the SPANISH YEARBOOK of INTERNATIONAL LAW

The Walls of Fortress Europe: Externalization of Migration Control and the Rule of Law

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Abstract: The aim of this contribution is twofold. First, it seeks to identify the main elements of the European policies of offshoring and outsourcing migration control and to describe the threats that these policies pose to the guarantees inherent to the Rule of Law. Second, given the serious risk of evasion of democratic controls that these policies entail, it attempts to find in the case law of European courts, specially the European Court of Human Rights, the elements that would make it possible to rebuild the eluded system of checks and balances.

Keywords: Border Control, European Migration Policy, Fortress Europe, Frontex, Access to Asylum, Extra-territorial Application of the ECHR.

(A) EUROPEAN OFFSHORING OF MIGRATION CONTROL

Above and beyond the lofty rhetoric used in the grand political pronouncements that have undergirded European action in the field of immigration and asylum,[1] it is the metaphor of Fortress Europe that best reflects the harsh reality of policies that have made border control and the fight against irregular immigration the core components of European action in this area.[2] This emphasis on migration control works two ways. In addition to a reactive dimension embodied in the return and readmission policies, aimed at forcing irregular migrants to leave, it includes a proactive facet intended to prevent such migrants

Article published on 31 December 2019

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[1] Since the Tampere Council Meeting, the EU has insisted that immigration and asylum policies should be carried out "fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments" and be able to "ensure the integration into our societies of those third country nationals who are lawfully resident in the Union" (Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, para. 4). The idea of balance is also the basis for the "global" approach on which the so-called external dimension of those policies is based. See: *Global approach to migration: Priority actions focusing on Africa and the Mediterranean*, European Council, Brussels, 15 and 16 December 2005, Annex I; European Council, Brussels, 14 and 15 December 2016, paras. 21 and ff.; and The Global Approach to Migration and Mobility, Communication from the Commission, 18 November 2011, COM(2011) 743 final.

[2] See, *per omnium*, P. García Andrade, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias* (Valencia, 2015), at 46 and ff.

Article published on 31 December 2019

 DOI:10.17103/sybil.23.23

from reaching European territory. Compared to the reactive dimension, this preventive facet is much more lightly regulated, is pursued much more opaquely and has received far less attention in the literature, especially in Spain.

In keeping with an approach first piloted elsewhere, and deepening a strategy initiated by the southern peripheral countries of the Schengen Area — quite singularly, Italy and Spain — the EU and its Member States have been fervently pursuing what have come to be called *non-entrée*[3], non-arrival[4], *neo-refoulement*[5] or front-door[6] policies. These policies typically entail the multiplication of so-called interception measures, in the broadest sense of the term. Interception measures refer to the set of legal, administrative and executive actions aimed at blocking or interrupting transit to European countries, with a view to preventing access to European territory by persons who, from the time they leave the countries of origin of the main migration flows and throughout their journey, aspire to access the European Union despite not meeting legal immigration requirements.[7]

The proliferation of interception measures entails an externalization process, in both the geographical and functional sense. It involves not only offshoring migration control, but also entrusting it to, or, at least, involving in its performance, organizations external to and/or independent of the European Member States themselves, whether private operators, third-country agents, or supra-state agencies such as Frontex. The European Union's strategy in response to the so-called refugee crisis, outlined in the European Agenda on Migration and debuted with the controversial EU-Turkey Statement of March 2016, unequivocally deepens these types of policies.

(B) THE WALLS OF FORTRESS EUROPE: INTERCEPTION MEASURES

Within the context of the Integrated Border Management System (IBMS), interception measures at the European level are intended to target migration flows at every point of the journey. These measures are fundamentally, if not exclusively, fivefold:

(a) First, they include a two-part *model for controlling access at source*. On the one hand, it consists of a visa system that requires migrants from almost all countries of origin of economic migrants and

3 J. Hathaway, 'The Emerging Politics of Non-Entrée', 91 *Refugees* (1992), at 40 and ff.; J. Hathaway and T. Gammeltoft-Hansen: *Non-Refoulement in a World of Cooperative Deterrence*, University of Michigan Law School, Law & Economics Working Papers (8 January 2014) 235-284; A. Gerard: *The Securitization of Migration and Refugee Women* (London-New York, 2014), at 67 and ff.

4 E. Taylor Nicholson: *Cutting Off the Flow: Extraterritorial Controls to Prevent Migration*, The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, Issue Brief (July 2011), at 2.

5 J. Hyndman and A. Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe', 43 *Government and Opposition* (2008) 249-269, at 249.

6 M. Paz, 'The Law of Walls', 28 *EJIL* (2017) 601-624, at 609.

7 Likewise, see: *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*. Executive Committee of the High Commissioner's Programme, Standing Committee, 18th meeting (EC/50/SC/CRP.17), 9 June 2000, para. 10; and A. Klug and T. Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures', in B. Ryan and V. Mitsilegas: *Extraterritorial Immigration Control: Legal Challenges* (Leiden-Boston, 2010), at 69.

 DOI:10.17103/sybil.23.23

refugees to the EU[8] to first obtain a visa, which, except in exceptional circumstances, they must apply for at embassies and consulates abroad.[9] On the other, it establishes a strict system of responsibility for carriers, who, under threat of harsh penalties, are compelled to perform de facto border control functions.[10]

(b) Second, *encouraging countries of origin and transit — especially neighbouring ones — to cooperate on the containment of migration flows* is an essential component of the IBMS and, therefore, of the external dimension of European immigration and asylum policy.[11] The refugee crisis and the strategy embodied by the "New Partnership Framework" have made cooperation on migration control a central issue in EU policy vis-à-vis the main countries of origin and transit. To this end, policies aimed at securing the indispensable political will of these countries have been made stricter. They have shifted from a strategy of intrinsically and eminently positive conditionality,[12] based on the granting of limited advantages with regard to migration, to one that, in addition to increasing the resources to be used, makes all EU and Member State policy towards these countries — including development cooperation policy — conditional in a way that does not rule out the use of negative incentives as well.[13]

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[8] Introduced in 1993 in the context of Schengen, the common list was incorporated into EU law in 2001, after the necessary attribution of powers by the Treaty of Amsterdam to the then European Community. See: Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21 March 2001, at 1). As it has been amended more than 15 times, it is advisable to check the unofficial codified version: Doc. 02001R0539-20170611.

[9] See, in relation to the uniform visa, Articles 4.1 and 10 of the Community Code on Visas. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ L 243, 15 September 2009, 1-58).

[10] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 187, 10 July 2001, at 45 and ff.). In compliance with the obligations so undertaken, in Spain, the inbound control system implemented by carrier companies is regulated under Art. 66.3 of the Law on Immigration (LOEX), and Arts. 16 and 18 of its implementing regulations (REX). On the access control system based on the establishment of a system of responsibility on the part of carriers, see: V. Moreno-Lax, 'Must EU Borders Have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States' Obligations to Provide International Protection to Refugees', *European Journal of Migration and Law* (2008), at 315 and ff.; T. Rodenhäuser, 'Another brick in the wall: carrier sanctions and the privatization of immigration control', 26 *IJRL* (2014) 223-247.

[11] S. Gil Araujo, 'Redefiniendo las fronteras de Europa. Sobre la deslocalización del control migratorio comunitario', in I. Markez (ed.): *Respuestas a la exclusión. Políticas de inmigración, interculturalidad y mediación* (Donostia-San Sebastián, 2006), at 60.

[12] On the traditional reservations regarding negative conditionality, in particular, as a response to the Spanish-British proposal submitted by the Blair and Aznar governments at the Seville Council Meeting in 2002, see: K. Eisele, 'EU External Relations and Migration Policy: The Historical Development of the External Dimension', in J. Niessen and E. Guild (eds.): *The External Dimension of EU Immigration Policy* (Leiden, 2014), at 99 and ff.; and S. Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control', in V. Guiraudon and G. Lahav (eds.): *Immigration Policy in Europe: The Politics of Control* (London, 2007), at 329 and ff.

[13] 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, Brussels, 7 June 2016, COM(2016) 385 final, at 10. On the new approach embodied by this strong emphasis on negative incentives and the ensuing controversy, see: C. Castillejo, 'The EU Migration Partnership Framework: Time for a Rethink?', *German Development Institute, Discussion Paper* 28/2017.

DOI:10.17103/sybil.23.23

Achieving and maintaining political will is not enough. It is also necessary to *build up the capacity of these third countries*, providing them with material resources, training their personnel and using the appropriate technological means to ensure effective surveillance and the exchange of information required to successfully carry out the interception operations. Largely replicating the networked cooperation structure that the Spanish[14] and Italian[15] border control services have used over the past decade with their respective African partners, the European Union has, via Frontex, assumed the mission of promoting and deepening this operational cooperation, involving as many Member States as possible in the effort.[16] As a result, outbound migration control actions involve a wide variety of players, including, in addition to third-country border control services, supra-state agencies (Frontex), peripheral EU Members States, and other Member States providing support for these peripheral states. Whilst these limits do not fall within the scope of primary law, Frontex Regulation nevertheless limits the powers of this European border agency, which, despite its name, has no border guards.[17] This, coupled with the added value that the peripheral Member States can bring to these operations, explains why, whenever possible, this operational cooperation relies on those states for leadership. In any case, the extraordinary opacity surrounding this operational cooperation, whether it is carried out directly by Frontex or implemented by the Member States, makes it extremely difficult to learn the details of the specific types of cooperation involved in the performance of material interception operations.

(c) Building on the precedent of similar practices carried out in the United States and Australia,[18] the EU Member States have begun to conduct various types of *sea patrol* operations that include interception

[14] L. Gabrielli, 'La externalización europea del control migratorio ¿La acción española como modelo?', *Anuario CIDOB de la Inmigración 2017*, at 129 and ff.; and M. Casas Cortes *et al.*, '"Good neighbours make good fences": Seahorse operations, border externalization and extra-territoriality', 23 *European Urban and Regional Studies* (2016), at 231 and ff.

[15] A. Di Pascale, 'Migration Control at Sea: The Italian Case', in B. Ryan and V. Mitsilegas (eds.): *Extraterritorial..., supra* n. 7, at 296 and ff.; and S. Hamood, 'EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?', 21 *Journal of Refugee Studies* (2008), 19-42.

[16] Cooperation with third countries, "focusing in particular on neighbouring countries and on those third countries which have been identified through risk analysis as being countries of origin and/or transit for illegal immigration" (Art. 4.f) is one component of European integrated border management. It has been defined as an objective of the European Border and Coast Guard with a view to managing — i.e. controlling — border crossings and addressing the challenges of migration and cross-border crime (Art. 4). See: Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16 September 2016, at 1 and ff.) (hereinafter, Frontex Regulation).

[17] See Art. 2, para. 14, of the Schengen Borders Code (Regulation 2016/399), cited in Art. 2.3 of the Frontex Regulation, as well as Art. 20 of this latter instrument.

[18] On US practice, see: N. Frenzen, 'US Migrant Interdiction Practices in International and Territorial Waters', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial..., supra* n. 7, at 375 and ff.; N. Legomsky, 'The USA and the Caribbean Interdiction Program', 18 *IJRL* (2006), at 677 and ff.; and G. Goodwin-Gill, 'The Haitian Refoulement Case: A Comment', 5 *IJRL* (1994), 103-110. On Australian practice, including the famous *Tampa* case, see, amongst others: C. Bailliet, 'The Tampa Case and Its Impact on Burden Sharing at Sea', 25 *Human Rights Quarterly* (2003), at 741 and ff.; C.M.J. Bostock, 'The International Legal Obligations Owed to the Asylum Seekers on the *MV Tampa*', *IJRL* (2002), at 279 and ff.; S. Kneebone, 'Controlling Migration by Sea: The Australian Case', in B. Ryan and V. Mitsilegas (eds.): Extraterritorial..., *supra* n. 7, at 347 and ff.; P. Mathew, 'Australian Refugee Protection in the Wake of the Tampa', 96 *AJIL* (2002), at 661 and ff.; and E. Willheim, 'MV Tampa: The Australian Response', 15 *IJRL* (2003), at 159 and ff.

measures. In the Italian case, in accordance with agreements with the Albanian and Libyan authorities, Italian patrol boats directly detained and returned intercepted migrants to the coasts of departure. The ECtHR's rejection, in 2013, of this policy of returning migrants to Libya prompted a change of strategy, consisting in building up the Libyan coastguard's material, logistic and personal capacity and charging it with carrying out this practice directly.[19] Subtler from the outset, the Spanish operations, conducted in third-country waters in the form of joint patrols — in practice, agents from those countries are brought onboard Spanish patrol boats — avoid contact with migrants through interceptions based on the interposition and action, in the form of directions, of local agents.[20]

The creation of Frontex has, through its most visible and costly activity, strengthened national actions with major operations. With European funding, the Agency organizes and coordinates the support of Member States, and any third countries that voluntarily agree to it, for the Member State that is especially affected, which, in turn, leads the operation. Maritime operations are subject to detailed regulations, enshrined in the 2014 Sea Borders Regulation,[21] derived from the general concept governing the Schengen and Dublin systems, whereby the host state is responsible for the operation's operational management and the disembarkation of the intercepted persons. Despite the progressive inclusion of search and rescue activities in the mandate of the maritime operations, they are an incidental and secondary function in relation to their main mission, which is none other than border control. In any case, the operations are carried out with a remarkable opacity and lack of transparency.[22]

(d) Although they have received far less attention in the media than similar infrastructure in other countries, the peripheral Member States whose land borders are most affected by irregular migration flows have been making a serious effort to secure those borders through the construction of so-called *migration fences*. In fact, these are more or less sophisticated structures that usually combine deterrent

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[19] Regarding Italian practice prior to Colonel Qaddafi's fall, see: S. Hamood, 'EU-Libya Cooperation...', *supra* n. 15, at 19 and ff.; A. Di Pascale, 'Migration Control...', *supra* n. 15, at 296 and ff.; and E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford, 2014), at 284 and ff.

[20] CAT, *J.H.A. v. Spain*, Decision of 10 December 2008, Communication No. 323/2007, CAT/C/41/D/323/2007; CEAR, *La situación de los refugiados en España. Informe 2008,* at 51 and ff.; and A. Sánchez Legido: *Controles migratorios y derechos humanos*, section 2.3.2 (forthcoming).

[21] Regulation (EU) No 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 189, 27 June 2014, 93-107).

[22] For an overview of Frontex's maritime operations, see: J.A. Quindimil López, 'La Unión Europea, Frontex y la Seguridad en las Fronteras Marítimas. ¿Hacia un Modelo Europeo de Seguridad Humanizada en el Mar?', 41 *Revista de Derecho Comunitario Europeo* (2012), at 57 and ff.; G.A. Oanta, 'Desarrollos jurídicos controvertidos en la vigilancia de las fronteras marítimas exteriores de la Unión Europea en el marco de Frontex. A propósito de la Decisión 2010/252/UE', in J.M. Sobrino Heredia et al. (eds.): *El desarrollo del Tratado de Lisboa: un balance de la Presidencia española. Décimas Jornadas Extraordinarias Escuela Diplomática-Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*, Madrid, 22 June 2010, Escuela Diplomática, Ministerio de Asuntos Exteriores y de Cooperación, Colección Escuela Diplomática No. 17 (2011), at 171 and ff.; F. Esteve García, 'El rescate como nueva función europea en la vigilancia del Mediterráneo', 111 *Revista CIDOB d'Afers Internacionals* (2015), at 153 and ff.; and S. Marinai, 'The interception and rescue at sea of asylum seekers in the light of the new EU legal framework', 53 *Revista de Derecho Comunitario Europeo* (2016), at 901 and ff.

DOI: 10.17103/sybil.23.23

and containment features — fences, barbed wire, ditches or pits — with communication channels and technological surveillance and detection devices. With the conspicuous precedent of the sophisticated Ceuta and Melilla fences,[23] built in the late 1990s and substantially reinforced since then, at least half a dozen other EU Member States — including Greece, Bulgaria, Hungary, Slovenia, Austria and France — in addition to one neighbouring country — Macedonia — have decisively undertaken more or lesssimilar initiatives.[24] Although, given the unpopularity of these types of migration control mechanisms, the European Commission has traditionally distanced itself from any express support for them, the model on which the Schengen system is based clearly encourages the peripheral Member States to use them.

(e) Finally, European countries have also resorted to the *excision of territory*, i.e. partially stripping border areas of their status as state territory in order to deny those who reach them the guarantees arising under migration and asylum law. This would include the French and British practices with regard to the international areas of ports and airports[25] or the imaginative concept of operational border developed by Spanish Interior Ministry authorities.[26] However, this procedure has not yet taken on the importance it has acquired elsewhere, especially in Australian practice.[27] This is largely due, as will be seen below, to the ECtHR's case law.

(C) EVASION OF RESPONSIBILITIES AND REHABILITATION OF THE SYSTEM OF GUARANTEES: THE RESPONSE OF THE EUROPEAN COURT OF HUMAN RIGHTS

To attempt a legal analysis of these European externalization policies, it is first necessary to recall four ideas. First, the implementation of these policies can have horrible consequences for the people subjected to the interception measures, both in material terms and for the enjoyment of human rights. Second, although states have wide-ranging recognized sovereign powers to regulate the entry and stay of aliens in

[23] J. Castán Pinos, 'Building Fortress Europe? Schengen and the Cases of Ceuta and Melilla', Working Paper, Centre for International Border Research, Belfast, 2009; M.A. Acosta Sánchez, 'Las fronteras terrestres de España en Melilla: delimitación, vallas fronterizas y tierra de nadie', 28 *REEI* (2014), at 17 and ff.; and S. Saddiki: *World of Walls: The Structure, Roles and Effectiveness of Separation Barriers* (Cambridge, 2017), at 37 and ff.

[24] A. Sánchez Legido, *Controles migratorios..., supra* n. 20, section 2.4.

[25] See, respectively, the factual background of the *Amuur* and *Gebremedhin* cases cited below and R. Barnes, 'The International Law of the Sea and Migration Control', in B. Ryan and V. Mitsilegas: *Extraterritorial..., supra* n. 7, at 117-119. For an overview of these types of practices, see: A. Valle Gálvez, 'Las zonas internacionales o zonas de tránsito de los aeropuertos, ficción liminar fronteriza', 9 *REEI* (2005), at 3.

[26] It is a paralegal reasoning tactic developed by the Interior Ministry, intended to provide a legal basis for so-called *hot returns*, whose trail must be traced through the parliamentary remarks and statements of Interior Ministry officials and internal documents of the Civil Guard commanders. For more information, see: P. García Andrade, 'Devoluciones en caliente de ciudadanos extranjeros a Marruecos', 67 *REDI* (2015-1), at 214 and ff.; and I. González García, 'Inmigración y derechos humanos: las devoluciones en caliente de inmigrantes subsaharianos desde España a Marruecos', 17 *Anuario de los Cursos de Derecho Humanos de Donostia-San Sebastián* (2017), at 151 and ff.

[27] Undoubtedly, the most conspicuous example is that of the immigration detention and processing centre built by the Australian authorities on Christmas Island. See: Commonwealth Ombudsman, *Christmas Island immigration detention facilities. Report on the Commonwealth and Immigration Ombudsman's Oversight of Immigration Processes on Christmas Island. October 2008 to September 2010*. February 2011.

 DOI 10.17103/sybil.23.23

their territory and to enforce those regulations, those powers are not unlimited. Amongst the limits, those arising under international and European human rights law and law on international protection are pre-eminent.[28] Third, at least in the case of Europe, the countries that implement and the institutions that promote the externalization of migration control are defined, respectively, as states and as a union based on the rule of law. As the Luxembourg court recalled in the *Les Verts*[29] case, this means that *all* public power is subject to the law. And, fourth, notwithstanding all these considerations, more than a few authoritative voices have suggested that the migration control externalization policies conceal a strategy for evading responsibilities and circumventing domestic and international legal guarantees through a dissociation of controls and rights that displaces the former without accompanying them with the latter.[30]

V. Mitsilegas is right when he notes that such policies pose intense challenges to the requirements arising under the rule of law and to the core of the notion of human dignity.[31] Surely, as suggested by B. Ryan, the best way to tackle these challenges is to try to restore the legal and democratic guarantees that have thus been excluded.[32] In such a restoration of the eluded controls, the response of the international bodies tasked with safeguarding human rights, in particular, the ECtHR, is extraordinarily important. In fact, in response to the question of whether or not those controls can be restored, the Strasbourg court's case law offers some affirmative answers, which, although only partial with regard to the general panorama of offshoring policies, are nevertheless important.

Thus, the Court has rejected the fictitious offshoring strategies embodied by the excision of areas and territories in relation to the international areas of ports and airports since the early *Amuur v. France*[33] case. In contrast, under the pretext of not getting into the Spanish-Moroccan territorial dispute over areas in North Africa, the chamber that decided the *N.T. and N.D. v. Spain* case in the first instance sidestepped the issue of whether the land between the Melilla fences is territory subject to the Convention's

[28] For an overview of this issue, see the recent contribution: S. Torrecuadrada García-Lozano, 'Los derechos humanos como límite a la gestión de los flujos migratorios mixtos', 36 *REEI* (2018).

[29] ECJ Judgment, Parti écologiste "Les Verts" v. European Parliament, C-294/83, EU:C:1986:166, para. 23.

[30] In this regard, see, amongst others: L. Bialasiewicz, 'Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean', 17 *Geopolitics* (2012), at 843 and ff.; T. Gammeltoft-Hansen, 'The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean', DHS Working Paper, No. 2008/6, at 238; B. Ryan, 'Extraterritorial Immigration Control: What Role for Legal Guarantees?', in B. Ryan and V. Mitsilegas: *Extraterritorial..., supra* n. 7, at 3; E. Brower, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and Its Member States', in B. Ryan and V. Mitsilegas, *Extraterritorial..., supra* n. 7, at 200; E. Taylor Nicholson, 'Cutting off the Flow: Extraterritorial Controls to Prevent Migration', Warren Institute, University of California, Berkeley Law School, July 2011, at 2; M. Fernández, *La responsabilité du fait des violations des droits de l'homme dans le cadre des opérations maritimes coordonnées par l'Agence Frontex,* Université Panthéon-Assas, Paris, 2012, at 64; and M. Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls', 34 *Berkeley Journal of International Law* (2016), at 21.

[31] V. Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed', in B. Ryan and V. Mitsilegas: *Extraterritorial..., supra* n. 7, at 63.

[32] B. Ryan, 'Extraterritorial...', *supra* n. 7, at 46 and ff.

[33] *Amuur v. France*, 25 June 1996, § 39, Reports 1996-III, §§ 41 and ff. The same idea underlies the decisions of the ECtHR in the cases *D. v. The United Kingdom*, 2 May 1997, Reports 1997-III, § 48, and *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, 26 April 2007, §§ 66-67, Reports 2007-II. The Spanish Constitutional Court's position is likewise based on it. See: Constitutional Court Writ 53/1996, of 6 March, F.J. 5.

 DOI:10.17103/sybil.23.23

application.[34] Had it adopted a different attitude and based jurisdiction on the territorial link, it would have confirmed that the migration fences were fully subject to the limits that the Convention imposes on such facilities, as the ECtHR itself already noted in its judgments on the Berlin Wall.[35] This appraisal is hardly trivial, given the concerns raised by certain recurring features in the design of anti-migration fences.[36] Spain's appeal of the decision offers the Grand Chamber the chance to rectify this mistake.

Likewise, in an attitude diametrically opposed to that taken by the US[37] and Australian[38] Supreme Courts, in the pivotal *Hirsi Jamaa* case, the ECtHR confirmed the Convention's applicability to maritime interceptions carried out by agents of the States Parties on the high seas from state vessels flying their flags.[39] It further found that the removal of intercepted or rescued persons to the authorities of a third country where there exists a real risk that they will be subjected to inhumane treatment, with no prior identification and without affording them the chance to demonstrate the personal circumstances based on which they might challenge their return, constitutes a violation of the prohibition on returns set out under Article 3 of the Convention, as well as of the prohibition on collective expulsions established in Article 4 of its fourth additional protocol.[40]

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[34] *N.T. and N.D. v. Spain*, Nos. 8675/15 and 8697/15, 3 October 2017, ECHR 2017, §§ 54-55. So as not to touch on the Spanish-Moroccan dispute even incidentally, the court based its jurisdiction on the verified effective control by the civil guard officers over the plaintiffs in the intermediate zone.

[35] For the ECtHR, the use of automatic and indiscriminate lethal systems in the context of the practice and legislation concerning the Berlin Wall and the categorical nature of the order to "annihilate border violators" were not only a breach of international human rights law but also criminal conduct according to the general principles of law recognized by the international community. Therefore, the authors' punishment could not be considered a violation of the principle of legality in criminal law, even if these practices were required under the domestic law of the GDR. See: *Streletz, Kessler and Krenz v. Germany* [GC], Nos. 34044/96, 35532/97 and 44801/98, §§ 72 and 73, 22 March 2001, Reports 2001-II; and *K.-H.W. v. Germany*, No. 37201/97, §§ 66 and 67, 22 March 2001, Reports 2001-II. The Human Rights Committee reached a similar conclusion. See: *Baumgarten v. Germany*, Communication No 960/2000, Human Rights Committee (CCPR), 78th session, Doc. CCPR/C/78/D/960/2000, 19 September 2003, § 9.4.

[36] Europa Press, 'El Defensor del Pueblo: "Las concertinas es un sistema de una crueldad extraordinaria"', 14 June 2018.

[37] In the *Sale* case, the US Supreme Court upheld the policy of offshore interdiction and automatic return ordered by President G.H.W. Bush to address the problem of Haitian "boat people" in the early 1990s, essentially based on the supposed lack of extraterritorial effectiveness of the non-refoulement principle set out in Art. 33 of the Geneva Convention. *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), section IV. For a critical analysis of the case, see: G.S. Goodwin-Gill, 'The Haitian Refoulement Case: A Comment', 6 *IJRL* (1994), at 103 and ff. The solution upheld in the *Sale* case was rejected four years later by the Inter-American Commission on Human Rights.*ComIDH, The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, § 157.

[38] In the *Tampa* case, the Federal Court of Australia upheld the strategy of containing migration at sea known as the "Pacific Solution", holding that the performance of "gatekeeping" functions, i.e. those geared towards preventing entry into Australian territory, were a prerogative power of the executive branch that had not been altered by migration legislation and that the intervention of the Australian agents had not generated a situation of detention that could give rise to the issue of a writ of *habeas corpus*. *Ruddock v. Vadarlis* [2001] FCA 1329 (18 September 2001), Federal Court (Full Court) (Australia).

[39] *Hirsi Jamaa and others* v. Italy, 23 February 2012, ECtHR 2012, §§ 81-82.

[40] *Idem*, §§ 122 and ff., and 180 and ff. The extraordinary interest that the *Hirsi Jamaa* case elicitedin the literature bears witness to its importance. See, amongst others: J.A. Carrillo Salcedo, 'Reflexiones a la luz de la Sentencia del Tribunal Europeo de Derechos Humanos en el caso Hirsi Jamaa y otros contra Italia (Sentencia de 23 de febrero de 2012). Derechos de los inmigrantes en situación irregular en España', 32 *Teoría y Realidad Constitucional* (2013), at 285 and ff.; M.D. Bollo Arocena, 'Push back, expulsiones colectivas y non refoulement. Algunas reflexiones a propósito de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia (2012)', in S. Torres Bernárdez (ed.): *El derecho internacional en el mundo*

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(D) THE PENDING RECONSTRUCTION: THE STRASBOURG COURT'S PROBABLE JURISDICTION IN RELATION TO OTHER INTERCEPTION MEASURES

Beyond the aforementioned cases, the question of whether, under the ECHR, the controls circumvented with the offshoring strategies could be deepened and expanded to include other interception measures is shrouded in incredible uncertainty. Because they are *measures implemented abroad*, the basis for them must consider the ECtHR's increasingly broad doctrine in cases in which, in accordance with Article 1 ECHR, an individual located beyond a State Party's borders is subject to its jurisdiction. However, because these measures are increasingly *implemented by bodies, agents or individuals that do not have the status of a State Party organ* and because *they increasingly involve multiple players,* it is also essential not to lose sight of the international norms governing the attribution of conducts and responsibility to those States.[41] Nevertheless, it must be recalled that the solutions that these latter norms point to can only be followed to the extent that they are compatible with an instrument that is both a human rights treaty and, in the words of the ECtHR, the constitutional instrument of European public order.[42]

The concept of extraterritorial regional disembarkation platforms first broached in the summer of 2018 has not yet been sufficiently defined. However, from the outset it can be said that any formula similar to that tried by the United States in Guantanamo or Australia in Nauru or Papua New Guinea would quite likely imply effective control over persons and the exercise of public prerogatives by authorities of the States Parties and would, thus, entail the Convention's application. This may be why the European Commission has clearly distanced itself from such solutions in the still highly ambiguous exploratory exercise it has been conducting regarding that concept.[43]

As for contactless maritime interception operations,[44] i.e. ones that do not include even brief custody of the affected individuals, they must be viewed, first, in relation to those operations verified directly by State Party vessels under the control of the State Party's own agents, who, rather than bringing the intercepted persons on board, simply block the path of their boat, dinghy or other more or less precarious inflatable craft, requiring them to return to the coast of departure or enabling their capture by third-

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multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez (Iprolex, Madrid, 2013), at 647 and ff.; and V. Moreno-Lax, 'Hirsi v Italy or the Strasbourg Court v Extraterritorial Migration Control?', *Human Rights Law Review* (2012), at 574 and ff.

41 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (hereinafter, DARSIWA), *Yearbook of the International Law Commission* (2001), Vol. II (Part Two).

42 ECtHR case law has repeatedly noted that the Convention's provisions should be interpreted "as far as possible" in accordance with other international law rules (amongst many others, in *McElhinney v. Ireland*, No. 31253/96, 21 November 2001, § 36; *Hassan v. The United Kingdom*, No. 29750/09, 16 September 2014, § 77, ECtHR 2014; *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, § 77, ECtHR 2011; and, quite especially, *Loizidou v. Turkey*, No. 15318/89, 18 December 1996, § 43, Reports 1996-VI).

43 European Council, Brussels, 28 June 2018, EUCO 9/18, para. 5. The idea is still in an exploratory phase: European Commission, *Non-paper on regional disembarkation arrangements.* Accessible through the hyperlink in the text of the press release *Managing migration: Commission expands on disembarkation and controlled centre concepts*, Press Release, Brussels, 24 July 2018.

44 Terms from V. Moreno Lax and M. Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows', in S. Juss (ed.):*Research Handbook on International Refugee Law* (forthcoming).

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country coastguards. In these situations, the precedents of the *Marine I*[45] case before the Committee Against Torture (CAT) and the *Xhavara*[46] case before the ECtHR make it possible to consider the existence of an effective control over persons that would trigger the Convention's application. Second, building even on the idea of control of specific situations or events on which essential rights recognized in the Convention depend used by the ECtHR in the *Jaloud*[47] case, surely a basis could be found for the ECHR's application and the possible responsibility of the States Parties in situations of breach of international search and rescue obligations by State Party vessels present in the area of an accident or whose intervention results in the capture of persons by foreign coastguards. And, third, with regard to joint patrols, such as those conducted by Spanish patrol boats from the Civil Guard's maritime service (SEMAR) in Mauritanian and Senegalese waters,[48] it could be argued that Spain should be held responsible under the ECHR. This is because everything indicates that this is not a case in which it placed its agents or bodies at the disposal of a third state as provided for under Article 6 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA), insofar as they are neither under the exclusive direction and control of the third state, nor are they acting pre-eminently for the purposes of that state.[49]

It could likewise be argued that the Convention, and any responsibility of the States Parties under it, applies in cases in which interception measures are *imposed on private operators or carried out through them.* In cases similar to that of the incident resulting in the preventive seizure of the *Open Arms* by the Italian authorities,[50] and provided the existence of orders or instructions by the relevant state's authorities

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45 Committee Against Torture, *J.H.A. v. Spain*, Decision of 10 December 2008, Communication No. 323/2007, CAT/C/41/D/323/2007, § 8.2.

46 *Xhavara and others v. Italy and Albania* (Dec.), No. 39437/98, ECtHR 2001.

47 *Jaloud v. the Netherlands,* No 47708/08, 20 November 2014, § 139, ECtHR 2015. Likewise, in a case involving very similar facts, *Pisari v. The Republic of Moldova and Russia*, No. 42139/12, 21 April 2015, § 33, ECtHR 2015.

48 In execution of the Seahorse programmes and Operation Hera, and on board the Civil Guard's SEMAR vessels stationed in Mauritanian and Senegalese ports, the joint patrols carry out surveillance activities against irregular migration and other forms of crime. In that context, under the coordination of the Santa Cruz de Tenerife Coordination Centre, they participate in interception operations that are even conducted in the territorial sea and contiguous areas of those countries to prevent the departure of *cayuco* boats and other vessels carrying irregular migrants to the Canary Islands (M. Casas-Cortes, *et al.*, 'Good Neighbours...', *supra* n. 14, at 242-243; and S. Carrera, *The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands,* CEPS, 2008, at 21-22). There are indications that similar experiences have been attempted by Spain with Morocco (M.T. Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension – The Safe Third Country Concept Revisited', 18 *IJRL* (2006), at 587; and P. García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in B. Ryan and V. Mitsilegas (eds.):*Extraterritorial..., supra* n. 7, at 319) and by Italy with Libya (M. Den Heijer, 'Europe beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in B. Ryan and V. Mitsilegas:*Extraterritorial..., supra* n. 7, at 172). The opacity that, as noted, surrounds these types of actions makes it difficult to determine the exact action protocols and, therefore, to know what would seem to be a decisive piece of information when applying the rules to determine the existence of jurisdiction and/or the attribution of responsibility to the European States, namely, the exact role that the States Parties' agents play in the interception operations.

49 On the interpretation of Art. 6.2 DARSIWA on which that observation is based, see the corresponding commentary in *ILC Yearbook* (2001), *supra* n. 41, at 45.

50 See: A. Sánchez Legido, '¿Héroes o villanos? Las ONG de rescate y las políticas europeas de lucha contra la inmigración irregular (A propósito del caso Open Arms)', 46 *Revista General de Derecho Europeo* (2018).

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could be accredited, any delivery of persons rescued by private vessels, whether belonging to rescue NGOs or otherwise, to foreign authorities — e.g. the Libyan coastguard — where there exists a risk of serious violation of essential rights recognized under the Convention could be considered a case of personal control through interposition verified by the private operator acting under those authorities' instruction and control. This would trigger a possible breach of the Convention attributable, for the same reason, to that State Party in accordance with Article 8 DARSIWA.

Similarly, the overseas performance by diplomatic or consular authorities of functions linked, amongst other things, to migration control and access to the territory is a case that the ECHR implementing bodies have already accepted as triggering its extraterritorial application.[31] In light of that finding, it can be quite plausibly asserted that the States Parties are responsible under the Convention for actions to control access to means of transport carried out by private carriers overseas. In fact, the ILC itself cited such control activities to exemplify the cases, falling under Article 5 DARSIWA, of attribution to a State of the conduct of entities empowered to exercise its governmental authority when they act in that capacity.[32]

(E) THE DUBIOUS APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO MEASURES ENCOURAGING COOPERATION ON MIGRATION CONTROL BY STATES OF ORIGIN AND TRANSIT

In contrast, the difficulties involved in justifying that the ECHR and its enforcement body could be, respectively, the appropriate instrument and channel for establishing the legal responsibility of States Parties for policies aimed at encouraging and/or forcing states of origin and transit to perform strict border controls — in this case, to prevent departures — are almost insurmountable. For one thing, the need to have been personally affected in some way, whether directly or indirectly,[33] implicit in the

[31] The Strasbourg court considers it "clear" that "the acts of diplomatic and consular agents, who are present in a foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others". *Al-Skeini and others v. The United Kingdom*, No 55721/07, 7 July 2011, § 134; and *Bankovic and others v. Belgium and others* (Dec.) [GC], No. 52207/99, § 75, 12 December 2001, Reports 2001-XII, § 73. Based on its reference to the case law of the former European Commission of Human Rights in making this assertion, the Court is understood to accept as cases involving the exercise of jurisdiction and consequent application of the Convention actions aimed at promoting the expulsion of an individual from a third state (*X. v. Germany*, No. 1611/62, Commission Decision of 25 September 1963, Yearbook 8, at 158), to respond to claims aimed at obtaining the custody of a minor residing in a Member State (*X. v. the United Kingdom*, No. 7547/76, Commission Decision of 15 December 1977, DR 12, at 73), or to manage the petition for protection before the host state authorities, at least when it is resolved, allowing said authorities to enter diplomatic premises and arrest the interested parties (*W.M. v. Denmark*, No. 17392/90, Commission Decision of 14 October 1992, DR 73, at 193).

[32] In what appears to answer the question of whether this is an example of the de facto case provided for in this precept, in its commentaries, the International Law Commission mentions as an example cases in which "[p]rivate or State-owned airlines may have delegated to them certain powers in relation to immigration control". DARSIWA, commentary to Article 5, para. 2, *ILC Yearbook* (2001), *supra* n. 41, at 44.

[33] According to the doctrine laid down by the Strasbourg court, an individual does not have standing to sue a State Party unless that individual can accredit that he or she is affected by the violation he or she cites from the Convention. If that violation is the result of general policies or measures, that means that, except in exceptional cases — e.g. secret measures that make it impossible to know whether a potential victim has really been affected or not — only those people who have been the subject of actions involving the application of those measures have access to the court. *Vhavara* (2001), *supra* n. 46, § 4.

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establishment of the status of victim required for individual applications to be admissible (Article 34 ECHR) makes the possibility of using this procedure to call on the ECtHR to act against alleged violations arising from general laws or policies extremely unlikely.

Additionally, according to the criteria set out in the DARSIWA, it is all but impossible to attribute to the States Parties executive interception actions that, whilst encouraged by European states, are carried out in territories outside their sovereignty and not subject to their effective control by third-country bodies that are not acting under their instructions, direction or control. The Draft Articles provide for two cases in which pressure by one state over another could give rise to the former's international responsibility. In both cases, however, the requirements to be met are so strict that their concurrence in the cases considered here is exceedingly unlikely. With regard to the first case direction and control exercised over the commission of an internationally wrongful act by another state provided for under Article 17, the ILC has insisted that it refers to cases of domination and/or actual direction by one state over the specific conduct performed by another and that it cannot be construed as including mere influence or concern, nor mere incitement or suggestion.[34] Meanwhile, for the pressure applied to constitute coercion triggering responsibility for the act carried out by the coerced state in this case, an interception measure as provided for under Article 18, the ILC has indicated that it must have the same essential character as *force majeure*, such that the coerced state has no choice but to commit the wrongful act. In other words, it is not enough for the pressure simply to have made compliance with the obligation in question more difficult or onerous.[35] These same considerations suggest that, in theory, none of the criteria used by the ECtHR as jurisdiction links triggering the Convention's application is met.

However, the assistance provided by the European countries and, especially, Italy to the Libyan coastguard is of such a singular nature as to raise the question of whether the Libyan agents' actions in the *respingimenti per procura*, or 'pull-back by proxy', might not give rise to situations in which migrants and refugees would be subject to Italian jurisdiction, which, in turn, would trigger Italy's responsibility under the Convention. Just as the ECtHR has indicated, in the Northern Cyprus, Transnistria and Nagorno-Karabakh cases, that jurisdiction exists when the entities that effectively control a territory depend on the support and assistance of a State Party for their very existence,[36] it can be plausibly understood that this could also be the case when the support and assistance of the State Party is vital to the performance of actions involving effective control over persons, as well as a possible breach of the Convention. Whether the support provided by Italy and other European states to the Libyan coastguards can be considered vital in this way and whether the resulting personal control can be used as grounds for the Court's jurisdiction and the responsibility of those states under the Convention are questions that the ECtHR will have to settle

[34] DARSIWA, commentary to Art. 17, para. 7, *ILC Yearbook* (2001), *supra* n. 41, at 73.

[35] DARSIWA, commentary to Art. 18, para. 2, *ILC Yearbook* (2001), *supra* n. 41, at 73.

[36] *Ivantoc and others v. Moldova and Russia*, No. 23687/05, § 115, 15 November 2011, ECtHR 2011; *Catan and others v. The Republic of Moldova and Russia*, No. 43370/04, 19 October 2012, *supra*, § 122; *Mozer v. The Republic of Moldova and Russia*, No. 11138/10, § 110, 23 February 2016, ECtHR 2016; and *Chiragov and Others v. Armenia*, No. 13216/05, § 186, 16 June 2015, ECtHR 2015.

DOI:10.17103/sybil.23.23

in response to a lawsuit filed in May 2018 over an incident that took place months earlier involving the *Sea-Watch 3*, in which more than 20 people drowned.[57]

Aside from exceptional cases of vital assistance, and even though Article 16 DARSIWA provides for the hypothetical case of responsibility for aid and assistance in the commission of a wrongful act by another state that, in this case, by definition, is not a State Party to the ECHR, it is virtually impossible to claim that jurisdiction under Article 1 exists and, thus, that the Court is competent in relation to interception actions performed by third states that maintain the capacity to perform their intrinsic functions — as occurs in the most important cases for Spanish practice. Therefore, and for elementary considerations of democratic conviction, it is absolutely essential to do away with the obscurantism and lack of effective parliamentary oversight that, under cover of secret memoranda of understanding, have characterized Spain's operational cooperation with half a dozen African countries and, especially, Mauritania and Senegal.

(F) PROBLEMS OF RESPONSIBILITY AND JUDICIAL OVERSIGHT ARISING FROM FRONTEX'S INVOLVEMENT IN INTERCEPTION MEASURES

In a development as necessary as it is positive, the more or less founded suspicions regarding Frontex's involvement in human rights violations[58] have given rise to a process to correct, at least, the most glaring structural shortcomings that, from the point of view of respect for fundamental rights, marred the Agency's original configuration, leading it to be regarded as some sort of irresponsible legal monster. Today, its obligations with regard to fundamental rights are much clearer and more specific, and the institutions created within it to promote and monitor this respect — the Consultative Forum and the Fundamental Rights Officer (FRO) — should be able to effectively ensure it. A suitable functioning of the new individual complaint mechanism would be helpful in that regard. However, the scant means allocated to the FRO[59] and, especially, the strong resistance that the Agency continues to show to accepting transparency requirements with all of the ensuing consequences are grounds for serious concern.

Although the current Frontex Regulation clearly lays out the obligation of States participating in operations coordinated by the Agency to respect fundamental rights,[60] there is still some ambiguity. Its executive bodies thus have broad discretion with regard to the measures to be taken in response to

[57] See: *Mare Clausum. The Sea Watch vs Libyan Coast Guard Case. 6 November 2017*, available at www.forensic-architecture.org. For an initial assessment of this case, see: A. Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?', 20 *European Journal of Migration and Law* (2018), at 396 and ff.

[58] S. Casella Colombeau *et al.*, *Agence Frontex: quelles garanties pour les droits de l'Homme. Étude sur l'agence européenne aux frontières extérieures en vue de la refonte de son mandat*, Les Verts/ALE, November 2010; and S. Keller *et al.*, *Frontex Agency: Which Guarantees for Human Rights?*, Migreurop, March 2011.

[59] I. Arnáez, 'Mecanismos para el control de los derechos fundamentales en las actividades de Frontex', in C. Blasi Casagrán and M. Illamola Dausà (eds.): *El control de las agencias del Espacio de Libertad, Seguridad y Justicia* (Madrid, 2016), at 129.

[60] Art. 25.3 Frontex Regulation.

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violations of those rights.[61] Aside from that, it must be recalled that the border guards *placed at the disposal* of the Agency as provided for under its Regulation are not entities *placed at its disposal* in the sense with which this expression is used in the DARSIWA. Therefore, the conduct of these agents is not attributable to it.[62] Hence, in application of the doctrine laid down by the ECtHR in the *Al-Jedda*[63] case, given that the assistance and coordination tasks the Agency carries out do not entail effective control or ultimate control and authority over the executive actions carried out by the Member States, their responsibility under the Rome Convention remains intact.

Of course, the possible responsibility of the Member States does not exclude that of the Agency itself. The sort of presumption of non-responsibility that the Agency seems to infer, based on the discourse of its leaders, from the exclusive competence that secondary law grants to Member States over the operational implementation of migration controls is inadmissible.[64] The likely concurrence of the requirements foreseen under the Art. 14 of the Draft Articles on the Responsibility of International Organizations (DARIO)could be the basis for the Agency's legal responsibility, whether complementary or concurrent with that of the Member States, for aiding or assisting in the possible violation of fundamental rights by those states. However, considering that the draft agreement on accession to the ECHR is at a standstill since Opinion 2/2013, today it is virtually impossible to seek the international responsibility of the Agency, or of the EU, before the ECtHR.[65]

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[61] Opinion on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, at 9.

[62] Under the DARSIWA, *placementatdisposal* involves acting under the authority of the receiving state, i.e. "under its exclusive direction and control, rather than on instructions from the sending State".[62]Although the concept of *placement at disposal* is broader under the DARIO, the attribution of the fact is conditional upon the exercise of effective control over the conduct by the international organization (Art. 7 and, especially, the commentary to para. 8, *ILC Yearbook 2011*, at 62-63). The Frontex Regulation makes it clear that, in the context of operations coordinated by Frontex, the border guards remain under the control of the Member States. See, in particular, Arts. 16.3.f, 21.2, 40.3 and 21.5 of the Frontex Regulation.

[63] *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, ECtHR 2011, § 4 and point 3 of the recitals; and *Jaloud* (2014), *supra* n. 47, §§ 149-152. Without getting into the thorny issue of when there exists "control in the last resort" by an international organization, suffice it to say that it clearly does not seem to exist when, in the words of the Agency's own regulation, the international organization limits itself to "supporting the application of Union measures related to external border management through the strengthening, evaluation and coordination of the actions of the Member States that implement those measures". Preamble, para. 6, and Art. 5.3 of the Frontex Regulation.

[64] Even if it is true that the debate over Frontex's responsibility may have been driven by a mishandled "blame game" that diverted attention with regard to who the main responsible parties were (J. Rijpma, 'Frontex: successful blame shifting of the Member States?', *Real Instituto Elcano (ARI)*, No. 69 (2010), at 1), it is one thing to acknowledge that reality and quite another to claim that one cannot speak of the Agency's complementary, incidental or residual responsibility in case of violation of obligations linked to respect for fundamental rights that unequivocally arise for it under the regulation applicable to it.

[65] Nevertheless, it must be recalled that the doctrine of equivalent protection by reason of which the Strasbourg court refrains from prosecuting Member State conduct regulated by EU Law is as the German Federal Constitutional Court famously put it *solange*, i.e., valid provided that or as long as EU law ensures a level of human rights protection equivalent to that offered, in this case, by the Rome Convention system. It can be deduced from the ILC's work that, were it to be confirmed in any case that Frontex were a simple shield designed or used by the Member States to evade their obligations and responsibilities under the Convention, those States could incur international responsibility for the Agency's conduct. See Art. 61 DARIO ("Circumvention of international obligations of a State member of an international organization"), and the corresponding commentary in which the codifying body invokes the *Bosphorus* case (Commentary to Art. 61, para. 4, *ILC Yearbook 2011*, at 110).

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However, certainly since the Treaty of Lisbon, Frontex has unquestionably been subject to the mechanisms for the review of legality and to the actions to establish liability that are the competence of the ECJ.[66] Notwithstanding the difficulties posed by the strict admissibility and substantive requirements to which the Luxembourg court's action is subject,[67] EU law clearly already offers real possibilities to ensure effective judicial review of a legal framework that likewise unequivocally imposes obligations to respect and enforce fundamental rights on all participants in the operations that the Agency coordinates. Nor must it be forgotten that the fact that the EU regulates the Member States' actions in the framework of operations coordinated by the Agency automatically entails the application — extraterritorial, where necessary — of the EU Charter of Fundamental Rights, whose application is not conditional on the existence of the jurisdictional links applicable in the case of the ECHR.[68]

(G) FOR A REBUILDING OF THE SYSTEM OF CHECKS AND BALANCES IN FORTRESS EUROPE

Few areas of action of the European public powers — whether at the Union or national level — pose such a risk of systemic breakdown of the checks and balances of the rule of law as that underlying the policies externalizing migration control. This situation can be dealt with, as has occurred elsewhere, by accepting rigid lines of separation, whether fictitious or manifestly real in the form of walls, based on the idea that only those on the inside are deserving of such enlightened principles. Alternatively, it can be addressed by trying to rebuild the democratic controls to ensure that they accompany migration control wherever it is performed. Possibilities to do so exist, and it is largely in the hands of the European courts to act on them. Whether we wish to see it or not, nothing less than European public order is at stake.

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[66] On the situation prior to the Lisbon Treaty, see: A. Hinarejos Parga, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford, 2009), at 83 and ff.; and V. Mitsilegas, 'Border Security in the European Union: Towards Centralized Controls and Maximum Surveillance', in E. Guild and F. Geyer (eds.):*Security versus Justice? Police and Judicial Cooperation in the European Union* (Aldershot, 2008), at 374 and ff.

[67] F. Esteve García, 'El control judicial de las agencias del Espacio de Libertad, Seguridad y Justicia', in C. Blasi Casagrán and M. Illamola Dausà (eds.):*El control..., supra* n. 59; and, more specifically in relation to Frontex, M. Fink:*Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law* (Oxford, 2018).

[68] ECJ, *Åkerberg Fransson*, EU:C:2013:105, para. 21; and ECJ, *Pfleger and others*, C-390/12, EU:C:2014:281, para. 34.

 DOI:10.17103/sybil.23.23