

ZOOM IN

The Question:

Externalizing EU Migration Control while Ignoring the Human Rights of Migrants: Is There Any Room for the International Responsibility of European States?

Introduced by Maria Irene Papa

In recent years the EU and its Member States have increasingly pursued migration externalization policies through strengthened cooperation with key countries of origin and transit, under which the latter agree to implement more effective exit controls in exchange for economic and technical assistance (in terms of *inter alia* training, equipment, financing of reception or detention centres, development aid and other forms of support).

Although those policies are not new, they have been expanded and reinforced following the dramatic intensification of the waves of migration towards Europe during the 2015 refugee crisis. Albeit publicly presented as instrumental in avoiding dangerous journeys and saving the lives of migrants (as is clearly illustrated by the controversial slogan ‘help them at home’), these strategies are actually designed to prevent further arrivals on EU soil and to shift responsibility for the management of migration flows from EU Member States towards non-EU countries of origin and transit. The problem is that, in pursuing these objectives, European States generally neglect the questionable human rights records and the precarious political situation of their counterparts.

The EU-Turkey deal concluded on 18 March 2016 and the Italy-Libya Memorandum of Understanding of 2 February 2017 are emblematic examples of such an approach. Indeed, these arrangements aim at outsourcing migration control to countries representing the main gateways to Europe for migrants.

These forms of cooperation have sparked widespread criticism from both civil society and international scholars, since they pose

thorny questions of compatibility with international rules in the fields of refugee law, human rights law and the law of the sea. What is more, while the externalization strategy in question is designed to ensure that the EU and its Member States avoid international responsibility, whether this aim has been or could be achieved remains controversial. The intricacy of these legal problems is further exacerbated by the difficulty of ascertaining the content of the relevant agreements on extraterritorial migration controls, given the lack of transparency and the high level of informality that characterize their negotiation, conclusion and implementation.

QIL invited three scholars, who have deep knowledge and have done extensive research on externalization of migration control, to sum up the debate on these matters and discuss possible legal grounds for establishing the responsibility – whether direct, derivative or shared – of EU Member States for the internationally wrongful acts committed following the implementation of cooperative migration management instruments. As a matter of fact, the multiplicity of actors involved raises tricky questions as to the allocation of responsibility. In particular, with regard to the legal position of the European States, the degree of participation, as well as the nature and seriousness of the breach are among the relevant legal parameters to be carefully assessed.

Violeta Moreno-Lax and Martin Lemberg-Pedersen's contribution provides a comprehensive overview of the ethical and legal implications deriving from the externalization of migration control by focusing on its 'border-induced displacement' effect. The authors identify two degrees of 'irresponsibilization' stemming from that approach, namely 'responsibility diffusion' and 'responsibility denial'. After a close examination of the apparent accountability gaps generated by the outsourcing policies, they conclude that the strategy of 'distance-creation' through externalization does not undermine the international obligations incumbent on European States.

Giuseppe Pascale's analysis on the other hand addresses the legal consequences of the cooperation on irregular migration and border control between Italy and Libya. He maintains that Italy bears derivative responsibility for complicity in the gross human rights violations in Libya, under Article 16 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). He further argues that Italy's international responsibil-



ity also originates from the violation of the special secondary obligations arising for all States from a serious breach of an obligation under a peremptory norm of general international law, namely the obligation not to recognize as lawful a situation created by such a breach and not to render aid or assistance in maintaining the ensuing situation, as provided by Article 41 ARSIWA.