[784]. As regards the first point, an increasing number of actors is involved in joint operations, as previously described. In addition to Frontex agents, also MSs and third states' national authorities, sometimes private actors and other EU bodies and agencies, such as Europol ('European Union Agency for Law Enforcement Cooperation') or the European Union Agency for Asylum ('EUAA'), participate[785]. The way such different entities interact in joint operations enables them to shift the blame for the harmful consequences of border control activities[786]. Although Frontex and the competent national authorities have a shared responsibility for implementing the EIBM, the Agency persists in stressing that MSs bear all responsibility for any potential breaches of human rights, since it apparently does not exercise any executive power that have a direct impact on migrants[787], as also supported by some scholars[788]. However, as shown before, Frontex is essential in defining and carrying out the EIBM, and has an influencing role. As a consequence, it has to acknowledge its responsibility for any decision it makes as well as for any action it fulfils[789]. Nonetheless, the complex organisational structure, the different jurisdictions involved, the different obligations incumbent on the various actors, the lack of transparency of operations, and, especially, the confusing distribution of activities carried out by so many different actors, in distinct ways in each joint operation, make it difficult to prove that the Agency is solely responsible for a human rights' violation[790].

As concerns the issues of jurisdiction, in principle, the territorial model would be used by the authorities of MSs hosting Frontex joint operations to exercise jurisdiction. Furthermore, according to the personal model, a jurisdictional relation is created every time a state exercises direct and physical authority and control over a person. This is what happens in rejections or detentions at the frontier and maritime interdiction operations beyond the MS's territorial waters, where not only host states, but also participating states can exercise jurisdiction as soon as their officers use their administrative or law enforcement authority, as an exception to the authority host MSs should exercise. Another example is represented by return operations, where the MS that issues the return decision exercises its jurisdiction, however, in the case of breaches of human rights the determination of responsible actors depends on the circumstances of the single case, due to the multiple authorities involved. Therefore, in these situations, it should not be automatically assumed

[784] RAIMONDO (2024: 203-206).
[785] GATTA (2023: 408-410).
[786] RAIMONDO (2024: 68-70).
[787] MAJCHER (2015: 53-54).
[788] RIJPMA (2014).
[789] RAIMONDO (2024: 68-70).
[790] GATTA (2023: 408-410); RAIMONDO (2024: 68-70).

that concurrent jurisdiction cannot be exercised, and that Frontex cannot be considered responsible likewise[791]. When working in cooperation with third states, there are complex challenges on jurisdiction, that can be established in various ways. Jurisdiction may be established based on the joint exercise of public powers, or even in the case of no direct contact with the migrant concerned. Indeed, it is not easy to determine whether the actions undertaken by third countries within the framework of joint operations are of a sovereign nature or are under the command or control of European institutions[792]. In the second scenario, decisions made on European territory, having detrimental implications beyond those borders, may also fall under EU or MSs' jurisdiction[793].

As a result, Frontex joint operations should be analysed through a multiple-responsibilities analysis, in order to frame legal responsibility in a way that is compatible with the real participation and ability of involved actors to shape the direction of operations[794]. The concept of dual attribution or shared responsibility, provided both by ARSIWA[795] and ARIO[796], can be applied to those situations, where there is no exclusive control and Frontex may be held responsible together with a MS or third state for human rights violations during joint operations[797]. Considering the aforementioned capacity of all participating actors to influence operational and strategic decisions, the EBGTs' actions could be considered attributable to Frontex, as well as host, participating and third states[798]. Therefore, some authors argue that multiple direct responsibilities can be established for wrongful acts committed in the course of such operations. An example is when joint patrols are organised on third-state territories under the coordination of Frontex, yet the third state does not exercise sufficient effective control over them to be exclusively responsible since MSs' border guards act quite independently[799]. Furthermore, in some cases Frontex can be considered directly responsible also for pushbacks, carried out with its own personnel, apart from other officers[800]. However, evidence is needed to demonstrate the existence of multiple direct responsibilities, and the opacity of Frontex joint operations hinders the research of sufficient indications. In cases where there is insufficient information to link

[791] RAIMONDO (2024: 203-206).
[792] BALDACCINI (2010: 251-254).
[793] RAIMONDO (2024: 203-206).
[794] FERNANDEZ (2016: 239, 247).
[795] ARSIWA, Article 47, para. 1, "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."
[796] ARIO, Article 48, para. 1, "Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act."
[797] MAJCHER (2015: 54-64).
[798] FERNANDEZ (2016: 254-256).
[799] FERNANDEZ (2016: 256-257).
[800] CANTOR ET AL. (2022: 135-141).

multiple actors to the same wrongdoing, the Agency's coordinated operations may nonetheless result in multiple indirect international responsibilities[801].

Some scholars[802] include among indirect forms of international responsibility the concept of 'positive obligations' – typically used in human rights' violations – and suggest to apply this notion to breaches of the law occurred during Frontex joint operations. Human rights bodies agree that duties under human rights are more stringent than those under traditional international law[803] for this reason positive obligations are defined, according to the ECtHR, as obligations of states or IOs to secure and ensure the rights of individuals under their jurisdiction, which entails preventing third actors, whose acts are not attributable to them, from violating human rights[804]. Therefore, positive obligations compel states and IOs to prevent human rights' breaches committed by others, that is private parties, other states or IOs[805]. A reason why the theory of positive obligations could be applied to Frontex joint operations is that, it imposes a duty of due diligence on states and IOs in situations where they have the ability to avoid human rights violations by other actors, transcending both issues of attribution and jurisdiction[806]. In order to prove responsibility for a breach of positive obligations, it is required to show that the state or IO knew or should have known about the violation – possessing foreseeability – and did not take the appropriate action to prevent it[807]. The same positive obligations lie upon Frontex, that must respect fundamental rights during joint operations. Hence, supporting human rights violations or not acting to prevent them in the course of such missions would be a clear violation of its duties under EU law[808]. Even in cases where the state in question, the EU or Frontex are not directly responsible for a particular violation, there may be situations in which they should or may have knowledge of and the means to forestall it. The specific role that each actor plays determines whether a certain breach can be deemed predictable and whether reasonable measures would have been available to it[809].

Nevertheless, for the purposes of this research, the forms of indirect responsibility that could also be applied to cases of human rights violations perpetrated during Frontex joint operations are others. In fact, a greater, albeit indirect, participation in such violations by Frontex and the states involved

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801 FERNANDEZ (2016: 247).
802 FERNANDEZ (2016); FINK (2016); RAIMONDO (2024).
803 Judgement of the Inter-American Court of Human Rights, 29 July 1988, Serier C No. 4 (1988), *Vélasquez Rodríguez Case*, para. 172; General comment of the United Nations Human Rights Committee, 26 May 2004, No. 31 [80] CCPR/C/21/Rev.1/Add.13, *The nature of the general legal obligation imposed on States Parties to the Covenant*, para. 8, Judgement *Genocide*, paras. 413-429.
804 Judgement of the European Court of Human Rights, 8 July 2004, 48787/99, *Ilascu and others v. Moldova and Russia.*
805 FINK (2016: 278).
806 FERNANDEZ (2016: 254-256).
807 FINK (2016: 278); RAIMONDO (2024: 241-245).
808 FERNANDEZ (2016: 254-256).
809 FINK (2016: 278).

could be assessed through the three kinds of indirect responsibility described in the previous chapter. Given the way in which the present analysis of responsibility allocation in Frontex joint operations is carried out, the lack of specificity and the general investigation conducted, it is not possible to exactly describe the types of relations arising from these operations using the lenses of indirect forms of governance. Contrary to what has been done in the two previous case studies, indirect forms of governance will only be generically applied to fictious situations, but without specifically describing every single operation. This *modus operandi* may lose the in-depth specificity and particularity of the analysis, but the research will gain in completeness and comprehensiveness. A more generic and all-encompassing approach will make it possible to create an analytical framework through which to study all types of joint operations undertaken by Frontex, EU MSs and third states.

In the first place, the circumvention of international obligations, or circumvention by induction, provided for by Articles 17 and 61 ARIO, might be considered a circumstance quite akin to cases of responsibility for positive obligations. This is because these norms, especially the one created for states, are used to guarantee the states' obligation to act to protect human rights[810]. Furthermore, it is possible to examine joint operations of Frontex in the light of these two Articles. As already explained, both orchestration and a softer P-A model can be associated to the situations of circumvention of international obligations, depending on the degree of discretion left to the implementing actors and on the control exercised by the externalising entities. As concerns Frontex operations, these may imply either the adoption of a decision by the EU binding MSs to take part in them and conduct certain actions which might be internationally wrongful, or the issuance of an authorization towards a MS, as provided by Article 17. Otherwise, more likely, joint operations may be used by host MSs to take advantage of the fact that the EU, and Frontex in particular, has competence in relation to border management, and to circumvent human rights obligations by causing Frontex to commit wrongful acts in this area of action, as indicated by Article 61. Nonetheless, there is no literature supporting the use of these norms for the attribution of responsibility in Frontex joint operations. Probably, this is due to the fact that authorisations or binding decisions required by Article 17 should be defined in the operational plans of the operations, which are not fully public, as previously explained. Furthermore, the impossibility of seeing the operational plans and the complexity of the actions undertaken do not even make it clear whether it is the EU or the host MS that is circumventing its international obligations through joint operations. Although this could be in part understood by observing who requests the activation of the operation, there is no public written evidence to prove it.

In the second place, direction and control, described in Articles 17 ARSIWA and 15 ARIO, provide for cases in which a state or IO impose a restriction of freedom over another state or IO. The dominance of one party

[810] LANOVOY (2016: 145-147).

over the wrongful behaviour in question can be described by the P-A form of hard and indirect governance. Specifically a ruled-based contract of delegation should be in force, where the principal specifies how exactly the agent should complete its tasks, since control must be effective and detailed, and direction must consist in a concrete operational order. Direction and control could be applied to joint operations from two perspectives[811]. On the one hand, Frontex's border guards and guest officers receive instructions and follow the directives of the host MS, which can be able to direct the activities of officers, depending on the specific circumstances and on the particular command and control clauses found in each operational plan. However, considering that through direction and control the directed entity should no longer be free to choose the course of action to be taken in a given situation, it might be difficult to claim that Frontex or the participating states' ability to exercise their freedom is seriously impeded during joint operations[812]. On the other hand, Frontex may, under certain conditions, impose the execution of some measures on a MS that it deems incapable of handling all aspects of border control. However, the state in question is often consulted before taking such measures, and in the event that the state refuses to cooperate, the Commission may reintroduce border controls at internal borders[813]. Hence, the EU and Frontex can effectively guide MSs in managing the EU's external borders, but MSs maintain sovereignty and primary responsibility over their national borders[814]. Direction and control might occur under some specific circumstances during joint operations, but generally all the actors involved maintain a certain degree of freedom that makes these missions incompatibles with the situations described by Articles 17 ARSIWA and 15 ARIO. As a result, although in some circumstances there could be the possibility to apply responsibility for circumvention of obligations or direction and control for human rights violations committed during Frontex joint operations, the most suitable form of indirect responsibility to prove seems to be complicity.

In the third place, indeed, the international legal framework on states and IOs' responsibility suggests that in the event of coordinated acts, states or IOs might be held responsible for breaches of international law other actors commit through their aiding and abetting[815]. Both orchestration and P-A models can be applied to cases of aid and assistance, yet knowing the specific features of each joint operation examined on the basis of these two models could help to understand what kind of assistance is provided and the level of contribution in the commission of the illegal act. There are two main scenarios wherein the involvement of states and Frontex becomes significant with regards to complicity-related questions. The first concerns the situations where Frontex may be seen as supporting a host MS or third state in a violation by providing technical or financial assistance. The second scenario concern the

[811] RAIMONDO (2024: 231-232).
[812] *Ibidem*.
[813] Regulation, 2019/1896, *on the EBCG,* Articles 32 and 42.
[814] RAIMONDO (2024: 231-232).
[815] BALDACCINI (2010: 251-254); PAPASTAVRIDIS (2016: 177).

complicity of states that host or take part in Frontex joint operations at the EU's external borders[816]. Generally speaking, if the EU and Frontex are considered as the actors who aid and assist MSs in the management of their external borders – hence, in the first scenario – it is more likely that the relation underpinning this support is a form of orchestration. Considering that IOs tend to use orchestration in order to remedy their lack of expertise, legitimacy and operational capacity, the EU and Frontex need to involve MSs to reach their objectives in the area of border management, despite the existence of these competences, which are insufficient[817]. Furthermore, the EU and Frontex do not have enough power to delegate, strongly monitor and enforce their decisions with regards to MSs, since policies on border controls are shared competences of the Union with those of MSs[818] and, as just explained, EU external borders remain national borders over which MSs keep their sovereignty and primary responsibility[819]. Therefore, this orchestration is carried out through the supporting role of Frontex.

As concerns the criteria to define responsibility for complicity, first, it should be proven that Frontex aided and assisted a host state in the perpetration of the wrongful act[820], indirectly participating in the violations committed[821]. The host state may be aided and assisted by Frontex through logistical, material, financial and technical support. While not essential, the assistance should be significant for the commission of the wrongful act; indeed, the Agency's support represents an incentive for MSs to take part in joint operations[822]. In addition to creating the operational plan, Frontex aids host states by sending them relevant MSs' assents, it coordinates the joint operations, including rescue operations, by greatly facilitating the action of the participating units, which would not be able to conduct certain actions without its support[823]. Furthermore, Frontex aids and assists host states in pushbacks operations, by providing strategic guidance, data and operational and technical support to their coast guards[824], as happened with Greece and Italy[825]. Also during joint return operations, the Agency shall provide technical and operational assistance in the implementation of such measures[826], and can finance or cofinance return operations[827]. For instance, it may be presumed that Frontex's support enabled an unlawful conduct if a deportee was mistreated during a joint return operation on an aircraft that it had chartered, with the Agency providing restraint equipment or funding escorts; or even contributing in

[816] RAIMONDO (2024: 232-239).
[817] VICERÉ (2021: 503).
[818] Art. 4, para. 2, letter j, TFEU; Regulation, 2019/1896, *on the EBCG,* Article 7.
[819] Regulation, 2019/1896, *on the EBCG,* Article 7, para. 1.
[820] RAIMONDO (2024: 232-239).
[821] FERNANDEZ (2016: 254-256).
[822] RAIMONDO (2024: 232-239).
[823] PAPASTAVRIDIS (2016: 177)
[824] CANTOR ET AL. (2022: 135-141).
[825] CHRISTIDES ET AL. (2020).
[826] Regulation, 2019/1896, *on the EBCG,* Article 48, para. 1, letter a.
[827] Regulation, 2019/1896, *on the EBCG,* Article 48, para. 1, letter f.

collective expulsions[828]. The same can be applied to status agreements and working arrangements with third states. The support provided by Frontex to third states – most notably Libya, Turkey and other countries – can be considered as aid and assistance in human rights violations occurring in the context of the receiving states' border control operations[829].

Second, the knowledge requirement can be considered fulfilled. In general, the coordinating officer's presence during Frontex joint operations guarantees that the agency is properly informed about the conditions under which each operation is conducted. The responsibility of the coordinating officer to notify the executive director of any non-compliance with the operational plan – particularly with regard to fundamental rights – supports the existence of Frontex's knowledge of the conditions in which possible breaches of human rights may transpire[830]. Moreover, the fundamental rights officer also monitors and investigates Frontex's adherence to fundamental rights, with the help of fundamental rights observers appointed to each operation and any relevant operational activity[831]. The establishment of the international coordination centre that gathers information on non-rescue incidents, the presence of an Agency's staff member during joint rescue operations[832], and of a project manager during return operations, are other elements of Frontex's awareness of human rights violations which may occur during such missions[833]. In the case of claims of collective expulsion, the proof of the knowledge requirement would be more challenging, since Frontex does not have access to the merits of return decisions issued by states. Indeed, a mechanism to review the return decisions of MSs, in order to mitigate the risk of collective expulsions during joint return operations, has been proposed by scholars[834]. Nonetheless, in all other examples, it would be difficult to argue that the Agency is uninformed of the facts surrounding a wrongdoing that was committed during one of its operations[835]. Therefore, the knowledge requirement can be considered fulfilled.

Third, the connected requirement of intent is even more difficult to demonstrate in this case, due to the actors involved and Frontex's dependence on the EU. Since it has legal personality and joint operations are mostly created to hinder irregular crossings of migrants, and strengthen borders and border management practices, the intent criterion could be considered met. Nonetheless, a case by case exam should be carried out and again, especially in this case, it must be considered that some scholars do not consider it a necessary requirement[836].

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[828] MAJCHER (2015: 67-68).
[829] RAIMONDO (2024: 232-239).
[830] Regulation, 2019/1896, *on the EBCG,* Article 44.
[831] Regulation, 2019/1896, *on the EBCG,* Articles 109 and 110, para. 3.
[832] PAPASTAVRIDIS (2016: 177).
[833] MAJCHER (2015: 68-69).
[834] *Ibidem*.
[835] RAIMONDO (2024: 232-239).
[836] LANOVOY (2014: 150-156); PASCALE (2018: 436-438).

Fourth, as concerns the requirement of opposability, since Frontex has legal personality under EU law, it may be held responsible for breaches of EU law[837]. Frontex is bound by the Charter of Fundamental Rights of the EU, but not by the ECHR or any other international human rights convention that could be pertinent to border control procedures, because it – as the EU – is not yet party to them. Hence, in joint operations conducted by Frontex within the border of EU MSs, all participating entities are bound by EU law and the Charter of Nice, yet only MSs are bound by international human rights treaties and the ECHR. However, the duties outlined in the Charter of Nice and EU treaties closely align with the obligations of MSs under international human rights law[838]. Furthermore, customary international law binds the EU and its MSs, particularly the prohibitions against torture and *refoulement*, the right to life, and prohibitions against collective expulsion[839]. As previously explained, it is reasonable to presume that the following human rights might be infringed during Frontex operations: the right to life, set out by Article 2 of the Charter of Nice; the right not to be subject to torture, inhuman and degrading treatment, protected by Article 4 of the Charter; the prohibition of arbitrary detention, provided for in Article 6 of the EU Charter on the right to liberty and security; the right to asylum, guaranteed by Article 18; the prohibition to remove, expel or extradite any person to a State where there is a serious risk to be subjected to the death penalty, torture or other inhuman or degrading treatment – *non-refoulement* – and the prohibition of collective expulsions indicated in Article 19[840]. The opposability requirement is more complex to prove in the case of third states' involvement. Indeed, third states are not bound by EU law, yet most of them are members of the Council of Europe, hence similarly to both host and participating states are bound by the ECHR. Although some scholars consider the ECHR as binding upon the EU and Frontex because the general principles of EU law are based on fundamental rights as guaranteed by the ECHR[841] – Article 6 TEU – it is uncertain if the ECHR would expand its jurisdiction to assess the indirect responsibility of a non-contracting IO, since the EU is not yet a party to the ECHR[842]. The fulfilment of the opposability requirement can be even more challenging to demonstrate when cooperating with states that are neither party to the ECHR nor to the Geneva Convention on Refugees, such as Libya. However, in these cases, customary international law can help in fulfilling this criterion[843]. Moreover, as indicated in the previous subsection, also other conventions can be considered, of which not all the actors concerned are parties, because according to Crawford the opposability requirement only requires that the conduct under

[837] MAJCHER (2015: 52-53).
[838] RAIMONDO (2024: 232-239).
[839] *Ibidem*.
[840] MAJCHER (2015: 52-53).
[841] *Ibidem*.
[842] RAIMONDO (2024: 232-239).
[843] *Ibidem*.

scrutiny constitutes a wrongful act for both the assisted and the assisting state – and IOs – regardless of the source of the international norm violated[844].

Finally, when considering Frontex and the EU as actors aiding and assisting a host state – MS or third state – in the violations of human rights during joint operations, it can be stated that, generally speaking, all the criteria outlined in Article 14 ARIO are met. Therefore, Frontex joint operations as a European externalisation policy of migration and borders management entail EU indirect responsibility for complicity.

The second scenario, wherein the involvement of states and Frontex becomes significant with regards to complicity-related questions, concerns the complicity of states that host or participate in Frontex joint operations at the EU's external borders[845]. In this case, the main wrongful act would be committed by Frontex, and the host state or the participating states could be deemed responsible for complicity in this wrongful act. The four requirements listed above need to be fulfilled too. First, for the material element, the host state provides the necessary logistical and technical structures to manage the operation. As for the participating states, their contribution may be important for the actual implementation of Frontex operations, although it is not essential. However, if their support has no relevant impact on the performance of operational activities, the material requirement would not be met and participating states could not be considered indirectly responsible[846]. Second, since it must approve the operational plan drafted by Frontex and oversee the joint operation's operational execution, the host MS should be aware of the possible breaches of the law occurred during the operations. As concerns participating states, the same reasoning can be true given that national officers report back on their activities to their home countries[847]; however, also in the case of the knowledge element, it is difficult to prove when there is little involvement of participating states. Third, in terms of the opposability criterion, instances of the host or participating state's complicity with Frontex would be subject to the same challenges as described in the previous scenario. Being them MSs, EU law can be considered the main parameter – together with customary international law – for responsibility attribution of human rights violations[848].

To sum up, responsibility for complicity can exist also for host MSs aiding and assisting Frontex in breaches of human rights perpetrated during joint operations. Nevertheless, the complicity of participating states is highly difficult to prove, give their light involvement in the operations. To remedy the shortcomings of the doctrine of complicity, some scholars have proposed complementing the concept of complicity with the doctrine of positive obligations, creating a kind of responsibility for complicity by omission[849]. This new notion of responsibility would require a less demanding mental element

[844] Crawford (2013: 410).
[845] Raimondo (2024: 232-239).
[846] Raimondo (2024: 238-239).
[847] Fink (2018: 165).
[848] Raimondo (2024: 238-239).
[849] Fink (2018); Gatta (2023); Raimondo (2024).

compared to complicity, namely the simple constructive awareness of a risk that a breach could happen, and no intent criterion. Moreover, when the breach occurs on the territory of a third country, the opposability requirement could be easier to meet thanks to the horizontal application of human rights obligations[850].

To conclude, this subsection has demonstrated that also in cases of human rights violations committed during Frontex joint operations, actors indirectly involved in such breaches could be held responsible, mainly for responsibility for complicity, be they the EU or European MSs. The complexity of joint operations and the contribution of a number of international actors with different levels and forms of support, make the allocation of responsibility an even more complicated study. The main actor violating the law, the entities supporting it, the level of aid provided, the main actor controlling the operation, the opacity of these processes, are all elements to take into consideration when examining responsibility. The present research has tried to propose an analytical framework through which, then, studying all types of joint operations undertaken by Frontex, EU MSs and third states. Then, starting from this framework, a case-by-case approach should be of course employed for a more specific and concrete analysis of actual case studies. After these deep investigations on responsibility attribution in three selected case studies, the next section will draw a conclusion on whether externalisation is a tool to circumvent responsibility and on what would allow such circumvention and human rights' violations.

3. Externalisation as a tool to circumvent legal responsibility? How and why?

To conclude the present research, it is necessary to recall and answer to the questions presented at the beginning of the paper. The first and main aim of this study was to understand whether externalising actors, such as the EU and its MSs, are responsible for human rights violations and elusion of law that externalisation policies for migration control may often cause, or whether such responsibility is limited to the actors who directly perform the actions under review. As just described in this chapter, externalising entities, be they MSs, such as in the case of the Italy-Libya MoU and Frontex joint operations, or the EU, such as in the examples of the EU-Turkey Statement and Frontex activities, can be held responsible for the aforementioned violations. Since, in the externalisation policies selected, externalising actors tend not to play any direct action in the breaches of human rights, they can bear responsibility for indirectly contributing to such violations. As a result, they can be held indirectly responsible for violations of human rights. The present research shows that, among the three forms of indirect responsibility relevant for this research – complicity, direction and control, and circumvention of

[850] RAIMONDO (2024: 245-247).

international obligations – complicity is certainly more likely to be attributable to externalising actors. The EU and its MSs tend to aid and assist implementing third actors, through financial, logistical, technical and operational support, keeping distance from them and their actions, leaving them quite free in the implementation of policies as in an orchestration relation, and not controlling them as delegation would require. Although it may seem that this support leaves externalising actors distant from the externalised actions and that they remain innocent of human rights violations perpetrated during the implementation of externalisation policies, according to Articles 16 ARSIWA, 14 and 58 ARIO, the EU and its MSs can be held responsible for this type of aid and assistance provided.

The second question to answer is whether the outsourcing of migration control can be seen as a way of circumventing the responsibility that would arise if the same activities were conducted directly by the EU and its MSs. Even though in most of the cases externalising actors cannot be held directly responsible for such violations of human rights; legally speaking, externalisation policies should not exempt them from their indirect responsibility. Therefore, in theory, externalisation policies should not be instruments to circumvent international responsibility. Nevertheless – and here is the third question posed at the beginning of the research – through the implementation of externalisation policies as a means of preventing migratory flows, the EU and its MSs have often circumvented their international legal responsibility for migration control and human rights violations occurred in those circumstances. Indeed, there are hardly any examples of judgments against European states or the EU for human rights violations that occurred during the implementation of externalisation policies in general, nor the ones described here, and that were amply documented by NGOs and newspapers. As a consequence, in the common European asylum system, externalisation policies are used to carry out activities that, if conducted by MSs, would imply their direct responsibility[851]. At the same time, externalisation and the legal system surrounding it also allow to avoid indirect responsibility of states and IOs, demonstrating to be an effective instrument to circumvent any kind of international responsibility.

However, since the right of states to control their borders only extends as far as human rights allow it, considering that the forementioned human rights' breaches have occurred for real[852], and seeing that national and international courts have the duty to safeguard human rights too, how has it been possible for the EU and its MSs to circumvent their legal obligations? What allows responsibility's circumvention? Who should protect migrants' rights? And which instruments are necessary to better guarantee the respect for migrants' rights? Holding a state or an IO responsible before courts and tribunals is not the same as stating that that state or IO is responsible for the commission

[851] Mc Namara (2013: 334-335).
[852] *Ibidem*.

of an internationally wrongful act[853]. An actor may be deemed responsible for an unlawful conduct, but judicial avenues to hold that actor responsible may not exist, or in case of human rights violations, international fora may not be accessible by individuals who suffered those violations. Furthermore, the pursuit of accountability actions is discouraged by the length and expense of the process as well as by the occasionally ineffective enforcement of the judgements. This is particularly true in situations when victims – who are foreign nationals with irregular status – are vulnerable, unable to afford legal representation and are neither allowed to enter the area where the forum of jurisdiction is situated. Additional challenges to accountability are caused by the multitude and the variety of actors who are engaged in externalisation policies, which increase the degree of difficulty in terms of responsibility attribution, and of determination of the relevant jurisdictions[854], as explained in the present research. Moreover, not all states are bound by the same international agreements, indeed already in the previous subsections the opposability requirement for complicity has not always been easy to demonstrate. Another point to consider is that states and IOs enjoy immunity before national courts, as it will soon be explained. Finally, a lack of transparency in the externalisation's methods of operation hinders the monitoring of legal accountability mechanisms, by making it more difficult to get evidence on breaches of the law or even on the identity of the actors involved[855].

States and IOs can only take action through their organs or representatives, however, from a legal perspective a state's or an IO's actions are what give rise to international responsibility rather than individual actions. Hence, the responsibility of a state is independent from and does not require the responsibility of individuals. However, under some circumstances, state actions may result in the concurrent attribution of responsibility to a state and individuals[856]. In light of this, in cases such as those involving refugees in Greek detention facilities or European and Italian collaboration with Libya, the application of international criminal law may be necessary to address the violence against migrants[857]. The concurrence between international and individual responsibility would not absolve the EU and its MSs of their obligations, rather findings about individual responsibility might affect later conclusions about state responsibility, by having a practical impact on it[858]. Individual responsibility remedies and state or IOs accountability remedies vary in that the former entails a duty to punish offenders, while the latter entails various types of reparations[859]. In contrast to solutions that fall under state and IO responsibility, primary norms dictate the obligation to pursue and punish individuals; nonetheless, part of the remedy may include the need to punish them. In this

[853] AUST (2011: 296-298).
[854] CANTOR ET AL. (2022: 154-155).
[855] *Ibidem*.
[856] RAIMONDO (2024: 252-253).
[857] AL ABDALLAH ET AL. (2021); RAIMONDO (2023).
[858] NOLLKAEMPER (2003: 615).
[859] CRAWFORD (2019: 566-589).

way, there may therefore be a synergy between state and individual responsibility, since enforcing a punishment duty can serve as a remedy against both the state and the individual[860].

The main legal routes an individual can follow to enforce states and IOs' responsibility and seek redress for human rights violations are the following ones. In the first place, national courts can be considered because the exhaustion of local remedies is a prerequisite for admittance before most supranational judicial authorities. During Frontex operations, civil and criminal responsibility of border guards deployed and of the Agency's statutory staff rests on the host MSs, whereas Frontex is accountable for the behaviour of its officers before the CJEU. In Frontex operations with third countries, team members and statutory staff of the Agency enjoy immunity from the third country's civil, criminal and administrative jurisdiction; yet, this does not exempt them from the jurisdiction of their home MSs – although Frontex's staff would remain unpunished having no sending MSs. However, when dealing with international responsibility of IOs, they enjoy immunity from domestic jurisdiction, hence, domestic courts cannot adjudicate complaints against the EU or Frontex, as an agency of the EU that benefits from the same privileges and immunities as its IO[861].

In the second place, the CJEU is the second level composing the system of judicial remedies against breaches of EU law. The CJEU controls the legality of EU institutions' acts, through the reference preliminary ruling[862], the actions for annulment[863], for failure to act[864] and for damages[865]. Thus, as just stated, the CJEU has authority to resolve disputes arising from human rights violations committed by Frontex staff[866]. Whereas, under EU law, national courts have jurisdiction over MSs' responsibility for violation of EU norms and compensation for damages to individuals. The CJEU cannot hear a case filed directly by an individual against one or more MSs and the EU[867]. In order to get remedies, concurrent claims need to be brought before national courts and the CJEU, and claims against MSs can reach the CJEU only after overcoming procedural obstacles[868]. As concerns the annulment action, it pertains to the judicial review of the legality of acts meant to have legal consequences for third parties. Individuals who want to bring a claim against border control measures before the CJEU need to fulfil two requirements. Firstly, the contested legislation mush have binding legal consequences for the applicant and alter his or her legal situation. Secondly, while EU institutions, bodies, offices and agencies are granted passive legitimation; two types of applicants

[860] NOLLKAEMPER (2003: 638).
[861] RAIMONDO (2024: 254-256).
[862] Article 267, TFEU.
[863] Article 263, TFEU.
[864] Article 265, TFEU.
[865] Article 340, TFEU.
[866] Regulation, 2019/1896, *on the EBCG,* Article 97, para. 4.
[867] GUILD ET AL. (2011: 86).
[868] FERNANDEZ (2016: 257-258).

are recognised for active legitimation, namely, EU institutions and MSs, considered privileged, and natural or legal persons, considered non-privileged. Individuals, in this last category, must either be addressees of the contested act or demonstrate that it is of direct and individual concern[869]. As regards the action for failure to act, it is subject to the same procedural obstacles. This procedure is applicable to cases in which the defendants are required by EU legislation to carry out particular tasks, consequently, to situations of Frontex's omissions[870]. Yet, for an action to be deemed inadmissible, it is sufficient that the Agency clarifies its stance on the call to act, as demonstrated already in some cases[871]. The described types of actions show that non-privileged applicants have lower possibilities to start a review procedure before the CJEU. The action for damages is currently the most promising legal remedy available to individuals. Its purpose is to determine the responsibility and compensate the victims. Nonetheless, in this case it is important to differentiate between international and EU public liability. EU public liability refers to the non-contractual responsibilities of public bodies under EU legislation. It requires three elements: a serious breach of the law must have occurred; the rule breached should confer rights on individuals; there must be a casual connection between the alleged damage and the conduct[872]. The third requirement prevented the Court from examining EU responsibility in some cases[873] due to the conflation between attribution and causation of actions causing human rights' violations. As a result, the CJEU does not seem to offer effective legal remedies for individuals, victims of human rights violations perpetrated by the EU or MSs.

In the third place, the ECtHR can be one of the most effective legal instruments individuals can resort to for the enforcement of international responsibility[874]. Individuals can bring a claim before the ECtHR against European MSs. Nonetheless, it is not clear whether the Court is prepared to rule on situations of aid and assistance given to a third state by EU MSs, since the court has proved to be reluctant to take decisions on indirect attribution of responsibility[875]. As concerns the EU, another problem arises. The ECtHR lacks jurisdiction over the acts of the EU and its bodies[876]. The EU should accede to the ECHR, as stipulated by Article 6, para. 2, of the TEU; similarly, Article 17 of Protocol No. 4 to the ECHR allows for this accession to happen within the ECHR's legal framework[877]. However, the possibility to be subject to external review by the ECtHR was delayed into the far future by the ECJ's

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869 RAIMONDO (2024: 256-261).
870 *Ibidem*.
871 Judgement of the General Court of the European Union, 10 March 2021, T-245/17, *ViaSat v. Commission*; Judgement of the General Court of the European Union, 7 April 2022, T-282/21, *SS and ST v. Frontex*.
872 RAIMONDO (2024: 256-261).
873 Judgement of the General Court of the European Union, 6 September 2023, T-600/21, *WS and Others v. Frontex*.
874 NASCIMBENE (2009: 5).
875 RAIMONDO (2024: 261-262).
876 FERNANDEZ (2016: 257-258).
877 RAIMONDO (2024: 261-262).

Opinion 2/13[878]. The ECJ was concerned, among other things, about the co-respondent mechanism, provided for in the Draft Accession Agreement of the European Union to the ECHR, according to which the EU or a MS could become a co-respondent to proceedings of the ECtHR. The main preoccupation regarded the fact that this mechanism would have required the ECtHR to evaluate the laws governing the allocation of powers between the EU and its MSs during the admissibility and merits stages. This would have affected the exclusive jurisdiction of the CJEU on these issues[879]. Negotiations have restarted recently, but it is unclear if they will reach a solution that will allow the EU to ratify the Convention[880]. Therefore, an individual complaint involving the EU or Frontex can only be evaluated by the CJEU still now, due to the EU's non-ratification of the ECHR, notwithstanding the challenges this process entails[881].

In the fourth place, other human rights treaty bodies could be called on[882]. For example, an individual whose rights have been violated during border control operations may bring a claim before the UN Human Rights Committee. In contrast to the ECtHR, the Committee would provide victims with a quicker and easier remedy; nonetheless, only state parties that have signed the First Optional Protocol to the ICCPR[883] are bound by the Committee's individual communication procedure. Furthermore, as explained with the ECtHR, other human rights treaty bodies cannot examine EU compliance with human rights[884]. Finally, most international fora are inaccessible by individuals, thus, this would render impossible for migrants to bring a claim against perpetrators, especially if IOs.

In the fifth place, since it is difficult to provide effective remedies for human rights' violations by the EU, and in particular by Frontex, alternative non-judicial routes have been explored in the EU. The European system is not fully capable of specifically challenging the actions of an Agency. For instance, actions for annulment are difficult to apply to human rights violations attributable to Frontex, that hardly take the form of a real, recognisable and traceable formal act, such as pushbacks or the aid and assistance provided for them. Similarly, actions for failure to act and for damages also encounter obstacles that seem difficult to overcome[885]. When legal responsibility is hard to achieve, less formal accountability procedures are the final option and the

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[878] Opinion of the Court of Justice of the European Union, 18 December 2014, 2/13, *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties.*
[879] FERNANDEZ (2016: 257-258).
[880] RAIMONDO (2024: 261-262).
[881] FERNANDEZ (2016: 257-258).
[882] For a deeper analysis on the issue see ÇALI ET AL. (2020).
[883] Protocol of the UN General Assembly, 19 December 1966, *Optional Protocol to the International Covenant on Civil and Political Rights.*
[884] RAIMONDO (2024: 261-262).
[885] GATTA (2023: 408-410).

most effective instrument for meeting victims' demand for justice[886]. Here accountability refers to a broader concept compared to responsibility, comprehending also administrative, political and social accountability[887]. Indeed, in addition to being a crucial preventive tool for human rights advocates, non-judicial scrutiny may be used as a democratic control and participation instrument[888]. Among these mechanisms there are the Consultative Forum and the Fundamental Rights Officer, the European Ombudsman, the European Court of Auditors, the European Anti-Fraud Office for administrative accountability; the role of European Parliament and the Council for political accountability; NGOs and CSOs' participation in the Consultative Forum and the activities carried out by civil society tribunals for social accountability[889]. However, despite a commendable activism in shedding light on irregularities in Frontex's work, the non-judicial instruments created remain ineffective in enforcing the Agency's legal responsibility. They generate an important political repulsive impact on Frontex, the EU and some MSs too[890], yet this effect is unsatisfactory from the perspective of the individual protection of migrants' rights[891].

To conclude, human rights law and the existing judicial framework do not provide effective and adequate remedies to individuals, victims of human rights violations[892]. The present analysis highlights the near impossibility of judicially challenging the legality of externalisation practices[893]. Therefore, externalised migration controls have proved to be powerful tools for circumventing international legal responsibility for states and IOs making use of them. International law is characterised by some gaps that help the EU and its MSs to circumvent their legal responsibility. Some of such gaps are the inaccessibility to most international fora by individuals, thus the compression of the right to appeal, the accession only by States to most international courts, the immunities enjoyed by IOs and states and the absence of available actions to undertake for human rights protection. Then, another point to consider is the difficulty that vulnerable and at-risk individuals, such as migrants and refugees attempting to arrive on European territory, may face in enforcing their rights, staying far from the territory where the fora of jurisdiction are located and without any material means to pursue litigation, precisely because of the same policies that have caused their rights to be violated. As a matter of fact

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886 RAIMONDO (2024: 254).
887 RAIMONDO (2024: 262-266).
888 CANTOR ET AL. (2022: 154-155).
889 AMADEO ET AL. (2022: 13-82); RAIMONDO (2024: 262-266).
890 For example, the Permanent People's Tribunal, a civil society tribunal composed of intellectuals, jurists, and representatives of CSOs concluded that Italy and the EU shared "co-responsibility" for the violations of migrant rights caused by their collaboration with Egypt and Libya and by the withdrawal of Frontex operations from the Mediterranean Sea, by issuing an invitation to the European and Italian Parliaments to promptly set up commissions of inquiry on their respective immigration policies and the allocation of funds intended for international cooperation. See Judgement of the Permanent People's Tribunal, 18-20 December 2017, *Session on the violation of the rights of migrants and refugees (2017-2018).*
891 GATTA (2023: 408-410).
892 FERNANDEZ (2016: 257-258).
893 FREIER ET AL. (2021).

more protection is guaranteed by the legal and jurisdictional system of the EU when the third-country national is already in the territory of a MS. This is the reason why the aim of externalisation policies is keeping migrants far away from such territories[894]. In the long term, if international law continues to expand the grounds for holding states responsible without concurrently creating the necessary procedural frameworks, a credibility gap is likely to emerge. This concern is part of a more general apprehension on the ineffectiveness of international law enforcement. States and IOs are responsible for law breaches regardless of the procedures used to implement their responsibility. Nonetheless, if structural weaknesses prevent the implementation of new basis for international responsibility, it is reasonable to delve into them and pursue change for improvement[895]. Given the serious concerns about the effects of externalisation policies on human rights, largely demonstrated in this research, it is imperative that new effective mechanisms for the enforcement of legal international responsibility are established.

[894] GATTA (2023: 408-410).
[895] AUST (2011: 310-311).

Conclusions

The present research work has investigated the responsibility of the EU and its MSs for human rights violations perpetrated during the implementation of externalisation policies adopted with the aim of controlling immigration. In particular, this study has answered to questions on whether externalising actors, as above, are responsible for such violations and for elusion of law through externalisation policies for migration control, or whether such responsibility is limited to the actors who directly operate and breach the law. Subsequently, it has tried to understand if the outsourcing of migration control can be seen as a tool to circumvent the responsibility that would arise if the same activities were conducted directly by the EU and its MSs, and if these actors have actually eluded their legal responsibility.

In summary, in order to address the abovementioned research questions, this work has first presented an introductory overview of statistics, policies and laws concerning migration in Europe. The European migration context has been framed through available data; the European legal and institutional background in the area of migration and asylum has been described; and the political choices of shifting sovereignty and externalising migration control have been examined. In the second chapter, political theories and legal framework relevant for this research have been presented. An explanation of indirect forms of states and IOs' responsibility under international law, together with a description of indirect forms of governance, applicable to externalisation policies, have been provided. Delegation and orchestration have been employed to better analyse relations underpinning externalisation policies. Furthermore, three indirect forms of international responsibility have been selected due to their applicability to externalisation, namely complicity, direction and control, and circumvention of international obligations. The final aim of this chapter was to illustrate how the combination of legal norms and political theories could ease the legal reasoning conducted in the subsequent chapter on externalisation case studies. In the third chapter, a concrete analysis of externalisation policies and responsibility attribution in case of human rights violations has been conducted. Three examples of externalisation policies for migration control implemented by the EU or its MSs have been studied, specifically, MoU between Italy and Libya, the Statement between the EU and Turkey, and Frontex joint operations. Finally, conclusions have been drawn on the legal analysis conducted and on the initial research questions.

What emerges from the present research is that the EU and its MSs can be held responsible for human rights violations committed as a consequence of externalisation policies' implementation. In particular, through the analysed case studies, it is demonstrated that externalising actors can be considered indirect responsible for complicity under Articles 16 ARSIWA, 14 and 58 ARIO, since they tend to aid and assist implementing third actors, through financial, logistical, technical and operational support. Moreover, the research

shows that, even though from a legal and theoretical point of view externalisation policies should not be instruments to circumvent international responsibility for migration control and human rights violations occurred in those circumstances, the EU and its MSs have circumvented it. This is due to the fact that the legality of externalisation policies is nearly impossible to challenge judicially[896]. Furthermore, human rights law and the existing judicial framework do not provide effective and adequate remedies to individuals, victims of human rights violations[897]. International law is characterised by gaps that help the EU and its MSs to circumvent their legal responsibility. Therefore, externalisation policies for migration control have proved to be powerful tools for eluding international responsibility. Liberties can be easily limited, human rights can be violated, and this is made easier if law does not prevent it[898].

In the absence of state-guaranteed protection of migrants and refugees, other third actors, such as NGOs and CSOs, have taken action to respond to the widespread practices of externalisation and their woeful consequences. NGOs and CSOs have actively opposed externalisation through their activities, in a phenomenon that Cuttitta[899] calls anti-externalisation. Any action that has an impact opposite to what externalising actors had envisaged is considered anti-externalisation[900], that comprehends two variants, namely counter-externalisation and counter-delocalisation[901]. These are possible external answers to the externalisation phenomenon; however, an internal action able to tackle and solve negative consequences of externalisation policies from the roots of migration control is necessary. As affirmed by UNHCR, states have the right to control irregular migration through different measures; yet, when these measures hinder the ability of vulnerable individuals to enter other countries safely and seek asylum, states are not respecting their international obligations to refugees[902]. At the centre of this research are individuals, deprived of their rights, not protected by any state nor institution, who are moving in search of more safety. Grater protection must be guaranteed to vulnerable individuals, such as migrants, asylum seekers and refugees, who experience violations of their rights where they come from, where they pass through and where they try to arrive. Grater protection of human rights must be ensured. Migrants' rights must be safeguarded.

Quite the opposite, externalisation policies for migration control are rights-threatening. For this reason, the EU and its MSs should develop migration policies protecting human rights. They should support actors that provide

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[896] FREIER ET AL. (2021).
[897] FERNANDEZ (2016: 257-258).
[898] BASARAN (2010: 104-105).
[899] CUTTITTA (2022)
[900] CUTTITTA (2022: 11).
[901] CUTTITTA (2022: 13-19).
[902] Position of the United Nations High Commissioner for Refugees, September 1995, *UNHCR Position: Visa Requirements and Carrier Sanctions*.

and promote the protection of migrants' rights in third countries and countries of origin, instead of encouraging the externalisation of migration control towards harmful actors. Resources should be used to strengthen the capabilities of all countries along migrant routes, by providing immigration and border security officials with training on human rights and refugee safeguards and by undertaking advocacy efforts for the respect of migrants' rights[903]. Therefore, the EU and its MSs should not support cooperations preventing individuals from leaving their countries of origin or transit, impeding potential asylum seekers from exercising their rights to leave any country or to seek asylum. Yet, they should rather promote such countries' efforts to strengthen their ability to respect and protect human rights, and address development needs[904]. Furthermore, externalising governments should aid and assist NGOs and CSOs whose work directly or indirectly supports protection of fundamental rights of migrants, refugees and asylum seekers. In this sense, the supervision of externalisation of border control by civil society actors and international human rights organisations is especially crucial. Finally, the EU and its MSs should not designate or treat third countries as safe third countries or as first countries of asylum for the return of asylum seekers unless they actually meet the required principles to be considered safe[905].

To conclude, in order for the findings of this research work to be generalizable, further studies are needed. Future research should adopt the same legal reasoning proposed here to other case studies. As demonstrated in this work, outsourcing policies are extremely complex practices and difficult to pigeonhole into a single definition or interpretation. This research has attempted to present a reading of some of the best known policies implemented so far by the EU or its MSs. However, as also explained in the course of the study, it is appropriate to apply a case-by-case approach in order to better understand the nature of single externalisation policies and to subsequently assess the legal implications in terms of responsibility for human rights violations. Moreover, new interpretations could be explored in future studies, such as the proposal to apply the notion of positive obligations in the assessment of responsibility attribution. Notwithstanding, it is clear that, as demonstrated heretofore, externalising actors, be they states or international organisations, cannot be exempted from their international legal responsibility for human rights violations occurred as a consequence of externalisation policies' implementation. Instead of legitimising such negligence, the law, the international community, the society and we individuals should recognise the limits of certain policies, advocate greater respect for migrants' rights, support the culture of respect for the dignity of others and become catalysts for change.

[903] FRELICK ET AL. (2016: 209-211).
[904] *Ibidem*.
[905] *Ibidem*.

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