The Smuggling of Migrants across the Mediterranean Sea

A Human Rights Perspective

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Abstract

Irregular migration by sea is one of the most apparent contemporary political issues, and one that entails many legal challenges. Human smuggling by sea is only one aspect of irregular migration that represents a particular challenge for States, as sovereignty and security interests clash with the principles and obligations of human rights and refugee law. In dealing with the problem of migrant smuggling by sea, States have conflicting roles, including the protection of national borders, suppressing the smuggling of migrants, rescuing migrants and guarding human rights.

The legal framework governing the issue of migrant smuggling at sea stems not only from the rules of the law of the sea and the Smuggling Protocol but also from rules of general international law, in particular human rights law and refugee law. The contemporary practice of States intercepting vessels engaged in migrant smuggling indicates that States have, on several occasions, attempted to fragment the applicable legal framework by relying on laws that allow for enhancing border controls and implementing measures that undermine obligations of human rights and refugee law. This article seeks to discuss the human rights dimension of maritime interception missions and clarify as much as possible the obligations imposed by international law on States towards smuggled migrants and whether or not these obligations limit the capacity of States to act.

Keywords: smuggling, refugees, migration, readmission, interceptions.

1. Introduction

Since the conclusion of the Schengen Agreement[1] – which abolished the internal border controls between EU States – the protection of the European Union's external borders has become a priority of national security. Today, border con-

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1 Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders (Schengen Agreement). 1990.

doi: 10.5553/EEYHR/258977642019002001005

trols are characterized by strategies of border securitization and extraterritorial border controls.[2] Border securitization and extraterritorial border controls do not refer to the application of domestic laws in areas beyond national jurisdiction (ABNJ); rather they refer to the adaptation of measures designed to strengthening border control in order to enhance the protection of national security and prevent irregular migrants from reaching their intended destination.[3] To this end, in 2004, the European Union (EU) established the European Agency for Management of External Borders (Frontex).[4] Since its creation Frontex has been active in enhancing the EU's border control by coordinating joint operations for interdicting vessels in the Mediterranean Sea. Other measures of preventing irregular migration and enhancing border controls have been also introduced, such as restrictive visas practices and pre-departure immigration control actions, e.g. cooperation with carriers and imposing penalties on carriers that bring an individual without a visa to the State of destination.[5] These measures, *ipso facto*, deny migrants the opportunity to reach the destination State through legal and safe channels. Therefore, in their search for new lives, migrants are increasingly seeking the help of smugglers to migrate through irregular/illegal channels to reach their intended destinations.

The smuggling of migrants via the Mediterranean Sea raises serious security concerns not only for the EU, but also for the international community as a whole. Owing to the ever-increasing measures of interdiction of vessels in the Mediterranean Sea, vessels, boats or crafts used for smuggling migrants are usually operated by unskilled persons and often by the migrants themselves, as the smugglers themselves do not wish to risk getting caught.[6] As a result, it may not only lead to catastrophic accidents that put the lives of smuggled migrants at risk, but also pose a threat to commercial shipping, maritime navigation and maritime safety. Because vessels carrying smuggled migrants will not return and are often destroyed, most vessels used by smugglers are unseaworthy, lack proper navigational equipment and are overcrowded, resulting in more drownings.[7] This results in distress situations that raise humanitarian concerns and require very costly search and rescue (SAR) operations. For instance, the operation *Mare Nostrum,* carried out in 2013 by the Italian Navy near the Libyan contiguous zone, cost

2 B. Ryan, 'Extraterritorial Immigration Control: What Role for Legal Guarantees?', *in* B. Ryan & V. Mitsilegas (Eds.), *Extraterritorial Immigration Control: Legal Challenges*, Leiden, Martinus Nijhoff, 2010, p. 3.

3 *Ibid*.

4 European Commission, Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX).

5 Ryan, 2010, p. 19.

6 J. Coppens, 'Migrant Smuggling by Sea: Tackling Practical Problems by Applying a High-Level Inter-Agency Approach', *Ocean Yearbook Online,* Vol. 27, No. 1, 2013, p. 325. *See also*: J. Carling, 'Migration Control and Migrant Fatalities at the Spanish-African Borders', *International Migration Review*, Vol. 41, No. 2, 2007, p. 327.

7 *Ibid*.

Italy €9 million per month.[8] Thus, the smuggling of migrants in the Mediterranean Sea left recipient States under particular pressure. Recipient States – e.g. Italy – are facing serious economic burdens and are increasingly concerned – in light of the recent terror attacks taking place across the world – about the identity and purpose of those arriving in their territory. In this context, the United Nations Secretary-General, in his 2016 report on *the Oceans and the Law of the Sea*, reaffirmed that the smuggling of migrants is one of the main threats to maritime security and called on all States to cooperate in taking measures in accordance with international law to combat these threats.[9]

In light of the foregoing, this article critically discusses the contemporary practice of EU States' interdicting vessels in the Mediterranean Sea and the legal implications associated with violating human rights obligations while conducting such operations. This article begins with a brief overview of Frontex maritime interception operations, as well as a brief overview of the unilateral measures adopted by some EU States to interdict vessels smuggling migrants across the Mediterranean Sea. Next, it assesses the legality of these interdiction operations against the background of international human rights obligations. However, since the article is concerned with the smuggling of migrants to Europe via the Mediterranean Sea, it brings into focus the applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) obligations while conducting these operations. Other legal factors that are also taken into account in this article are the International Law Commission's Articles on Responsibilities of States for Internationally Wrongful Acts (hereinafter, ILC Articles on State Responsibility).[10] It is necessary to point out that the ILC Articles on State Responsibility codifies customary international law, and all States are bound by it.[11]

2. Fortress Europe: Intercepting Smuggled Migrants at Sea

In principle, a coastal State may interdict a vessel within its internal waters, territorial waters or the contiguous zone to prevent or to punish infringements of its immigration laws. For instance, if a vessel embarks persons contrary to the immi-

8 S. Scherer & I. Polleschi, 'Italy in Talks with Eu to Share Responsibility for Boat Migrants', *Reuters*, 2014, available at: www.reuters.com/article/us-eu-italy-migrants/italy-in-talks-with-eu-to-share-responsibility-for-boat-migrants-idUSKBN0FD1YL20140708 (last accessed 1 July 2019). *See also*: The Guardian, 'Italy: End of Ongoing Sea Rescue Mission "Puts Thousands at Risk"', 2014, available at: www.theguardian.com/world/2014/oct/31/italy-sea-mission-thousands-risk (last accessed 1 July 2019).

9 UN Report of the Secretary-General, Oceans and the Law of the Sea, UN Doc, S/2016/66, 7 September 2016; *See also*: UN Report of the Secretary-General, Oceans and the Law of the Sea, UN Doc A/71/71, 6 September 2016.

10 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 2001.

11 Andreas Fischer-Lescano *et al.*, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', *International Journal of Refugee Law*, Vol. 21, No. 2, 2009, p. 279.

doi: 10.5553/EEYHR/258977642019002001005

gration laws of the coastal State, the coastal State may use the right of hot pursuit in accordance with the United Nations Convention on the Law of the Sea (LOSC) to interdict that vessel and prevent it from proceeding "further onward international travel".[12] The interdiction of vessels can also occur as a result of compliance with other obligations imposed on States from other sources of international law. For instance, State parties to the United Nations Convention on Transnational Organized Crime (UNTOC) and the Smuggling Protocol[13] are obliged to act against any vessel engaged in a transnational criminal act, e.g. human trafficking or smuggling. However, many transit and departure States bordering the Mediterranean Sea, e.g. Libya, lack the resources to effectively control their maritime borders and carry out their obligations under the UNTOC and the Smuggling Protocol. Therefore, EU States that are most affected by irregular migration have over the years adopted a significant number of measures of border control, either individually or jointly with other neighbouring States, that aim to reduce and prevent irregular migration from occurring.

In practice, most interdiction operations occur in ABNJ, e.g. the high seas, or in the territorial sea of other States provided that they have acquired the consent of that State. In this context, the United Nations High Commissioner for Refugees (UNHCR) defines maritime interception operations as:

> [A]ll measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.[14]

Formerly, the practice of European States in the Mediterranean Sea was to escort intercepted vessels to their ports, where migrants were screened individually to identify who was in need of protection or had asylum claims.[15] Although the screening process was not ideal, it was to a certain extent consistent with the requirements of human rights and refugee laws.[16] However, the recent practice of EU States of interdicting vessels in the Mediterranean Sea, as will be explained in the following sections, has not always been consistent with the rules and obligations of human rights and refugee law. This raises concerns about the limitations on the capacity of States to act against vessels that are engaged in smuggling

12 UNHCR, Executive Committee 54th Session, Conclusion on Protection Safeguards in Interception Measures No 97 (Liv) UN General Assembly Doc. (A/AC.96/987) and Doc.12A (A/58/12/Add.1), 2003, available at: www.unhcr.org/excom/exconc/3f93b2894/conclusion-protection-safeguards-interception-measures.html (last accessed 1 July 2019). *See also*: LOSC, Art. 111.

13 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, (Smuggling Protocol).

14 UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Un Doc. No. Ec/50/Sc/Crp.17, 2000', *Refugee Survey Quarterly*, Vol. 19, No. 4, p. 173.

15 S. Borelli & B. Stanford, 'Troubled Waters in the Mare Nostrum: Interception and Push-Backs of Migrants in the Mediterranean and the European Convention on Human Rights', *Uluslararası Hukuk ve Politika – Review of International Law and Politics*, Vol. 10, p. 33.

16 *Ibid*.

migrants. In other words, to what extent do human rights obligations imposed on States limit their capacity to act?

2.1. Frontex Maritime Interception Operations

Since 2005 Frontex has played an important role in strengthening EU's external borders and reducing the flow of irregular migration via the Mediterranean Sea. Today the presence of Frontex is the most visible militarization of European borders.[17] Most of the operations conducted by Frontex in the past involved the practice of diverting vessels and returning smuggled migrants to the State from which they departed.[18] The first joint interception operation coordinated by Frontex, known as *Hera*, took place on the Atlantic coast of West Africa.[19] The operation was carried out by Spain, Italy and Portugal and targeted the flow of irregular migration from West African States destined for the Canary Islands. Similarly, Frontex coordinated other joint interception operations in the Mediterranean Sea, targeting illegal migration from North African States towards Eastern European States, for instance, operation *Nautilus*, operation *Hermes* and, more recently, operations *Triton* and *Themis*.[20]

Most Frontex operations take place either on the high seas or in the territorial seas of other States, e.g. the territorial sea of departure or transit States. EU States hosting these operations have usually relied on several legal grounds to justify the conduct of these operations. The legal bases for interdicting vessels in the territorial sea of other States are usually bilateral agreements, which allow Frontex's patrols to interdict vessel smuggling migrants in the territorial sea of other States. As of today, Frontex has concluded working agreements with eighteen countries and is negotiating working agreements with almost all North African coastal States.[21] These agreements include training, technical assistance, information sharing and participation in border control operation in order to enhance third States' border control capabilities.[22] The legal grounds for intercepting vessels on the high seas are often based on the LOSC provisions. In this context, Article 110 of the LOSC is usually invoked with regard to interdicting

17 K. Aas & H. Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life', *The British Journal of Criminology*, Vol. 55, No. 1, p. 3.

18 For instance: In operation Hera III "1167 migrants were diverted back to their points of departure at ports at the West African coast" *see*: FRONTEX News Release (13-4-2007), available at: https://frontex.europa.eu/media-centre/news-release/hera-iii-operation-It9SH3 (last accessed 1 July 2019); *see also*: Borelli & Standford, 2014, p. 34.

19 For an overview of the operation, *see*: https://frontex.europa.eu/media-centre/news-release/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc (last accessed 1 July 2019).

20 Frontex, News Release 2018, Frontex launching new operation in Central Med, available at: https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7 (last accessed 1 July 2019).

21 List available at: http://frontex.europa.eu/partners/third-countries (last accessed 1 July 2019).

22 *Ibid., see also*: N. Markard, 'The Right to Leave by Sea: Legal Limits on Eu Migration Control by Third Countries', *European Journal of International Law*, Vol. 27, No. 3, 2016, p. 613.

doi: 10.5553/EEYHR/258977642019002001005

stateless vessels on the high seas.[23] Additionally, Article 98 of the LOSC – the duty to render assistance to vessels and persons in distress – is also often invoked to justify these operations.[24] Although the main objective of intercepting vessels on the high seas is to prevent the flow of irregular migrants from reaching Europe, Frontex and other EU States often frame their interdiction operations as humanitarian missions with the objective of saving migrants' lives in an attempt to avoid obligations and responsibilities under human rights and refugee law. As a result, these operations blur the distinction between two different legal regimes and lead to a situation where "vessels that are not in distress have been 'rescued', whereas vessels genuinely in distress have been ignored or diverted".[25] This is because Frontex and other EU States emphasize that SAR obligations must be understood as "operating independently from other international obligations arising from refugee law and human rights".[26] However, the European Court of Human Rights (ECtHR) – as will be discussed in the following section – rejected the fragmentation of international obligations and asserted that SAR obligations do not operate independently from other obligations arising from refugee law and human rights law.[27]

In theory, all operations carried out under the auspices of Frontex have to provide the means for screening migrants to identify persons in need of protection, e.g. asylum seekers, before returning those who are not entitled to protection to the State of departure.[28] However, Frontex was often criticized on the grounds that there are "human rights implications attached to its work and that it was ill-equipped to tackle them" and that the screening practices adopted by Frontex are not ideal, do not offer any form of protection, lack complaint mechanisms, lack clarity regarding its role and responsibility in migration control and show 'lack of democratic scrutiny' with regard to its agreements with third States to intercept and return vessels.[29] Frontex operations have also been criticized by many academics and international organizations for breaching international obligations of human rights and refugee laws.[30] However, Frontex always asserted

23 E. Papastavridis, "'Fortress Europe' and Frontex: Within or without International Law?", *Nordic Journal of International Law*, Vol. 79, No. 1, 2010, p. 83.

24 *Ibid.*, p. 86.

25 *Ibid*.

26 V. Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of Eu Member States' Obligations Accruing at Sea', *International Journal of Refugee Law*, Vol. 23, No. 2, 2011, p.177.

27 *Hirsi Jamaa and Others v. Italy,* no. 27765/09. para. 36. (*Hirsi* Case).

28 Borelli & Stanford, 2014, p. 35.

29 Parliamentary Assembly of the Council of Europe, Frontex: Human Rights Responsibilities, Resolution 1932, 2013, para. 2, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19719&lang=en (last accessed 1 July 2019). *See also*: Borelli & Stanford, 2014, p. 36.

30 *See* for example: S. Trevisanut, 'Maritime Border Control and the Protection of Asylum-Seekers in the European Union', *Touro International Law Review*, Vol. 12, 2009, pp. 157-161. *See also*: Borelli & Stanford, 2014..

that the responsibility lies with the States participating in these operations, not with Frontex itself.[31]

2.2. Unilateral Interception Measures: 'Pushback Operations'

In parallel to Frontex operations, EU States that are most affected by irregular migration have implemented unilateral measures to interdict vessels in the Mediterranean Sea. Between 2007 and 2011, EU States conducting interdiction missions in the Mediterranean Sea, e.g. Italy, developed a practice of interdicting vessels on the high seas and returning all migrants back to the State of departure to avoid obligations of human rights and refugee law.[32] These measures, known as pushback operations, aim to divert vessels and return all migrants indiscriminately to the State of departure – blanket returns – without offering any form of screening to determine who is in need of protection or has asylum claims.[33] In 2009, Italy adopted this strategy, and the first pushback operation was carried out in the same year and resulted in the return of 471 smuggled migrants to Libya.[34] Like Frontex operations, Italy's pushback operations have been widely criticized for breaching international obligations of human rights and refugee law.[35] However, in 2012 the ECtHR asserted the illegality of that practice in its recent decisions.[36] The ECtHR further affirmed the extraterritorial application of the principle of *non-refoulement* – the duty not to return people to a place where their life or liberty would be threatened – and that State Parties to the European Convention on Human Rights (ECHR)[37] cannot avoid their responsibility to asylum seekers by simply interdicting vessels on the high seas and returning them to the State of departure.[38] As a result, EU States have sought to outsource their obligation and responsibilities by concluding bilateral agreements, known as 'readmission agreements', with transit States and States of departure. The objectives of these agreements, as claimed by EU States, are to prevent and suppress

31 Papastavridis, 2010, p. 86. *See also*: Borelli & Stanford, 2014, p. 36.
32 Trevisanut, 2009, pp. 157-161.
33 Borelli & Stanford, 2014, p. 37.
34 *Ibid*., p. 39; *see also*: Y. Maccanico, 'Italy: The Internal and External Fronts: Security Package and Returns', *Statewatch Bulletin*, Vol. 19, No. 3, 2009, p. 4.
35 Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers', 2009, pp. 55-57, available at: www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-andasylum-seekers (last accessed 1 July 2019). *See also*: Amnesty International, Annual Report, 2010, p. 186, available at: www.amnesty.org/en/documents/pol10/001/2010/en/ (last accessed 1 July 2019). *See also*: Amnesty International, 'Italy: Over 100 Reportedly Pushed-Back at Sea', 2011, available at: www.amnesty.org/en/documents/eur30/017/2011/en/ (last accessed 1 July 2019).
36 *See* for instance: *Hirsi* Case; *see also*: *Khlaifia and Others v. Italy*, (15 December 2016). ECtHR, App. No. 16438/12. (*Khlaifia* Case).
37 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as amended by Protocols Nos. 11 and 14, 1950.
38 *Hirsi* Case, para. 36.

doi: 10.5553/EEYHR/258977642019002001005

transnational crimes such as the smuggling of migrants.[39] To this end, the EU concluded a readmission agreement with Turkey in 2016 known as the EU-Turkey Deal, and Italy concluded a bilateral agreement with Libya in 2017.[40] Similarly, Germany concluded two similar agreements with Tunisia and Egypt in 2017.[41] These agreements have been widely criticized by academics[42] and human rights organizations on the grounds that the main intention behind them is to enhance border control at sea to prevent the flow of migrants from reaching Europe and to avoid responsibilities under human rights law and refugee law.[43] The bilateral agreements concluded by Germany were also criticized for being immoral since these countries lack any legal guarantee against human rights abuses, which risks the lives of those in need of protection.[44] Thus, the continuing catastrophic situation in the Mediterranean Sea has once again brought the severe tension 'between competing legal norms, and between moral and legal considerations' into international focus.[45] Against this background, the following section discusses the applicability of human rights and refugee law obligations in the maritime context in view of the recent ECtHR decisions.

3. Beyond Fortress Europe: The Applicability of Human Rights Obligations at Sea

3.1. The Application of Human Rights Obligations within the Territorial Sea

Article 2 of the LOSC provides that the sovereignty of the coastal State extends beyond its land territory and internal waters to encompass the territorial sea. The

39 *See* for instance: Agreements between Germany and Egypt/Tunisia concerning Cooperation in the Field of Security (2017), available at: www.bundestag.de/dokumente/textarchiv/2017/kw17-de-aegypten-tunesien/501784 (last accessed 1 July 2019).

40 European Council, 'EU-Turkey Statement', 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (last accessed 1 July 2019). *See also*: Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic, 2017.

41 Agreements between Germany and Egypt/Tunisia concerning Cooperation in the Field of Security, 2017, available at: www.bundestag.de/dokumente/textarchiv/2017/kw17-de-aegypten tunesien/501784 (last accessed 1 July 2019).

42 *See* for instance: L. Haferlach & D. Kurban, 'Lessons Learnt from the Eu-Turkey Refugee Agreement in Guiding EU Migration Partnerships with Origin and Transit Countries', *Global Policy*, Vol. 8, No. 4, 2017, pp. 85-93.

43 K. Gogou, 'The Eu-Turkey Deal: Europe's Year of Shame', Amnesty International, 2017, available at: www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/ (last accessed 1 July 2019). *See also*: The UN Human Rights Office of the High Commissioner, 'Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya', 2016, available at: www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (last accessed 1 July 2019).

44 Human Rights Watch, 'Germany/Egypt: Agreement Risks Complicity in Abuses', 2017, available at: www.hrw.org/news/2017/04/24/germany/egypt-agreement-risks-complicity-abuses (last accessed 1 July 2019).

45 R. Barnes, 'Refugee Law at Sea', *International and Comparative Law Quarterly*, Vol. 53, No. 1, 2004, p. 47.

possession of the territorial sea, as the International Court of Justice (ICJ) points out, "is not optional, not dependent upon the will of the State, but compulsory".[46] The possession of a territorial sea has two important consequences. First, any person within the territorial sea of a coastal State becomes subject to the jurisdiction of that State. Second, any obligations of international law imposed on the coastal State within its land territory apply *mutatis mutandis* to the territorial sea. Critically, this includes human rights law and refugee law obligations, which means that human rights obligations apply at the territorial sea as much as within the coastal State's land territory. Nevertheless, several attempts have been made by some States to evade their obligations under international human rights and refugee law by adopting conflicting national laws.[47] For instance, since most refugee law obligations are of territorial nature, meaning that they arise only when the person is within the territory of a State and under its jurisdiction, France, in 1991, tried to revoke the effects of some human rights and refugee law obligations by turning airports and ports into international zones.[48] Similarly, Australia adopted a legislation in 2001[49] that turns several islands within its territorial sea into 'migration zones', where the obligations imposed on it by the 1958 Migration Act[50] do not apply, including obligations of international refugee law.[51]

This practice of adopting national laws that conflict with international obligations constitutes a breach of Article 27 of the Vienna Convention on the Law of Treaties, which provides that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, a State cannot avoid its obligation under international treaties by invoking its domestic laws.[52] Adopting domestic laws that conflict with international obligations also constitutes a breach of Article 32 of the ILC Articles on State Responsibility, which provides that "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations" under international law. In its decision, the ECtHR asserted in the *Amuur v. France* case that "despite its name, the international zone does not have extraterritorial status" and that the applicants were in France's territory and subject to French law.[53] Thereby, the creation of such zones to avoid the application of international human rights obligations amounts to acting in bad faith, and EU States cannot

46 *Anglo–Norwegian Fisheries Case, United Kingdom v. Norway*, (18 December 1951). International Court of Justice (ICJ), Reports 1951, 116, Dissenting Opinion of Sir Arnold McNair, p. 160.
47 Fischer-Lescano *et al.*, 2009, p. 262.
48 *Ibid*. *See also*: *Amuur v. France*, no. 17/1995/523/609, paras. 6 and 9.
49 Migration Amendment (Excision from Migration Zone) act 2001, no.127/2001, available at: www.legislation.gov.au/Details/C2004A00887 (last accessed 1 July 2019).
50 The Australian Migration Act, no. 62/1958, available at: www.legislation.gov.au/Details/C2017C00309 (last accessed 1 July 2019).
51 G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford, Oxford University Press, 2007, p. 225. *See also*: Fischer-Lescano *et al.*, 2009, p. 262.
52 Fischer-Lescano *et al.*, 2009, p. 263.
53 *Amuur v. France*, para. 52.

doi: 10.5553/EEYHR/258977642019002001005

justify a wrongful act by invoking their domestic laws as it leads to a "legal vacuum that the ECHR sought to avoid".[54]

3.2. Beyond the Territorial Sea: The Extraterritorial Application of Human Rights Obligations

It is first necessary to point out that international human rights obligations were developed to regulate the conduct of States within their own territory, not beyond it.[55] Therefore, it may appear at first sight that the extraterritorial application of human rights obligations is beyond most international human rights treaties.[56] Many States have argued against the extraterritorial application of human rights obligations. For instance, the US Supreme Court decided in 1993 in the *Sale v. Haitian Centers Council* case that the obligation of *non-refoulement* does not have an extraterritorial effect.[57] However, this position was criticized and condemned by academics[58] and the UNHCR for breaching human rights obligations.[59] More recently, similar arguments were raised by European States; for instance, Fischer-Lescano points out that in 2005 Germany argued that the principle of *non-refoulement* does not apply on the high seas "since the high seas are extraterritorial".[60] In 2009, Italy raised similar arguments while justifying its pushback operations to the ECtHR.[61] Thus, it is the purpose of the following subsections to examine the applicability of human rights obligations in ABNJ.

3.2.1. Extraterritorial Jurisdiction and Effective Control

In the context of intercepting vessels smuggling migrants in the Mediterranean Sea, the first question that arises is whether or not obligations of the ECHR apply in ABNJ. Article 1 of the ECHR stipulates that an EU member State shall secure the rights and freedoms listed in the convention to everyone within its jurisdiction. Hence, it is necessary to understand the circumstances under which an interdicted vessel may fall under the jurisdiction of the boarding State. The ECtHR in *Banković v. Belgium and 16 others* asserted that the meaning of jurisdiction in Article 1 of the ECHR is 'primarily territorial'; however, in special circumstances the ECHR can "apply to a State's extraterritorial acts".[62] In this context,

54 Fischer-Lescano *et al.*, 2009, p. 276.

55 A. Gallagher & F. David, *The International Law of Migrant Smuggling*, Cambridge, Cambridge University Press, 2014, p. 263.

56 *Ibid.*, p. 251.

57 *Sale v. Haitian Centers Council*, (21 June 1993). USSC, 509 US 155, 156; *See also*: Fischer-Lescano *et al.*, 2009, p. 266.

58 *See* for example: Goodwin-Gill and McAdam, 2007, p. 247. *See also*: N. Klein, 'A Maritme Security Framework for the Legal Dimensions of Irregular Migration by Sea' *in* V. Moreno-Lax & E. Papastavridis (Eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach - Integrating Maritime Security with Human Rights*, Brill / Nijhoff, 2016, p. 50.

59 UNHCR, 'Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council', International Legal Materials*, Vol. 32, 1993, p. 1215.

60 Fischer-Lescano *et al.*, p. 265.

61 *Hirsi* Case, para. 160.

62 *Banković and Others v. Belgium and 16 Other Contracting States*, no. 52207/99, paras. 59 and 61. (*Bankovic* Case).

the ECtHR provides that individuals may fall under the jurisdiction of an EU State if an agent of that State exercises control over them in ABNJ:

> the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction.[63]

Moreover, the ECtHR affirmed in its decision in *Banković v. Belgium and 16 others* that the exercise of extraterritorial jurisdiction by a State involves "the activities of its diplomatic or consular agents abroad and on-board craft and vessels registered in, or flying the flag of that State".[64] Thus, the ECtHR decision is consistent with the LOSC Article 92, which extends the jurisdiction of the flag State to every vessel flying its flag and every person onboard. Furthermore, it would be paradoxical to Article 1 of the ECHR if other – non-Europeans – individuals affected by the jurisdiction of an EU State are excluded from the application of the ECHR.[65] This was also affirmed by the ECtHR's decision in *Hirsi v. Italy,* where the court stated that "where there is control over another, this is *de jure* control exercised by the state in question over the individuals concerned".[66]

The extraterritorial application of the ECHR's provisions does not only apply when an EU State exercises effective control over vessels on the high seas, but also when exercising effective control over vessels in the territorial sea of other States. In this context, the ECtHR affirmed in the *Xhavara and others v. Italy and Albania* that Italy held the responsibility for the border control measures taken by its agents in the Albanian territorial waters and that Italy cannot outsource its obligation by displacing its border controls.[67] The court decision indicates that intercepting vessels in the territorial sea of other States does not release the EU State from its obligation and does not transfer the responsibility for the persons intercepted in the territorial sea by default to the coastal State. It should also be mentioned that in cases where an EU State conducts a joint interdiction operation with other EU or non-EU States, all States participating in the operation must ensure the application of human rights and refugee law obligations. In this context, Article 47 of the ILC Articles on State Responsibility provides: "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act." Hence, the individual responsibility of each State can be invoked when obligations of human rights and refugee laws are violated.

In summary, the exercise of jurisdiction in ABNJ "is always accompanied by the responsibility of the State for internationally wrongful acts".[68] In other words, as much as States have a duty to prevent and suppress the crime of

63 *Al-Skeini and Others v. United Kingdom*, no. 55721/07, para. 136.
64 *Bankovic* Case, para. 73.
65 Fischer-Lescano *et al.*, 2009, p. 275.
66 *Hirsi* Case, para. 77.
67 *Xhavara & Ors v. Italy & Albania,* no. 39473/98.
68 G. Goodwin-Gill, 'Setting the Scene: Refugees Asylum Seekers and Migrants at Sea – the Need for a Long-Term Protection-Centered Vision' in Moreno-Lax and Papastavridis, 2016, p. 23.

doi: 10.5553/EEYHR/258977642019002001005

migrant smuggling, they also have a duty towards victims and whoever come under their jurisdiction and effective control. In light of this, the following subsection aims to discuss the applicability of some of the most relevant human rights obligations to maritime interception operations to determine what EU States should refrain from doing when intercepting vessels in the Mediterranean Sea.

3.2.2. The Right to Leave, the Right to Asylum, Non-refoulement and the Prohibition on Collective Expulsion

3.2.2.1. The Right to Leave

Under customary international law everyone has the right to leave any country, including his own country. The right to leave is codified in the Universal Declaration of Human Rights (UDHR) and other multilateral treaties such as the International Covenant on Civil and Political Rights (ICCPR), the ECHR and the African Charter of Human and Peoples' Rights.[69] The right to leave a State in which individuals may suffer human rights violations is a necessary precondition for securing other fundamental rights, e.g. the right to life, the right to be free of torture and the right to seek asylum.[70] The right to leave, however, is not an absolute right but is subject to restrictions imposed by laws that are necessary for national security, public order, the prevention of crimes, the protection of public health and the protection of other persons' freedoms and rights.[71] For instance, a State may restrict the right of people to leave by creating specific points of departure in order to prevent transnational crimes such as human smuggling or trafficking, to prevent criminals from escaping justice or to secure pending trials. However, these restrictions must not prejudice "the essence of the right, and the freedom to leave must remain the rule and the restrictions must remain the exception".[72] Accordingly, arbitrary departure prevention by either the coastal State or other States operating in its territorial sea to prevent the smuggling of migrants may constitute a breach of the right to leave.[73] Thus, there must be a balance between public interests and individuals' rights. In this context, the UN Human Rights Committee (HRC) asserted that "The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality".[74] In other words, the right to leave must be

69 *See* UDHR Art. 13; ICCPR Art. 12(2); African Charter of Human and Peoples' Rights Art. 12, Protocol No. 4 to the ECHR Art. 2(2) "everyone shall be free to leave any country, including his own".

70 Markard, 2016, p. 594. *See also*: Council of Europe - Commissioner for Human Rights, 'The Right to Leave a Country', Issue Papers, Commissioner for Human Rights, 2013, p. 5.

71 ICCPR, Art. 12(3); Protocol No. 4 to the ECHR, Art. 2(3).

72 UN Human Rights Committee, (2 November 1999). General Comment No. 27: Freedom of Movement Art.12 (Un Doc. Iccpr/C/21/Rev.1/Add.9), para. 13; *See also*: Markard, 2016, p. 597; M. Den Heijer, 'Europe and Extraterritorial Asylum', Institute of Immigration Law, Faculty of Law, Leiden University, 2011, p.165.

73 UN Human Rights Committee, (2 November 1999), *ibid*. para. 10. *See also*: Fischer-Lescano *et al.,* 2009, p. 278.

74 UN Human Rights Committee, 1999, *ibid*., para. 16.

assessed not only against the restrictions imposed by law, but also on an ad hoc basis taking into account the particular situation of each person subject to the restrictions.[75]

Furthermore, the HRC has asserted that the restrictions on the right to leave must be consistent with other rights of the ICCPR.[76] Consequently, a restriction that may violate other fundamental rights, e.g. the right to life or the right to be free of torture, constitutes a violation of the ICCPR.[77] For instance, intercepting a vessel carrying migrants on the high seas and forcibly returning everyone to the State of departure without offering any form of screening constitutes a violation of the ICCPR and deprives the right of a person to leave from "any meaningful effect".[78] This is also consistent with Article 11(1) of the Smuggling Protocol, which provides that any measures taken by a State party to the Protocol that aims to suppress or prevent the smuggling of migrants must not prejudice the 'free movement of people' or result in unjustified prevention of departure.[79]

The right to leave is not a complete right, as it cannot be fulfilled unless other States permit entry to its territory.[80] The ECtHR in its decision in *Amuur v. France* pointed out that the right to leave becomes theoretical if there is no other State "offering protection comparable to the protection they expect to find in the country where they are seeking asylum that is inclined or prepared to take them in".[81] Since States are often reluctant or not willing to take others in, migrants tend to seek the help of smugglers in entering the territory of other States. In this context, it must be pointed out that the Convention Relating to the Status of Refugees (Refugee Convention)[82] obliges States Parties to decriminalize the entry of asylum seekers coming from States where 'their life or freedom was threatened' and prohibits their *refoulement*.[83]

3.2.2.2. The Right to Asylum and Access to Legal Protection

Under international law, States have the right to control the entry of foreigners into their land territory and to expel illegal migrants.[84] However, the right to expel illegal migrants who have entered a State illegally is not an absolute right and is subject to restrictions imposed by human rights obligations. For instance, pursuant to Article 14(1) of the UDHR, "everyone has the right to seek and to enjoy in other countries asylum from persecution".

75 *Riener v. Bulgaria*, no. 46343/99, para. 128. *See also*: Fischer-Lescano *et al.*, 2009, p. 278. *See also*: Den Heijer, 2011, p. 163. *See also*: C. Harvey & R. Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law', *International Journal of Refugee Law*, Vol. 19, No. 1, 2007, p. 6.
76 UN Human Rights Committee, 1999, para. 11.
77 *Ibid.*, para. 18.
78 Den Heijer, 2011, pp. 162-166.
79 *See also*: Markard, 2016, p. 607.
80 *Baumann v. France*, no. 33592/96, para. 61. *See also*: Markard, 2016, p. 595. *See also*: Goodwin-Gill and McAdam, 2007, pp. 382-383.
81 *Amuur v. France*, para. 48.
82 UNGA, Convention Relating to the Status of Refugees (Refugee Convention), 28 July 1951.
83 *Ibid*., Art. 31(1) & Art. 33.
84 *Saadi v. Italy,* no. 37201/06, para. 124 (*Saadi* Case).

doi: 10.5553/EEYHR/258977642019002001005

Most human rights treaties and conventions do not guarantee that everyone who seeks asylum will receive it; neither do most human rights treaties explicitly contain an obligation of *non-refoulement*. Nevertheless, the ECtHR has asserted that everyone coming within the jurisdiction of a State party to the ECHR shall have the right to access protection and the right to have their cases assessed individually.[85] Owing to the fact that vessels – including Frontex and other EU State vessels – lack the appropriate conditions and personnel to examine and assess individual asylum claims, it has been argued that all smuggled migrants shall be taken to an EU State until their nationalities and status are determined and their asylum claims or protection requests are examined.[86] Accordingly, judicial remedy – access to protection and procedures – is essential for assessing these claims, and all migrants shall have the right to remain in the State until their claims are examined.[87] In this context, Fischer-Lescano points out that the application of the principle of *non-refoulement* "is only guaranteed if the person concerned can claim effective legal protection".[88] Similarly, the UNHCR regards the right to an effective legal protection an essential element for the application of *non-refoulement,* especially in cases when asylum seekers have to appeal a negative decision in the first instance.[89] Not allowing asylum seekers to wait in the territory of the hosting State for 'the outcome of an appeal against a negative decision at first instance' renders the legal protection ineffective.[90] In this context, the ECtHR has asserted that when individuals come within the jurisdiction of a State member to the ECHR, that State shall provide them with the "opportunity and facilities to seek international protection".[91]

3.2.2.3. Non-refoulement at Sea

The principle of *non-refoulement* is the most relevant restriction on States seeking to return smuggled migrants or asylum seekers to their State of origin. As mentioned earlier, *non-refoulement* refers to the prohibition on expelling, transferring or returning individuals to a State where their fundamental human rights may be violated. The principle of *non-refoulement* is a norm of customary international law,[92] which is codified under Article 33(1) of the Refugee Convention and other conventions.[93] Although the ECHR does not include a direct obligation of *non-refoulement,* the principle, *inter alia*, serves as an element of the right to life and

85 *Hirsi* Case, para. 36.
86 Papastavridis, 2010, p. 85.
87 Fischer-Lescano *et al.*, 2009, p. 278.
88 *Ibid.*, p. 285.
89 UNHCR, "Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", Council Document 14203/04, Asile 64, 9 November 2004, Comment to Art. 38 (1), p. 51.
90 *Ibid.*
91 *Hirsi* Case, para. 36.
92 UNHCR, "Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees", 16 January 2002, HCR/MMSP/2001/09a, p. 1 para. 4, available at: www.unhcr.org/refworld/docid/3d60f5557.html (last accessed 1 July 2019).
93 For instance: Art. 2(3) of the 1969 OAU Convention Governing Specific Aspects of Refugee Protection in Africa.

applies equally to the prohibition on torture or inhuman or degrading treatment or punishment.[94]

According to international refugee law, individuals outside their State of origin are the only ones entitled to become refugees.[95] In other words, the obligation of *non-refoulement* can apply only when individuals are outside their State of origin. However, when a vessel smuggling migrants is being interdicted in the territorial sea of other States, it is in theory necessary to differentiate between two categories of smuggled migrants.[96] The first category consists of the nationals/citizens of the coastal States who are present within its territorial sea, for instance, Libyans within the Libyan territorial sea. The second category consists of individuals from other States within the coastal State's territorial sea, for instance, Syrians within the Libyan territorial sea. With regard to the former category, since migrants are still within the territory of their State of origin, the measures taken against them – e.g. intercepting the vessel and returning all migrants to the coasts – are not subject to the obligation of *non-refoulement*.[97] In contrast, the measures taken against non-nationals/citizens are subject to the obligation of *non-refoulement,* as they are outside the territory of their State of origin. However, in practice differentiating between the two categories is not possible, as both nationals and non-nationals are often smuggled together and as both categories often lack documentation such as passports or IDs that determine their nationalities.[98] In this context, it has been argued that since the measures taken against the vessel do not distinguish between the two categories, the law that is more advantageous for the migrants shall apply.[99] In other words, the obligation of *non-refoulement* shall apply to both categories until their status and nationalities are determined, a process that usually takes place in a later stage.[100]

The obligation of *non-refoulement* applies where the risk comes not only from State actors, but also from private actors.[101] Therefore, if a State transfers a person to a State that is not recognized as a safe State in terms of human rights and refugee law, where persons are at risk of degrading treatment or exposed to abuses from either the State agents or private actors, this amounts to *refoulement*.[102] Additionally, the ECtHR asserted that returning a person to a State from where that individual will subsequently be transferred to another State in which the fundamental rights of that person may be violated amounts to indirect *refoulement*.[103] In this context, the ECtHR emphasizes that the political situation of the

94 See: ECHR, Art.2 & Art.3; Art.3 of UNGA, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984. *See also*: A. Klug & T. Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures' *in* Ryan & Mitsilegas, 2020, p. 70.

95 Refugee Convention, Art. 1(A)(2).

96 Fischer-Lescano *et al.*, 2009, p. 278.

97 *Ibid*.

98 *Ibid*.

99 *Ibid*.

100 *Ibid*.

101 *H.L.R. v. France*, no. 24573/9, para. 40. *See also*: Borelli & Stanford, 2014, p. 48.

102 *Hirsi* Case, para. 36.

103 *Ibid.*, para. 146.

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doi: 10.5553/EEYHR/258977642019002001005

State where migrants are to be transferred or returned is a crucial element in assessing the risks faced by the displaced persons.[104] Thus, Italy, for instance, would be in breach of the principle of *non-refoulement* if it interdicted a vessel carrying smuggled migrants and decided to deliver the migrants – who came under its jurisdiction and effective control – to Libya, where their fundamental rights are at risk, or where they are subsequently transferred to another non-safe State where too their fundamental rights may be at risk. It has also been argued that, given the conflicts and massive human rights violations in the Middle East and other African States, fair proceedings are not guaranteed there either, and thus all intercepted or rescued migrants shall not be returned to those States, but rather they should be taken to an EU State.[105]

3.2.2.4. The Prohibition on Collective Expulsion

Closely related to the obligation of *non-refoulement* is the prohibition on collective expulsion, codified under Article 4 of Protocol 4 of the ECHR. Collective expulsion refers to

> any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.[106]

Collective expulsion is most visible in Italy's pushback operations. For example, in *Hirsi v. Italy,* a vessel carrying irregular migrants was intercepted on the high seas 35 NM from Lampedusa. All migrants were taken onboard an Italian navy vessel and indiscriminately returned to Libya without being offered any form of screening.[107] The applicants accused Italy of breaching Article 3 of the ECHR, which prohibits torture and degrading treatment on the grounds that returning them to Libya or to their State of origin would expose them to torture and degrading treatment, as well as Article 4 of Protocol 4 of the ECHR, which prohibits collective expulsion, and Article 13, which concerns the right of remedy for violating their freedoms and rights.[108] In its response, Italy argued that these measures of interdiction taken against the vessel do not fall under the scope of Article 4 of Protocol 4 to the ECHR, as the ECHR is of a territorial nature and all measures were carried out outside the Italian national territory.[109] Moreover, Italy justified its conduct as a rescue operation on the high seas, arguing that the obligation to render assistance to persons in distress "did not itself create a link between the State" conducting the SAR missions "and the persons concerned establishing the

104 *Saadi* Case, para. 130.

105 Fischer-Lescano *et al.*, 2009, p. 285.

106 Council of Europe/European Court of Human Rights, (2017). "Guide on Article 4 of Protocol No. 4 – Prohibition of Collective Expulsion of Aliens", p. 5, available at: www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf (last accessed 1 July 2019)

107 *Hirsi* Case, para. 11.

108 *Ibid.*, para. 3.

109 *Ibid.*, para. 160.

State's jurisdiction".[110] In its decision, the ECtHR condemned the Italian practice of blanket returns and asserted that 'pushback' operations violated Article 4 of Protocol 4 to the ECHR.[111] The court further stated that the objective of Article 4 is to "prevent States being able to remove certain aliens without examining their personal circumstances" and that Article 4 "contains no reference to the notion of 'territory'".[112] Furthermore, the ECtHR reaffirmed that when a State exercises effective control over other individuals its jurisdiction extends to cover them, by virtue of the principle of flag State jurisdiction.[113] In this context, the court emphasized that Italy is bound by the principle of *non-refoulement* "wherever it exercised its jurisdiction, which included via its personnel and vessels engaged in border protection or rescue at sea, even when operating outside its territory".[114] This is also consistent with Article 19 of the Smuggling Protocol, which explicitly states that the obligations imposed on State parties shall not affect the rights of individuals under both human rights law and refugee law and "the principle of *non-refoulement* as contained therein".

Finally, it should be mentioned that in 2014 the European Parliament and Council adopted new regulations for Frontex that reflect some of the legal constraints imposed by the ECtHR judgment in *Hirsi v. Italy*.[115] For instance, Article 4 of the new regulation prohibits transferring a person to a place 'in contravention of the principle of *non-refoulement*' where that person might be subject to torture, prosecution, inhuman or degrading treatment.[116] However, the 2014 Frontex regulations have been criticized for being 'organizationally fragmented' as the regulations do not offer any "practical guidance as to how or when state interception, pushback, and third-state transfer powers are limited by intervening obligations to protect migrant rights".[117]

4. Readmission Agreements

Following the decisions of the ECtHR, European States sought to outsource their international obligations under human rights law and refugee law to North African coastal States by transferring their maritime interception operations and border controls to these States. To this end, EU States concluded the so-called readmission agreements. This section aims to critically discuss the aims of these agreements and whether the rules of international law may provide a tool for

110 *Ibid*., paras. 65 and 95.
111 *Ibid*., paras. 185-186.
112 *Ibid*., para. 177.
113 *Ibid*., para. 77.
114 *Ibid*., para. 36.
115 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex – Frontex 2014 regulations.
116 *Ibid*., Art. 4(1).
117 B. Miltner, 'The Mediterranean Migration Crisis: A Clash of the Titans' Obligations', *The Brown Journal of World Affairs* XXII, no. I, 2015, p. 221.

doi: 10.5553/EEYHR/258977642019002001005

holding EU States parties to these agreements responsible for the violations of human rights associated with these agreements.

Readmission agreements may simply be understood as bilateral or multilateral agreements between EU States and other States from which migrants often depart towards Europe, e.g. North African States and Turkey. The central aim of these agreements is to prevent the departure of vessels carrying irregular migrants, by reinforcing the capacities of the States of departure in border management by providing vessels, funding, technical assistances and training to coastguards. Consequently, upon the ratifications of these agreements, third States such as Turkey, Egypt, Tunisia or Libya may be obliged to adopt measures that aim to strengthen border controls to prevent illegal departure. Examples of such measures might be adoption of legislation and measures that restrict the crossing of borders to specific checkpoints, criminalization of the crossing of borders from areas outside of the specified checkpoints, increasing fines and prison sentence for irregular departures and interdiction of vessels suspected of migrant smuggling at the territorial sea and the contiguous zone.

4.1. The EU-Turkey Deal

In 2016, the EU concluded a readmission agreement with Turkey (EU-Turkey Deal).[118] At its core, the agreement aims to reinforce Turkey's border controls to combat and prevent irregular migration and the smuggling of migrants to EU.[119] It further aims to facilitate the return of asylum seekers to the first country of admission; in other words, it aims to return to Turkey all new irregular migrants coming to Greece via the Aegean Sea.[120] In return, the EU will resettle one Syrian for every Syrian returned to Turkey and will provide Turkey with financial support – projected at €6 billion – and speed up visa liberalization for Turkish nationals.[121] The EU-Turkey Deal was criticized by many academics, NGOs and international organization on the ground that "the premise on which the deal was constructed – namely that Turkey is a safe place for refugees – was flawed".[122] A year after the implementation of the EU-Turkey Deal, the number of vessels

118 European Council (2016) "EU-Turkey Statement", available at: www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement (last accessed 1 July 2019).

119 *Ibid*.

120 *Ibid*.

121 *Ibid*.

122 K. Gogou, 'The Eu-Turkey Deal: Europe's Year of Shame', Amnesty International, 2017, available at: www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/ (last accessed 1 July 2019). *See also*: L. Haferlach & D. Kurban, 'Lessons Learnt from the Eu-Turkey Refugee Agreement in Guiding Eu Migration Partnerships with Origin and Transit Countries', *Global Policy*, Vol. 8, no. 4, 2017, pp. 85-93; E. Collett, 'The Paradox of the Eu-Turkey Refugee Deal', Migration Policy Institute, 2016, available at: www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal (last accessed 1 July 2019). *See also*: P. Boghani, 'European Leaders Face Criticism for Refugee Deal with Turkey', PBS, 2016, available at: www.pbs.org/wgbh/frontline/article/european-leaders-face-criticism-for-refugee-deal-with-turkey/ (last accessed 1 July 2019).

arriving in Greece via the Aegean Sea dropped by 97%, and the Eastern Mediterranean Sea route was deemed closed.[123]

4.2. The EU-Libya Deal

Following the enclosing of the eastern Mediterranean Sea route by the implementation of the EU-Turkey Deal, the central Mediterranean Sea route became the primary route used for smuggling irregular migrants to Europe. Therefore, in February 2017, the EU and Libya concluded the Memorandum of Understanding on Cooperation in the Fields of Development, Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic (hereinafter The EU-Libya Deal).[124] The EU-Libya Deal was criticized for being a reduplication of the former 2008 Treaty of Friendship, Partnership and Cooperation.[125] The essential difference between the two agreements is that maritime interdiction operations are now carried out by the Libyan authorities. Thus, pushback operations, which were ruled illegal by the ECtHR for violating human rights obligations, are now transferred to Libya, and the Libyan coastguards are the ones charged with returning smuggled migrants back to Libya. Thereby, Italy will not bear a direct responsibility for the breaches of human rights obligations.[126] To help Libya with this task, Italy has agreed to provide training and technical assistance to the Libyan navy and coastguards along with financial support – projected at €220 million – to the Libyan government, to strengthen measures of border control and improve the detention facilities of illegal migrants in Libya.[127] The EU-Libya agreement raises serious concerns and creates a large gap in the protection of human rights for two reasons: first, Libya is not a safe country. Instead, it is torn apart by civil wars and lacks law enforcement. In this context, in December 2016 the UN report stated that:

> The situation of migrants in Libya is a human rights crisis. The breakdown in the justice system has led to a state of impunity, in which armed groups, criminal gangs, smugglers and traffickers control the flow of migrants through the country.[128]

123 European Council (2017). "EU-Turkey Statement", available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf (last accessed 1 July 2019).

124 Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic, 2017.

125 D. Nakache & J. Losier, 'The European Union Immigration Agreement with Libya: Out of Sight, out of Mind?', E-International Relations, 2017.

126 *Ibid*.

127 *Ibid*. *See also*: A. Merelli, 'Like Trump in the Us, Europe Is Finding New Ways to Keep Refugees Out' Quartz, 2017, available at: https://qz.com/904026/europe-has-a-genius-new-strategy-to-deal-with-migrants-pay-war-torn-libya-to-detain-them/ (last accessed 1 July 2019).

128 The UN Human Rights Office of the High Commissioner, 'Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya', 2016, p. 1, available at: www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (last accessed 1 July 2019).

doi: 10.5553/EEYHR/258977642019002001005

The report also indicates that some Libyan governmental members are participating in the smuggling of migrants.[129] The report further notes that many migrants are subject to "arbitrary detention, torture, other ill-treatment, unlawful killings, sexual exploitation" and some are being sold as slaves.[130] Furthermore, in 2017 the delegation from the European Union Border Assistance Mission in Libya (EUBAM-Libya) justified the termination of its mission in Libya owing to the deteriorating security situation and "the absence of a functioning national government".[131] Second, Libya, in contrast to Turkey, is not a State member to the Rome Statute of the ICJ or to the Refugee Convention or its Protocol;[132] and there are no legal procedures to apply for asylum in Libya.[133] This demonstrates that by supporting the Libyans in the interdiction of vessels in the Mediterranean Sea to prevent migrants from leaving or to return them to Libya, Italy created a serious gap in the protection of human rights, as Libya by no means can be considered a safe State. The same can also be said with regard to other readmission agreements concluded with other North African States.

4.3. The EU Indirect Responsibility

The question that arises when border controls are transferred to other States is, to what extent can an EU member State be held responsible for the acts of another State that constitute violations of human rights obligations? It has been argued that international obligations of human rights and refugee laws are legally binding when a State seeks to transfer its responsibilities to another State.[134] Under customary international law a State can be held responsible when it assists another State to commit an internationally wrongful act. In this context Article 16 of the ILC Articles on State Responsibility states:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: that State does so with knowledge of the circumstances of the internationally wrongful act; the act would be internationally wrongful if committed by that State.[135]

129 *Ibid*.

130 *Ibid*. *See also*: C. Quackenbush, 'The Libyan Slave Trade Has Shocked the World, Here's What You Should Know', *The Time*, 2017, available at: http://time.com/5042560/libya-slave-trade/ (last accessed 1 July 2019).

131 EUBAM-Libya Report, 2017, available at: http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf (last accessed 1 July 2019).

132 UNHCR, State Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, June 2014, available at: www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (last accessed 1 July 2019). *See also*: S. Tucci, 'Libya and International Refugee and Asylum Law: Addressing the Protection of Refugees and Migrants Displaced by the 2011 Conflict', *Oxford Monitor of Forced Migration*, Vol. 2, No. 2, 2011, p. 49.

133 Nakache & Losier, 2017.

134 Fischer-Lescano *et al.*, 2009, p. 279.

135 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 2001, Art.16.

Aiding and assisting another State does not require physical involvement – as in the situation of conducting joint interdiction operations – in order to invoke the indirect responsibility of the aiding State. Instead, indirect responsibility of the aiding State may occur by providing funds, vessels, training, technical assistance and other means of political support.[136] For example, following the signing of the EU-Libya Deal, in May 2017, the Libyan Coastguard received four patrol vessels from Italy to enhance border controls and to prevent vessels carrying irregular migrants from leaving the Libyan territorial sea.[137] In the same month the Libyan Coast Guard prevented a vessel that belonged to the NGO Sea-Watch from rendering assistance to more than 450 migrants and returned all migrants to Libya.[138] Reports from human rights monitors indicate that when migrants are intercepted by the Libyan Coast Guards and returned to Libya, they are detained in bad conditions, often returned to their State of origin regardless of their political status, transferred to the Libyan western borders and left in the desert, exposed to more abuse or subjected to slavery and torture.[139] Therefore, training or aiding the Libyan coastguards to enable them to intercept vessels in the Mediterranean Sea and subsequently returning all migrants to Libya, where there are grave human rights violations, indeed constitutes violations of fundamental human rights, e.g. the right to life, the right to be free of torture and the right to leave and the right to access proceedings and protection. Although Italy and the EU will not bear a direct responsibility since the interdiction operations are being carried out by Libya and within the Libyan territorial sea, their indirect responsibility may be invoked in accordance with Article 16 of the ILC Articles on State Responsibility since they are aware of the human rights crisis in Libya but continue to aid and train the Libyan Coastal Guard regardless. In short, neither the exercise of border controls in ABNJ nor international cooperation releases the EU State from its international obligation or legal responsibility.

5. The Fight against Migrant Smugglers

In addition to the previous policies, the European Council announced in 2015 that the EU would make all efforts to prevent further loss of life in the Mediterra-

136 Fischer-Lescano *et al.*, 2009, p. 280

137 A. Smith, 'Uncertainty, Alert and Distress: The Precarious Position of Ngo Search and Rescue Operations in the Central Mediterranean', *Revue Maroco-Espagnole de Droit International et Relations Internationales: Paix et Securite Internationales*, No. 5, 2017, p. 48. *See also*: P. Cuttitta, 'Repoliticization through Search and Rescue? Humanitarian Ngos and Migration Management in the Central Mediterranean', *Geopolitics*, 2017, p. 17.

138 A. Elumami, 'Libyan Coastguard Turns Back Nearly 500 Migrants after Altercation with Ngo Ship', *Reuters*, 2016, available at: www.reuters.com/article/us-europe-mi¬grants-libya-idUSKBN1862Q2 (last accessed 1 July 2019). *See also*: Smith, 2017, p. 48; Cuttitta, 2017, p. 17.

139 UN Human Rights Office of the High Commissioner, 2016. *See also*: Middle East Monitor, 'Italy Begins Training Libyan Navy and Coastguard', 2017, available at: www.middleeastmonitor.com/20170919-italy-begins-training-libyan-navy-and-coastguard/ (last accessed 1 July 2019).

doi: 10.5553/EEYHR/258977642019002001005

nean Sea.[140] To this end, the EU adopted Decision 2015/778, which establishes the European Union Naval Force Mediterranean (EUNAVFOR MED) Operation Sofia, which aims "to disrupt the business model of human smuggler and trafficking networks" by identifying smuggler networks and capturing and disposing of smuggler vessels.[141] There are twenty-seven EU States that contribute to Operation Sofia, and its mandate consists of three phases. The first phase is to patrol the high seas and gather information in accordance with international law to support the monitoring and detection of smuggler networks.[142] The second phase is to "conduct boarding, search, seizure and diversion" of vessels suspected of migrant smuggling in accordance with the rules of the LOSC and the Smuggling Protocol on the high seas and in the territorial and internal waters of the coastal States concerned on obtaining their consent or in accordance with a UN Security Council Resolution (hereinafter UNSCR).[143] The third phase is taking 'all necessary measures' against vessels suspected of being used for human smuggling by 'disposing them or rendering them inoperable' in the territory of the third State concerned upon obtaining its consent or according to a UNSCR.

Following the initiation of Operation Sofia, the UNSC adopted Resolution 2240, which authorizes State parties to board any vessel on the high seas, upon the consent of the flag State, if they suspect them of being engaged in migrant smuggling.[144] Paragraphs 6 & 7 of the Resolution, which grant States the right to board vessels, uses the words 'reasonable grounds to believe' without explaining what 'reasonable grounds' implies or which suspicions would amount to reasonable and thereby trigger the right to board and inspect vessels. In this context, since the Resolutions must always be seen as an exception to the principle of freedom of navigation, the Resolution's provisions must be interpreted strictly so they do not lead to abuse of rights. Thus, the words 'reasonable grounds' should amount to more than just a mere suspicion.

Although the official mandate of Operation Sofia is clearly a mandate of border enforcement and does not include an official SAR mandate, the operation is still obliged by the LOSC and customary international law to render assistance to persons in distress. In 2016 the European Council added to the mandate of Operation Sofia a task to train the Libyan Coast Guard and Navy to perform SAR mis-

140 European Council, Press release, Special Meeting of the European Council – Statement, 23 April 2015, available at: www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/ (last accessed 1 July 2019).

141 EU Council Decision (CFSP), 18th May 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), Art. 1, available at: www.operationsophia.eu/mission-at-a-glance/ (last accessed 1 July 2019).

142 *Ibid.*, Art. 2(2)(a).

143 *Ibid.*, Art. 2(2)(b).

144 UNSC Resolution 2240(2015), UNSC Resolution 2312(2016) and UNSC Resolution 2380(2017), paras. 6 & 7, available at: www.un.org/press/en/2017/sc13015.doc.htm (last accessed 1 July 2019). *See also*: Meetings Coverage, 'Adopting Resolution 2312 (2016), Security Council Extends Authorization to Intercept vessels Suspected of Illegal Smuggling from Libya', United Nations, 6 October 2016, available at: www.un.org/press/en/2016/sc12543.doc.htm (last accessed 1 July 2019).

sions and to disrupt smuggling networks in the Libyan territorial sea.[145] More critically, Guilfoyle points out that Operation Sofia 'is framed as a Common Foreign and Security Policy operation', under which the ECtHR has no jurisdiction to review the actions taken while the mission is being carried out or after its conclusion.[146] This means that persons affected by that operation are left without any legal "remedies under EU law".[147] Furthermore, it means that training and assisting the Libyan Coast Guard and Navy to prevent irregular departures and to return migrants boats to Libya will not give rise to either the EU's direct or indirect responsibility under the system of the ECtHR. To conclude, Operation Sofia is a clear example of how the EU continues to prioritize security measures over the protection of human rights. To this end, Guilfoyle points out that the purpose of this operation is not to establish a major rescue operation at sea or to prevent further loss of life, as claimed, but to find 'legal mechanisms to interdict migrant smugglers' and to destroy migrants' boats before they depart from Libya.[148] Finally, it should be mentioned that on 25 July 2017 the mandate of Operation Sofia was extended until 31 December 2018.[149]

6. Conclusion

Viewing irregular migration through the lens of security and considering it as a threat to both maritime security and the State of destination led EU States to rely on laws that externalize border controls, with only few considerations as to the applicability of human rights at sea. In an effort to shift the focus of EU States from security concerns to individuals' rights and entitlements under international human rights law, the ECtHR has affirmed in its recent decisions that the principle of *non-refoulement* and the provisions of the ECHR apply in ABNJ just as much as they do in the territory of EU States. It has further asserted that EU States cannot abandon their responsibilities and obligations under international law by simply externalizing or displacing their border controls in areas outside the territorial sea.[150] Thus, wherever an EU State exercises jurisdiction for the purposes of border controls and have de facto effective control over persons at sea, it must adhere to the principles of the ECHR, human rights law and refugee laws.

145 European Council, Press release, Council conclusions on EUNAVFOR MED Operation Sophia, 23 May 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/05/23/fac-eunavfor-sophia/ (last accessed 1 July 2019).

146 D. Guilfoyle, 'Transnational Crime and the Rule of Law at Sea: Responses to Maritime Migration and Piracy Compared', *in* V. Moreno-Lax & E. Papastavridis (Eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach - Integrating Maritime Security with Human Rights*, International Refugee Law Series, Brill Nijhoff, 2016, p. 184.

147 *Ibid.*, p. 185.

148 *Ibid.*, p. 186.

149 European Council, Press release, EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018, available at: www.consilium.europa.eu/en/press/press-releases/2017/07/25/eunavformed-sophia-mandate-extended/ (last accessed 1 July 2019).

150 *Hirsi* Case, para. 36.

doi: 10.5553/EEYHR/258977642019002001005

Unfortunately, the EU continues to deal with the situation in the Mediterranean Sea through the lens of security. This is evident from the attempts to circumvent court decisions by transferring their maritime interception operations and border controls to other States to outsource their responsibilities under international law and by launching a military operation under which the ECtHR lacks the jurisdiction to review any of its conducts. It remains, however, to be seen whether or not Italy and other EU States do indeed have legal responsibility for the lives and dignity of persons affected by that practice and whether or not Italy and other EU States are able to get away from their indirect responsibility under the system of the ECtHR. More critically, the EU's attempt to circumvent international and regional obligations demonstrates a critical betrayal of the original values of the EU and indicates that the political dialogue has seriously deteriorated.