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EU Migration Diplomacy: Challenges to the International Protection of Human Rights and Inspiring Principles for a Renewed Approach to Migration Management

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EU Migration Diplomacy: Challenges to the International Protection of Human Rights and Inspiring Principles for a Renewed Approach to Migration Management

by

Francesca Romana Partipilo*

Abstract

Since the outbreak of the so-called “Arab Spring” and the subsequent migratory movements towards Europe, the EU has made increasing recourse to agreements with third countries for the joint control of its external borders. Legal scholars describe this phenomenon as a strategy of “externalization” of migration. This paper addresses EU externalization policies, examining their political rationale, legal basis, and historical trajectory. By means of two case-studies, the contribution stigmatizes the adverse human rights impact of EU’s cooperation with third countries. It argues that migration should not be approached through short-sighted containment strategies enacted by means of agreements with third States aimed at avoiding EU accountability for human rights violations on the migratory route. Despite their proclaimed aims, indeed, such agreements do not strike an adequate balance between European legitimate security concerns and the imperative to protect migrants’ rights. Therefore, adopting a normative approach, this paper suggests that the EU and its Member States cooperate among themselves and with international organizations and NGOs to propose valid alternatives to current, flawed migration policies. Acknowledging the importance of international cooperation in tackling the challenges connected with migration, the paper argues that what needs to be revised is the substantial content of the agreements with third countries, rather than the choice to stipulate them in the first place. Such agreements should be based on the prioritization of a human rights perspective, rather than being hinged on the necessity to contain irregular migration by any means.

Keywords: Externalisation; Migration diplomacy; Refugee law; Libya; Turkey

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I. Introduction

In August 2021, the withdrawal of US troops from Afghanistan facilitated the Taliban return to power.¹ As photographs documenting Kabul exodus circulated worldwide, the restoration of the brutal regime which ruled the country from 1996 to 2001 shook the international community. European leaders, however, appeared to be more alarmed by the potential migratory consequences of the Taliban takeover than by the extremists' absolute disregard for human rights. A few days after the Taliban took Kabul, in fact, an extraordinary Council meeting was held to discuss the developments in Afghanistan in relation to "potential implications in the areas of international protection, migration, and security". In their "Statement on the situation in Afghanistan",² EU Ministers of Home Affairs jointly declared that:

"The EU will engage and strengthen its support to third countries [...] to *prevent illegal migration* from the region, *reinforce border management capacity* and *prevent smuggling of migrants* and trafficking in human beings".³

Pursuant to a consolidated strategy, therefore, EU leaders stressed their intention to boost neighbouring and transit countries' reception capacities, to avert new migratory movements towards the European block. In addition, EU Ministers specified that:

"Based on lessons learned, the EU and its Member States stand determined to act jointly to *prevent the recurrence of uncontrolled large-scale illegal migration movements* faced in the past, by preparing a coordinated and orderly response".⁴

Notably, in April 2021, the EU had signed a Joint Declaration on Migration Cooperation with Afghanistan, aimed at "promoting joint efforts in the fight against migrant smuggling

¹ HOLLINGSWORTH Julia, *Who are the Taliban and how did they take control of Afghanistan so swiftly?*, CNN, 24 August 2021. Available at: <https://edition.cnn.com/2021/08/16/middleeast/taliban-control-afghanistan-explained-intl-hnk/index.html>.

² Council of the EU, Press Release, *Statement on the situation in Afghanistan*, 31 August 2021.

³ Statement on the situation in Afghanistan, para.4 (emphasis added).

⁴ Ibidem, para.6 (emphasis added).

and human trafficking and facilitating the reintegration of people returning to Afghanistan”.⁵ The Statement and the Joint Declaration are by no means the first attempts to manage migration through the strategic cooperation with third countries. Rather, as suggested by the reference to “lessons learned” contained in the Statement, the two documents are inspired by a longstanding European strategy in the field of migration management and border control. In fact, both the EU and its Member States have increasingly made recourse to technical and political agreements with States where migration flows originate or transit to regulate a huge variety of aspects connected to migration.⁶ Such a strategy has been examined by legal scholars through the analytical prism of “externalisation” of migration control towards third countries.⁷

This paper addresses EU external action in the migration domain, namely the recurring practice of cooperating with third States with a view to curbing irregular migration while enhancing the protection of EU external borders. The paper criticizes this policy’s adverse consequences on migrants’ rights. It does not purport to examine every deal stipulated by the EU with third countries, but rather to identify certain trends characterising the relationship between the EU and its periphery, with a view to proposing some inspiring principles for better-drafted cooperation agreements. To such an end, in the first section, the legal and political framework for the cooperation with third countries will be outlined, identifying the fundamental legal documents and political acts guiding the EU diplomatic activity. Then, in the second and third section of the work, two case studies will be analysed, selected in view of the countries’ strategic position within migration patterns towards the EU. Finally, in the fourth and last section, the paper will propose an alternative, human rights-oriented paradigm for EU migration diplomacy. In particular, it will argue that enhanced cooperation between the EU, its Member States, and other partners, including international organizations (IOs), non-governmental organizations (NGOs), civil society organizations (CSOs), and the academia, is key to strengthening migrants’ rights and promoting better designed policies. In addition, the paper will recommend the enhancement of the monitoring of the deals stipulated with third countries, employing non-State actors and the academia as valuable allies in such an effort.

⁵ European External Action Service, *EU-Afghanistan Joint Declaration on Migration Cooperation*, 26 April 2021.

⁶ SPAGNOLO Andrea, *The conclusion of bilateral agreements and technical arrangements for the management of migration flows: an overview of the Italian practice*, Italian Yearbook of International Law (2019), pp. 211-230, p. 211.

⁷ SPIJKERBOER Thomas, *The global mobility infrastructure: Reconceptualising the externalisation of migration control*, European Journal of Migration and Law (2018), pp. 452-469. The origin of the idea of externalization is generally traced back to July 1998, when the Austrian Presidency of the Council of the EU wrote a strategic paper on immigration and asylum policy which contained the first mention of the idea to fight irregular migration externally: “[...] all the EU’s bilateral agreements with third States must incorporate the migration aspect”. See, in this regard, Council of the EU, Note from Presidency to K4 Committee, *Strategy paper on immigration and asylum policy*, 9809/98, Brussels.

II. EU migration diplomacy: the two sides of the (Mediterranean) coin

Migration diplomacy is described as “[S]tates’ use of diplomatic tools, processes, and procedures to manage cross-border population mobility”.⁸ Traditionally, States negotiated agreements on issues such as ceasefires, human rights, trade, nuclear disarmament, cross-border pollution, *et cetera*. Progressively, migration has also been included in the list of topics regulated via inter-state bargaining. In fact, in the last decades, cross-border movements of people increased exponentially, with clear repercussions on States’ diplomatic activity, particularly in the Mediterranean basin. In this region, gradually, the diplomatic activity around the issue of migration spilled over at the supranational level, with the EU gaining a prominent role, expanding its competences in asylum matters.⁹ Today, rather than being confined to the political agenda of single EU Member States, migration management has become a central task of the EU.¹⁰

Migration, asylum and border management policies, long maintained as core national competences of the Member States, became shared competences with the adoption of the Maastricht Treaty, in 1992.¹¹ In 1999, the Tampere Council Conclusions referred to the need to establish a Common European Asylum System (CEAS), and to the importance of partnership with countries of origin.¹² In particular, the Conclusions underlined that “[p]artnership with third countries [...] will be a key element for the success of such a policy, with a view to promoting co-development”.¹³ In addition, since the establishment of the Schengen system and the corresponding liberalization of EU’s internal borders, the protection of its external borders became a priority area for the EU. The connection between the protection of European external borders and EU policies of externalization has been identified by several scholars. Lavenex, for instance, explains that “externalization is historically associated with many advantages, such as lowering the cost of control of EU common borders by remotely preventing access to them”.¹⁴ Policies of externalization are thus achieved by keeping migrants and refugees at a considerable distance, either at sea or on foreign lands,

⁸ ADAMSON Fiona B., TSOURAPAS Gerasimos, *Migration Diplomacy in World Politics*, International Studies Perspectives (2019), pp. 113-128, p. 116.

⁹ LAVENEX Sandra, *Multilevelled EU external governance: the role of international organizations in the diffusion of EU migration policies*, Journal of Ethnic and Migration Studies (2016), pp. 554-570, p. 554.

¹⁰ Lavenex explains that “[t]raditionally a core aspect of State sovereignty, immigration control has first moved upwards to the intergovernmental sphere. It has then been brought closer to supranational governance, and [then moved] outwards towards the realm of EU foreign relations”. See LAVENEX Sandra, *Shifting up and out: The foreign policy of European immigration control*, West European Politics (2006), pp. 329-350, p. 329.

¹¹ BOSWELL Christina, *The ‘External Dimension’ of EU Immigration and Asylum Policy*, International Affairs (2003), pp. 619-638. It should be noted that, pursuant to the ‘principle of conferral’ enshrined in Art.5 TEU, the EU only enjoys the competences explicitly conferred upon it by the treaties. The Treaty of Lisbon, in particular, contains the division of competences between the EU and its Member States. After the adoption of the Treaty, Art.3 TFEU enshrines the areas in which the EU enjoys exclusive competence, Art.4 TFEU lists the shared competences between the EU and its Member States, whilst Art.6 TFEU contains the list of fields where the EU can support, coordinate or supplement EU Member States’ policies. Today, Art.4., para.2, sub-para.J TFEU provides that the “area of freedom, security and justice” pertains to the shared competences of the EU and its Member States.

¹² Art.29 TEU or Art.67 TFEU refers to the establishment of an EU Common Policy on asylum, immigration and external border controls.

¹³ Tampere European Council, *Presidency Conclusions*, 15-16 October 1999. Also see Laeken European Council, *Presidency conclusions*, 14-15 December 2001. Seville European Council, *Presidency Conclusions*, 21-22 June 2002.

¹⁴ See LAVENEX, *supra* at 10.

avoiding their access to the asylum systems of EU Member States. Consequently, externalization brings considerable disadvantages, such as a heightened risk of human rights violations at the hands of regimes and third States not always well-equipped to deal with migration while ensuring adequate standards of protection.

The control of EU borders through inter-State cooperation does not represent a novelty within the European legal *aquis*. In the 1990s, such a strategy was employed with the former communist countries in Eastern Europe.¹⁵ Then, the Hague Programme, adopted by the European Council in 2004 with a view to setting common priorities for the EU in the following five years, emphasized the need “to continue the process of fully integrating migration into the EU’s existing and future relations with third countries”.¹⁶ Consequently, since 2005, the Global Approach to Migration (GAM)¹⁷ – renamed Global Approach to Migration and Mobility (GAMM) in 2011 –¹⁸ promoted a close collaboration with third countries in the migration realm.¹⁹ The GAMM acknowledges that migration issues are an integral part of the EU’s external relations and that they should be tackled through a close partnership between the countries of origin, transit, and destination.²⁰

The 2011 popular revolts in the MENA region strongly influenced EU policies on migration and narratives around these policies.²¹ As a matter of fact, EU external action in the field of migration is shaped by the need to respond to global challenges and address their consequences in the asylum domain. In this respect, it was argued that “external triggers, such as the so-called ‘migrant and refugee crisis’, provide scope conditions affecting the way in which the EU external action is pursued”.²² The uprisings of the Arab Spring prompted significant cross-border movements as people fled violence, arrests and – in the case of Libya and Syria – heavy military fighting.²³ EU’s immediate response largely focused on border surveillance and containment of migrants in the southern Mediterranean through

¹⁵ LAVENEX Sandra, SCHIMMELFENNING Frank, *EU rules beyond EU borders: theorizing external governance in European politics*, Journal of European Public Policy (2009), pp. 791-812. Also see MATEI Michela et al., *International migration policies in two post-communist countries: comparative evidence from Romania and Poland*, Eastern Journal of European Studies (2020), pp.427-448. The Authors explain that Poland and Romania are among the largest emigration countries in the former Eastern bloc. Before the 90s, the two countries adopted strict policies to avoid mass emigration of citizens. Nonetheless, as the Authors explain, oppressive political regimes and economic shortages led to the development of illegal emigration networks. This, in turn, led EU Member States to stipulate bilateral agreements with both countries to regulate the matter.

¹⁶ Council of the EU, *The Hague Programme: strengthening freedom, security and justice in the European Union*, 2005/C 53/01, Brussels.

¹⁷ Brussels European Council, *Presidency Conclusions*, 15-16 December 2005, point 4, and Annex I, *Global Approach to Migration: priority actions focusing on Africa and the Mediterranean*.

¹⁸ European Commission, *The Global Approach to Migration and Mobility*, COM (2011) 743; Council Conclusions on the Global Approach to Migration and Mobility, 3 May 2012.

¹⁹ European Council, *Presidency Conclusions on the Global approach to Migration: Priority actions focusing on Africa and the Mediterranean*, Brussels, 15-16 December 2005.

²⁰ European Commission, Communication, *The Global Approach to Migration*, COM(2011) 743 final, p.5. It should be noted that, in reaction to the Arab uprisings in 2011, the global approach was officially extended to cover also asylum and refugee issues.

²¹ For an overview of migration patterns through and from Libya, see TOALDO Mattia, *Migration Through and From Libya: A Mediterranean Challenge*, IAI Working Papers (2015), pp. 1-20.

²² EMILIANI Tommaso, *E Pluribus Unum? The Communitarization of EU Migration, Asylum and Border Management Policies in Times of Crisis*, European Integration Studies (2017), pp. 19-30.

²³ FARGUES Philippe, FANDRICH Christine, *Migration after the Arab Spring*, Migration Policy Centre Research Report (2012), pp. 1-22.

a set of complementary actions: the intensification of border control and surveillance, political pressure on newly established authorities to cooperate in curbing irregular migration, and the introduction of new legislative proposals suspending mobility.²⁴

After 2011, the EU started stipulating “mutually beneficial” partnerships with third countries – the “Dialogues on Migration, Mobility and Security” – in the context of the GAMM.²⁵ The dialogues aimed at boosting the capacity of Southern Mediterranean neighbours of the EU to manage irregular migration, imposing relevant obligations on partner States in the form of stricter control of their external borders, cooperation with Frontex, and negotiation of readmission agreements with the EU.²⁶ The reference to “mutual benefits” to be achieved through the partnership with third countries suggests that migrants’ rights were not included in the equation, and benefits were to be reserved to the EU and its partner countries. Rather than representing the beneficiaries of the dialogues, therefore, migrants were treated as the mere object of the partnership agreements.

The topic of mutuality evokes a crucial aspect of migration diplomacy: third countries’ position in the context of negotiations of externalisation agreements. In fact, migration diplomacy is not a one-sided process, exclusively guided by the EU policy agenda. Origin and transit countries do not merely constitute the object of EU externalization strategies, they also contribute to shaping such strategies, according to their own interests and objectives. They represent the other side of the “Mediterranean coin”. While on the one hand the EU makes recourse to diplomatic means to achieve goals related to migration management and border control, third countries, on the other hand, might employ diplomatic means to achieve goals unrelated with migration.²⁷

Third States’ diplomatic agendas are governed by a wide array of policy objectives. Origin and transit countries exploit the topic of migration to reinforce their internal security, promote their international reputation, achieve economic objectives, obtain the lifting of visa requirements for their own citizens, as a bargaining chip in international negotiations, and so on. As a way of example, it has been observed that countries such as Tanzania have made exaggerated public appeals to the UNHCR with a view to securing funding and material resources for migration management.²⁸ Further, Greenhill²⁹ demonstrated that States use threats of forced displacement as a form of coercive diplomacy in the attempt to achieve their security aims, as when Milosevic threatened an outflow of refugees from Kosovo in

²⁴ CARRERA Sergio et al., *EU Migration Policy in the wake of the Arab Spring. What prospects for EU Southern Mediterranean Relations?*, MedPro Technical Report n.15 (2012), pp. 1-30.

²⁵ European Commission, Communication, *A dialogue for migration, mobility and security with the Southern Mediterranean countries*, COM(2011) 292 final.

²⁶ CARRERA Sergio et al., *The EU’s Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities*, CEPS essay, n. 20 (2015), pp. 1-22.

²⁷ ADAMSON and TSOURAPAS, cit. *supra* at 8, p. 118.

²⁸ WHITAKER Beth Elise, *Refugees in western Tanzania: the distribution of burdens and benefits among local hosts*, Journal of Refugees Studies (2002), pp. 339-358.

²⁹ GREENHILL Kelly, *The use of refugees as political and military weapons in the Kosovo conflict*, in Thomas (ed.), “Yugoslavia Unravelling: Sovereignty, Self-Determination, Intervention”, Lexington Books (2003), pp. 205-42.

1999.³⁰ Somehow following the example of the Serbian dictator, Erdogan weaponized migrants as a political tool in 2020, when he resorted to the opening of Turkish borders, pushing thousands of refugees into Greece, and causing the death or wounding of hundreds of them at the hands of Greek security forces.³¹ Similarly, in 2021, hundreds of thousands of refugees have been stranded for weeks at the border between Belarus and Poland, pushed there by President Lukashenko in an attempt to achieve his political ends, connected with the lifting of European sanctions against Belarus.³²

Third States' strategies demonstrate that migration may be "hijacked" and reduced to an exploitative business, whereby migrants are weaponized by EU partner countries to achieve their political and economic objectives. This should suffice as proof of the failure of current EU strategies on the cooperation with third countries. In fact, as long as the EU will attach paramount importance to the control of its external borders, exclusively founding its migration strategy on the securitization of its frontiers while neglecting human rights considerations, third countries will exploit the leverage conferred upon them by the high numbers of refugees hosted in their territories to threaten the EU with the risk of a migrant invasion. In such a context, the ones paying the highest price are migrants themselves, treated as agency-less puppets and forced to take increasingly dangerous and long routes, for the benefit of politicians who base their electoral successes on the narrative of the invasion and on the exploitation of refugees.

Different narratives have been employed, in legal documents and policy statements, to justify EU externalization policies.³³ After the episodes of April 2015, when nearly one thousand migrants lost their lives in the Mediterranean in just a few days, the European Agenda for Migration was adopted, recognizing the "human tragedy" unfolding at the borders of Europe, and calling for a comprehensive approach to the solution of the crisis.³⁴ The Agenda on Migration led to the adoption of the EU Action Plan against Migrant Smuggling, as well as the EU Action Plan on Returns and the EC's recommendation to establish a common Return Handbook.³⁵ These measures were aimed at facilitating the return of third-country nationals entering irregularly in Europe and increasing cooperation with third

³⁰ ADAMSON and TSOURAPAS, cit. *supra* at 8, p. 120.

³¹ Apparently, Erdogan was disturbed by the stalling of visa-liberalization talks with the EU. See Amnesty International, *Explained: The situation at Greece's borders. What's happening at Greece's borders with Turkey?*, March 5, 2020. Available at: <https://www.amnesty.org/en/latest/news/2020/03/greece-turkey-refugees-explainer/>.

³² RANKIN Jennifer, *Fortress EU is beating Belarus, with refugees as pawns in cruel game*, The Guardian, November 15, 2021. Available at: <https://www.theguardian.com/world/2021/nov/15/belarus-fortress-eu-refugees-sanctions-european-union>.

³³ Moreno-Lax examined the evolution of the rhetoric employed to justify European involvement in the Mediterranean. European discourse, she argues, "reflects a change from a 'pure' securitizing logic of pre-emption of unauthorized movement, with irregular movers portrayed as near-criminals, towards an increasingly human rights-friendly narrative that depicts migrants as victims and smugglers as perpetrators of death and abuse at sea". See MORENO-LAX Violeta, *The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm*, Journal of Common Market Studies (2018), pp. 119-140. Also see, on this issue, CUTTITA Paolo, *Delocalization, Humanitarianism, and Human Rights: The Mediterranean Border Between Exclusion and Inclusion*, Antipode (2017), pp. 783-803.

³⁴ European Commission, *A European Agenda on Migration*, COM(2015) 240 final.

³⁵ European Commission, *Recommendation 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks*, OJ L 339.

countries. The Agenda for Migration identified the “fight against smuggling and trafficking in human beings” as a policy priority, stating that “the criminal networks which exploit *vulnerable migrants* must be targeted”.³⁶ At the same time, the document envisaged the increase of the budget for the Frontex joint operations Triton and Poseidon.³⁷ The rhetoric of vulnerability and the victimization of migrants were thus exploited to justify European concern (or, rather, obsession) with the “fight against smuggling” and the further securitization of migration.³⁸

The Political Declaration and Action Plan adopted at the November 2015’s Valetta Summit on Migration further demonstrates that references to the “suffering, abuse and exploitation” of people on the move were used to introduce and reinforce policies focused on security-related practices regarding border control.³⁹ Indeed, the action plan envisages the capacity-building and the financing of investments for improved border management systems in order to support national capabilities to control land, sea and air borders, as well as maritime surveillance capabilities for the purpose of prevention of irregular migration.⁴⁰

In July 2016, the European Commission announced the launch of a new partnership framework with third countries, within the context of the European Agenda on Migration. Pursuant to the document, “Member States, EU institutions and key third countries need to work together in partnership to bring order into migratory flows”.⁴¹ After careful analysis, the document reveals that the Commission’s interpretation of “orderly migratory flows” coincides with the further increase of border-control and counter-smuggling efforts, by employing partner countries as Europe’s border-guards. There is no mention of regular migration pathways other than the generic acknowledgement that the “EU needs to put in place pathways for people to come to the EU legally”. In addition, the document envisages an important role of third countries in the reception and/or reintegration of asylum seekers, with a view to preventing migrants from reaching EU territory by “develop[ing] safe and sustainable reception capacities and provid[ing] lasting prospects close to home”. As for Libya, for instance, the document envisages an envelope of projects worth around EUR 100 million to protect migrants in detention centres, improve the border control system and the legal framework in the country. Regrettably, given the appalling situation in Libyan detention centres, the Commission’s action could further finance a system in which torture is systematically practiced. Such an outcome stands in stark contrast with the words

³⁶ European Commission, *A European Agenda on Migration*, emphasis added.

³⁷ Ibidem.

³⁸ PERKOWSKI Nina, *Deaths, Interventions, Humanitarianism and Human Rights in the Mediterranean ‘Migration Crisis’*, Mediterranean Politics (2016), pp. 331-335.

³⁹ Valletta Summit, 11-12 November 2015, *Action Plan*: https://www.consilium.europa.eu/media/21839/action_plan_en.pdf, and *Political Declaration*: https://www.consilium.europa.eu/media/21841/political_decl_en.pdf. See JEANDESBOZ Julien, PALLISTER-WILKINS Polly, *Crisis, Routine, Consolidation: The Politics of the Mediterranean Migration Crisis*, Mediterranean Politics (2016), pp. 316-320.

⁴⁰ Valletta Summit, *Action Plan*, p. 14.

⁴¹ Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on *establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM(2016) 385 final.

of the Commission itself, which, in the document, specifies that the new Partnership Framework “[...] must take place in a context which fully respects international law and fundamental rights”.⁴²

Finally, the New Pact for Migration and Asylum, presented by the Commission in 2020, considers enhanced partnerships with third countries as a fundamental pillar of a new European approach to migration.⁴³ Regrettably, however, the “new” approach proposed by the Commission remains anchored to the prioritization of European’s security interests. For instance, the new pact does not require an appropriate assessment of the human rights situation in third countries as a prerequisite for the stipulation of agreements between the EU and such countries. Similarly, the Commission is not asked to evaluate whether a particular third country ratified the Geneva Convention, before stipulating agreements with such country. This leaves the door open to agreements with countries with poor human rights records. In addition, the Pact attempts to further outsource the management of migration to third countries by strengthening their ability to better control their borders, and to conduct independent search and rescue missions.⁴⁴ Undeniably, therefore, a careful reading of the Pact’s sections devoted to the cooperation with third countries reveals that the basic approach has not changed, and that EU security interests are still prioritized over a human rights perspective.

Undoubtedly, agreements with third countries have contributed to curbing migrants’ access to the EU, yet the price paid is measured in human rights violations. Despite the wording of the analysed documents, displaying a bogus commitment to fundamental rights, EU migration policies in third countries continue to determine serious violations of migrants’ rights, in a poorly concealed attempt to stem migratory flows to the EU. Famously, Alston and Weiler argued that “a strong commitment to human rights is one of the principal characteristics of the European Union”.⁴⁵ Regrettably, such a commitment is not reflected by current EU migration policies. The following sections examine two case-studies, selected in view of their crucial importance within migration patterns in the Mediterranean, to identify their detrimental consequences on migrants’ lives, and suggest some inspiring principles for an alternative approach to migration diplomacy.

Turkey has been selected in view of the centrality of the country in the Eastern Mediterranean route, while Libya represents a prominent example of a transit country within the Central Mediterranean route. The two routes are the most active migration corridors to-

⁴² Communication from the Commission *on a new partnership framework*, p.1.

⁴³ European Commission, Press Release, *A Fresh Start on Migration: Building Confidence and Striking a New Balance between Responsibility and Solidarity*, 23 September 2020.

⁴⁴ MUSUMECI Daniele, *Sul partenariato UE-Stati terzi in ambito migratorio: le proposte del nuovo patto sulla migrazione e l’asilo in tema di rafforzamento delle capacità di border management*, Freedom Security Justice: European Legal Studies (2021) n. 2.

⁴⁵ ALSTON Philipp, WEILER Joseph, *An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights*, in Alston Philipp (ed.), “The EU and Human Rights”, Oxford: Oxford University Press, pp.3-66, p. 12.

wards Europe, thus representing the most interesting ones to address for this paper's purposes. The case studies highlight different strategies employed by the EU to prevent migrants' access to its territory while discharging accountability for potential human rights violations on the migratory route. They also demonstrate how ill-conceived agreements might provide foreign countries with substantial political leverage, which could be employed against the EU to achieve policy aims unrelated with migration. Finally, the cases show that, despite individual agreements may contain clauses on the respect of international law and human rights standards, the considerable leeway left to third States in the practical implementation of such deals causes substantial violations of such standards, in the absence of adequate monitoring mechanisms.

III. The EU-Turkey Statement

In 2016, at the peak of the “refugee crisis”, the EU stipulated an agreement with Turkey, to curb migration in the Eastern Mediterranean Route.⁴⁶ The agreement envisaged the return of irregular migrants from Europe to Turkey and the resettlement of Syrian refugees to Europe as part of a “one-to-one” policy.⁴⁷ For every Syrian returned to Turkey after having irregularly crossed the border with Greece, the EU agreed to relocate a Syrian hosted in Turkey on its territory.⁴⁸ The agreement followed a series of meetings held since November 2015, dedicated to deepening Turkey-EU relations as well as to strengthening their cooperation on migration, with the EU-Turkey Joint Action Plan activated on 29 November 2015.⁴⁹ In addition, on 15 December 2015, the Commission proposed a Voluntary Humanitarian Admission Scheme for Syrian Refugees in Turkey.⁵⁰ Member States were invited to participate in the scheme on a voluntary basis, admitting persons in need of international protection who were displaced by the conflict in Syria.

The EU-Turkey agreement had disturbing repercussions on migrants' human rights. Human rights advocates pointed to the violation of international refugee law caused by the deal, arguing that European countries closed their borders to asylum-seekers.⁵¹ In fact, although the EU is not a state party to the Refugee Convention, the TFEU provides that it must abide by the Convention and its Protocol Relating to the Status of Refugees, and ensure its laws comply with the principle of *non-refoulement*.⁵² In addition, individual Member

⁴⁶ According to UNHCR data, in February 2018, almost 3.5 million Syrian refugees were registered in Turkey. See UNHCR 2018 Syria Regional Refugee Response: <http://data.unhcr.org/syrianrefugees/country.php?id=224>.

⁴⁷ European Council, Press Release 144/16, *EU-Turkey Statement*, 18 March 2016.

⁴⁸ RYGIEL Kim et al., *The Syrian refugee crisis: The EU-Turkey 'deal' and temporary protection*, Global Social Policy (2016), pp. 315-320.

⁴⁹ European Commission, *EU-Turkey joint action plan*, Brussels, 15 October 2015, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860.

⁵⁰ European Commission, Press Release, *Commission presents Recommendation for a voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria*, 15 December 2015.

⁵¹ ALPES Maybritt Jill, TUNABOYLU Sevda, VAN LIEMPT Ilse, *Human rights violations by design: EU-Turkey Statement prioritises returns from Greece over access to asylum*, EUI Migration Policy Centre Policy Briefs (2017), pp. 1-10.

⁵² Art. 63, points 1 and 2, and Art. 64(2) TEC or Art. 78 TFEU.

States are bound by international agreements which they have concluded and ratified. Accordingly, Member States parties to the Refugee Convention are bound by the treaty, including its provision of *non-refoulement*.⁵³ Regrettably, however, violations of the principle of *non-refoulement* derive from the deportation of asylum-seekers to Turkey. In fact, many scholars and human rights advocates agree on the fact that Turkey may not be considered a “safe third country” where asylum claimants are able to apply for international protection.⁵⁴ In this regard, it must be noted that Turkey adopts a peculiar territorial limitation to its ratification of the Geneva Convention. In fact, Turkey restricted the scope of the Convention to “events occurring in Europe”. Consequently, only those fleeing “events occurring in Europe” can be given refugee status. Clearly, this goes in the exact opposite direction as today’s migration flows.

Doubts on the legal viability of the deal with Turkey were also raised by the Parliamentary Assembly of the Council of Europe (PACE). PACE expressed doubts as to whether Turkey satisfies the EU’s legal tests for the return of asylum-seekers, asking the EU to halt the return of asylum seekers to Turkey until such legal requirements were clearly satisfied. Rapporteur Tineke Strik stressed that “[e]ven on paper, [the agreement] raises many serious questions of compatibility with basic norms on refugees’ and migrants’ rights. It has so far given every indication of being even more problematic in practice”.⁵⁵ For instance, it is extremely difficult for people to seek international protection after being deported to Turkey. Between April 2016 and September 2017, only 57 out of 1,144 (non-Syrian) deportees succeeded in filing an asylum application from within Turkish detention centres.⁵⁶

Besides representing a considerable threat for the human rights of the asylum-seekers present on Turkish territory and hosted in the country’s reception facilities, the EU-Turkey agreement conferred substantial bargaining power to President Erdogan.⁵⁷ In March 2020, Erdogan opened Turkish borders, pushing thousands of refugees into Greece. He justified his decision by referring to Europe’s breach of some clauses of the agreement. As a matter of fact, the agreement was connected to the prospect of visa liberalisation for Turkish citizens, and talks on the promised liberalization had stalled, due to Turkish unlawful activities against the Kurds at the border with Syria. Greece responded to the sudden migratory movements by closing the borders of Kastanies and Kipi and violently pushing back asylum

⁵³ Art. 216, para.2, TFEU.

⁵⁴ POON Jenny, *EU-Turkey deal: Violation of, or Consistency with, International Law?*, European Papers (2016), pp. 1195-1203. A list of criteria ensure that a country is designated as a “safe third country”. Among these criteria, the life and liberty of the asylum claimants must not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion; there must be no risk of serious harm as defined in Directive 2011/95/EU; the principle of non-refoulement must be respected; the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment must be respected; the possibility to request refugee status must exist.

⁵⁵ Parliamentary Assembly of the Council of Europe, *PACE raises human rights questions over EU-Turkey migrant deal*, 20 April 2016.

⁵⁶ European Commission, *Seventh Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2017) 470 final.

⁵⁷ According to data of the Asylum Information Database and ECRE, the only reception centre in Turkey is in Yozgat and has a modest capacity of 100 places, therefore applicants for international protection in Turkey have to pay for private accommodation out of their own budget. See the data at: <https://asylumineurope.org/reports/country/turkey/reception-conditions/housing/conditions-reception-facilities>.

seekers, causing bloody clashes and deaths among migrants. The European Union, then, intervened by stressing that the funds promised to Turkey had all been duly paid. Finally, the political standoff – and humanitarian crisis – was solved when the High Representative of the Union for Foreign Affairs, Josep Borrell, declared that Europe was ready to provide additional funds to Turkey.

Undisputedly, the EU-Turkey deal has shown the significant role played by Turkey in governing migration at the international and regional level.⁵⁸ In addition, it has unveiled the complex relation of interdependency existing between the EU and Turkey.⁵⁹ Regrettably, the March 2020 events demonstrated how the transactional nature of the deal with Turkey put the EU in a situation of strong dependency from a third State with a questionable human rights record. Therefore, the 2016 deal, while acknowledging and reinforcing the centrality of Turkey in migration patterns in the Eastern Mediterranean, also strengthened Erdogan's power and heightened the fragility of the EU.

The EU-Turkey deal is representative of the EU's attempt to escape accountability for the human rights violations stemming from the implementation of the agreement. As a matter of fact, a recurring feature of European externalisation practices is the Union's attempt to shield itself from questions of accountability by configuring its partners as intermediaries in the implementation of its border-control policies yet – at the same time – as the only responsible actors for such policies. This is particularly alarming when EU policies enacted by European partner countries produce considerable legal effects on refugees' rights, as it is the case with the EU-Turkey Statement. Notably, the European Court of Justice, stating on the legal nature of the pact in April 2016, reached an interesting conclusion by declaring that the deal is not an act of EU institutions.⁶⁰ Pursuant to the decision of the Court, the agreement is not attributable to the European Council, but rather to the heads of state or government of the EU Member States and their Turkish counterparts. Consequently, the Court declared that it did not have jurisdiction on the deal. Clearly, this decision rendered inapplicable the Lisbon Treaty, with its set of democratic checks and balances, otherwise applicable to EU international treaty-making.⁶¹ In particular, the lack of jurisdiction means that migrants and asylum-seekers experiencing the deal's detrimental consequences cannot have recourse to the set of legal guarantees contained in the EU legal *acquis*.⁶² In fact, by attributing the deal to the heads of state or government of EU Member States, rather than

⁵⁸ HECK Gerda, HESS Sabine, *Tracing the effects of the EU-Turkey deal: the momentum of the multi-layered Turkish border regime*, Movements (2017), pp. 35-57, p. 38.

⁵⁹ As a matter of fact, Turkey is dependent on the EU as far as the promised visa liberalisation for its citizens is concerned. However, in the meanwhile, the EU is dependent on Turkey, for the joint control of its eastern borders, and the correct implementation of the 2016 deal.

⁶⁰ ECJ, Cases T-192/16, T-193/16, T-257/16, NF, NG and NM v European Council, ECLI:EU:T:2017:128, ECLI:EU:T:2017:129, ECLI:EU:T:2017:130.

⁶¹ CARRERA Sergio, DEN HERTOOG Leonhard, STEFAN Marco, *It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal*, CEPS Policy Insights (2017), pp. 1-15.

⁶² MERLINO Massimo, PARKIN Joanna, *Fundamental and human rights framework: protecting irregular migrants in the EU*, CEPS Report, pp. 1-16, p. 2.

the European Council, the EU effectively avoided triggering the application of the EU Charter of Fundamental Rights and the principles and values on which the Union is based.

IV. The EU in Libya

Libya has traditionally been a crucial transit point for migration from Africa and the Middle East to Europe, via the Mediterranean Sea.⁶³ As a consequence, it represents one of the most important partner countries for the EU. It should be noted at the outset that Libya does not have an asylum system and it did not sign the 1951 Geneva Convention on Refugees. In addition, Libyan law criminalizes irregular entry, stay and exit - punishable by a prison sentence, a fine, and deportation - without distinguishing between asylum-seekers, refugees, migrants, or victims of trafficking.⁶⁴

European migration policies in Libya are intertwined with the Italian role in the North African country, in a cycle of mutually reinforcing strategies. The agreements between Italy and Libya, in fact, paved the way for a more active involvement of the European Union in the cooperation with third countries in the field of migration.⁶⁵ The first discussions on migration between Italy and Libya date back to the late 1990s,⁶⁶ with the cooperation between the two countries officially starting in the early 2000s.⁶⁷ A first agreement between Italy and Libya was signed on 13 December 2000, establishing cooperation in the fight against terrorism, organized crime, illicit traffic of narcotics and illegal immigration.⁶⁸ Pursuant to the deal, the two countries agreed to exchange information on illegal immigration and ensured reciprocal assistance to combat the phenomenon.⁶⁹ Italy and Libya further extended their cooperation in 2003 and 2004 to include a readmission agreement,⁷⁰ border-guard training programmes, the construction of detention centres in Libya and the funding of deportation schemes.⁷¹ Then, a new agreement, the Treaty of Friendship, Partnership and Cooperation, was signed in 2008.⁷²

⁶³ PAOLETTI Emanuela, PASTORE Ferruccio, *Sharing the Dirty Job on the Southern Front? Italian – Libyan Relations on Migration and Their Impact on the European Union*, International Migration Institute Working Paper (2010), pp. 1-42.

⁶⁴ TUCCI Stephanie, *Libya and International Refugee and Asylum Law: Addressing the Protection of Refugees and Migrants Displaced by the 2012 Conflict*, Oxford Monitor of Forced Migration (2012).

⁶⁵ KLEPP Silja, *A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea*, European Journal of Migration and Law (2019), pp. 1-21.

⁶⁶ On July 4, 1998, a “Joint Communiqué” was signed. The agreement contained Italy’s formal acknowledgement of the suffering caused to Libyans during the colonial period. Then, in the period following the signing of the agreement, various meetings between Italian and Libyan authorities on migration-related issues took place.

⁶⁷ PAOLETTI Emanuela, *Power Relations and International Migration: The case of Italy and Libya*, Political Studies (2011), pp. 269-289.

⁶⁸ The Memorandum of Intent addressed drug-trafficking, terrorism, organized crime, and illegal migration, and became effective after its ratification by the Italian Parliament on December 22, 2002.

⁶⁹ GIUFFRÈ Mariagiulia, *State Responsibility Beyond Borders: What legal Basis for Italy’s Push-Backs to Libya?*, International Journal of Refugee Law (2012), pp. 692-734.

⁷⁰ PAOLETTI Emanuela, *Migration Agreements between Italy and North Africa: Domestic Imperatives versus International Norms*, 2012. Available at: <https://www.mci.edu/publications/migration-agreements-between-italy-and-north-africa-domestic-imperatives-versus>.

⁷¹ Parlamento Italiano, Seduta n. 329 del 25 giugno 2003, Informativa urgente del Governo sulla politica in materia di immigrazione, 2003.

⁷² Senato della Repubblica, Disegno di legge n.1333, Ratifica ed esecuzione del trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiriya araba, libica, popolare socialista, signed in Bengasi on 30 August 2008. Available at: https://www.senato.it/documenti/repository/dossier/studi/2008/Dossier_092.pdf.

Italian cooperation with Libya has been strongly encouraged by the EU. In 2006, the European Parliament concluded that “EU-Libya cooperation on the issue of migration is imperative”.⁷³ Similarly, in June 2009, the Presidency of the Council of the European Union made it clear that “concluding the negotiations of the EC readmission agreements with key countries of origin and transit, such as Libya and Turkey, is a priority”.⁷⁴ In addition, the 2016 Commission’s communication on a new partnership framework with third countries contains a section on Libya, whereby the Commission grants substantial funds to the North African country, with a view to supporting security sector reform, with a specific focus on border management.⁷⁵

Notoriously, in February 2017 Italy signed a Memorandum of Understanding⁷⁶ with Libya on “illegal migration, human trafficking, and reinforcement of border security”. The MoU is based on the Treaty of Friendship, Partnership and Cooperation signed in 2008 and suspended in 2012, after the landmark *Hirsi Jamaa* decision, delivered by the Strasbourg Court. In the preamble of the agreement, the two countries underline the importance of improving the control and security of Libyan borders, both land and maritime ones, and of reducing the arrival of migrants to the Libyan territory. The preamble also reaffirms the “resolute determination of cooperating to identify urgent solutions to the matter of the irregular migrants who cross Libya to go to Europe by sea, through the provision of temporary hosting camps in Libya”. Articles 1 and 2 outline the cooperation between the two countries on security and irregular migration, and Italy’s commitment to finance development programs in Libya, aimed at “fighting irregular migration”. Since the signing of the document, Italy has provided the Libyan Coastguard with patrol boats, equipment, and training to patrol Libya’s territorial waters. As a result, in 2017 about 20,000 people were reported to have been intercepted by the Libyan coastguard and taken back to detention centres in Libya.⁷⁷

Interestingly, the preamble of the MoU stresses the “obligations deriving from international customary law and agreements to which the Parties are bound, including Italy’s membership to the European Union”. Despite the reference to the international obligations binding the two States, the repatriation of migrants based on the agreement violates Article 3 of the ECHR, prohibiting inhuman and degrading treatment, as already determined by the Strasbourg Court in the *Hirsi* case.⁷⁸ The repatriation of migrants could also breach Article 3 of the UN Convention Against Torture. Further, the repatriation of migrants intercepted in the high seas or in the territorial waters of European countries places Italy in breach of

⁷³ European Parliament, Directorate General External Policies, Human Rights Unit, *Report of the visit of an ad hoc delegation to Tripoli, Libya*, on 4 o 6 December 2005, Brussels 2006.

⁷⁴ Brussels European Council, *Presidency Conclusions*, 18-19 June 2009.

⁷⁵ Communication on a new partnership framework with third countries, p. 15.

⁷⁶ The three-page-long document is structured in a preamble and an operative section, composed of eight articles. Articles 1 and 2 outline the obligations of the parties; Article 3 mentions the establishment of a mixed committee to implement the MoU, Article 4 concerns the financing, Article 5 the applicable legal framework and Articles 6 to 8 deal with technical aspects.

⁷⁷ Amnesty International, *A year after Italy-Libya Migration Deal, Time to Release Thousands Trapped in Misery*, 2018.

⁷⁸ ECHR, Application no. 27765/09, *Hirsi Jamaa and Others v. Italy*, 23 February 2012.

Article 33 of the 1951 Refugee Convention, enshrining the principle of *non-refoulement*. Finally, particularly worrying is the financing of the local reception centres in Libya. The appalling conditions of these centres have been widely reported by UN experts and NGOs. Nonetheless, the human rights record of these sites is not mentioned in the MoU neither is there any reference to measures capable of mitigating the risk of human rights violations.⁷⁹

As for the cooperation between the EU and the Libyan Coastguard, in the 2017 Joint Communication “Migration on the Central Mediterranean route: managing flows, saving lives”, the European Commission stressed that “to effectively cope with the current situation, part of the answer must lie in the Libyan authorities preventing smugglers from operating, and for the *Libyan coastguard to have the capacity to better manage maritime border* and ensure safe disembarkation on the Libyan coast”.⁸⁰ The Commission also recommended that “Libyan authorities’ effort must be supported by the EU and its Member States notably through *training, providing advice, capacity building and other means of support*”.⁸¹ In this framework, the signing of the Memorandum of Understanding (MoU) between Libya and Italy in February 2017 matches the recommendations and objectives of the Commission, for it purports to enhance the cooperation between the two countries with a view to provide Libyan authorities with the necessary competences and assets to effectively manage their borders.

The Joint Communication was followed, in February 2017, by the Malta Declaration on the external aspects of migration, adopted just a few days after the signing of the MoU between Italy and Libya. The declaration reiterated that “efforts to stabilize Libya are now more important than ever” and that “in Libya, *capacity building is key for the authorities to acquire control over the land and sea borders* and to combat transit and smuggling activities”.⁸² Further, the declaration specified that “priority will be given to the training, equipment and support to the Libyan national coastguard and other relevant agencies”.⁸³ The analysed documents point to a deep connection between European and Italian migration policies. European statements appear to support the bilateral cooperation between Italy and Libya, and Italian policies seem to influence EU migration strategies, paving the way for a closer cooperation between the EU and its Southern Mediterranean partners. Another concrete example of the connection between European and Italian migration policies is traceable in the Malta Declaration, where the European Council called for the “continuing support to efforts and initiatives from individual Member States directly engaged with Libya”, welcoming the

⁷⁹ PALM Anja, *The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?*, EU Immigration and Asylum Law and Policy (2017). Available at: <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>.

⁸⁰ European Commission, Joint Communication to the European Parliament, the European Council and the Council, *Migration in the Central Mediterranean route: Managing flows, saving lives*, JOIN (2017)4 final, emphasis added.

⁸¹ Ibidem (emphasis added).

⁸² European Council, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 3 February 2017. Emphasis added.

⁸³ European Council, *Malta Declaration*.

Italy-Libya MoU and declaring that the EU was “ready to support Italy in its implementation of the Memorandum of Understanding”.

The cooperation with Libya reveals another interesting feature of EU migration diplomacy: its liquid and malleable nature, exploited to circumvent legal constraints deriving from international human rights law and decisions of international courts. In fact, EU migration policies are shaped by different potential constellations of the interdependency between law and diplomacy, and the EU action in Libya demonstrates how the equilibrium between the two may vary over time. In particular, the EU action in Libya shows a shift from cooperative to delegated non-arrival policies. Before the decision of the Strasbourg Court in *Hirsi Jamaa* – the first judgment on the interception of migrants at sea – the EU employed cooperative non-arrival policies to pre-empt migrants’ access to its territories. Interdictions at sea were conducted in agreement with Libya under bilateral treaties (as the ones between Libya and Italy).⁸⁴ Pursuant to such a strategy, EU Member States’ authorities and Libyan ones cooperated to keep migrants out of EU external borders. However, in *Hirsi Jamaa*, the Court stated that Article 4 of Protocol 4 to the ECHR, prohibiting mass expulsion, applied extraterritorially, constituting a “significant check on States’ efforts to delocalize migration control and asylum processing”.⁸⁵ In other words, the Court noted that the obligations of States arising out of international refugee law represented an effective impediment for cooperative non-arrival policies impinging on migrants’ human rights, as they applied extraterritorially, notwithstanding the agreements with third countries.

After the *Hirsi Jamaa* decision, the EU and its Member States shifted to more nuanced strategies, based on the use of third countries’ authorities as proxies, in the attempt to completely discharge legal accountability for the potential violations ensuing from such strategies. These new, delegated non-arrival policies are, for instance, achieved through the “capacity-building of Libyan authorities”, or the “provision of training, advice and other means of support” to such authorities, as recommended by the Joint Communication and the Malta Declaration. As recognised by the European Council itself, thanks to the training, equipment and funding provided to Libya, migrants arrivals on the Central Mediterranean route have fallen by almost 70% in the third quarter of 2017 compared to the same period in 2016.⁸⁶ In the meanwhile, regrettably yet foreseeably, human rights violation have not ceased, demonstrating that the EU’s cooperation with Libya remains inconsistent with international human rights law, as well as with EU’s founding principles.

Human Rights Watch argued that “senior EU officials are aware of the plight facing migrants detained in Libya”, reporting that in November 2017, EU migration commissioner,

⁸⁴ PAPANICOLOPULU Irini, *Hirsi Jamaa v. Italy*. Application No.27765/09, The American Journal of International Law (2013), pp. 417-423, p. 417.

⁸⁵ *Ibidem*, p. 421.

⁸⁶ Brussels European Council, *European Council Meeting Conclusions*, 14 December 2017.

Dimitri Avramopoulos, acknowledged that “we are all conscious of the appalling and degrading conditions in which migrants are held in Libya”.⁸⁷ Further, a report prepared jointly by the Human Rights, Transitional Justice and Rule of Law Service of the United Nations Support Mission in Libya (UNSMIL) and the Office of the High Commissioner for Human Rights (OHCHR), described the serious abuses suffered by migrants in Libya.⁸⁸ In October 2018, UNHCR estimated that over 8,000 persons were held in detention centres run by the Directorate to combat illegal migration (DCIM) and that in “all facilities, detention conditions fail to meet international standards and have been described as “appalling”, “nightmarish”, “cruel, inhuman and degrading”.⁸⁹ While single European Member States – e.g. Italy – may be considered responsible for human rights violations due to their financial and technical support to Libyan authorities, the EU is certainly not blameless. Arguably, a renewed approach to the cooperation with third countries is required.

V. A renewed approach to migration

Acknowledging the undeniable flaws in current partnership agreements with third countries, this contribution purports to suggest some inspiring principles to guide EU diplomatic efforts in the migration realm. In particular, the present contribution argues that enhanced cooperation between the EU, its Member States, and other partners, including international organizations (IOs), non-governmental organizations (NGOs), civil society organizations (CSOs), and academia, is key to strengthening migrants’ rights and promoting better designed policies. Such a cooperation would certainly avoid univocal, Euro-centric approaches in the drafting and implementation of said policies. As we will see, IOs and NGOs are often involved in the *implementation* of EU migration policies, in a variety of different roles and positions. Nonetheless, what this paper suggests, with a view to promoting better-drafted cooperation agreements, is to include IOs, NGOs/CSOs and academia in the *conception* and *drafting* of the policies itself. Such a procedural shift would ensure that EU migration policies include a human rights perspective, rather than being exclusively hinged on the necessity to curb irregular migration at all costs. Further, the EU decision-making process would considerably benefit from the knowledge, expertise, and fresh perspective brought by IOs/NGOs/CSOs and the academia.

In addition, the paper suggests the EU should radically enhance the *monitoring* of the implementation of the deals, so to ensure that agreements’ clauses on the respect of human rights are not misinterpreted, causing dangerous violations of migrants’ rights. In a logic of streng-

⁸⁷ HRW, *No Escape from Hell. EU Policies contribute to abuse of migrants in Libya*, HRW Report (2019).

⁸⁸ United Nations Support Mission in Libya (UNSMIL), and Office of the High Commissioner for Human Rights (OHCHR), *Report on the human rights situation of migrants and refugees in Libya*, December 2018.

⁸⁹ HRW, *No Escape from Hell* (2019).

thened cooperation with IOs, NGOs, and CSOs, it is also proposed that, rather than employing third countries' authorities as proxies in non-arrival policies, the EU could delegate migration-related activities in third countries to IOs and NGOs/CSOs, obviously given the third countries' consent.⁹⁰ This might contribute to avoiding human rights violations at the hands of third States' authorities. As way of example, during 2018, taking advantage of the gap left by the NGOs rescuing lives in the Mediterranean, Libyan coast guard vessels have been recovering migrants in their SAR area and disembarking them in Libya.⁹¹ The ensuing human rights violations, within Libyan detention centres, are well-known. Clearly, such violations could have been avoided had the EU envisaged a different pattern of cooperation with NGOs operating SAR in the Mediterranean.

Despite the complexity of the issue, managing migration and the cooperation with third countries through more efficient and principled policies is both necessary and possible.⁹² It is *necessary* as the EU will never cope with its internal challenges unless it demonstrates to be able to cope *externally* with migration. There exists a widespread agreement on the fact that the so-called "refugee crisis" has unveiled the structural deficiencies of the CEAS and created considerable frictions amongst its Member States.⁹³ It not only put pressure on the CEAS, but also affected the functioning of the Schengen rules, leading to a temporary suspension of the Dublin system and the introduction of border checks by several Member States.⁹⁴ By doing so, it "shook ... [the] very foundation" of the European integration project,⁹⁵ revolving around the free movement of European citizens.

In addition to consolidating the Union *internally*, a renewed approach to migration would also restore EU's international reputation as a human rights defender, thus addressing more intangible, ethical aspects of the EU external action. The deaths of thousands of asylum-seekers, in fact, have gradually eroded the position of the EU as a promoter of human rights in the world. NGOs and human rights defenders have blamed the Union for the recurring tragedies at sea. When commenting on a recent decision of the Human Rights Committee, ascertaining Italy's responsibility for a 2013 shipwreck in which two hundred lives were lost, Human Rights Watch maintained that "while Italy had direct primary responsibility, [...] the EU bears responsibility for the tremendous death toll at sea".⁹⁶ Undisputedly,

⁹⁰ CUTTITA Paolo, *Non-governmental/civil society organisations and the European Union-externalisation of migration management in Tunisia and Egypt*, Population, Space and Place (2020), pp. 1-13, p. 2.

⁹¹ FANTINATO Marco, *EU regional disembarkation arrangements in the Mediterranean: between the outsourcing of search and rescue services and the externalisation of sea border management*, Italian Yearbook of International Law (2019), pp. 63-76, p. 70.

⁹² Notably, Article 67 TFEU (ex Article 61 TEC and ex Article 29 TEU) requires that "[the EU] 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 [...]".

⁹³ THYM Daniel, *The "refugee crisis" as a challenge of legal design and institutional legitimacy*, Common Market Law Review (2016), pp. 1545-1573. In this regard, see ATANASSOV Nikolai, RADJENOVIC Anja, *EU Asylum, Borders and External Cooperation on Migration: recent developments*, European Parliamentary Research Service (2018), pp. 1-31. Also see LAVENEX Sandra, *Failing Forward? Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, Journal of Common Market Studies (2018), pp. 1195-1212.

⁹⁴ ATANASSOV, RADJENOVIC, *ibidem*.

⁹⁵ JUNCKER, Jean-Claude, *State of the Union Address*, 13 September 2017.

⁹⁶ SUNDERLAND Judith, *How Europe can help end death and despair in the Mediterranean Sea*, HRW (2021). Available at: <https://reliefweb.int/report/world/how-europe-can-help-end-death-and-despair-mediterranean-sea>.

therefore, the negative human rights implications of EU's external action in the field of migration should be addressed. As required by the Treaty of Lisbon, "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".⁹⁷ Article 21 TEU thus enshrines the "desire to construe an ethical framework able to give guidance to the exercise of EU's foreign power".⁹⁸ In addition, Article 18 of the European Union's Charter of Fundamental Rights prescribes that the Union fully honours its solemn commitment to the "absolute respect for the right to seek asylum". Arguably, the deaths of migrants at the borders of Europe, caused by EU non-arrival policies, do not represent a bright example of respect for such principles and commitments.

As anticipated at the beginning of this section, cooperation between the EU and other IOs and/or non-State actors, in the migration realm, would not represent a *complete* novelty. Notably, the legal basis for the cooperation between the EU and other IOs is included in the founding treaties. Article 209 TFEU, in fact, referring to Article 21 TEU cited above, prescribes that the "Union may conclude with [...] competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union [...]". Further, Article 212 TFEU establishes that "[w]ithin their respective spheres of competence, the Union and the Member States shall cooperate with [...] the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned". In addition, and more specifically, Declaration No. 17 of the Amsterdam Treaty stipulates that UNHCR, and other concerned IOs, must be consulted by EU institutions in matters pertaining to asylum.⁹⁹

By way of example, ever since the Commission and the Council started to develop the external dimension of EU asylum and migration policy, aimed at improved cooperation in the joint management of migratory flows, UNHCR has monitored the process and provided expertise and policy inputs as regards EU cooperation with third countries (Eastern Europe, Western Balkans, Mediterranean basin) in asylum and migration matters. Moreover, in 2013 an agreement was signed between EASO, the European Asylum Support Office, and UNHCR, aimed at "establishing a more structured cooperation framework on the

⁹⁷ Art. 21 TEU.

⁹⁸ CANNIZZARO Enzo, *The value of the EU international values*, in Douma et al. (eds.), "The Evolving Nature of EU External Relations Law", Springer (2021), pp. 1-377, p. 4. See also DE WITTE Bruno, *Too Much Constitutional Law in the European Union's Foreign Relations?*, in Cremona, de Witte (eds.), "EU Foreign Relations Law – Constitutional Fundamentals", Hart Publishing: Oxford (2008), pp. 3-15.

⁹⁹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Declaration no. 17 on Art. 73k of the Treaty establishing the European Community.

relevant areas of common work”.¹⁰⁰ The agreement was then renewed in 2021, outlining the areas of cooperation between EASO and UNHCR. In particular, the agreement envisages that the parties cooperate in matters pertaining to training (Article 3), protection-related tools (Article 5), Country of Origin information (Article 6), vulnerable and stateless persons (Article 9), data and information gathering and analysis (Article 14), and so on. The agreement also includes a chapter on the external dimension of the parties’ activities, which foresees that “the Parties will exchange relevant information and best practices on their engagement in associate countries [...] other third countries where both Parties are or may become active, and their related cooperation with international organisations.”¹⁰¹ Agreements on the practical implementation of EU programmes in third countries, such as this one, are common. A similar working arrangement, for instance, exists between EASO and IOM, detailing the cooperation of the two.¹⁰² The agreement envisages the exchange of data, information, and documentation between EASO and IOM, the joint implementation of projects and activities of common interest, the cooperation in the reception of applicants for international protection, and so on. Crucially, however, such agreements do not replace the necessity, pinpointed in this contribution, to seek the consultation of IOs and NGOs *prior* to the drafting and negotiation of border-control and technical agreements between the EU and third countries. Therefore, while the working arrangements between the EU, its agencies, and other IOs (or NGOs) might represent a crucial tool to enhance international cooperation in the implementation of EU migration policies, the prior consultation of relevant IOs/NGOs/CSOs might avoid that the EU migration diplomacy gives absolute priority to the objective of curbing migration, over the protection of human rights.¹⁰³

The multiple advantages deriving from international cooperation in the field of migration are recognised by international instruments. Notably, the Global Compact for Refugees (GCR) acknowledges the need to pursue a multi-stakeholder and partnership approach, in line with relevant legal frameworks, in dealing with forced displacement.¹⁰⁴ The GCR, indeed, states that “civil society organizations, including those that are led by refugees, [...], will contribute to assessing community strengths and needs, inclusive and accessible planning and programme implementation, and capacity development, as applicable”.¹⁰⁵ The reference to CSOs led by refugees is remarkable, as it acknowledges the necessity to enhance refugees’ agency in the management of issues directly impinging on their lives. Moreover, by including refugees in discourses on migration, the EU and its Member States would send

¹⁰⁰ Working Arrangement between the European Asylum Support Office (EASO) and the Office of the United Nations High Commissioner for Refugees (UNHCR), Geneva, 13 December 2013, Art. 1, available at: https://easo.europa.eu/sites/default/files/public/EASO-UNHCR-Working-Arrangement_0.pdf.

¹⁰¹ Art. 15 of the Working Arrangement between EASO and UNHCR.

¹⁰² Working Arrangement between the European Asylum Support Office (EASO) and the International Organization for Migration (IOM), Paris, 22 July 2019, available at: <https://euaa.europa.eu/sites/default/files/easo-iom-working-arrangement.pdf>.

¹⁰³ DOS SANTOS SOARES A., BECK-MANNAGETTA S., *EU Cooperation with Third Countries on Asylum: The Case of Libya Revisited*, in Douma et al. (eds.), “The Evolving Nature of EU External Relations Law”, Springer (2021), pp. 1-377, p. 317.

¹⁰⁴ United Nations General Assembly, *Global Compact for Refugees*, 17 December 2018, A/RES/73/151, p. 13.

¹⁰⁵ *Ibidem*, para. 40.

a strong signal on the importance attributed to individuals, and not just governmental agencies, within EU policies on migration and asylum.

From the perspective of a supranational organization such as the EU, several advantages derive from the cooperation with non-State actors. Organizations working on the field are better placed to identify migrants' needs and vulnerabilities, implementation-related challenges, and the consequences that EU policies might exercise on migrants' rights. Accordingly, their involvement in the drafting of EU migration policies and agreements with third countries would substantially improve such deals. In fact, grassroot organizations enjoy a comparative information advantage, thanks to their proximity to migrants and other stakeholders, and to their knowledge and expertise, acquired during years of work on the field.¹⁰⁶ In addition, it has been explained that "linkages with international organizations present the following advantages [for the EU]: international norms could be invoked when the EU lacks an own proper *acquis* in a field where it wants to promote policy approximation; international organisations may have specific resources which the EU is lacking: personnel capable of implementing EU measures in the third country, expertise in a given area of international politics, contacts or physical facilities and money".¹⁰⁷ Further, "framing EU requirements in terms of overarching endeavours of international organizations also generates legitimacy, as the latter have the advantage of being regarded as impersonal, value-neutral, not self-interested and hence technocratic actors whose purpose is not the exercise of power but equitable problem-solving".¹⁰⁸ In other words, IOs and NGOs' physical proximity to the field might also increase third States officials' trust in EU institutions and policies, and their willingness to cooperate with them.

Cooperation with the EU might also lead to substantial advantages for the involved non-State actors. First, and quite intuitively, they could exploit the chance to broaden their impact on EU migration policies, lobbying for migrants' rights and promoting a virtuous cycle of cooperation amongst EU institutions, Member States, and non-State actors. They could also enhance their position and visibility at the EU level, presenting themselves as respectable and knowledgeable actors within the asylum realm. Further, their activities in third countries might go beyond the mere implementation of EU externalisation policies, including practices not related to asylum such as helping people out of detention, preventing or delaying deportations, assisting in criminal proceedings in origin or transit States and so on. As a matter of fact, this process has been observed in Egypt and Tunisia, where the provision of legal aid through activities funded by the EU (a project managed by *Terre d'asile* in Tunisia and another one managed by an Egyptian NGO from 2013 to 2016) was seen as

¹⁰⁶ Other authors have pinpointed that "migration policy requires the necessity of embracing proximity, local expertise and legitimacy and to tailor interventions to local contexts". See GEDDES Andrew, and MARU Mehari, *African and EU Migration Diplomacy: A Suggested Future Direction*, ISPI Commentary, 21 December 2020, available at: <https://www.ispionline.it/en/publicazione/african-and-eu-migration-diplomacy-suggested-future-direction-28734>.

¹⁰⁷ LAVENEX, cit. *supra* at 9, p. 4.

¹⁰⁸ LAVENEX, cit. *supra* at 9, p. 7.

part of the externalisation process yet went beyond the process itself, to include activities aimed at protecting migrants' rights.¹⁰⁹

It should be noted that the substantial advantages that non-State actors such as IOs, NGOs, and CSOs could obtain from a cooperation with the EU in the asylum domain may be outweighed by other considerations, linked to the autonomy of such actors and their principles. For instance, some NGOs might be less inclined toward the cooperation with big, powerful IOs and with the EU. In fact, NGOs are often critical towards the EU border regime and could oppose a dialogue with the Union, in order not to be perceived as 'accomplices' of the EU in its restrictive migration practices. The Tunisian association *La terre pour tous*, for example, in an interview with the Italian researcher Paolo Cuttita, declared that "the responsibility for migrant deaths lies on the policies of the EU and its Member States in the first place". In addition, the president of the association told the researcher that his association would not "talk with those who only take money from the States", referring to a large, government-friendly organization and to the fact that external funding may impinge on NGOs' principles and autonomy.¹¹⁰ Notably, autonomy refers to the degree to which international organizations exercise independent power.¹¹¹ In this regard, Lavenex explained that "the more an IO [but the same holds true for NGOs, for this paper purposes] is dependent on external funding [...] for its survival, the more likely it is to be instrumentalised for external governance purposes".¹¹² Evidently, such a drawback should be carefully avoided, if the relevant IOs and NGOs' autonomy is to be preserved in order for them to effectively "lobby" for the enhancement of migrants' rights within EU migration policies.

A renewed approach to EU migration diplomacy would also need to place enhanced attention on the human rights record of EU's partner countries, to avoid the funding of authoritarian regimes responsible for serious violations of migrants' rights. A possible solution would be to send "fact-finding missions" to third countries with a view to evaluating the situation on the ground, before the stipulation of agreements for the joint management of migration. In the current state of things, instead, third countries elected as partners by the EU may be described as a sort of "black holes": "information" goes in, in the form of financial and/or logistical support to migration management on their territories, and it is not returned to the EU.¹¹³ As a matter of fact, just as information caught by black holes, information on the treatment of refugees and asylum-seekers on the territory of partner third countries is scarce, difficult to collect, and often unreliable. In addition, the living conditions of asylum-seekers on the territory of third countries does not seem to improve,

¹⁰⁹ CUTTITA, cit. *supra* at 99, p. 8.

¹¹⁰ *Ibidem*, p. 7.

¹¹¹ ODERMATT Jed, *When a Fence Becomes a Cage*, EUI Working Papers, MWP 2016/07, pp. 1-19, p. 3.

¹¹² LAVENEX, cit. *supra* at 9, p. 4.

¹¹³ However, it should be noted that four scientists have recently succeeded in demonstrating that the event horizon of a black hole might account for all the information contained in the black hole, despite their theory being quite new and not universally shared. If interested, see HACO Sasha, HAWKING Stephen, PERRY Malcolm, and STROMINGER Andrew, *Black Hole Entropy and Soft Hair*, Journal of High Energy Physics (2018), pp. 1-19.

as a consequence of EU funding. This is particularly true for Libya. The division of the country amongst rival administrations and warring parties renders the data collected on the treatment of migrants somehow uncertain. Fact-finding missions could contribute to avoid the lack of reliable information, providing a first-hand description of the human rights situation on the ground. Academics and legal experts, EU Commission's representatives, NGOs and civil society organizations could all contribute to such missions, so to truly assess third countries' compliance with human rights before the stipulation of the agreements. In such a way, these fact-finding missions may function as telescopes pointed at third countries to collect information and send it back to the EU.

Finally, given that the implementation of the deals with third countries is as crucial as the substantial content of the agreements themselves, adequate monitoring mechanisms should be put in place, to supervise the implementation of partnership agreements and avoid the misinterpretation of their clauses. This paper's argument is that such a monitoring process could be "outsourced" to IOs and NGOs. For instance, IOs and NGOs such as UNHCR, IOM, Save the Children, UNICEF, St. Andrews Refugee Services, and so on would be precious partners in such a monitoring exercise. By way of example, one could think of the E-notes project (European NGOs Observatory on Trafficking, Exploitation and Slavery), established to set up a Europe-wide permanent monitoring mechanism on measures against trafficking, exploitation, and slavery in Europe. The objective of the observatory is to give NGOs a greater role in fighting human trafficking, helping victims and so on. The project, acknowledging the crucial role played by monitoring and evaluation of the anti-trafficking legislation of EU Member States, places an important responsibility on NGOs with long-standing experience in the anti-trafficking field, to lay the foundation stones to define a comparable methodology for NGOs to monitor and report on progress.¹¹⁴ Such an approach might be "copied and pasted", with the necessary adjustments, in the field of the implementation of EU deals with third countries.

Therefore, this paper argues that the outsourcing of migration management to third countries does not absolve the EU from the responsibility arising out of the human rights violations occurring on the migratory route, at the hands of third countries' authorities. Accordingly, new guiding principles for EU diplomatic activities in the migration realm should be adopted, to preserve EU's international reputation as a promoter of human rights. What this paper suggests is to include all the relevant actors and stakeholders in the drafting of agreements with third countries, and in the monitoring of such agreements' implementation, to prioritize a human rights perspective over the curbing of migration at any cost, in a spirit of shared responsibility (between the EU, other IOs, NGOs and CSOs) for the issue of migration.

¹¹⁴ More information on the E-notes project may be found at: https://ec.europa.eu/anti-trafficking/e-notes-european-ngos-observatory-trafficking-exploitation-and-slavery_en.

VI. Conclusion

This paper built on the crucial observation that the EU's response to the so-called "refugee crisis" has led to questionable practices of securitization and externalization of border-control, with dramatic consequences on the lives and rights of people crossing the Mediterranean. Acknowledging that the negative human rights implications of EU migration policies are detrimental to the reputation of the Union as a human rights defender, and should as such be addressed, the paper aimed at providing new inspiring principles for a human rights-oriented cooperation with third countries. The paper did not challenge the importance of migration diplomacy. On the contrary, it maintained that cross-border movements of people should be tackled through international cooperation. *De facto*, the intrinsically transnational nature of migration warrants such cooperation. As acknowledged in the New York Declaration, indeed, "[l]arge movements of refugees and migrants [...] are global phenomena that call for global approaches and global solutions".¹¹⁵ Accordingly, this contribution held that cooperation with other IOs, NGOs and CSOs, alongside the academia, would provide the EU with a deeper understanding of the dynamics linked with migration, possibly allowing it to design better policies, focused on a human rights perspective and on the need to achieve a safe and orderly migration, rather than curbing it by any means. In particular, the paper stressed that international cooperative efforts should have the primary interests of migrants at their heart, so to avert the kind of human rights violations produced by EU externalisation strategies as described in this contribution. Ideally, a renewed EU migration policy should be based on the acknowledgment that, while the protection of European external borders is of paramount importance and represents a legitimate policy aim for the EU external action, the European Union should strengthen its commitment to the protection of human rights and make sure that its migration policy reflects such a commitment and remains loyal to EU values.

* * *

¹¹⁵ United Nations General Assembly, *New York Declaration for Refugees and Migrants*, 3 October 2016, A/RES/71/1.

List of abbreviations

AU	African Union
CEAS	Common European Asylum System
CSO	Civil Society Organization
DCIM	Directorate to Combat Illegal Migration
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
EU	European Union
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
GCR	Global Compact on Refugees
HRW	Human Rights Watch
IO	International Organization
IOM	International Organization for Migration
MENA	Middle East and North Africa
MOU	Memorandum of Understanding
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
SAR	Search and Rescue
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees
UNSMIL	United Nations Support Mission in Libya
US	United States

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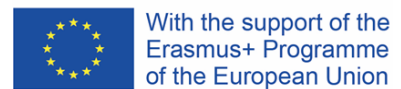
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Table of content

I. Introduction.....	1
II. EU migration diplomacy: the two sides of the (Mediterranean) coin.....	3
III. The EU-Turkey Statement	9
IV. The EU in Libya.....	12
V. A renewed approach to migration	16
VI. Conclusion	23
List of abbreviations	24
Bibliography.....	25



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