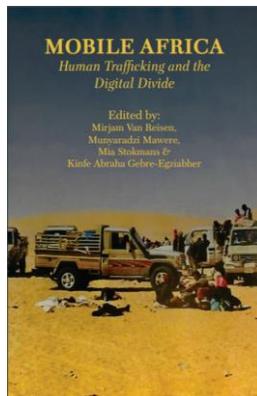


Playing Cat and Mouse: How Europe Evades Responsibility for its Role in Human Rights Abuses of Migrants and Refugees

Annick Pijnenburg & Conny Rijken

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Playing Cat and Mouse: How Europe Evades Responsibility for its Role in Human Rights Abuses against Migrants and Refugees

Annick Pijnenburg & Conny Rijken

Introduction

On 28 June 2018, amid heightened tensions on the issue of migration, the leaders of the European Union (EU) made a number of agreements on migration at a meeting of the European Council. The conclusions of this meeting reconfirm that “a precondition for a functioning EU policy relies on a comprehensive approach to migration which combines more effective control of the EU’s external borders, increased external action and the internal aspects, in line with our principles and values” (European Council, 2018, p. 1). Although the conclusions do not address the details of the envisaged measures, various key elements are directly relevant for mixed migration flows in Africa. These include increased support for the Sahel region, the Libyan Coast Guard, coastal and

The EU tries to stem migration flows before they reach its borders. Its policy of externalising its borders and cooperative migration controls puts people on the move – regardless of whether they are refugees or migrants – at risk of sometimes severe abuse. The dire situation of migrants rescued in the Mediterranean Sea and returned to Libya, where they face arbitrary detention, torture and slavery, is but one example of the many ways in which such policies can negatively affect the rights of refugees. But who is responsible for the human rights abuses against refugees and migrants? The EU cannot claim that it has no responsibility, as it controls, at least in part, the conditions under which these human rights abuses take place.

southern communities, as well as humane reception conditions, voluntary humanitarian return, cooperation with countries of origin and transit, and voluntary resettlement. It also involves exploring the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), and increased funding for the EU Emergency Trust Fund for Africa, “a partnership with Africa aiming at a substantial socio-economic transformation of the African continent”. Furthermore, it involves strengthening the supportive role of the European Border and Coast Guard Agency, Frontex, including in cooperation with third countries (European Council, 2018, pp. 1–3).

Although vaguely formulated, these conclusions fit within the broader trend of the increasing externalisation of the EU’s external borders and migration control. In fact, two years earlier, the European Commission announced the new Migration Partnership Framework, which provides for reinforced cooperation with third countries to better manage migration (European Commission, 2016a). Indeed, as will be discussed in this chapter, the EU and its member states are increasingly seeking to stem migration flows before they reach the EU’s borders, and they are doing so, among other things, by increasing cooperation with countries of origin and transit. In fact, this trend of externalisation and cooperation goes beyond the European Union, as other countries, such as Israel, Australia and the USA, have adopted similar policies (Gammeltoft-Hansen & Hathaway, 2015).

Indeed, since the 1980s, destination states have implemented policies “that seek to keep most refugees from accessing their jurisdiction, and thus being in a position to assert their entitlement to the benefits of refugee law” (Gammeltoft-Hansen & Hathaway, 2015, p. 241). The nature of such policies has changed, moving from ‘traditional’ measures to prevent refugees from reaching destination states, such as visa controls, carrier sanctions, and high seas interdiction, to cooperation-based measures, such as the offering of financial

incentives and the provision of equipment, machinery, or training to states of origin and transit (Gammeltoft-Hansen & Hathaway, 2015, p. 243). These developments in migration control policies can be explained by changes in migratory patterns and technology, policy transfers (whereby ‘new’ policies implemented by one destination state are ‘copied’ by others), and developments in international refugee and human rights law (Gammeltoft-Hansen & Tan, 2017, p. 33). At the same time, and regardless of restrictive migration policies worldwide, we have seen an increase in the number of people on the move, increased mobility and mobility options, and a growth in the smuggling networks facilitating such mobility.

The externalisation of, and cooperation in, migration control are problematic trends, because they risk exposing people on the move to harm. There is a real risk that asylum seekers who are in need of international protection are either prevented from leaving or returned to countries where they face persecution or other human rights violations. Moreover, there is a risk that people on the move, regardless of whether they are asylum seekers or not, suffer sometimes severe abuse as a result of the externalisation of migration and cooperative migration control policies. The dire situation of migrants rescued in the Mediterranean Sea and returned to Libya, where they face arbitrary detention, torture and slavery, is but one example of the many ways in which such policies can negatively affect the rights of migrants, including asylum seekers.

Although various legal challenges (sometimes successful) have been brought against unilateral migration control policies, externalisation and cooperation trends in migration control raise new legal challenges. It has, thus, been argued that “precisely when they try the hardest to protect rights beyond territorial borders, courts acquire the most significant role in providing the conditions for the rights’ further violation” (Mann, 2013, p. 369). States and courts can be said to play a cat-and-mouse game, in which “states continuously adapt and mutate their policies in an attempt to ensure their viability *vis-à-vis* legal developments” (Gammeltoft-Hansen, 2014, p. 575). As will be seen in this chapter, the development of Italian policies to constrain

migration from North Africa illustrates this point. Indeed, this chapter will show that, from a legal perspective, attributing responsibility for the human rights abuses suffered by migrants and refugees to the actors involved is not an easy task. It raises many thorny legal issues and the applicable international legal framework contains gaps and grey areas. Gaps are situations in which actors (states, non-state actors, the EU and EU agencies) can escape responsibility for their conduct, while grey areas are situations in which the law does not provide a clear answer as to who is responsible.

This chapter seeks to identify legal boundaries and define responsibilities in the area of migration control, in Africa and on the shores of the EU. The aim is to point to relevant legal concepts and discuss the limitations of the legal framework in relation to current practices. Although the UNHCR and IOM, as international organisations, play an important role in migration governance, their responsibility is not discussed in this chapter. The main research question is: *To what extent can the EU and its agencies, as well as state and non-state actors, be held responsible for the human rights violations suffered by refugees and migrants?*

The remainder of this chapter is divided into four sections. The first section gives several examples of current migration control practices: Italian and European cooperation with Libya; returns from Libya to countries of origin, including the plight of Eritreans on the move; and agreements between Israel, Rwanda and Uganda. The second section examines the responsibility of states, while the third discusses the responsibility of the European Union and relevant EU agencies. The last section offers some concluding remarks.

This chapter is primarily based on legal analysis of an area that is undergoing change, both in terms of practice and legal standards. The description of current practices in the first section is based on desk research. It is not exhaustive, but rather highlights a few examples that reveal the complexity of the issues at hand. The legal analysis in the latter sections relies primarily on case law and scholarly literature.

Examples of migration control policies

Italian and European support for Libya

Since the year 2000, Italy has signed various agreements with Libya, including the 2008 Treaty of Friendship, under which the two countries agreed to cooperate to curb migration flows. Under this agreement, in 2009, Italy intercepted migrant vessels and returned their passengers to Libya (Mussi & Tan, 2017). However, in 2012, the European Court of Human Rights in Strasbourg ruled, in the case of *Hirsi Jamaa*, that this practice breached Italy's obligations under the European Convention on Human Rights (European Court of Human Rights, 2012). It held that there was a risk that the intercepted asylum seekers would be ill-treated in Libya without access to an asylum procedure and be returned to their countries of origin (mainly, Somalia and Eritrea), where they were at risk of persecution. In the context of the Arab Spring in 2011, Italy suspended its cooperation with Libya, but after the European migration crisis of 2015–2016 and the continuing steady influx of migrants from Libya, Italy renewed its formal cooperation with Libya through a memorandum of understanding signed on 2 February 2017, which was endorsed a day later by the EU in the Malta Declaration (Hirsch & Dastyari, forthcoming, 2019).

However, the situation in the Central Mediterranean has changed in the past few years. Smuggling practices have changed, with smugglers using less seaworthy vessels, resulting in more boats in distress that need rescuing and such rescues taking place closer to the Libyan coast (IOM, 2017, p. 8). The Italian policy to limit the number of arrivals is two-fold. On the one hand, Italy tries to restrict the activities of NGO vessels carrying out rescues in the Mediterranean Sea. On the other hand, it has established a Libyan Coast Guard that can intercept migrant boats in distress and return those rescued to Libya (Heller & Pezzani, 2018). Italy, thus, provides funds and equipment to the Libyan Coast Guard, and coordinates rescue operations. The European Union supports this approach by training and funding the Libyan Coast Guard (Amnesty International, 2017). Unlike in 2009, the interceptions on the Mediterranean Sea are no longer carried out

by Italian vessels, but by Libyan vessels, operating with Italian and European support. As will be seen below, this difference has important consequences in terms of responsibility under international law. Indeed, it has been argued that the European Court of Human Rights' decision in *Hirsi Jamaa*:

[...] contributed to understandings of how to evade judicial review in future cases. By saying that a state must not turn back asylum seekers with boats under their de jure or de facto control a court is also inviting such policies, as long as they can be conducted with no such control. (Mann, 2013, p. 369)

The result of these policies is that migrants are returned to Libya, where they are at risk of being detained in inhumane and degrading conditions, tortured, raped, sold into slavery and even killed (Amnesty International, 2017). As discussed below, they are also at risk of being returned to their country of origin, for instance, with the help of the IOM, even when this would put their lives at risk. In such cases, the principle of non-refoulement, a binding norm in international law, is violated.

Returns from Libya to countries of origin

The horrific conditions in which migrants in Libya are held in detention centres are widely documented (UNSMIL & OHCHR, 2016; Amnesty International, 2017), with the ultimate crisis reflected in CNN's documentary on the auction of migrants (CNN, 2017). Detained in these centres, people are tortured, deprived of food and clean drinking water, and live in inhumane conditions without adequate living space, medical treatment or basic supplies (OHCHR, 2017; Amnesty International, 2017; Refugees International, 2017). While some of these centres are run by Libya's Ministry of the Interior's Department for Combatting Illegal Migration, others are run by Libyan militias, which are reportedly involved in the smuggling and trafficking business themselves (Flynn, 2017). The lack of a strong central government in Libya has left a power vacuum, creating an environment for organised crime, including trafficking and smuggling, to flourish (Shaw & Mangan, 2014; Williams, 1999). As in other risky migration routes, migrants are subjected to rape, torture,

demands for the payment of ransom, and exploitation, not only while they are en route, but also in the Libyan detention centres (Shaw & Mangan, 2014; Van Reisen & Rijken, 2015). This inevitably comes with practices of human trafficking (Philips & Missbach, 2017).

Given these circumstances, described by some as “hell on earth” (Refugees International, 2017), the African Union, the EU and Libya joined forces to release these migrants and help them return to their countries of origin. IOM assists migrants to return to their country of origin through its Voluntary Humanitarian Return programme. IOM claims that, with the support of the EU, the African Union and the Libyan government, some 23,302 migrants have been returned to their countries of origin between January 2017 and March 2018 (IOM, 2018a). This operation takes place within the larger EU-IOM joint initiative to protect and assist migrants in need in 26 states along the Central Mediterranean route. The EU-IOM joint initiative, which was agreed upon in December 2016, is funded through the EU Emergency Trust Fund for Africa (European Commission, 2016b).

IOM not only assists with returns, but also with reintegration in the country of origin. The latter is extremely complicated, because many of the migrants are traumatised during the migration. To make reintegration work, IOM takes an integrated approach that combines support for returning migrants and their home communities, with the involvement of local communities in the reintegration process. They seek to address migration in an integrated fashion, in which migration governance, including all relevant actors, can take place (Betts, 2013; Lavenex & Schimmelfennig, 2009). The question is whether this will prevent returned migrants from trying to leave their country again in search of a better place. We know from scholarly work that people embark on risky migration journeys even when the risks en route exceed the risks at home (Massey & Coluccello, 2015; see also Chapter 12, *Desperate Journeys: The Need for Trauma Support for Refugees*, by Selam Kidane & Mia Stokmans). Moreover, migrants who have returned to Nigeria, for instance, say they will try to reach Europe again (Aljazeera, 2018). Under the EU-IOM-Nigeria project ‘Strengthening the management and governance of migration and the

sustainable reintegration of returning migrants to Nigeria’, some 8,803 migrants have been returned from Libya to Nigeria (IOM, 2018b). In contrast to the high number of victims of trafficking in the detention centres in Libya and among Nigerian migrants in general, IOM reported only 311 victims of human trafficking (IOM, 2018b). This is worrisome, because if returnees are not identified as victims of trafficking they are deprived of the support and assistance available to such victims (Paasche, Skilbrei & Plambech, 2018). Moreover, migrants in need of international protection might be among the people who have been returned. As such they are denied access to international protection.

The situation of Eritrean migrants stranded in North African countries is of particular concern, because many are subjected to torture, rape, kidnapping and trafficking for ransom (Van Reisen & Rijken, 2015). Although the number of Eritrean arrivals in Europe was on the rise in 2015, their number dropped sharply in 2016; however, estimates suggest that the number of people leaving Eritrea remains high, prompting the question why the number of arrivals has decreased (Frouws & RMMS, 2017). Although during 2016, the interception and deportation of Eritreans by Sudan and Egypt was scaled up, there is no proof that Eritreans have been returned to Eritrea on a large scale. Yet, if Eritrean migrants who fled their country did not arrive in the EU and were not returned to Eritrea, where are they? Some stay in refugee camps in Ethiopia and Sudan, others settle in urban centres (sometimes as undocumented migrants) within and beyond the region. Some “disappear and do not survive the dangerous journey through the desert or across the Mediterranean” (Frouws & RMMS, 2017). Given the practice of trafficking for ransom in the recent past, there is reason to be concerned about the plight of Eritreans.

Israel’s agreements with Rwanda and Uganda

In the mid-2000s, the number of asylum seekers from Sudan and Eritrea who reached Israel through Egypt’s Sinai peninsula increased substantially, reaching over 60,000 in 2012 (Sabar & Tsurkov, 2015). In reaction, Israel built a 242-kilometre long electronic fence along its

border with Egypt, which was completed in 2014. This effectively stopped the arrival of new asylum seekers from Sudan and Eritrea (Lidman, 2018). The vast majority of Eritreans and Sudanese currently living in Israel are not recognised as refugees (Lidman, 2018). Following various legislative changes regarding the detention of asylum seekers, since 2016:

[...] newly arriving individuals, including asylum-seekers, are detained in an immigration detention facility for a three-month period upon arrival [...] Single Eritrean and Sudanese men under the age of 60 are then automatically transferred to the semi-open Holot facility, for a period of up to 12 months mandatory residence. (UNHCR, 2016, p. 1)

Moreover, since 2013, Israel has implemented a voluntary departure programme, under which asylum seekers are given the ‘choice’ of accepting resettlement in Uganda or Rwanda, remaining in prolonged detention in Israel, or returning to their country of origin (Sabar & Tsurkov, 2015, p. 14; see also Chapter 8, *Israel’s ‘Voluntary’ Return Policy to Expel Refugees: The Illusion of Choice*, by Yael Agur Orgal, Gilad Liberman & Sigal Kook Avivi). Between the start of the programme in December 2013 and June 2017, some 4,000 Eritrean and Sudanese asylum seekers have been relocated to Rwanda and Uganda (UNHCR, 2017). It has been reported that Eritrean asylum seekers who accept resettlement from Israel to Rwanda bypass immigration at Kigali airport and are pressured to agree to being smuggled into Uganda. The same applies to Sudanese asylum seekers flown from Israel to Uganda, who are smuggled to South Sudan or Sudan. Some of those returned are reported to have later died in the Mediterranean Sea as they tried to reach Europe (Green, 2017). In a similar vein to Italy’s current policy of providing support to the Libyan Coast Guard, which seems designed to prevent migrant arrivals without incurring responsibility for human rights violations, “[t]he process appears designed not just to discard unwanted refugees, but to shield the Israeli, Rwandan, and Ugandan governments from any political or legal accountability” (Green, 2017). In early 2018, a mass deportation plan for asylum seekers to leave Israel for unnamed destinations in Africa or face indefinite detention was delayed following legal

challenges and mounting pressure (ECRE, 2018). At the same time, Israel withdrew from an agreement with the UNHCR to implement solutions for some 39,000 asylum seekers in Israel (UNHCR, 2018a, 2018b).

These are only some examples of how the human rights of migrants and refugees are violated in the externalisation of migration control. The states and institutions that implement such policies, for instance, Italy and Israel, seem to think that they can successfully manage migration while avoiding being held responsible for such violations. Accordingly, based on a legal analysis, the next two sections discuss to what extent the practices described here enable states, non-state actors, and the EU and its agencies to be held responsible for their involvement in migration control activities outside the EU.

Responsibility of states

This section focuses on the responsibility of states for violating the human rights of migrants and asylum seekers, while the next section focuses on the responsibility of the EU and its agencies. The aim is not to provide an exhaustive list of human rights violations, nor to determine which actors are responsible for what, but rather to point out areas where it is difficult to make such a determination. Under international law, there are three ways in which states can incur responsibility: direct responsibility for the conduct of state actors, failing to protect people from harm, and complicity. Each of these is discussed in turn.

State actors

Under international law, states have an obligation not to commit human rights violations and, if they do, they can be held responsible in accordance with the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) (International Law Commission, 2001). According to Article 2 of ARSIWA, such responsibility arises if two requirements are fulfilled, namely, if the conduct is attributable to the state and if it constitutes a breach of the international obligations of the state. The violation of human rights obligations fulfils the latter requirement. As regards the requirement

of attribution, as discussed in the previous section, some of the abuses suffered by migrants, including asylum seekers, are inflicted by state agents. This is the case if, for instance, asylum seekers are deprived of their liberty in Israel or are detained by the Department for Combatting Illegal Migration in Libya (OHCHR, 2017). Because state agents – such as border control authorities and coast guards, the police, and the army – act on behalf of the state, if they commit a human rights violation, the state is responsible.

If an individual is on the territory of the state when state agents commit a human rights violation against him or her, it is relatively easy to establish that the state in question is responsible. Thus, Israel and Libya are responsible for detaining asylum seekers on their territory. However, sometimes states also act beyond their borders. This was the case in *Hirsi Jamaa*, as discussed in the previous section, where Italian border forces intercepted migrants on the high seas, i.e., beyond Italy's territorial waters. This raises the question of whether states are also responsible when they act extraterritorially. Under human rights law, states have to respect the human rights of all individuals within their jurisdiction. A state is responsible for human rights abuses if they are committed by a state agent within its jurisdiction. But when does an individual come within the jurisdiction of a state (Den Heijer & Lawson, 2013, p. 165)?

Broadly speaking, there are two situations when a state exercises jurisdiction outside its territory. First, when a state exercises effective control over territory abroad, as in the case of military occupation (Milanovic, 2011). Second, and more importantly in the context of migration, a state also exercises extraterritorial jurisdiction when it exercises control and authority over a person outside its territory (Milanovic, 2011). Thus, the question is: when does a state exercise sufficient control over a person outside its territory?

It is clear that a state exercises jurisdiction over persons when it exercises “physical power and control” over them, for instance, when they are detained by state agents abroad or on an intercepted ship, as held in *Al-Skeini and Others v the United Kingdom* (European Court of

Human Rights, 2011, para. 137). Thus, in the *Hirsi Jamaa* case, Italy exercised jurisdiction because Italian military ships had taken the intercepted asylum seekers on board (European Court of Human Rights, 2012, para. 81). However, it is unclear to what extent lesser forms of control over persons abroad also trigger jurisdiction. As mentioned above, Italy now only supports the Libyan Coast Guard through funding, equipping, training and coordinating rescues. It is doubtful that this reaches the required level of control for establishing jurisdiction. If it does, both Italy and Libya could be responsible for returning migrants, including asylum seekers, to a place where there is a risk that they will be ill-treated. However, if it does not, only Libya would be responsible for any violation of the human rights of intercepted migrants. Likewise, in the case of Israel returning migrants to Uganda and Rwanda, the absence of Israeli agents on the ground in those countries means that it is difficult to establish that Israel exercises jurisdiction over the people returned to Rwanda and Uganda, despite the fact that the asylum seekers are returned on the basis of an agreement with Israel. Nevertheless, we will see below that in both situations the states of Italy and Israel might be held indirectly responsible for their cooperation with African states.

Non-state actors

What about harm inflicted by non-state actors? As noted above, not all human rights violations are committed by states. An example of the harm committed by non-state actors is the torture of Eritrean asylum seekers by human traffickers. Another example is the arbitrary detention of migrants in Libya in detention centres, which are run by militias rather than the Ministry of the Interior's Department for Combatting Illegal Migration. In such situations, state actors are not directly involved in inflicting harm. However, in addition to having the obligation not to commit any human rights violations themselves, states are also obliged under human rights law to protect individuals within their jurisdiction from harm committed by others (Shelton & Gould, 2013). Thus, a state must protect people from a risk it knows, or should have known, about. This does not mean that a state is responsible for the ill-treatment itself, but rather for not having done everything that it could reasonably be expected to do to prevent it:

the applicable standard is one of due diligence (Shelton & Gould, 2013). If, despite this, the person suffers harm, the state still complied with its obligations and cannot be held responsible. However, if the state fails to take all reasonable measures, or even colludes with the private actors committing the harm, it can be held responsible for failing to protect the person and prevent the harm. Thus, if there are credible reports that human traffickers torture migrants in order to receive a ransom, and the state does nothing to prevent this from happening, or even facilitates it, the state can be held responsible under international law.

Moreover, in some cases, if the state exercises a high level of control over the non-state actor in question, the conduct of the non-state actor can be attributed to the state. It is then as if the state itself committed the human rights violation in question. Here also, it is unclear how much control the state must exercise over the non-state actor for the latter's conduct to be attributed to the state. Under international law the threshold is high, requiring either complete dependence or strict control, or direction or control of specific conduct (Jackson, 2015, pp. 177–178). In the case of the migrant detention centres in Libya, which are run by militias, if it can be shown that the militias are acting on behalf of the Libyan state, Libya could be held directly responsible for the human rights violations committed there.

Last, as for the conduct of state actors, a state can only be held responsible if it exercises jurisdiction over the individuals in question. Thus, in order to argue that European states are responsible for the ill-treatment of migrants, including asylum seekers, in Libya because they did not take all reasonable measures to prevent it, it must first be established that they exercised jurisdiction over them. However, this is unlikely to be the case because they do not exercise physical power and control over them.

Moreover, the extent to which states have positive obligations to prevent and protect when acting extraterritorially remains unclear. Indeed, even in situations where a state exercises jurisdiction over

individuals outside its territory, the question remains to what extent that state has to protect them from harm. If state A exercises jurisdiction over a person who is located on the territory of state B, when examining the obligations of state A, one also has to take into account the fact that state B exercises territorial jurisdiction and has the obligation to protect individuals on its territory from human rights violations (Battjes, 2017, p. 281). Moreover, it seems that the extent of state obligations is proportional to the level of control exercised over the individual in question: more control means more obligations (Battjes, 2017, p. 283).

Derived responsibility

So far the discussion has focused on situations in which states are directly responsible for human rights violations. However, states can also be indirectly responsible for human rights violations, namely, when they are complicit in human rights violations committed by other states. One provision is particularly important in this regard: Article 16 of ARSIWA. Although it is not embodied in a treaty, this provision is part of customary or unwritten law (Aust, 2011, p. 191). It provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*
- b) the act would be internationally wrongful if committed by that State.*

Thus, if the requirements of Article 16 are met, a state is responsible for aiding or assisting another state in committing human rights violations, even if it does not exercise jurisdiction. The exact contours of the rule embodied in Article 16 remain unclear (Aust, 2011, pp. 99–100). In the context of migration, one particularly thorny issue is the question of causality: the aid or assistance is generally provided in order to stop migration flows and/or improve the situation of migrants in transit countries and would-be migrants in countries of origin, not to commit human rights violations (see, for example, European Council, 2018). Nevertheless, it has been argued that Italy and other European states are responsible because of the support

they provide to the Libyan Coast Guard (Moreno-Lax & Giuffré, forthcoming, 2019; Hirsch & Dastyari, forthcoming, 2019).

Likewise, in the Israeli example, if Israel knew of the violations taking place and continued the expulsions, or if it actually agreed with the authorities in Rwanda and Uganda to smuggle asylum seekers out of the country, Israel could be held responsible under Article 16 of ARSIWA. Moreover, Israel could be held directly responsible for violating the principle of non-refoulement if it knew or should have known of these practices.

Responsibility of the EU and its agencies

As illustrated in the examples given in the first part of this chapter, it is not only states that are involved in migration control in Africa. The EU is heavily involved in many of the agreements that underpin migration governance outside the EU's borders, through either the facilitation of such activities, the financing thereof, or the secondment of personnel, for instance, via the European Asylum Support Office (EASO). EU institutions are the architectures of these agreements and EU agencies such as Frontex and EASO play a role in their implementation (Mitsilegas, 2015). The case of *NF v European Council* (Court of Justice of the European Union, 2017) shows that it is difficult to establish the responsibility of EU institutions for their involvement in agreements, even when these are implemented (partly) on EU territory. In this case, the Court of Justice of the European Union ruled that the EU-Turkey Statement was not concluded by the European Council, but instead by the heads of state or governments of EU member states and Turkey, and, therefore, the Court of Justice lacked jurisdiction. This decision has been interpreted as a choice by the Court of Justice not to intervene in migration control policies (Spijkerboer, 2018). Establishing responsibility is even more difficult if the implementation of the agreements concluded between the EU and third countries takes place outside the EU (Giuffré, 2012).

The question here is which rules and regulations are in place to find international bodies responsible and under what conditions can these rules be triggered. The same question arises as regards the responsibility of the agencies Frontex and EASO for their involvement in the implementation of agreements, either within EU territory or beyond. Both questions are addressed in turn below. But before this, the next sub-section addresses the responsibility of the EU as an international organisation.

The European Union

In 2011, the International Law Commission adopted the Draft Articles on the Responsibility of International Organisations (ARIO) (International Law Commission, 2011), which mirror ARSIWA. They can be seen as the little brother of, or *lex specialis* to, the ARSIWA as they have not yet reached the same level of maturity. It is generally agreed that ARSIWA has now developed into customary law, whereas, due to a lack of practice, this cannot be said about the ARIO (Boon, 2011, p. 9). Article 4 of ARIO is the equivalent of Article 2 of ARSIWA and contains the same requirements for the responsibility of international organisations, namely, a breach of an international obligation that is attributable to the international organisation. Article 10 ARIO states that:

[T]here is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned. (International Law Commission, 2011)

The EU is an international organisation. Moreover, following Article 6 of the Treaty on the EU, it is bound by the rights in the Charter on Fundamental Rights of the EU, the European Convention on Human Rights and the fundamental rights as they result from the constitutional traditions of the EU member states. Violation of these obligations by the institutions of the EU, including its agencies, is the responsibility of the EU, if the act is attributable to it (Hoffmeister, 2010, pp. 745–746; Boon, 2011, pp. 3–9). In the case of migration governance outside the EU's territory, and especially in those cases

where the EU institutions or agencies are not directly involved in implementation, this might be problematic. For instance, the EU supports and finances the interception of migrants and their return to the Libyan coast by the Libyan Coast Guard, but has no direct control over the coast guard's activities and operations, which remain within the sovereign power of Libya.

In the same vein as Article 16 of ARSIWA, Article 14 of ARIO is a provision on aiding and assisting. Thus, if the EU aids or assists another state or another international organisation in violating human rights it can be held responsible under the condition that it knew of the circumstances and that the conduct would have been an internationally wrongful act if committed by the EU itself. Similar to what was discussed above in regard to Article 16 of ARSIWA, it is unclear how and when Article 14 of ARIO applies. This remains a grey area of the law.

The many efforts of the EU to manage migration in its external dimensions have been documented elsewhere in this book and discussed by others (Graziani, 2017; Collet & Ahad, 2017). Molenaar and El Kamouni-Janssen document how the agreements which the EU has concluded with third states in Sub-Saharan Africa fail to take into account local realities and, therefore, are ineffective and inefficient at best, and counterproductive at worst (2017, pp. 2, 64–67). The interceptions by the Libyan Coast Guard, which lead to the detention of migrants in inhumane conditions, is a sad example of such practices.

The question is, then, whether the EU can be held responsible in these situations where the violation of the rights of migrants (imprisonment) is a direct consequence of the EU's involvement. At first glance this situation does not seem to fulfil the requirements for responsibility, as there is no direct involvement and the intent of the EU's action was not the violation of these rights. However, if the EU knew that the violations are a direct consequence of its actions one could argue that the EU is responsible for aiding and assisting in the violation of human rights. As such, reports, for example, by

humanitarian organisations, on the human rights situation on the ground are indispensable for holding the EU responsible for human rights violations conducted by states and non-state actors.

Frontex

This and the following section discuss the responsibility of agencies tasked with the implementation of EU migration control policies. In general, the rules on the responsibility of EU agencies are found in the agreement establishing the particular agency. In addition, and based on the Treaty on the Functioning of the EU, the annulment procedure can be initiated against acts of EU agencies (Article 263). In such a procedure, the Court of Justice of the European Union can review the legality of the acts of agencies having legal effect. As such, it is possible to also hold agencies (such as Frontex and EASO) accountable. Unfortunately, a procedure for infringing the treaties, which would be more suitable here, can only be directed against EU member states (European Ombudsman, 2013; Parliamentary Assembly, 2013).

As we will see, Frontex is already mandated to act in the territorial waters and on the territory of third states, based on agreements with these states. Both Frontex and EASO play an important role in the implementation of policies in hotspots in Greece and Italy and might play a similar role in the future, if and when EU reception centres are established on the territory of third states, as was recently proposed by EU leaders (European Council, 2018).

Motivated by migration control and migration management considerations, Frontex as a European agency assists member states in securing their borders and the borders of the EU as a whole and in preventing ships on the high seas from entering the territorial waters of EU member states without permission. Its main task is to coordinate operations and to assist member states in the management of the EU's external borders. Frontex also assists member states in implementing operational aspects of external border management, including actions in third states (Regulation 2016/1624, consideration 3) and the return of third country nationals who are illegally present

in a member state (consideration 11) (European Parliament & European Council, 2016). In the past, Frontex has been heavily criticised for violating international human rights law (Weinzierl & Lisson, 2007; Kasperek, 2010; Human Rights Watch, 2011). Criticism continued when Rapid Border Intervention Teams (RABITs) were established for the first time in October 2010 when Greece faced a huge influx of migrants entering through Turkey. Human Rights Watch's reports on these practices indicated that Frontex violated fundamental rights with its operations on Greek territory, especially by sending intercepted migrants to Greek detention centres where conditions were dire (Human Rights Watch, 2011; Marin, 2011). Frontex then claimed it could not be held directly liable for any human rights violations taking place. It argued that it only coordinated tasks at the request of states whose actions were exercised by national professionals who were not employed by Frontex, but acted under the jurisdiction of the host state (which made the request for assistance) and remained under their national jurisdictions in relation to criminal liability and the carrying of weapons. It is debatable whether this statement can be upheld (Mitsilegas, 2015; Kasperek, 2010) and to what extent Frontex's new founding regulation (Regulation 2016/1624), has changed this situation.

Frontex is currently involved in various operations, including in and with third states. In the Mediterranean (Scherer, 2018), Frontex is involved in Operation Triton, which was replaced by Operation Themis in February 2018. Frontex vessels carry out search and rescue operations and bring migrants to a safe port in the EU. The European Union Naval Force Mediterranean (EUNAVFOR MED) Operation Sophia, in which Frontex also participates, was specifically established to disrupt criminal smuggling and trafficking networks (European Union External Action, n.d.). The training of personnel of the Libyan Coast Guard is part of this mission. In the Aegean Sea, Frontex is involved in operation Poseidon, whose focus has changed from search and rescue to border surveillance (Frontex, n.d.).

Over the years we have seen the expansion of Frontex's operational tasks. Indeed, in 2016 the mandate of Frontex, and especially its operational tasks, were extended further in Regulation 2016/1624:

[...] to provide increased technical and operational assistance to Member States through joint operations and rapid border interventions; to ensure the practical execution of measures in a situation requiring urgent action at the external borders; to provide technical and operational assistance in the support of search and rescue operations for persons in distress at sea. (European Parliament & European Council, 2016, consideration 11)

However, the responsibility of Frontex did not see a similar expansion. Civil and criminal liability is dealt with at the national level, albeit in accordance with the law of the host state, and not the home state anymore (Regulation 2016/1624, Articles 42 and 43, respectively). The criminal liability of Frontex officials is now to be treated similarly to that of officials of the host member state. However, a provision acknowledging the liability of the agency has been adopted in Article 60, but is subject to the agreement underlying Frontex's activities in a specific case. Article 60 states that “[t]he contractual liability of the Agency shall be governed by the law applicable to the contract in question” (European Parliament & European Council, 2016).

Given the current responsibility gap regarding Frontex's activities, the question that remains is to what extent both Frontex as an agency and the EU member states involved in Frontex are responsible for human rights violations during its operations (Pollak & Slominski, 2009). The NGOs and other organisations that have reported on these practices argue that Frontex cannot escape responsibility. As we will discuss in the next section, similar questions arise regarding the involvement of other agencies and cooperation structures designed at the EU level, notably EASO (Mitsilegas, 2015).

EASO

The European Asylum Support Office, established in 2011 by Regulation 439/2010 (European Parliament & European Council,

2010), provides operational support to member states with specific needs and to member states whose asylum and reception systems are under particular pressure. As such, the EASO assists Greece and Italy in the processing of asylum claims in EU hotspots. The EU hotspots approach is defined as an:

[a]pproach where the European Asylum Support Office (EASO), the European Border and Coast Guard Agency (Frontex), Europol and Eurojust work on the ground with the authorities of frontline EU Member States which are facing disproportionate migratory pressures at the EU's external borders to help to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants. (European Commission, 2015)

In principle, operational support by EASO is limited to the registration, identification, fingerprinting and debriefing of asylum seekers and return operations. In addition, EASO helps to process asylum applications as quickly as possible. EASO issues admissibility opinions on individual asylum applications lodged in Greece, which are then presented to the Greek Asylum Service for the final admissibility decision. This form of joint processing appears to go beyond EASO's mandate under its current regulation 439/2010, which in recital 14 provides that "the Support Office should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection" (European Parliament & European Council, 2010).

Similarly, as for Frontex, these operational tasks give rise to the question to what extent EASO bears responsibility if the human rights of migrants in hotspots are violated. As is well documented, the situations in hotspots and on the Greek Islands are deplorable and inhumane (Human Rights Watch, 2017; Ćerimović, 2017; Danish Refugee Council, 2017). It is clear that EASO cannot be held responsible for the living conditions and facilities (or lack thereof) on the Greek Islands, as this is simply beyond its mandate. However, what if rights are violated while giving an opinion on the admissibility of an individual asylum application? The official standpoint of EASO

and Greece is that EASO does not formally decide on asylum applications and that this remains the sole responsibility of Greece.

Nevertheless, EASO's involvement led the European Centre for Constitutional and Human Rights to file a complaint with the European Ombudsman. The complaint claims that EASO is overstepping its mandate in conducting admissibility interviews in hotspots and that EASO's opinions amount to *de facto* admissibility decisions. The Ombudsman recognised that "there are genuine concerns about the quality of the admissibility interviews as well as about the procedural fairness of how they are conducted", but found that "ultimate legal responsibility for decisions on individual asylum applications rests with the Greek authorities". It also noted that EASO's founding regulation would likely be amended in the future to provide explicitly for such activity, and held that further inquiries into the complaint were not justified (European Ombudsman, 2018). In order to strengthen the mandate of EASO, in 2016, the European Commission launched a proposal to expand the operational tasks of EASO and to transform it into an EU Agency for Asylum (European Commission, 2016c). Pending adoption, the proposal was amended in September 2018, again expanding the operational tasks for the new EU Agency for Asylum (European Commission, 2018).

Thus, whereas states like Italy adapt their policies in reaction to legal developments, in the case of EASO, legal documents are amended in reaction to new policy developments. The cat-and-mouse game can, therefore, also be seen to work the other way around. In any event it is evident that not only states, but also the EU, make efforts to develop migration control policies which at first sight are legal, either because they exploit loopholes in the existing framework or because they adapt the legal framework itself. However, such policies, nevertheless, can lead to human rights violations and it remains unclear which actor is responsible for these violations. As regards EASO, the EU's envisioned strengthened mandate for the new EU Agency for Asylum suggests that questions of responsibility will continue to arise in the future.

Conclusion

This chapter investigates the question: *To what extent can the EU and its agencies, as well as state and non-state actors, be held responsible for the human rights violations suffered by refugees and migrants?* First, several examples of migration control policies were considered. It was then discussed to what extent the states involved in these policies, as well as the EU and its agencies, may or may not be held responsible for the human rights violations suffered by migrants. As regards states, the chapter shows that they can be held responsible, both for the conduct of state officials and for the conduct of non-state actors. However, states need to exercise sufficient control in order to exercise jurisdiction. If that is not the case, they can only incur responsibility for aiding or assisting another state. Both as regards jurisdiction and aiding or assisting, it is unclear where the boundaries lie. As regards the EU and its agencies, the situation is similar. If they act directly, EU institutions can be held responsible on the basis of the obligations embodied in the Charter on Fundamental Rights of the EU and the European Convention on Human Rights. However, EU institutions hardly act directly in a third country in the field of migration control. The situation is, however, different for EU agencies such as Frontex, and in the future possibly also EASO, whose mandates include operational tasks. This chapter shows that it is difficult to establish the responsibility of these agencies and that this is an area very much under development. With the EU planning to further externalise migration control, it is important to clarify the legal grey areas and to fill in the gaps in the legal framework, in order for the migrants whose rights are being violated not to be left in a legal black hole.

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