A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control

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'The verdict in the future will be a terrible one: No one will be able to again say that he did not know it all. Whoever knew about it and raised no objections has made himself complicit.'
Prof Dr Klaus Bade, 15 March 2016[1]

INTRODUCTION

During the first five months of 2015 approximately 1,850 people died across the Mediterranean whilst attempting to reach the European Union (EU).[2] In response to this, in April 2015 the Commission presented a 10-point action plan,[3] on the basis of which the Council agreed to strengthen the EU's 'presence at sea, to fight traffickers, to prevent illegal migration flows and to reinforce internal solidarity and responsibility'.[4] As a result of this agreement, on 13 May 2015 the Commission presented a highly controversial European Agenda on Migration (hereinafter 'European Agenda'), which included both internal and external policy measures. One of the cardinal objectives of the European Agenda is to 'address the root causes of migration',[5] and to fulfil this objective the EU aims at 'mainstream[ing] migration issues into development cooperation'.[6] However, since the adoption of the European Agenda, and arguably because of it, EU member states have not lived up to their obligations to extend international protection to those who need it. Similarly, as detailed in this article, they have pushed for policies aimed at externalising the management of migration, including through dubious bilateral agreements which foresee the use of aid funding in return for cooperation on migration control. In so doing, they have failed to move towards a more coherent, humane and legally acceptable response to the arrival of people on European shores.

Thus, against a background of pushbacks at sea and of closing borders with razor wire

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The authors wish to thank Professor Nigel White and Dr Marko Milanovic for their useful comments.
Unless otherwise stated, all websites were last accessed on 12 January 2016.
[1] See interview with MiGAZIN, the German online portal specialising in migration, available at: http://www.migazin.de/2016/03/15/bades-meinung-merkels-mann-grobe/ .
[2] According to UNHCR, 3,771 deaths occurred across the Mediterranean by the end of 2015, with 1,015,078 people attempting the crossing. As of October 2016, whilst the number of crossings had fallen sharply to 327,800, the number of lives lost at sea already amounted to 3,740. See http://www.unhcr.org/uk/news/latest/2016/10/580f3e684/mediterranean-death-toll-soars-2016-deadliest-year.html.
[3] European Commission, 'Joint Foreign and Home Affairs Council: Ten Point Action Plan on Migration', available at: http://europa.eu/rapid/press-release_IP-15-4813_en.htm.
[4] See 'Special Meeting of the European Council, 23 April 2015: Statement', available at: http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/.
[5] See European Commission's Press Release 'Managing Migration Better in All Aspects: A European Agenda on Migration', available at: http://europa.eu/rapid/press-release_IP-15-4956_en.htm.
[6] EU Commission, 'A European Agenda on Migration', COM(2015) 240, 13 May 2015, 8.

on land,[7] the fact that the European Agenda also envisages the use of development aid as a tool for migration control has so far remained largely unchallenged. At best, it has been considered as a 'lesser evil': a less unpleasant option than seeing thousands of people trying to climb newly erected fences, or worse, crossing the Mediterranean and drowning at sea. The explicit use of development aid to control migration, however, raises a number of points of contention: for instance, can such funds be at all classified as 'development aid'? How will this aid be allocated and what repercussions will it have on overall aid distribution and availability for 'development' projects? With an overall budget of EUR 96.8 billion allocated to EU external cooperation assistance for the 2014-2020 period, the EU flexes its donor muscles and unapologetically calls for stronger action to link aid to the stemming of migratory flows towards the EU. This call, operationalised *inter alia* by the specific creation of a new Emergency Trust Fund for Africa (EUR 1.8 billion, to be matched by the contributions of recalcitrant member states), raises serious concerns about the type of development cooperation that the EU intends to pursue within the context of the European Agenda.[8] Crucially, in current EU measures aid funds are explicitly made conditional on returns to partner countries (such as Turkey, Afghanistan, Sudan, and soon Libya and other African countries),[9] where, arguably, substantive protections enshrined in the 1951 Refugee Convention and in international law more generally are not fully ensured.

The main aim of this article is to expose and analyse the way in which the European Agenda links development aid to the externalisation of migration control, to assess whether such policies breach international law and whether the EU and its member states can be held liable for aiding or assisting such breaches. More broadly, the article also reflects on the longer-term implications that the incorrect classification and distorted use of aid within the European Agenda may have on aid practice. It argues that the absence of regulation over what aid is and how it should be allocated fuels the many problems surrounding aid, thus enabling its (mis)use within the European Agenda for migration control. From the outset, there are two main underlying questions that this article seeks to answer: firstly, is it legal for the EU and its member states to fund third countries in order for them to implement migration control measures in the service of the EU, mainly aimed at returning people and preventing them from seeking asylum in the member states? And secondly, are the EU and its member states in breach of their obligations under international law if they conclude agreements with countries that notoriously violate human rights, especially when these agreements foresee no mechanisms to ensure that international obligations will be respected by the recipient country?

One key problem with the EU measures is that so far they seem to be relying on the assumption that refugees can be returned if they enter a country illegally. Article 31 of

[7] On the border closures which took place along the Western Balkans in March 2016, and on the related entrapment of refugees in Greece, see P Kingsley, 'Balkan countries shut borders as attention turns to new refugee routes', The Guardian, 9 March 2016, available at: http://www.theguardian.com/world/2016/mar/09/balkans-refugee-route-closed-say-european-leaders.

[8] See 'Joint Way Forward' agreement with Afghanistan signed in October 2016, EU Doc 12191/16 of 22 September 2016.

[9] See EU Commission, 'Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration' (7 June 2016) COM(2016) 385 final. See ibid for agreement with Afghanistan; below at n 22 for agreement with Sudan.

the 1951 Refugee Convention clearly establishes that state parties should not penalise refugees for reaching a perspective country of asylum illegally,[10] thus taking into consideration the fact that otherwise states might do anything within their powers to close all legal entry routes, that is, precisely what the EU has been doing over the last two decades.[11] This principle of non-penalisation for mere illegal entry was confirmed in June 2016 by the Court of Justice of the EU (CJEU) in the *Affum* case.[12] Similarly, Article 31 cannot be interpreted as requiring immediate and direct arrival from the place in which refugees are at risk of persecution.[13] Such an interpretation would result in refugees only ever being able to seek asylum in neighbouring countries, given the existence of contemporary deterrent measures aimed at halting the arrival of refugees.[14]

This article argues that the agreements concluded under the European Agenda to externalise migration control are incompatible with international law and that, as a result, the diversion of development funds towards supporting such agreements is highly concerning. It also argues that by providing aid to third countries and making it conditional on effective cooperation on migration control, yet without ensuring that international protection obligations are adequately upheld, the EU and its member states have knowledge of the wrongful acts committed by third countries[15] in order to control migration towards the EU. They could therefore be liable for aiding or assisting wrongful conduct occurring within the context of these cooperation agreements.[16]

The EU presents its policies as 'rights-based' cooperation or development actions aimed at addressing the situation of vulnerable migrants. However, as evidenced in

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[10] International refugee law fundamentally recognises all asylum seekers as presumptive refugees. Refugee status determination procedures, therefore, are only declaratory in nature and international protection extends to asylum seekers, unless and until refugee status is rejected on the merits after an appropriate legal process. See eg G Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection' (2001), available at: www.unhcr.org/3bcfdf164.pdf.

[11] See generally R Zaiotti (ed), *Externalizing Migration Management: Europe, North America and the Spread of 'Remote Control' Practices* (Routledge, 2016); and T Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2013) at 15.

[12] Case C-47/15 *Sélina Affum v Préfet du Pas de Calais and Procureur général de la Cour d'appel de Douai* [7 June 2016] Grand Chamber judgment.

[13] See eg JC Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 394.

[14] See Y Holiday, 'Penalising Refugees: when should the CJEU have jurisdiction to interpret Article 31 of the Refugee Convention?', available at: http://eulawanalysis.blogspot.co.uk/2014/07/penalising-refugees-when-should-cjeu.html. See also C Costello and M Mouzorakis, 'EU Law and Detainability of Asylum-Seekers' (2016) 35 *Refugee Survey Quarterly* 47.

[15] On the level of knowledge required for aiding and assisting, see H Moynihan, 'Aiding and Assisting, Challenges in Armed Conflict and Counterterrorism', available at: www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-11-14-aiding-assisting-conflict-counterterrorism-moynihan.pdf.

[16] See J Hathaway and T Gammeltoft-Hansen, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235. For an argument suggesting that in this type of case it would be admissible to expand the *Soering* criteria for jurisdiction, see M Jackson 'Freeing *Soering*: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 *European Journal of International Law* 817; and M Jackson, *Complicity in International Law* (Oxford University Press, 2015).

this article, these policies are mainly aimed at externalising migration control.[17] In order to do so, the EU promotes a 'more for more' approach (i.e. more cooperation on controlling migration in exchange for more aid funds), whereby 'development' aid is made conditional on cooperation in halting migration. As evidenced in this article, most of the 'development' policies implementing the European Agenda are aimed at ensuring swift returns to countries of transit or origin, and have little or no provision about development *strictu senso*. Even when these policies are linked to a humanitarian or development objective, they often lack any appropriate monitoring mechanism to ensure that the said objective will be fulfilled. In this way the funds provided risk remaining blank cheques to the host government.

For instance, in relation to the EU-Turkey Joint Action Plan[18] (hereinafter 'Joint Action Plan'), first introduced at the end of 2015, an official EU-Turkey statement of 18 March 2016 explicitly refers to 'projects for refugees, notably in the field of health, education, infrastructure, food and other living costs' and to the channelling of funds through the Facility for Refugees in Turkey.[19] Although, at first sight, it might seem acceptable to consider these funds as aid to refugees, it is contended in this article that without specific measures to ensure that the funds to the recipient state will be spent for the purposes for which they have been allocated,[20] there remains a real risk that these funds will assist the implementation of migration control measures in breach of international law.

The arguments introduced above will be developed in the four sections of this article: section I introduces the European Agenda and analyses its 'development' measures, looking at the way in which most of these measures are essentially aimed at outsourcing migration control to third countries, so as to prevent asylum seekers from starting their journeys towards Europe or ever reaching European shores. Section II reviews the cooperation agreements signed between Italy and Libya since 2008, under which aid to Libya became conditional on helping Italy halt migration. Since Italy, together with Spain,[21] has been one of the first EU member states to link the disbursement of development funds to migration control, and since claims have been made that the EU approach to 'development for migration' has been drawn on the lines of the Italian experience,[22] these agreements offer an interesting historical perspective and further insight into possible developments and broader implications of the current EU policies. As evidenced by an agreement recently signed with

[17] Zaiotti (n 11).
[18] Although this agreement is often referred to as the EU-Turkey 'deal', most EU documents refer to the EU-Turkey Joint Action Plan of 15 October 2015. See European Commission Fact Sheet: EU-Turkey Joint Action Plan, available at: http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.
[19] See EU-Turkey Statement, 18 March 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.
[20] This does not apply, of course, to funds channelled through well-established agencies which are providing assistance to refugees in Turkey, including with EU funds.
[21] See Carrera et al, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?' (2016), available at: www.ceps.eu/publications/eu-morocco-cooperation-readmission-borders-and-protection-model-follow.
[22] See the non-paper submitted by the Italian government in May 2016: 'Migration Compact: Contribution to an EU Strategy for External Action on Migration' (2016), available at: www.governo.it/sites/governo.it/files/immigrazione_0.pdf. See also Ian Traynor, 'EU considering plan to outsource Mediterranean migrant patrols to Africa' The Guardian, 20 March 2015, available at: http://www.theguardian.com/world/2015/mar/20/eu-italian-proposals-outsource-mediterranean-migrant-patrol-africa.

Sudan,[23] Italy also continues to lead the way in concluding bilateral agreements with countries with questionable human rights records,[24] and without mechanisms in place to ensure that aid funds are used for genuine development purposes. As such, an in-depth analysis of the Italian approach to this type of development funding can shed light on the wider approach adopted both bilaterally and at EU level within the framework of the European Agenda. Section III considers the dangers of using development policies to control migration flows, especially in terms of distorting the fundamental meaning of development aid and the ways in which it is defined and allocated. This section explains why the funding of migration control envisaged as part of the European Agenda cannot be considered aid, as it is essentially a payment made to third countries to readily accept returnees and prevent departures—measures aptly described as 'pull-backs by third countries in the service of EU member states'.[25] The EU is using taxpayers' money not to assist, not to help, not to create development and welfare, but to illegally 'pull-back' people, including women and children. Calling funds allocated for these purposes 'aid' would legitimise its use and its disbursement while further damaging aid reputation and perception. Section IV consolidates the main legal argument, advanced throughout this article, that the EU 'development' policies are fundamentally incompatible with international human rights law and international refugee law. This section argues that the EU and member states may be liable for aiding or assisting a third country in breaching its protection obligations as a result of the provision of development aid under the cooperation agreements of the European Agenda. More specifically, liability follows because aid is not merely given 'in good faith' and later misused by third countries implementing migration control measures in breach of international law. In its cooperation agreements, the EU and its member states make aid conditional on and instrumental to the implementation of measures that lead to breaches of international law. They have therefore knowledge that the funds provided will aid or assist such breaches by third countries.[26] The article thus concludes that EU cooperation agreements with third countries should be reconsidered and that international legal obligations vested upon the EU, its member states and third countries should be upheld.

I. The EU Agenda and its Development Measures: The 'More for More' Approach

The European Agenda presented by the Commission on 13 May 2015 includes both internal and external policy measures, not least the deployment of a Common Security and Defence Policy (CSDP) operation which targets the vessels used by smugglers

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[23] See Memorandum of Understanding on migration between Italy-Sudan, available at: www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan_rev.pdf ; and for allegations that aid funds might support the Janjaweed militia, see www.statewatch.org/news/2016/oct/ep-meps-letter-collective-expulsions-to-Sudan.pdf.

[24] Hathaway and Gammeltoft-Hansen (n 16), 256, explaining that it is not unusual for cooperation agreements on migration to be with third countries which are unable/unwilling to ensure international protection.

[25] N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *European Journal of International Law* 591, 592.

[26] This was confirmed in *Hirsi Jamaa and Others v Italy*, ECHR Grand Chamber, Application no 27765/09, judgment of 23 February 2012. The ECtHR held (at para 131) that Italian authorities knew or should have known that the irregular migrants returned to Libya 'would be exposed in Libya to treatment in breach of the [Convention] and that they would not be given any kind of protection in that country'.

and traffickers. On 18 May 2015 the CSDP operation, backed by a Crisis Management Concept,[27] was approved by the Council. EUNAVFOR MED (later renamed Operation Sophia),[28] the EU military operation in the Southern Central Mediterranean was thus established[29] to contribute to the disruption of 'the business model of smugglers and traffickers of people in the Mediterranean'.[30] Despite the sharp criticism levelled against the launch of Operation Sophia and the decision to 'systematically identify, capture and destroy'[31] the vessels used by smugglers and traffickers, in February 2016, NATO also deployed its ships in the Aegean Sea as part of a mission to support EU authorities and member states.[32] The mandate of the NATO mission in the Aegean Sea is aimed at intelligence, surveillance and reconnaissance (ISR) in Greek and Turkish territorial waters. These activities are of crucial importance for the success of Operation Sophia which was initially limited to international waters. The NATO mission is not authorised to stop vessels carrying refugees and is therefore presented as deterring human trafficking networks. Crucially, however, NATO provides critical ISR information to Greek, Turkish and Frontex [33] authorities, and although ISR operations *per se* may not trigger responsibility for *refoulement* measures, the provision of ISR information which is then used to operationalise returns may trigger NATO's responsibility in aiding or assisting breaches of international law.[34]

As further discussed in section IV, such returns would be in breach of the prohibition against *refoulement*, according to which states are under a clear obligation, enshrined both in international refugee law and in international human rights law, not to return asylum seekers to a place where they would be at risk of torture and other cruel, inhuman or degrading treatment. *Non-refoulement* is also a principle part of

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[27] See Common Security and Defence Policy, 'Crisis Management Concept', available at: http://www.statewatch.org/news/2015/may/eu-med-military-op.pdf.

[28] Ironically, the operation was renamed after the name of a baby born to a mother rescued off the coast of Libya in August 2015. See http://www.euintheus.org/press-media/eunavfor-med-operation-sophia-helping-migrants-in-the-mediterranean/.

[29] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1432022661565&uri=OJ:JOL_2015_122_R_0004.

[30] See Council of the European Union, Press Release, 18 May 2015, available at: http://www.consilium.europa.eu/en/press/press-releases/2015/05/18-council-establishes-naval-operations-disrupt-human-smugglers-mediterannean/.

[31] A European Agenda on Migration (n 6) at 3.

[32] See NATO, 'NATO defence ministers agree on NATO support to assist with the refugee crisis and migrant crisis' 11 February 2016, available at: http://www.nato.int/cps/en/natohq/news_127981.htm. See also NATO press conference of 11 February 2016, available at: http://www.nato.int/cps/en/natohq/opinions_127972.htm, and Statement by NATO Secretary General, Jens Stoltenber, 25 February 2016, available at: https://www.youtube.com/watch?v=BYzw9uQ_4iM.

[33] Council Regulation 1168/2011 (EC), amending Council Regulation 2007/2004, (EC), arts. 1, 3(b) establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2004) Official Journal of the European Union (L349/1). Also note that, as part of the implementation measures of the European Agenda, Frontex' mandate was expanded with the creation of the European Border and Coast Guard, officially approved on 15 September 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/09/14-european-border-coast-guard/.

[34] M Zwanenburg, 'Shared Responsibility in North Atlantic Treaty Organization-led Operations' (2016), available at: www.sharesproject.nl/publication/shared-responsibility-in-north-atlantic-treaty-organization-led-operations/.

customary international law,[35] as a complementary element of the absolute prohibition against torture.

If the EU migration response at sea is far from acceptable, not least in terms of its legality vis-à-vis international law,[36] the response on land is equally disconcerting. Closures of the Balkan land route during the first few months of 2016, for instance, following a closed-door agreement between Austria, Croatia, The Former Yugoslav Republic of Macedonia, Serbia and Slovenia,[37] have resulted in collective expulsions, serious human rights violations and a *de facto* sealing of Greek borders.[38]

At least on paper, the European Agenda rests on four main pillars: (1) Reducing the incentives for irregular migration; (2) Border management – saving lives and securing external borders; (3) Europe's duty to protect: a strong common asylum policy; and (4) A new policy on legal migration.[39] Whilst the European Agenda claims to have as its 'immediate imperative' the 'duty to protect those in need', a closer analysis of its four pillars and key actions reveals its real emphasis on pushing migration control beyond European borders,[40] closer to the countries of origin and transit: essentially, an attempt to *prevent* migratory flows towards Europe.

It is apparent that, through the European Agenda and partly with the use of development funds, the EU is adopting a series of measures aimed at achieving this preventative objective: e.g., identification and possible interception of vessels; the deployment of immigration officers in foreign countries;[41] the widespread use of 'safe countries of origin' and 'safe third countries' arrangements;[42] and the creation of special facilities[43] for what may result in the creation of *de facto* centres for the extraterritorial processing of asylum claims and the offshore detention of asylum seekers and returnees. Whilst section IV analyses the international legal implications of some of the preventative measures contained in the European Agenda, this section focuses specifically on its 'development' policies, in particular those related to the creation of a European Trust Fund for Africa. Since the EU-Turkey Joint Action Plan is also included in the 'external dimension' policies of the European Agenda, relevant aspects of this agreement are discussed in this article, within the context of ascertaining the legality of the cooperation agreements concluded under the European

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[35] G Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press, 2007) 208. See however J Hathaway, 'Leveraging Asylum' (2010) 45 *Texas International Law Journal* 45.

[36] Goodwin-Gill and McAdam, ibid.

[37] See UN High Commissioner for Human Rights, 'Europe/migration: Five-country police agreement exacerbates crisis and puts vulnerable migrants at risk', available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17091&LangID=E.

[38] See Spokesperson of the Office of the UN High Commissioner for Refugees (UNHCR), 'UN warns of imminent humanitarian criris in Greece amid disarray in Europe over asylum', available at: http://www.unhcr.org/uk/news/briefing/2016/3/56d564ed6/unhcr-warns-imminent-humanitarian-crisis-greece-amid-disarray-europe-asylum.html.

[39] A European Agenda on Migration (n 6) at 6-17.

[40] Gammeltoft-Hansen (n 11).

[41] According to the European Agenda, the Commission and the European External Action Service will work together with partner countries 'to tackle migration upstream': see European Agenda on Migration (n 6) at 5.

[42] See EU Commission Fact Sheet, 'Refugee Crisis: European Commission takes decisive action, Questions and Answers' 9 September 2015, available at: http://europa.eu/rapid/press-release_MEMO-15-5597_en.htm.

[43] ibid.

Agenda.

The European Trust Fund for Africa

Throughout the first half of 2016 most of the media attention focused on migration flows through the Aegean route and the Western Balkan route, with EU strategies mainly aimed at stopping arrivals from and ensuring prompt returns to Turkey. These strategies have in fact resulted in the emergence of alternative routes to the EU. In March 2016, refugee agencies recorded a marked increase in incoming migratory flows through the central Mediterranean route (mainly from Libya to Italy) and via new routes across the Adriatic Sea from Albania.[44]

This is one of the reasons why EU agreements with African partners have never lost their strategic significance, and remain at the core of the EU external 'development' policies of the European Agenda. Most importantly, a specific set of migration-related 'development' activities is dedicated to strategic countries of origin and transit in the regions of Sahel, Horn of Africa, Lake Chad, Gulf of Guinea and North Africa. As of March 2016 the plan was to fund these activities by diverting EUR 1.8 billion from the EU development budget (see table below), mainly from the European Development Fund (EDF), towards the creation of a new Emergency Trust Fund for Africa. According to the Commission, this Trust Fund will enable a much swifter allocation of funds,[45] 'to create stability in the regions [of Sahel and the Lake Chad, the Horn of Africa, and the North of Africa] and to contribute to better migration management'.[46] The Trust Fund was approved at the Valletta Summit on Migration in November 2015[47] and provides for projects aimed at, *inter alia*, supporting the reintegration of returnees; improving 'migration management, including containing and preventing irregular migration and fighting against the trafficking of human beings, smuggling of migrants and other related crimes'; and, improving governance, also in terms of border management and other migration-related aspects.[48] According to a Commission communication dated February 2016, a total amount of EUR 350 million had been allocated to projects mainly aimed at, *inter alia*, helping local authorities managing migratory flows and promoting alternatives to irregular migration; improving the resilience of local populations and 'creating conditions for the return and reintegration' of refugees; strengthening migration management 'through providing capacity building and basic equipment, developing policies and legislation on trafficking and smuggling, and raising awareness about the dangers of irregular migration'; and, finally, supporting the management of voluntary returns.[49]

Instruments	**Commitments (EUR)**
Reserve of the 11th EDF	1 000 000 000

[44] See 'Is Italy the next Greece?' Financial Sense, 14 March 2016, available at: http://www.financialsense.com/contributors/stratfor/is-italy-next-greece.
[45] See EU Commission Fact Sheet (n 42).
[46] ibid, question 7.
[47] See Council of the European Union, 'Valletta Summit on Migration Action Plan' (17 November 2015) Document 14146/15, available at: www.consilium.europa.eu/en/press/press-releases/2015/11/12-valletta-final-docs/.
[48] ibid.
[49] EU Commission, 'Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration' (10 February 2016) COM(2016) 85, 7-8.

Regional Indicative Programme for West Africa – 11th EDF	200 000 000
Regional Indicative Programme for Central Africa – 11th EDF	10 000 000
Regional Indicative Programme for Eastern Africa, Southern Africa and the Indian Ocean – 11th EDF	25 000 000
National Indicative Programmes for Horn of Africa 11th EDF	80 000 000
Special Support Programme for South Sudan – 9th and previous EDFs	80 000 000
European Neighbourhood Instrument	200 000 000
Instrument Contributing to Stability and Peace	10 000 000 TBC
Humanitarian aid, food aid and disaster preparedness	50 000 000
Development Cooperation Instrument	125 000 000
DG HOME Budget lines	20 000 000 TBC
EU Member States contributions	Amounts to be confirmed
Balance available	1 800 000 000
Total for the measure proposed	1 800 000 000

Source: EU Commission Fact Sheet (http://europa.eu/rapid/press-release_MEMO-15-5597_en.htm)

Various measures in the European Agenda target the Sahel region and include the Saharan city of Agadez, for instance, measures aimed at ensuring the prompt readmission and return of people who do not qualify for international protection.[50] Agadez is a crucial crossroad for migrants from sub-Saharan Africa seeking to reach the EU through Libya and Algeria.[51] Migrants expelled from Northern African countries are also often routed through Agadez, where the International Organization for Migration (IOM) has been operating transit centres since 2011, including with funding from the Italian Ministry of Interior.[52] Although previous migration-related cooperation attempts with Niger failed because of widespread corruption, the European Agenda reflects the EU determination to increase its cooperation with African partners in the region, so as to ensure prompt returns.[53] One element of the 'development' measures for Africa is the creation of a pilot multi-purpose centre in Agadez. The centre is presented, rather vaguely, as an assistance and information point for migrants, 'to provide a realistic picture of the likely success of migrants' journeys, and offer assisted voluntary return options for irregular migrants'.[54] The centre, however, does not exist in a vacuum, and is part of a 'firm commitment to supporting capacity building of third countries in the field of migration and border

[50] The capacity-building mission EUCAP Sahel Niger will also be strengthened to support the new migration-reducing measures in the European Agenda. Similarly, EUCAP Sahel Mali already provides training to Mali national security forces and an expansion of its mandate is under consideration. See EU Commission Fact Sheet (n 42) at 11.
[51] IOM, 'IOM Opens Agadez Transit Centre in Niger Desert', 14 November 2014, available at: https://www.iom.int/news/iom-opens-agadez-transit-centre-niger-desert.
[52] ibid.
[53] Valletta Action Plan (n 47) at 20-22.
[54] EU Commission Fact Sheet (n 42) at 8.

management, as well as to the stabilisation and development of these regions of Africa, from the Sahel to the Horn of Africa, and the North of Africa'.[55]

As discussed in the next section, in order to implement the external dimension of the European Agenda, the EU is increasingly entering into bilateral agreements of dubious legality with transit countries and implementing return measures which have already been found to be in breach of international law.[56]

II. DEVELOPMENT COOPERATION AGREEMENTS BETWEEN ITALY AND LIBYA: A DANGEROUS PRECEDENT

Italy was notoriously one of the first countries in Europe to link the use of development funds to migration control. Prior to the launch of the European Agenda, claims were made that the EU approach to 'development for migration' was drawn on the lines of the Italian experience,[57] whilst Italy continues to seek strategic partnerships with countries such as Sudan to externalise migration control.[58] This section, therefore, provides an account of the salient features of the development cooperation agreements signed between Italy and Libya in the early-to-mid 2000s,[59] under which aid to Libya became conditional on halting migration to Italy. An overview of these agreements provides an historical perspective on the use of aid to halt migration flux and enables a clearer understanding of the possible consequences and broader implications of current EU policies.

Using Aid to Halt Refugees: the Libya-Italy agreement as a precursor to the EU Action Plan?

One of the core principles of Italian development cooperation is to be an 'integral part of Italian foreign policy' (Article 1 of Law 125/2014).[60] Italy is not the only donor to combine development cooperation policies with foreign policy interests.[61] Such links,

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[55] ibid, at 7.
[56] *Hirsi* (n 26).
[57] See above (n 22).
[58] See above (n 23).
[59] Cooperation between Italy and Libya on migration matters dates back to the early 2000s. See also F Mussi and NF Tan, 'Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia', in this volume at XXX. However, the first agreement linking development projects to halting migration was signed in 2008 (see below at n 65).
[60] Italian development cooperation has its legal foundations in Law 49/87 as recently modified and modernised by Law 125/2014. Core objectives of Italian development cooperation policies are: to promote and respect human rights and human dignity, equality and the Rule of Law (Article 1.2(b)). Article 1 also affirms that Italian development cooperation 'is inspired by the UN Charter and the Charter of Fundamental Rights of the European Union. Its action in conformity with Art 11 of the Italian Constitution contributes to build peace and justice and pursues the objective of solidarity amongst people in partnership with recipients' (Article 1.1).
[61] M Carbone (ed), *Italy in the post-Cold War Order: Adaptation, Bipartisanship, Visibility* (Lexington Books, 2011) especially chapter 5, Carbone 'Italy as a Development Actor: A Tale of Bipartisan Failure'. There has been much research on why donors grant aid. Economic, political, ethical reasons (and a mixture of all or some of these factors) are often associated with aid granting. See, eg, SW Hook, *National Interest and Foreign Aid* (Lynne Rienner, 1995); N Woods, 'The Shifting Politics of Foreign Aid' (1995) 81 (2) *International Affairs* 393. Experts criticise the way in which aid is allocated, arguing that aid should be about development only and not about fostering donors' political and economic interests. On this, see especially A Alesina and D Dollar, 'Who Gives Foreign Aid to Whom and Why?' (2000) 5 *Journal of Economic Growth* 33. Donors, on the contrary, maintain that the

however, rather than being openly made in key development cooperation law, are usually made via policy statements, policy papers and *ad hoc* speeches by development cooperation ministers[62] (or foreign policy ministers). Arguably, there are significant implications in having an official link between development cooperation and foreign policy. For instance, such links justify–and reinforce–a certain outdated idea of development and development cooperation. They also drive development cooperation close to donors' vested interests and far from states' national and international obligations to protect and respect human rights and broader UN objectives and goals (e.g. as enshrined in Articles 55 and 56 of the UN Charter). Linking development cooperation to foreign policy interests also helps to justify public officials' and politicians' use of development cooperation as a means to enhance specific national interests and their choices of aid recipients rather than, or even at the expense of, 'development' objectives in the strict sense,[63] leading to ineffective distortions of aid allocation (see section III below).

Given the link between aid and foreign policy which is openly made in the Italian development cooperation law, it is not surprising that Italian politicians have been open about aid being used to control (or find allies against) migration. Indeed, differently from other countries who have resorted to partially or completely closing their borders to immigration, or who have resorted to interceptions at sea and pushbacks, since the early 2000s Italy has looked for 'alternative' ways of dealing with migration. In a quest to prevent migrants from reaching Italian shores, successive Italian government(s) (i.e. all those administrations from across the political spectrum that have followed one another since the 2000s) resorted to using development aid as a means of controlling migration flows. Recipient countries were carefully selected according to their proximity to Italian shores (for example Libya and Tunisia) and their strategic position in regards to migration flows. Italy committed to strengthening cultural and economic relationships, building major infrastructures such as roads and hospitals (famously, the Libya-Egypt highway was part of the Italian-Libyan development cooperation plan) and contributing to other social programmes. This was done in exchange for 'collaboration' on immigration control, i.e. the aid was openly made conditional on the recipient helping Italy to control migration flows by stopping migrants at the borders and preventing them from initiating the 'dangerous' travel by sea to reach Italian shores.

The case of Italian aid to Libya (and to its former Colonel Gaddafi) is particularly controversial. Agreements between Italy and Libya date back to the early 2000s. However, while earlier agreements mainly focused on strengthening cultural and economic ties between the two countries,[64] subsequent agreements (and the one

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achievement of foreign policy objectives while granting development aid is simply a collateral outcome of sound development objectives.

[62] These are often driven and conditioned by specific historical events. See recently the UK DFID, 'UK Aid: tackling global challenges in the national interest', available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478834/ODA_strategy_final_web_0905.pdf.

[63] For example, politicians often unashamedly use and promote aid as an instrument to further economic opportunities for national industries and other political interests.

[64] For example, the Accordo di cooperazione culturale, scientifica e tecnologica fra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, signed in Tripoli on 5 June 2003 and ratified by Italy with LEGGE 9 dicembre 2005, n. 258 (*GU n.297 del 22-12-2005*) is all about cultural

signed in 2008 in particular) make strong and explicit links between aid and migration control. It is this latter agreement which provides the focus for the analysis of this section. On 30 August 2008 a Treaty of Friendship, Partnership and Cooperation between Italy and Libya was signed. The Treaty was ratified by Italy with Law 7/2009 on 6 February 2009.[65] The Cooperation Treaty specifically foresaw cooperation in migration matters as one of its central objectives (Art 19). For its part, Italy committed to donate 5 billion US dollars over 20 years (to a maximum of 250 million US dollars per year) to implement infrastructure projects in Libya (Art 8, para 1). The infrastructure projects could be implemented by Italian contractors only (Art 8, para 2) and Italy remained responsible for the management of the financial funds (Art 8, para 4).[66] Indeed, Italy had been successful in finding in Gaddafi a strategic ally against immigration. Despite the outcry of the international community, the Libyan dictator implemented stringent migration control measures. Gaddafi also accepted the return to Libya of rafts and other vessels intercepted at sea (*de facto* pushback policies).[67] The United Nations High Commissioner for Refugees (UNHCR) repeatedly denounced the deplorable conditions for asylum-seekers in Libya; the inhumane treatment to which people were subjected in the Libyan camps and detention centres; and the recurring human rights abuses perpetrated against them, as well as the despicable conditions suffered by many of those affected by the pushbacks. Despite being aware of this situation, however, the Italian Government continued to call for the fulfilment of the migration commitments undertaken by Libya as a condition for the aid to be granted. The Italian Minister of the Interior at the time, Maroni (exponent of *Lega Nord*, a political party notorious for its xenophobic ideals), was proud to state that aid to Libya was conditional on Libya helping Italy to halt migration and he once even publicly proclaimed that if Libya was not more effective, aid funding would be withdrawn.[68]

The squander of 'aid' money to Libya continued uninterrupted until the surge of the civil war, amidst suspicions of corruption and lack of monitoring mechanisms to ascertain whether the aid money was being spent for development projects.[69] Once the armed conflict started, Italy continued for a brief period to grant aid money to the insurgent government but when it was clear that no action was being taken to halt

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cooperation and mutual collaboration in the education and arts sector. No specific funds are allocated although it is clearly stated that each country will contribute according to their means.

[65] LEGGE 6 febbraio 2009, n. 7 *Ratifica ed esecuzione del Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 agosto 2008* (GU n.40 del 18-2-2009), available at: www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2009-02-18&atto.codiceRedazionale=009G0015¤tPage=1.

[66] For the Cooperation Treaty see ibid; a similar agreement has been signed with Tunisia (see www.storiemigranti.org/spip.php?article1004 and also www.interno.it which refers to the agreement between Maroni and Essid).

[67] The ECHR has condemned Italy's repatriation of immigrants from Libya; see *Hirsi* (n 26).

[68] See Esteri, 'Immigrati, vacilla l'accordo con la Libia. Tripoli a Maroni: Non detti tu le regole', Corriere della Sera, 22 Settembre 2008, available at: www.repubblica.it/2008/05/sezioni/esteri/libia-italia/maroni-immigrati/maroni-immigrati.html.

[69] Allegations in the Italian press denounced the lack of transparency in the way aid was being spent, including allegations that the money was being used to build a new villa for Gaddafi rather than to build new infrastructure for the country. Despite further, similarly grave allegations, no investigation was launched. See, for example, M. Cedolin, 'news internazionali : Regalo a Gheddafi o alla lobby del cemento?', available at: http://www.luogocomune.net/site/modules/news/article.php?storyid=2797. And see also http://www.lultimaribattuta.it/27636_emergenza-sbarchi-le-frasi-di-maroni-e-i-contesti-totalmente-diversi.

refugees (and possibly when it was feared that the money could have been misappropriated by ISIS) aid to Libya ceased.[70]

Although it may be argued that the factual background to the agreements with Libya and Turkey appear to be different, a closer look at the EU-Turkey Joint Action Plan (further discussed in section IV) reveals that the latter agreement contains some of the same problematic characteristics as that concluded by Italy and Libya. Despite EU claims that the protection of the most vulnerable underpins the European Agenda, it is apparent that in general its policies are motivated by a desire to prevent refugees from reaching the EU. In a manner similar to the Cooperation Treaty between Libya and Italy, the new forms of ‘more for more’ development promoted by the EU and its member states have as their central objective cooperation in migration matters. On 18 March 2016, the EU committed to speeding up the disbursement to Turkey of EUR 3 billion and promised funding for further (unidentified) projects.[71] Crucially, the document stated that ‘provided the above [migration] commitments achieve their desired results’, the EU was also ready to allocate funding up to a maximum of an additional EUR 3 billion by the end of 2018. It was common knowledge at the time that in order to agree to the plan, the Turkish government had in fact requested 6 billion euros, as well as the fast-tracking of its EU accession procedure and visa liberalisation for Turkish citizens.[72] Despite the widespread condemnation of the agreement,[73] the EU relied on Article 38 of the Asylum Procedures Directive and on the fact that in practice Greek courts will have to establish whether the risk of direct and/or indirect *refoulement* in Turkey is such as to fail to meet the level of security necessary for Turkey to qualify as a safe third country under Article 38. Correspondence by the Commission to the Greek authorities[74] indicated in May 2016 that the former considered that Article 38 only required that returnees were afforded protection equivalent to the 1951 Refugee Convention, rather than its ratification without geographical limitations. Furthermore, the temporary protection status granted to Syrians in Turkey, combined with Turkish written assurances and a Turkish regulation adopted in January 2016 granting Syrians permission to work under certain circumstances, were considered by the Commission protection equivalent to the 1951 Refugee Convention. These considerations, however, were

[70] Further agreements were signed in 2012, with a memorandum of understanding, and 2013 with a ‘technical cooperation agreement’. It appears that, as of 2016, Italy is taking part in a broader EU approach. See Mussi and Tan (n 59).
[71] See EU-Turkey statement (n 19).
[72] Jennifer Rankin, ‘Turkey outlines “one for one” plan to tackle Syrian refugee crisis’, The Guardian, 7 March 2016, available at: www.theguardian.com/world/2016/mar/07/eu-offers-another-3bn-to-urkey-at-emergency-migration-summit .
[73] See, eg German migration expert, Prof Dr Klaus Bade, who called the EU agreement with Turkey ‘scandalous’ and said that it amounted to ‘trading in refugees as commodities’ (n 1). See also the statement by the Council of Europe Commissioner for Human Rights, Nils Muiznieks: ‘Stop Your Backsliding, Europe’, The New York Times, 14 March 2016, available at: www.nytimes.com/2016/03/15/opinion/stop-your-backsliding-europe.html?_r=0; and European Council of Refugees and Exiles (ECRE) ‘Memorandum to the European Council Meeting 17-18 March 2016: Time to Save the Right to Asylum’. There are, however, also scholars who consider it ‘a building block for an international solution to a transnational problem’: D Thym, ‘Why the EU-Turkey Deal is Legal and a Step in the Right Direction’ (2016), available at: http://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/.
[74] Letter by the European Commission Director-General for Migration and Home Affairs to the Greek Secretary-General for Population and Social Cohesion, 5 May 2016, Ref. Ares(2016)2149549 – 05/05/2016.

made before Turkey announced a state of emergency on 21 July 2016 following a failed coup attempt, and shortly thereafter declared derogation from the European Convention on Human Rights and from the International Covenant on Civil and Political Rights.[75] In May and October 2016 numerous reports also exposed allegations of exploitation of Syrian refugees, including children, in the Turkish garment industry.[76] Crucially, at the time of finalising this article the Hellenic Council of State, i.e. the Supreme Administrative Court of Greece, was reviewing for the first time the decision to return a Syrian asylum seeker to Turkey.[77]

As argued in this article, the EU-Turkey agreement is better understood as a continued EU trend to externalise migration control, including through the use of aid funds as part of cooperation agreements with third countries. This approach represents a critical setback not only for international protection in Europe, but also in terms of EU practice of development aid. The following section analyses in detail the profound implications that such a (mis)use of aid has in terms of triggering a development paradox, whereby no development *strictu senso* is actually ever engendered.

III. The Development Paradox of the EU Aid Plans

Sixty Years of Aid: What We Know, What We Have Learnt, What We Should Avoid

As outlined in section I, the EU agenda foresees the use of development aid resources to strengthen migration management in transit countries. In relation to the Trust Fund for Africa, much of the funds that the EU plans to use have been diverted from (or are surpluses of) previous development funds such as EDF. While the redistribution and diversion of existing resources from one fund to another raises serious questions of legitimacy and justice of donors' actions linked to recipients' (legitimate) expectations (especially within the EDF context) and to the availability and predictability of aid resources, the use of aid funds to halt migration is problematic in many other respects. Firstly, as analysed more fully in the next section, such use of aid could breach international refugee law because in effect it prevents refugees from reaching countries where asylum applications can be made. Secondly, the countries to which aid is diverted often have dubious human rights records, hence believing that they will respect migrants' human rights without ensuring that appropriate protections are in place is, to say the least, disingenuous. As explained throughout this article, returns to a country where people would be at risk of torture and other cruel, inhuman or degrading treatment amount to a violation of the prohibition against *refoulement*. Consequently, strengthening authoritarian regimes via the provision of aid money may result in liability of the EU and its member states for aiding or assisting third countries in the commission of wrongful acts, especially in violations of protection provisions enshrined in international human rights law, international refugee law and EU Treaty principles linking aid and human rights protection. Finally, these new

[75] For an analysis of these derogations, see M Scheinin, 'Turkey's Derogation from Human Rights Treaties – An Update' (2016), available at: www.ejiltalk.org/turkeys-derogation-from-human-rights-treaties-an-update/.

[76] See Business and Human Rights Resource Centre, 'Syrian Refugees: Abuse and Exploitation in Turkish Garment Factories', available at: www.business-humanrights.org/en/modern-slavery/syrian-refugees-abuse-exploitation-in-turkish-garment-factories; and BBC Panorama, Darragh MacIntyre, 'The Kids Who Have to Sew to Survive', 23 October 2016, available at: www.bbc.co.uk/news/business-37693173.

[77] Case AY 38839, Counsel submission on file with author.

recipients of aid money usually suffer a serious governance gap and are critically affected by corruption, hence raising questions over the use and effectiveness of the aid funds provided.

Before dealing with the legal question, this article highlights the contradictions that the EU migration policies raise from a development perspective and how such policies negate every principle of aid effectiveness that the EU has, up to the present, staunchly promoted.

To Be or Not To Be? Of the European Agenda Not Entailing Development Aid—and Why It Matters

Despite the fact that aid has been used as a financial instrument to help the poor for over sixty years, an official, legally binding, definition of what development aid is and how it should be categorised does not exist.[78] However, some guidance on what can be classified as development aid is given by the OECD, one of the few organisations recording levels of aid granted both bilaterally and multilaterally by donors. Since the OECD statistics are regarded as official records of aid disbursements and since most donors are members of and report their aid disbursement to the OECD, the definition of development aid there used is certainly indicative as to what the term is usually understood to refer.

According to the OECD glossary of statistical terms, aid can be classified as 'flows which qualify as Official Development Assistance (ODA) or Official Aid (OA).'[79] In turn, ODA is defined as 'Flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent (using a fixed 10 percent rate of discount)'.[80]

Since donors keep using this definition for reporting aid flows, and since this remains the only available categorisation of aid financing, it seems appropriate to use this definition as a baseline to ascertain whether the EU funds here under investigation could be classified as 'aid'.[81]

[78] Donors often disagree on how certain financial instruments should be regarded and end up classifying their aid disbursements as they see fit. Many are the example that could be made, for all see how the different definition of partial tied aid given by the EU and the OECD.
[79] OECD, Glossary of Key Terms and Concepts. From the 'Development Co-operation Report: Efforts and Policies of Members of the Development Assistance Committee', available at: http://stats.oecd.org/glossary/detail.asp?ID=3795.
[80] See https://stats.oecd.org/glossary/detail.asp?ID=6043. Official assistance to developing and transitional countries has two main components: grants, which do not need to be repaid; concessional loans, which have to be repaid, but at lower interest rates and over longer periods than commercial bank loans. Financial flows are officially defined as aid if the grant element is at least 25 per cent (calculated at a rate of discount of 10 per cent), that is, provided the present value of the repayments for that aid flow are no more than 75 per cent of its face value. Where the discount rate used is the cost of commercial capital of the recipient. See O Morrissey and H White, *How Concessional is Tied Aid* (CREDIT Research Paper, No 93/13, 1993) 4. The fact that aid can be granted as loans and hence increased the recipients' debt is a cause of great criticism.
[81] This definition, however, remains limited in many respects, for a start, because members of the OECD are mainly developed countries and therefore it offers a developed countries-centred notion of

In this respect a first objection that can be raised against the EU plan is that its financing to strengthen migration control cannot be classified as 'aid' because the EU planned funds are neither about 'economic development' nor about 'welfare'. Indeed, the proposed EU plans lack any real indication of what projects will be funded and as to how the EU money will be spent. Whilst the money is often allocated to training officials in neighbouring countries to behold, retain and 'receive' refugees, there are no clear economic or welfare plans for the recipient. As a result, the proposed EU use of funds fails to meet the OECD parameters for 'aid flows'.

It could be opposed that aid spent to assist refugees in donor countries already counts as development aid and that the EU is therefore not departing from current practices.[82] In fact the situation is significantly different. The EU proposals depart from previous practice where aid resources have been used to assist migrants in donor countries, providing basic and first instance necessities and hence improving the welfare of the beneficiaries. The EU plans foresee instead that the aid will be donated to the governments of countries hosting refugees with no indication —or reassurance—that the money will be spent to improve refugees' conditions. In fact one could argue that by returning people to countries that are already struggling with high numbers of refugees and increasing the number of people kept in camps or 'reception' centres, refugees' conditions will deteriorate rather than improve. Further, as explained below, the lack of monitoring systems to ensure that the aid money will be spent to assist refugees (and meet any other development objectives) compromises the EU position in terms of possible liability for aiding or assisting aid recipients in the violation of international law (see section IV).

Given the lack of any real development strategy and vision, it seems therefore paramount to call for a redefinition of the terminology used to define the money that will be used by EU member states to pay third countries to strengthen their border controls and to unconditionally accept returnees. It needs to be made clear that the EU is not disbursing aid, because the definition of aid flows accepted under current international practice is not met. Given the gravity of the violations which appear to occur whilst implementing these cooperation agreements, some may question the need to challenge the classification of the EU financial plans as development aid. Fundamentally it is important to challenge this distorted use of funds because using the term development aid would imply condoning the use of aid resources to control migration. Aid is an instrument of international cooperation between states as enshrined in numerous UN treaties (see below Article 55 and 56 UN Charter). Its use is accepted and encouraged at the international level because associated with good endeavours. Furthermore, like in the bilateral Italy-Libya agreements, the EU and its member states have put in place no guarantee to ensure that aid will not be misused by the recipient countries.[83] Sixty years of granting aid have taught us that it will be a waste to grant aid to governments that are unable or unwilling to spend and use it well because they lack sound governance systems. Indeed, the criticism raised against aid in the past decade has prompted the international community to reconsider the way aid is used, invested and spent. Donors and recipients agree that the effectiveness of aid needs to be proven if aid is to continue to be granted. Enhancing aid effectiveness

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development aid, further because donors have interpreted the 'development' objectives that underpin this definition very loosely over time.

[82] For example Italy counts as ODA money that is spent to rescue and assist refugees arriving in Italy.

[83] See concerns related to Italy-Sudan bilateral agreement (n 23).

requires donors to focus on development; to support countries that have in place good development plans and strategies; and to grant aid according to developing countries' needs rather than their strategic political or trade positions.[84] With the policies related to the European Agenda, the EU is disbursing funds with little or no consideration of how the money will be spent and if it will be well spent and managed, going against the aid effectiveness principle it has previously endorsed. This seriously compromises the effectiveness of the funding, ultimately further undermining public support for aid allocation, and augmenting public distrust of aid policy.

Similar concerns were also raised by the European Court of Auditors in March 2016, which on the eve of the announcement of the Joint Action Plan, released a report on other EU 'migration' projects in which it criticised EU spending for being poorly monitored and inefficient.[85] Crucially, the report highlighted that whilst human rights and refugee protection were often mentioned as stated commitments in many official EU documents, in practice no meaningful effort was made to support the authorities in the recipient countries to comply with international legal standards.[86] Lead auditor, Danièle Lamarque, also observed that with the explicit prioritisation of migration management in the EU external policies, most of the funds were spent on managing migration flows, thus prioritising the security dimension of EU policies, rather than real development.[87]

It is also important to note that aid resources are scarce, funds for 'real' development projects are shrinking and counting as aid something that is not effective—or worse, something that is bound to be ineffective—inflates the total of aid money disbursed, affecting the aid budget, without any real return for 'development' *per se*. Moreover, classifying such funds as development aid would also allow for an easy diversion and reallocation of funding from one country to another (as is happening in the case of EDF funding, as discussed above) imposing social and economic costs on the population of other countries formerly receiving the aid. Hence we need to ask what effect the EU redistribution of aid will have on its former beneficiaries.

Finally, diverting aid resources used to tackle social problems in order to address migration control will also create animosities amongst the population of the recipient country, who will see that financial resources that were once directed towards addressing their own basic needs are now being used as a tool of foreign policy. Not surprisingly, after the adoption of the European Agenda, UN Secretary-General Ban

[84] There have been numerous 'aid effectiveness' initiatives promoted in the past decade: from Rome to Busan, via Paris and Accra, donors and recipients have agreed on targets and have endorsed new commitments to foster aid success. For example, over 152 states have signed the Paris declaration on enhancing aid effectiveness, where clear targets and specific commitments have been endorsed to foster aid success see Stern et al, 'Thematic Study on the Paris Declaration', available at: https://www.oecd.org/dac/evaluation/dcdndep/41807824.pdf.

[85] European Court of Auditors, 'EU external migration spending in Southern Mediterranean Neighbourhood countries until 2014', 18 March 2016, Special Report No 9/2016, para 77. See also paras 27-31 and 66-89.

[86] Ibid, paras 87-88. Specific reference was also made in the report to the SaharaMed project, which shares many similarities with the plans envisaged by the European Agenda. 10 million euros, in fact, were allocated to the SaharaMed project to improve local capacity in 'tackling irregular immigration and preventing and intercepting irregular immigrants in the Mediterranean area' (para 89). The project, however, foresaw no precautionary measures to guarantee respect for migrants' rights.

[87] IRIN, 'Auditors give thumbs down to EU migration spending' 18 March 2016, available at: www.irinnews.org.

Ki-moon issued a warning against reductions in development aid by European countries in order to redirect funds to 'projects' for refugees and asylum seekers. 'Redirecting critical funding away from development aid at this pivotal time' he stated 'could perpetuate challenges that the global community has committed to address'.[88]

A Dearth of Regulation for Aid

Although states' obligation to assist is now recognised (albeit not without controversy) as a principle of international human rights law, the precise scope of the obligation remains uncertain. For many, in particular, the binding nature of aid is to be inferred from a joint reading of the UN Covenant on Economic, Social and Cultural Rights and Articles 55 and 56 of the UN Charter.[89] The opposite view, held especially by donor states (the USA in particular),[90] maintains that development aid is not required as a result of an international obligation but represents only a discretionary moral commitment.[91] Furthermore, even if the obligation to grant aid was to be acknowledged by all donors, the exact scope of that obligation—and its application in practice—would remain uncertain until donors agree to binding rules on the *quantum* (how much) and *quomodo* (how, in what ways, aid should be disbursed). Such fundamental issues are mostly still at the discretion of each state.[92] This lack of binding rules,[93] and of international agreements establishing to whom aid should be allocated and which countries should be prioritised, is one of the major problems affecting aid donations.

Formal and substantial questions over what aid is and how it should be used have been fuelled by the lack of international regulation of development aid. While guidelines exist on country income classification and on aid categorisation,[94] donor countries cannot generally be bound to give aid to one country rather than another.[95] Some countries have agreed Codes of Conduct and Cooperation on aid allocation, but these instruments remain as best practices; they are not incorporated into binding laws

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[88] UN News Centre, 'UN warns against cuts in development aid due to refugee crisis', 11 November 2015, available at: www.un.org/apps/news/story.asp?NewsID=52525#.WHebfrF0eV4.

[89] See O De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2002) 34 *Human Rights Quarterly* 1084. See also M Salomon, 'The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights: An Overview of Positive Obligations to Fulfil', 16 November 2012, available at: http://www.ejiltalk.org/author/msalomon/.

[90] See generally R McCorquodale and MA Baderin, (eds), *Economic Social and Cultural Rights in Action* (Oxford University Press, 2007).

[91] G Cataldi and G Serra, 'Tied Development Aid: A Study on Some Major Legal Issues' (2010) 10 *Italian Yearbook of International Law* 219, 222.

[92] The only such agreement is the Food Assistance Convention agreed by a group of donors in 2012 and entered into force on January 2013. For an analysis of this convention see A La Chimia, 'Food Security and the Right to Food: Finding Balance in the 2012 Food Assistance Convention' (2016) 65 *International and Comparative Law Quarterly* 99.

[93] Guidelines on country income classification can be found at www.un.org/special-rep/ohrlls/ldc/list.htm, where the UN lists on Least Developed Countries (LDC), low income countries etc., are available. For the OECD definition of aid, see above (n 79).

[94] The OECD list of aid recipients is very broad and donors can freely choose to whom to give aid. In order to be classified as official development assistance (ODA), however, the disbursement must have a development objective, high concessionality level, and be donated government to government.

[95] It could be argued that when emergencies occur the international community has an obligation to provide aid (especially under international law instruments such as ICESCR and ICCPR).

(one example is the EU Code of Conduct on Complementarity and the Division of Labour in Development Policy).[96] Devising rules in this area is complex because binding rules—on either the *quantum* or the *quomodo* of aid—might deter donors from granting aid or might lead to lower aid disbursements. As a result of the lack of regulation in this area, and of poor coordination between donor countries, aid tends to be over-allocated to certain countries while others remain overlooked. It tends to be volatile and unpredictably allocated on the basis of donors' priorities and interests rather than of recipient countries' needs.[97] However the grant of aid does not occur in a complete vacuum. Even though donors cannot be bound to give aid to specific countries or to give aid in certain quantities or ways (i.e. untied, in cash, in kind, etc.) donors remain bound when granting aid by all of their other international and regional commitments, agreements and obligations. Fundamentally, aid cannot be used to jeopardise the attainment of the objectives endorsed within such agreements, obligations and commitments.[98]

Arguably, it is this unregulated system of aid donation that has made possible the emergence of the current 'more for more' approach (i.e. more cooperation on controlling migration for more aid funds) delineated in the European Agenda and in its ancillary implementation policies. The EU, in fact, is unashamedly making 'development' aid conditional on third countries' cooperation in reducing migratory flows, either by preventing people from leaving in the first place or by promptly accepting them back when returned from Europe. And it is specifically to enhance the cooperation of third countries on readmission and return that the EU calls for using 'a fine balance of incentives and pressure',[99] including through aid conditionalities.

IV. International Law and the Cooperation Measures of the European Agenda

As discussed so far, the EU and its member states make use of aid conditional on the recipient country actively cooperating in controlling migration flows towards the donor countries. The aid is openly granted on condition that the recipient country prevents departures and readily accepts returnees. Can such a condition be attached to the aid provided? Is such a condition compatible with protection obligations under international law?

In relation to Italy, one of the present authors has argued elsewhere that the imposition of such conditions (and the (mis)use of aid deriving from it) is incompatible with national and international law.[100] At the national level such conditions are incompatible with the objectives, laid down in Law 125/20014, to

[96] COM (2007) 72 Final see chapter six.

[97] A La Chimia, *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law: The Imperative for Change* (Hart, 2013).

[98] This link is easily acknowledged in respect of international trade law and competition law: i.e. aid donations that cause trade distortion or hamper competition are generally forbidden, think for example at Art 10 of the Agreement on Agriculture.

[99] On 8 October 2015 the European Council, in its conclusions on the future of the EU return policy related to the European Agenda, regrettably welcomed 'the introduction of the more-for-more principle as a way to increase the EU's and Member States' leverage. A fine balance of incentives and pressure should be used to enhance the cooperation of third-countries on readmission and return'. See http://www.consilium.europa.eu/en/press/press-releases/2015/10/08-jha-conclusions-return-policy/.

[100] La Chimia (n 97).

foster human rights through development aid policies; with the Italian Constitution, which specifically provides for the respect and protection of human rights; and with the many international and regional human rights instruments signed by Italy. Aid that is used to perpetrate human rights abuses is clearly illegal and violates national law (both ordinary and constitutional law). Indeed, the Italian Constitution places respect, protection, and promotion of human rights at the very heart of the Italian legal system.[101] All public authorities, therefore (and hence Italian aid agencies), are bound to respect the Italian Constitution and its principles (an unconstitutional act can be annulled by the Italian Constitutional Court). When aid projects are implemented they have to fulfil these higher constitutional principles.[102] The existence of a formal link between the implementation of aid projects (in Libya or elsewhere) and migration policies which breach human rights would, therefore, arguably invalidate the aid projects by breaching the Constitution.[103]

As outlined in section I, the 'development' measures of the European Agenda mirror very closely the Italian 'more for more' approach in its use of development for the control and externalisation of migration. The European Agenda, in fact, introduces a series of plans aimed at 'addressing the main root causes of irregular and forced migration': these include supporting third countries in 'developing their own solutions to better manage their borders'; and in ensuring the prompt readmission and return of their nationals; the development of 'reception' and asylum system capacities in transit countries and in third countries closer to the countries of origin. Most importantly, many of these measures are accompanied by the diversion of development funds to be used to 'support' relevant countries in their fight against trafficking and smuggling. In particular, the cooperation agreements concluded under the European agenda unequivocally seal the nexus between migration, development and security policies.[104]

The above measures have been described by Hathaway and Gammeltoft-Hansen as examples of 'cooperation-based *non-entrée*', mainly 'predicated on international cooperation, with deterrence occurring in the territory, or under the jurisdiction, of the home state or a transit country'.[105] As this article has explained so far, from the perspective of development aid, the adoption and implementation of these measures is largely possible by taking advantage of a lack of international aid regulation, and a wilful rejection of any existing framework for international assistance and cooperation. Bearing in mind the adverse implications that a return to explicit political

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[101] A combined application of Article 2 (respect of human rights) and Article 10 (compliance with international law, ie Italy must respect all international agreements to which Italy is member, including all the human rights instruments, including those related to refugee law) of the Italian Constitution would enable this conclusion. Indeed Articles 2 and 11 are said to provide the constitutional foundation for a strong human rights protection in the Italian legal system.

[102] If conflicts exist between foreign policy interests and human rights, then those conflicts should be resolved in favour of human rights.

[103] In the specific case of aid to Libya, given the decision in *Hirsi* (n 26), the cooperation Italy-Libya agreement (n 65) should be deemed unlawful to the extent that it subordinates and links the granting of aid money to cooperation in migration control measures resulting in international wrongful acts.

[104] This is also explicitly confirmed in the Joint Communication to the European Parliament and the Council, 'Addressing the Refugee Crisis in Europe: The Role of EU External Action', JOIN(2015) 40, 12.

[105] Hathaway and Gammeltoft-Hansen (n 16) 248. See section 'Jurisdiction in evolution', 257ff, for circumstances in which non-entrée measures may lead to the establishment of jurisdiction (through attribution, shared responsibility or through aiding or assisting) for violations of international law.

conditionalities would have on various aspects of development aid (see sections II and III above), these 'development' policies are not only politically and ethically untenable but also, in many ways, incompatible with international law. This section argues in particular that, under certain circumstances, the EU and its member states may be liable for aiding or assisting third countries in breaching international law during the implementation of their cooperation agreements. As contended by Hathaway and Gammeltoft-Hansen,

> a state which takes steps such as providing maritime patrol vessels or border control equipment, which seconds border officials, or which shares relevant intelligence or directly funds migration control efforts that assist another country to breach its *non-refoulement* or other protection obligations is taking action that can fairly be characterized within the ambit of aiding or assisting.[106]

For the purposes of this article, the key question that needs to be addressed is whether liability under international law ensues when the development aid provided by the EU and its member states as part of the cooperation agreements of the European Agenda is used by third countries to implement migration control measures in breach of international law. In order to answer this question, the next section first examines the applicable legal framework, focusing primarily on the right to seek asylum and the principle of *non-refoulement*.[107] The section then considers whether the EU and its member states can be liable for aiding or assisting another state's wrongful conduct through the provision of aid funds for migration control.

*The Right to Seek Asylum and the Principle of Non-***Refoulement**

The right to seek asylum pertains to both international refugee law and international human rights law: fundamentally, it ensures that people fleeing persecution are provided with access to international protection, in particular access to mechanisms aimed at ascertaining if a person is entitled to such international protection. The starting point for the existence of this right is Article 14 of the Universal Declaration of Human Rights (UDHR), which establishes that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. Current EU Member States, in their capacity as members of the United Nations General Assembly, would have voted in favour of the UDHR back in December 1948, thus endeavouring 'to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms'.

The right to seek asylum, reiterated in the 1967 Declaration on Territorial Asylum and in the 1993 Vienna Declaration on Human Rights and Programme of Action, does not *per se* create a duty upon states to 'grant asylum'. Crucially, however, it does create an obligation, vested upon states, to assess asylum applications. States, therefore, as a minimum, 'have a duty under international law *not to obstruct* the right to seek asylum'.[108] The right to seek asylum is considered an emerging norm of customary international law, and as such it supports the existence of a right to apply for asylum

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[106] Ibid, 279.
[107] This discussion supports the argument that the wrongful act committed by the third country 'would have been wrongful had it been committed by the assisting State itself' ILC Article 16 Commentary (n 135). See also relevance of the right to leave in the context of 'pullback' measures under the cooperation agreements discussed. See Markard (n 25).
[108] Goodwin-Gill and McAdam (n 35) 358 (emphasis added).

when fleeing persecution[109]—including a right to seek and apply for asylum in the EU, and a related duty of EU member states not to systematically prevent this from happening. The duty to provide those fleeing persecution with a means for accessing international protection mechanisms is crystallised in the 1951 Refugee Convention (Convention), which requires signatories to implement refugee status determination procedures in order to confirm whether a person meets the criteria of the definition of a refugee and is therefore entitled to international protection. This transforms the person's status from that of a *de facto* refugee into that of a *de jure* refugee.[110]

It is important to reiterate that, under the Convention, a person automatically becomes a refugee the moment in which she meets the definition criteria (Article 1A), not when her status is confirmed by a state through an asylum determination process.[111] Therefore, international refugee law already establishes that states are under an obligation to respect the rights of asylum seekers, which applies 'as soon as a refugee comes under a state's jurisdiction, in the sense of being under its control or authority'.[112] This partially explains, of course, the efforts recently taken by many countries, including EU member states, to ensure that *de facto* refugees never reach their borders, so as to circumvent their obligation to extend international protection to them. However, states are under a clear obligation, established in international refugee law and in international human rights law, not to *refoul* asylum seekers – and *non-refoulement* is now widely confirmed as a principle of customary international law,[113] specifically, as a complementary element of the absolute prohibition against torture. This has also been consistently re-affirmed at the European level by the European Court of Human Rights (ECtHR) – a point to which we return below.

The principle of *non-refoulement* and the right to seek asylum are directly relevant to the plans put forward in the European Agenda, as they result in externalising migration controls outside of the EU and, *de facto*, in an attempt to circumvent existing legal obligations under the Convention and under international human rights law, more specifically, the right to seek asylum and the prohibition against *refoulement*, outlined in this section. Interception at sea, rejection at the border and preventing borders being reached, as well as agreements to shift migration control duties to transit countries, directly contravene the right to seek asylum and are contrary to states' obligations to implement the Convention by providing asylum processing mechanisms which respect due process guarantees.[114] Externalisation of border control also breaches the prohibition against *refoulement*, enshrined in Article 33 of the Convention, in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and also in Article 7 of the International Covenant on Civil and Political Rights (ICCPR).[115]

A state's primary *non-refoulement* obligation under Article 33 of the Convention is to

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[109] A Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 *International Journal of Refugee Law* 293, 300.
[110] JC Hathaway and M Foster, *The Law of Refugee Status* (Cambridge University Press, 2014, 2nd edition) 25.
[111] Ibid, at 26.
[112] ibid. See also, Hathaway and Gammeltoft-Hansen (n 16).
[113] Goodwin-Gill and McAdam (n 35) 208.
[114] UNHCR Executive Committee No 82 'Safeguarding Asylum' (1997) para ii.
[115] E Lauterpacht and D Bethlehem, ' The Scope of the Principle of Non-Refoulement: Opinion' in E Feller et al, *Refugee Protection in International Law* (Cambridge University Press, 2003) 163.

ensure that a person is not returned to a place where she fears persecution on one of the Convention grounds (as *per* Article 1A definition, persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion). This obligation is further complemented by specific international human rights law guarantees under the CAT (Article 3) and ICCPR (Article 7) and under customary international law. These guarantees expand the protection against *non-refoulement* to *anybody* who might be at risk of torture, not only those fearing persecution on the basis of one of the Convention grounds listed above. Thus, when states prevent people from reaching their borders and from accessing an effective refugee status determination system, they fail to adequately implement their Convention obligations, and their obligations under international human rights law (including customary law obligations), since they substantially fail to ensure that these persons are not *refouled*. Similarly, when states return people to any country in which they may face torture or any other inhuman or degrading treatment, they are in breach of their *non-refoulement* obligations. This is also the case when people are returned to any territory where they risk being further returned to a country in which they will risk such treatment (e.g. if returned to a country which is *de facto* incapable of processing asylum claims effectively or in which asylum seekers face inhuman or degrading treatment while their asylum claims are under consideration).

Now, let us consider the above in light of the cooperation measures in the European Agenda. There is a real risk, for instance, that any of the 'reception' centres opened in third countries will turn into centres for the extraterritorial processing of asylum claims and/or centres for the indefinite detention of people returned under the cooperation agreements of the European Agenda. If we look at the conditions in which refugees have been kept in detention centres in North Africa,[116] mostly with the support of EU member states, it is apparent that the use of EU development funds envisioned in the European Agenda may result in violations of the right to seek asylum and of the absolute prohibition against *refoulement*. Let us look, furthermore, to the EU adoption of the EU-Turkey Joint Action Plan. As clarified by UNHCR on the same day in which the agreement was sealed, the plan must respect international law, which means that:

> people seeking international protection will have an individual interview on whether their claim can be assessed in Greece, and the right to appeal before any readmission to Turkey. This would also entail that once returned, people in need of international protection will be given the chance to seek and effectively access protection in Turkey. We now need to see how this will be worked out in practice, in keeping with the safeguards set out in the agreement – many of which at present are not in place.[117]

The Joint Action Plan contains reassurances that international law and EU law will be respected. At the same time, however, it also states that '*all* new irregular migrants crossing from Turkey into Greece as from 20 March 2016 will be returned to Turkey', a statement which clearly contradicts the prohibition of collective expulsion of aliens,

[116] Global Detention Project, 'The Detention of Asylum Seekers in the Mediterranean Region' (April 2015), available at: www.globaldetentionproject.org/the-detention-of-asylum-seekers-in-the-mediterranean-region-2.

[117] See 'UNHCR on EU-Turkey deal: Asylum safeguards must prevail in implementation', 18 March 2016, available at: www.unhcr.org/uk/news/press/2016/3/56ec533e9/unhcr-eu-turkey-deal-asylum-safeguards-must-prevail-implementation.html.

as part of the principle of *non-refoulement*, as well as in Article 4 of Protocol 4 of the ECHR and in Article 19(1) of the Charter of Fundamental Rights of the European Union. At this point, it is important to note that the ECtHR has repeatedly affirmed the customary international law nature of *non-refoulement* in cases which are directly related to asylum seekers. In the landmark case of *Hirsi*,[118] which concerned the interception at sea and return of people to Libya resulting from the Italy-Libya bilateral agreements discussed in section II, the ECtHR found Italy in breach of the European Convention of Human Rights (ECHR) prohibition of collective expulsion (Article 4 of Protocol 4 ECHR) and of the guarantees against *refoulement* (Article 3). More specifically, in relation to bilateral agreements on migration, the Court found that:

> Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States.[119]

The ECtHR also held that 'the existence of domestic laws [in Libya] and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities'.[120] Italy, therefore, could not reasonably rely on the existence of such laws, nor on Libya's commitment in its bilateral agreement with Italy, when it knew or ought to have known that the people returned to Libya were at risk of ill treatment.[121] The findings in *Hirsi* are equally applicable to the cooperation agreements already concluded and planned under the European Agenda. Similarly, the fundamental principle of *non-refoulement* and the prohibition against collective expulsions were reaffirmed in the case of *MSS v Belgium and Greece*.[122] In the Grand Chamber's judgment in the recent case of *Khlaifia and Others v Italy*,[123] the Court also found that the Italy-Tunisia bilateral agreement of April 2011 could not constitute 'a clear and foreseeable legal basis for the applicants' detention'. In this instance, the Court did not find a violation of Article 4 of Protocol No. 4 of the ECHR (prohibition against collective expulsion), since the applicants had been given an opportunity to make arguments against their expulsion to the competent authorities but had failed to do so. It would have been useful to hear the Court's opinion on the scope and implications of these types of bilateral agreements, but unfortunately the Court considered it unnecessary 'to address the question whether, as the Government argued, the April 2011 agreement between Italy and Tunisia, which has not been made public, can be regarded as a "readmission" agreement within the meaning of the Return Directive, and whether this could have implications under

[118] *Hirsi* (n 26).
[119] Ibid, para 129.
[120] *Hirsi* (n 26) para 128.
[121] ibid and para 131.
[122] *MSS v Belgium and Greece*, ECHR Grand Chamber, Application no 30696/09, judgment of 21 January 2011.
[123] *Khlaifia and Others v Italy*, ECHR Grand Chamber, Application no 16483/12, judgment of 15 December 2016, paras 102-3.

Article 4 of Protocol No. 4'.[124]

In relation to the Joint Action Plan, the EU premised the agreement on the fact that applications for asylum in Greece can be found to be inadmissible on the grounds that Turkey can be considered a 'safe third country'. The EU refers in particular to Article 38 of the EU Asylum Procedures Directive,[125] which defines as a 'safe third country' any state in which:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) there is no risk of serious harm as defined in Directive 2011/95/EU;

(c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.[126]

In March 2016, following damning reports on the risk of ill treatment to which people returned to Turkey were exposed,[127] the UNHCR recommended urgent action to ensure that the situation on the ground met international legal standards,[128] as well as the provisions of the EU Asylum Procedures Directive. Amongst the concerns raised in the reports, there is the fact that Turkey still upholds the geographical limitation of the 1951 Refugee Convention, which in turn means that non-European refugees are not entitled to international protection.[129] Furthermore, the Joint Action Plan does not contain necessary provisions to systematically ensure that refugee status is individually determined in an appropriate manner before removal, as established in both international refugee law and international human rights law.

As mentioned in section II, according to the Commission itself,[130] and to scholars who

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[124] Ibid, para 255. See a critique of the decision by S Zirulia and S Peers, 'A template for protecting human rights during the "refugee crisis"? Immigration detention and the explusion of migrants in a recent ECtHR Grand Chamber ruling', 5 January 2017, available at: http://eulawanalysis.blogspot.co.uk/2017/01/a-template-for-protecting-human-rights.html. For further ECHR decisions on collective expulsion of aliens, see eg *Sharifi and Others v Italy and Greece*, ECHR Chamber, Application no 16643/09, judgment of 21 October 2014; *Georgia v Russia (I)*, ECHR Grand Chamber, Application no 13255/07, judgment of 3 July 2014; and *Čonka v Belgium*, ECHR Chamber, Application no 51564/99, judgment of 5 February 2001.

[125] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[126] Ibid, Article 38(1).

[127] See eg reports by Amnesty International and Human Rights Watch (n 20).

[128] UNHCR press release (n 117).

[129] The Joint Action Plan only envisages the 'one-for-one' resettlement of Syrian refugees (one refugee to be resettled in EU member states for one person returned to Turkey).

[130] Letter of 5 May 2016 (n 74).

support the Joint Action Plan as a legally acceptable solution,[131] Article 38 only requires that returnees be afforded protection equivalent to the 1951 Refugee Convention (which would not necessarily require its ratification without geographical limitations). Whilst there are credible reports that circumstances for refugees in Turkey have deteriorated during the second half of 2016 (see section II), the Commission blames the slow pace of the Greek Asylum Service and the Greek Appeals Authority for hampering 'the goal of ensuring returns' to Turkey.[132] Based on this article's analysis, the Joint Action Plan is better understood as part of a continued trend (further entrenched in the European Agenda) of EU measures aimed at externalising migration control, whereby the EU and its member states systematically rely on cooperation agreements with third countries. These agreements entail the disbursement of aid funds conditional on third countries' cooperation in controlling migration towards the EU.

Crucially, the provision of such funds may result in liability of the EU and its member states for aiding or assisting third countries in committing breaches of international law. As submitted by Hathaway and Gammeltoft-Hansen, many contemporary cooperation-based *non-entrée* measures can be challenged on the basis of recent developments in the law of jurisdiction and of shared responsibility. But there are still circumstances in which a state's involvement may not be sufficient to establish jurisdiction, even if we understand jurisdiction within the broader, expanded conceptualisation that they propose.[133] When examining the responsibility of the EU and its member states for such breaches, for instance, it is apparent that the measures adopted by third countries whilst implementing their bilateral agreements with EU member states cannot be easily challenged under the law of jurisdiction. EU involvement, e.g. when providing training, equipment, liaison officers and advisers, would often not be sufficient to establish jurisdiction, since third countries rarely act under the direction and control of EU authorities.[134] Lack of jurisdiction, however, does not necessarily mean that the EU and its member states cannot be held responsible for the breaches of international law resulting from the implementation of their cooperation agreements with third countries, especially when aid is made conditional on the implementation of effective migration control measures. According to Hathaway and Gammeltoft-Hansen, 'there is an emerging consensus that international law will hold states responsible for aiding or assisting another state's wrongful conduct'.[135] According to Article 16 of the International Law Commission's Articles on State Responsibility, responsibility for aiding or assisting an internationally wrongful act by another state will be found if '(a) [The aiding or

[131] See Thym (n 73). See also K Hailbronner, 'Legal Requirement for the EU-Turkey Refugee Agreement: A Reply to J Hathaway' (2016), and Hathaway's rejoinder 'Taking Refugee Rights Seriously: A Reply to Professor Hailbronner', available at: http://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/.

[132] European Commission, 'Third Report on the Progress made in the Implementation of the EU-Turkey Statement' (28 September 2016) COM(2016) 634 final, 4.

[133] For a discussion of the traditional and expanded notion of jurisdiction see Hathaway and Gammeltoft-Hansen (n 16) 257ff. See also A Nollkaemper and D Jacobs (eds) *Distribution of Responsibilities in International Law* (Cambridge University Press, 2015). See however Jackson's suggestion to expand the interpretation of the *Soering* criteria (n 16).

[134] Ibid, 276–77. See however Milanovic's argument on the 'effective overall control': M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011) 263.

[135] Hathaway and Gammertoft-Hansen (n 16) at 277.

assisting] state does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State'.[136]

According to the commentary to Article 16, aid or assistance must be given 'with a view to facilitating the wrongful act, and must actually do so'.[137] Where our argument differs from Hathaway and Gammeltoft-Hansen is in considering the purposes for which aid or humanitarian assistance is given to third countries under the European Agenda. Based on the commentary to Article 16, in fact, they argue that state liability 'should not follow where aid or assistance given in good faith is subsequently misused by another country – for example, a state providing development aid is not responsible if, unbeknownst to it, that aid is used to implement border controls that lead to the *refoulement* of refugees'.[138] Although interpretation of the requirements of Article 16 remain controversial, for the purposes of this article it is possible to argue that the EU and its member states, when providing funds to third countries for the purposes of migration control, do not do so entirely in good faith. EU documents clearly state that 'a fine balance of incentives and pressure'[139] will be used to obtain third states' cooperation on migration control. Civil society's demonstrations against the corruption and coercion underlying these agreements[140] call into question the proclaimed 'good faith' of the funds promised to third countries. Most importantly, the conditionalities attached to the release of funds and the lack of mechanisms to ensure that money is genuinely used for development purposes suggest that the EU and its member states have knowledge that the funds provided will aid or assist an internationally wrongful act by a third country.[141] As examined in this section, most of the migration control measures adopted in light of the cooperation agreements of the European Agenda would breach the right to seek asylum and the prohibition against *refoulement*, and would thus represent a wrongful act if committed by the EU or any of its member states.

CONCLUSION

This article has analysed the 'development' policies enshrined in the European Agenda and has critically evaluated the way in which aid is increasingly being used for the purposes of migration control. It highlighted the need to acknowledge the serious implications of associating development aid with migration policies predominantly aimed at halting migration flows from countries of origin and transit. In doing so, it argued that this (mis)use of aid not only undermines the primary objectives of development, but may also trigger responsibility of the EU and its

[136] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentary (2001) UN Doc A/56/10, GAOR, 56th Session, Supp No 10.
[137] ibid, Article 16, para 5.
[138] Hathaway and Gammertoft-Hansen (n 16) at 280.
[139] See statement by the European Council on 8 October 2015 (n 99).
[140] See Sune Engel Rasmussen, 'EU signs deal to deport unlimited numbers of Afghan asylum seekers' The Guardian, 3 October 2016, available at: https://www.theguardian.com/global-development/2016/oct/03/eu-european-union-signs-deal-deport-unlimited-numbers-afghan-asylum-seekers-afghanistan; and RFI Afrique, 'Le collectif the migrants "Mains propres" occupe le consulat de Mali à Paris', 31 December 2016, available at: http://www.rfi.fr/afrique/20161231-consulat-mali-paris-occupe-migrants-mains-propres-ue-polemique.
[141] HP Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2013) 244–49.

member states for aiding or assisting internationally wrongful acts committed by the aid recipients.

By reviewing the cooperation agreements signed between Italy and Libya since 2008 the article has outlined the similarities of these agreements with the current policies enshrined in the European Agenda, thus warning against the much hailed approach of 'more for more'. The risks of this approach are apparent, especially in terms of distorting the fundamental meaning of development aid and the ways in which it is defined and allocated. Most importantly, the measures related to the cooperation agreements of the European Agenda are incompatible with the international protection obligations vested upon the EU and its member states. This incompatibility, in turn, further compromises the status of the aid measures envisaged in the European Agenda, since development policies which contribute to human rights violations are to be considered in direct breach of international law, and as such should be invalidated.

As argued in this article, donors' refusal to acknowledge any legally binding obligation to grant aid, and/or on the modality of granting aid, has led to a system of aid governance based on donors' priorities and interests, where aid commitments are not driven by recipients' needs but are exposed instead to the variability and mutability of donors' national economic and political priorities. This has enabled the emergence of the 'more for more' approach delineated in the European Agenda, whereby the EU unashamedly makes 'development' aid conditional on the effective reduction of migration flows. The EU promotes a 'fine balance of incentives and pressure' to persuade third countries to cooperate on 'pullbacks', readmission and return.[142] It responds to the charges of illegality by relying on the concept of 'safe third country', even when factual circumstances on the ground appear to indicate a risk of direct or indirect *refoulement* for the people returned. Thus, under these cooperation agreements third-country partners agree, for instance, to 'take any necessary measures to prevent new sea or land routes for illegal migration opening' to the EU.[143]

If it is true that there are no explicit legally binding rules that directly discipline aid, it is also true that over the past 60 years states have acknowledged the existence of legal obligations that do have an impact on the way in which aid can and should be administered and distributed. The notion that aid is a charitable act and that donors, therefore, are free to behave as they like is no longer tenable. If aid is a new weapon to be deployed in the so-called war against illegal migration, this use should be openly recognised and problematised, and as such it should be scrutinised against the existing legal framework of international protection, so as to ascertain responsibility for the internationally wrongful acts committed in the service of the EU.

[142] See statement by the European Council on 8 October 2015 (n 99).
[143] See EU-Turkey statement on Joint Action Plan (n 19).