



NON-STATE ACTORS AND ILLEGAL MIGRATION:  
A NEW EUROPEAN APPROACH TO SECURITY POLICIES<sup>♦</sup>

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**ABSTRACT:** The impact of NSAs such as OAGs, OCGs and terrorist groups on MENA region is twofold. They fuel instability, crime, violence, and armed conflicts in the region and turn into push factors, if not means or vehicle, for illegal migration towards Europe where it is often perceived, right or wrong, as a serious threat to security. The EU response to migration is therefore evolving as well as the related security policies. Following decades of strong and wide protection of human rights in any situation, European States are seeking for a new and different balance between human rights and security. It seems as if States are nowadays ready to trade some political idealism and legal functionalism in the field of migration and human rights for more political pragmatism and legal formalism in the field of security. Some clues are emblematic of this new culture of security marked by some US-style features such as a more limited judicial review and a formalistic interpretation and application of the law. Even if, for the time being, Europe has substantially stayed true to a high standard of human rights protection, the quest for more security by Governments might set them on a collision course with supranational Courts and their functionalist approach to human rights protection.

**KEYWORDS:** Non-State actors and illegal migration; Security and human rights; European and US approaches to security; Non-State actors' impact on MENA region and EU; New EU security policies.

**CONTENTS:** 1. Defining relevant non-State actors for security in the Euro-Mediterranean region. – 2. Non-State actors' impact in MENA region and resulting consequences for Europe in terms of illegal migration. – 3. Perceptions of illegal migration in Europe and some key elements for policy-making in the field of security. – 3.1. Balancing human rights with security and granting or limiting judicial review. – 3.2. Interpreting legal rules and facts: European functionalism vs. American formalism. – 4. A new European approach to security policies: less judicial review, more formalism and a different balance between human rights and security. – 5. Conclusions.

1. Non-State Actors (NSAs) “vary widely in size, organization, motives, goals and resources, making the term [...] difficult to define” as a matter of international law<sup>1</sup>. Moreover, international law deals with NSAs for multiple purposes insofar they participate in international legal processes. As a result, there is no comprehensive international legal framework and fragmentation and uncertainty are commonplace among law-makers, scholars and analysts. The broadest notion holds that “all entities different from States are non-state in nature”<sup>2</sup>, including international organizations (IOs). It is a general definition that suits the purpose of this Article even though narrower definitions exist.

This Article focuses on three NSAs that – from different perspectives and for different reasons – all have an influential impact on political processes within the Euro-Mediterranean region: organized armed groups (OAGs) as the armed or military wing of a non-State party to an armed conflict<sup>3</sup>; organized criminal groups (OCGs); terrorist organizations. All of them are addressee of international law because of their impact and interaction with legal values shared and protected by the international community, including those related to illegal migration.

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<sup>1</sup> See Orla Marie Buckley, *Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara*, 37 N.C.J. Int'l L. & Com. Reg. 793 (2012), at 796.

<sup>2</sup> See Andrew Clapham, *Non-state Actors*, in POST-CONFLICT PEACEBUILDING: A LEXICON 200-212 (V. Chetail ed., 2009).

<sup>3</sup> See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), at 32 and note 48, <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> (“[It is] crucial to distinguish a non-State party to a conflict (e.g., an insurgency, a rebellion, or a secessionist movement) from its armed forces (i.e., an organized armed group) [...] The term organized armed group refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense [...] the actual parties to [an armed] conflict are the High Contracting Party and the opposing non-State party, and not their respective armed forces”).



No international treaty explicitly defines what is an OAG even though State practice and international jurisprudence have highlighted some distinctive elements. According to the ICRC's interpretive guidance in the field of international humanitarian law (IHL), it is a collective entity (i.e., a group) other than State armed forces that "develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces"<sup>4</sup>. A minimum level of organization and the ability to wage armed violence is required and once that armed confrontation is protracted and intense, then there exists a situation of "armed conflict" under international law and relevant IHL provisions applies<sup>5</sup>. Non-State parties to a conflict, to whom OAGs are often affiliated as armed or military wing, are heterogeneous: rebels, insurgents (groups controlling a part of the territory of the State against which are in conflict), national liberation movements (groups representing peoples "fighting against colonial and alien occupation and against racist regimes in the exercise of their right of self-determination")<sup>6</sup>, de facto governments (groups exercising direct control over territory and population and operating similarly to a State providing public services), etc.

The UN Convention against Transnational Organized Crime, UNCTOC (189 State Parties except Congo and Iran), provides the most universal and comprehensive definition of OCG: a "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences [...] in order to obtain, directly or indirectly, a financial or other material benefit" (i.e., mafia, drug cartels, etc.)<sup>7</sup>. For the UNCTOC, "serious crime" are offences "punishable by a maximum deprivation of liberty of at least four years or a more serious penalty"<sup>8</sup> while a group is "structured" when it is not "randomly formed for the immediate commission of an offence and [it] does not need to have formally defined roles for its members, continuity of its membership or a developed structure"<sup>9</sup>. Albeit the UNCTOC only applies to "transnational organized crime"<sup>10</sup>, OCGs involved in the business of illegal migration (trafficking in persons and smuggling of migrants) within European and MENA regions are almost always "transnational" in their nature or activities. Accordingly, they are covered by UNCTOC and transnational criminal law, that is to say the "law that suppresses crime that transcends national frontiers"<sup>11</sup> through the unified criminalization of the most serious crimes, the harmonization of their definitions and related measures of crime prevention and suppression (confiscation, seizure, special investigative techniques, etc.) within the domestic legal systems and the promotion and enhancement of international judicial and police cooperation for purposes of confiscation, extradition, mutual legal assistance, joint investigations, law enforcement, collection, exchange and analysis of information, etc..

Terrorism is perhaps the most challenging definition because there is no agreement in international law. There is political consensus in the UNGA on which criminal acts, methods and practices constitute "terrorism", e.g. those "intended or calculated to provoke a state of terror in the general public [...] whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them"<sup>12</sup>. Yet, the problem is to draw a distinction between terrorism (and terrorist organizations) and armed

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<sup>4</sup> *Id.* at 32.

<sup>5</sup> ICTY (Trial Chamber), *Prosecutor v. Duško Tadić*, Judgment of 7 May 1997, Case No. IT-94-1-T. Armed conflicts between States and OAGs (dissident armed forces and other OAGs), or between OAGs, are "of non-international character" (NIAC) and they must be distinguished by "international armed conflicts" (IAC) occurring between States only. NIAC are regulated by a lesser number of IHL rules (customary rules of IHL, Common Article 3 of the 1949 Geneva Conventions, Addition Protocol II of 1977 to the Geneva Conventions).

<sup>6</sup> Upon Article 1(4) of Additional Protocol I of 1977 to the Geneva Conventions, armed conflicts involving national liberation movements are to be considered IACs rather than NIACs.

<sup>7</sup> Article 2(a).

<sup>8</sup> Article 2(b). UNCTOC also criminalizes offences under Article 5 (Participation in an organized criminal group), 6 (Laundering of proceeds of crime), 8 (Corruption) and 23 (Obstruction of justice).

<sup>9</sup> Article 2(c).

<sup>10</sup> Article 3(2) ("An offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State").

<sup>11</sup> See NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 13 (2012).

<sup>12</sup> See U.N. GENERAL ASSEMBLY, Resolution 49/60 of 9 December 1994 (Measures to Eliminate International Terrorism), Annex, Section I, No. 3, <http://www.un.org/documents/ga/res/49/a49r060.htm>.



conflicts (and OAGs), including OAGs fighting against foreign occupation for self-determination and national liberation. The distinction has major and obvious consequences in terms of political legitimacy and governing legal regimes. Violent acts committed by non-State parties (and affiliated OAGs) in situations of armed conflicts are not covered by international law on terrorism (multilateral counter-terrorism conventions and protocols, transnational criminal law, etc.) but by IHL<sup>13</sup>. Serious breaches of IHL are not “terrorist acts” but amount to “war crimes” (including the war crime of terror). However, there is no impunity under IHL for “terrorist acts” committed in armed conflict because “IHL already provides a strong legal framework [...] and expressly prohibits terrorist acts in all instances” of armed conflicts<sup>14</sup>. Adding “an additional layer of incrimination at the international level [e.g., counter-terrorism provisions and transnational criminal law] to all acts committed by NSAGs, regardless of their lawfulness under IHL [...] would reduce the likelihood of obtaining respect for IHL even further”<sup>15</sup>. It is no surprise that negotiations on the draft of the Comprehensive Convention against International Terrorism – in progress since 1996 within the Ad Hoc Committee established by UNGA Resolution 51/210 of 17 December 1996 and the UNGA Sixth Committee – are deadlocked in practice and substantial progress towards an agreed-upon legal framework are impeded. Since 1963, however, 19 international legal instruments on terrorist acts (Conventions and protocols) have been adopted even though none of them provides a comprehensive definition of terrorism and they only focus on acts, offences and methods related to their specific subject-matters (civil aviation, internationally protected persons, nuclear material, maritime navigation, financing of terrorism, etc.).

2. All these NSAs play a direct role and have a major impact on the dynamics of MENA region and of some key countries such as Libya and Syria. Serious consequences also stem from NSAs-driven dynamics in the MENA region for the neighbouring European region. Security in the whole area is seriously affected or threatened. The overall scenario is quite complex and multifaceted and old and new root causes contribute to the current situation.

OAGs, terrorist organizations, and OCGs are the main players of recent and current armed conflicts, violence and instability in Libya and Syria. Sometimes with the support of third entities, including foreign States, OAGs have caused, ignited or contributed to the NIACs which had been crippling Libya and Syria for a long time. The power vacuum resulting from the weakening of the Governments engaged in a series of armed conflicts on their own territory provided terrorist organizations and hardliners “with an advantageous operational environment”<sup>16</sup> and safe havens “to organize, plan, raise funds, communicate, recruit, train, transit, and operate in relative security”<sup>17</sup> to advance their political agenda and hit scores of innocent targets on site or elsewhere, including European citizens and cities. Instability and widespread violence tearing these regions apart also provided welcome opportunities for the OCGs. In fact, ungoverned or ill-governed areas allow OCGs to develop, run, and strengthen their illicit traffic of persons, narcotics, and any other good along routes that are often exploited also by terrorist organizations and hardliners to move freely. Transnational organized crime activities (trafficking in persons and smuggling of migrants, narcotics, firearms, environmental resources such as wildlife and timber, illegal trafficking of waste including hazardous waste, etc.) benefit from regions under stress and institutional weakness and, in turn, threaten their governance and stability. All these NSAs benefit from on-going situation in Libya and Syria. Collusion between OAGs and OCGs fuels terrorism and plunders natural resources and there is a strong “interplay between conflicts, both current and recent, as well as global trafficking flows [and in particular] when rebels gain exclusive control of a portion of a country [those areas] often become trafficking hubs and retail centres for all

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<sup>13</sup> U.N. OFFICE ON DRUGS AND CRIME, INTERNATIONAL COOPERATION IN CRIMINAL MATTERS: COUNTERTERRORISM 28 (2012), [https://www.unodc.org/documents/terrorism/Publications/TrainingCurriculumModule3/Module3\\_EN.pdf](https://www.unodc.org/documents/terrorism/Publications/TrainingCurriculumModule3/Module3_EN.pdf) (“Universal counter-terrorism conventions and protocols do not apply in situations of armed conflict”).

<sup>14</sup> Stéphane Ojeda, *Global counter-terrorism must not overlook the rules of war*, December 13, 2016, <https://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/>.

<sup>15</sup> *Id.*

<sup>16</sup> See Dan E. Stigall & Christopher L. Blakesley, *Non-State Armed Groups and the Role of Transnational Criminal Law During Armed Conflicts*, 48 *The Geo. Wash. Int'l L. Rev.* 1 (2015-2016), at 6.

<sup>17</sup> U.S. DEPARTMENT OF STATE (BUREAU OF COUNTERTERRORISM), COUNTRY REPORTS ON TERRORISM 2017 225, Released September 2018, <https://www.state.gov/j/ct/rls/crt/2017/>.



manner of illicit goods and services”<sup>18</sup>. Since the beginning of armed conflicts in Libya and Syria, trafficking in persons and smuggling of migrants have been among the most lucrative activities for OCGs and OAG and have also raised the threat of terrorist border infiltration in MENA countries and in Europe by hiding among migrants entering illegally. The “crime-terror” nexus has benefited most from irregular migrant movements pushed by armed conflicts and instability in the MENA region towards Europe: “relationships between organisations range from contracting services and the appropriation of tactics, to complete mergers or even role changes” and irregular migration has provided “financial opportunities to criminal enterprises [and] terrorist organisations [that] have worked with and sometimes emulated organised crime syndicates through involvement in the trafficking of drugs, people, weapons and antiquities”<sup>19</sup>.

As a result, OCGs, OAGs and terrorism (i.e., crime, armed conflicts, and violence) are both means and push factors for illegal migration flows as well as safe and wealthy Europe is a pull factor for all refugees escaping persecutions, asylum seekers fleeing armed conflicts, violence and human rights violations, and economic migrants looking for a better life elsewhere. In countries of origin (Syria and, to a certain extent, Libya) and transit (Libya and, to a certain extent, Turkey) irregular migration impacts in terms of political, economic and institutional instability. In countries of destination (EU Member States) the impact of irregular migration concerns how they have affected perceptions of security threats and have changed or are changing the European culture of security and its approach to security threats and policies.

3. For a number of years Europe has been the destination of irregular migration flows. In 2007-2013 period, the number of yearly illegal border crossings in the EU was around 150.000. In 2014-2016 period, the number increased significantly with the highest number of arrivals recorded in 2015 (1.800.000 persons) and 2016 (more than 500.000). Since then, however, the number of illegal border crossings has fallen dramatically due to new EU security policies, including the 2016 deal with Turkey and the 2017 bilateral protocol between Italy and Libya. Arrivals in Greece and Italy have greatly reduced (in 2018 detections on the Central Mediterranean route to Italy plunged 80% compared to 2017) and notwithstanding human traffickers constantly change their routes overall numbers are sharply down from their 2015-2016 peak. The EU Agency Frontex estimates that in 2018 the number of irregular crossings has been at lowest level in 5 years (150.000), falling by a quarter compared with 2017 and being also 92% below the peak of migratory crisis in 2015<sup>20</sup>. As of January 16, 2019, arrivals in Europe amount to 4.449<sup>21</sup>.

Even though migratory flows are not set to increase in the future they have provoked reactions and concern among European institutions, politicians and citizens. For EU Commission and Member States illegal migration may constitute a serious threat to public policy and internal security, at least in case of «uncontrolled influx of high numbers of undocumented or inadequately documented persons, not registered upon their first entry to the EU»<sup>22</sup>. Illegal migration might then justify the application of extraordinary measures such as the reintroduction of checks at European internal borders. Another great concern in terms of security is that illegal migration may also be exploited by hardliners, terrorists and criminals to sneak into Europe amid migrants. As a matter of politics and

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<sup>18</sup> U.N. OFFICE ON DRUGS AND CRIME, THE GLOBALIZATION OF CRIME. A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, at 222 and ii (2010), [http://www.unodc.org/res/cld/bibliography/the-globalization-of-crime-a-transnational-organized-crime-threat-assessment.html/TOCTA\\_Report\\_2010\\_low\\_res.pdf](http://www.unodc.org/res/cld/bibliography/the-globalization-of-crime-a-transnational-organized-crime-threat-assessment.html/TOCTA_Report_2010_low_res.pdf) (in developed and under-developed countries “crime is fuelling corruption, infiltrating business and politics, and hindering development”).

<sup>19</sup> See Cameron Sumpter & Joseph Franco, *Migration, Transnational Crime and Terrorism: Exploring the Nexus in Europe and Southeast Asia*, 12 *Perspective on Terrorism* 36 (October 2018), at 36.

<sup>20</sup> FRONTEX, NUMBER OF IRREGULAR CROSSINGS AT EUROPE’S BORDERS AT LOWEST LEVEL IN 5 YEARS, News Release, 4 Jan 2019, <https://frontex.europa.eu/media-centre/news-release/number-of-irregular-crossings-at-europe-s-borders-at-lowest-level-in-5-years-ZfkoRu>. Syria is the most common country of origin of those arriving in Greece while many sub-Saharan African countries (Eritrea, Somalia, Nigeria, Guinea, Mali, Ivory Coast, etc.) are among the top countries of origin for arrivals in Italy and Spain. Iraq, Afghanistan, Bangladesh, and Pakistan are also among the main countries of origin of migrants and asylum seekers.

<sup>21</sup> INTERNATIONAL ORGANIZATION FOR MIGRATION, FLOW MONITORING, <http://migration.iom.int/europe?type=arrivals> (January 22, 2019).

<sup>22</sup> EUROPEAN COMMISSION, *Eight biannual report on the functioning of the Schengen area (1 May-10 December 2015)*, Strasbourg, 15.12.2015, COM(2015) 675 final, § 2.2, at 6.



society, some political parties across Europe have put illegal migration at the top of their political agendas also blaming it for threatening European and national social identities and thousands of jobs that should be only reserved for European workers. Advancing populist or nationalist agendas, these political parties are gathering support in certain press circles and sections of public opinion and have greatly contributed to develop and heighten the often misleading but nonetheless widespread perception among Europeans that immigration is an actual and serious threat to security and welfare.

For the purpose of its analysis, this Article only focus on how the EU security policy is changing for addressing threats and challenges related to illegal migration. The elaboration of security policies on behalf of States and IOs is influenced, among other factors, by the background culture and approach to security and by the way courts and government institutions interpret and apply legal rules and factual circumstances. The main consequence of the many interaction options between these two factors affects and shapes the balance between human rights and security. For decades, the European way to address security threats has been characterized by functionalism and absolute prevalence of human rights over security concerns. This Article posits that this approach is changing and that Europe is learning some lessons on security from the United States. To this end, this Article will first explore the main differences between European and US approaches and will then explain how they are slowly narrowing.

3.1. As regards the background culture and approach to security, in Europe security is certainly a core issue but it is however guaranteed within a more comprehensive framework of other values and interests in which human rights are equally if not more important. No balancing test between human rights and security is allowed. “Even in times of emergency or war”, States cannot balance the security risk with the risk that fundamental rights might be infringed by security or migration-related measures<sup>23</sup>. The ban was articulated by the European supranational courts (European Court of Justice, ECJ; European Court of Human Rights, ECtHR), it is always upheld and it also applies to aliens who illegally arrive, enter and reside within the EU regardless of their status (asylum-seeker, displaced person, migrant, suspected or sentenced person), of measure sought (return, removal, extradition to another EU or foreign State) and of charges brought (deportation orders are stayed even when issued against aliens playing an active role in terrorist organizations and threatening national security)<sup>24</sup>. Primacy of law and judicial interpretation are absolute and politics must defer to the opinion of the Judiciary. European supranational courts vindicate their right to “ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights”. Not even “overriding considerations” concerning the security of the EU or its Member States can hinder or limit judicial review insofar as it remains “indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned”<sup>25</sup>. Not even the UNSC binding resolutions can displace application and enforcement of human rights. In fact, their primacy is recognized only if resolutions are “in line with human rights”<sup>26</sup>.

In the United States, instead, the culture of security is so important that human rights may be severely limited. The balancing test between human rights and security is allowed so far as to permit the extrajudicial killing abroad of a US citizen who is a senior operational leader of al-Qaida<sup>27</sup> or the indefinite detention without charge or trial

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<sup>23</sup> ECtHR (Grand Chamber), Judgment of 15 November 1996, *Chahal v. the United Kingdom*, Application no. 22414/93.

<sup>24</sup> ECtHR (Grand Chamber), Judgment of 28 February 2008, *Saadi v. Italy*, Application no. 37201/06.

<sup>25</sup> ECJ (Grand Chamber), Judgment of 18 July 2013, *European Commission & Council of the EU v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595-10 P, §§ 97-98 and 125.

<sup>26</sup> ECtHR (Grand Chamber), Judgment of 7 July 2011, *Al-Jedda v. the United Kingdom*, Application no. 27021/08.

<sup>27</sup> U.S. OFFICE OF THE ATTORNEY GENERAL, Letter to the Chairman of the Committee on the Judiciary of the United States Senate, May 22, 2013, <https://www.justice.gov/slideshow/AG-letter-5-22-13.pdf> (extrajudicial killing is lawful if the US Government “has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States” because the Government has the right to use lethal force “to protect the American people from the threats posed by terrorist” when capture is not feasible). See also U.S. DEPARTMENT OF JUSTICE, White Paper. Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force, no date, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).



of Guantanamo detainees<sup>28</sup>. The balancing test also governs the expedited removal procedure by which an alien can be denied entry and physically removed from the US because border security is “critically important” to national security and “aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety”<sup>29</sup>. In this case the balance is between “the nature of the private interest at stake” (the claim for the Fifth Amendment due process right to counsel) and “the government’s interest, including the additional financial or administrative burden” the granting of such right would impose on the government (costs of detention, government’s lawyers, “pay for the increased time the immigration officer must spend adjudicating such cases, distracting the officer from any other duties”, etc.)<sup>30</sup>. The *Peralta-Sanchez* ruling held that individuals facing expedited removal procedure have no right to counsel or to a hearing before an immigration judge because even though they have “technically effected entry into the United States” they only “have a limited interest at stake” having not been present “for some period of time longer than a few minutes or hours” on the US soil. It is just a formalistic matter of time and, as time does *not* go by, throughout the procedure aliens are treated as if they were not within the US for the purposes of applying some constitutional rights. As a result, the scope of human rights protection narrows because it cannot thwart government’s goal to exclude quickly inadmissible aliens<sup>31</sup>. In cases of national security, foreign affairs, and immigration, human rights must often yield to security as well as the judicial power should yield, in principle, its competence to the Executive power under the long-established judicial deference doctrine.

In immigration cases judicial deference “is particularly powerful [...] because ‘the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control’”<sup>32</sup>. Of course, all of this does not mean that American judges have abdicated their constitutional functions and it is not unusual for judges to review and struck down executive orders. Nevertheless, it is undeniable that in the United States human rights protection and judicial review over Government are more limited than in Europe.

3.2 As regards the way courts and government institutions interpret and apply legal rules and factual circumstances, European supranational courts have a functional rather than a formalistic approach. In the field of human rights, “European functionalism” means that legal interpretation is closer to the spirit of the law (teleological interpretation) than to the letter of the law (literal interpretation). To uphold and fully implement the spirit of human rights legislation, rules and facts in situations concerning human rights are carefully assessed for the purpose of granting the widest possible protection. As a result, functionalism often extends human rights protection and it almost always makes it possible to link the exercise of governmental authority (especially abroad) and the application of law and attributability of responsibility. Whenever European judges are called upon to protect human rights, they always apply the “reality on the ground test” and reject literal or formalistic interpretations of the law. Under this test, situations concerning human rights are always carefully assessed in detail and with regard to the actual reality in order to detect any possible real risk of human rights violations. As a result, States are usually held accountable for their actions wherever in the world those actions may have been committed or their consequences felt.

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<sup>28</sup> WHITE HOUSE, Plan for Closing the Guantanamo Bay Detention Facility, February 2016, at 1 and 4, [https://www.defense.gov/Portals/1/Documents/pubs/GTMO\\_Closure\\_Plan\\_0216.pdf](https://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf). (Guantanamo detainees “who cannot safely be transferred to third countries” are subject to continued indefinite detention without charge or trial because their detentions “remains necessary to protect against a continuing significant threat to the security of the United States”).

<sup>29</sup> Executive Order 13767 of January 25, 2017, Border Security and Immigration Enforcement Improvements, *Federal Register* vol. 82, no. 18, 8793-97.

<sup>30</sup> U.S. Court of Appeals, *U.S. v. Peralta-Sanchez*, 868 F.3d 852 (9th Cir. 2017). The balancing test was articulated in *Mathews v. Eldridge*, 424 U.S. 219 (1976).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 210 (1953)).



In case of return and removal of illegal aliens, for instance, the “reality on the ground test” rules out any probative value to the fact that the receiving State is party to relevant international human rights treaties<sup>33</sup>. Sending States must always demonstrate that receiving States are “safe countries” where human rights are generally and consistently protected and there are no substantial grounds “for believing that there was a real risk that the applicants would be subjected” to torture, inhuman or degrading treatment or punishment<sup>34</sup>. The “safe country test” also applies to EU Member States because there is no presumption they would respect fundamental rights only because are EU members<sup>35</sup>. Against this background diplomatic assurances offered by receiving States to European sending States almost never pass the “reality on the ground test”. After a substantial case-by-case assessment, in fact, assurances must be enough “detailed”, “reliable” and “specific” and provide “individual guarantees” that illegal aliens, if returned, would have their human rights respected<sup>36</sup>. Another consequence is about the extraterritorial scope of non-refoulement principle. In line with the UNHCR advisory opinion, “the decisive criterion” for applying the principle is whether asylum-seekers “come within the effective control and authority” of the State wherever it happens including interdictions at sea<sup>37</sup>. Such interpretation is consistent with the overriding humanitarian object and purpose of the principle and perfectly matches the European teleological approach to human rights legal instruments.

In the United States, instead, courts and government institutions interpret and apply legal rules and factual circumstances according to a formalistic rather than functional approach. In the field of human rights, “US formalism” means that legal interpretation is closer to the letter of the law (its literal interpretation) than to the spirit of the law (its teleological interpretation). To uphold the letter of the law, rules and facts in situations concerning human rights are not always scrutinized with due regard to the humanitarian intent underlying human rights legislation and the need to protect security may outweigh anything else including effective human rights protection. As a result, formalism may sometimes narrow human rights protection and it also makes it possible to split the exercise of governmental authority (especially abroad) from the application of law and attributability of responsibility. The political rationale behind this approach lies in the fact that the Constitution (the law) “follows the flag” (the exercise of governmental authority) but at times “doesn’t quite catch up with it”<sup>38</sup>. Such formalism explains why the period of time spent by Peralta-Sanchez on the US soil was so relevant for the Court of Appeals in order to assess the scope of his human rights and why the Supreme Court held that non-refoulement principle did not apply outside the national territory and government could return asylum-seekers provided they have not reached or crossed national border (for instance, in case of interdiction and return of asylum vessels on the high

<sup>33</sup> ECtHR (Grand Chamber), Judgment of 23 February 2012, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, §§ 128, 136 (“The existence of domestic laws 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 [...] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of ECHR”).

<sup>34</sup> 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, Article 38(1) (State is “safe” when “(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”).

<sup>35</sup> ECtHR (Grand Chamber), Judgment of 21 January 2011, *M.S.S. v. Belgium & Greece*, Application no. 30696/09; ECtHR, Judgment of 21 October 2014, *Sharifi and Others v. Italy & Greece*, Application no. 16643/09; ECJ, Judgment of 21 December 2011, *N.S. v. Secretary of State for the Home & M.E. and Others v. Refugee Applications Commissioner and Others*, Joined Cases C-411/10 and C-493/10.

<sup>36</sup> ECtHR (Grand Chamber), Judgment of 4 November 2014, *Tarakhel v. Switzerland*, Application no. 29217/12, §§ 120, 122 (“Swiss authorities were obliged to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together [...] Without detailed and reliable information [...] the Swiss authorities did not have sufficient assurances [and in case of return] there would accordingly be a violation of Article 3 of the Convention”).

<sup>37</sup> OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (January 26, 2007), at § 43, <http://www.unhcr.org/4d9486929.pdf>.

<sup>38</sup> See the statement of Elihu Root, US Secretary of War, in PHILIP C. JESSUP, ELIHU ROOT 348 (1938) (“As near as I can make out the Constitution follows the flag – but doesn’t quite catch up with it”).



seas). The Supreme Court upheld the formalistic interpretation of the word “return” in Article 33(1) of 1951 Refugee Convention advanced by a Presidential Executive Order<sup>39</sup>. Whilst conceding that such interpretation “may even violate the spirit” of the 1951 Convention, the Court however concluded that “a treaty cannot impose unanticipated extraterritorial obligations [...] through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation’s actions toward aliens outside its own territory, it does not prohibit such actions”<sup>40</sup>. For the same reason, diplomatic assurances required by the US Government before transferring foreign nationals to countries whose human rights record displays a real risk of human rights violations are so generic and scant when compared to those required by European courts. The United States only gets the promise from the receiving State that “appropriate humane treatment measures” (a lower standard than full protection of human rights) will be guaranteed but there is no substantive assessment of the real risk of human rights violations occurring after the transfer<sup>41</sup>. The United States only relies on the formal assurance offered by the receiving State and the seeking of such formal promise is the only legal requirement to abide by the human rights obligations.

4. In the United States formalism is still the main methodology and legal ideology in assessing facts and interpreting and applying domestic and international rules. In Europe, instead, a process was perhaps set in motion through which differences are slowly narrowing and the European approach is coming a little bit closer to the American one in terms of management of security threats. In times of growing terrorist threats and unprecedented irregular migration flows, there is an increasing securitization of European policies and some States are wondering whether the highest level of human rights protection afforded by European courts in the last decades is still “sustainable” with respect to the need of addressing these threats.

Several elements confirm the growing securitization of European policies:

a) some fundamental principles of EU integration have been amended or suppressed. For instance, EU citizens no longer undergo minimum checks when crossing EU external borders as well as reintroduction of border controls within Schengen area is no longer a truly exceptional measure. The Schengen Borders Code will be updated to better tackle new security challenges and time limits for internal border controls will be prolonged to a maximum period of two years<sup>42</sup>;

b) massive-scale data collection, treatment and analysis are being developed and implemented to identify unknown likely suspects, create general assessment criteria for criminal profiling, build up “stronger and smarter information systems for borders and security”, improve quality and efficiency of border crossing processes, and contribute to the fight against irregular migration. To this end, the EU Directive on the use of passenger name record and the EU Regulations establishing the Entry-Exit System and the European Travel Information and Authorization System have been recently adopted<sup>43</sup>;

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<sup>39</sup>Anthony North, *Extraterritorial Effect of Non-refoulement*, <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-north/north-j-20110907> (the word “return” in Article 33(1) would only be “referred to the defensive act of resistance or expulsion at the border rather than to transporting a person to a particular destination”).

<sup>40</sup> U.S. Supreme Court, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), at 183.

<sup>41</sup> U.S. DEPARTMENT OF DEFENSE, *Detainee Transfers Announced*, Press Release No: NR-438-15, November 15, 2015, <http://www.defense.gov/News/News-Releases/News-Release-View/Article/628980/detainee-transfers-announced> (“The US coordinated with the Government of the United Arab Emirates to ensure these transfers took place consistent with appropriate security and humane treatment measures”).

<sup>42</sup> Since April 2017 EU Member States must carry out systematic and enhanced checks against relevant databases on all persons, including EU citizens, at all external borders (air, sea and land borders), both at entry and exit. On September 2017, the EU Commission proposed to adapt the Schengen Borders Code in order to respond to evolving and persistent serious threats to public policy or international security.

<sup>43</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime. Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System. Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States.





c) the EU return policy will be revised to make it more effective on the basis of principles (for instance, a wider use of swifter and simplified procedures and detention) and goals (curbing abuses of asylum procedures, prevent and combat irregular migration, etc.) which echo the US return policy<sup>44</sup>;

d) cooperation with non-EU States to prevent and manage irregular migration is being steadily enhanced. The “idea of establishing centers for the ‘external processing’ of asylum claims [...] actually realized in the Caribbean by the United States and in the Pacific area by Australia” is the key element of such policy<sup>45</sup>. Processing centers funded by the EU in African countries to identify refugees and hold and turn back migrants are part of the more comprehensive concept of “regional disembarkation platforms” whose objective “is to provide quick and safe disembarkation on both sides of the Mediterranean of rescued people [...], a responsible post-disembarkation process [and] a truly shared regional responsibility in replying to complex migration challenges”<sup>46</sup>. Those rescued in international waters by EU States’ flag vessels would be disembarked in third countries (such as northern African countries) provided their consent, their being “safe” and the respect of the principle of non-refoulement. The incipient EU offshoring processing policy bears a close resemblance to the widely criticized Australian policy of regional resettlement to Nauru and Papua New Guinea and increases the risk of human rights violations, of turning a blind eye and “of ‘blame shifting’ or ‘passing the buck’ among the various actors”<sup>47</sup>.

The growing securitization of European security policies underpins a different culture of security and a renewed approach to interpreting and applying legal rules which imply the adoption of new legal solutions that are typical of the US approach to security threats.

In the first place, a different culture of security implies limiting the full judicial review of supranational courts (especially, the ECtHR) that for decades has been the quintessential element of the European way to protect human rights. For different reasons but with the same goal of better protecting their own security, France, Ukraine and Turkey derogated from the obligations under the ECHR. Furthermore, the ECHR system will be amended by Protocol no. 15 (all signatory States but Italy and Bosnia and Herzegovina have ratified it) and an explicit reference to the principle of subsidiarity and the margin of appreciation doctrine will become part of the ECHR. The reform will shift the present balance between national courts and ECtHR in favor of the former because “national authorities are in principle better placed than an international court to evaluate local needs and conditions” and therefore apply and implement the ECHR<sup>48</sup>. Many European States believe, right or wrong, that the ECtHR’s legal understanding of the ECHR as a “living instrument” has gone too far and that it expanded rights and freedoms too much beyond what the framers of the Convention had in mind in 1950. Derogations, reforms and States’ attitude suggest that in times of increasing security threats European States feel a degree of unease with the present balance and are looking for a different judicial framework.

In the second place, the renewed approach to interpreting and applying legal rules in the field of illegal migration seem to distance itself from European functionalism and get closer to American-style formalism. After all, turning to formalism is almost inevitable once simplification and swiftness of asylum and return procedures and cooperation and shared responsibility with third countries become the “key pillars” of European migration and return policies. On one hand, simplification and swiftness are at odds with that thorough and careful examination of asylum-seekers and migrants situations required by the “reality on the ground test”. On the other, cooperation and partnership with African countries require a greater reliance and respect for their sovereignty, assurances and

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<sup>44</sup> See EUROPEAN COMMISSION, Communication on a more effective return policy in the European Union – A Renewed Action Plan, Brussels, 2.3.2017, COM(2017) 200 final. See also EUROPEAN COMMISSION, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), Brussels, 12.9.2018, COM(2018) 634 final.

<sup>45</sup> Anna Liguori, *Some Observations on the Legal Responsibility of States and International Organizations in the Extraterritorial Processing of Asylum Claims*, 25 *The Italian Yearbook of International Law* 135, at 135.

<sup>46</sup> EUROPEAN COMMISSION, Managing Migration: Commission expands on disembarkation and controlled centre concepts, Press Release IP/18/4629, Brussels, 24 July 2018. See also EUROPEAN COMMISSION, Non-paper on regional disembarkation arrangements, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724\\_non-paper-regional-disembarkation-arrangements\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-regional-disembarkation-arrangements_en.pdf).

<sup>47</sup> See Liguori, *supra* note 45, at 135.

<sup>48</sup> Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 213, Explanatory Report, at § 9, [http://www.echr.coe.int/Documents/Protocol\\_15\\_explanatory\\_report\\_ENG.pdf](http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf).



commitments<sup>49</sup>. Partnerships inevitably allocate and distinguish tasks, duties and responsibilities and this may weaken the European goal to uphold and promote its own values “in its relations with the wider world” and to “develop a special relationship with neighboring countries [...] founded on the values of the Union”<sup>50</sup>. The more the EU relies on cooperation and assurances from third countries, the less it can command respect for universality of human rights standards. Outsourcing human rights protection inevitably lowers these standards and it might lead Europe to turn a blind eye or claim no liability for violations occurring abroad.

A couple of latest developments in the field of illegal migration support these findings:

1) on September 2015, the European Commission proposed the establishment of a EU common list of safe countries of origin<sup>51</sup>. Applications for international protection lodged by nationals of safe countries would be fast-tracked for allowing faster returns if refused. The safe-country assumption could actually make the assessment of the application too fast and cursory and the need for faster returns could prevail over the effective protection of human rights. In this respect it is thought-provoking the Action Plan to support Italy in reducing migratory pressure presented by the European Commission on July 2017. The Commission urged Italy to develop “a national list of ‘safe countries of origin’, prioritizing the inclusion of the most common countries-of-origin of migrants arriving in Italy”<sup>52</sup>. The logic behind safe countries lists seems reversed and undermined. Third countries should be included on the list following a thorough and careful assessment of their being “safe”. In this case, however, the inclusion depends – or, at least, seems depending – on the fact that certain countries are the most common countries-of-origin of migrants arriving in Italy. The real aim seems to be to reduce migratory pressure and protect European security at any cost rather than to curb abuses of asylum systems (clearly unfounded claims, subsequent applications, etc.). The case of Nigerian nationals is a telling example. In 2016 Nigeria was one of the most common countries-of-origin of migrants arriving in Italy and the recognition rate of asylum application lodged by its nationals (more than 47,000) was so low (8% in the first three quarters) that the abuse of the asylum system was seemingly clear. However, the IOM “estimates that 70% of the Nigerian women and children who arrived in Italy in 2015 and the first five months of 2016 were victims of trafficking”<sup>53</sup>. The stark contrast between data exposes a failure in the Italian asylum system notwithstanding the application of ordinary asylum procedures. If Nigeria were included in the safe countries list, accelerated and streamlined asylum procedures would then apply and the risk of not being able to identify a victim of trafficking would become considerably greater;

2) on March 2016, the EU and Turkey issued a joint statement (“EU-Turkey Statement”) in order to have all irregular migrants crossing from Turkey into Greek islands returned to Turkey<sup>54</sup>. The European Council and the European Commission deny any binding value to the Statement because it would only be a press communique setting political commitments as allegedly proved by the use of the word “statement” instead of “agreement”. This interpretation runs counter to the reality on the ground. The content of the Statement “action points, thereby enumerating the commitments to which the parties have consented”, the active involvement of EU Institutions in its implementation and relevant international law suggest that it is an international binding agreement<sup>55</sup>. Even the ECJ qualified the Statement as a binding international “agreement” although it eventually held that the agreement “cannot be regarded as a measure adopted by the European Council” or the EU but by the EU Member States in

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<sup>49</sup> EUROPEAN COMMISSION, Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, Strasbourg, 7.6.2016.

<sup>50</sup> See Article 3(5) and Article 8(1) of the Treaty on European Union.

<sup>51</sup> EUROPEAN COMMISSION, Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purpose of Directive 2013/32, and amending Directive 2013/32/EU, COM(2015) 452 final, Brussels, 9.9.2015.

<sup>52</sup> EUROPEAN COMMISSION, Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity, SEC(2017) 399, Brussels, 4.7.2017, at 4.

<sup>53</sup> GRETA, REPORT ON ITALY UNDER RULE 7 OF THE RULES OF PROCEDURE FOR EVALUATING IMPLEMENTATION OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING ON HUMAN BEINGS (30 January 2017), GRETA(2016), at 29. GRETA stands for Group of Experts on Action against Trafficking on Human Beings.

<sup>54</sup> EU-TURKEY STATEMENT (18 March 2016), Press Release 144/16, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/EU-Turkey-statement/>.

<sup>55</sup> See Mauro Gatti, *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)*, published on April 18, 2016, [ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/](http://ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/).



their own capacity<sup>56</sup>. The thin and somewhat ambiguous distinction drawn by the ECJ between EU agreements and EU Member States agreements reveals a formalistic approach that it would have been unthinkable just a few years ago in Europe. Formalism underpinning the EU-Turkey Statement is also demonstrated by generic assurances contained therein such as that returns take place “in full accordance with EU and international law”, “all migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement”, and “any application for asylum will be processed individually by the Greek authorities”. Assurances of this kind are more similar to the (formal) ones sought by the US Government than to the (substantive) ones required by the European supranational courts. EU Commission’s responses to the criticism that “the EU-Turkey Statement might serve as a blueprint for human rights violations”<sup>57</sup> appear equally generic insofar as the Commission confirms that returns “are carried out strictly in accordance with the requirements of EU and international law, and in full respect of the principle of non-refoulement” and the situation in the Turkish centers “complies with required standards”<sup>58</sup>. The Statement ends up almost appearing a political *escamotage* and a legal shortcut to institutionalizing the US-style scant diplomatic assurances, avoiding a strict application of EU and international law of human rights and achieving at any cost the goal of halting irregular migration flows.

5. The impact of NSAs such as OAGs, OCGs and terrorist groups on MENA region is twofold. They fuel instability, crime, violence, and armed conflicts in the region and turn into push factors, if not means or vehicle, for illegal migration towards Europe where it is often perceived, right or wrong, as a serious threat to security. The EU response to migration is therefore evolving. Following decades of strong and wide protection of human rights in any situation, Member States and the European Commission are seeking for a new and different balance between human rights and security. It seems as if States and Commission are nowadays ready to trade some political idealism and legal functionalism in the field of migration and human rights for more political pragmatism and legal formalism in the field of security. Derogations and reform of the ECHR and Schengen system, the recast of return policy, the ambiguous legal nature and paternity of the EU-Turkey Statement, and the increasing reliance on partnerships with third countries are emblematic clues of this new culture of security marked by some US-style features such as a more limited judicial review and a formalistic interpretation and application of the law. Even if, for the time being, Europe has substantially stayed true to a high standard of human rights protection, the quest for more security especially by Governments might set them on a collision course with supranational Courts and their functionalist approach to human rights protection. The first testing ground might be the lawfulness of cooperation with third countries. EU Institutions and Member States have been accused of complicity and/or “contactless responsibility” in abuses committed in Libya against migrants and applications have been lodged before the ECtHR<sup>59</sup>. Should the Strasbourg Court uphold these charges, how would governments react? Would they respect the ruling as always happened in the past or take a challenging stance as Visegrad States did in the *affaire* of mandatory relocation of asylum seekers decided by the ECJ<sup>60</sup>?

<sup>56</sup> ECJ, Order of 28 February 2017, *NF v. European Council, NG v. European Council, NM v. European Council*, Joined Cases T-192/16, T-193/16, T-257/16, at §§ 71-72.

<sup>57</sup> See Kim de Vries, *The EU-Turkey Statement: A Design for Human Rights Violations?* (July 2018), <https://openaccess.leidenuniv.nl/bitstream/handle/1887/63629/K.%20de%20Vries.%20The%20EU%20Turkey%20Statement.%20A%20design%20for%20human%20rights%20violations..pdf?sequence=1>. See also COUNCIL OF EUROPE (PARLIAMENTARY ASSEMBLY), THE SITUATION OF REFUGEES AND MIGRANTS UNDER THE EU-TURKEY AGREEMENT OF 18 MARCH 2016 (April 2016), Report of the Committee on Migration, Refugees and Displaced Persons, Doc. 140128, at §§ 3.2-3.3.

<sup>58</sup> EUROPEAN COMMISSION, Fifth Report on the progress made in the implementation of the EU-Turkey Statement, COM(2017) 204 final, Brussels, 2.3.2017, at 5.

<sup>59</sup> Violeta Moreno-Law & Mariagiulia Giuffrè, *The Raise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows*, in RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW (S. Juss ed., forthcoming). See Richard Mackenzie-Gray Scott, *Torture in Libya and Questions of EU Member State Complicity* (2018), <https://www.ejiltalk.org/torture-in-libya-and-questions-of-eu-member-state-complicity/>.

<sup>60</sup> ECJ (Grand Chamber), Judgment of 6 September 2017, *Slovakia and Hungary v. Council*, Joined Cases C-643/15 and C-647/15.