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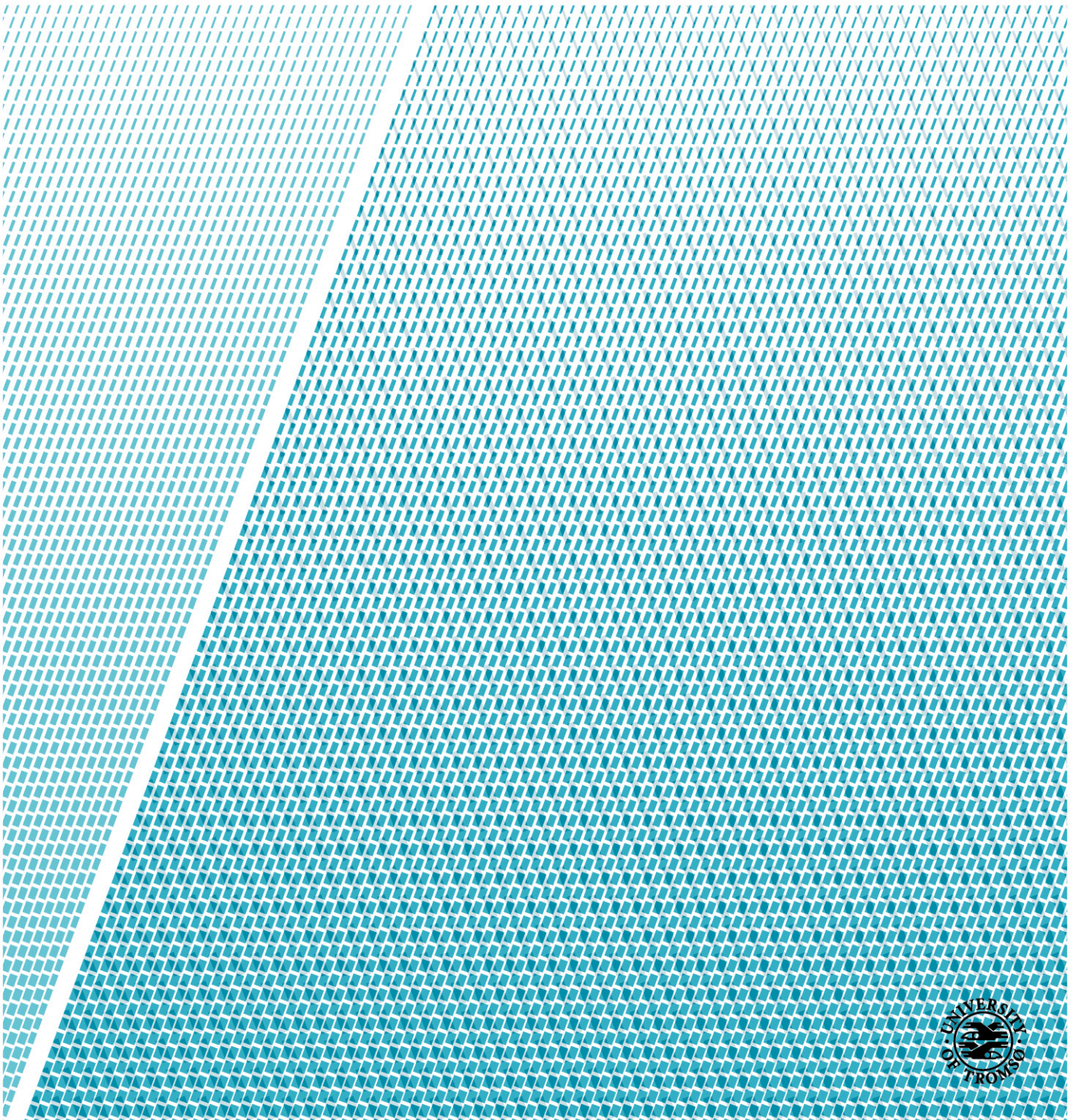
Faculty of Humanities, Social Sciences and Education
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The Smuggling of Migrants across the Mediterranean Sea: States' Responsibilities and Human Rights

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Abbreviations

ABNJ	Areas Beyond National Jurisdiction
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms.
ECtHR	European Court of Human Rights.
EEZ	Exclusive Economic Zone.
EU	European Union.
EU-Libya Deal	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.
EU NAVFOR Med	European Union Naval Operation Against Human Smugglers and Traffickers in the Mediterranean.
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States.
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights.
ICJ	International Court of Justice.
ILC	International Law Commission.
ILC Articles on State Responsibility	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Yearbook of the International Law Commission, 2001, vol. ii.
IMO	International Maritime Organization.
IOM	International Organization For Migration.
ITLOS	International Tribunal for the Law of the Sea.
LOSC	United Nations Convention on the Law of the Sea.
MOU	Memorandum of Understanding.
MRCC	Maritime Rescue Coordination Centre.
M/V	Merchant Vessel.
NGO	Non-governmental organization.
NM	Nautical Mile
Refugee Convention	The 1951 Convention relating to the Status of Refugees.
SAR	Search and Rescue.

SAR Convention	The International Convention on Maritime Search and Rescue.
Smuggling Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.
SOLAS	Safety of Life at Sea Convention.
UDHR	Universal Declaration of Human Rights.
UN	United Nations.
UNGA	United Nations General Assembly.
UNHCR	United Nations High Commissioner for Refugees.
UNSCR	United Nations Security Council Resolution.
UNTOC	United Nations Convention on Transnational Organized Crime.
The US	The United States of America.
VCLT	Vienna Convention on the Law of Treaties.

Chapter I: Introduction

1. Background and Spatial Scope

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. Thus, managing migrant smuggling by sea requires consideration of both transnational criminal law and justice, as well as a clear understanding of the relevant legal framework and the interaction between overlapping legal regimes. With this in mind, the main objective of this thesis is to clarify, as much as possible, the rights and obligations of States with regards to migrant smuggling by sea. In other words, the aim is to clarify what States are obliged to do or refrain from doing when dealing with the issue of migrant smuggling by sea.

Although the focus of this thesis is the legal framework of migrant smuggling by sea, it would be misleading to consider this legal framework in isolation from the broader political context, which has a significant influence on its development. As this thesis is being written, hundreds of thousands of people are fleeing their homelands and crossing land and sea borders to escape conflicts, insecurity, economic instability, abuses of human rights and poverty in the Middle East, Africa and Asia. The recent mass migrations from these regions have led to what is known today as the ‘migration crisis’. The United Nations High Commissioner for Refugees (hereinafter UNHCR) describes the current crisis as the greatest displacement of people since the Second World War, with more than 65 million people who have been displaced since 2015.¹ The vast majority of displaced persons continue to remain in the same region of origin or migrate to neighboring States.² Only a small percentage of persons affected attempt to cross the Mediterranean Sea to reach into a member State of the European Union (hereinafter EU).³

However, since the beginning of 2014, the number of people trying to cross the EU borders via irregular channels has substantially increased. The majority of migrants crossed into Europe via the Mediterranean Sea. There are three main irregular migration routes that are often used to smuggle migrants across the Mediterranean Sea to reach Europe: the central, eastern

¹ UNHCR, (2016). "Global Trends: Forced Displacements in 2015" p.5 Available at: <http://www.unhcr.org/576408cd7.pdf>

² Ibid., p.15.

³ Ibid., p.13-15.

and western Mediterranean routes, (see figure 1 below). Since 2015, more than one million migrants crossed the Mediterranean Sea via these routes to reach the EU in comparison to 22,500 in 2012, as shown in table 1.

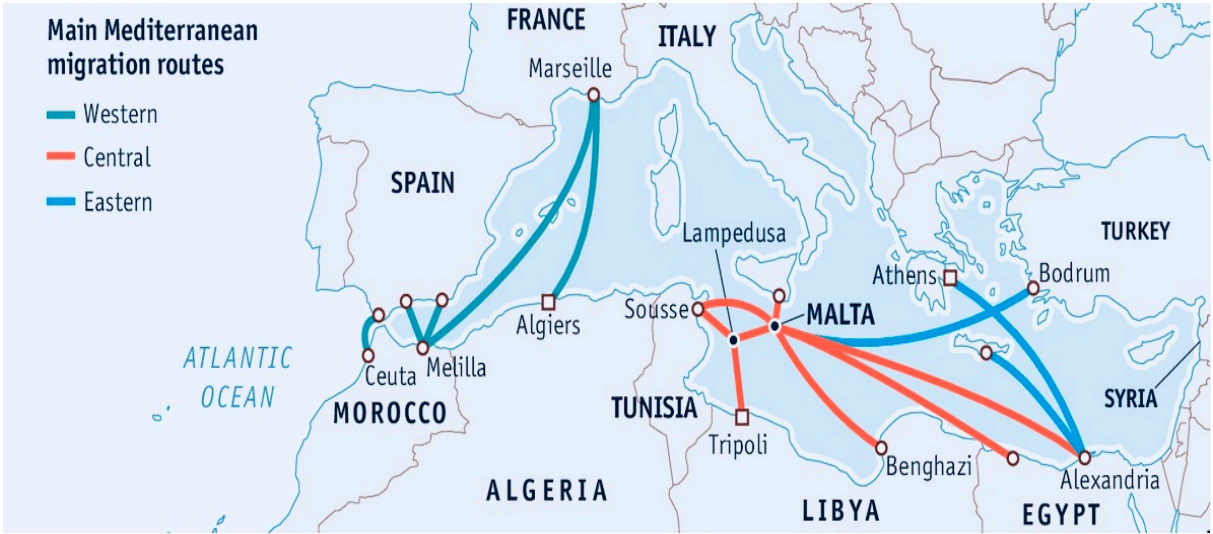


Figure 1: Main Mediterranean migration sea routes.⁴

Year	2012	2013	2014	2015	2016	2017	May 2018
Number of crossings	22,500	60,000	216,054	1,015,078	362,753	171,332	25,669

Table 1: Mediterranean Sea arrivals from 2012.⁵

The migration crisis in Europe does not refer only to the significant numbers of people crossing into Europe via irregular channels, but also to the substantial number of migrants reported dead or missing trying to cross the Mediterranean Sea. The Mediterranean Sea is regarded today as the world most dangerous and deadliest sea.⁶ Reports from the UNHCR and the International Organization for Migration (hereinafter IOM) indicate that the number of people that go missing each year trying to cross the Mediterranean Sea has substantially increased since 2012, with more than 16,000 persons reported dead or missing since 2014, as shown in table 2.⁷

⁴ The Economist, (2015). "Everything You Want to Know About Migration across the Mediterranean" The Economist, Available at: <https://www.economist.com/blogs/economist-explains/2015/05/economist-explains-6>
⁵ UNHCR, (2015). "The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees", p.5.; see also: UNHCR, Operational Portal Refugee Situation, Mediterranean Situation, Available at: <http://data2.unhcr.org/en/situations/mediterranean>.
⁶ Philippe Fargues, (2017). "Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence", International Organization for Migration (IOM) The UN Migration Agency, Geneva, p.1.
⁷ UNHCR, Operational Portal Refugee Situation, Mediterranean Situation, supra note (5).; See also: UNHCR, (2015). Supra note (5),p.5.; see also: Tamara Last & Thomas Spijkerboer, (2014). "Tracking Deaths in the Mediterranean" in Fatal Journeys: Tracking Lives Lost During Migration, ed. Tara Brian & Frank Laczko, Geneva, International Organization for Migration, p.92-97.

Year	2012	2013	2014	2015	2016	2017	May 2018
Dead or missing	500	700	3538	3771	5096	3139	609

Table 2: Number of persons reported dead or missing trying to cross the Mediterranean.⁸

2. Definitions and Terminology

Before delving into the discussions of migrant smuggling by sea there are a few terms that must be clarified to avoid confusion. The term ‘irregular migration’ can be simply understood as the crossing of a State’s borders without that State’s permission. Since people migrate for different reasons and have different profiles and needs, and not all of them are primarily refugees, or have asylum claims or are in need of a special protection, the term ‘smuggled migrants’ will be used in this thesis to refer to persons on board of vessels carrying migrants in violation of international and national laws. The term ‘migrant smuggling’ can be defined as “the unauthorized movement of individuals across national borders for the financial or other benefit of the smuggler”.⁹ According to the Protocol against the Smuggling of Migrants by Land, Sea and Air¹⁰ (hereinafter the Smuggling Protocol), the smuggling of migrants is considered to be a transnational crime.

The term ‘State of departure’ or ‘departure State’ is used to refer to the State where smugglers chose to start the journey. Whereas the term ‘transit State’ refers to the States that individuals pass through to reach their destination. However, certain States, such as Libya, can be regarded as both transit State and departure State at the same time, because some migrants are fleeing from Libya and some are passing through from other States. The term ‘recipient State’ is used to refer to the coastal State of intended destination where migrants enter land territory illegally, e.g. Italy and Malta.

Finally, the term ‘maritime interception/interdiction’ refers to the measures of border controls, which a State may undertake to prevent the arrival of vessels carrying illegal migrants from reaching its land territory.¹¹ In the context of interdicting vessels engaged in smuggling migrants at sea, there are different measures of interdiction that are often employed such as the identification of vessels, refusal of disembarkation and ‘pushing back’ vessels to international waters. It should also be mentioned that maritime interception operations are not limited only

⁸ UNHCR, Operational Portal Refugee Situation, Mediterranean Situation, supra note (5).

⁹ Anne Gallagher & Fiona David, (2014). “The International Law of Migrant Smuggling”, Cambridge University Press, p.1.

¹⁰ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 2000.

¹¹ For the purposes of the present thesis, both terms interception and interdiction are used interchangeably to refer to interfering with vessels at sea.

to preventing vessels smuggling migrant, but are also used to combat other threats e.g. terrorism and drug trafficking.

3. Setting the Scene: Migrant Smuggling and Maritime Security

Since the conclusion of the Schengen Agreement¹² – which abolished the internal border controls between EU States – the protection of the EU’s external borders has become a priority of national security. Today border controls are characterized by strategies of border securitization and extraterritorial border controls.¹³ Border securitization and extraterritorial border controls do not refer to the application of domestic laws in areas beyond national jurisdiction (hereinafter 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.¹⁴ To this end, in 2004, the EU established the European Agency for Management of External Borders (hereinafter Frontex).¹⁵ 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.¹⁶ 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.¹⁷ These measures, ipso facto, deny migrants the opportunity to reach to the destination State through legal and safe channels. Therefore, in searching for new lives, migrants are increasingly requesting 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. Due to the ever increasing measures of vessels interdiction in the Mediterranean Sea, vessels, boats or crafts used for smuggling migrants are usually operated by unskilled persons and often by the migrants

¹² European Union, 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.

¹³ Bernard Ryan, (2010). "Extraterritorial Immigration Control: What Role for Legal Guarantees?" in *Extraterritorial Immigration Control: Legal Challenges*, ed. Leiden, Martinus Nijhoff, p.3.

¹⁴ Ibid.

¹⁵ European Union: 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).

¹⁶ Frontex operations are further discussed in: Part two, Chapter IV.

¹⁷ Bernard Ryan, (2010). *supra* note (13), p.19.

themselves, as the smugglers themselves do not wish to risk getting caught.¹⁸ This situation may lead to catastrophic accidents that do not only risk the lives of smuggled migrants, but also constitute a threat to commercial shipping, maritime navigation and maritime safety. Owing to the fact that 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.¹⁹ Additionally, these vessels are rarely capable of navigating the Mediterranean Sea's harsh weather and often run out of fuel, which result in distress situations that require very costly search and rescue (hereinafter SAR) operations. For instance, operation *Mare Nostrum* that was carried out in 2013 by the Italian Navy near the Libyan contiguous zone, costed Italy €9 million per month.²⁰ Thus, the smuggling of migrants across 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 to their territory. In this context, the UN 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 upon all States to cooperate to take measures in accordance to international law to combat these threats.²¹

Between the period of 2007 and 2011, EU States conducting interdiction operations in the Mediterranean Sea e.g. Italy, developed a practice of interdicting vessels at the high seas and returning all migrant indiscriminately back to the State of departure to avoid obligations of human rights and refugee law.²² However, in 2012 the European Court of Human Rights (hereinafter ECtHR)²³ asserted the illegality of that practice in its recent decisions.²⁴ The ECtHR,

¹⁸ Jasmine Coppens, (2013). "Migrant Smuggling by Sea: Tackling Practical Problems by Applying a High-Level Inter-Agency Approach", *Ocean Yearbook Online* 27, no. 1, pp.323-58, p.325.; see also: Jørgen Carling, (2007). "Migration Control and Migrant Fatalities at the Spanish-African Borders", *International Migration Review* 41, no. 2, pp.316-43, p.327.

¹⁹ Ibid.

²⁰ Steve Scherer & Ilaria Polleschi, (2014). "Italy in Talks with Eu to Share Responsibility for Boat Migrants" Reuters, Available at: <https://www.reuters.com/article/us-eu-italy-migrants/italy-in-talks-with-eu-to-share-responsibility-for-boat-migrants-idUSKBN0FD1YL20140708>. See also: The Guardian, (2014). "Italy: End of Ongoing Sea Rescue Mission 'Puts Thousands at Risk'" Available at: <https://www.theguardian.com/world/2014/oct/31/italy-sea-mission-thousands-risk>.

²¹ UN Report of the Secretary-General, (7 September 2016). "Oceans and the Law of the Sea", UN Doc, S/2016/66; See also: UN Report of the Secretary-General, (6 September 2016). "Oceans and the Law of the Sea", UN Doc A/71/71.

²² Seline Trevisanut, (2009). "Maritime Border Control and the Protection of Asylum-Seekers in the European Union", *Touro International Law Review* 12, pp.157-61.

²³ The European Court of Human Rights, established by the European Convention on Human Rights, 1959.

²⁴ See for instance: *Hirsi Jamaa and Others V. Italy*, (23 February 2012). ECtHR, App. No. 27765/09. (hereinafter *Hirsi Case*); see also: *Khlaifia and Others V. Italy*, (15 December 2016). ECtHR, App. No. 16438/12. (hereinafter *Khlaifia Case*).

further affirmed the extraterritorial application of the principle of *non-refoulement* – the duty to not to return people to a place where their life or liberty would be threatened – and that EU States Parties to the European Convention of Human Rights (hereinafter ECHR)²⁵, cannot avoid their responsibility to asylum seekers by simply interdicting vessels at high seas and returning them to the State of departure.²⁶ As a result, EU States have sought to outsource their obligation and responsibilities by concluding bilateral agreements, known as ‘readmission agreements’, with transit and departure States. The objectives of these agreements as claimed by EU States, are to prevent and suppress transnational crimes such as the smuggling of migrants.²⁷ 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 also known as the EU-Libya Deal.²⁸ Similarly, Germany concluded two similar agreements with Tunisia and Egypt in 2017.²⁹ These agreements have been widely criticized by academics,³⁰ and human rights organizations on the bases that the main intentions behind them is to enhance borders control at sea, prevent the flow of migrants from reaching Europe and to avoid responsibilities under human rights law and refugee law.³¹ The bilateral agreements concluded by Germany were also criticized for being immoral on the basis that these countries lack any legal guarantee against human right abuses, which risks the lives of those in need of protection.³² 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.³³

²⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as amended by Protocols Nos. 11 and 14, 1950.

²⁶ Hirsi Case, supra note (24), para.36.

²⁷ See for instance: Agreements between Germany and Egypt/Tunisia concerning Cooperation in the Field of Security (2017). Available at: <https://www.bundestag.de/dokumente/textarchiv/2017/kw17-de-aegypten-tunesien/501784>. For further discussion on ‘readmission agreements’ see: chapter four, section four.

²⁸ European Council (2016) “EU-Turkey Statement”. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> 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).

²⁹ Agreements between Germany and Egypt/Tunisia concerning Cooperation in the Field of Security, (2017). supra note (27),

³⁰ See for instance: Lisa Haferlach & Dilek Kurban, (2017). "Lessons Learnt from the Eu-Turkey Refugee Agreement in Guiding Eu Migration Partnerships with Origin and Transit Countries", Global Policy 8, no. 4, pp.85-93.

³¹ Kondylia Gogou, (2017). "The Eu-Turkey Deal: Europe's Year of Shame" Amnesty International, Available at: <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/> See also: The UN Human Rights Office of the High Commissioner, (2016). "Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya" Available at: http://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf.

³² Human Rights Watch, (2017). "Germany/Egypt: Agreement Risks Complicity in Abuses" Available at: <https://www.hrw.org/news/2017/04/24/germany/egypt-agreement-risks-complicity-abuses>.

³³ Richard Barnes, (2004). "Refugee Law at Sea", International and Comparative Law Quarterly 53, no. 1, pp.47-77, p.47.

4. Focus, Objectives and Outline

The previous section demonstrated that the issue of migrant smuggling by sea is a complex multidimensional issue that affects States, international organizations, non-governmental organizations (hereinafter NGOs), merchant vessels (hereinafter MV) and individuals. It also raises questions concerning the legal framework of migrant smuggling that consists of a broader framework of rules stemming from international customary law, international conventions and multilateral and bilateral agreement. Consequently, different legal regimes are operating simultaneously, e.g. transnational criminal law, the law of the sea, refugee law, human rights law and customary international law.

The previous section also demonstrated that human rights obligations are not always recognized to the fullest extent when States carry out maritime interception or SAR missions at sea. One example is the application of the principle of *non-refoulement*, which is still debatable when dealing with migrants intercepted or rescued at sea.³⁴ Thus, there appears to be conflicts between the provisions of overlapping legal regimes and a lack of clarity regarding the obligations of States. However, due to the limited space and time given a full analysis of the entire applicable legal regime within the content of this thesis is not possible. With this in mind, the core focus of this thesis will not be individual rights under international law, but rather it will be States' rights and obligations under the relevant international legal instruments that govern the issue of migrant smuggling by sea. In this context, the main objective of this thesis, as mentioned earlier, is to clarify as much as possible, what States are obliged to do or refrain from doing when dealing with the issue of migrant smuggling by sea.

In order to achieve the objective of this thesis, the thesis will take the following structure. This introduction constitutes chapter one and will continue – following this section – by introducing the methodology and the sources of law. Following this Chapter, the thesis is divided into two main parts. Part one is concerned with discussing in detail the legal framework that governs the smuggling of migrants by sea, and has the objective of clarifying the relevant rules and principles that provide States with the capacity to act against the crime of migrant smuggling by sea. Part two is concerned with the application of human rights at sea, emphasizing the ‘human element’ of the crime of migrant smuggling, and arguing for an approach to combat human smuggling that respects human rights.

³⁴ For more discussion on the principle of non-refoulement see: Chapter IV Section 3, and Chapter V Section 3.

Part one consists of two chapters: chapters two and three. Chapter two has the purposes of clarifying and discussing the relevant rights and obligations imposed by transnational criminal law on States to combat and suppress the crime of migrant smuggling. Chapter three has the objective of examining the relevant provisions of the Law of the Sea Convention³⁵ (hereinafter LOSC) that may provide States with the capacity to act against vessels engaged in migrant smuggling and discusses the legal bases for interdicting vessel at sea within the different maritime zones established by the LOSC.

Part two consists of chapters four and five. Chapter four reflects on the contemporary practice of EU States in interdicting vessels engaged in the act of migrant smuggling in the Mediterranean Sea and considers the human rights violations associated with that practice. The main objectives of chapter four are to clarify what the applicable principles of human rights and refugee law in maritime interdiction operations are; and to discuss to what extent EU State are obliged to act in accordance to these principle while interdicting vessels at sea. Finally, chapter four discusses the so called ‘readmission agreements’ and the legal basis for holding EU State Members responsible for breaching principles of human rights and refugee laws. Chapter five is concerned with the legal framework of SAR. It critically discusses the obligations imposed on States and shipmasters to render assistance to persons and vessels in distress. It also discusses the concept of place of safety and the responsibility of States for violating human rights obligations while conducting SAR missions. Chapter five also has the objective of discussing the contemporary role of NGOs’ in conducting SAR missions and examines whether and to what extent Libya as a coastal State can hinder NGOs’ vessels from conducting rescuing missions in the claimed SAR zones. Finally, chapter six will present the conclusion and provide suggestions for enhancing the protection of the rights of smuggled migrants at sea.

5. Methodology and Sources of Law

5.1 Methodology

To achieve the objectives of this thesis, I will employ the traditional dogmatic methodology applied in legal sciences. Thus, a two-step methodology is necessary. In the first step, the thesis describes and discusses the existing legal frameworks for migrant smuggling by sea, i.e. it analyzes the *lege lata*. The objectives here are to determine the significance of the rules relevant to the issue of migrant smuggling by sea, as well as what States are obliged to do or refrain from doing. In the second step, the thesis analyzes the nexus between the relevant legal frameworks governing the issue of migrant smuggling by sea and also analyzes State practice in order

³⁵ The United Nations Convention on the Law of the Sea, 1982.

to expose the areas where the law is deficient and to suggest changes or development of the laws in question, i.e. it analyzes options and obstacles for a development *de lege feranda*.

The primary methods used are the analysis of legal texts, State practice and case law. The relevant provisions of international treaties have been interpreted in accordance with the rules of interpretation laid down by Article 31 of the Vienna Convention on the Law of Treaties (hereinafter VCLT)³⁶. In this context, Article 31(1) of the VCLT provides that a treaty must be interpreted in “good faith”, in accordance with the ordinary meaning “given to its terms” and “in light of its object and purpose”.

5.2 Sources of Law

The primary legal sources used for this thesis are the sources of law as stipulated by the Statute of the International Court of Justice (hereinafter ICJ) Article 38(1), including international conventions, “international custom, as evidence of a general practice accepted as law”, general principles of law and judicial decisions.³⁷ Accordingly, different legal provisions from various legal sources that are relevant to the issue of migrant smuggling by sea are assessed and examined in this thesis, including provisions from the LOSC, the International Convention on Maritime Search and Rescue (hereinafter SAR Convention)³⁸, the International Convention for the Safety of Life at Sea (hereinafter SOLAS)³⁹, The United Nations Convention against Transnational Organized Crime (hereinafter UNTOC)⁴⁰, the Smuggling Protocol, as well as other related international instruments.⁴¹ Additionally, the thesis identifies arguments from judicial decisions, articles, chapters and books of legal scholars in order to support the legal analysis, enhance understanding of the issues in focus and determine what the law is and what it ought to be. For the same purposes, the thesis also makes use of secondary sources such as reports and statistics from various international human rights organizations and NGOs.

³⁶ The Vienna Convention on the Law of Treaties, 1969.

³⁷ The Statute of the International Court of Justice, 1945.

³⁸ The International Convention on Maritime Search and Rescue, 1979.

³⁹ The International Convention for the Safety of Life at Sea, 1974.

⁴⁰ United Nations Convention against Transnational Organized Crime, 2000.

⁴¹ The International Maritime Organization (Imo) Is a Specialized Agency of the United Nations, Established, 1948.

Part One
The Legal Framework of Migrant Smuggling

Chapter II: Acting against the Crime of Migrant Smuggling by Sea

1. Introductory Remarks

Undermining States sovereignty and the protection of national security are usually invoked as the main justifications for acting against illegal migration and the smuggling of migrants. Sovereignty as demonstrated by the Permanent Court of International Justice, refers to States independence “to a portion of the globe” where States have “the right to exercise therein, to the exclusion of any other State, the functions of a State”.⁴² Closely related are the principles of sovereign equality, territorial integrity and non-intervention in domestic affairs that stipulate that a State can exercise enforcement jurisdiction within its territory but cannot exercise enforcement jurisdiction in the territory of another State without its consent. For instance, in the Libyan territorial waters, Italy cannot interdict vessels engaged in human smuggling without Libya’s consent. This is based on the view that the international legal system is constructed as a State system based on consent, with the concept of sovereignty being the cornerstone of international law.⁴³ International law, therefore, is regarded to be interstate law, where States are bound by what they consent to. The consent of a State can be explicit, as with multilateral and bilateral treaties, or implicit through customary international law.⁴⁴ The consent of a State – as demonstrated in the following chapters – plays a significant role in expanding the State’s capacity to regulate conduct at sea, including activities related to the smuggling of migrants by sea.⁴⁵

States in the past tried to combat and suppress transnational crimes including the crime of migrant smuggling through national measures in an effort to maintain national security and the integrity of their borders.⁴⁶ However, as States recognized that contemporary threats e.g. terrorism, trafficking and human smuggling are of a transnational nature and cannot be faced individually or only by national measures, several initiatives were introduced at the international level to combat and suppress transnational crimes. This has led to the adoption of the UNTOC and the Smuggling Protocol. Having said this, the main purpose of the following sections is to determine what the legal grounds for criminalizing the act of migrant smuggling are,

⁴² *Island of Palmas, Netherlands V. USA*, (4 April 1928). The Permanent Court of International Justice (PCIJ), Volume II, p.383.

⁴³ Anne-Marie Slaughter, (2000). "A Liberal Theory of International Law", *American Society of International Law* 94, pp.240-49, p.240.; See also: Malcolm Shaw, (2008). "International Law", 6th ed. Cambridge University Press, p.487.

⁴⁴ Jan Klabbers, (2013). "International Law", Cambridge University Press, p.38.

⁴⁵ Anne Gallagher & Fiona David, (2014). *Supra* note (9), p.225.

⁴⁶ Jasmine Coppens, (2013). *Supra* note (18), p.327.

in other words, what the international obligations imposed on States to combat and suppress the crime of migrant smuggling by sea are.

2. The Criminalization of Migrant Smuggling

As a starting point, it is necessary to stress that under international criminal law a State can only prosecute a crime if it has recognized the grounds to claim jurisdiction over that crime, and its national law expressly prescribed that conduct as criminal. In this context, the *nullum crimen sine lege* principle provides that no person shall be held responsible or punished for an act that was not criminalized by law. This principle is today a fundamental right and a legal guarantee which was affirmed by the Universal Declaration of Human Rights (hereinafter UDHR)⁴⁷:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”.⁴⁸

A similar obligation is also codified in Article 15(1) of the International Covenant on Civil and Political Rights (hereinafter ICCPR).⁴⁹ In light of this, it is necessary to determine the sources of international law that impose obligations on States vis-a-vis the criminalization of migrants smuggling by sea.

2.1 State Obligations under International Law

At the international level, customary international law does not impose any obligations on States with respect to the criminalization of migrant smuggling by sea.⁵⁰ The only obligations under international law that bind States are derived from the UNTOC and the Smuggling Protocol.⁵¹ Because of this, States that have ratified the UNTOC and the Smuggling Protocol are the only ones that are legally bound to criminalize the smuggling of migrants under their domestic legislation and the acts related to it. In view of this, the following sections aim to clarify what the obligations imposed by the UNTOC and the Smuggling Protocol on States to combat the crime of migrant smuggling, are. However, due to the limited space given and since the provisions of the Smuggling Protocol are more specific to the topic of migrant smuggling, the Protocol’s provisions are dealt with in detail in comparison to the UNTOC’s provisions that are dealt with briefly.

⁴⁷ United Nation General Assembly (UNGA), Universal Declaration of Human Rights, 1948.

⁴⁸ *Ibid.*, Art. 11(2).

⁴⁹ UNGA, The International Covenant on Civil and Political Rights (ICCPR), 1966.

⁵⁰ Anne T. Gallagher & Fiona David, (2014). *Supra* note (9), p.387.

⁵¹ *Ibid.*, 355.

2.2 State Obligations under the UNTOC

The essential purpose of the UNTOC obligations is to combat transnational organized crimes.⁵² The UNTOC provides that any offence subject to the convention and its protocols must consist of three main elements: first, it must amount to a serious crime; second, it must have a transnational nature; third, it must involve an organized criminal group.⁵³ Hence, transnational organized crimes can be simply understood as serious crimes that usually involve organized criminal groups and that are transnational in nature.⁵⁴ The UNTOC defines these three elements broadly.⁵⁵ For instance, organized criminal group is defined as a group that consists of at least three persons and one that exists for a period of time, with the aim of committing a serious offence for obtaining “directly or indirectly, a financial or other material benefit”.⁵⁶ The UNTOC further provides that the crime “is transnational in nature, if it is committed in more than one State”, or one that commences in a State and is accomplished in another, or one “that is committed in one State but has substantial effects” on other States.⁵⁷ As a result, States Parties to the UNTOC enjoy a wide discretion and are capable of addressing various transnational criminal acts that are not explicitly addressed under the UNTOC.⁵⁸

The UNTOC is further supplemented by three additional protocols that deals with trafficking in persons, the smuggling of migrants and trafficking in firearms respectively. It is important for the understanding of the provision of the Smuggling Protocol and to avoid confusion to highlight the nexus between the UNTOC and the Smuggling Protocol. The nexus between the UNTOC and the Smuggling Protocol is apparent in three respects. Firstly, pursuant to Article 37 of UNTOC, a State cannot become a party to the Smuggling Protocol unless it ratifies the UNTOC. Similarly, a State party to the UNTOC is not bound by the Smuggling Protocol unless it ratifies it.⁵⁹ In this context, it should be mentioned that – with the exception of Morocco that is only a party member to the UNTOC – all States bordering the Mediterranean Sea are parties to both the UNTOC and the Smuggling Protocol.⁶⁰ Secondly, in conjunction to Article 37 of the UNTOC, Article 1 of the Smuggling Protocol indicates that the Protocol must be interpreted in a manner consistent with the UNTOC, and that the provisions of the UNTOC

⁵² UNTOC, Art.1.

⁵³ Ibid., Art.3.

⁵⁴ Ibid.

⁵⁵ Ibid., Arts. 2 & 3.

⁵⁶ Ibid., Art.2(a).

⁵⁷ Ibid., Art.3(2).

⁵⁸ Anne T. Gallagher & Fiona David (2014). *Supra* note (9), p.41.

⁵⁹ UNTOC, Art.37.

⁶⁰ Status of Ratification of the UNTOC and the Smuggling Protocol is available at: <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>.

apply, *mutatis mutandis*, to the Smuggling Protocol. Article 1 of the Smuggling Protocol further provides that the offenses established within the Protocol shall be considered offenses established by the UNTOC.⁶¹

Finally, it must be mentioned that since States Parties to the UNTOC are obliged to criminalize and combat transnational crimes, the convention by itself may provide the bases for a State to criminalize the smuggling of migrants by sea – as a form of transnational crimes – even in cases where that State has not ratified the Smuggling Protocol.⁶² This is because the crime of migrant smuggling by sea consists of the three elements necessary to fall under the UNTOC scope of application, as the smuggling of migrants by sea is a serious crime that usually involves an organized criminal group and one that is transnational in nature, as it usually commences in one State and is accomplished in another and has substantial effects on other States. Additionally, since the UNTOC is widely ratified and reached almost a universal status, it may be argued that all States are obliged to criminalize the crime of migrant smuggling as a form of transnational crime.⁶³

2.3 State Obligations under the Smuggling Protocol

The Smuggling Protocol that supplements the UNTOC is the primary legal instrument that deals with the crime of migrant smuggling. It aims to prevent and combat the crime of migrant smuggling by fostering an approach based on promoting international cooperation.⁶⁴ The Protocol also aims to harmonize domestic legislations by imposing similar obligations on all States to criminalize the smuggling of migrants and to punish smugglers, while protecting the rights of smuggled migrants.⁶⁵

Prior to the Smuggling Protocol, there was no international instrument that dealt with the issue of human smuggling in a comprehensive manner and the term smuggling often overlapped with human trafficking. This is based on the fact that there are situations when smuggling and trafficking can occur at the same time. For instance, when a group of people accept to be smuggled to another country, only to find themselves being exploited.⁶⁶ Therefore, it is

⁶¹ Smuggling Protocol, Art.1.

⁶² Anne T. Gallagher & Fiona David, (2014). *Supra* note (9), p.41.

⁶³ As of November 2017, 189 States ratified the Organized Crime Convention and 146 ratified the Smuggling Protocol. See: <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>

⁶⁴ Smuggling Protocol, Art.2.

⁶⁵ *Ibid*. See also: UN Office on Drugs and Crimes, (2004). *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p.349 (para.55).

⁶⁶ Human Rights Watch, (2009). "Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers" pp.55-57 Available at: <https://www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers>.

necessary to distinguish between the crime of human smuggling and the crime of human trafficking. Smuggling differs from trafficking in the sense that smuggling always includes the crossing of another State's borders, whereas trafficking happens regardless of whether the victims are taken to another State or not.⁶⁷ Moreover, in smuggling the persons being smuggled voluntarily agree to be moved from a place to another, in contrast to trafficking where the victims did not agree to be moved or have been deceived when agreeing, only to find themselves being exploited during the journey or upon arriving at the destination.⁶⁸ Due to the limited space given, no further discussion on human trafficking will take place within the content of this thesis.

2.3.1 The Elements of the Crime of Migrant Smuggling

In order for the crime of migrant smuggling to fall under the Smuggling Protocol's scope of application, the crime – in conjunction to Article 3(1) of the UNTOC as mentioned in the previous section – must consist of the following elements: be transnational in nature, involve an organized criminal group, and must amount to a serious crime.⁶⁹ Therefore, human smuggling crimes that are not of transnational nature, or do not involve an organized criminal group, are beyond the scope of the UNTOC and the Smuggling Protocol. For instance, transporting a person to a State without obtaining the necessary visa may amount to a crime under the domestic laws of that State. However, since it is not transnational in nature and not recognized as a form of organized crime, it is beyond the UNTOC and the Smuggling Protocol scope of application.⁷⁰

There are three additional elements for the crime of migrant smuggling that can be extracted from the Smuggling Protocol. The Smuggling Protocol defines the smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.⁷¹ Accordingly, the crime of migrant smuggling would only fall under the Protocol's scope of application if it consists of two elements. The first element is the illegal entry of a person into a State that s/he is not a national of or holds a permanent residence or visa to. Illegal entry is defined under Article 3(b) of the Smuggling Protocol as “crossing borders without complying with the necessary requirements for legal entry into the receiving State”. The second element is obtaining “directly or indirectly, a financial or other material

⁶⁷ Human Right Watch, (2015). "Smuggling and Trafficking Human Beings, Questions and Answers" Available at: <https://www.hrw.org/news/2015/07/07/smuggling-and-trafficking-human-beings>.

⁶⁸ Ibid.

⁶⁹ UNTOC, Art.3(1). See also: Smuggling Protocol, Art. 4.

⁷⁰ Legislative Guides, *supra* note (65), p.340, para.28

⁷¹ Smuggling Protocol, Art. 3(a).

benefit”.⁷² According to the Travaux Préparatoires for the Organized Crime Convention and Protocols the reason for referring to “financial or other material benefit” was to exclude support from family members and NGOs’ support for humanitarian reasons from the application of the protocol.⁷³ Finally, the Smuggling Protocol stipulates that States Parties are only obliged to criminalize the smuggling of migrants when the conduct is committed intentionally.⁷⁴ Thus, forcing a person to transport migrants across the borders of another State member “would not suffice”, as the criminal conduct must be committed intentionally and must involve an organized criminal group as stipulated by the UNTOC.⁷⁵

2.3.2 No Criminalization or Punishment for Migrants

One essential element of the Smuggling Protocol is that it does not aim to punish smuggled migrants. To this end, Article 5 provides that migrants shall not be held liable to criminal prosecution under the Protocol as they “have been the object of the conduct”.⁷⁶ Furthermore, Article 6(1) of the Smuggling Protocol stipulates that States shall only criminalize the conduct of smuggler, and shall reduce or even eliminate the application of their domestic laws on immigration to smuggled migrants as they are the object of the conduct.⁷⁷ Therefore, since the main intention is to prevent the crime of smuggling and to punish smugglers, if a migrant is caught in possession of fraudulent documents, in accordance to Article 6 s/he “would not generally fall within domestic offences adopted pursuant to paragraph 1(b), whereas a smuggler who possessed the same document for the purpose of enabling the smuggling of others would be within the same offense”.⁷⁸

2.3.3 Criminalization of Related Offenses

Pursuant to Article 6(1) of the Smuggling protocol, States Parties are obliged to criminalize related offenses to the crime of migrant smuggling when “committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit”. For instance, the production of “fraudulent travel or identity documents” and “providing or possessing” such documents for the “purpose of enabling the smuggling of migrants”.⁷⁹ States are also obliged to criminalize the attempt, the participation in, and the organization or directing of others to commit such

⁷² Ibid.

⁷³ United-Nations, (2006). Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, p.469.

⁷⁴ Smuggling Protocol, art. 6.

⁷⁵ Anne Gallagher & Fiona David, (2014). Supra note (9), p.364.

⁷⁶ Smuggling Protocol, Art.5.

⁷⁷ Legislative Guides, supra note (65), p.349 (para. 54)

⁷⁸ Ibid.

⁷⁹ Smuggling Protocol, 6(1)b.

offences.⁸⁰ Finally, States are also obliged to criminalize the use of fraudulent travel or identity documents, “or any other illegal means” to allow a person to remain illegally in the State concerned without complying with the necessary requirements.⁸¹

Article 6(3) of the Smuggling Protocol further obliges States to consider any circumstances “that endanger or [are] likely to endanger the lives and safety of migrants” and those “that entail inhuman or degrading treatment, including exploitation” as aggravating circumstances to the offences.⁸² In this context, the use of overcrowded and unseaworthy vessels or crafts, which usually lacks of crews and safety measures, to smuggle migrants across the Mediterranean Sea, must be considered to be aggravating circumstances to the offense as they endanger the safety and lives of migrants on board of these crafts and vessels directly.

Finally, since the provisions of the UNTOC must apply, *mutatis mutandis*, to the Smuggling Protocol. States Parties to the Smuggling Protocol, pursuant to Article 34(3) of the UNTOC – which preserves the rights of States to adopt stricter measures than those provided by the Convention to prevent and combat transnational organized crimes – are allowed to adopt stricter legislations than those embodied within the Smuggling Protocol. Accordingly, the obligations of criminalization under the UNTOC and the Smuggling protocol should be regarded as minimum standards. However, the capacity of States Parties to adopt stricter regulation is subject to the savings clause in Article 19 of the Smuggling Protocol, which prevents States from adopting laws and regulations that may breach obligations of human rights law and refugee law when implementing the Protocol’s provisions. For instance, in the context of migrant smuggling by sea, if an EU State adopts a law that permits the removal of all vessels smuggling migrants from its territorial sea and returning all migrants to the State of departure, that law would be inconsistent with the obligation of *non-refoulement*. Subsequently, that State cannot justify its conduct as complying with the obligations imposed by the Smuggling Protocol as it violates Article 19 of the Smuggling Protocol, which, as discussed, stipulates that even in the course of combating migrant smuggling, a State cannot engage in actions which may violate human rights.

2.3.4 Emphasis on Combating the Crime of Migrant Smuggling by Sea

Like other transnational crimes – such as terrorism, drug trafficking and smuggling of arms – the smuggling of migrants by sea affects not only one State, but has substantial effects on other States as well. Therefore, cooperation among States is crucial to suppress the smuggling of

⁸⁰ Ibid., Art. 6(2)a,b.

⁸¹ Ibid., Art. 6(1)C.

⁸² Ibid., Art. 6(3).

migrants. To this end, Article 7 of the Smuggling Protocol lays down an obligation on States Parties to cooperate in accordance with the international law of the sea to prevent and suppress the smuggling of migrants by sea. However, the Protocol does not specify the nature of such cooperation, which may impair the effectiveness of this duty. Nevertheless, other provisions of the Smuggling Protocol can provide some guidance on what the obligation of cooperation imply. For instance, the obligation on States parties with common borders to exchange information related to smuggling matters,⁸³ and the obligation on States parties to cooperate “to ensure that there is adequate personnel training in their territories” to fight smuggling and to protect the rights of smuggled migrants.⁸⁴ Furthermore, Article 17 of the Smuggling Protocol encourages States Parties to the Protocol to conclude bilateral or regional agreements and operational arrangements between them to enhance the application of the Protocol’s provisions and to strengthen the measures employed for fighting the crime of migrant smuggling. To this end, some EU States bordering the Mediterranean Sea, e.g. Italy, and other States that are affected by the migration crisis, e.g. Germany, have relied upon this obligation and other similar obligations under international law to enhance and extraterritorialize their border controls.⁸⁵

Article 8 of the Smuggling Protocol sets out the legal framework of interdicting vessels engaged in smuggling migrants at sea and specifies what the measures of interdiction are.⁸⁶ However, it must be stress that the Smuggling Protocol does not establish a new legal regime for interdicting vessels at sea, but rather, it emphasizes the core principles of the international law of the sea.⁸⁷ To this end, the Smuggling Protocol provides that when a State is acting or/and cooperating to prevent and suppress the smuggling of migrants by sea, it must act in accordance to the international law of the sea.⁸⁸ This being said, the following chapter will demonstrate the nexus between the LOSC and the Smuggling Protocol and how the Smuggling Protocol may have the ability to modify or expand the rights and obligations between State Parties to both the LOSC and the Smuggling Protocol, through the application of the *lex specialis derogat legi generali* rule – the specific prevails over the general.⁸⁹

⁸³ Ibid., Art. 10.

⁸⁴ Ibid., Art.14(2).

⁸⁵ See for instance: Agreements between Germany and Egypt/Tunisia concerning Cooperation in the Field of Security, (2017). supra note (27), See also: Italy-Libya Memorandum of Understanding, 2017, supra note (28), . For further discussion see Chapter IV.

⁸⁶ Further discussions on the interdiction of vessels at sea and Articles 7, 8 and 9 of the Smuggling Protocol are carried out in detail in the following chapters.

⁸⁷ Anne Gallagher & Fiona David, (2014). Supra note (9), p.55.

⁸⁸ Smuggling Protocol, art. 7 & 9.

⁸⁹ Anne Gallagher & Fiona (2014). Supra note (9), pp.78-79.

3. Concluding Remarks

To conclude, this chapter has demonstrated that the UNTOC and the Smuggling Protocol provide States with the legal grounds to act against the crime of migrant smuggling. The Smuggling Protocol is an important development in combating transnational crimes as it defines the crime of migrant smuggling, specifies its elements, and lays down the rights and duties of States and the mechanisms to act against the crime of migrant smuggling by sea. However, the Smuggling Protocol by itself cannot prevent and suppress the smuggling of migrants by sea and needs to be supplemented by other relevant rules including customary international law, the law of the sea and human rights and refugee laws. These rules are often competing and their application in the context of migrant smuggling by sea is complex and may create confusion regarding which rules are to be applied and how to apply them.⁹⁰ For that reason, the next chapter seeks to clarify, as precisely as possible, what the applicable rules of the LOSC with regards to the issue of migrant smuggling by sea are.

⁹⁰ Anne Gallagher & Fiona ibid., p.55.

Chapter III: States Jurisdiction over the Crime of Migrant Smuggling by Sea

1. Introductory Remarks

The Smuggling Protocol – and arguably the UNTOC – obliges all States Parties to criminalize and to establish jurisdiction over the crime of migrant smuggling.⁹¹ However, establishing jurisdiction over the crime of migrant smuggling by sea is extremely complex. This is because the crime of migrant smuggling by sea, as mentioned earlier, usually commences in one State and is accomplished in another and often involves criminals and victims from different States. Hence, the crime does not only affect one State, instead it affects several States at the same time e.g. the State of departure, the transit State, the flag State and the State of destination.⁹² The complexity of establishing jurisdiction over the crime of migrant smuggling by sea is further increased since the LOSC divides the world oceans into distinct jurisdictional zones, where it acknowledges in each of the zones distinct rights and obligations. Accordingly, the crime of migrant smuggling by sea operates across several jurisdictions.

In view of this complexity and in order to determine what States rights, obligations and responsibilities within the different maritime zones are. This chapter will clarify and discuss in detail the relevant rules of the LOSC that may grant coastal and flag States the capacity to prescribe and enforce laws and regulations to combat and suppress the crime of migrant smuggling within the different maritime zones established by the LOSC. However, it is necessary first to commence the present chapter by clarifying briefly what jurisdiction implies and what the different types of jurisdictions that States can exercise are.

2. Jurisdiction under International Law

A logical consequence of the principle of sovereignty is that a State within its own territory has the power and capacity to regulate the conduct of persons by prescribing and enforcing its domestic laws. This capacity is usually known as territorial jurisdiction and States generally can exercise three forms of jurisdiction: prescriptive, enforcement and adjudicative jurisdictions. Prescriptive jurisdiction refers to the ability of a State to regulate the conduct of actors present in its territory in accordance with a particular set of laws, as well as prescribing specific conducts as criminal acts. Enforcement jurisdiction refers to the State's capacity to enforce sanctions and punish actors for their criminal conduct or for noncompliance with its laws. Finally, adjudicative jurisdiction is the State's ability to institute proceedings against the actor's unlawful conduct at tribunals and courts.

⁹¹ Smuggling Protocol, Art. 6.

⁹² Jasmine Coppens, (2013). *Supra* note (18), p.327.

In addition to territorial jurisdiction, international law recognizes other circumstances where a State may establish extraterritorial jurisdiction and universal jurisdiction. Universal jurisdiction refers to the State's ability to exercise jurisdiction over certain crimes regardless of whether the crimes are committed by one of its nationals/citizens or not, regardless where the crimes have taken place and regardless whether these crimes affect that State or not. For instance, the transport of slaves and piracy.⁹³ The reason why all States should assert jurisdiction over these crimes is because they affect the international community as a whole. However, this type of jurisdiction is irrelevant for the crime of migrant smuggling by sea since transnational crimes lack of any assertion of being considered universal crimes. This is evident from the fact that transnational crimes are subject to international treaties that provide States with the ability to assert jurisdiction over such crimes. Nevertheless, there have been considerable efforts "to expand the concept of slavery to include" the crime of migrant smuggling as a form of modern slavery, which would make it fall under the category of universal crimes, and thereby every State would be obliged to combat and suppress it.⁹⁴

In contrast to universal jurisdiction, extraterritorial jurisdiction is of particular importance in the context of migrant smuggling by sea. Extraterritorial jurisdiction refers to the State's ability to exercise jurisdiction over criminal conducts in ABNJ where one of its citizens is involved, e.g. if the perpetrator or the victim is one of its citizens.⁹⁵ In this context, it is important to mention that under international law of the sea, ships are considered to be nationals of the State and the concept of 'flag State'⁹⁶ serves to extend the State's national jurisdiction to all vessels flying its flag in ABNJ, e.g. the high seas.⁹⁷ A State may also exercise extraterritorial jurisdiction to prevent particular crimes that have a significantly adverse impact or that threaten its national security, e.g. terrorism,⁹⁸ and other crimes established by transnational criminal law, e.g. migrant smuggling and drug trafficking.⁹⁹ To this end, Article 15(2) of the UNTOC provides that every State Party to the UNTOC may establish jurisdiction over transnational offences in ABNJ when the offence is committed against one of its nationals, when the offence

⁹³ LOSC, Arts. 99, 100.

⁹⁴ For detailed discussions see: Anne Gallagher & Fiona David, (2014). *Supra* note (9), p.246 & p.424. See also: Efthymios Papastavridis, (2010). "Fortress Europe' and Frontex: Within or without International Law?", *Nordic Journal of International Law* 79, no. 1, pp.75-111, p.85. See also: Douglas Guilfoyle, (2016). "Transnational Crime and the Rule of Law at Sea: Responses to Maritime Migration and Piracy Compared" in 'Boat Refugees' and Migrants at Sea: A Comprehensive Approach - Integrating Maritime Security with Human Rights, ed. Violeta Moreno-Lax & Efthymios Papastavridis, *International Refugee Law Series*, Brill Nijhoff, pp.169-96.

⁹⁵ Anne Gallagher & Fiona David, (2014). *Supra* note (9), pp.214-15.

⁹⁶ The term flag State refers to the State in which the vessel is registered.

⁹⁷ This is further discussed under section 3.5.1.

⁹⁸ Vaughan Lowe, (2007). "International Law," Oxford University Press, p.176.

⁹⁹ Anne Gallagher & Fiona David, (2014). *Supra* note (9), p.215.

is committed by one of its nationals, or when the offence is committed “with a view to the commission of a serious crime within its territory”. However, this permission to establish jurisdiction in ABNJ must be consistent with the principles of sovereignty and States territorial integrity.¹⁰⁰ In the context of migrant smuggling by sea, this means that a State cannot interdict a vessel suspected of migrant smuggling in the territorial sea of another State unless it acquires its consent. Similarly, since vessels are considered to be floating extensions of their flag States, a State cannot interdict a foreign vessel suspected of migrant smuggling on the high seas without the permission of the flag State. However, if the vessel is stateless – not flying a flag, lack registry, documentations or claims to nationality – it becomes subject to the domestic enforcement measure of the boarding State and can be interdicted at all time.¹⁰¹ In this context, it must be mentioned that if the vessel is flying more than one flag, it must be deemed stateless, as vessels under the LOSC can “sail under the flag of one State only”.¹⁰² The position of Stateless vessels is of particular importance, as most vessels used by smugglers to smuggle migrants are commonly stateless.¹⁰³ The reason smugglers tend to use non-registered – Stateless – vessels is to avoid criminal responsibility.

3. Jurisdiction over Migrant Smuggling Offenses under the LOSC

The capacity of a State to act against the crime of migrant smuggling by sea is subject to the LOSC. However, before engaging in a detailed discussion of the relevant rules of the LOSC, a brief overview of the LOSC and its main objectives is necessary for understanding the following sub-sections.

The LOSC, also known as ‘the constitution of the oceans’, encompasses 320 Articles that establish a comprehensive legal regime that governs the rights and responsibilities of States at sea. The LOSC central objectives are to create “a legal order for the seas and oceans” and to maintain a balance between the interests of flag States and those of coastal States.¹⁰⁴ The LOSC divides the oceans and seas to distinct jurisdictional maritime zones, namely: internal water, the territorial sea, the contiguous zone, the exclusive economic zone (hereinafter EEZ) and the

¹⁰⁰ UNTOC, Art.4.

¹⁰¹ Richard Barnes, (2010). "The International Law of the Sea and Migration Control" in *Extraterritorial Immigration Control: Legal Challenges*, ed. Bernard Ryan & Valsamis Mitsilegas, Leiden, Martinus Nijhoff, p.131. See also: Felicity Attard, (2016). "Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?", *Journal of Maritime Law & Commerce* Vol. 47, pp.219-48, p.321. This is further discussed under section 3, subsection 3.5 at 3.5.2.3.

¹⁰² LOSC, Art. 92.

¹⁰³ European Commission Staff Working Document, (2007). "Study on the International Law Instruments in Relation to Illegal Immigration by Sea", Commission of the European Communities, Brussels, no. SEC 691, pp.1-7, p.1.

¹⁰⁴ LOSC, Preamble.

high seas. These maritime zones are measured and determined from the baseline of the coastal State’s territorial sea, as shown in figure 2 below. The LOSC, strictly regulates the jurisdiction of coastal State and flag State within the distinct maritime jurisdictional zones. As a result, coastal States have varying degree of sovereign rights and jurisdiction in each of the five zones, ranging from full territorial sovereignty within its internal waters, to almost no sovereign rights on the high seas. In other words, the sovereign rights and jurisdiction of a coastal State are stronger landwards and grow weaker seawards, and eventually, disappear on the high seas.

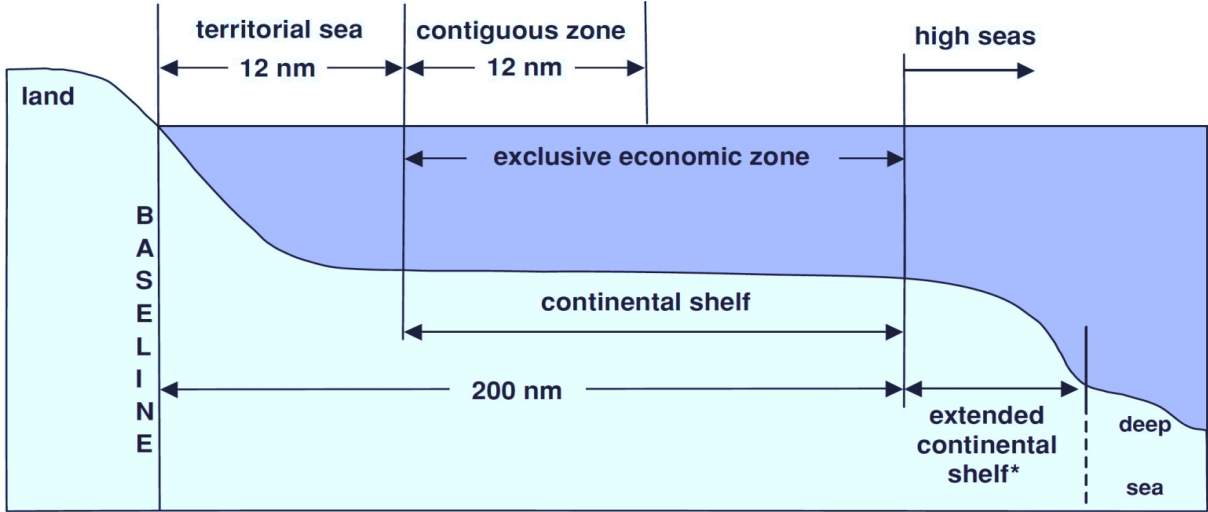


Figure 2: Maritime zones under the United Nations Convention on the Law of the Sea.¹⁰⁵

3.1 Internal Waters

Internal waters are those waters located landward of the territorial sea’s baseline, as shown in figure 2. These waters include gulfs, lakes, rivers, bays, canals and ports. According to the LOSC and the Convention on the Territorial Sea and Contiguous Zone, the coastal State’s sovereignty extends beyond its land territory and internal water to encompass the territorial sea.¹⁰⁶ This reference implicitly acknowledges that internal waters are sovereign territory and a coastal State has complete and absolute sovereignty over its internal waters as much as within its land territory. Accordingly, the coastal State’s national laws – e.g. criminal and immigration laws – apply *mutatis mutandis* to its internal water. This means that a coastal State is permitted to exercise all forms of jurisdiction over all foreign vessels within its internal waters, including matters related to migration such as migrant smuggling.¹⁰⁷

¹⁰⁵ Donald Rothwell Stuart Kaye, Afshin Akhtarkhavari, Ruth Davis, (2010). "Law of the Sea" in International Law: Cases and Materials with Australian Perspectives, ed. Cambridge University Press, p.505.

¹⁰⁶ LOSC, Art. 2. See Also: Convention on the Territorial Sea and the Contiguous Zone, 1958, Art. 1(1).

¹⁰⁷ Traditionally coastal States refrained from exercising jurisdiction on foreign vessels with respect to internal matters that do not have effects to the coastal states, see: Robin Churchill & Alan Lowe, (1999). "The Law of the Sea", Manchester University Press, p.65-66.

Since ports constitute part of the coastal State's internal waters, accessing them usually requires the coastal State's permission. Hence, a coastal State may deny vessels carrying smuggled or rescued migrants access to its ports. This is also consistent with the fact that under international law there is no duty imposed on States to disembark rescued migrants onto their own territory. In this context, customary international law provides that foreign vessels do not enjoy a right to access the coastal State's ports, and every coastal State is competent to allow or deny access to its ports. This was affirmed by the ICJ in the Nicaragua decision, where the court stated that "by virtue of sovereignty ... coastal State may regulate access to its ports".¹⁰⁸ Nevertheless, there are a few exceptions where vessels may access the ports of the coastal State without its permission. For instance, in cases of distress or force majeure – which are discussed in part two, chapter five of this thesis.¹⁰⁹ Finally, it should be mentioned that in contrast to the territorial sea, foreign vessels do not enjoy the right of 'innocent passage' in the coastal State's internal waters except in specific circumstances.¹¹⁰

3.2 Territorial Sea and the Right of Innocent Passage

The territorial sea can be described as an "adjacent belt of sea" that extends beyond the land territory and does not exceed twelve nautical miles measured from the baselines.¹¹¹ In the Anglo-Norwegian Fisheries Case, the ICJ affirmed that a coastal State does not need to claim a territorial sea to assert its rights to it.¹¹² Likewise, a coastal State cannot reject the possession of the territorial sea, as "the possession of this territory is not optional, not dependent upon the will of the State, but compulsory".¹¹³

As mentioned earlier, Article 2 of the LOSC provides that the sovereignty of a coastal State extends beyond its land and internal waters to the territorial sea. Accordingly, every coastal State is competent to legislate and enforce its laws and regulations in the territorial sea and all vessels within the territorial sea are subject to the coastal State's domestic laws including

¹⁰⁸ Military and Paramilitary Activities in and against Nicaragua, Nicaragua V. United States of America, (27 June 1986). International Court of Justice (ICJ), Reports of Judgements, Advisory Opinions and Orders, p.101 para (213).

¹⁰⁹ See LOSC, Art. 18(2); See also: Article 125, which grants land-locked States the right to transit passage through territory of the transit State including internal waters.

¹¹⁰ For instance, see LOSC, Art. 8 (2) which indicates that a straight baseline established in accordance to article 7 "has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters". See also: LOSC, Art.52 (1) "all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3".

¹¹¹ LOSC, Art. 2(1) and Art. 3.

¹¹² 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.

¹¹³ Ibid.

immigration and criminal laws.¹¹⁴ Additionally, since the coastal State has sovereignty in the territorial sea, other States cannot interdict vessels or exercise enforcement jurisdiction in the coastal State's territorial sea unless they acquire its consent. This is also consistent with Article 8 of the Smuggling Protocol that provides that any measure employed for interdicting vessels engaged in the act of migrant smuggling cannot be taken in the territorial sea of other States Parties, unless they consent to it.¹¹⁵ On this basis, the United States of America (hereinafter US) and Spain have concluded bilateral agreements that grant them the right to exercise enforcement jurisdiction on the territorial sea of third States.¹¹⁶ Another example is the 2008 Caribbean Community Maritime and Airspace Security Cooperation Agreement that permits States Parties to interdict vessels or exercise law enforcement in the territorial seas of other States Parties.¹¹⁷

3.2.1 The Right of Innocent Passage

Unlike internal waters, the coastal State's sovereignty in the territorial sea is not absolute and not equivalent to what it possesses in its internal waters. This is because the capacity of a coastal State to exercise jurisdiction in its territorial waters is restricted by the right of innocent passage granted to all foreign vessels.¹¹⁸ Innocent passage can be described as the continuous and expeditious navigation through the territorial sea for the purpose of traversing the sea without entering the coastal State's internal waters.¹¹⁹ Accordingly, the right of innocent passage requires the presence of two conditions. Firstly, the passage must be continuous and expeditious, meaning that foreign vessels do not have the intention to enter to the coastal State's internal water. Secondly, the passage must be considered innocent, meaning that the vessel must not engage in acts that may constitute a threat or disturb the peace, security and good order of the coastal State.¹²⁰ In this context, article 19(2) of the LOSC provides a list of the acts that are considered to be prejudicial to the peace, security and good order of the coastal State and coastal States are allowed pursuant to Article 25(1) of the LOSC to prevent any passage that is not innocent.

¹¹⁴ Mark Pallis, (2002). "Obligations of States Towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes", *International Journal of Refugee Law*, pp.329-64, p.359.

¹¹⁵ *Travaux Préparatoires*, supra note (73), p.494.

¹¹⁶ Natalie Klein, (2014). "A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants", *International and Comparative Law Quarterly* 63, pp.787-814, p.795. See also: Agreement between the Government of the United States of America and the Government of the Dominican Republic concerning Maritime Migration Law Enforcement (20 May 2003).

¹¹⁷ Caribbean Community – CARICOM – Maritime and Airspace Security Cooperation Agreement, 4 July 2008.

¹¹⁸ Donald Rothwell & Tim Stephens, (2010). "The International Law of the Sea", Bloomsbury Publishing, p.70.; See also: LOSC, Art. 17.

¹¹⁹ LOSC, Art. 18(2).

¹²⁰ *Ibid.*, Art. 19(1).

3.2.2 Innocent Passage and the Crime of Migrant Smuggling

In the context of migrant smuggling by sea, the question that arises is whether or not a coastal State may prevent the passage of a foreign vessel carrying irregular migrants. In other words, to what extent do foreign vessels smuggling migrants retain the right of innocent passage in the territorial sea? In order to answer this question, distinction should be made between two situations. The first situation is whether or not a foreign vessel that intends to disembark smuggled migrants contrary to the coastal State's immigration laws retains the right of innocent passage? The second situation is whether or not a foreign vessel smuggling migrants destined to another State retains the right of innocent passage?

With regards to the first situation Articles 19(2), 25 and 27(1) of the LOSC are of particular importance. Article 19(2)g of the LOSC explicitly states that the "loading or unloading" of any person contrary to the "immigration or sanitary laws and regulations of the coastal State" renders the vessel's passage non-innocent. Obviously, the vessel that intends to unload smuggled migrants contrary to the coastal State immigration law falls within the scope of Article 19(2). Therefore, the coastal State, pursuant to Article 25 of the LOSC, is permitted to take all the "necessary steps" to prevent that passage, as it may constitute a threat or disturbance to the peace and good order of the coastal State or its security.¹²¹ Additionally, Article 27(1) of the LOSC, grants every coastal State the right to enforce its criminal laws on any crime that may occur onboard of foreign vessels traversing the territorial sea, "if the consequences of the crime extend to the coastal State; or if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea".¹²² Accordingly, since the consequences of the crime of migrant smuggling in this situation extend to the coastal State, the coastal State is permitted to enforce its criminal and immigration laws on that vessel. This is also supported by State practice, as an example, Australia has exercised jurisdiction in its territorial waters over vessels suspected of smuggling migrants on a number of occasions.¹²³ It has been argued that the coastal State also has the right to escort or remove vessels engaged in one of the acts listed in Article 19(2) to the high seas or proceed with arrest.¹²⁴ In this context, Coppens argue that although Article 25 of the LOSC does not "explicitly permit removal of ships from the territorial sea, it must be considered implicit" as it is being "regarded as a part of customary international

¹²¹ Ibid., Art. 25. See also: Convention on the Territorial Sea and the Contiguous Zone, Art.16(1).

¹²² LOSC, Art. 27.

¹²³ See for instance, the Tampa Incident discussed in Chapter V, Section 3.

¹²⁴ Richard Barnes, (2010). *supra* note (101) p.124.

law”.¹²⁵ However, escorting or removing a foreign vessel carrying smuggled or rescued migrants to the high seas raises many human rights concerns regarding the right of asylum and *non-refoulement*.¹²⁶

In contrast to the first situation, it is unclear whether or not a foreign vessel smuggling migrants destined to another State retains the right of innocent passage. On one hand, it may be argued that the list of acts in Article 19(2) must be considered as an exhaustive list. Thus, since Article 19(2) of the LOSC does not provide that the mere carriage of illegal migrants while traversing through the territorial sea renders the passage non-innocent, it may be argued that a vessel carrying illegal migrants retains the right of innocent passage. Additionally, as mentioned earlier a coastal State may exercise criminal jurisdiction over a crime that occurs onboard of a foreign vessel traversing the territorial sea *only* when the consequences of the crime extends to the coastal State.¹²⁷ Therefore, it may be argued that since the consequences of the crime in this situation do not extend to the coastal State – as the migrants are destined to another State – the coastal State may not enforce its criminal laws on that vessel, or hamper its passage. On the other hand, it may be argued that vessels smuggling migrants destined to another State *do not* retain the right of innocent passage. One reason is that there is not sufficient State practice to assert that the list of acts in Article 19(2) should be considered as an exhaustive list.¹²⁸ It has been argued that any act that may threaten the coastal State or threatens its interest should render the passage non-innocent.¹²⁹ There are two legal bases that support this view. Firstly, the reference in Article 19(2)(l) to “any other activity not having a direct bearing on passage” indicates that the list contained in that Article is non-exhaustive. Based on this, a coastal State retains a wide discretion to decide on whether or not an activity has a direct bearing on the passage and to decide on the necessary measures that should be applied for the protection of its security and interest.¹³⁰ Secondly, the reference in Article 19(1) that the passage shall be in accordance with the LOSC and ‘with other rules of international law’, indicates that other regional or international treaties between States may impose other obligations on States with regards to the right of innocent passage. This is also consistent with Article 21 of the LOSC that grants coastal

¹²⁵ Jasmine Coppens, (2016). "Interception of Migrant Boats at Sea" in *Boat Refugees and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights*, ed. Violeta Moreno-Lax & Efthymios Papastavridis, Brill/Nijhoff, p.200-01.

¹²⁶ These concerns are further discussed in chapter four.

¹²⁷ LOSC, art. 27.

¹²⁸ Richard Barnes, (2010). *supra* note (101) p.123. See also: Rothwell, Donald Stephens, (2010). *Supra* note (118), pp.216-17. See also: Myron Nordquist, (1985). “United Nations Convention on the Law of the Sea 1982: A Commentary”, vol. II, Martinus Nijhof, p.173.

¹²⁹ Mark Pallis, (2002). *Supra* note (114),p.356.

¹³⁰ Donald Rothwell & Tim Stephens, (2010). *Supra* note (118), p.217.

States the right to adopt laws and regulations related to innocent passage in their territorial sea as long as they are consistent with the LOSC and “other rules of international law”. In this context, Article 7 of the Smuggling Protocol stipulates that States Parties to the Smuggling Protocol are obliged to cooperate to the fullest extent possible to prevent and suppress the crime of migrant smuggling by sea. Thus, although Article 19(2) of the LOSC does not provide that the smuggling of migrants destined to another State would render the passage non-innocent, it may be argued that States Parties to the Smuggling Protocol are under an obligation to cooperate with other States Parties to suppress and prevent the smuggling of migrants. This being the case, smuggling migrants or carrying illegal migrants destined to another State renders the passage of foreign vessels in the territorial sea non-innocent. Accordingly, if a coastal State that has reasonable grounds to believe that a foreign vessel or a stateless vessel traversing through its territorial sea is engaged in migrant smuggling, it is obliged to act against it.¹³¹ However, unlike stateless vessels, pursuant to Article 8(2) of the Smuggling Protocol, the coastal State may not employ any measures against a foreign vessel smuggling migrants unless it notifies the flag State and obtain its consent. Similarly, Article 27(3) of the LOSC requires every coastal State to obtain the consent of the flag State concerned before taking any measures against foreign vessels in the territorial sea. In this setting, it may be argued that the Smuggling Protocol has the ability to modify or expand the rights and obligations of the coastal States Parties to the Smuggling Protocol. This is also consistent with Article 311(3) of the LOSC which allows States to conclude in good faith agreements between themselves to modify or suspend the provisions of the LOSC, as long as these agreements are consistent with the LOSC.

Finally, it should be mentioned that regardless of the situation, Articles 21(1) and 24(1) of the LOSC stipulate that any laws or regulations adopted by the coastal States to regulate innocent passage must be non-discriminatory,¹³² and in conformity with the provisions of the LOSC and other rules of international law.¹³³ Accordingly, coastal States are not allowed to adopt or prescribe regulations that may discriminate between foreign vessels or that can go against other obligations stemming from other sources of international law, e.g. refugee and human rights laws. Similarly, Article 19 of the Smuggling Protocol provides that the Protocol’s provisions shall not affect the obligations of States under international human rights treaties and obliges all States to take all the appropriate measures to protect the rights of smuggled migrants when implementing the Protocol’s provisions and to ensure that the measures adopted

¹³¹ European Commission Staff Working Document, (2007). *Supra* note (103), at para. 2.1.3.

¹³² LOSC, Art. 24(1).

¹³³ *Ibid.*, Art. 21(1).

are non-discriminatory.¹³⁴ Thus, a coastal State may not invoke its obligation under the Smuggling Protocol to justify the adoption of laws or regulations that permit removal of vessels carrying illegal migrants from the territorial sea to the high seas as a mean of suppressing the crime of migrant smuggling, without providing any form of screening to determine whether or not some of the smuggled migrants are in need of protection or have asylum claims.¹³⁵ In such cases, the coastal State may be held responsible for breaching principles of human rights and refugee laws, e.g. the right to asylum and *non-refoulement*. Arguably, the coastal State may also be held responsible for breaching the LOSC Article 21(1) by adopting laws or regulations contrary to other rules of international law.

3.3 The Contiguous Zone

In the context of migrant smuggling by sea, the contiguous zone is of a particular importance since coastal States are granted powers to prevent and to punish infringements of their immigration laws and regulations in areas beyond the territorial sea. The contiguous zone was recognized for the first time as a distinctive maritime zone under Article 24 of the 1958 Convention on Territorial sea and Contiguous Zone.¹³⁶ The zone is described under the LOSC Article 33 as a zone contiguous to the territorial sea. In comparison to the territorial sea, the contiguous zone must be claimed by coastal States. Article 33(2) of the LOSC provides that coastal States are entitled to claim a contiguous zone up to 24 nautical miles from the baselines “from which the breadth of the territorial sea is measured” as illustrated in figure 2.

In contrast to the territorial sea, coastal States have limited rights in the contiguous zone. Coastal States are only entitled to exercise “the control necessary” to prevent and to punish infringements of “its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea”.¹³⁷ Moreover, coastal States are only allowed to exercise this control when those infringements have a direct link with the coastal State’s sovereign territory or territorial sea.¹³⁸ In this context, unless foreign vessels commit such infringements, they retain the right to exercise the freedom of high seas within the contiguous zone. This has been affirmed by the International Tribunal for the Law of the Sea (hereinafter ITLOS) in the M/V Saiga case, in which the court stated that:

¹³⁴ Smuggling Protocol, Art. 19.

¹³⁵ This is further discussed in Chapter IV, Section, 3, Sub-section 3.1.

¹³⁶ United Nations, Convention on the Territorial Sea and the Contiguous Zone, 1958.

¹³⁷ LOSC, Art. 33(1) a,b.

¹³⁸ Ibid.

“[T]he ordinary meaning of Article 33 is that the power of the coastal State to punish infringement of the stated laws (committed outside territorial areas or within the contiguous zone) is not generally permissible in relation to vessels merely located in the contiguous zone and not proven to have some relevant connection with territorial areas”.¹³⁹

Distinction should also be made between the ability of a coastal State to punish infringements and the ability to prevent it. The ability of a coastal State to punish infringements of its immigration laws arises only after the action has taken place, hence it applies normally to vessels that have departed from the territorial sea.¹⁴⁰ Whereas, the ability of a coastal State to prevent infringements applies normally to incoming vessels, for example, when there are reasonable grounds to believe that a vessel intends to enter the territorial waters and disembarks irregular migrants in violation of the coastal State’s immigration laws.¹⁴¹

According to Article 33 of the LOSC, coastal States are permitted to use the measures of “control necessary” when acting against such infringements.¹⁴² It is important to clarify what the words “control necessary” of Article 33 of the LOSC imply. The ordinary meaning of the words of Article 33 of the LOSC do not support the claim that coastal States have the right to prescribe or enforce laws and regulations in the contiguous zone. Instead they are only allowed to exercise measures of – policing – control.¹⁴³ It has been argued that the measures of control shall be limited to “inspection and warring and cannot include arrest or forcible taking into port” since no crime has been committed yet.¹⁴⁴ Goodwin-Gill argues that coastal States may not only inspect vessels, but also stop, board and redirect the vessel when there are reasonable grounds to believe that the vessel intends to enter the territorial waters in breach of the coastal State’s immigration law.¹⁴⁵ Similarly, Rothwell and Stephens argue that coastal States are not allowed to extend or enforce their laws and regulation applicable in territorial sea over vessels engaged in the smuggling of migrants to the contiguous zone, but rather are only allowed to exercise measures of necessary control, which may include the interdiction and removal of vessels from the contiguous zone.¹⁴⁶ Interdicting and removing vessels from the contiguous zone

¹³⁹ *M/V Saiga, No. 2, St. Vincent and the Grenadines V. Guinea*, (1 July 1999). International Tribunal for the Law of the Sea, Separate Opinion of Judge Laing, para.15.

¹⁴⁰ Anne Gallagher & Fiona David, (2014). *Supra* note (9), p.240.

¹⁴¹ *Ibid.*

¹⁴² LOSC, Art.33.

¹⁴³ Robin Churchill & Alan Lowe, (1999). *Supra* note (107), p.137.

¹⁴⁴ Ivan Shearer, (1986). "Problems of Jurisdiction and Law Enforcement against Delinquent Vessels", *International and Comparative Law Quarterly*, no. 35 p.330.

¹⁴⁵ Guy Goodwin-Gill, (1996). "The Refugee in International Law", Second ed.Oxford, Clarendon Press, p.165-66.

¹⁴⁶ Donald Rothwell & Tim Stephens, (2010). *Supra* note (118), p.80.

as a form of control are also supported by State practice, “with some coastal states using their navy to interdict these vessels and tow them out beyond the contiguous zone”.¹⁴⁷ For instance, the Australian Coastguard’s operation Relax, which had the objective of interdicting Indonesian vessels in the Australian contiguous zone, used to tow vessels back towards Indonesia.¹⁴⁸ However, if the interpretation of the words “the control necessary” is to be accepted to include measures that permit coastal States to remove vessels from the contiguous zone and tow them back to the high seas or returning them to the State of departure, these measures would constitute a legal gap with regards to the protection of asylum seekers within the contiguous zone. This is because redirecting or removing vessels from the contiguous zone breaches obligations of human rights and refugee law as it amount in practice to *refoulement*.¹⁴⁹ In this context, it has been argued that measures of necessary control undertaken by coastal states should provide “asylum seekers with a hearing to establish whether they meet the refugee definition”.¹⁵⁰

Finally, it must be stressed that coastal States are only allowed to exercise control in the contiguous zone when the infringements of laws are linked to the coastal State’s territory or territorial sea.¹⁵¹ Therefore, a coastal State in accordance to the LOSC may not be allowed to exercise control over foreign vessels carrying illegal migrants in the contiguous zone when the disembarkation is intended to take place in another coastal State, unless the coastal State acquires the consent of the flag State.¹⁵²

3.4 The Exclusive Economic Zone (EEZ)

The EEZ could be described as the waters that extends up to 200 nautical miles “from the baseline from which the breadth of the territorial sea is measured”.¹⁵³ Accordingly, the first 12 nautical miles of the EEZ overlap with the territorial sea, and the following 12 miles overlap with the contiguous zone, as shown in figure 2. By virtue of Article 58 of the LOSC, all foreign vessels within the EEZ enjoy the freedom of navigation and other freedoms of the high seas. Therefore, the rules of the regime of high seas – discussed in the next section – apply *mutatis mutandis* to the EEZ. However, vessels exercising the freedoms of the high seas in the EEZ are subject to the exclusive rights of coastal States in their EEZ, e.g. the coastal State sovereign rights to explore, exploit, conserve and manage natural resources.¹⁵⁴

¹⁴⁷ Ibid.

¹⁴⁸ For further discussion see: Natalie Klein, (2014). Supra note (116),p.788.

¹⁴⁹ This is further discussed in part II chapter II.

¹⁵⁰ Mark Pallis, (2002). Supra note (114),p.354. See also: Jasmine Coppens, (2016). supra note (125) p.208.

¹⁵¹ LOSC, Art. 33

¹⁵² Anne Gallagher & Fiona David, (2014). Supra note (9), p.240.

¹⁵³ LOSC, Art. 57. See also: Figure 2 above.

¹⁵⁴ Ibid., Art. 56(1)a.

Beyond the contiguous zone, a coastal State is not entitled to prescribe or enforce migration laws. Nevertheless, the only observations that should be made in the context of migrant smuggling by sea is the area where artificial islands and offshore installations are located. Pursuant to Article 60(1) of the LOSC coastal States have exclusive rights to construct artificial islands and offshore installations in the EEZ. However, since such installations are not part of the coastal State's territorial sea, and coastal States cannot have national claims to parts of the high seas, Article 60(2) of the LOSC provides that coastal States are *only* granted jurisdiction over such installations, including migration matters. Hypothetically, smugglers could try to disembark migrants on these artificial islands or offshore installations. In this context, Barnes argues that the scope of any laws regarding asylum seekers should not include offshore installations for two reasons.¹⁵⁵ Firstly, such installations are often privately run and lack facilities to accommodate persons, and allowing claims of asylum to occur on such installations would encourage migrants to target them.¹⁵⁶ Secondly, offshore installations are dangerous for the environment, and allowing claims of asylum to occur on these installations may lead to accidents that have serious consequences for the environment, migrants and those who work on them.¹⁵⁷

Finally, it must be mentioned that for the purposes of navigation safety and the protection of such installations, the LOSC permits coastal States to establish safety zones up to 500 meters around artificial islands and offshore installations.¹⁵⁸ Within these safety zones coastal States are allowed to take the "appropriate measures" to ensure the safety of navigation and the safety of such installations and all foreign vessels are obliged to respect these safety zones.¹⁵⁹

3.5 The High Seas

The high seas is an area beyond national claims that is not subject to any State sovereignty or any form of jurisdiction or control, where all vessels are entitled to enjoy the freedoms of the high seas. The principle of the freedom of high seas is recognized as customary international law and reflected in many conventions, e.g. the High Seas Convention¹⁶⁰ and the LOSC. The LOSC stipulates that the high seas are open to all States whether coastal or landlocked, and all States are entitled to sail vessels flying their flag on the high seas.¹⁶¹ The LOSC further provides that the high seas must be "reserved for peaceful purposes",¹⁶² and all States on the high seas

¹⁵⁵ Richard Barnes, (2010). *supra* note (101) p.128.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ LOSC, Art. 60(4),(5).

¹⁵⁹ *Ibid.*, Art. 60(4),(6).

¹⁶⁰ See Art.2 of the United Nations Convention on the High Seas, 1958.

¹⁶¹ LOSC, Art. 90.

¹⁶² *Ibid.*, Art.88.

enjoy the freedoms of the high seas contained therein, e.g. the freedom of navigation and the freedom of overflight.¹⁶³

3.5.1 The Principle of Flag State Jurisdiction

Closely related to the principle of the freedom of high seas is the principle of flag State jurisdiction. Flag State jurisdiction is a long-standing principle of customary international law. This principle is codified in Article 92 of the LOSC, which provides that a vessel on the high seas is subject only to the jurisdiction of the State whose flag is being flown by the vessel. This jurisdiction extends to cover both legislative and enforcement jurisdiction. This was affirmed in the Lotus case decision by the Permanent Court of Justice:

“Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them”.¹⁶⁴

To this end, article 97 of the LOSC stipulates that a State cannot exercise enforcement jurisdiction over foreign vessel on the high seas, even for the purposes of investigation, unless it acquires the consent of the flag State. However, a State may be entitled to exercise jurisdiction over foreign vessels on the high seas if they meet one of the limited exceptions within Article 110. Article 110 of the LOSC grants all States the right to visit vessels on the high seas when they have reasonable grounds to suspect that a vessel on the high seas is engaged in one of the following crimes: piracy, slave trading or unauthorized broadcasting, or in situations where the vessel is stateless ‘without a nationality’. It should be stressed here that by virtue of Article 58(1) of the LOSC, the right of visit codified in Article 110 does not only apply to the high seas, but also to the EEZ subject only to the rights of the coastal State in the EEZ.

3.5.2 Jurisdiction over Foreign Vessels Smuggling Migrants on the High Seas

Undoubtedly, the mere carriage of migrants on the high seas is not a crime under international law. The only criminalized conduct under international law with this regard is the smuggling of migrants, and solely for States Parties to the UNTOC and the Smuggling Protocol. The LOSC, unfortunately, lacks any provisions that deals directly with the issue of migrant smuggling, and does not provide States with any form of jurisdiction over vessels smuggling migrants on the high seas.

¹⁶³ Ibid., Art. 87.

¹⁶⁴ S.S. Lotus, France Vs. Turkey, (7 September 1927). PCIJ, Series. A no.10, at 25.

In view of contemporary challenges – e.g. terrorism, arms trafficking and migrant smuggling – that are not addressed directly under the LOSC, States have been increasingly active in concluding multilateral and bilateral agreements that provide them the right to board foreign vessels on the high seas to suppress and combat these contemporary challenges. To this end, the US has concluded more than 60 bilateral ship boarding agreements with other States in order to board their vessels in areas beyond the US national jurisdiction.¹⁶⁵ Other States, as mentioned earlier, vehemently argued to include the smuggling of migrant under one of the exceptions listed in Article 110 of the LOSC.¹⁶⁶ In particular the efforts evolved around expanding the concept of slavery to include the smuggling of migrant as a form of modern slavery.

It may also be argued that States consent to regional or international treaties may impose additional obligations on States or expand their rights to exercise jurisdiction over foreign vessels smuggling migrants on the high seas. In other words, although the conditions listed in Article 110 of the LOSC – under which States’ vessels are justified to board foreign vessels on the high seas – do not include a suspicion of being engaged in migrant smuggling, it is arguable that Article 8(2) of the Smuggling Protocol may have expanded the rights of State Parties, to visit and board vessels smuggling migrants on the high seas. This is consistent with Article 87 of the LOSC that provides that the freedoms of the high seas are subject to conditions laid down by the LOSC *and* “by other rules of international law”. As mentioned earlier, this is also consistent with Article 311(3) of the LOSC which provides that States may conclude agreements between themselves to modify or suspend the provisions of the LOSC, and also consistent with the application of the *lex specialis derogat legi generali* rule.

If it is to be accepted that the Smuggling Protocol has modified or expanded the rights of States under Article 110 of the LOSC, then it must be emphasized that the Smuggling Protocol does not displace the rules of flag State jurisdiction codified in the LOSC. This is because States Parties to the Smuggling Protocol may exercise jurisdiction *only* in cases where they have already acquired the consent of the flag State.¹⁶⁷ Accordingly, it may be argued that even though Article 110 of the LOSC does not require the consent of the flag State to exercise the right of visit, the situation is different in cases of migrant smuggling, as a State cannot enforce any measures against a foreign vessel suspected of migrant smuggling unless it notifies the flag State and acquires its consent.¹⁶⁸ However, as demonstrated in earlier, it may be argued that

¹⁶⁵ Henrik Ringbom, (2015). "Introduction" in Jurisdiction over Ships: Post-Unclos Developments in the Law of the Sea, ed. Henrik Ringbom, Publications on Ocean Development, Brill, p.4.

¹⁶⁶ Anne Gallagher & Fiona David, (2014). Supra note (9), p.424. See also: supra note (94).

¹⁶⁷ Smuggling Protocol, Art. 8(2).

¹⁶⁸ Ibid.

States Parties to the Protocol are under a positive duty to cooperate to suppress the smuggling of migrants, and thus, they are under an obligation to provide their consent. Consequently, denying consent may amount to a refusal to cooperate, and thereby, constitute a breach of the Smuggling Protocol.¹⁶⁹

Finally, it must be mentioned that the consent of the flag State can be provided on an *ad hoc* basis and can also be stipulated in bilateral or multilateral agreements. It has been argued that longstanding maritime customs indicate that shipmasters of private vessels may grant warships their consent to board vessels under their command, even though there is no codified rule under international law of the sea that explicitly authorizes a shipmaster to give consent to a warship to board his vessel on behalf of the flag State.¹⁷⁰

3.5.3 Intercepting Foreign Vessels Smuggling Migrants on the High Seas

The LOSC does include any references to maritime interceptions or vessels interdictions, however, its provisions on the right of visit, in particular paragraphs 2 and 3 of Article 110 are what provides a basis for maritime interception on the high sea. Thus, any interference with foreign vessels on the high seas must be consistent with the LOSC provisions. Therefore, a few observations should be made with regards to the provisions on the right of visit.

Firstly, not all vessels on the high seas can exercise the right of visit over a vessel engaged in one of the acts listed in Article 110. The LOSC grants this right only to warships, military air craft and to “authorized ships or aircraft clearly marked and identifiable as being on government service”.¹⁷¹ A similar provision is also listed in Article 9(4) of the Smuggling Protocol. It should also be mentioned that this holds true for warships engaged in Frontex intercepting operations on the high sea.¹⁷²

Secondly, the LOSC requires that before approaching a foreign vessel on the high seas, there must be ‘reasonable grounds’ for suspecting that the vessel is engaged in one of the acts listed in Article 110. A similar demand is also included in Article 8(2) of the Smuggling Protocol. However, neither the LOSC nor the Smuggling Protocol explain what reasonable ground implies or which suspicions would amount to reasonable and thereby trigger the right of visit.¹⁷³

¹⁶⁹ Felicity Attard, (2016). *Supra* note (101),p.231.

¹⁷⁰ James Kraska, (2010). "Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure", *Ocean and Coastal Law Journal* 16, no. 1, pp.1-45, p.16. See also: Jasmine Coppens, (2016). *supra* note (125) p.209.

¹⁷¹ LOSC, Art. 110.

¹⁷² Efthymios Papastavridis, (2010). *Supra* note (94),p.83. For further discussion on Frontex, see Chapter IV, Section 2.

¹⁷³ Efthymios Papastavridis, (2014). "Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans", London, Bloomsbury, p.62.

Since, the right of visit is an exception to the principle of navigation, Article 110 must be interpreted strictly so it does not lead to an abuse of the right of visit.¹⁷⁴ Therefore, it has been argued that the wording ‘reasonable grounds’ for suspicion must amount “to more than a mere suspicion” and each suspicion “must be assessed on an ad hoc basis”.¹⁷⁵ Reasonable grounds for suspicion could be easily satisfied in some cases, for instance, when all the vessels engaged in the illegal conduct share common features, e.g. the situation of piracy off the coast of Somalia.¹⁷⁶ However, since this is not always the case, cooperation between States is essential for facilitating the establishment of reasonable grounds for suspicion. To this end, the duty of States to cooperate in exchanging information related to smuggling matters, as stipulated by Article 10 of the Smuggling Protocol is essential.

Thirdly, in cases where a State has reasonable grounds to suspect that a vessel is engaged in one of the acts listed in Article 110, the power granted to warships is only to approach the vessel and check the vessel’s documents.¹⁷⁷ In cases where suspicion remains, authorized vessels or warships may board the vessel for further examination, and the examination must be carried out “with all possible consideration”.¹⁷⁸ In this context, Reuland argues that if the examination presents sufficient evidence that the vessel has been engaged in one of the illegal activities listed in article 110, the warship may arrest and prosecute the vessel and the crew.¹⁷⁹ In cases where suspicions are unfounded, the boarding State is obliged to compensate the vessel for any losses or damage.¹⁸⁰ Similarly, the Smuggling Protocol stipulates that the interdicting State shall ensure the safety of the foreign vessel and its cargo, take into account the legal and commercial interests of the flag State, and the safety of the environment.¹⁸¹ Article 9(2) of the Smuggling Protocol further provides that the vessel subject to the intercepted measures shall be compensated for any loss or damage when the grounds for the measures taken against it prove to be unfounded.

3.5.4 Intercepting Stateless Vessel Smuggling Migrants on the High Seas

The position of stateless vessels, as mentioned earlier, is of a particular importance, as most vessels used by human smugglers are commonly stateless. It has been argued that vessels should

¹⁷⁴ Ibid.

¹⁷⁵ Ibid. see also: Jasmine Coppens, (2013). *Supra* note (18),p.333.

¹⁷⁶ Efthymios Papastavridis, (2014). *Supra* note (172), p.62.

¹⁷⁷ LOSC, Art.110(2).

¹⁷⁸ Ibid.

¹⁷⁹ Robert Reuland, (1989). "Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction", *Vanderbilt Journal of Transnational Law* 22, pp.1161 - 229, p.1176.

¹⁸⁰ LOSC, Art. 110(3).

¹⁸¹ Smuggling Protocol, art. 9(1)b, c, d.

only be regarded stateless when the flag State denies the claimed nationality by the vessel, or when the shipmaster fails to make a claim of nationality when requested.¹⁸² In such cases, the LOSC Article 110(1) provides States with the legal bases for intercepting stateless vessels on the high seas.

Pursuant to Article 110(1) (d) and (e), a warship may approach and board a vessel on the high seas when its nationality is uncertain to confirm its nationality or its status as stateless.¹⁸³ However, the LOSC is silent on the measures of enforcement that warships may undertake against stateless vessels beyond boarding and inspection.¹⁸⁴ Similarly, it is uncertain what the measures that States Parties to the smuggling protocol may undertake are. However, in comparison to Article 110 of the LOSC, the Smuggling Protocol goes a step beyond boarding and inspection by allowing States to “take appropriate measures in accordance with relevant domestic and international law” when the suspicion – that a stateless vessel is smuggling migrants – is confirmed.¹⁸⁵ However, the Protocol does not specify what the words “appropriate measures” implies, though it has been agreed that these measures may include the capture and the arrest of the vessel and the smugglers.¹⁸⁶ This also confirms the view that when vessels are lacking any claim to nationality, these vessels do not enjoy any form of protection and are subject to the domestic enforcement measure of the boarding State.¹⁸⁷

Finally, regardless whether the vessel is stateless or not, the measures undertaken by the boarding State against a vessel smuggling migrants are subject to the saving clauses in Articles 9, 16 and 19 of the Smuggling Protocol. In this context, the Smuggling Protocol provides that the State carrying out the interdiction operation must ensure the safety and the humane treatment of all persons on board of the interdicted vessel.¹⁸⁸ In addition, Article 16 and 19 emphasize that the measures undertaken by the boarding State shall be consistent with other obligations of international law, and that the boarding State shall take all measure necessary to preserve and protect the rights of people on board, e.g. the right to life, the right not to be tortured and *non-refoulement*.¹⁸⁹

¹⁸² Richard Barnes, (2010). supra note (101) p.130.

¹⁸³ LOSC, Art.110(2).

¹⁸⁴ Anne Gallagher & Fiona David, (2014). Supra note (9), p.245.

¹⁸⁵ Smuggling Protocol, Art. 8(7).

¹⁸⁶ Tulio Scovazzi, (2014). "Human Rights and Immigration at Sea" in Human Rights and Immigration, ed. Ruth Rubio-Marin, Oxford University Press, p.218. See also: Patricia Mallia, (2009). “Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework”, vol. 66, Publications on Ocean Development, Martinus Nijhoff, p. 70. See also Anne Gallagher & Fiona David, (2014). Supra note (9), p.245.

¹⁸⁷ Richard Barnes, (2010). supra note (101) p.131. See also: Felicity Attard, (2016). Supra note (101),p.321.

¹⁸⁸ Smuggling Protocol, Art. 9(1)a.

¹⁸⁹ The application of human rights obligations at sea is further discussed in Chapter IV, Section 3.

3.5.5 The Doctrine of Hot Pursuit

The right of hot pursuit is recognized as a customary principle of international law and was codified under both the High Seas Convention Article 23 and the LOSC Article 111.¹⁹⁰ The right of hot pursuit is another exception to the principle of flag State jurisdiction and arises only when a coastal State has “good reasons to believe” that a vessel departing from one of its maritime zones has breached its laws and regulations within that maritime zone.¹⁹¹ For instance, if a vessel disembarks or embarks persons in violation of the coastal State’s immigration laws in the territorial sea and seek to flee to the high seas. In this context, subject to the conditions listed in Article 111 of the LOSC, a coastal State may command its warships or other official ship or authorized military aircrafts to pursue that vessel in order to arrest and seize it.

The hot pursuit may only begin when the foreign vessel that committed the illegal conduct is within one of the coastal States maritime zones – e.g. internal water, the territorial sea, the contiguous zone, the EEZ – and “after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship”.¹⁹² However, in the context of migrant smuggling, the right of hot pursuit cannot start in the EEZ, since coastal States do not enjoy jurisdictions over immigration matters in the EEZ. Furthermore, the right of hot pursuit must cease once it has been interrupted or “as soon as the ship pursued enters the territorial sea of its own State or of a third State”.¹⁹³ In cases where a foreign vessel is stopped or arrested and the circumstances “do not justify the exercise of the right of hot pursuit”, the coastal State is obliged to compensate the foreign vessel for any loss or damage caused during the conduct.¹⁹⁴

3.5.6 The Use of Force in Maritime Interceptions

The LOSC’s provisions 110 and 111 that permit States to take enforcement measures over vessels engaged in illegal activities imply or even demand the use of force. Hence, questions concerning the use of force usually arise when intercepting vessels carrying irregular migrants at sea, in particular when dealing with stateless vessels. Unfortunately, the LOSC does not include any provisions that regulate the use of force at sea. The only relevant provision is Article 225, which stipulates that while taking enforcement measures, States “shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk”.¹⁹⁵ Nevertheless, case law can

¹⁹⁰ Anne Gallagher & Fiona David, (2014). *Supra* note (9), p.426.

¹⁹¹ LOSC, Art. 111.

¹⁹² *Ibid.*, Art. 111(1),(2),(4).

¹⁹³ *Ibid.*, Art. 111(1),(3).

¹⁹⁴ *Ibid.*, Art. 111(8).

¹⁹⁵ *Ibid.*, Art. 225.

provide guidance regarding the use of force in maritime interceptions. In the *S.S. I'm Alone* arbitration, the Commissioners concluded that during the use of force to stop, board, search or seize a vessel, it was acceptable if the vessel sank incidentally.¹⁹⁶ However, the Commissioners affirmed that “intentional sinking of the suspected vessels was not justified”.¹⁹⁷ In the *Red Crusader* Incident, the Commission of Inquiry also dealt with the issue of the use of force and concluded that gunshots exceed the legitimate use of force on two counts “a) firing without warning of solid gunshot; b) creating danger to human life on board the *Red Crusader* without proved necessity”.¹⁹⁸

The most echoing judgement concerning the use of force in maritime interception operations was the ITLOS decision in the *M/V Saiga case No. 2*. In this case, the ITLOS asserted that international law “requires that the use of force must be avoided as far as possible”.¹⁹⁹ The tribunal also affirmed that the use of force, should only be considered “as a last resort” after exhausting all other alternative measures.²⁰⁰ However, in cases where the use of force is inevitable “it must not go beyond what is reasonable and necessary in the circumstances”.²⁰¹ The tribunal further asserted that when force is used “considerations of humanity must apply in the law of the sea as they do in other areas”,²⁰² and “all efforts should be made to ensure that life is not endangered”.²⁰³ In light of the above the use of force in maritime interception operations must always be considered as a last resort, must be proportionate to the circumstances and must not go beyond what is necessary and reasonable.

4. Concluding Remarks

This chapter has discussed in detail the relevant provisions of the LOSC that may grant States the capacity to act against the crime of migrant smuggling at sea. Furthermore, it demonstrated that States’ authority at sea is not absolute and any action taken against foreign vessels suspected of being engaged in the act of migrant smuggling must be consistent with the relevant rules of the LOSC. Although the LOSC provisions are what provide a basis for maritime interception operations at different maritime sea zones, it lacks provisions that deal with the issue

¹⁹⁶ S. S. “I’m Alone”, Canada v. United States, (30 June 1933 and 5 January 1935). Reports of International Arbitral Awards, Volume III, pp.1609-1618, p.1615. Available at: http://legal.un.org/riaa/cases/vol_III/1609-1618.pdf

¹⁹⁷ Ibid

¹⁹⁸ The Red Crusader, Commission of Enquiry, Denmark v. United Kingdom, (23 March 1962). Reports of International Arbitral Awards, Volume XXIX, pp.521-539, p.538. Available at: http://legal.un.org/riaa/cases/vol_XXIX/521-539.pdf

¹⁹⁹ *M/V Saiga*, No. 2, St. Vincent and the Grenadines V. Guinea, supra note (139), para. 155.

²⁰⁰ Ibid, para. 156.

²⁰¹ Ibid, para. 155.

²⁰² Ibid.

²⁰³ Ibid, para. 156.

of migrant smuggling. Therefore, the LOSC inevitably needs to be supported by other branches of international law. As far as the smuggling of migrants is concerned, the Smuggling Protocol as discussed earlier is what provides a basis for States to exercise enforcement jurisdiction over vessels suspected of being engaged in the crime of migrant smuggling. However, 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.

Unfortunately, the contemporary practice of States intercepting vessels engaged in migrant smuggling indicates that EU States have, on several occasions, attempted to fragment the applicable legal framework by relying upon laws that allow for enhancing border controls and implementing measures that undermine obligations of human right and refugee law. Having said this, the following chapter 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.

Part Two

State Practice, Human Rights and Implications of Humanity at Sea

Chapter IV: The Contemporary Practice of Interdicting Vessels in the Mediterranean Sea

1. Introductory Remarks

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 immigration laws of the coastal State, the coastal State may use the right of hot pursuit to interdict that vessel and prevent it from proceeding “further onward international travel”.²⁰⁴ 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 UNTOC and the Smuggling Protocol 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 neighboring States, that aim to reduce and prevent irregular migration from occurring, including restrictive visa practices and intercepting vessels on the high seas. In addition to these measures, various bilateral and regional agreements, memorandums of understandings and other arrangements were concluded with North African States for the same purposes, for instance in 2009 Italy concluded a bilateral agreement with Libya that permits Italy to intercept vessels in the Libyan territorial sea.²⁰⁵ Although these measures, arrangements and agreements may take different forms, they share a common goal: to control and to prevent the flow of irregular migration from Africa or the Middle East towards Europe.

In practice, most interdiction operations occurs 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 as discussed earlier. In this context, the 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

²⁰⁴ UNHCR, (2003). "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), Available at: <http://www.unhcr.org/excom/exconc/3f93b2894/conclusion-protection-safeguards-interception-measures.html>.

²⁰⁵ Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya (Bengasi, 30 August 2008, entered into force 3 March 2009).

international borders by land, air or sea, and making their way to the country of prospective destination".²⁰⁶

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 is in need of protection or has asylum claims.²⁰⁷ Although, the screening process was not ideal, it was to a certain extent consistent with the requirements of human rights and refugee laws.²⁰⁸ 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 regarding the limitations on the capacity of States to act against vessels that are engaged in smuggling migrants. In other words, to what extent do human rights obligation imposed on States limit their capacity to act?

In light of the above, this chapter 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. The following section commences with giving 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. However, it is beyond the scope of this thesis to discuss every legal aspect of Frontex and its operations. Following that, this chapter will assess the legality of these interdiction operations against the background of international human rights obligations. However, since this thesis is concerned with the smuggling of migrants to Europe via the Mediterranean Sea, a special focus is given to the applicability of the ECHR obligations during conducting these operations. Other legal factors that are also taken into account in the discussions of the present chapter are the International Law Commission's Articles on Responsibilities of States for Internationally Wrongful Acts (Hereinafter ILC Articles on State Responsibility).²⁰⁹ It is necessary to point out that the ILC Articles on State Responsibility codifies customary international law, and all States are bound by it.²¹⁰

²⁰⁶ UNHCR, (2000). "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, (Un Doc. No. Ec/50/Sc/Crp.17)", *Refugee Survey Quarterly* 19, no. 4, pp.171-79, p.173.

²⁰⁷ Silvia Borelli & Ben Stanford, (2014). "Troubled Waters in the Mare Nostrum: Interception and Push-Backs of Migrants in the Mediterranean and the Euro-Pean Convention on Human Rights", *Uluslararası Hukuk ve Politika – Review of International Law and Politics* 10, pp.29-69, p.33.

²⁰⁸ *Ibid.*

²⁰⁹ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Un Doc. A/56/83., 2001.

²¹⁰ Andreas Fischer-Lescano et.al, (2009). "Border Controls at Sea: Requirements under International Human Rights and Refugee Law", *International Journal of Refugee Law* 21, no. 2, pp.256–96, p.279.

2. Maritime Interception Operations and Fortress Europe

2.1 Frontex Maritime Interception Operations

Since 2005 the European Agency for Management of External Borders (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.²¹¹ 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.²¹² The first joint interception operation coordinated by Frontex, known as *Hera*, took place at the Atlantic coast of West Africa.²¹³ 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 interception joined operations in the Mediterranean Sea, targeting illegal migration from North African States towards Eastern European States, for instance, operation *Nautilus* in 2007, operation *Hermes* and more recently operations *Triton* and *Themis*.²¹⁴

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. Hence, these operations are subject to the legal regimes of the high seas and of the territorial sea, both discussed in part I, chapter III of the present thesis. EU States hosting these operations have usually relied on several legal grounds to justify conducting these operations. The legal bases for interdicting vessels in the territorial sea of other States are usually based on 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 18 countries and is negotiating working agreements with almost all North African coastal States.²¹⁵ These agreements include training, technical assistance, information sharing, and participation in border control operation in order to enhance third States' border controls capabilities.²¹⁶ The legal grounds for intercepting vessel on the high seas are often based on the LOSC provisions. In this context, Article 110 of the

²¹¹ Katja Aas & Helene Gundhus, (2015). "Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life", *The British Journal of Criminology* 55, no. 1, pp.1-18, p.3.

²¹² 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>; see also: Silvia Borelli & Ben Stanford, (2014). *Supra* note (207), p.34.

²¹³ For an overview of the operation, see: <https://frontex.europa.eu/media-centre/news-release/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc>

²¹⁴ 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>

²¹⁵ List available at: <http://frontex.europa.eu/partners/third-countries>

²¹⁶ *Ibid*, see also: Nora Markard, (2016). "The Right to Leave by Sea: Legal Limits on Eu Migration Control by Third Countries", *European Journal of International Law* 27, no. 3, pp.591–616, p.613.

LOSC is usually invoked with regards to interdicting stateless vessels at the high seas.²¹⁷ 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.²¹⁸

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 framed 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. This is because Frontex and other EU States emphasizes that SAR obligations must be understood as “operating independently from other international obligations arising from refugee law and human rights”.²¹⁹ As a result, these operations blur the distinction between two different legal regimes and led to a situation where “vessels that are not in distress have been ‘rescued’, whereas vessels genuinely in distress have been ignored or diverted”.²²⁰ However, the ECtHR – as will be discussed in this chapter – 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.²²¹

In theory, all operations carried under the auspices of Frontex have to provide means for screening migrants to identify persons who are in need of protection, e.g. asylum seekers, before returning those who are not entitled to protection to the State of departure.²²² However, Frontex was criticized by the Parliamentary Assembly of the Council of Europe, on the grounds that there are “human rights implication attached to its work and that it was ill-equipped to tackle them” and that the screening practices adopted by Frontex are not ideal, not offering any form of protection and lacking complaints mechanisms.²²³ Additionally, the Parliamentary Assembly of the Council of Europe criticized Frontex for the “lack of clarity” regarding its role and responsibility in migration control, and a “lack of democratic scrutiny” with regards to its agreements with third States to intercept and return vessels.²²⁴ Frontex operations have been also criticized by many academics and international organizations for breaching international

²¹⁷ Efthymios Papastavridis, (2010). *Supra* note (94),p.83.

²¹⁸ *Ibid.*, p.86.

²¹⁹ Violeta Moreno-Lax, (2011). "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of Eu Member States' Obligations Accruing at Sea", *International Journal of Refugee Law* 23, no. 2, pp.174-220, p.177.

²²⁰ *Ibid.*

²²¹ *Hirsi Case*, *supra* note (24), para.36.

²²² Silvia Borelli & Ben Stanford, (2014). *Supra* note (207),p.35.

²²³ Parliamentary Assembly of the Council of Europe, (2013). "Frontex: Human Rights Responsibilities", Resolution 1932, para.2 Available at: [http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19719&lang=en.](http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19719&lang=en;); See also: Silvia Borelli & Ben Stanford, (2014). *Supra* note (207),p.36.

²²⁴ Parliamentary Assembly of the Council of Europe, (2013), *ibid.* para.3.

obligations of human rights and refugee laws.²²⁵ However, Frontex always asserted that the responsibility lies with the States participating in these operations, not with Frontex itself.²²⁶

2.2 Unilateral Interception Measures “Push Back 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. These measures, known as push-back 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.²²⁷ In 2009, Italy adopted this strategy and the first push back operation was carried out in the same year and resulted in the return of 471 smuggled migrants to Libya.²²⁸ The legal grounds for these push-back operations were based on a bilateral agreement concluded between Italy and Libya in 2008.²²⁹ Under this agreement, Italy and Libya agreed to cooperate in various sectors, including cooperation in suppressing irregular migrations. Pursuant to this agreement Italy has agreed to provide training to coast guards, financial support and to set up detention facilities for returned migrants.²³⁰ Like Frontex operations, Italy’s Push-back operations have been widely criticized for breaching international obligations of human rights and refugee law.²³¹ Similarly, Greece has been criticized recently for conducting push-back operations against vessels seeking to reach its territory from Turkey via the Aegean Sea.²³² Frontex and Push-back operations raise serious concerns regarding the applicability of human rights and refugee law at sea. Having said this, the following section has the objective of discussing the application of human rights and refugee law obligations in maritime context in view of the recent ECtHR decisions.

²²⁵ See for example: Seline Trevisanut, (2009). *Supra* note (22).; Silvia Borelli & Ben Stanford, (2014). *Supra* note (207).

²²⁶ Efthymios Papastavridis, (2010). *Supra* note (94),p.86. See also: Silvia Borelli & Ben Stanford, (2014). *Supra* note (207),p.36.

²²⁷ Silvia Borelli & Ben Stanford, (2014), *ibid.* p.37.

²²⁸ *Ibid.*, p.39; see also: Yasha Maccanico, (2009). "Italy: The Internal and External Fronts: Security Package and Returns", *Statewatch Bulletin* 19, no. 3 p.4.

²²⁹ Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People’s Libyan Arab Jamahiriya (Bengasi, 30 August 2008, entered into force 3 March 2009).

²³⁰ Borelli, Silvia & Ben Stanford, (2014). *Supra* note (207),p.38.

²³¹ Human Right Watch, (2009). *Supra* Note (66). see also: Amnesty International, (2010). "Annual Report",p.186. Available at: <https://www.amnesty.org/en/documents/pol10/001/2010/en/>. See also: Amnesty International (2011). "Italy: Over 100 Reportedly Pushed-Back at Sea" Available at: <https://www.amnesty.org/en/documents/eur30/017/2011/en/>.

²³² Human Rights Watch, (2014). "Greece: Investigate Pushbacks, Summary Expulsions" Available at: <https://www.hrw.org/news/2014/01/30/greece-investigate-pushbacks-summary-expulsions>., see also: Amnesty International, (2013). "Frontier Europe Human Rights Abuses on Greece’s Borders with Turkey" Available at: <https://www.amnesty.org/en/documents/EUR25/008/2013/en/>.

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

3.1 The Application of Human Rights Obligations within the Territorial Sea

As mentioned earlier, 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 possession of the territorial sea as the ICJ points out “is not optional, not dependent upon the will of the State, but compulsory”.²³³ The possession of a territorial sea has two important consequences. Firstly, any person within the territorial sea of a coastal State becomes subject to the jurisdiction of that State. Secondly, 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 legislations.²³⁴ 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, in 1991, France tried to revoke the effects of some human rights and refugee law obligations by turning airports and ports into international zones.²³⁵ Similarly, Australia adopted a legislation in 2001²³⁶ that turns several islands within its territorial sea into ‘migration zones’, where the obligations imposed on it by the 1958 Migration Act²³⁷ do not apply, including obligations of international refugee law.²³⁸

This practice of adopting national legislations that conflict with international obligations constitutes a breach of Article 27 of the VCLT, 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 legislations.²³⁹ Adopting domestic legislations 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

²³³ Anglo–Norwegian Fisheries Case, United Kingdom V. Norway, *supra* note (112), p.160.

²³⁴ Andreas Fischer-Lescano et.al, (2009). *Supra* note (210),p.262.

²³⁵ *ibid.*; See also: Amuur V. France, (25 June 1996). ECtHR, App. No. 17/1995/523/609, para. 6 & 9.

²³⁶ Migration Amendment (Excision from Migration Zone) act 2001, no.127/2001. Available at: <https://www.legislation.gov.au/Details/C2004A00887>

²³⁷ The Australian Migration Act, no.62/1958, <https://www.legislation.gov.au/Details/C2017C00309>.

²³⁸ Guy Goodwin-Gill & Jane McAdam, (2007). “The Refugee in International Law”, 3rd ed.Oxford University Press, p.225.; See also: Andreas Fischer-Lescano et.al, (2009). *Supra* note (210),p.262.

²³⁹ Andreas Fischer-Lescano et.al (2009), *ibid*, p.263.

failure to comply with its obligations” under international law. In its decision, the ECtHR asserted in *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.²⁴⁰ 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 justify a wrongful act by invoking their domestic legislations as it leads to a “legal vacuum that the ECHR sought to avoid”.²⁴¹

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.²⁴² Therefore, it may appear at first sight that the extraterritorial application of human rights obligations is beyond most international human rights treaties.²⁴³ Many States have argued against the extraterritorial application of human rights obligations. For instance, the US Supreme Court in 1993 decided in *Sale v. Haitian Centers Council* case, that the obligation of *non-refoulement* does not have an extraterritorial effect.²⁴⁴ However, this position was criticized and condemned by academics²⁴⁵ and the UNHCR for breaching human rights obligations.²⁴⁶ 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 sea, “since the high seas are extraterritorial”.²⁴⁷ In 2009, Italy raised similar arguments while justifying its push-back operations to the ECtHR.²⁴⁸ Thus, it is the purpose of the following subsections to examine the applicability of human rights obligations in ABNJ. It must be recalled that ABNJ in this context, refers to the sea areas beyond the territorial sea or the contiguous zone, since a potential EEZ would be considered high seas for the purposes of migration control.

²⁴⁰ *Amuur v. France*, supra note (235), para.52.

²⁴¹ Andreas Fischer-Lescano et.al, (2009). Supra note (210),p.276.

²⁴² Anne Gallagher & Fiona David, (2014). Supra note (9), p.263.

²⁴³ Ibid., p.251.

²⁴⁴ *Sale v. Haitian Centers Council*, (21 June 1993). USSC, 509 US 155, 156.; See also: Andreas Fischer-Lescano et.al, (2009). Supra note (210),p.266.

²⁴⁵ See for example: Guy Goodwin-Gill & Jane McAdam, (2007). Supra note (238), p.247. See also: Natalie Klein, (2016). "A Maritime Security Framework for the Legal Dimensions of Irregular Migration by Sea" in 'Boat Refugees' and Migrants at Sea: A Comprehensive Approach - Integrating Maritime Security with Human Rights, ed. Violeta Moreno-Lax & Efthymios Papastavridis, Brill / Nijhoff, p.50.

²⁴⁶ UNHCR, (1993). "Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*", International Legal Materials 32 p.1215.

²⁴⁷ Andreas Fischer-Lescano et.al, (2009). Supra note (210),p.265.

²⁴⁸ *Hirsi Case*, supra note (24), para.160.

3.2.1 Extraterritorial Jurisdiction and Effective Control

In the context of intercepting vessel smuggling migrants in the Mediterranean Sea, the first question that arise 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 circumstance the ECHR can “apply to a State’s extraterritorial acts”.²⁴⁹ In this context, the ECtHR provide 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”.²⁵⁰

Moreover, the ECtHR affirmed explicitly 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”.²⁵¹ Thus, the ECtHR decision is consistent with the LOSC Article 92 that 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.²⁵² 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”.²⁵³

The extraterritorial application of the ECHR’s provisions do 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

²⁴⁹ *Banković and Others V. Belgium and 16 Other Contracting States*, (12 December 2001). ECtHR, App. No. 52207/99, para. 59 & 61.

²⁵⁰ *Al-Skeini and Others V. United Kingdom*, (7 July 2011). ECtHR, App. No. 55721/07, para. 136.

²⁵¹ *Banković Case*, supra note (249), para. 73.

²⁵² Andreas Fischer-Lescano, et.al (2009). Supra note (210),p.275.

²⁵³ *Hirsi Case*, supra note (24), para.77.

cannot outsource its obligation by displacing its border controls.²⁵⁴ The court decision indicates that intercepting vessels in the territorial sea of other States do not release the EU State from its obligation, and do 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”.²⁵⁵ In other words, as much as States have a duty to prevent and suppress the crime of migrant smuggling, they also have a duty towards victims and whoever come under their jurisdiction and effective control. In light of this, the following sub-section 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 UDHR and other multilateral treaties such as the ICCPR, the ECHR and the African Charter of Human and Peoples’ Rights.²⁵⁶ 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.²⁵⁷ The right to leave, however, is not an absolute right and subject to restrictions imposed by laws that are necessary for the interest of national security, public

²⁵⁴ *Xhavara & Ors V. Italy & Albania*, (1 Januray 2001). ECtHR, App. No. 39473/98.

²⁵⁵ Guy Goodwin-Gill, (2016). "Setting the Scene: Refugees Asylum Seekers and Migrants at Sea – the Need for a Long-Term Protection-Centered Vision" in *Boat Refugees’ and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights*, ed. Violeta Moreno-Lax & Efthymios Papastavridis, Brill Nijhoff, p.23.

²⁵⁶ 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”.

²⁵⁷ Nora Markard, (2016). *Supra note (216)*,p.594.; See also: Council of Europe - Commissioner for Human Rights, (2013). "The Right to Leave a Country", Issue Papers, Commissioner for Human Rights, pp.1-65, p.5.

order, the prevention of crimes, the protection of public health and the protection of other persons' freedoms and rights.²⁵⁸ 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".²⁵⁹ Accordingly, arbitrary departure prevention by either the coastal State or other States operating in its territorial sea, even for the purposes of preventing the crime of migrant smuggling, may constitute a breach of the right to leave.²⁶⁰ Thus, there must be a balance between public interests and individuals rights. In this context, the UN Human Rights Committee (hereinafter 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".²⁶¹ In other words, the right to leave must not only be assessed against the restrictions imposed by law, but also must be assessed on an ad hoc basis taking account the particular situation of each person subject to the restrictions.²⁶²

Furthermore, the HRC has asserted that the restrictions on the right to leave must be consistent with other rights of the ICCPR.²⁶³ Consequently, restrictions on the right to leave that may violate other fundamental rights, e.g. the right to life or the right to be free of torture, constitute a violation of the ICCPR.²⁶⁴ 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".²⁶⁵ This is also consistent with Article 11(1) of the Smuggling Protocol, which provides that any measures taken by a State parties to the Protocol that

²⁵⁸ ICCPR, Art. 12(3); Protocol No. 4 to the ECHR, Art. 2(3).

²⁵⁹ Human Right 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: Nora Markard, (2016). *Supra* note (216),p.597.; Maarten Den Maarten Den Heijer, (2011). "Europe and Extraterritorial Asylum", Institute of Immigration Law, Faculty of Law, Leiden University p.165.

²⁶⁰ UN Human Right Committee, (1999), *ibid.* para. 10.; See also: Andreas Fischer-Lescano, et.al, (2009). *Supra* note (210),p.278.

²⁶¹ UN Human Right Committee, (1999), *ibid.* para. 16.

²⁶² *Riener V Bulgaria*, (23 May 2006). ECtHR, App. no. 46343/99, para. 128.; See also: Andreas Fischer-Lescano et.al, (2009). *Supra* note (210),p.278.; See also: Maarten Heijer, (2011). *Supra* note (259),p.163.; See also: Colin Harvey & Robert Barnidge, (2007). "Human Rights, Free Movement, and the Right to Leave in International Law", *International Journal of Refugee Law* 19, no. 1, pp.1-21, p.6.

²⁶³ UN Human Right Committee, *supra* note (259), para. 11.

²⁶⁴ *Ibid.*, para. 18.

²⁶⁵ Maarten Den Heijer, (2011). *Supra* note (259),p.162 - 66.

aims to suppress or prevent the smuggling of migrants must not prejudice the “free movement of people” or result in unjustified prevention of departure.²⁶⁶

The right to leave is not a complete right, as it cannot be fulfilled unless other States permit entry to its territory.²⁶⁷ 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 is inclined or prepared to take them in”.²⁶⁸ Since States are often reluctant or not willing to take others in, migrants tend to seek the help of smugglers to enter the territory of other States. In this context, it must be pointed out that the Convention Relating to the Status of Refugees (hereinafter Refugee Convention)²⁶⁹ obliges States Parties to decriminalize the entry of asylum seekers coming from States where “their life or freedom was threatened” and prohibits their *refoulement*.²⁷⁰

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.²⁷¹ 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”.

Most human rights treaties and conventions do not guarantee that everyone who seeks asylum will receive it, neither do most human rights treaties contain an explicit 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.²⁷² 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.²⁷³ 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

²⁶⁶ See also: Nora Markard, (2016). *Supra* note (216),p.607.

²⁶⁷ *Baumann V France*, (22 May 2001). ECtHR, App. no. 33592/96, para. 61.; See also: Nora Markard (2016). *Supra* note (216),p.595. See also: Guy Goodwin-Gill & McAdam, (2007). *Supra* note (238), p.382-83.

²⁶⁸ *Amuur V. France*, *supra* note (235), para. 48.

²⁶⁹ UNGA, Convention Relating to the Status of Refugees (Refugee Convention), 28 July 1951.

²⁷⁰ *ibid.* Art. 31(1) & Art. 33.

²⁷¹ *Saadi V. Italy*, (28 February 2008). ECtHR, App. No. 37201/06, para 124.

²⁷² *Hirsi Case*, *supra* note (24), para.36.

²⁷³ *Efthymios Papastavridis*, (2010). *Supra* note (94),p.85.

State until their claims are examined.²⁷⁴ 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”.²⁷⁵ 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.²⁷⁶ 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.²⁷⁷ 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”.²⁷⁸

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,²⁷⁹ which is codified under Article 33(1) of the Refugee Convention and other conventions.²⁸⁰ 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 applies equally to the prohibition on torture or inhuman or degrading treatment or punishment.²⁸¹

According to international refugee law individuals outside their State of origin are the only ones entitled to become refugees.²⁸² In other words, the obligation of *non-refoulement* can

²⁷⁴ Andreas Fischer-Lescano, et.al, (2009). Supra note (210),p.287.

²⁷⁵ Ibid., p.285.

²⁷⁶ UNHCR, (2005). “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, of 9 November 2004, Comment to Art. 38 (1), p.51.

²⁷⁷ Ibid.

²⁷⁸ Hirsi Case, supra note (24), para.36.

²⁷⁹ UNHCR, (2002) “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: <http://www.unhcr.org/ref-world/docid/3d60f5557.html>

²⁸⁰ For instance: Art. 2(3) of the 1969 OAU Convention Governing Specific Aspects of Refugee Protection in Africa.

²⁸¹ 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: Anja klug & Tim Howe, (2010). "The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures" in Extraterritorial Immigration Control, ed. Bernard Ryan & Valsamis Mitsilegas, Martinus Nijhoff, p.70.

²⁸² Refugee Convention, Art. 1(A)(2).

only apply when individuals are outside their State of origin. However, when a vessel smuggling migrant is being interdicted in the territorial sea of other States, it is in theory necessary to differentiate between two categories of smuggled migrants.²⁸³ The first category consist 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 consist of individuals from other States within the coastal State's territorial sea, for instance, Syrians within the Libyan territorial sea. With regards 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*.²⁸⁴ Whereas, the measures taken against non-nationals/citizens are subject to the obligation of *non-refoulement*, as they are already 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 both categories often lack documentation such as passports or IDs that determines their nationalities.²⁸⁵ 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.²⁸⁶ In other words, the obligation of *non-refoulement* shall apply to both categories until their status and nationalities are determined, the process which usually takes place in a later stage.²⁸⁷

The obligation of *non-refoulement* applies not only where the risk comes from State actors, but also from private actors.²⁸⁸ 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*.²⁸⁹ Additionally, the ECtHR asserted that returning a person to a State, 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*.²⁹⁰ In this context, the ECtHR emphasizes that the political situation of the State where migrants are to be

²⁸³ Andreas Fischer-Lescano et.al, (2009). Supra note (210),p.278.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ H.L.R. V. France, (29 April 1997). ECtHR, App. No. 24573/9, para. 40.; See also: Borelli, Silvia & Ben Stanford, (2014). Supra note (207),p.48.

²⁸⁹ Hirsi Case, supra note (24), para.36.

²⁹⁰ Ibid., para.146.

transferred or returned is a crucial element in assessing the risks faced by the displaced persons.²⁹¹ Thus, Italy, for instance, would be in breach of the principle of *non-refoulement* if it interdicts a vessel carrying smuggled migrant and decides 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 their fundamental rights may as well, 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.²⁹²

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”.²⁹³

Collective expulsion is most visible in Italy’s push-back 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 back to Libya without being offered any form of screening.²⁹⁴ 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.²⁹⁵ 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 outside the Italian national territory.²⁹⁶ Moreover, Italy justified its conduct as a rescue operation on the high seas arguing the obligation to render assistance to persons in distress “did not itself create a link between the State”

²⁹¹ Saadi V. Italy, supra note (271), para. 130.

²⁹² Andreas Fischer-Lescano et.al, (2009). Supra note (210),p.285.

²⁹³ 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: https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf

²⁹⁴ Hirsi Case, supra note (24), para.11.

²⁹⁵ Ibid., para.3.

²⁹⁶ Ibid., para.160.

conducting the SAR missions “and the persons concerned establishing the State’s jurisdiction”.²⁹⁷ In its decision, the ECtHR condemned the Italian practice of blanket returns and asserted that ‘push-back’ operations violated Article 4 of protocol 4 to the ECHR.²⁹⁸ 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’”.²⁹⁹ Furthermore, the ECtHR reaffirmed that when a State exercise effective control over other individuals its jurisdiction extends to cover them, by virtue of the principle of flag State jurisdiction.³⁰⁰ 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”.³⁰¹ This is also consistent with Article 19 of the Smuggling Protocol that 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 judgement in *Hirsi v. Italy*.³⁰² For instance, Article 4 of the new regulation prohibits transferring a person to a place “in contravention to the principle of *non-refoulement*” where that person might be subject to torture, prosecution, inhuman or degrading treatment.³⁰³ 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”.³⁰⁴

²⁹⁷ Ibid., para.65 & 95.

²⁹⁸ Ibid., para.185-86.

²⁹⁹ Ibid., para.177.

³⁰⁰ Ibid., para.77.

³⁰¹ Ibid., para.36.

³⁰² 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.

³⁰³ Ibid, Art. 4(1).

³⁰⁴ Barbara Miltner, (2015). "The Mediterranean Migration Crisis: A Clash of the Titans' Obligations", The Brown Journal of World Affairs XXII, no. I, pp.213-37, p.221.

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 State 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 rules of international law may provide a tool for holding EU States parties to these agreement responsible for the violations of human rights associated with these agreement. 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. For instance, adopting legislations and measures that restrict the crossing of borders to specific check-points, criminalizing the crossing of borders from areas outside of the specified check points, increasing fines and prison sentence for irregular departures and interdicting 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 (hereinafter EU-Turkey Deal).³⁰⁵ 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.³⁰⁶ It further aims to facilitate the return of asylum seekers to the first country of admission, in other words, it aims to return all new irregular migrant coming to Greece via the Aegean Sea, back to Turkey.³⁰⁷ 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.³⁰⁸ The EU-Turkey Deal was criticized by many academics, NGOs and international organization on the basis that “the premise on which the deal was constructed – namely that

³⁰⁵ European Council (2016) “EU-Turkey Statement”. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement>

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

Turkey is a safe place for refugees – was flawed”.³⁰⁹ A year after the implementation of the EU-Turkey deal, the number of vessels arriving to Greece via the Aegean Sea dropped by 97% and the Eastern Mediterranean Sea route was deemed closed.³¹⁰

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).³¹¹ The EU-Libya Deal was criticized for being a reduplication of the former 2008 Treaty of Friendship, Partnership and Cooperation.³¹² The essential difference between the two agreements is that maritime interdiction operations are now carried out by the Libyan authorities. Thus, push-back 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.³¹³ To help Libya with this task, Italy has agreed to provide training and technical assistance to the Libyan navy and coastguards and financial supports – projected at €220 million – to the Libyan government, to strengthen measures of border control and improve the detention facilities of illegal migrants in Libya.³¹⁴ The EU-Libya agreement raises serious concerns and creates a large gap in the protection of human rights for two reasons: Firstly, 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:

³⁰⁹ Kondylia Gogou, (2017). *Supra Note (31)*.; See also: Lisa Haferlach & Dilek Kurban, (2017). *Supra note (30)*.; Elizabeth Collett, (2016). "The Paradox of the Eu-Turkey Refugee Deal" Migration Policy Institute, Available at: <https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal> ; See also: Priyanka Boghani, (2016). "European Leaders Face Criticism for Refugee Deal with Turkey" PBS, Available at: <https://www.pbs.org/wgbh/frontline/article/european-leaders-face-criticism-for-refugee-deal-with-turkey/>

³¹⁰ 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

³¹¹ Italy-Libya Memorandum of Understanding, 2017, *supra note (28)*,

³¹² Delphine Nakache & Jessica Losier, (2017). "The European Union Immigration Agreement with Libya: Out of Sight, out of Mind?", *E-International Relations*.

³¹³ *Ibid.*

³¹⁴ *Ibid.*; See also: Annalisa Merelli, (2017). "Like Trump in the Us, Europe Is Finding New Ways to Keep Refugees Out" Quartz, Available at: <https://qz.com/904026/europe-has-a-genius-new-strategy-to-deal-with-migrants-pay-war-torn-libya-to-detain-them/>.

“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”.³¹⁵

The report also indicates that some Libyan governmental members are participating in the smuggling of migrants.³¹⁶ 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.³¹⁷ Furthermore, in 2017 the delegation from the European Union Border Assistance Mission in Libya (EUBAM-Libya) justified the termination of its mission in Libya due to the deteriorating security situation and “the absence of a functioning national government”.³¹⁸ Secondly, Libya in contrast to Turkey, is neither a State member to the Rome Statute of the ICJ, nor to the Refugee Convention or its Protocol;³¹⁹ and there are no legal procedures to apply for asylum in Libya.³²⁰ This demonstrates that by supporting the Libyans to interdict vessels in the Mediterranean Sea to prevent migrants from leaving or to return them back 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 regards to other readmission agreements concluded with other North African States.

4.3 The EU’s 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.³²¹ 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:

³¹⁵ The UN Human Rights Office of the High Commissioner, (2016). *Supra* Note (31).p.1.

³¹⁶ *Ibid*.

³¹⁷ *Ibid*. See also: Casey Quackenbush, (2017). “The Libyan Slave Trade Has Shocked the World, Here’s What You Should Know”, *The Time*, Available at: <http://time.com/5042560/libya-slave-trade/>

³¹⁸ EUBAM-Libya Report, (2017). Available at: <http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>

³¹⁹ UNHCR, State Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, June 2014 available at: <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> See also: Sabrina Tucci, (2011). “Libya and International Refugee and Asylum Law: Addressing the Protection of Refugees and Migrants Displaced by the 2011 Conflict”, *Oxford Monitor of Forced Migration* 2, no. 2, pp.48-54, p.49.

³²⁰ Delphine Nakache & Jessica Losier, (2017). *Supra* note (312).

³²¹ Andreas Fischer-Lescano et.al, (2009). *Supra* note (210),p.279.

“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.”

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.³²² 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 vessel carrying irregular migrants from leaving the Libyan territorial sea.³²³ 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 back to Libya.³²⁴ 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 subject to slavery and torture.³²⁵ Therefore, training or aiding the Libyan coastguards to enable them to intercept vessels at the Mediterranean Sea and subsequently returning all migrants back 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 carried out by Libya and within the Libyan territorial sea, their indirect responsibility may be invoked in accordance to 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,

³²² Ibid., p.280.

³²³ Adam Smith, (2017). "Uncertainty, Alert and Distress: The Precarious Position of Ngo Search and Rescue Operations in the Central Mediterranean", *Revue Maroc-Espagnole de Droit International et Relations Internationales: Paix et Securite Internationales*, no. 5, pp.29-70, p.48. See also: Paolo Cuttitta, (2017). "Repoliticization through Search and Rescue? Humanitarian Ngos and Migration Management in the Central Mediterranean", *Geopolitics*, pp.1-29, p.17.

³²⁴ Ahmed Elumami, (2016). "Libyan Coastguard Turns Back Nearly 500 Migrants after Altercation with Ngo Ship" Reuters, Available at: <http://www.reuters.com/article/us-europe-mi-grants-libya-idUSKBN1862Q2>. See also: Adam Smith, (2017). *Supra* note (323),p.48. See also: Paolo Cuttitta, (2017). *Supra* note (323),p.17. For more discussion on the practice of NGO in conducting SAR missions see Chapter V section 4.

³²⁵ UN Human Rights Office of the High Commissioner, (2016). *Supra* Note (31). See also: Middle East Monitor, (2017) "Italy Begins Training Libyan Navy and Coastguard". Available at: <https://www.middleeastmonitor.com/20170919-italy-begins-training-libyan-navy-and-coastguard/>

neither the exercise of border controls in ABNJ nor international cooperation release the EU State from its international obligation or legal responsibility.

5. The Fight against Migrant Smugglers

In addition to the previous policies, in 2015 the European Council announced that the EU will make all efforts to prevent further loss of life at the Mediterranean Sea.³²⁶ To this end, the EU adopted Decision 2015/778 that establishes the European Union Naval Force Mediterranean (EUNAVFOR MED) Operation Sofia that aim “to disrupt the business model of human smuggler and trafficking networks” by identifying smuggler networks, capture and dispose of smuggler vessels.³²⁷ There are 27 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 monitoring and detecting smuggler networks.³²⁸ The second phase is to “conduct boarding, search, seizure and diversion” of vessels suspected of migrant smuggling in accordance to 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 upon obtaining their consent or in accordance to a UN Security Council Resolutions (hereinafter UNSCR).³²⁹ 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 that 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.³³⁰ Paragraphs 6 & 7 of the Resolution that grant States the right to board vessels uses the words “reasonable grounds to believe” without explaining what the words ‘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 provision must be interpreted strictly so they do not lead to abuse of

³²⁶ European Council, Press release, Special Meeting of the European Council – Statement, 23 April 2015. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/>

³²⁷ EU Council Decision (CFSP), 18th May 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), Article 1. More information on the mission is available at: <https://www.operationsophia.eu/mission-at-a-glance/>

³²⁸ Ibid, Article 2(2)(a).

³²⁹ Ibid, Article 2(2)(B).

³³⁰ UNSC Resolution 2240(2015), UNSC Resolution 2312(2016) and UNSC Resolution 2380(2017), para. 6 & 7. available at: <https://www.un.org/press/en/2017/sc13015.doc.htm> 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: <https://www.un.org/press/en/2016/sc12543.doc.htm> .

rights. Thus, the words ‘reasonable grounds’ should amount to more than just a mere suspicion.³³¹

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.³³² In 2016 the European Council added to the mandate of operation Sofia a task to train the Libyan Coastguards and Navy to perform SAR missions and to disrupt smuggling networks in the Libyan territorial sea.³³³ 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.³³⁴ This means that persons affected by that operation are left without any legal “remedies under EU law”.³³⁵ Furthermore, it means that training and assisting the Libyan Coastguards and Navy to prevent irregular departures and to return migrants boats back 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 that illustrates 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 smuggler” and to destroy migrants boats before they depart from Libya.³³⁶ Finally, it should be mentioned that the mandate of operation Sofia was extended on the 25th of July 2017 until the 31st of December 2018.³³⁷

6. Concluding Remarks

Viewing irregular migration through the lens of security and constituting it as threat to both maritime security and the State of destination, led EU States to rely upon laws that externalize border controls, with only few considerations 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

³³¹ See: Chapter III, Section 3, Subsection 3522.

³³² The legal framework of SAR is discussed in detail in Chapter V.

³³³ European Council, Press release, Council conclusions on EUNAVFOR MED Operation Sophia, 23/5/2016. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/05/23/fac-eunavfor-sophia/>

³³⁴ Douglas Guilfoyle, (2016). *supra* note (94) p.184.

³³⁵ *Ibid.*, p.185.

³³⁶ *ibid.*, p.186.

³³⁷ European Council, Press release, EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/07/25/eunavformed-sophia-mandate-extended/>

as they apply in the territory of EU States. It 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.³³⁸ 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 principle of the ECHR, human rights law and refugee laws.

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 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.

³³⁸ Hirsi Case, *supra* note (24), para.36.

Chapter V: The Legal Framework of Search and Rescue Operations

1. Introductory Remarks

Crossing the Mediterranean Sea to reach Europe is a dangerous journey. As pointed earlier in the introduction, most vessels/crafts used by smugglers are overcrowded, unseaworthy and lack proper navigational equipment. Moreover, due to the increased practice of interdicting vessels in the Mediterranean Sea, smugglers tend to let migrants – who lack training – navigate the sea on their own, to avoid being arrested.³³⁹ Because of this, vessels or crafts carrying smuggled migrants are likely to end up in distress situations where costly SAR operations are required. This raises the question of whether or not States and private merchant vessels are required to render assistance to smuggled migrants who are in distressing situations. The answer to this question is always affirmative, as the duty to render assistance to vessels and persons in distress is a norm of customary international law that has been codified in many treaties, and all States are required to render assistance to any person or vessel in distress at sea.³⁴⁰

Unfortunately, States and merchant vessels are continuously failing to carry out their duty to assist vessels and persons in distress at sea. There are several reasons that may explain this failure. A merchant vessel, for instance, may fail to carry out its duty to render assistance for commercial reasons, e.g. to avoid costly delays which are often not compensated, to avoid criminal accusations of aiding smugglers, or to ensure the safety of the vessel and the crew. A State may be reluctant or fail to render assistance to smuggled migrants for security concerns or to avoid international obligations and legal responsibilities under international human rights and refugee laws.³⁴¹

As mentioned earlier in chapter III, under customary international law foreign vessels cannot access the coastal State's ports without obtaining its permission, and every coastal State is competent to allow or deny access to its ports. Although, it is recognized under customary international law and the LOSC that a vessel may access the coastal State's ports in cases of distress or force major, States have often denied and prevented vessels carrying smuggled migrants rescued at sea to access their ports even when the vessel is in a distress situation.³⁴² The clearest example, is the Norwegian M/V Tampa incident, where the Australian authorities denied the vessel entry to its port because it was carrying rescued migrants, even though the vessel

³³⁹ Jasmine Coppens, (2013). *Supra* note (18),p.325.

³⁴⁰ International Law Commission, (1956). "Commentary on Draft Article 12 of the United Nations Convention on the High Seas," UN Doc. A/3179. See also: LOSC, Art. 98.; SAR Convention, Annex, Chapter 2, Regulation 2.1.10.; SOLAS Convention, Regulation 33(a). See also; Mark Pallis, (2002). *Supra* note (114),p.333-34.

³⁴¹ This is further discussed in sections 3, subsections 3.3 & 3.4 below.

³⁴² Richard Barnes, (2010). *supra* note (101),p.136.

was in distress.³⁴³ Hence, it is clear that there is a conflict that exists between the obligations of rescuing or rendering assistance to persons in distress on one hand and the right of a State to regulate access to its territory on the other hand. This raises concerns regarding where rescued migrants should be taken and disembarked.

In light of the above, the following section has the objectives of clarifying and discussing the legal obligations imposed on States and shipmasters to render assistance to persons and vessels in distress. However, a full analysis of the legal framework regulating maritime SAR is beyond the scope of this thesis. Therefore, in section three the focus will be on the duty to disembark rescued migrants in a place of safety and the nexus between the concept of place of safety and the principle of *non-refoulement*. Finally, section four of this chapter discusses the contemporary practice of NGOs conducting SAR operations in the Mediterranean Sea.

2. The Duty to Render Assistance to Persons or Vessels in Distress

2.1 The Concept of Distress

The term distress is not defined by the LOSC or the SOLAS Convention. However, the SAR Convention provides some guidance and defines the term “distress phase” as “a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance”.³⁴⁴ Based on this definition, a distress situation requires the presences of two conditions. Firstly, reasonable certainty that there is a threat of grave and imminent danger to the vessel or persons on board. Secondly, the threat or the danger faced by the vessel or persons in distress requires immediate assistance. The words “reasonable certainty” and “threat” of regulation 1.3.13 of the annex to the SAR Convention imply that the distress situation need not to be “of an actual physical necessity”.³⁴⁵ Similarly, the ILC points out that it is not necessarily for a situation of distress to “jeopardizes the very existence of the person concerned”.³⁴⁶ Instead, it is sufficient if the circumstances of the situation implies that there is a threat to the vessel or the lives of person, that would require immediate assistance. Therefore, in the context of migrant smuggling across the Mediterranean Sea, since smugglers tend to use overcrowded, unseaworthy vessels or crafts that risk the lives of migrants, every person onboard of these vessels crafts must be considered at distress and assistance must be rendered to them at all time.

³⁴³ Victorian Council for Civil Liberties Incorporated V. Minister for Immigration & Multicultural Affairs, (11 September 2001). Federal Court of Australia, FCA 1297 . This case is further discussed in the following section.

³⁴⁴ SAR Convention, Annex, chapter 1, Regulation 1.3.13.

³⁴⁵ The Eleanor, (22 November 1809). High court of Admiralty, p. 161.

³⁴⁶ The ILC (1973), “Yearbook: The International Law Commission”, vol. II, p.134, para.4.

2.2 The Duty on Shipmasters to Render Assistance

Vessels traversing the oceans “are playing the frontline role” in the global search and rescue system.³⁴⁷ They are the first actors available to render assistance to persons and vessels in distress. Their role is essential to ensure the effectiveness of the SAR system and without their role it would be impossible “to provide for the safety of life at sea [and] preserve the integrity of the global SAR services”.³⁴⁸ Since the migration crisis started in the Mediterranean Sea, merchant vessels were heavily relied upon to render assistance to persons in distress. In 2014 it was estimated that merchant vessels performed 25% of all SAR missions in the Mediterranean Sea.³⁴⁹

The duty of shipmasters to render assistance is a principle of customary international law that is enshrined in four widely ratified conventions, including the LOSC, SOLAS, the 1985 High Seas Convention and the 1910 Salvage Convention.³⁵⁰ In this context, Article 10(1) of the 1910 Salvage convention³⁵¹ provides that shipmasters are obliged “to render assistance to any person in danger of being lost at sea” as far as he can do so without causing serious danger to the vessel and persons on board. A similar obligation is also codified in Article 12 of the 1958 High Seas Convention and Article 98 the LOSC. The LOSC Article 98(1) stipulates that every State must require “the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passenger: to render assistance to any person found at sea in danger of being lost” and to rescue persons in distress when informed of their need for assistance “insofar as such action may reasonably be expected of him”. Accordingly, the obligation of shipmasters to render assistance arises in two different situations: the first situation is when persons are found at sea, e.g. floating survivors; the second situation is when rendering assistance is requested or when the shipmaster is informed about it. However, the obligation to render assistance is weakened by the reference in Article 98(1) to the wording “insofar as he can do so without serious danger to the ship, the crew or the passenger”.³⁵² The reference to the wording “in so far as such action may reasonably be expected of him”, indicates

³⁴⁷ Anne Gallagher & Fiona David, (2014). *Supra* note (9), p.446.

³⁴⁸ IMO: the Maritime Safety Committee, (2004). “Guidelines on the Treatment of Persons Rescued at Sea”, Resolution Msc167(78), Doc. Msc 78/26/ Add.2 Annex 34., at para. 5.1. See also: Rick Button, (2017). “International Law and Search and Rescue”, *Naval War College Review* 70, no. 1, pp.25-64, p.32.

³⁴⁹ European Political Strategy Centre Strategic Notes, (2017). “Irregular Migration Via the Central Mediterranean: From Emergency Responses to Systemic Solutions”, European Council p.4. Available at: https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pdf

³⁵⁰ Mark Pallis, (2002). *Supra* note (114),p.333-34. See also: Anne Gallagher & Fiona David, (2014). *Supra* note (9), p.446.

³⁵¹ Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, (Salvage Convention), done Sept. 23, 1910, entered into force Mar. 1, 1912.

³⁵² Mark Pallis, (2002). *Supra* note (114),p.340.

that shipmasters have a wide degree of discretion to decide when or how to render assistance.³⁵³ For instance, if the shipmaster is too far away or there are other vessels present or close to the location of the vessel or person in distress, the shipmaster may not be obliged to render assistance.³⁵⁴

The obligations imposed on shipmasters to render assistance are developed in more detail in the SOLAS Convention, which is the most important international treaty that deals with the safety of merchant ships.³⁵⁵ The obligation of shipmasters to render assistance to vessels and people in distress is found in Regulation 10(a), Chapter V of the SOLAS Convention. Similar to Article 98(1) of the LOSC, Regulation 10(a) of SOLAS Convention provides that every shipmaster that receives a signal from persons in distress at sea and can provide assistance is bound to proceed with all speed to assist them. In comparison to the LOSC obligations, Regulation 10(a) of the SOLAS adds other requirements on shipmasters if they are unable to provide assistance. In such case, shipmasters are obliged to record the reasons for their failing to assist persons in distress and they must inform the appropriate SAR services. It should also be mentioned that the duties under the SOLAS Convention may seem like they are imposed directly on shipmasters, however, “the binding element is on States parties”.³⁵⁶ Accordingly, the international responsibility for non-compliance with the SOLAS Convention falls on States Parties. This is also consistent with the fact that international law is regarded to be interstate law, under which States are only bound by what they consent to.³⁵⁷ Understanding this is of particular importance to avoid confusion when determining the responsibility of States and shipmasters.³⁵⁸

The duty to render assistance applies to every person in distress regardless of his status, nationality or the circumstance that led to the distress situation.³⁵⁹ The duty also applies throughout the oceans and is not restricted to areas beyond the territorial sea as a strict interpretation of the LOSC Article 98 would imply.³⁶⁰ In this context, Barnes points out that since the duty to render assistance is found in Part VII regulating the regime of the high seas, a strict

³⁵³ Ibid.

³⁵⁴ Richard Barnes, (2010). *supra* note (101) p.136.

³⁵⁵ See: IMO “International Convention for the Safety of Life at Sea (SOLAS), 1974” available at: [http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-\(solas\)-1974.aspx](http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-(solas)-1974.aspx)

³⁵⁶ Anne Gallagher & Fiona David, (2014). *Supra* note (9), p.448.; see also: Mark Pallis, (2002). *Supra* note (114),p.332.

³⁵⁷ See Part one, chapter II, section 1.

³⁵⁸ See Section 3.3 of this Chapter.

³⁵⁹ SAR Convention, Annex, Chapter 2, Regulation 2.1.10. See also: SOLAS Convention, Regulation 33(a).

³⁶⁰ Myron Nordquist, (1995). “United Nations Convention on the Law of the Sea 1982: A Commentary”, vol. III, Martinus Nijhoff, p.177.

interpretation of the Article may imply that the duty applies only to the high seas, the EEZ by virtue of Article 58 of the LOSC and within the contiguous zone.³⁶¹ The practice of the majority of States also indicates that the duty to render assistance applies in the territorial sea as much as it applies within other maritime zones.³⁶² This is also consistent with Article 18 of the LOSC that explicitly mentions that an innocent passage may include “stopping and anchoring ... for the purpose of rendering assistance to persons, ships or aircrafts in danger or in distress”. Pillas points out that this view is supported by additional arguments.³⁶³ Firstly, the term ‘high seas’ is not mentioned in Article 98 rather broader terms are used, e.g. ‘the seas’ and ‘at sea’, which indicates that the obligations are of a broader scope of application.³⁶⁴ Secondly, the obligation to render assistance would lose any meaning “if they were to cease the moment a ship crossed the boundaries into the territorial waters of a state”.³⁶⁵ Finally, according to the VCLT Article 31(1), a treaty shall be interpreted “in light of its object and purpose”. Thus, it would be contradictory to the objectives of the LOSC to exclude persons in distress in the territorial sea from the protection listed in Article 98.³⁶⁶

Finally, it should be mentioned that SOLAS chapter V does not apply to military vessels and other non-commercial vessels. However, military and other non-commercial vessels are still bound to render assistance to persons in distress by norms of international customary law. Additionally, the obligations listed in both Articles 98(1) of the LOSC and Article 12 of the 1958 High Seas Convention do not distinguish between private, merchant or military/governmental vessels, and thus it applies to all vessels.³⁶⁷

2.3 The Duty on Coastal States to Render Assistance

The duty on flag States and shipmaster to render assistance is further reinforced by the obligations on coastal States to render assistance to persons in distress. The LOSC requires all coastal states to promote the establishment of adequate and effective SAR services and to enter into regional arrangements for the same purposes when the circumstances require.³⁶⁸ A similar requirement is listed under Regulation 15(a) of the SOLAS Convention, which provides that every coastal State must ensure that adequate arrangements of SAR are available around its

³⁶¹ Richard Barnes, (2010). *supra* note (101), p.137.

³⁶² *Ibid.*, p.137.

³⁶³ Mark Pallis, (2002). *Supra* note (114), p.337.

³⁶⁴ *Ibid.*, p.337.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*, p.337-38.

³⁶⁷ Council of Europe: Committee on Migration Refugees and Displaced Persons, (2012). "Lives Lost in the Mediterranean Sea: Who Is Responsible", Parliamentary Assembly report p.12, para.55.

³⁶⁸ LOSC, Art 98 (2).

coasts. The Regulation of the SOLAS Convention goes a step further than the LOSC by specifying what the arrangements that should be included are, for example adequate means for determining the locations of persons or vessel in distress.

The SAR Convention includes a similar requirement on coastal States to render assistance to persons in distress. However, in contrast to the LOSC and the SOLAS Convention, the SAR Convention provides a comprehensive legal framework for coastal States to implement their SAR obligations. The SAR Convention aims to establish a global SAR system that would cover the world's oceans and insure that adequate SAR facilities are in place.³⁶⁹ To achieve its objective, the SAR Convention fosters an approach based on promoting international cooperation. The core obligation of rendering assistance is listed in Regulation 2.1.1 of the SAR Convention, which provides that all State parties shall individually or collectively "as appropriate" engage in the development of SAR services to ensure that assistance is provided to any person in distress at sea. The obligation also requires States to take "urgent steps" when informed that "any person is, or appears to be, in distress at sea" to ensure that the "necessary assistance" is provided.³⁷⁰ The SAR Convention also requires States Parties to establish individually or in cooperation with each other maritime rescue coordination centers (hereinafter MRCC).³⁷¹ In implementing their obligations, States Parties to the SAR Convention should enter into arrangement to establish SAR zones, in which the coastal State is the *primary responsible* body for coordinating SAR operations.³⁷² These arrangements are necessary for delimiting the SAR zones and for establishing the legal grounds for cooperation between coastal States for conducting and coordinating SAR operations.³⁷³

Following the adoption of the SAR Convention, the world's oceans were divided into several SAR zones.³⁷⁴ It must be noted that a coastal State's SAR zone may cover a large portion of the high seas, however, this should not be understood as an extension to the coastal State's maritime boundaries.³⁷⁵ As the high seas is an area beyond national claims and not subject to any State sovereignty or any form of jurisdiction or control. The SAR zone of a coastal State may overlap with the SAR zone of another coastal State. For example, the Italian SAR

³⁶⁹ Rick Button, (2017). Supra note (348), p.26.

³⁷⁰ SAR Convention, Annex, Chapter 2, Regulation 2.1.1.

³⁷¹ Ibid. Regulation 2.3.1.

³⁷² Ibid. Regulation 2.1.3 & 2.1.4.

³⁷³ Rick Button (2017). Supra note (348),p.30.

³⁷⁴ Richard Barnes, (2010). supra note (101), p.140. See also: Thomas Gammeltoft-Hansen, (2016). "The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration" in 'Boat Refugees' and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights, ed. Violeta Moreno-Lax & Efthymios Papastavridis, Brill Nijhoff, pp.69-78, p.68.

³⁷⁵ Rick Button, (2017). Supra note (348), p.30.

zone overlaps with the Maltese SAR zone, as illustrated in figure 3 below. In this context, the SAR convention emphasizes that this overlap is “not related to and shall not prejudice the delimitation of any boundary between States”.³⁷⁶ Thereby, the SAR zone only defines the geographic location where each State is overall responsible for coordinating SAR operations.³⁷⁷ The map (figure 3) below illustrates the SAR zones of coastal States boarding the Mediterranean Sea.

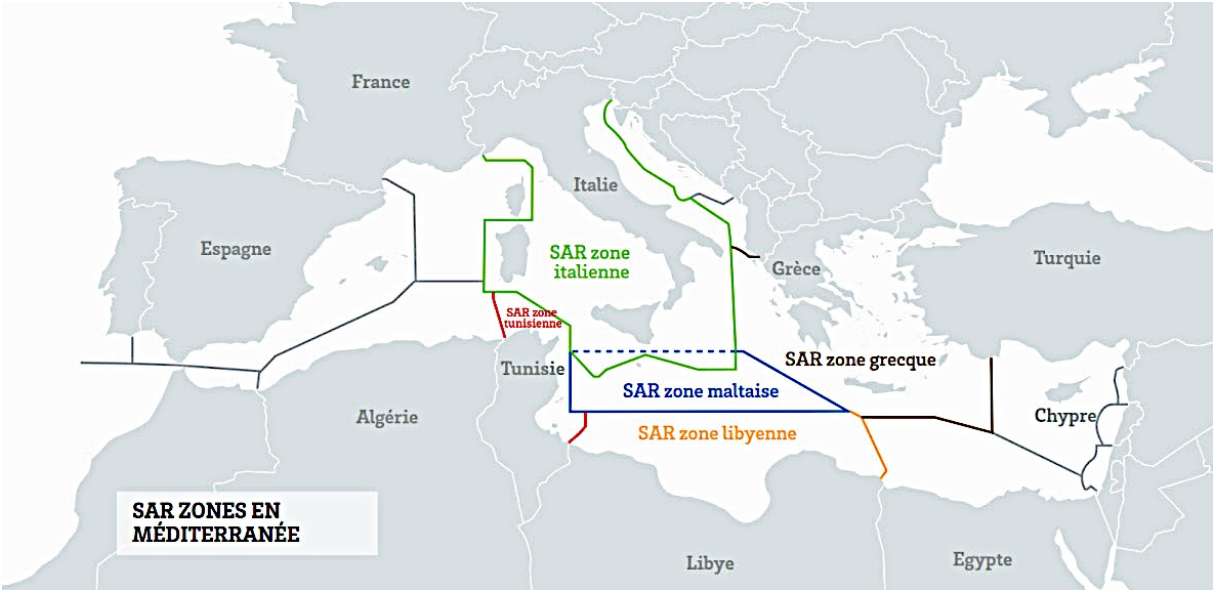


Figure 3 – Mediterranean Sea SAR Zones.³⁷⁸

3. The Dilemma of Disembarking Rescued Persons in a Place of Safety

3.1 Legal Duties vs. Policies of Security

In theory, when a shipmaster fulfils his obligations to render assistance to persons or vessels in distress, it is expected that the coastal State will also fulfil its obligations by coordinating the disembarkation of rescued persons in a safe place in order to relieve the shipmaster of his duty.³⁷⁹ Unfortunately, in everyday practice this is not the case, as States have often delayed and even refused to allow vessels carrying rescued persons to disembark them in their ports, especially, when there are asylum seekers among those rescued. States have justified this position by arguing that there is no direct obligation on States to allow for the disembarkation of

³⁷⁶ SAR Convention, Annex, Chapter 2, Regulation 2.1.7.
³⁷⁷ Rick Button (2017). Supra note (348),p.30.
³⁷⁸ Giulia Bertoluzzi, (2017). "Sar Zone: A La Recherche De Vies À Sauver En Méditerranée" L’observatoire en Ligne du Secteur de la sécurité, Available at: <https://www.observatoire-securite.tn/fr/2017/06/08/sar-zone-la-recherche-de-vies-sauver-en-mediterranee/>
³⁷⁹ Rick Button, (2017). Supra note (348),p.32-35.

rescued migrants in their territory. Furthermore, it has been argued that allowing disembarkation in their ports encourages illegal migrations and flourishes the smuggling business.³⁸⁰ However, this view was criticized on the grounds that the real intention of States is to avoid legal responsibilities and obligations under human rights and refugee law.³⁸¹ The MV Tampa incident that took place in 2001, presents a good example.

The MV Tampa – a Norwegian vessel – was requested by the Australian authorities to render assistance to a vessel in distress within the Australian SAR zone.³⁸² The MV Tampa responded to the call and carried out its duty by rendering assistance to the vessel in distress. Although the MV Tampa was licensed to carry only 50 persons, it picked up 433 Afghan asylum-seekers.³⁸³ The captain of the MV Tampa was going to deliver the survivors back to Indonesia. However, the rescued survivors threatened to commit suicide unless the captain traveled to Christmas Islands, so the captain of the MV Tampa proceeded to Christmas Islands.³⁸⁴ The MV Tampa shipmaster further sent out a distress call to the Australian authorities revealing that the MV Tampa was in distress for two reasons: firstly, the vessel was not licensed to carry more than 50 persons, but it had to rescue 433 persons and consequently the vessel lacked safety equipment, e.g. life jackets, and was not sufficiently equipped to accommodate and provide medical assistance, food and water for everyone on board;³⁸⁵ And secondly, some rescued persons were dying and in need of urgent medical treatment.³⁸⁶ Under these circumstances, the MV Tampa proceeded to Christmas Islands and requested access to enter the Australian waters. However, permission to enter Australian waters was denied. Nevertheless, the shipmaster proceeded to Christmas Islands since the vessel was in distress. The Australian navy, in a response, prevented the vessel from proceeding, seized the vessel and arrested the captain and the crew.³⁸⁷ A week later, the persons rescued were transferred from the M/V Tampa to a vessel that belongs to the Australian Navy and taken to Papua New Guinea, where their asylum claims were processed by the UNHCR.³⁸⁸

³⁸⁰ UNHCR, (2002). "Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea", p.4, para.13. Available at: <http://www.unhcr.org/protection/globalconsult/3e5f35e94/background-note-protection-asylum-seekers-refugees-rescued-sea.html>

³⁸¹ Ibid.

³⁸² Victorian Council for Civil Liberties Incorporated v. Minister for Immigration & Multicultural Affairs, (11 September 2001), Federal Court of Australia 1297, at para. 16.

³⁸³ Ibid, para. 15 & 17.

³⁸⁴ Ibid, para. 18.

³⁸⁵ Ibid, para. 3, 15, 22 & 23.

³⁸⁶ Ibid, para. 22 & 23.

³⁸⁷ Ibid, para. 26 & 27.

³⁸⁸ Ibid, para. 43; see also: Richard Barnes, (2004). *Supra* note (33),p.48.

The previous example illustrates clearly the failure of the SAR system, as a result of the refusal of the Australian authorities to cooperate so as to avoid international obligations and responsibilities under human rights and refugee laws. This raises concerns and legal challenges regarding the obligation of disembarking rescued persons in a place of safety. In particular it raises the following questions: what does the concept of place of safety mean? What are the requirements that must be present for a place to be recognized as place of safety? Are there differences between the requirements of the place of safety and the principle of *non-refoulement*? Can a vessel be considered a place of safety?

3.2 The Concept of Place of Safety

Before delving into the discussions of the concept of place of safety, it must be mentioned that following the MV Tampa incident, both SOLAS and SAR Conventions were amended to include additional duties on States Parties to the Conventions. Of great relevance are Regulations 3.1.9 of the SAR Convention and 33(a) of the SOLAS Convention that place a duty on coastal States to coordinate and cooperate with shipmasters to assist the embarkation of rescued persons in a place of safety. The same provisions also assign the primary responsibility on the coastal State responsible for the SAR zone – in which assistance is rendered – *to ensure* that survivors are disembarked in a place of safety within a reasonable time.³⁸⁹ Accordingly, the amendments establish an obligation of result.³⁹⁰ In other words, the SAR mission will not be considered completed unless the rescued persons are effectively disembarked. However, as the following sections will demonstrated in detail, these amendment were not made to avoid situation like the MV Tampa, rather they were made to shift responsibility towards non-EU States.

Neither the SOLAS nor the SAR convention define the term ‘place of safety’ or clarify the criteria that must be satisfied for a place to be considered a place of safety. Therefore, there is still ambiguity as to the precise meaning of the concept ‘place of safety’ and what it implies. However, the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea (hereinafter the 2004 IMO Guidelines), which were adopted along with the amendments of the SOLAS and SAR Conventions provide some guidance and define the concept of place of safety as:

³⁸⁹ SAR Convention, Annex, Chapter 3, Regulation 3.1.9. See also: SOLAS Convention, Regulation 33(a).

³⁹⁰ Richard Barnes, (2010). *supra* note (101) p.133. See also: Seline Trevisanut, (2010). "Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?", *The International Journal of Marine and Coastal Law* 25, pp.523-42, p.524. See also: Violeta Moreno-Lax, (2011). *Supra* note (219),p.196.

“A location where the rescue operation is considered to terminate. It is also a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met”.³⁹¹

Based on this definition, the concept of place of safety requires the presence of two main criteria: the safety of life and the presences of basic human need. The 2004 IMO Guidelines further provides that a place of safety should not be defined solely by reference to a geographic location, but rather, a “place of safety should be determined by reference to its characteristics”.³⁹² Furthermore, the 2004 IMO Guidelines emphasis that as long as the criteria of the place of safety are satisfied, the location does not need to be a location that is more advantageous to the survivors.³⁹³

Button points out that the International Aeronautical and Maritime Search and Rescue Manual provides that a place of safety does not have to be on a dry land, but rather, it could be onboard a rescue unit if the criteria of a place of safety can be satisfied.³⁹⁴ However, a reading of Regulation 1.3.2 of chapter 1 of the annex to the SAR convention, which defines rescue operation as “an operation to retrieve persons in distress, provide for their medical or other needs, and deliver them to a place of safety” indicate that a vessel cannot be regarded a place of safety, as the wording “deliver them” suggests that the vessel shall *deliver* rescued persons to a place of safety.³⁹⁵ This is also consistent with the 2004 IMO Guidelines, which provides that a rescue vessel may only be regarded as place of safety “*until survivors are disembarked at their final destination*”.³⁹⁶ In this context, Violeta Moreno-Lax rightly points out that since a place of safety must be on dry land and a “vessel cannot be considered a final place of Safety”, permitting “passage and entry to port might eventually have to be tolerated”.³⁹⁷ Finally, the 2004 IMO Guidelines points out that disembarking rescued person in “territories where the lives and freedoms of those alleging a well-founded fear of perfection would be threatened” should be avoided in cases where the rescued survivors are asylum-seekers or refugees.³⁹⁸

3.3 The Concept of Place of Safety and *Non-refoulement*

As discussed in the previous section, the concept of place of safety requires the presence of two criteria: basic human needs and the safety of life. Hence, it may be argued that the concept of

³⁹¹ The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, *supra* note (348), p.10, para. 3.

³⁹² *Ibid.*

³⁹³ *Ibid.*, p.10.

³⁹⁴ Rick Button, (2017). *Supra* note (348),p.36.

³⁹⁵ UNHCR, (2002). *Supra* note (380),p.4, para.12.

³⁹⁶ The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, *supra* note (348), p.8, para. 6.14

³⁹⁷ Violeta Moreno-Lax, (2011). *Supra* note (219),p.193.

³⁹⁸ The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, *supra* note (348), p.8, para. 6.17

place of safety implies that rescued migrants cannot be disembarked in a State or a place where their lives could be threatened or endangered. This raises the following questions: whether or not there are differences between the concept of place of safety and the principle of *non-refoulement*?; Whether or not delivering rescued migrants to a non-safe place can amount to *re-foulement*?; And whether or not and to what extent States or shipmasters can be held liable for delivering rescued persons to a place that is not considered safe.

3.3.1 Responsibility of the Coastal State Responsible for the SAR Zone

The question concerning whether or not delivering rescued migrants to a non-safe place amounts to *refoulement*, can be raised against the coastal State responsible for the SAR Zone, if directs vessels through its MRCC to disembark rescued migrants in a place where their lives may be threatened or endangered.

On one hand, it may be argued that if a coastal State through its MRCC directs a vessel to disembark rescued migrants in a place where their lives or freedoms could be threatened or endangered or to any place, the coastal State itself cannot not return them to, it amounts to *refoulement*. Supporters of this view argue that since the 2004 IMO Guidelines explicitly make a reference to the principle of *non-refoulement*, there are no substantive differences between the criteria that must be satisfied for a place to be considered a place of safety and the criteria of the principle of *non-refoulement*.³⁹⁹ On the other hand, Smith rightly points out that there are differences between the criteria of the concept of ‘place of safety’ and the principle of *non-refoulement*.⁴⁰⁰ This is because the definition of the concept of ‘place of safety’ under the 2004 IMO Guidelines uses a language that does not “incorporate the full obligations under human rights law”.⁴⁰¹ In this context, Smith argues that the criteria of place of safety are “much easier to satisfy than the more comprehensive standards that constitute the principle of *non-refoulement*”.⁴⁰² Further, Smith rightly points out that the differences between the standards of the concept of place of safety and *non-refoulement* present a gap in the protection of human rights.⁴⁰³ This is because, invoking these differences may allow the State responsible for the SAR zone to return migrants onboard of a private vessel to a place the State itself could not return them to it, as it may amount to *refoulement*.⁴⁰⁴ This is particularly true in the context of

³⁹⁹ Ibid., p. 11, para. 7. See also: Jasmine Coppens, (2015). "Lampedusa: The Impact of Seaborne Migration on States and Shipping", Mededelingen Koninklijke Belgische Marine Academie: Communications Academie Royale de Marine de Belgique vol. 39.

⁴⁰⁰ Adam Smith, (2017). Supra note (323), p.64.

⁴⁰¹ Ibid., p.36.

⁴⁰² Ibid., p.64.

⁴⁰³ Ibid., p.36.

⁴⁰⁴ Ibid., p.64.

migrant smuggling from Libya to Europe, as since 2013 Italy has assumed responsibility for coordinating SAR operations throughout the designated Libyan SAR zone.⁴⁰⁵ Therefore, if the Italian MRCC considers that the criteria of the place of safety can be satisfied in a specific port or place in Libya, the Italian MRCC may direct any private vessel to disembark rescued migrants in that port, even though this port or place does not meet the standards of the principle of *non-refoulement*, and thereby avoid *refoulement*. An incident that illustrates this situation is the M/V Salamis incident – a similar incident to the 2002 M/V Tampa – that took place near Libyan coasts in 2013.

The M/V Salamis was requested by the Italian MRCC to render assistance to 102 persons in distress close to the Libyan coasts.⁴⁰⁶ The MRCC instructed the shipmaster to return the survivors back to Libya at port *Khoms*, which was determined to be the place of safety by the Italian MRCC, even though Libya is not a safe State and has torn apart by a civil war since 2012.⁴⁰⁷ However, the shipmaster did not follow the instructions of the Italian MRCC and proceeded to Malta – the vessel’s planned route. The Maltese authorities responded by denying the vessel entry to its waters and denying disembarkation.⁴⁰⁸ Eventually, Italy allowed the vessel to disembark the survivors in Syracuse.⁴⁰⁹ In March 2018, a similar incident took place in Mediterranean Sea when the Spanish NGO’s vessel Pro-Activa Open Arms rendered assistance to persons in distress, and refused to take the rescued migrants back to Libya as it was instructed by the Italian MRCC. The matter that led Italy to seize the vessel when it reached its port and accused the NGO of aiding illegal migration.⁴¹⁰ The question that arises here is, what could have happened if the shipmaster followed the instruction of the Italian MRCC and delivered the migrants back to Libya? Could this amount to indirect *refoulement*? In other words, to what extent can the coastal State responsible for the SAR zone be held responsible for indirect *refoulement*, if it directs private vessels through its MRCC to return rescued migrants to a place that it cannot itself return them to. It may be argued that under the theory of agency, a State

⁴⁰⁵ Ibid., p.38.; See also: Paolo Cuttitta, (2017). Supra note (323),p.14. See also: Amnesty International, (2017). "Europe: A Perfect Storm: The Failure of European Policies in the Central Mediterranean", pp.1-29. Available at: <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>

⁴⁰⁶ Guy Goodwin-Gill, (2016). supra note (255) p.28.

⁴⁰⁷ Ibid., p.26.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ The Local, (2018) "Italy Seizes NGO Boat that Refused to Take Migrants to Libya". Available at: <https://www.thelocal.it/20180319/italy-seizes-ngo-boat-proactiva-open-arms-libya-migrants>. For Further discussion on the contemporary practice of NGO in conduct SAR operation, see section 4 below.

may be held liable if “the vessel was acting as an agent of the State”.⁴¹¹ In this context, Article 8 of the ILC Articles on State Responsibility states that:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct”.

The International Tribunal for the Former Yugoslavia demonstrated that the rationale behind this principle is to prevent States from disposing of its international responsibility “by having private individuals carry out tasks that may not or should not be performed by the state”.⁴¹² However, as Smith points out it is uncertain whether the State responsible for the SAR zone can be held liable for indirect *refoulement* in accordance to Article 8 of the ILC Articles on State Responsibility.⁴¹³ The reason for this uncertainty is that when international tribunals apply Article 8 they look at “the degree of overall control imposed by the State” over private actors to determine the State’s responsibility.⁴¹⁴ To conclude, due in part to a lack of legal mechanisms, it is difficult to hold States responsible in the situations described. This presents another legal gap in the protection of human rights. Furthermore, despite the amendments made to the SOLAS and SAR Conventions to avoid situations like the M/V Tampa, the M/V Salamis incident shows the insufficiency of these amendments.

3.3.2 Responsibility of the Flag State

Another question that may arise is whether or not a flag State can be held responsible for *refoulement* if it disembarks rescued migrants in a place where their lives could be threatened or endangered. In order to answer this question, distinction must be made between SAR operations conducted by State actors and those conducted by private actors.

3.3.2.1 State Actors’ SAR Missions

In 2010 the EU Council emphasized that when SAR missions are carried out “No person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-*refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle”.⁴¹⁵ However, on several occasions some EU States

⁴¹¹ Adam Smith, (2017). *Supra* note (323),p.67.

⁴¹² Prosecutor v. Dusko Tadic aka "Dule", (7 May 1997). International Criminal Tribunal for the former Yugoslavia (ICTY), Opinion and Judgment, IT-94-1-T, para. 117.

⁴¹³ Adam Smith, (2017). *Supra* note (323),p.67.

⁴¹⁴ *Ibid.*

⁴¹⁵ Council Decision 2010/252/EU of 26 April 2010, Supplementing the Schengen Borders Code, OJ L 111/20, para 1.2; see also: EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014, OJ L 189/93, para. 12.

framed their interdiction operations in the Mediterranean Sea as SAR operations in attempts to avoid obligations of human rights and refugee law. For instance, in *Hirsi v. Italy*, Italy argued that the case did not fall within the ECtHR's jurisdiction because the duty to render assistance under the LOSC "did not in itself create a link between the State and the persons concerned establishing the State's jurisdiction".⁴¹⁶ The ECtHR, however, rejected this argument in its decision and affirmed 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".⁴¹⁷ Furthermore, as mentioned earlier, the court emphasized that when a State exercises effective control over other individuals its jurisdiction extends to cover them.⁴¹⁸ Accordingly, human rights and refugee law obligations apply to SAR operations conducted by EU State actors or agents in the Mediterranean Sea, regardless where the SAR operation took place whether in the territorial sea, the high seas or in the territory of other States.

It should also be pointed out that since in reality irregular migrants and asylum seekers are often smuggled together and that asylum claims are examined at a later stage, both categories must be afforded the same protection under human rights and refugee law, and should be taken to an EU State member rather than being returned to the State of departure until their claims are examined and determined.⁴¹⁹ This is also consistent with the fact that shipmasters are not the competent authority to assess the asylum claims of individuals. In this context, the UNHCR emphasizes that ensuring access to "fair and effective procedures for determining status and protection" is a key element to ensure protection for asylum seekers and is carried best on dry land, not onboard vessels.⁴²⁰ The UNHCR further points out that on-board processing has proven to be "impractical for situations involving large number of people" and problematic in various matters, such as the lack of interpreters and appropriate appeal mechanisms.⁴²¹

Finally, it must be mentioned that the new regulations for Frontex adopted in 2014 provide that if the EU States hosting the Frontex operation consider disembarking the rescued persons in a third State, they must first consider the general situation in that State before transferring them to it.⁴²² As mentioned earlier, it may be argued that, given the conflicts and massive

⁴¹⁶ *Hirsi Case*, supra note (24), para.50.

⁴¹⁷ *Ibid.*, para.36, 80 & 81.

⁴¹⁸ *Ibid.*, para.77.

⁴¹⁹ Andreas Fischer-Lescano et.al, (2009). Supra note (210), p.278.

⁴²⁰ UNHCR, (2002). Supra note (380), p.6.

⁴²¹ *Ibid.*, p.6-7.

⁴²² EU Regulation 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 – 2014 Frontex Regulations, Art. 4(2).

human rights violations in North African States, fair proceedings are not guaranteed there. Therefore, all intercepted or rescued migrants shall be taken to an EU State.⁴²³ Articles 9 & 10 of the 2014 Frontex Regulations also provides that in cases where the State hosting the operation cannot agree on where to disembark the rescued persons, the State hosting the operation, as a last resort, shall disembark the persons rescued in its own territory.⁴²⁴ However, it remains to be seen whether or not this obligation will be complied with in practice. Furthermore, as mentioned earlier 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”.⁴²⁵

3.3.2.2 *Non-State Actors’ SAR Missions: Are private vessels bound by the principle of non-refoulement?*

Another question that may arise is whether or not the flag State can be held responsible for indirect *refoulement* if a private vessel flying its flag, delivers rescued migrants to a place where their lives may be threatened or endangered.

On one hand, it may be argued that in view of the ECtHR decisions a flag State is only bound by the obligations of *non-refoulement*, when a State actor conducts the SAR operation. Whereas private vessels rendering assistance are not bound by the principle of *non-refoulement*, but their conduct must be in accordance to the SAR and SOLAS Conventions.⁴²⁶ On the other hand, it may be argued that by virtue of the principle of flag State jurisdiction the vessel and everyone onboard, including rescued migrants are considered to be under the jurisdiction of the flag State.⁴²⁷ Accordingly, the responsibility of the flag State may be invoked on the grounds that the vessel is a “floating extension” of the State in question.⁴²⁸ Thus, if some of the rescued person have asylum claims, it may be argued that the flag State may be held responsible for breaching the principle of *non-refoulement* if the survivors are delivered to a place where their lives or freedoms may be threatened or endangered.⁴²⁹ However, a flag State may only be held responsible for the acts of a private vessel flying its flag if a genuine link exists between the State and that vessel in accordance to Article 91 of the LOSC. This can be difficult in practice

⁴²³ Andreas Fischer-Lescano et.al, (2009). Supra note (210),p.285.

⁴²⁴ Douglas Guilfoyle, (2016). supra note (94), p.183.

⁴²⁵ Barbara Miltner, (2015). Supra note (304), p.221.

⁴²⁶ Adam Smith, (2017). Supra note (323), p.64.

⁴²⁷ UNHCR, (2002). Supra note (380), p.6.

⁴²⁸ Ibid., p.3.

⁴²⁹ Guy Goodwin-Gill, (2016). supra note (255) p.23.

because the genuine link is absent in many cases, due to the issue of open registries – the so called flag of convenience.⁴³⁰ The flag of convenience refers to the practice of some States – e.g. Panama, Liberia and Malta – of developing open registries that enable vessels to claim the nationality of the State “with which the vessel has few or no connections” at all.⁴³¹ In this context, Vaughan points out that the ICJ in the *Nottebohm* case concluded that “the grant of nationality by a State is not necessarily determinative in every context”.⁴³² In short, if a genuine link between the private vessel and the flag State does not exist, it can be difficult in practice to hold the flag State responsible.

3.3.3 Responsibility of Shipmasters

Another question that may arise is to what extent shipmasters can be held responsible for delivering rescued persons to a place that does not meet the criteria of a place of safety? As mentioned earlier, the responsibility of a shipmaster may be invoked if s/he intentionally does not render assistance to persons in distress and s/he may be criminally liable under the domestic laws of the flag State. The obligation imposed on shipmasters to render assistance to persons in distress must also be weighed against his/her responsibility to ensure the safety of the vessel and the crew onboard. To this end, the UNHCR points out that International maritime law does not “elaborate on any continuing responsibility of the master once a rescue has been effected”.⁴³³ Therefore, it is unclear whether a shipmaster may be held liable if s/he acts upon the instruction of the MRCC and proceeds towards delivering rescued migrants to a place that is not considered as a safe place in terms of human rights and refugee law. It has been argued that “the obligation to bring rescued persons to a safe place is addressed to both governments and shipmasters under the Law of the Sea” but “the prohibition of *refoulement* applies to governments of Contracting States only”.⁴³⁴ However, it must be recalled here that even though the obligations of the SOLAS convention may appear to be addressed directly to shipmasters, the binding element of the LOSC, SOLAS or the SAR Conventions are on the State parties not on shipmasters. Therefore, in cases where shipmasters act upon the instruction of the MRCC and deliver rescued migrants to a specific point as they were instructed, it is unlikely that they can

⁴³⁰ Angelos Syrgios, (2006). “Developments on the Interdiction of Vessel on the High Seas” in: *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After*, Ed. By, Anastasia Strati et al. Martinus Nijhoff, pp.149-201, p.152.

⁴³¹ *Ibid.*

⁴³² Vaughan Lowe, (2007). *Supra* note (98), p.155.; See also: *Nottebohm Case (Liechtenstein v. Guatemala)*; Second Phase, International Court of Justice (ICJ), 6 April 1955. See also: Robert Sloane (2009). “Breaking The Genuine Link: The Contemporary International Legal Regulation of Nationality”, *Harvard International Law Review*, Volume 50, Number 1, pp.1-60, p.4.

⁴³³ UNHCR, (2002). *Supra* note (380), p.2, para.6.

⁴³⁴ Maarten den Heijer, (2011). *Supra* note (259), p.248.

be held responsible for violating the obligation of delivering rescued persons to a place of safety. In this context, the International Chamber of Shipping points out that shipmasters “has no responsibility for determining the Status of those rescued”.⁴³⁵ Nevertheless, it must be mentioned that the International Chamber of Shipping also points out that shipmasters are disclaimed from any legal responsibility when “listening to or acting upon” information provided by the rescued persons concerning their legal status.⁴³⁶ This may indicate, that shipmasters enjoy a wide discretion to accept or refuse to act in accordance to the MRCC’s instruction.

3.4 Conflicts Related to the Division of Responsibility under the SAR Convention

As mentioned earlier, following the adoption of the SAR Convention, the world’s oceans were divided into several SAR zones in which each coastal State is responsible for coordinating SAR mission. The 2004 amendments to both the SOLAS and SAR Conventions emphasized the importance of these zones and placed the primary responsibility on the coastal State responsible for the SAR zone to cooperate with other State parties to find a place of safety where rescued person could be disembarked. However, if the States concerned fail to cooperate to reach a decision on where the disembarkation should occur, and if the State responsible for the SAR zone refuses to allow the disembarkation, in practice, it may lead to a situation where rescued persons are left in serious danger at sea. This is because there is no obligation imposed on States under the SAR convention or any other treaty that obliges a State to allow for the disembarkation of rescued person in their territory.

Placing the primary responsibility on the coastal State responsible for the SAR zone to find a place of safety where rescued person could be disembarked led some States, for example, Malta, to reject the amendments. This is because if no other State – that is considered to be a safe place in terms of human rights and refugee law – accepts the disembarkation of rescued person in its territory, the coastal State responsible for the SAR zone may find itself obliged to allow for the disembarkation to take place in its territory. In this context, Malta fears that, given its small size and the large SAR zone it maintains, ratifying the amendments may lead to unreasonable obligation to disembark rescued migrants on its territory.⁴³⁷ Instead, Malta, emphasizes that the disembarkation shall take place in the safe port nearest to where assistance was rendered. In contrast to Malta, Italy accepted the amendments and links the disembarkation of

⁴³⁵ The International Chamber of Shipping, (2015). “Large Scale Rescue Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons”, 2nd edition, p.3. Available at: <http://www.ics-ship-ping.org/docs/default-source/resources/safety-security-and-operations/large-scale-rescue-at-sea.pdf?sfvrsn=30>

⁴³⁶ Ibid.

⁴³⁷ Malta’s size is around 316 KM² while its SAR Zone is around 250,000 KM². See also: Guy Goodwin-Gill, (2016). *supra* note (255), p.26.

rescued persons to the SAR zone where assistance was rendered.⁴³⁸ The disagreement between Italy and Malta on which State shall be primary responsible for the disembarkation of rescued migrants, led to tensions between the two States and reluctance to conduct SAR operations, which resulted in a situation where hundreds of asylum-seekers were left to die in the Mediterranean Sea.

On October 2013, a fishing boat carrying more than 450 migrants located 70 NM away from Lampedusa, sent a distress call requesting assistance from the Italian MRCC.⁴³⁹ However, since the boat was in the Maltese SAR zone,⁴⁴⁰ the Italian MRCC instructed them to call the Maltese authorities and request assistance, even though Malta is 118 NM away.⁴⁴¹ The vessel sent another distress call to Malta, and the SAR coordination center instructed them to contact the Italian MRCC since they were near Lampedusa.⁴⁴² Despite numerous distress calls and the presence of an Italian navy 19 NM away, the reluctance of both Italy and Malta to rescue them, as neither Italy nor Malta were willing to allow for the disembarkation, led to the death of more than 300 persons who were left to sink in the Mediterranean Sea, including 60 children.⁴⁴³

This incident indicates that the obligation on the State responsible for the SAR zone in which assistance was rendered to coordinate and cooperate with other States members to ensure that persons rescued are disembarked in a place of safety has been proven to be insufficient. It also indicates that the absence of a legal obligation on States to accept the disembarkation of rescued persons on their territories presents a large gap in the SAR regime. Unfortunately, as long as States remain resistant to the articulation of such an obligation, this gap in the SAR system will remain, and it seems likely that the SAR system will continue to fail.

4. The Contemporary Practice of NGOs in Conducting SAR Missions

This section will discuss the contemporary practice of NGO conducting SAR missions in the Mediterranean Sea. The purpose of this section is to clarify as much as possible whether or not this practice is consistent with the obligations of the law of the sea. It further aim to clarify the extent to which Libya – upon the establishment of its SAR zone – may exclude or remove

⁴³⁸ Ibid., p.26.

⁴³⁹ Samuel Osborne, (2017). "Horroric Phone Calls Reveal How Italian Coast Guard Let Dozens of Refugees Drown." *The Independent*, Available at: <http://www.independent.co.uk/news/world/europe/italian-navy-lets-refugees-drown-migrants-crisis-asylum-seekers-mediterranean-sea-a7724156.html>. See also: Fabrizio Gatti, (2017). "Cosi L'italia Ha Lasciato Annegare 60 Bambini: In Esclusiva Le Telefonate Del Naufragio" *L'Espresso*, Available at: http://video.espresso.repubblica.it/inchieste/cosi-l-italia-ha-lasciato-annegare-sessanta-bambini-le-telefonate-del-naufragio-mai-sentite-prima/10267/10368?refresh_ce.

⁴⁴⁰ See: figure 3 above for an illustration of the size of Malta's SAR zone.

⁴⁴¹ Samuel Osborne, (2017). *Supra Note (439)*. See also: Fabrizio Gatti, (2017). *Supra Note (439)*.

⁴⁴² Ibid.

⁴⁴³ Ibid. See also: Adam Smith, (2017). *Supra note (323)*, p.37.

NGOs vessels conducting SAR missions from that zone. The following subsection will commence by discussing the reasons that led to the emergence of this practice.

4.1 The Emergence of NGOs Deployers in the Central Mediterranean Sea

Following the October 2013 shipwreck, mentioned earlier, Italy commenced a SAR operation known as *Mare Nostrum*. The operation was the first border control mission that had a specific mandate to rescue people. The operation lasted for one-year and contributed to saving more than 130.000 migrants in the Mediterranean Sea.⁴⁴⁴ Unfortunately, this operation was terminated as it lacked support from the European Union and was often criticized for encouraging irregular migration.

In October 2014, Frontex replaced the Italian operation *Mare Nostrum* with a joint operation known as *Triton*. In contrast to *Mare Nostrum*, operation *Triton* consisted of 26 EU States and was intended – as claimed by Frontex – to coordinate EU SAR activities in the Mediterranean Sea and to support the Italian authorities with the migration crisis.⁴⁴⁵ However, in comparison to operation *Mare Nostrum*, *Triton*'s budget and geographical scope were far more limited.⁴⁴⁶ The rationale behind limiting the geographical scope, as alleged by international organizations, is that by patrolling close to the Libyan territorial sea operation *Mare Nostrum* was encouraging migrants to take the dangerous journey.⁴⁴⁷ Limiting the operational area of Frontex's patrols raised much criticisms as it could have fatal consequences by making the journey riskier and deadlier on individuals fleeing Libya.⁴⁴⁸ International organizations and

⁴⁴⁴ Adam Smith, (2017). *supra* note (323), p.37. See also: Adam Taylor, (2015). "Italy Ran An Operation that Saved Thousands of Migrants from Drowning in the Mediterranean. Why did it stop?" The Washington Post. Available at: <https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/italy-ran-an-operation-that-save-thousands-of-migrants-from-drowning-in-the-mediterranean-why-did-it-stop/>.

⁴⁴⁵ European Commission, (2014). "Frontex Joint Operation 'Triton'- Concerted Efforts to Manage Migration in the Central Mediterranean". Available at: http://europa.eu/rapid/press-release_MEMO-14-566_en.htm

⁴⁴⁶ Triton's patrol units were located 30 NM off the Italian coasts, whereas Mare Nostrum units were located 130 NM off the Italian coasts. See: Human Rights Watch, (2015). "EU: Intolerable Inaction Costs Lives at Sea: Set Up Robust, Mediterranean-wide Search and Rescue Operation". Available at: <https://www.hrw.org/news/2015/04/15/eu-intolerable-inaction-costs-lives-sea>. See also: Eugenio Cusumano, (2017). "Emptying the Sea with a Spoon? Non-Governmental Providers of Migrants Search and Rescue in the Mediterranean", *Marine Policy* 75, pp.91-98, p.92.

⁴⁴⁷ IOM, Press Release, (2014). "IMO Applauds Italy's Life-Saving Mare Nostrum Operation: Not a Migrant Pull Factor". Available at: <https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor>. See also: Alan Travis, (2014). "UK Axes Support for Mediterranean Migrant Rescue Operation", *The Guardian*. Available at: <https://www.theguardian.com/politics/2014/oct/27/uk-mediterranean-migrant-rescue-plan>

⁴⁴⁸ Benjamin Haddad, (2015). "Europe Passes the Buck While Thousands Die", *Foreign Policy*. available at: <http://foreignpolicy.com/2015/04/23/europes-gray-suits-give-refugees-a-cold-shoulder-shipwreck-migrants-mediterranean/>

NGOs criticized the EU States hosting this operation for abandoning their obligations and responsibilities under human rights law and refugee law.⁴⁴⁹ Although the operational area of *Triton*'s patrols was far more limited, the number of migrant crossing the Mediterranean Sea in 2015 – as shown in table (1) – has increased significantly. This indicates that the claims made by EU States that *Mare Nostrum* was a pull factor for irregular migration were based on false premises, because the flow of migrants did not stop even though the mission *Mare Nostrum* ended. Instead of discouraging irregular migration, restricting the operational area and numbers of patrols led to the rise in the number of deaths. For this reason, many NGOs decided to fill in this gap by engaging in SAR missions and locating their vessels near the Libyan territorial waters, where most crafts and boats carrying migrants sank or capsized.

Since Italy has assumed responsibility for coordinating SAR operations throughout the designated Libyan SAR zone in 2013, NGOs operating in the Mediterranean Sea coordinates their SAR operations with the Italian MRCC and are constantly in contact with it.⁴⁵⁰ In April 2015, following a catastrophic shipwreck incident off the Libyan coast, where more than 700 smuggled migrants died the EU tripled *Triton*'s budget and expanded the location of its patrol from 30 NM south of Sicily to 138 NM.⁴⁵¹ Although, the official mandate of *Triton* did not include an official SAR mandate, the operation was still obliged by the LOSC and customary international law to render assistance to persons in distress.⁴⁵² In February 2018, Frontex replaced operation *Triton* with operation *Themis*.⁴⁵³

4.2 NGOs' SAR Missions: from Praise and Support to Criminal Allegations

NGOs have played an essential role in mitigating the migration crisis in the Mediterranean Sea by conducting SAR missions that have saved thousands of lives. In contrast to State and merchant vessels that conduct SAR operations as a secondary concern, NGOs operating in the Mediterranean Sea have SAR operations as their main objective. There are two different models for SAR operations conducted by NGOs. The first model is to conduct a full SAR operation by rendering assistance to person in distress, taking them onboard and disembarking them in Italy.⁴⁵⁴ The second model consists of two phases. The first phase is to render assistance by

⁴⁴⁹ Human Rights Watch, (2015). "EU: Intolerable Inaction Costs Lives at Sea: Set Up Robust, Mediterranean-wide Search and Rescue Operation".

⁴⁵⁰ Paolo Cuttitta, (2017). Supra note (323), p.15.

⁴⁵¹ Amnesty International Public Statement, (2015). "A Safer Sea: The impact of increased search and rescue operations in the central Mediterranean". Available at: <https://www.amnesty.org/en/documents/eur03/2059/2015/en/>. See also: Paolo Cuttitta, (2017). Supra note (323), p.7.

⁴⁵² Paolo Cuttitta, (2017). Ibid, p.8.

⁴⁵³ 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>

⁴⁵⁴ Eugenio Cusumano, (2017). Supra note (446), p.92-94.

providing life-vests, water and urgent medical treatment, but without taking any migrants onboard.⁴⁵⁵ The second phase is the continuous monitoring of the situation until a large vessel comes to take the rescued migrants onboard and deliver them to Italy.⁴⁵⁶ By 2016 NGOs were “the second most active provider of SAR services in Central Mediterranean” and managed to render assistance to persons in distress more than Frontex, EUNAVFOR MED and merchant vessels.⁴⁵⁷ As Smith points out States participating in operation Sophia have even developed a practice of locating their vessels behind NGO vessels and “respond only where migrant vessels passed through their lines”.⁴⁵⁸

Throughout 2015 and 2016 NGO rescue missions were broadly praised and supported by Italy and the EU.⁴⁵⁹ However, since late 2016 the EU’s policies towards NGOs conducting SAR operation have shifted dramatically.⁴⁶⁰ Since then and as of the time of writing this thesis, NGOs are often criticized by EU States for encouraging irregular migration. NGOs also became subject to investigations, based on accusations of aiding and colluding with smuggler networks. In this context, Frontex criticized NGO SAR missions for accomplishing the crime of migrant smuggling by providing transportation to Europe.⁴⁶¹ Similarly, the European commission stated in February 2017 that “the majority of irregular immigrants and refugees arriving in Italy are now actually being transported most of the way on vessels provided by European navies, coast guards *and* NGOs – thereby facilitating the work of the smugglers”.⁴⁶² In the same month, Italy initiated an investigation concerning whether NGOs have been colluding with smugglers and receiving financial funds from them.⁴⁶³ In August 2017, Italy began another investigation against the NGO *Médecins sans Frontières* – known as Doctors without Borders – for allegations of assisting illegal migration.⁴⁶⁴

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ Adam Smith, (2017). Supra note (323),p.42.

⁴⁵⁸ Ibid., p.43.

⁴⁵⁹ Eugenio Cusumano, (2017). Supra note (446),p.91. See also: Adam Smith, (2017). Supra note (323),p.43.

⁴⁶⁰ Adam Smith, (2017). Ibid., p.43.

⁴⁶¹ Ibid. p.44.

⁴⁶² European Political Strategy Centre Strategic Notes (2017). “Irregular Migration via The Central Mediterranean: From Emergency Responses to Systemic Solutions”. European Commission, p.7. Available at: https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pdf See also: Patrick Wintour, (2017). “NGO Rescues off Libya Encourage Traffickers, says EU Borders Chief”, The Guardian. Available at: <https://www.theguardian.com/world/2017/feb/27/ngo-rescues-off-libya-encourage-traffickers-eu-borders-chief>

⁴⁶³ Adam Smith, (2017). Supra note (323), p.45.

⁴⁶⁴ Reuters Staff, (2017). “Italian prosecutors widen investigation to include MSF over migrant rescues: source”, Reuters. Available at: <https://www.reuters.com/article/us-italy-migrants-medecins-sans-frontier/italian-prosecutors-widen-investigation-to-include-msf-over-migrant-rescues-source-idUSKBN1AL0HZ> See also: Lizzie Dearden, (2017). “Italy seizes refugee rescue ship accused of having contact with Libyan smugglers”, The Independent. Available at: <https://www.independent.co.uk/news/world/europe/italy-refugee-rescue-ship-jugend-rettet-libyan-smugglers-mediterranean-migrant-boats-lampedusa-a7875371.html>

The practice of accusing NGOs of aiding illegal migration and collaborating with smugglers has been widely condemned and criticized by international human rights organizations.⁴⁶⁵ This raises the question of whether or not rendering assistance to smuggled migrants and subsequently delivering them to Italy can be considered smuggling under the Smuggling Protocol. It must be recalled here that for the crime of migrant smuggling to fall under the Smuggling Protocol's scope of application, the crime must be committed intentionally *and* for the purposes of obtaining directly or indirectly a financial or material benefit. As mentioned earlier, the reason the smuggling protocol refers to "financial or other material benefit" is to exclude support from family members and *support for humanitarian reasons*, from the application of the protocol.⁴⁶⁶ Hence, unless Libya, Italy or any other State have sufficient evidence to prove that NGOs are conducting SAR missions and subsequently delivering migrant to Europe for the purposes of obtaining a financial or material benefit, they will not fall under the scope of application of the Smuggling Protocol.

4.3 The Italian Code of Conduct

In July 2017, Italy initiated a Code of Conduct for NGOs conducting SAR missions in the Mediterranean Sea and threatened to close its ports to vessels that do not sign or comply with the code.⁴⁶⁷ The code, however, was slightly amended in response to NGO concerns, for example to allow for transferring migrant to other boats and to limit the power of the competent authorities to carry weapons on-board of NGO vessels.⁴⁶⁸ The Code, in its final version, contains 13 provisions that impose a number of obligations with which NGOs must comply when conducting SAR operations in the Mediterranean Sea.⁴⁶⁹ However, there are a few observations that must be made clear as the Code, even in its final version, contains many flawed obligations that are inconsistent with international law. For instance, the first provision of the Code imposes a duty on NGOs to commit themselves not to enter the Libyan territorial sea, "except in situations of grave and imminent danger" that requires immediate assistance.⁴⁷⁰ This provision is inconsistent with LOSC for several reasons.

⁴⁶⁵ See for instance: Amnesty International, (2017). *Supra* note (405).

⁴⁶⁶ Travaux Préparatoires, *supra* note (73), p.469. See Chapter II, Section 2, Subsection 2.3 at 2.3.1.

⁴⁶⁷ See: Code of Conduct for NGOs Involved in Migrants' Rescue Operations at Sea, 1st version, last paragraph. Available at: <http://www.statewatch.org/news/2017/jul/italy-eu-sar-code-of-conduct.pdf> See also: Adam Smith, (2017). *Supra* note (323), p.46.

⁴⁶⁸ Adam Smith, (2007). *Ibid*. See also: Code of Conduct For NGOs Involved in Migrants' Rescue Operations at Sea, (the amended version), available at: <https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf>

⁴⁶⁹ Code of Conduct for NGOs Involved in Migrants' Rescue Operations at Sea, (the amended version), *ibid*.

⁴⁷⁰ *Ibid*, p.2.

Firstly, although the provision commence with the phrase “in accordance with relevant international law” it contradicts the basics of international law and violates the principles of sovereignty and non-intervention into domestic affairs. This is because Italy has neither sovereignty nor jurisdiction over the Libyan territorial sea to oblige foreign vessels to refrain from entering the Libyan territorial sea. Similarly, Italy may only regulate innocent passage in its territorial sea, but not in the territorial sea of another State.

Secondly, the provision contradicts with the principle of ‘flag State jurisdiction’ under which foreign vessels are bound and only subject to the domestic laws of the flag State. Thus, Italy may only oblige NGO vessels flying its flag not to enter the Libyan territorial sea, but is not in a position to oblige NGO vessels belonging to other States to refrain from entering the Libyan territorial sea.

Thirdly, Assuming that Libya authorizes Italy to regulate passage in its territorial sea, this provision would still be inconsistent with the regime of innocent passage provided by the LOSC. This is because Article 24(1) (a) explicitly prohibits the coastal State to impose any requirement on foreign vessel which may have “the practical effect of denying or impairing the right of innocent passage”. Accordingly, obliging NGO vessels to commit themselves not to enter the territorial sea of another State has the practical effect of impairing and denying them the right of innocent passage. Furthermore, Article 24(1) (b) also prohibits the coastal State to “discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State”. Therefore, since the obligation of the first provision of the Code of Conduct is only imposed on NGOs vessel and not on all private vessels, it constitutes also a breach to Article 24(1) (b) of the LOSC.

Fourthly, the provision is also inconsistent with the LOSC article 21, which obliges every coastal State that adopts laws or regulation relating to innocent passage to be in conformity with the LOSC and other rules of international law. This is because the reference to the wording “except in situations of grave and imminent danger” in the first provision of the Code of Conduct is not in conformity with other rules of international law, as it requires a higher threshold than what is required by customary international law, or by the SAR Convention to trigger the duty to render assistance to persons in distress. As discussed earlier, a distress situation does not need to be “of an actual physical necessity” to trigger the duty to render assistance, but rather, it shall be sufficient to trigger that duty if the circumstances imply that there is a threat to the lives of the persons concerned that would require immediate assistance.⁴⁷¹ To

⁴⁷¹ The Eleanor, (22 November 1809), high court of Admiralty, p.161. See also: section 2 above, sub-section 2.1, “the concept of distress”.

this end, it must be recalled here that since smugglers tend to use unseaworthy and overcrowded vessels, those vessels or crafts and every person onboard, ipso facto, must be considered to be in distress. Therefore, assistance must always be rendered to those vessels and crafts at all time.

Finally, the reference to the wording “not to obstruct search and rescue by the Libyan Coast Guard” implies that NGOs should only engage and render assistance to persons in distress if the Libyan Coastguard fails to rescue them.⁴⁷² Critically, since vessels that are intercepted by the Libyan Coastguard are always returned to Libya, this obligation reflects the policy adopted by the EU that aims to shift the responsibility of interdicting vessels to Libya, making it the duty of Libya to stop the flow of migrants without bearing a direct responsibility on the EU for the lives of those migrants. To this end, the Code also requires NGO vessels to refrain from giving any signal that would indicate their presence in order not to facilitate the departure of vessel carrying migrants, or the smuggling process and allows them only to make signals in the course of SAR events.

The contemporary practice of NGOs locating their vessels close to the Libyan territorial sea to render assistance to smuggled migrants raises also the question of whether or not and to what extent can a coastal State hinder NGO vessels from rendering assistance or remove it from its SAR Zone? In order to answer these questions, it is necessary first to highlight a few issues concerning the so called Libyan SAR zone.

4.4 The Construction of the Libyan SAR Zone

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. Furthermore, since 90% of departures from North Africa to Europe departs from Libya, therefore, the developments that are taking place in Libya are of particular importance to this thesis.⁴⁷³ In August 2017, Libya officially announced the establishment of a national SAR zone and declared its responsibility for the SAR zone,⁴⁷⁴ a decision that was applauded and welcomed by Italy.⁴⁷⁵ Following the declaration of the Libyan SAR zone,

⁴⁷² Code of Conduct for NGOs Involved in Migrants' Rescue Operations at Sea, (the Amended version), p.2.

⁴⁷³ International Organization for Migration, (2016). “Missing Migrants: Tracking Death along Migratory Routes - Mediterranean Migrant Arrivals in 2016”. Available at: <https://missingmigrants.iom.int/mediterranean-migrant-arrivals-2016-178882-deaths-737> See also: Eugenio Cusumano, (2017). Supra note (446),p.92.

⁴⁷⁴ Adam Smith, (2007). Ibid, p.53. See also: Daily Mail, (2017). “Libya Navy Bars Foreign Ships from Migrant 'Search and Rescue' Zone”, available at: <http://www.dailymail.co.uk/wires/afp/article-4779316/Libya-navy-bars-foreign-ships-migrant-search-rescue-zone.html>; See also: Steve Scherer & Aidan Lewis, (2017). “Italy Plans Big Handover of Sea Rescues to Libya Coastguard”, Reuters. Available at: <https://www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-italy-plans-big-handover-of-sea-rescues-to-libya-coastguard-idUSKBN1E91SG>

⁴⁷⁵ Adam Smith, (2007). Ibid, p.38; Daily Mail, ibid.

the Libyan authorities announced that it intends to exclude all NGOs vessel rendering assistance to ‘migrant boats’ from its SAR zone.⁴⁷⁶ To this end in August 16th, 2017 the Libyan coastguards detained the vessel *Pro-activa Open Arms* on the high seas 27 NM away from the Libyan coasts.⁴⁷⁷ In response, many NGOs engaged in rescuing people in the central Mediterranean suspended their operations, as they regarded the statements of excluding NGOs from the claimed SAR zone to be a threat of violence against them.⁴⁷⁸

The Libyan announcement of establishing a national SAR zone and claiming responsibility for the SAR zone, may also imply the end of Italy’s assumed responsibility for coordinating SAR missions in the Libyan SAR zone.⁴⁷⁹ However, there are many uncertainties concerning the Libyan SAR zone. Firstly, the size of the Libyan SAR zone is unknown and not yet specified. Despite this, NGOs were advised by the Italian MRCC “to remain 60 NM away from the Libyan Coasts”.⁴⁸⁰ Secondly, as of the time of writing this thesis, the Libyan government never established an MRCC to coordinate SAR operations. Critically, provision 2.3 of the SAR Convention stipulates that for a State to meet the requirements for developing national SAR services it must establish an MRCC. Accordingly, Libya may not be able to coordinate rescue missions until it officially establishes an MRCC or until it authorizes another State to coordinate the SAR operations through the Libyan SAR zone on its behalf.

Another critical point that must be stressed is that as of the time of writing this thesis, there has been conflicting news concerning whether or not Libya suspended or withdrew the application for the establishment of the SAR zone.⁴⁸¹ However, as Cuttitta points out, the EU is determined to help Libya to establish its SAR zone and the EU is also funding the establishment of the Libyan MRCC.⁴⁸² To this end, in 2016 the European Council – as mentioned earlier – added the task of training of the Libyan Coast Guards and Navy, to the mandate of operation

⁴⁷⁶ Chris York, (2017) “Libyan Navy Orders NGO Ships to Stay out of Mediterranean Search and Rescue Zone,” Huffpost United Kingdom, available at: http://www.huffingtonpost.co.uk/entry/libyan-navy-orders-ngo-ships_uk_598d7666e4b0909642962d06 .

⁴⁷⁷ Adam Smith, (2017). Supra note (323),p.49. See also: Medecins sans Frontier, (2017). “Hindrance of Humanitarian Assistance will create a Deadly Gap in the Mediterranean Sea”. Available at: <http://www.msf.org/en/article/hindrance-humanitarian-assistance-will-create-deadly-gap-mediterranean-sea>

⁴⁷⁸ Adam Smith, (2017). Ibid, p.53.

⁴⁷⁹ Ibid, p.38; See also: Paolo Cuttitta, (2017). Supra note (323),p.17.

⁴⁸⁰ Adam Smith, (2017). Ibid, p.53.

⁴⁸¹ Paolo Cuttitta, (2018). “Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part I)”. Available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centre-border-criminologies/blog/2018/04/pushing-migrants>

⁴⁸² Ibid. See also: Italian Coastguard, Press release (2017) “Delegazione della Guardia Costiera si reca a Tunisi per il progetto di creazione di un Centro Operativo per la ricerca e il soccorso marittimo in Libia” (Delegation of the Coast Guard went to Tunisia for the purposes of creating a Maritime Search and Rescue Coordination Center in Libya). Available at: <http://www.guardiacostiera.gov.it/stampa/Pages/delegazione-guardia-costiera-tunisi-progetto-lmrcc.aspx>

Sofia, so the Libyan Navy and Coast Guards can be able to disrupt smuggling networks and to perform SAR missions in the Libyan territorial sea.⁴⁸³ In light of this, the following subsection aims to answer the question concerning the extent to which a coastal State can hinder an NGO vessel from rendering assistance and exclude or remove it from its SAR Zone, assuming that Libya establishes its SAR zone.

4.5 The Legality of Excluding NGOs from the Libyan SAR Zone?

4.5.1 Excluding NGO vessels from the Libyan Territorial Sea

As discussed earlier, under the LOSC the coastal State has sovereignty over the territorial sea, which extends 12 NM from the coasts.⁴⁸⁴ The sovereignty of the coastal State in the territorial sea is not absolute, as the capacity of the coastal State to exercise jurisdiction in the territorial sea is restricted by the right of innocent passage.⁴⁸⁵ However, the LOSC grants coastal States broad rights to regulate innocent passage and to prevent any passage that is not considered innocent.⁴⁸⁶

Libya in accordance to the LOSC has two legal basis for excluding NGO vessels from its territorial sea. Firstly, Article 18 of the LOSC requires that in order to be considered innocent, the passage of a foreign vessel in the territorial sea must be “continuous and expeditious”. Thus, if an NGO decides to locate its vessels in the Libyan territorial sea and to *remain* there even for the purposes of rendering assistance to persons in distress, the vessel’s presence would not be consistent with the meaning of innocent passage and Libya pursuant to Article 25(1) of the LOSC may prevent the passage of that vessel. Secondly, Article 19(2) of the LOSC provides a list of acts that cannot be performed by foreign vessels, as they may disturb the peace and good order of the coastal State, and thereby render the passage non-innocent. With regards to these acts, the LOSC explicitly mentions that “the loading or unloading” of any person in violation of the coastal State immigration laws and regulations renders the passage non-innocent.⁴⁸⁷ Accordingly, if an NGO vessel is present within the 12NM of the Libyan’s territorial sea, and the Libyan authorities suspect it of breaching the Libyan immigration laws or engaging in an act that disturbs the peace and good order of State, Libya would be permitted to take all measures necessary to prevent the passage of that vessel and it may remove or exclude it from

⁴⁸³ European Council, Press release (2016). “Council Conclusions on EUNAVFOR MED Operation Sophia”, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/05/23/fac-eunavfor-sophia/>

⁴⁸⁴ LOSC, Art. 2 & 3.

⁴⁸⁵ Donald Rothwell & Tim Stephens, (2010). *Supra* note (118), p.70.; See also: LOSC, Art.17.

⁴⁸⁶ LOSC, Art. 21 & 25.

⁴⁸⁷ LOSC, Art. 19.

the territorial sea.⁴⁸⁸ However, as mentioned earlier, the duty to render assistance to persons in distress at sea applies through all maritime zones, including the territorial sea, and every shipmaster is obliged to render assistance to persons in distress. Therefore, an NGO vessel that is merely passing through the Libyan territorial sea retains the right of innocent passage even if it stops to render assistance to persons in distress. This is also consistent with article 18(2) of the LOSC that provides that an innocent passage may include “stopping and anchoring... for the purpose of rendering assistance to persons, ships or aircrafts in danger or in distress”. Such passage may not be prevented by the coastal State and Libya as the coastal State is obliged in accordance to Article 24(1) (a) of the LOSC to refrain from hampering this passage.

Finally, it should be mentioned that if Libya hinder NGO vessels from conducting SAR operations in its territorial sea, Libya would not be in breach of its obligations to render assistance to vessels or persons in distress at sea as long as Libya is effectively rendering assistance and rescuing them.

4.5.2 Excluding NGO Vessels from Areas beyond the Libyan Territorial Sea

Within the next 12NM that form the Libyan contiguous zone, Libya may also exclude and push-out NGO vessels from its contiguous zone. The basis for this is Article 33 of the LOSC which provides that every coastal State has the right to “exercise control necessary” to prevent and to punish infringements of immigration “laws and regulations within its territory or territorial sea”.⁴⁸⁹ Hence, if Libya has reasonable grounds to believe that an NGO vessel has breached or going to breach its migration laws, Libya may exercise the control necessary to punish or prevent such violations. As discussed earlier, this may include excluding or pushing a vessel out from the contiguous zone.⁴⁹⁰ However, unless an NGO vessel engages in one the acts of article 33, Libya may not exclude or push the NGO vessel out of its contiguous zone, as the mere presence of an NGO vessel in the contiguous zone is subject to the freedom of the high seas.⁴⁹¹ Accordingly, Libya cannot hinder NGO vessels from conducting SAR missions in that zone, as hindering NGO vessels from conducting SAR missions would constitute a breach to the principle of freedom of navigation. Similarly, it would constitute a violation of the principle of freedom of navigation, if Libya interferes with NGO vessels in areas beyond the contiguous zone that overlap with the Libyan SAR zone. This is because, coastal States do not enjoy any rights related to matters of migration beyond the contiguous zone, and vessels on the high seas

⁴⁸⁸ See Chapter III, Section 3, Subsection 3.2., at 3.2.2.

⁴⁸⁹ LOSC, Art. 33(1) a,b.

⁴⁹⁰ See Chapter III, Section 3, at Subsection 3.3.

⁴⁹¹ Ibid.

are only subject to the jurisdiction of their flag State.⁴⁹² It should be mentioned that if Libya conducts a SAR operation on the high seas and subsequently returns all migrants back to Libya or to another non-safe State, Libya's direct responsibility may also be invoked for breaching the concept of place of safety as well as breaching other human rights law obligations, e.g. *non-refoulement*. In light of this, it can be argued that Libya may be held responsible for committing an international wrongful act if it breaches obligations of human rights, or hinders an NGO vessel from conducting SAR missions on the high seas. In this context, Article (2) of the ILC Articles on States Responsibility provides that a conduct of a State would be a wrongful act if "it constitutes a breach of an international obligation of the State".

The only relevant powers that the LOSC may grant to Libya as a coastal State to protect its sovereignty and punish infringements of its laws is the right of "hot pursuit".⁴⁹³ Pursuant to Article 111 of the LOSC, if Libya has reasonable reasons to believe that a vessel breached its laws and regulations within one of its maritime zone, it may command its warships or other official ship or authorized military aircrafts to pursue that vessel in order to arrest and seize it.⁴⁹⁴ For instance, if an NGO vessel embarks persons in contrast to Libya's immigration laws and proceeded to the high seas, Libya – subject to Article 111 of the LOSC – may command its navy to pursue an NGO's vessel. However, this right is only applicable where breaches of the laws that are applicable in one of its maritime zones have already occurred – "not as a preventative measure".⁴⁹⁵ If this is not the case, Libya may not interfere with NGO vessels on the high sea.

Finally, Article 110 of the LOSC may also provide a basis for Libya to interfere with NGOs vessels on the high sea provided that a Libyan warship has reasonable grounds to believe that a vessel on the high seas is engaged in piracy, slave trading or unauthorized broadcasting or in situations where the vessel is stateless, that is, 'without a nationality'.⁴⁹⁶ However, as discussed earlier, Article 8(2) of the Smuggling protocol, arguably, may expand these activities to include the smuggling of migrants. In this context, it may be argued that since Libya is a State party to both the UNTOC and the Smuggling Protocol, it is obliged to prevent and counter the crime of migrant smuggling.⁴⁹⁷ Therefore, if a Libyan warship suspects that an NGO vessel on the high seas is engaged in smuggling migrants, the Libyan warship after obtaining the consent

⁴⁹² See Chapter III, Section 3, Sub-Section 3.4.

⁴⁹³ See Chapter III, Section 3, Sub-Section 3.5 at 3.5.4.

⁴⁹⁴ LOSC, Art. 111.

⁴⁹⁵ Adam Smith, (2017). *Supra* note (323),p.54.

⁴⁹⁶ LOSC 110

⁴⁹⁷ See Chapter II, Section 2, Subsection 2.2 & 2.3.

of the flag State and subject to the provisions of Articles 110 of the LOSC and Article 8 of the Smuggling protocol, may approach the NGO vessel and take the measures necessary. It should also be recalled here that Resolution 2240 adopted by the UNSC following the initiation of operation Sofia, may provide Libya with another legal basis to board any foreign vessel including NGO vessels, if Libya suspects them of being engaged in migrant smuggling on the high seas, providing that they obtained the consent of the flag State.⁴⁹⁸

In light of the above, one may conclude that beyond the territorial sea, the general principle that applies is the freedom of the high seas and there is no legal basis for the Libyan authorities under international law of the sea to interfere with NGO vessels exercising the freedom of navigation, save in cases where they meet one of the few exceptions discussed earlier. Otherwise, interfering with an NGO's vessel would constitute a breach of the freedom of the high seas. Finally, it must be mentioned here that a treaty shall always "be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".⁴⁹⁹ To this end, the freedom of navigation has to remain the rule and restrictions of that right must remain the exception. Therefore, since Articles 110 of the LOSC, 8(2) of the Smuggling Protocol, and the UNSCR 2240 are exceptions to the principle of freedom of navigation, they must be interpreted strictly so they do not lead to abuse of right.⁵⁰⁰

5. Concluding Remarks

It cannot be doubted that the duty to render assistance applies through all maritime zones, and all vessels at all time are bound to render assistance to persons and vessels in distress regardless of their nationality or status. The duty to render assistance is triggered when there is a reasonable certainty that a person or a vessel is threatened by imminent danger that requires immediate assistance.⁵⁰¹ Hence, since smugglers tend to smuggle migrants across the Mediterranean by using unseaworthy and overcrowded vessels or craft that risk the lives of every person onboard of those vessels, therefore, people onboard of these vessels or crafts are considered in distress and assistance must be rendered to them at all time. However, the lack of an obligation imposed on States to allow for the disembarkation of rescued persons on their territory, presents a large

⁴⁹⁸ UNSC Resolution 2240(2015), UNSC Resolution 2312(2016) and UNSC Resolution 2380(2017), para. 6 & 7. Available at: <https://www.un.org/press/en/2017/sc13015.doc.htm> See also: Security Council, Meetings Coverage, (2016) "Adopting Resolution 2312 (2016), Security Council Extends Authorization to Intercept vessels Suspected of Illegal Smuggling from Libya," United Nations, 6 October 2016, SC/12543. Available at: <https://www.un.org/press/en/2016/sc12543.doc.htm> .

⁴⁹⁹ VCLT, Art.31.

⁵⁰⁰ Efthymios Papastavridis, (2014). *Supra* note (173), p.62. See also: Chapter III, Section 3, Subsection 3.5.2.2.

⁵⁰¹ SAR Convention, Annex, chapter 1, Regulation 1.3.13.

gap in the SAR system and dramatically weakens the duty to render assistance to vessels and persons in distress.

The SAR amendments that place the primary responsibility on the coastal State responsible for the SAR zone – in which assistance is rendered – *to ensure* that coordination and cooperation with other States for the disembarkation of rescued persons in a place of safety, may lead to problematic results in the context of the migration crisis in the Mediterranean Sea. This is because it shifts the responsibility for the SAR zone from Italy to Libya. In other words, after Libya announced its responsibility for its SAR zone in 2017, the coordination on where rescued person should be disembarked following the establishment of the MRCC, becomes Libya’s responsibility.⁵⁰² In this context, Cuttitta points out that the EU’s main objective for strengthening the abilities of the Libyan Coastguard is to enhance Libya’s capability of conducting SAR missions and to establish a Libyan MRCC, so as to more quickly shift responsibility for SAR missions to Libya.⁵⁰³ Should this shift take place, in cases where Libya does not reach a decision with other States on where to disembark rescued migrants, or if Italy or Malta – as the closest safe places – refuse to disembark the rescued migrants on their territory, Libya may have no choice but to direct NGO vessels and other private vessels to disembark rescued migrants – who are *fleeing* from Libya due to humanitarian crisis – back to one of the Libyan ports! This will lead to a situation where migrants are stuck in a State where massive violations of human rights are taking place and if they try to leave, they will be brought back. In this context, Gammeltoft-Hansen rightly points out that “the 2004 amendments to the SAR regime establish a normative structure for shifting sovereign responsibilities towards non-EU States”.⁵⁰⁴

In light of the above, one can conclude that the current SAR framework is insufficient to cope with the recent challenges unfolded by the migration crisis in the Mediterranean Sea. This also means that the amendments made to the SAR and SOLAS Conventions in 2004 present another gap in the protection of human rights.

⁵⁰² See above Section 4, Subsection 4.4 (The Construction of the Libyan SAR Zone).

⁵⁰³ Paolo Cuttitta, (2017). *Supra* note (323),p.19.

⁵⁰⁴ Thomas Gammeltoft-Hansen, (2016). *supra* note (374) p.69.

Chapter VI: Conclusion and Final Remarks

The ever increased measures of border control employed for the protection of the EU's external borders, the restrictions imposed on accessing legal migration channels to reach Europe, along with the fact that there are no visas for the purposes of seeking asylum, led thousands of people who are forced to leave their homelands to request the help of smugglers to illegally reach Europe. Since 2015, more than one million smuggled migrant crossed the Mediterranean Sea to reach Europe, challenging the capacity of the EU States to regulate migration and manage border controls at sea.

Since the beginning of the migration crisis, security concerns have been the primary factors that influenced the EU's border policy and practice. Today the EU's border policy revolves around three main components: increasing and enhancing measures of border control, launching military operations against migrant smugglers and cooperating with departure and transit States to shift the responsibility of border control to these States. So far, these measures of control may have *temporarily* reduced the number of migrants or asylum seekers trying to reach Europe but they have failed to stop or prevent people from migrating. This is due to the fact that these policies only address the symptoms and ignore the fundamental causes of the current migration crisis.

The current migration crisis is the result of long-standing conflicts, military interventions, inequalities and other geopolitical and economic factors. Just as conflicts, political oppression and security drive persons to seek refuge and search for new lives elsewhere, so do poverty, economic inequalities and the search for work opportunities. Not to mention that globalization and mobility adds other layers to the challenges faced from the migration crisis. In dealing with the migration crisis, EU States have relied upon laws that enhances and extraterritorialize measures of border controls, with only few considerations for the application of human rights at sea.

Under international law there is nothing that can prevent a State from restricting irregular migration and punishing breaches of its immigration laws. On the contrary, international law encourages States to prevent the smuggling of migrants and all States party to the Smuggling Protocol are obliged to prevent and suppress that crime. However, as much as States have a duty to prevent and suppress the crime of migrant smuggling by sea, they also have a duty towards victims who are under their jurisdiction and effective control. Thus, EU States must avoid the fragmentation of the applicable legal framework governing the issue of migrant smuggling by sea. In other words, EU States must avoid the practice of 'cherry picking' by favoring to comply with laws that externalize border controls over compliance with obligations of human

rights that urge a duty to protect. What is needed is a mandate that it has *protection* as its primary concern instead of reinforcing border controls, a mandate that reflects the foundational values of the EU and the EU's commitment to protect the rights of smuggled migrants in accordance to the ECHR, human rights law and refugee law.

Interdiction and SAR operations carried out by either Frontex, EUNAVFOR MED or EU States must be exercised with due regard to the LOSC and other applicable rules stemming from other sources of international law, including human rights law and refugee law. These operations must also consider the disembarkation of migrants rescued or migrants interdicted at sea in a European State where both the lives and freedoms of those migrants are not endangered or at risk. These operations must not return them to the State of origin or departure until their status, nationalities and individual asylum claims are examined and determined. In this context, procedural guarantees and access to judicial remedy are essential for the protection against *refoulement*. In short, where interdiction or SAR operations occur, fundamental rights remain applicable.

The lack of an international obligation imposed on States to allow for the disembarkation of rescued persons on their territory presents a large gap in the SAR system. Due to conflicts, massive violations of human rights that take place in many North African States, they cannot be considered a place of safety where rescued migrants may be disembarked. In light of this, Goodwin-Gill points out that if no EU State agrees to disembark rescued migrants on their territory, then effective international supervised agreements are essential to ensure that migrants are going to be treated in accordance to international law and European standards at the place where they are going to be disembarked.⁵⁰⁵ He also points out that following individual examination of the claims of those who are requesting protection, they must be offered appropriate solutions such as resettlement in third States.⁵⁰⁶

The legal framework governing the smuggling of migrant by sea, discussed in this thesis, is complex and stems from various branches of international laws that are often intersecting and conflicting. This thesis represents only a small part of the legal challenges unfolded by the issue of migrant smuggling, yet these legal challenges are only one dimension of the issue of migrant smuggling. This is because the issue of migrant smuggling is a multifaceted problem with many dimensions that affects not only States, but also individuals, commercial shipping and international organizations. During an interview that I have conducted with the German

⁵⁰⁵ Guy Goodwin-Gill, (2016). *supra* note (255) p.27.

⁵⁰⁶ *Ibid.*

Ship-owners' Association,⁵⁰⁷ with regards to merchant vessels that have conducted SAR operations in the Mediterranean Sea, emphasis was put on two main concerns: the psychological trauma seafarers suffer when witnessing the tragedies in the Mediterranean Sea and the financial burdens commercial ships have to bear with when conducting SAR operations that are always not covered by insurance. Similar concerns were also raised in another interview with "Opielok Offshore Carriers" a private German shipping company that was directly engaged in conducting SAR missions in the Mediterranean Sea.⁵⁰⁸ Therefore, the issue of migrant smuggling cannot only be dealt with from a legal perspective, but instead it requires a holistic approach, that goes beyond the realm of law.

Finally, dealing with the issue of migrant smuggling through the lens of security and relying upon laws that reinforce or externalize border controls has proven to be a very narrow approach that undermines efforts to establish a more holistic approach to dealing with irregular migration and the issue of migrant smuggling. The EU needs to address the root causes of this problem and adopts a strategy that is based on justice and the rule of law. The only long term policy that may have an impact and indeed influences the causes of irregular migration is the one that pushes toward development, democracy, social justice and one that emphasizes on respecting freedoms and human rights in the States where migrants are fleeing from.

⁵⁰⁷ The German Shipowners' Association (Verband Deutscher Reeder), established in 1907. Interview was conducted, the 19th of September 2017 in Hamburg, Germany.

⁵⁰⁸ Opielok Offshore Carriers, established in 1998. Interview was conducted, the 22nd of September 2017 in Hamburg, Germany.

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