

**Irregular Migration by Sea: A Critical Analysis of EU and EU Member State  
Extraterritorial Practice in the Light of International Law**

Enkelejda Koka

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Kent Law School  
University of Kent

Supervisors: Professor Nick Grief

Dr. Thanos Zartaloudis

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## ABSTRACT

Since 2011, the arrival of more than one million migrants via irregular means on overcrowded, unseaworthy vessels fleeing persecution, civil war, poverty and devastation, has generated contradictory policies and legal measures from the EU and its Member States. On the one hand, the irregular migration crisis in the Mediterranean has been linked with notions of humanitarianism, focusing on search and rescue and the provision of aid including water, food, medical care, and shelter; while on the other, it has prompted increased security through extraterritorial border controls in order to try and tackle human smuggling and discourage irregular migration. This thesis examines the implications of these extraterritorial border control measures for the rights of irregular migrants and questions the measures' compliance with international human rights law and other international obligations. In particular, it investigates the Italian and Greek extraterritorial practices of interception and push-backs to Libya and Turkey from January 2014 to June 2016. Furthermore, this research investigates the EU's policy framework for these Member States' extraterritorial border controls at sea which resulted in rules for the surveillance of external sea borders under Frontex's coordination (the Sea Borders Regulation of 15 May 2014) and, more recently, the EU-Turkey statement of 18 March 2016 to facilitate the accelerated return of irregular migrants from Greece to Turkey.

Based on a critical appraisal of these measures in the light of international law, this thesis contributes to demonstrating that the Italian and Greek extraterritorial practices and the EU's strategy (through Frontex) of 'stopping boats' carrying irregular migrants and 'altering their course' to a third country or onto the high seas, ostensibly in order to save lives, are in breach of their obligations under international law, especially the Law of the Sea and international human rights law and refugee law. It is argued that these extraterritorial practices have not only violated international human rights law and other international obligations but have also significantly increased the death toll among irregular migrants attempting to cross the Mediterranean Sea. It is also argued here that the Sea

Borders Regulation has not only failed to unify the rules on interception, search and rescue and disembarkation during Frontex joint operations at sea, but also seeks to legitimise these practices contrary to a 'good faith' interpretation and implementation of international human rights law and other international obligations.

The thesis concludes that in light of the law of international responsibility, Greece and Italy bear international responsibility for every internationally wrongful act or omission attributable to their officials during interception operations at sea in violation of international human rights law or other international obligations, notably the right to life, the duty of search and rescue, the prohibition of inhuman or degrading treatment or punishment and the principle of *non-refoulement*. Moreover, it is argued that the EU in its institutional role is legally responsible for its own internationally wrongful acts and omissions in violation of its international obligations. This thesis contributes then by rebutting the assumptions often held in the scholarly arena by arguing that responsibility can be attributed to the EU for the internationally wrongful acts committed during Frontex joint operations and through decisions addressed to Member States authorising them to commit acts that are internationally wrongful.

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## ABBREVIATIONS

APD	Asylum Procedures Directive
ARIO	Law of International Responsibility for International Organisations
ASR	Articles on State Responsibility
CAS	Temporary Centres for Emergency Reception
CAT	Convention against Torture
CEAS	Common European Asylum system
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1989
CF	Consultative Forum
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CMSI	Central Mediterranean Sea Initiative
CoE	Council of Europe
CPA	First Accommodation Centres
CPSA	First Aid and Reception Centres
CSDP	Common Security and Defence Policy
EASO	European Asylum Support Office
EBGT	European Border and Coast Guard Teams
ECHR	European Convention on Fundamental Rights
ECRE	European Council for Refugees and Exiles
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
EUBAM	EU Border Assistance Mission

Europol	European Union Agency for Law Enforcement Cooperation
EUROSUR	European Border Surveillance System
FCO	Frontex Coordinating Officer
FRA	European Union Agency for Fundamental Rights
FRO	Fundamental Rights Officer
Frontex	European Border and Coast Guard Agency
GAMM	Global Approach to Migration and Mobility
GCEU	General Court of the European Union
HRW	Human Rights Watch
IAMSAR	International Aeronautical and Maritime Search and Rescue Manual
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organisation
IOM	International Organisation for Migration
ITLOS	International Tribunal for the Law of the Sea
ITLOS	International Tribunal of the Law of the Sea
KFOR	Kosovo Force
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Groups
OHCHR	Office of the United Nations High Commissioner for Refugees



RCC	Regional Coordination Centre
RCD	Reception Conditions Directive
SAR	Search and Rescue
SBC	Schengen Borders Code
SOLAS	International Convention for the Safety of Life at Sea
SOPs	Standard Operating Procedures
SPRAR	Protection of Asylum Seekers and Refugees
TCNs	Third Country Nationals
TEP	Technical Equipment Pool
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNMIK	UN Mission in Kosovo
VCLT	Vienna Convention on the Law of Treaties

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## Chapter 1: Introduction

### 1.1 Research Questions and Contribution to Literature

Since 2011, with an escalated irregular migration crisis producing unprecedented tragic deaths at sea, Italy and Greece with the assistance of the EU (through Frontex<sup>1</sup>) considered the Mediterranean Sea as a space of humanitarian intervention, purportedly in the name of protecting life at sea. Under the newly developed concept in literature, the ‘extra-territorialisation of border management’, the EU and its Member States perceived that they had an obligation to prevent ‘irregular migrants’<sup>2</sup> from embarking upon a perilous sea journey.<sup>3</sup> The

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<sup>1</sup> The European Border and Coast Guard Agency established by Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (EBCG Regulation) [2016] OJ L 251/55, previously known as: the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>2</sup> IOM defines irregular migration as ‘movement that takes place outside the regulatory norms of the sending, transit and receiving countries. However, there is no clear or universally accepted definition of irregular migration’. IOM, Key Migration Terms <<https://www.iom.int/key-migration-terms>> accessed 26 October 2017; Whereas ‘illegal migrant/migration’ is defined as the illegal crossing of borders in violation of the immigration laws of a destination country. See UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, 2000, article 3(b); Also see IOM Glossary, 49, <<http://www.corteidh.or.cr/sitios/Observaciones/11/Anexo5.pdf>> accessed 18 May 2018; In the Mediterranean and Aegean seas irregular migration is ‘mixed’. It consists of people flows moving for different reasons but which share the same route. The ‘boat people’ share the same vessel and cross the sea without authorisation with the aim to reach EU territory. Thus, the term ‘irregular migrant’ includes asylum seekers, refugees, trafficked and smuggled persons, unaccompanied children, stateless persons, economic migrants and displaced persons, see Anna Triandafyllidou and Angeliki Dimitriadi, ‘Migration Management at the Outposts of the European Union’ (2013) GLR 22(3) 598-618, 600; Judith Kumin, ‘The Challenge of Mixed Migration by Sea’ (2014) FMR 45, 49; Nathalie Bernardie-Tahir and Camille Schmoll, Islands and Undesirables: Introduction to the Special Issue on Irregular Migration in Southern European Islands (2014) JIRS 12(2), 87-102, 88-89.

<sup>3</sup> Virginie Guiraudon, ‘Before the EU Border: Remote Control of the “Huddled Masses”’ in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds), *In Search of Europe’s Borders* (Kluwer Law International 2003) 191; Elspeth Guild and Didier Bigo, ‘The Transformation of European Border Controls’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden, Martinus Nijhoff, 2010) 258; Maribel Casas-Cortes and Sebastian Cobarrubias, ‘Stretching Borders Beyond Sovereign Territories? Mapping EU and Spain’s Border Externalization Policies’ (2010) *Geopolítica(s)* 2(1) 71-90, 80; Luisa Marin, ‘Policing EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An analysis of Frontex Joint Operations at the Southern Maritime Border’ (2011) *JCER* 7(4) 468-487, 486; Triandafyllidou and Dimitriadi (n 2) 601; Tiziana Torresi, ‘An Emerging Regulatory Framework for Migration’ (2013) *GLR* 22:3, 648-665, 656; Maribel Casas-Cortes, Sebastian Cobarrubias and John Pickles, ‘Riding Routes and Itinerant Borders: Autonomy of Migration and Border Externalization’ (2015) *Antipode* 47(4) 894-914, 895; emphasis added.

most adequate response seemed to be that of further security and the militarisation<sup>4</sup> of migration as an expansion of State sovereignty.<sup>5</sup> As irregular migrants continue to arrive in mass, the EU border management strategy remains a key policy priority on the EU agenda.<sup>6</sup> Thus, as a policy area in development, the literature assessing the human rights violations and the consequent international responsibility of the various actors involved in extraterritorial practices has been limited. On this basis, the thesis focuses on the following developments: actual violations of international obligations resulting from Italian and Greek extraterritorial practice, a critical assessment of the EU Regulation establishing rules for the surveillance of external sea borders (Sea Borders Regulation)<sup>7</sup> under Frontex coordination for compliance with international obligations and the responsibility of Italy, Greece and that of the EU in its collective role for breaches of international obligations under the law of international responsibility.<sup>8</sup>

This research raises the following questions and sub-questions: 1. Whether the Italian and Greek extraterritorial practices are consistent with international human rights law, refugee law and the Law of the Sea? Do these extraterritorial measures violate international law obligations such as *non-refoulement*, and the right to leave one's own country combined with the right to asylum? 2. Whether the Sea

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<sup>4</sup> Peter Kraska, 'Militarization and Policing – Its Relevance to 21<sup>st</sup> Century Police' (2007) Policing 1-13, 3: 'It is the process of arming, organizing, planning, training for, threatening, and sometimes implementing violent conflict'; Reece Jones and Corey Johnson, 'Border Militarisation and the Re-articulation of Sovereignty' (2016) TIBG 41(2) 187-200, 188.

<sup>5</sup> Jones and Johnson (n 4) 188; Peter Roberts, 'The Militarisation of Migration: From Triton to Sofia: Assessing the Credibility of the EU's Naval Interventions against Migrant Smuggling in the Mediterranean' in Tuesday Reitano, Sasha Jespersen, Lucia Ruiz-Benitez de Lugo (eds), *Militarised Responses to Transnational Organised Crime* (Palgrave, 2017) 217-233.

<sup>6</sup> European Commission, *Communication on the Delivery of the European Agenda on Migration* COM (2017) 55 final, 2.

<sup>7</sup> Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Sea Borders Regulation) OJ L189/93 [2014] based on TFEU, article 77(2)(d).

<sup>8</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No 10 (A/56/10), chp.IV.E. (ASR); ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (ARIO).

Borders Regulation is compatible with international human rights law, refugee law and the Law of the Sea? Has the Sea Borders Regulation created a new immigration regime for Member State interception, search and rescue as well as disembarkation practices when conducted under Frontex coordination? 3. Whether the EU is attributed with responsibility for the internationally wrongful acts committed during Frontex joint operations and/or when adopting decisions and authorizations obliging its Member States to commit an act that would be internationally wrongful in light of the law of international responsibility? Is the EU using the Frontex regulatory framework to avoid its responsibility as the responsible entity in control of Frontex seconded-border guards? Have the Sea Borders Regulation and the EU-Turkey statement been designed to circumvent the EU's responsibility for violations of its international obligations such as the *non-refoulement* principle?

Hence, this research contribution critically analyses: 1) the Greek extraterritorial practices through interception and push-backs to Turkey from January 2014 to June 2016, and the Italian indirect push-backs with Libya through the EU Border Assistance Mission as of 22 May 2013 (EUBAM Libya)<sup>9</sup> - Turkey and Libya being third countries with poor human rights records, 2) Frontex's involvement in violations of human rights and other international obligations through activities including interception, push-back, disembarkation and 3) the legal responsibility of Italy, Greece, and the EU for violations of international obligations.

It is argued that these extraterritorial measures in the form of interception and push-backs violate the international obligations of Greece, Italy and the EU's. Furthermore, the thesis argues that these extraterritorial border controls have had the adverse effect of adopting two parallel asylum and immigration legal frameworks differentiating between irregular migrants who arrive by sea and those who arrive by land; hence, offering fewer legal safeguards to those irregular

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<sup>9</sup> Council Decision 2013/233/CFSP On 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya) [2013] OJ L138/15.

entrants by sea. However, it is concluded that international refugee and human rights law, although its extraterritorial application conflicts with national and supranational public security interests, protects persons in need of international protection regardless of whether they enter by regular or irregular means. Through its original contribution, this thesis has compared the economic cost figures for Italy and Greece on the irregular migration crisis to the costs of pecuniary, non-pecuniary damages, costs and expenses awarded by the ECtHR for breaches of human rights and other international obligations and has found that violations of international refugee and human rights law have not transpired because of lack of knowledge on these conventions' extraterritorial application but because the economic costs for non-compliance are definitely lower than the costs of compliance.<sup>10</sup>

It is argued that these extraterritorial measures have as their main objective the transformation of the Mediterranean and Aegean seas into a migration containment belt to block flows of irregular migrants to EU territory as to avoid international responsibility for any violations of international obligations committed during these extraterritorial border controls. Confronted with the complexities of the national and international judiciary systems, once returned to country of departure, victims of illicit border control practices encounter difficulties from seeking redress against the participating Member States in Frontex joint operations. The assumption created in existing literature and the underdeveloped principles of shared responsibility is that multi-party attributions of the same internationally wrongful acts are difficult to prove and thus are capable of diluting international responsibility. Hence, these extraterritorial measures have been arguably designed to create and exploit gaps in the rule of law and in the legal regime of State and international organisations' legal responsibility.

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<sup>10</sup> See Chapter 4, section 4.6.

This academic research aims to provide an original contribution to current literature regarding the application of the law of international responsibility in terms of Italian and Greek push-back practices and Frontex joint operations. This thesis originally contributes to literature by rebutting the assumption of the EU's non-responsibility created by the underdeveloped principles of international responsibility as a result of jurisdictional limitations and the lack of scholarly literature making reference to situations or consequences of responsibility for the EU when it takes advantage of its regulatory framework in light of Articles 4, 7 and 17 ARIO. It draws on data from NGOs and civil society on illicit extraterritorial practices on the ground and the existing set of legal literature on the extraterritorial application of international human rights, refugee law and the law on international responsibility. This research further contributes to literature by identifying the legal gaps in international protection created by the Sea Borders Regulation in which is argued to discriminate and undermine the rights of irregular migrants that arrive by sea compared to those arriving by land.

## 1.2 Literature Review

This thesis differs from the existing literature in that it does not analyse irregular migration solely from a security and State sovereignty perspective but examines the effects that security has on irregular migration by sea, focusing on the violation of human rights and other international obligations caused by Italian and Greek extraterritorial border control practices with EU assistance through Frontex. Established literature in irregular migration and border control studies has focused on issues of security and the militarisation of border controls. Divergent lines of argument have been put forward between legal scholars on prioritising national sovereignty to control one's borders over compliance with international human rights law. Ilse van Liempt and Stephanie Sersli argue that the on-going battle between Member States and organised criminal networks (described as the dark side of globalisation) challenge not only fundamental principles of international law but also State sovereignty.<sup>11</sup> With the help of human smugglers, they argue that a nation's sovereign power comes under threat by the 'unsanctioned movement' allowing unwanted migrants to reach Member State territory, in revelation of a failed border regime.<sup>12</sup>

Van Liempt and Sersli argue that by re-imagining the enemy from being a State to a 'transnational network of private actors (i.e. organized crime)', all the border guard needs to focus the inquiry on is how the person crossed the border and with whom, instead of whether that person is escaping from a despotic regime.<sup>13</sup> This perspective would allow Member States to consider human smuggling as a threat

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<sup>11</sup> Ilse van Liempt and Stephanie Sersli, 'State Responses and Migrant Experiences with Human Smuggling: A Reality Check' (2013) *Antipode* 45(4) 1029-1046, 1029; Also see John Salt, 'Trafficking and Human Smuggling: a European Perspective' (2000) *IM* 38(3) 3 Special Issue 2000/1, 31-56, 32 <<http://onlinelibrary.wiley.com/doi/10.1111/1468-2435.00114/pdf>> accessed 21 January 2017.

<sup>12</sup> Ilse van Liempt and Jeroen Doomernik, 'Migrant's Agency in the Smuggling Process: The perspectives of Smuggled Migrants in the Netherlands' (2006) *IM* 44(4) 165-190; Ilse van Liempt, *Navigating Borders: Inside Perspectives on the Process of Human Smuggling into the Netherlands* (Amsterdam University Press, 2007); Van Liempt and Sersli (n 11) 1029.

<sup>13</sup> Van Liempt and Sersli (n 11) 1029.



to the State rather than as ‘a reaction on restrictions posed by states’.<sup>14</sup> Van Liempt and Sersli have focused their study of irregular migration under the inter-relationship of boat people, State sovereignty and the criminalization of human smuggling in the EU. Reece Jones and Corey Johnson argue that threats of terrorism and immigration have resulted in a shift to the militarization of borders which represent an expansion of State sovereignty into new spaces.<sup>15</sup> Nora Markard, on the other hand, considers that the fight against irregular migration is not justified on grounds of national security and public order. To justify restrictions on grounds of national security and public order, Markard argues that there must be an actual link between the individual’s conduct and his/her threat to national security which must be genuine and present.<sup>16</sup>

Didier Bigo, incorporating the above arguments, argues that a genuine link between national security and the threat of irregular migration cannot be established because these security measures are not adopted to protect public order but are part of a ‘border game’.<sup>17</sup> On the basis of empirical research conducted from 2006-2013, Bigo concluded that military operations used for border control under Frontex or under bilateral agreements were not purely a security measure but adopted as part of a ‘border game’ to keep the ‘unwanted’ away from EU territory.<sup>18</sup> According to Bigo’s ‘border game’, smugglers organise themselves into developing new routes not caught by State surveillance, whereas Member States through pre-emptive interception stop irregular migrants from

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<sup>14</sup> Van Liempt and Sersli (n 11) 1029; also see David Kyle and Christina Siracusa, ‘Seeing the State Like a Migrant: Why So Many Non-criminals Break Immigration Laws’ in Willem van Schendel and Itty Abraham (eds), *Illicit Flows and Criminal Things* States, Borders, and the Other Side of Globalization (Bloomington: Indiana University Press, 2005) 153-176.

<sup>15</sup> Jones and Johnson (n 4) 187.

<sup>16</sup> *Stamose v Bulgaria* Application no 29713/05 (27 November 2012) paragraph 35; Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’ (2016) *EJIL* 27(3) 591-616, 609.

<sup>17</sup> Didier Bigo, ‘The (In)securitization Practices of the Three Universes of EU Border Control: Military/Navy-border Guards/Police – Database Analysts’ (2014) *SAGE* 45(3) 209-225, 212 <<http://sdi.sagepub.com/content/45/3/209.full.pdf+html>> accessed 26 October 2017.

<sup>18</sup> Bigo (n 17) 212; empirical research from 2006-2013 under the FP6 Challenge research programme financed by the European Commission; Also see Peter Andréas, *Border Games, Policing the US-Mexico Divide* (Cornell University Press, 2000).

reaching EU territory and through the practice of push-back ensure their immediate return to the country of departure. Hence, through interception measures and EUROSUR<sup>19</sup> (an EU electronic system of surveillance) they established an electronic wall to separate Europe from North Africa and the Middle East.<sup>20</sup>

This thesis argues that a genuine link between irregular migration and extraterritorial border control measures purportedly justified in the name of terrorism and State security cannot be established. There is no evidence that irregular migration leads to increased terrorist activity.<sup>21</sup> The report published by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, stated that the overly-restrictive migration policies could not be justified on grounds of State security.<sup>22</sup> On the contrary, the more restrictive migration policies that criminalise irregular migration and which engage in push-back operations increase the covert movements of people by smugglers which as a consequence may increase terrorist activities.<sup>23</sup> It is therefore argued that the measures undertaken under the Protocol on migrant smuggling are not proportionate to their aim and do not meet the tests of legality and necessity.<sup>24</sup>

Bigo further argued that this ‘border game’ produced undesirable effects, turning smugglers routes into something more organised, avoiding the need to play hide

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<sup>19</sup> Regulation (EU) No 1052/2013 establishing the European Border Surveillance System (EUROSUR Regulation) (OJ L 295/11, 6.11.2013).

<sup>20</sup> Bigo (n 17) 212.

<sup>21</sup> UN, ‘Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (Ben Emmerson, 13 September 2016) A/71/384, 4-5, particularly paragraph 8; OHCHR, ‘Refugees and Terrorism: “No Evidence of Risk” – New Report by UN Expert on Counter-Terrorism’

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20734&LangID=E> accessed> 17 October 2017.

<sup>22</sup> UN, ‘Promotion and Protection of Human Rights (n 21) paragraph 11.

<sup>23</sup> UN, ‘Promotion and Protection of Human Rights (n 21) paragraph 11.

<sup>24</sup> UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR) 16 December 1966, United Nations, Treaty Series, Volume 999, 171 (entry into force 23 March 1976) article 12(3).

and seek. Pinning their hopes upon Member States' compliance with their refugee, human rights and search and rescue obligations towards overcrowded boats of irregular migrants in distress, all the smugglers had to do was to place irregular migrants on cheap, unsophisticated vessels often with defective engines controlled by the migrants themselves and broadcast a distress call once on the high seas.<sup>25</sup> In response, Member States were determined to combat the human smugglers. Bigo argued that they intentionally misinterpreted their international obligations on search and rescue and disembarkation in order to avoid responsibility for the individuals who unwittingly assist the growing industry of organised crime.<sup>26</sup> As a consequence, however, Member States began avoidance behaviour which has had a direct contribution to migrant deaths at sea.<sup>27</sup>

Thomas Spijkerboer furthers the argument that extraterritorial border control policies contribute to border deaths. Unable to conduct extensive empirical research to confirm his presumption, Spijkerboer argues that the 'available data make it plausible' to hold that a relationship exists. Based on the data made available by NGOs such as United against Racism, Fortress Europe, and other local and short term studies, Spijkerboer concluded: 'the intensification of European border control policies has not reduced the number of migrants; the intensification of European border control policies has led to the shifting of undocumented migration to ever more dangerous routes; and the number of registered border deaths has increased considerably over the years'.<sup>28</sup> Hence, on these grounds Spijkerboer argues that lack of legal channels and intensified border controls have 'led to more dangerous travel routes, with increasing

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<sup>25</sup> Van Liempt and Sersli (n 11) 1038.

<sup>26</sup> Bigo (n 17) 212.

<sup>27</sup> Bigo (n 17) 211.

<sup>28</sup> Thomas Spijkerboer, 'The Human Costs of Border Control' (2007) EJML 9, 127-139; Jorgen Carling, 'Migration Control and Migrant Fatalities at the Spanish-African Borders' (2007) IMR 41(2), 316-343; Dirk Godenau and Manuel Zapata Hernandez, 'The Case of the Canary Islands (Spain): A Region of Transit Between Africa and Europe' in Gemma Pinyol (ed), *Immigration Flows and the Management of the EU's Southern Maritime Borders* (Documentos CIDOB Migraciones 17, 2008) 13-43; Thomas Spijkerboer, *Are European States Accountable for Border Deaths?* (Ashgate Research Companion, 2011) 62; also supported by Hein de Haas, 'Migration and Development: A Theoretical Perspective' (2010) IMR 44, 227-264.

fatalities as a predictable consequence'.<sup>29</sup> Thus, upon knowledge of such effect, he argues that Member States have a positive obligation to adapt their policies so as to minimize the undesirable side-effect of deaths at sea. He further argues that border deaths give rise to three positive obligations: 1) to carry out an investigation into fatalities at EU borders, 2) to minimize the number of fatalities by assessing border control policies, and 3) to identify victims and inform relatives.<sup>30</sup> Spijkerboer merely touches upon the topic of EU collective responsibility holding that these positive obligations belong not only to Mediterranean States but to all European States under a collective responsibility; however, he does not further develop or support substantively the argument as claimed.<sup>31</sup>

This thesis contributes to literature by arguing that the 'border game' has become a form of 'structural violence', used as a deterrent tool in the cruellest inhuman way.<sup>32</sup> To avoid EUROSUR's detection, human smugglers have placed as many irregular migrants as possible on cheap, unsophisticated vessels often with defective engines controlled by the migrants themselves. Greek coastguards on the other hand, have been alleged to have intentionally endangered the lives of irregular migrants through seizing their boat engine and leaving them stranded at sea. Each Member State has a positive obligation to safeguard the lives of individuals within its jurisdiction.<sup>33</sup> In addition, they must take preventative

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<sup>29</sup> Spijkerboer, *Are European States Accountable* (n 28) 66; The EU manages the entry of non-EU citizens under the visa regime. An EU 'black-list' has been created, listing 132 third States whose nationals are required to obtain a visa in order to enter Member State territory. Not surprisingly, the countries situated in the Mediterranean region are included in this 'black-list'. See Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243; Regulation (EC) No 851/2005 of 2 June 2005 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism, [2005] OJ L 141/3; Israel and Turkey are not included within the 'black-list'.

<sup>30</sup> Spijkerboer, *Are European States Accountable* (n 28) 72.

<sup>31</sup> Spijkerboer, *Are European States Accountable* (n 28) 73.

<sup>32</sup> Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Global Frontier* (London, UK: Palgrave Macmillan, 2011) 93-118.

<sup>33</sup> UN General Assembly, *Convention on the High Seas 1958*, 29 April 1958, United Nations,

measures to assist these boats and avoid any illicit practices leading to the capsizing of boats resulting in deaths.<sup>34</sup> A positive duty is imposed on Greece by the ECHR to commence investigations to identify those dying at sea and punish those responsible for causing these deaths.<sup>35</sup> Failure to commence investigations into alleged human rights violations constitutes an internationally wrongful act imputing Greece with international responsibility. It is argued that the EU's sophisticated surveillance combined with the illicit Greek push-back practices have turned the Mediterranean Sea into a graveyard. The probability of dying in the Mediterranean Sea in 2005-2014 has been increased from 20.5% to at least 45% in the first four months of 2015.<sup>36</sup> In 2016, the probability of dying on the Libya to Italy route was ten times higher than the crossing from Turkey to Greece.<sup>37</sup> Thus, these extraterritorial tools have endangered irregular migrants' lives contrary to the 'right of life'.<sup>38</sup>

Furthermore, these extraterritorial border control measures have given rise to various legal issues with serious consequences for international provisions on search and rescue and the Law of the Sea. Anja Klug has analysed irregular maritime movements arguing that they 'pose multi-faceted challenges relating to

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Treaty Series, Volume 450, 11 (entered into force on 30 September 1962) article 12; International Convention for the Safety of Life at Sea, 1974 (SOLAS) 1184 UNTS 3, article 33; International Maritime Organization, *International Convention on Salvage*, 28 April 1989, UNT 33479 (entry into force 14 July 1996), article 7; UN General Assembly, *Convention on the Law of the Sea* (UNCLOS) UNTS 31363 (adopted 10 December 1982, entered into force in 1994) article 98; *Osman v United Kingdom* Application no 23452/94 (1998) ECHR 101, paragraph 115; Van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> edn Antwerp, Intersentia 2006) 355.

<sup>34</sup> *Öneryildiz v Turkey* Application no 48939/99 [2004] ECHR 657, paragraphs 62-65; *Osman* (n 33) paragraph 93.

<sup>35</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (entry into force 4 November 1950) (ECHR), article 2(2) read in conjunction with article 1; *McCann and Others v the United Kingdom* Application no 18984/91 (1995) Series A no 324, paragraph 161; *Kelly and Others v the United Kingdom* Application no 69076/01 (4 May 2001) paragraph 94.

<sup>36</sup> Philippe Fargues and Anna Di Bartolomeo, *Drowned Europe 2015*, European University Institute, Migration Policy Centre, 3.

<sup>37</sup> Refugees and Migrants, 'UN Refugee Agency: 2016 is Deadliest Year for Refugees Crossing to Europe via Central Mediterranean' (2 September 2016) <<https://refugeesmigrants.un.org/un-refugee-agency-2016-deadliest-year-refugees-crossing-europe-central-mediterranean>> accessed 24 October 2017.

<sup>38</sup> See Chapter 4, section 4.3 on push-backs endangering migrants' lives.

refugee protection, border control and security, as well as inter-State relations'.<sup>39</sup> Klug argues that as irregular migrants travel in unseaworthy and overcrowded vessels giving rise to distress situations, a duty to rescue is imposed on intercepting States to disembark them at a 'place of safety'.<sup>40</sup> However, in the absence of an effective burden-sharing mechanism in the EU for irregular migratory flows, disembarkation rules have become problematic because of the Member States' reluctance to accept the responsibility to host irregular migrants whom they rescue. Clearly, the obligations arising out of search and rescue operations conflict with Member States' interests in managing migration and ensuring their security. However, these interests cannot justify or legitimise avoidance behaviour towards rescue activities in the Mediterranean Sea which amount to a violation of the international search and rescue obligations. In accordance with the Common European Asylum system (CEAS)<sup>41</sup> and the Dublin Regulation,<sup>42</sup> those Member States rescuing or hosting the irregular migrants have to bear the burden of reception and ensure that they provide adequate legal safeguards. Consequently, as Violeta Moreno-Lax and Tugba Basaran put it, Member States such as Italy and Greece are discouraged from participating in rescue operations.<sup>43</sup> Moreover, these States have adopted inconsistent interpretations and applications of terms such as 'distress', 'disembarkation' and

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<sup>39</sup> Anja Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing' (2014) *IJRL* 26(1) 48-64.

<sup>40</sup> International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, (SAR Convention) 27 April 1979, 1403 UNTS (entry into force: 22 June 1985), Annex 3, Chapter I, 1.3.2.

<sup>41</sup> The Common European Asylum system (CEAS) harmonises procedural and substantive law on Asylum, based on TFEU, article 78(1).

<sup>42</sup> Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29.6.2013 (Dublin Regulation) based on TFEU, article 78(2)(e), and articles 3, 5, and 18; Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), [2008] OJ L 348/98, article 1, and articles 6 -14; legal basis ex TEC, article 63(3)(b).

<sup>43</sup> Tugba Basaran, 'The Saved and the Drowned: Governing Indifference in the Name of Security' (2015) *SD* 46(3) 205-220, 206; Violeta Moreno-Lax, "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea" (2011) *IJRL* 23(2) 174-220, 175 <<https://academic-oup-com.chain.kent.ac.uk/ijrl/article-lookup/doi/10.1093/ijrl/eer005>> accessed 24 October 2017.

‘place of safety’ in the relevant international Conventions, giving rise to different national approaches to the irregular migration crisis.<sup>44</sup>

However, any inconsistent interpretation of ‘distress’ and ‘place of safety’ is fatal to the most fundamental principle, the ‘right to life’,<sup>45</sup> and inconsistency in relation to ‘disembarkation’ leads to violations of the principle of *non-refoulement* and the prohibition of collective expulsions.<sup>46</sup> Klug argues that a solution to Member State avoidance behaviour on search and rescue would be to establish agreements to respond to irregular maritime movements through a broader ‘Regional Cooperation Framework’ which could adequately respond to maritime distress incidents and rescue at sea, saving the lives of many vulnerable individuals.<sup>47</sup> However, it is argued that this framework would not provide a durable solution to the question on the responsible State as set out by the Dublin Regulation.

Furthermore, this thesis argues that although the SAR Convention and the Sea Borders Regulation have set out clear rules on when to initiate search and rescue, they have not addressed the issue of responsibility for and the consequences of failed rescue scenarios by inactive SAR States; thereby creating a gap in the legal framework on State responsibility for negligent or intentional failed rescues. It is argued here that one possible solution to this legal vacuum would be to impose *de jure* responsibility on the State in which the distress call is made within its SAR zone to actively respond to that call. Seline Trevisanut and Amy Moen argue that people in distress place their lives in the hands of the State receiving the call, imposing an obligation on States not only to perform the SAR service but to provide it with ‘due diligence’ when assuming responsibility for their SAR

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<sup>44</sup> Violeta Moreno-Lax, *The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia* (Policy Brief 4, 2017) 7-8.

<sup>45</sup> ECHR, article 2; Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02 (EU Charter) article 2; ICCPR, article 6; see Chapter 5 for more detail.

<sup>46</sup> Basaran, ‘The Saved and the Drowned’ (n 43) 206-207.

<sup>47</sup> Klug (n 39) 60.

zone.<sup>48</sup> Therefore, at the moment a distress call is made, an ‘exclusive long distance *de facto* control’ is created, creating ‘a relationship’ sufficient to make the ECHR applicable.<sup>49</sup> This *de facto* control becomes *de jure* at the moment that the distress call comes within the SAR zone. This thesis argues that coastal States have a positive obligation to take preventative measures to counter immediate risks to persons in distress who come under their responsibility – leading to recognition of a ‘right to be rescued’.

The EU attempted to offer a solution to these inconsistent national interpretations, through the adoption of the Sea Borders Regulation,<sup>50</sup> where Member States agreed on a uniform interpretation of principles such as rescue, disembarkation and distress combining border control and search and rescue within one Regulation, operational under Frontex’s coordination. Despite human rights safeguards expressly set out within the Regulation, Den Heijer and Basaran argue that in practice the rules do not effectively assist in a uniform interpretation on the terms ‘distress’, ‘disembarkation’, and ‘place of safety’.<sup>51</sup> By way of original contribution, it is argued in this thesis that Greece, the host Member States to *Poseidon* operation,<sup>52</sup> and Italy host Member State to Operation *Triton*,<sup>53</sup> do not

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<sup>48</sup> Amy Moen, ‘For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention’ (2010) 24 OYB 377-410, 386, 389: ‘Article 98(2) represents the imposition of a positive duty, with no clear understanding of its minimum threshold or its outer limit, and no clear indication of the relationship that gives rise to such an obligation. (...) Search and rescue under Article 98(2) then cannot be the mere promotion of a service, but the promotion of a certain level of service.’ Seline Trevisanut, ‘Is There a Right to be Rescued at Sea? A Constructive View’ 2014 <<http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-constructive-view/>> accessed 23 October 2017; see *Furdík v Slovakia* Application no 42994/05 (2 December 2008).

<sup>49</sup> Trevisanut, “Is There a Right to be Rescued” (n 48).

<sup>50</sup> Sea Borders Regulation (n 7) see articles 6-10.

<sup>51</sup> Basaran, ‘The Saved and the Drowned’ (n 43) 206; Maarten den Heijer, ‘Frontex and the Shifting Approaches to Boat Migration in the European Union, A Legal Analysis’ in Ruben Zaiotti (ed), *Externalizing Migration Management: Europe, North America and the Spread of ‘Remote Control’ Practices* (Routledge Research in Place, Space and Politics, 2016) 54; See Chapter 2, section 2.8.

<sup>52</sup> Frontex, *Poseidon* Sea, since 2014 <<http://frontex.europa.eu/operations/archive-of-operations/Lq8P8c>> accessed 27 October 2017; replaced by *Poseidon Rapid Intervention* from 28 December 2016, Frontex, “Frontex and Greece Agree on Operational Plan for *Poseidon* Rapid Intervention” (17 December 2015) <<http://frontex.europa.eu/news/frontex-and-greece-agree-on-operational-plan-for-poseidon-rapid-intervention-yiSxga>> accessed 27 October 2017.



fulfil the ‘safe country’ criteria governing disembarkation.<sup>54</sup> The Sea Border Regulation does not offer an alternative course of action in circumstances when the host/coastal Member State do not guarantee an effective functional asylum system. It is argued therefore that the provisions on interception and disembarkation under the Sea Borders Regulation violate EU and international obligations.

Guy Goodwin-Gill, Maarten Den Heijer, Daniel Bethlehem and Elihu Lauterpracht are among the leading scholars analysing the effects of extraterritorial border control on asylum, the *non-refoulement* principle and the prohibition of collective expulsions.<sup>55</sup> Despite the claims of Member States that international refugee and human rights laws apply only territorially, Den Heijer, Goodwin-Gill and Kim Seunghwan argue that the application of the *non-refoulement* obligation extends beyond State territory.<sup>56</sup> Thus, any conduct applied extraterritorially that violates refugee and other international human right laws and obligations such as *non-refoulement* makes States internationally responsible for those acts just as they would be if the same conduct had been applied within their territory. Den Heijer’s argument, supported by ECtHR case

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<sup>53</sup> Frontex, ‘Frontex Launches Joint Operation *Triton*’ 1 November 2014, <<http://frontex.europa.eu/news/frontex-launches-joint-operation-triton-JSYpL7> accessed 27 October 2017; Operation *Triton* continues to date, see Frontex, ‘Frontex and Italy Hold First Meeting of Working Group on Operation *Triton*’ 24 July 2017 <<http://frontex.europa.eu/news/frontex-and-italy-hold-first-meeting-of-working-group-on-operation-triton-uwfr9p>> accessed 27 October 2017.

<sup>54</sup> See Chapters 3-5.

<sup>55</sup> Guy Goodwin-Gill, ‘*Non-Refoulement*’ (2011) IJRL 23(3) 443-457; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Oxford, 2012); also see Maarten Den Heijer, ‘Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Immigration and Asylum Law and Policy in Europe, 2010) 163-194; Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of *Non Refoulement: Opinion*,’, in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) paragraphs 76-86

<sup>56</sup> *ibid*; Kim Seunghwan, ‘*Non-Refoulement* and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context’ (2017) LJIL (30) 49-70, 50.

law,<sup>57</sup> concludes that overarching norms such as the prohibition of *refoulement* are equally applicable to irregular migrants subjected to pre-border control measures.<sup>58</sup>

From an international human rights law perspective, Lauterpacht and Bethlehem argue that the prohibition of *refoulement* is a ‘fundamental component of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment’.<sup>59</sup> The principle of *non-refoulement* applies regardless of the status or conduct of the individual at risk.<sup>60</sup> They further argue that what is material is not the form of return by the State, but rather the effect of the measure which would put the individual at risk if returned to a place where s/he would be exposed to ‘the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or *refoulement*’.<sup>61</sup> In terms of its application, the principle of *non-refoulement* would apply as long as the individual comes under the effective control of the State, whether this occurs within a State’s territory or elsewhere.<sup>62</sup>

Borelli and Stanford confirm that despite the ECtHR’s ruling in *Hirsi* in February 2012,<sup>63</sup> Member States with the assistance of Frontex are conducting interception and indiscriminate return practices against irregular migrants’ vessels as

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<sup>57</sup> Kees Wouters and Martin den Heijer, ‘The Marine I Case: a Comment’ (2010) 22 IJRL 1, 1-19, 1 ‘the *Hirsi* judgment established a beacon for migrants’ rights at sea when confronted with State interception measures.’; *Hirsi Jamaa and Others v Italy* Application no 27765/09 ECHR 2012, paragraph 135.

<sup>58</sup> Den Heijer, ‘Europe Beyond its Borders’ (n 55) 163-194.

<sup>59</sup> Lauterpacht and Bethlehem (n 55) paragraph 221 (b); CAT, article 3; ECHR, article 3; *Soering v UK* Application no 14038/88 Series A no 161, paragraph 88; *Chahal v the United Kingdom* Application no 45276/99 ECHR 2001-II, paragraph 75; ICCPR, article 7. See also Human Rights Committee, *General Comment No. 20* (1992) HRI/HEN/1/Rev.1, 28 July 1994, paragraph 9.

<sup>60</sup> Lauterpacht and Bethlehem (n 55) paragraph 239; CAT, article 3; ICCPR, article 7; General Comment No. 20, paragraph 2; ECHR, article 3; *Chahal* (n 59) paragraph 74.

<sup>61</sup> Lauterpacht and Bethlehem (n 55) paragraph 241. General Comment No. 20, paragraph 9.

<sup>62</sup> Lauterpacht and Bethlehem (n 55) paragraph 242.

<sup>63</sup> *Hirsi* (n 57).

demonstrations of austerity, nationalism and xenophobic feelings.<sup>64</sup> Mariagiulia Giuffré and Seline Trevisanut have argued that Italy and Greece have exercised coercive push-back practices directing vessels out of the contiguous zone, onto the high seas, in the belief that no responsibility rests on States beyond the territorial sea.<sup>65</sup> Other scholars such as Silvia Borelli and Ben Stanford have addressed the practice of ‘push-backs’ under the auspices of Frontex.<sup>66</sup> They argue that forced returns to the country of departure raise serious issues from the perspective of international human rights law, supporting the extraterritorial applicability of the prohibition of *refoulement*.<sup>67</sup> According to Den Heijer, the main objective of extraterritorial border control is to shift the geographical borders of the EU to other countries, so that would-be asylum seekers ‘experience a foreign border while still within their country of origin’.<sup>68</sup>

This thesis contributes to literature by arguing that this ‘foreign border’ constitutes a form of a pull-back which is in effect an indirect push-back practice in disguise, condemned by the ECtHR in *Hirsi*.<sup>69</sup> Preventing would-be asylum seekers from leaving a State’s territorial waters (pull-back) is incompatible with the *bona fide* principle, as Member States are obliged to provide international

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<sup>64</sup> Silvia Borelli and Ben Stanford, ‘Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights’ (2014)10 RILP, 26-69, 64-65.

<sup>65</sup> Mariagiulia Giuffré, ‘State Responsibility beyond Borders: What Legal Basis for Italy’s Push-Backs to Libya?’ (2012) IJRL 24(4); Mariagiulia Giuffré, ‘Watered-Down Rights on the High Seas: *Hirsi Jamma and Others v Italy* (2012)’ (2012) ICLQ 61(3) 728-750; Seline Trevisanut, ‘The Principle of *Non-Refoulement* and the De-Territorialization of Border Control at Sea’ (2014) 27 LJIL 661-675, 663; See Chapter 2, section 2.3.2; also see Richard Barnes, ‘The International Law of the Sea and Migration Control’ in Ryan Bernard and Mitsilegas Valsamis (eds), *Extraterritorial Immigration Control* (2014, Leiden: Brill) 127.

<sup>66</sup> Borelli and Stanford (n 64) 46.

<sup>67</sup> Borelli and Stanford (n 64) 45.

<sup>68</sup> Wouters and den Heijer (57) 4.

<sup>69</sup> *Hirsi* (n 57) paragraph 137; *Amuur v France* Application no 19776/92 EHRR 1996-III, paragraph 52 in which the ECtHR confirmed that *refoulement* may occur within the territory of a State, at its borders, or outside its territory; Cf. *Sale v Haitian Council Centre* 509 US 155 (1993), where the US Supreme Court held that all undocumented migrants who were not refugees would be returned back as long as they did not reach United States territory. See also the decision of the Australian Federal Court in *Ruddock v Vadarlis* [2001] FCA 1329 – 110 FCR 491 (known as the *Tampa* Case), at paragraph 127, finding the government’s prerogative power to prevent the entry of non-citizens into Australia central to Australia’s sovereignty.

protection against persecution or other forms of ill-treatment in the State of departure.<sup>70</sup> Assisting the State of departure to prevent would-be asylum seekers from leaving its territorial waters is a violation of the ‘right to leave one’s own country’ and the ‘right to seek asylum’.<sup>71</sup> Through EUBAM, it is argued that Italy with EU assistance is conducting indirect push-back practices, forcing would-be asylum seekers to stay to the ‘frontiers of territories’ where they may be subjected to ill-treatment. By way of an original contribution to literature it is argued in this thesis that the Refugee Convention and the ECHR provisions are inadequate and unable to offer protection to persons in need of international protection against extraterritorial State practice in the field of international cooperation in migration control within the framework of transnational organized crime.<sup>72</sup> It is argued that through EUBAM Libya, the EU and Italy conduct indirect push-back practices contrary to the *non-refoulement* principle. EUBAM Libya is argued to constitute an EU and Italian strategy to evade international responsibility for would-be asylum seekers.

This research has identified the regulatory shortcomings created by the provisions of Article 33 of the Refugee Convention and Article 3 ECHR which are argued not to offer sufficient international protection against State and international organizations’ international cooperation practices.<sup>73</sup> For Article Article 33 of the Refugee Convention and Article 3 ECHR to apply, to be recognised as a refugee

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<sup>70</sup> UNHCR’s amicus curiae brief, reprinted in 17 IJRL (2005) 427.

<sup>71</sup> UDHR, article 14(1) ‘right to asylum’; UN General Assembly, *Convention Relating to the Status of Refugees* (Refugee Convention) 28 July 1951, United Nations, Treaty Series, Volume 189, 137 (adopted 28 July 1951, entered into force 22 April 1954), article 1A(1) and article 33; ECHR, article 3; on the ‘right to leave one’s own country’ see UDHR, article 13; Protocol No 4 to the ECHR, article 2; Council of Europe, Commissioner for Human Rights, *The Right to Leave a Country*, Issue Paper 15 August 2013, 5; Guy Goodwin-Gill, ‘The Right to Leave, the Right to Return and the Question of the Right to Remain,’ in Vera Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (The Hague: Kluwer, 1996) 96; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford, 3<sup>rd</sup> edition, 2007) 383.

<sup>72</sup> UN Convention against Transnational Organised Crime 2000 and its Protocols, Resolution A/RES/55/25 of 15 November 2000 (New York, 15 November 2000) UNTS 12, Volume 2225, 209.

<sup>73</sup> Also see EU Charter, article 19(2).

and to be offered international protection the person must be ‘outside the territory of his/her country of nationality or habitual residence’<sup>74</sup> or fall within a State’s extraterritorial jurisdiction. However, to hold Italy and the EU accountable for their assistance to Libya through EUBAM in violation of the ‘right to asylum’ and the *non-refoulement* principle, a causal link must be established between the conduct of Italy and the EU and that of the refugees being forced to stay within Libyan territory.<sup>75</sup> Training programs and financial assistance offered to Libyan authorities for the purpose of intercepting and pulling-back would-be asylum seekers are insufficient to satisfy the test of ‘effective control’ over Libyan territory or over persons as provided by the ECtHR in its case law.<sup>76</sup> Thus, these two conventions become non-applicable in cases of indirect breaches by States or international organizations to the ‘right to asylum’ and the *non-refoulement* principle.

It is argued in this thesis that the essence of international law does not allow a State to avoid its international responsibilities by assisting third countries to breach their international obligations in the context of cooperation in migration control. The law of international responsibility provides for Italy or the EU to acquire a derived responsibility if it is found that through their financial and know-how assistance to Libya, they are in effect conducting indirect push-back practices, as prohibited by the ECtHR in *Hirsi* in violation to the *non-refoulement* principle.<sup>77</sup> These indirect push-back practices constitute internationally wrongful acts which raise the legal responsibility of Italy and the EU for violations of international obligations in light of Article 16 ASR and Article 14 ARIO respectively.

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<sup>74</sup> Refugee Convention, article 1A(2); *European Roma Rights Centre and Others v Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2003] EWCA Civ 666, paragraph 31; Also see UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, (Geneva, December 2011) paragraph 88.

<sup>75</sup> UNHCR, *Conclusions adopted by the Executive Committee on the International Protection of Refugees No 22 (XXXII)* 1981, A/36/12/Add.1, paragraph II(A)(2).

<sup>76</sup> *Bankovic and Others v Belgium* Application no 52207/99 ECHR 2001-XII, paragraph 73.

<sup>77</sup> *Hirsi* (n 57) paragraph 137.

In relation to Frontex, scholars such as Luisa Marin, Barbara Miltner, Sergio Carrera, Leonhard den Hertog and Joanna Parkin have focused on the inadequacy of Frontex's mandate to address human rights violations occurring in its operational area for joint operations at sea and its incompatibility with the EU's international obligations.<sup>78</sup> Katja Franko Aas and Helene Gundhus have criticized Frontex's mandate for adopting a 'peculiar co-existence of the securitization of the border and the growing presence and prominence of human rights and humanitarian ideals in border policing practices', considering paradoxical the self-representation of EU humanitarianism and solidarity through Frontex in border management.<sup>79</sup> Aas and Gundhus question how Frontex, signifying the militarisation of EU borders, represents humanitarian ideals and safeguards fundamental rights, especially the 'right to life', 'right to an effective remedy' and protection against return to a place of ill-treatment, persecution and torture (the principle of *non-refoulement*).<sup>80</sup> Similarly, Polly Pallister-Wilkins argues that Frontex's language of humanitarianism is merely a disguise for the EU and Member States' true intention to militarise external borders in the name of 'humanitarianism borderland'; an incoherence between border policing (restricting rights *per se*) and respect for irregular migrants' rights.<sup>81</sup> Melanie Fink, one of the few researchers examining the 'legal accountability for human rights in the management of external borders in Europe', has approached Frontex's extraterritorial practices from the perspective of cooperation. She argues that the involvement of multi-actors dilutes responsibility amongst those

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<sup>78</sup> Marin, 'Policing EU's External Borders' (n 3) 480; Sergio Carrera, Leonhard den Hertog, Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' (2013) EJML 15(4) 341–342; Sergio Carrera and Leonhard den Hertog, *Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean* CEPS Paper, 2015, 6; Barbara Miltner, 'The Mediterranean Migration Crisis: A Clash of the Titans' Obligations?' (2015) BJWA 22(1) 213-237, 215.

<sup>79</sup> Katja Franko Aas and Helene Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life' (2015) BJC 55(1) 1-18, 1.

<sup>80</sup> Aas and Gundhus (n 79) 1, 10.

<sup>81</sup> Polly Pallister-Wilkins, 'The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros' (2015) *International Political Sociology* 9, 53–69, 63.

involved, allowing the main actor ‘to act as single cogs in the whole operation’ whilst others bear responsibility.<sup>82</sup>

This thesis further contributes to literature by arguing that Frontex deployment in the Mediterranean and Aegean seas is not just a tool to assist Italy and Greece in managing their external borders but a strategic tool to circumvent the international responsibility of Member States and the EU. In joint operations, it becomes difficult to pinpoint a specific actor, thus the buck of responsibility may be shifted from one actor to another. The host Member State considers Frontex to have the control of the operation and the responsible entity for wrongful conduct occurring within the operational area.<sup>83</sup> Whereas Frontex, rejects any responsibility arguing that its *de jure* mandate does not give it competence to take the leading role in joint operations. The aim of these actors is not to create an internal conflict on who actually has effective control over the operational area, but to devise a strategy to create a gap in attribution of accountability in which the Member States and the EU may circumvent their international responsibilities although in violation of international obligations. Roberta Mungianu has navigated through the structure of Frontex and its working methods to address the theoretical and practical questions on whether EU responsibility could be triggered by violations occurring in Frontex’s joint operations.<sup>84</sup> In her examination of the EU’s responsibility under the scrutiny of EU and international law, focusing mainly on the principle of *non-refoulement*, Mungianu’s analysis does not establish responsibility to the EU for the conduct of seconded border guards participating in joint operations.<sup>85</sup> In her assessment of the rules of attribution under Article 4 and 7 ARIO, the host Member State not Frontex has ‘effective control’ over the conduct of the border guards. Thus, Mungianu argues that the conduct of the

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<sup>82</sup> Melanie Fink, “Nobody’s Fault? Legal Accountability for Human Rights Violations, Frontex-Coordinated Joint Operations” <<http://stipendien.oeaw.ac.at/sites/default/files/poster.pdf>> accessed 22 October 2017.

<sup>83</sup> *ibid.*

<sup>84</sup> Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press, 2016).

<sup>85</sup> *ibid.*, 87.

seconded border guards is attributed to the host Member State. This thesis rejects Mungianu's argument that Frontex does not have 'effective control' over the conduct of seconded border guards. The Frontex Executive Director draws up and dictates the conditions of cooperation between Frontex and the participating Member States, and sets out through its operational plan the provisions on command and team compositions which Greece must agree and implement.<sup>86</sup> On the ground, Greece has the obligation to issue instructions to the seconded border guards upon a reproduction of a decision taken at EU level. Thus, Frontex is argued to be the *de facto* controller in command of Frontex joint operations. By way of an original contribution, the wrongful conduct of border guards placed under Frontex's disposal is attributed to the EU in the light of Articles 4 and 7 ARIO.

This thesis differs from existing literatures which have assessed the international legal responsibility of international organisations such as the EU in light of ARIO mainly because they have been focused on the shared responsibility of the EU and its Member States in the context of the EU's Crisis Management Missions involving Member State military.<sup>87</sup> Scarlet McArdle's thesis is based upon a critique of ARIO to accommodate the complex nature of the EU arguing that these articles leave the EU's actions outside the law of responsibility.<sup>88</sup> McArdle

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<sup>86</sup> Regulation (EU) 1168/2011 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 Regulation) [2011] OJ L304/1, article 3a(1) - as repealed by EBCG Regulation amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, article 15(2-3); also see EBCG Regulation (n 1) article 16; Sergio Carrera, *The EU Border Management Strategy: Frontex and the Challenges of Irregular Migration in the Canary Islands* CEPS Working Document No 261, March 2007, 14; emphasis added.

<sup>87</sup> Malcolm Evans and Panos Koutrakos, *The International Responsibility of the European Union, European and International Perspectives* (Bloomsbury Collections, 2013); Scarlett McArdle (2014) *The International Responsibility of the European Union: a Critique of the International Law Commission's Articles on the Responsibility of International Organisations* (PhD thesis, University of Sheffield); Andrés Casteleiro, *The International Responsibility of the European Union, From Competence to Normative Control* (Cambridge Studies in European Law and Policy, 2016).

<sup>88</sup> McArdle (n 87) 21.



further argues that the international law system of responsibility is ill equipped to address the supranational character of the EU despite its international identity.<sup>89</sup> McArdle, Andre Nollkaemper, Dov Jacobs, and Roberta Mungianu identified the limitations of ASR and ARIO to have originated because of the establishment of responsibility as a singular principle requiring blame to be allocated to a specific responsible actor.<sup>90</sup> These legal scholars have found this approach to be out-dated and no longer reflecting the changes of international action in the field of multilateral cooperation. In light of the changing nature of international action involving a complex and high degree of interdependence in collective action, Andre Nollkaemper and Dov Jacobs have addressed the possibility of shared responsibility in international law.<sup>91</sup> They argue that the principles of international law as they now stand do not provide clear guidance as to whether the increased situations of multiple actors involved in the same wrongful act may give rise to situations of shared responsibility.<sup>92</sup> The above mentioned legal scholars have attempted to identify gaps in the international legal framework to cases of shared responsibility and have provided a new perspective to allocating shared international responsibility in cases involving multi actors.

To date, the EU's shared responsibility has been addressed by way of example of the EU's crisis management missions when implementing UN Security Council Resolutions in which Member States had to second personnel. Ramses Wessel and Aurel Sari have studied the division of international responsibility between the EU and its Member States in the area of foreign, security and defence policy (CFSP and CSDP).<sup>93</sup> Although Wessel and Sari touch upon the possible

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<sup>89</sup> McArdle (n 87) 22.

<sup>90</sup> André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A conceptual Framework' (2013) 34 MJIL 359, 363; Mungianu (n 84) 53, 69; McArdle (n 87) 141.

<sup>91</sup> Nollkaemper and Jacobs (n 90) 363.

<sup>92</sup> Nollkaemper and Jacobs (n 90) 363; McArdle (n 87) 234-235.

<sup>93</sup> Ramses Wessel, *Division of International Responsibility between the EU and its Member States in the Area of Foreign, Security and Defence Policy* (2011) ALF, 36; Aurel Sari and Ramses Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in Bart van Vooren, Steven Blockmans and Jan Wouters (eds), *the EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2012) 4.

international responsibility of the EU in relation to the area of CFSP and CSDF in light of the ARIO, the main focus of their investigation was the unclear division of who acts under the CFSP and CSDF and who then maintains international responsibility.<sup>94</sup> However, confronted with the unitary system of fault allocation, these new conceptual frameworks on shared responsibility still require a better formulation to receive assertion by judicial or arbitral decisions that responsibility can be shared.<sup>95</sup> As a solution to finding the EU internationally responsible for the acts of its institutions, agencies or Member States existing literature have focused on developing the concept on shared responsibility. However, jurisdictional limitations and the lack of scholarly literature making reference to situations or consequences of shared responsibility have kept the law on shared responsibility undeveloped. At the same time, they have created assumptions that the complexity of the EU legal framework prevents international courts from finding the EU internationally responsible for the acts of its institutions, agency or Member States in light of Article 4 and 7 ARIO. This thesis contributes to literature by rebutting these assumptions.

The present research has based its argument on the ILC commentaries and on the research of Francesco Messineo's on Article 7 ARIO.<sup>96</sup> Messineo has questioned whether international law allowed within its scope the possibility to have multiple attributions, i.e. the internationally wrongful act would be attributed to more than one actor at once or whether it accommodated only one possibility, that of exclusive attribution where only one actor may be found responsible at a time. Messineo argues that ASR and ARIO do recognise the possibility of multiple attribution of conduct and there is no reason why one or more States or international organizations cannot be attributed a given conduct at the same time. He argues that in such cases of international cooperation multiple attributions are

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<sup>94</sup> *ibid.*

<sup>95</sup> Nollkaemper and Jacobs (n 90) 364.

<sup>96</sup> Francesco Messineo, "Multiple Attribution of Conduct" SHARES Research Paper No. 2012-11, <[www.sharesproject.nl/wp-content/uploads/2012/10/Messineo-Multiple-Attribution-of-Conduct-2012-111.pdf](http://www.sharesproject.nl/wp-content/uploads/2012/10/Messineo-Multiple-Attribution-of-Conduct-2012-111.pdf)> accessed 15 October 2017.

the default position. However, Messineo argues that Article 7 ARIO is an exception to the principle of multiple attributions.<sup>97</sup> The ILC commentaries have clearly emphasised that in those circumstances when an organ of a State is placed at the disposal of another State, there must still be a determination on who maintains responsibility for the wrong occurred.<sup>98</sup> Hence, the possibility of a shared responsibility is excluded. Thus, in relation to Frontex joint operations, this thesis has assessed the EU's international responsibility from the perspective of an exclusive attribution derived from the conduct of Frontex, as opposed to a shared responsibility perspective as addressed by the above mentioned scholars.

It is argued in existing literature that the complexity of the EU legal framework prevents the EU from an attribution of international responsibility for its extraterritorial policies and actions. By way of an original contribution, this thesis will argue that an allocation of the EU's responsibility is possible under Article 17 ARIO, designed to cover precisely situations where the EU takes advantage of its legal framework and the separate personality of its Member States to circumvent its international obligations. This thesis is believed to be among the first to analyse Article 17 ARIO in light of Frontex joint operations, let alone assess its application in terms of the EU-Turkey statement (concluded on 18 March 2016 and entered into force on 20 March 2016) and the Sea Borders Regulation.<sup>99</sup> To date, scholars have addressed their research on the EU-Turkey statement in the

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<sup>97</sup> *ibid*, 44.

<sup>98</sup> Commentary to Draft Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011 (ARIO Commentary) Volume II, Part Two, see Chapter II 'Attribution of conduct to an international organization' Articles on the Responsibility of International Organizations, article 7, paragraph 4; Also see Third Report on State Responsibility by Roberto Ago, Special Rapporteur (UN Doc A/CN.4/246 and Add.1-3 (F)) ILC Yearbook 1971, Volume II(1), 199, paragraphs 201-206.

<sup>99</sup> EU Council, 'EU-Turkey Statement, 18 March 2016' (Press Release 144/16) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> accessed 25 October 2017; Agreement between the European Union and the Republic of Turkey on the re-admission of persons residing without authorization (EU-Turkey re-admission Agreement) OJ L134/3, 7 May 2014 (date of effect 1 October 2014, entry into force on 1 June 2016).

form of blogs,<sup>100</sup> forums,<sup>101</sup> magazine articles<sup>102</sup> and working papers.<sup>103</sup> NGOs have been the fiercest critics of the EU-Turkey statement, claiming that Turkey cannot be considered a ‘safe third country’.<sup>104</sup> Furthermore, the Sea Borders Regulation has been criticised by scholars such as Maarten den Heijer and Luisa Marin not to conform to general principles of EU and international law.<sup>105</sup> However, this research is amongst the first that assesses the EU-Turkey statement, and the Sea Borders Regulation in light of Article 17 ARIO, argued to have been adopted as tools of circumvention for EU responsibility under international law by compelling the Member States to commit an act that would be internationally wrongful if committed by the EU.<sup>106</sup>

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<sup>100</sup> Jean-Baptiste Farcy, “EU-Turkey Agreement: Solving the EU Asylum Crisis or Creating a New Calais in Bodrum?” (7 December 2015, EMLB) <<http://www.gdr-elsj.eu/wp-content/uploads/2016/03/EU-Immigration-and-Asylum-Law-and-Polic...eating-a-new-Calais-in-Bodrum-%C2%BB-Print.pdf>> accessed 25 October 2017.

<sup>101</sup> Nilgun Eralp, ‘Challenges of the German-Led Refugee Deal between Turkey and the EU’ (2016) CESifo Forum 17(2) 21.

<sup>102</sup> Sevda Tunaboylu and Jill Alpes, ‘The EU-Turkey Deal: What Happens to People Who Return to Turkey?’ (2017) FMR 54, 84.

<sup>103</sup> Ilke Toygür and Bianca Benvenuti, *One Year on: An Assessment of the EU-Turkey Statement on Refugees* (2017) IA Working Papers 17.

<sup>104</sup> Emanuela Roman, Theodore Baird and Talia Radcliffe, “Statewatch Analysis Why Turkey is Not a ‘Safe Country’” (Statewatch Analysis, No 4/16, February 2016) <<http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>> accessed 25 October 2017; Kenneth Roth, Salil Shetty and Catherine Woollard, “Say No to a Bad Deal with Turkey” (HRW, 17 March 2016) <<https://www.hrw.org/node/287722>> accessed 26 October 2017; Bill Frelick, “Is Turkey Safe for Refugees” (Policy Review, March 2016) <<https://www.hrw.org/news/2016/03/22/turkey-safe-refugees>> accessed 25 October 2017; Orçun Ulusoy, “Turkey as a Safe Third Country?” (Border Criminologies, 26 March 2016) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>> accessed 25 October 2017; UNHCR, “Legal Considerations on the Return of Asylum-Seekers and Refugees from Greece to Turkey As Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept” 23 March 2016, 5 <<http://data2.unhcr.org/en/documents/details/47237>> accessed 25 October 2017; Amnesty International, “Turkey: No Safe Refuge: Asylum-seekers and Refugees Denied Effective Protection in Turkey” 3 June 2016, 15 <<https://www.amnesty.org/en/documents/eur44/3825/2016/en>> accessed 25 October 2017; Ahmet İçduygu and Evin Millet, *Syrian Refugees in Turkey: Insecure Lives in an Environment of Pseudo-Integration* Global Turkey in Europe Working Papers, No 13, August 2016, 5-6 <<http://www.iai.it/en/node/6690>> accessed 27 October 2017.

<sup>105</sup> Luisa Marin, ‘Policing the EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border’ (2014) J CER Volume 7, Issue 4; Den Heijer, ‘Frontex and the Shifting Approaches’ (n 51).

<sup>106</sup> ARIO, article 17.

In addition, this thesis will be amongst the first to challenge the legal nature of the EU-Turkey statement in the light of recent Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council*, in which the General Court of the European Union (GCEU) concluded that the statement was not an act of an institution of the EU, hence excluding the Court's jurisdiction under Article 263 TFEU.<sup>107</sup> The statement is argued in this thesis to constitute in effect an international agreement not with the Members of the EU Council but between Turkey and the EU. The actual objective of the EU-Turkey statement is argued to have been a strategy by the EU and its Member States to bind its partner third countries to comply with their political obligations under the auspices of existing obligations with the EU and in the same time avoid any responsibility for the EU for violations of international obligations committed as a result of the statement's implementation.<sup>108</sup> However, in light of Article 17 ARIIO, this thesis argues that the EU institutions may not use the EU legal framework to avoid international responsibility for violations conducted by the Member States under EU decisions and authorizations.

### **1.3 Methodology and Ethical Issues**

This study is based on doctrinal legal research through a law in context analysis referring to primary legal sources such as the 1951 Refugee Convention (Refugee Convention), the Convention against Torture (CAT Convention), the International Covenant on Civil and Political Rights (ICCPR), United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), the International Convention for the Safety of Life at Sea 1974 (SOLAS Convention), the International Convention on Maritime Search and Rescue 1979 (SAR Convention), the International Convention on Salvage 1989, the UN Convention against Transnational Organized Crime 2000, the European Convention on Human Rights (ECHR), the

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<sup>107</sup> (28 February 2017) ECLI:EU:T:2017:128.

<sup>108</sup> See Chapter 6 for further analysis.

Treaty of the EU (TEU) and the Treaty on the Functioning of the EU (TFEU),<sup>109</sup> the EU Charter of Fundamental Rights (EU Charter). It also draws on international agreements concluded by the EU and Turkey such as the EU-Turkey readmission agreement, the EU-Turkey statement and the bilateral readmission agreements concluded by Italy with Libya and Sudan and Greece with Turkey. The following EU secondary legislations are addressed: the Dublin Regulation, the revised Eurodac Regulation, the recast Asylum Procedures Directive, the recast Reception Conditions Directive, the revised Qualification Directive and the Return Directive. In terms of IHRL, although the CAT and the ICCPR are discussed briefly in various places, the primary focus of this thesis is on the ECHR.

In addition, the thesis draws upon decisions of international and regional courts such as the International Court of Justice (ICJ), International Tribunal of the Law of the Sea (ITLOS), the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) and national courts of Italy and Greece, referring when relevant to other Member State court decisions. In relation to statistical data, the thesis draws upon the data provided by Eurostat, Frontex and the European Union Agency for Fundamental Rights (FRA). The reports of international monitoring bodies of the UN, Council of Europe and the EU are drawn on, such as the Office of the United Nations High Commissioner for Refugees (OHCHR), the European Committee for the Prevention of Torture and the Commissioner for Human Rights, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, FRA reports, and the Commissions progress reports and press release on state of play. In relation to secondary sources the thesis has examined scholarly literature, notably journal articles and monographs as well as reports from international and regional NGOs.

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<sup>109</sup> Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2012/C 326/01.

Due to the nature of the irregular migration crisis, assessing Member States' and Frontex's compliance with fundamental rights during joint operations at sea becomes difficult especially as there is no official Member State or EU statistics as to compliance of international obligations on the ground. Member States claim to be fully compliant with applicable EU and international legal frameworks. Therefore, the slightest infringement reported by non-legal sources such as NGO reports, activist accounts, and the news on the media signal violations of international obligations. Thus, in the absence of official Member States' data and statistics, to demonstrate push-back practices in interception and search and rescue operations this thesis bases its analysis on reports published by NGOs such as Pro Asyl,<sup>110</sup> HRW,<sup>111</sup> Amnesty International,<sup>112</sup> Migreurop<sup>113</sup> and Watch the Med<sup>114</sup> which have confirmed through testimonies of irregular migrants. These reports have gained authority by the fact that the ECtHR relied on similar reports in *MSS*, *Hirsi*, *Sharifi*, and recently in *Khlaifia* when it held that Greece and Italy were in violation of Article 3 ECHR.<sup>115</sup> Furthermore, the ECtHR held in its

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<sup>110</sup> Pro Asyl, "Pushed-back: Systematic Human Rights Violations Against Refugees in the Aegean Sea and at the Greek-Turkish Borders" November 2013, 27 <<https://www.proasyl.de/en/material/pushed-back-systematic-human-rights-violations-against-refugees-in-the-aegean-sea-and-the-greek-turkish-land-border/>> accessed 26 October 2017.

<sup>111</sup> HRW, "Greece: Investigate Push-backs, Summary Expulsions" 30 January 2014 <<https://www.hrw.org/news/2014/01/30/greece-investigate-pushbacks-summary-expulsions>> accessed 26 October 2017.

<sup>112</sup> Amnesty International, "Greece: Frontier of Hope and Fear: Migrants and Refugees Pushed Back at Europe's Border" 19 April 2014 <<https://www.amnesty.org/en/documents/EUR25/004/2014/en/>> accessed 25 October 2017; Amnesty International, "The Human Cost of Fortress Europe, Human Rights Violations against Migrants and Refugees at Europe's Borders" (July 2014) 20 <<https://www.amnesty.ch/de/themen/asyl-und-migration/festung-europa/dok/2015/die-kampagne-sos-europa/bericht-the-human-cost-of-fortress-Europe>> accessed 25 October 2017.

<sup>113</sup> FIDH, Migreurop, EMHRN, "Frontex between Greece and Turkey: at the Border of Denial" 17 July 2014, 29 <<https://www.frontexit.org/en/docs/49-frontexbetween-greece-and-turkey-the-border-of-denial/file>> accessed 25 October 2017.

<sup>114</sup> Watch the Med, Alarm Phone Press Release (5<sup>th</sup> of August 2015) <<http://www.watchthemed.net/index.php/page/index/18>> accessed 25 October 2017.

<sup>115</sup> *MSS v Belgium and Greece* Application no 30696/09 ECHR 2011, paragraphs 348-349; *Hirsi* (n 57) paragraphs 35-36, 37-39, 40-41, 125; *Sharifi v Italy and Greece* Application no 16643/09 (21 October 2014) paragraph 102; and recently in *Khlaifia and Others v Italy* Application no 16483/12 (1 September 2015) paragraph 197, referring to PACE Ad Hoc Sub-Committee and Amnesty International; other reports used by the court, see Report of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading

recently decided case of *Sakir* that the Greek authorities were at fault for failing to consider the reports of various NGOs and other Greek institutions as relevant to the investigation.<sup>116</sup> The same sources are now relied upon here to demonstrate that push-backs are systematically occurring on the Eastern Mediterranean route (Greece to Turkey). Apart from NGO reports, Frontex reports are used as confirmation that Greece is allegedly involved in collective expulsions from Greek territorial waters and/or on the high seas to Turkey.<sup>117</sup> In 2013, Frontex confirmed that it had received eighteen reports by Frontex officers alleging informal forced returns in the form of push-backs in groups.<sup>118</sup>

In this thesis it is argued that at the time the Mediterranean Sea has been subject to closest surveillance, the highest number of people have been reported dead or disappeared at sea.<sup>119</sup> Although it is recognised that some of these deaths were a direct result of the inherent dangers of the seas and the un-seaworthiness of vessels, others have been due to the determination of the EU and its Member States to seal their external borders.<sup>120</sup> Conducting legal research on the cause and magnitude of deaths and disappearances in the context of irregular migration by sea has its difficulties. The first difficulties arise with accurately counting and registering the number of deaths resulting during border crossings. The irregular migration crisis in itself occurs in hiding, unattended, away from the public eye,

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treatment or Punishment (CPT) visit on Italy from 27 to 31 July 2009, 28 April 2010, CPT/Inf (2010); HRW, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' 21 September 2009 <<https://www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers>> accessed 26 October 2017.

<sup>116</sup> *Sakir v Greece* Application no 48475/09 (24 March 2016) paragraphs 70-72.

<sup>117</sup> Amnesty International, 'Frontier Europe: Human Rights Abuses on Greece's Border with Turkey' 9 July 2013, 9.

<sup>118</sup> *ibid.*

<sup>119</sup> ECRE Interview with Tineke Strik (9.12.2011), member of the PACE: its Migration Committee is currently investigating on 2011 accidents in the Mediterranean. The interview is available at <<http://migrantsatsea.wordpress.com/2011/12/12/ecre-interview-with-tineke-strik-regardingpace-investigation-into-migrants-deaths-in-mediterranean/>> accessed 17 October 2017.

<sup>120</sup> Özgün Topak, 'The Biopolitical Border in Practice: Surveillance and Death at the Greece-Turkey Border Zones (2014) 32 EPSS 815-833, 816; Amnesty International, "The Human Cost of Fortress Europe" (n 112).



following irregular paths and happening at any time.<sup>121</sup> In addition, there is no official record of the actual number of irregular migrants who have lost their lives in attempting to cross over to EU territory. Nor do the Member States have a unique system of registration for the number of deaths occurring at their land or sea borders. For this reason, the only official statistics on the number of deaths are those recorded by the Member States or third countries from the recovered dead bodies, not the number of persons reported missing by family members or NGOs whose bodies are not recovered. Furthermore, any fatalities occurring via land and sea borders are not always brought to the attention of the relevant authorities. Thus, even the Member States' or third countries' official records are not accurate or complete.

The next best data on migrant deaths is that established by the OHCHR and International Organisation for Migration (IOM), recording the number of refugee deaths in an irregular situation.<sup>122</sup> For the years 2011 to 2016 there were approximately 15,000 registered deaths.<sup>123</sup> In addition to these international organisations, there are various institutions and civil society groups that have attempted to keep a more complete record of those migrants dying in irregular situations. There have been various attempts by civil society to gather statistics through indirect sources. Fortress Europe, a webpage maintained by civil society, gathers information on the incidents reported on the news, eyewitnesses, reports from family members, official records and so on. For example, Fortress Europe revealed that 4,273 people died in 2015 compared to IOM statistics of 3,771.<sup>124</sup> It must be emphasised that although Fortress Europe has the most comprehensive estimates of the number of migrants missing or dead, the website is not always up

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<sup>121</sup> Anna Triandafyllidou, *Irregular Migration in Europe: Myths and Realities* (Routledge, Research in Migration and Ethnic Relations Series, 2016) 1.

<sup>122</sup> IOM, "Fatal Journeys Tracking Lives Lost during Migration" 2014, 15 <[https://publications.iom.int/system/files/pdf/fataljourneys\\_countingtheuncounted.pdf](https://publications.iom.int/system/files/pdf/fataljourneys_countingtheuncounted.pdf)> accessed 25 October 2017; IOM, "Missing Migrants Project" <<https://missingmigrants.iom.int/>> accessed 5 May 2017; UNHCR, "Mediterranean Situation" <<http://data2.unhcr.org/en/situations/mediterranean>> accessed 25 October 2017.

<sup>123</sup> IOM, "Missing Migrants Project" (n 122).

<sup>124</sup> Fortress Europe <<http://fortresseurope.blogspot.al/>> accessed 25 October 2017.

to date (last updated 16 February 2016) and these figures still do not reflect the reality of the crisis. The press does not cover all the incidents occurring at sea or via land as they have become so common that they are no longer 'news'. Therefore, the precise number of irregular migrants' crossing over EU borders is unknown and impossible to keep track of.

Furthermore, in the light of the University's Code of Ethical Practice for Research, since this research does not involve human participants it does not raise any ethical issues.

## 1.4 Thesis Structure and Chapter Summary

The thesis is structured in three parts. Part One which includes Chapters Two, Three and Four analyse the extraterritorial measures adopted in response to the irregular migration crisis and the international obligations violated as a result. Part Two consisting of Chapter Five addresses Frontex involvement in violations of international obligations during interception, search and rescue and disembarkation. Part Three includes Chapter Six and Seven the Conclusion critiques the involvement of Frontex and the imposition of EU decisions and authorisations as a tool to circumvent and possibly dilute Member State and EU international responsibility for violations of international obligations committed whilst addressing the irregular migration crisis.

From a doctrinal perspective, Chapter Two examines the complex legal issues arising in interception and Search and Rescue (SAR). It covers the applicable legal regimes: the Law of the Sea, international criminal law,<sup>125</sup> international human rights law and international refugee law. Although a State's right to conduct interception operations is justified on the basis of its legitimate interest in controlling irregular migration, it must also ensure the safety of maritime transportation and endeavour to rescue persons on unseaworthy vessels.<sup>126</sup> However, it is argued that the primary objective of Member State interceptions is to detect boats carrying irregular migrants, stop them from reaching Member State territory and to persuade them to return to their country of departure. The border game is explained in light of the Law of the Sea, international human rights and refugee law which obliges Member States to respect and protect the rights of irregular migrants who come within their jurisdiction. Upon a detailed explanation of the Law of the Sea and the ways a Member State exercises its

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<sup>125</sup> Interception measures are exercised on the basis of the Protocols to the UN Convention against Transnational Organized Crime 2000, henceforth the 'Palermo Protocols' (adopted by resolution A/RES/55/25 of 15 November 2000, New York, 15 November 2000) UNTS 12, Vol. 2225, 209.

<sup>126</sup> UNHCR, *Conclusion on Protection Safeguards in Interception Measures* No 97 (LIV) 10 October 2003, A/AC.96/987 and No 12A (A/58/12/Add.1, paragraph 3; Natalie Klein, 'A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants' (2014) ICLQ 63(4) 787-814, 788.

jurisdiction, it is concluded that any form of coercion to prevent the vessel entering their territorial waters falls under Member State jurisdiction and the act is in violation of their international obligations such as the right to seek asylum, the *non-refoulement* principle and the prohibition of collective expulsions.<sup>127</sup>

Furthermore, it is argued that although international law at times comes to the advantage of irregular migrants, it has also been used to their disadvantage causing serious consequences to their ‘right to life’. As irregular migrants travel in overcrowded and unseaworthy ships, this Chapter provides an analysis of the complex legal issues on situations of distress, disembarkation and place of safety. It argues that these concepts, despite clear guidelines on their interpretation, have been misinterpreted and misapplied by Member States due to their reluctance to accept the responsibility to host irregular migrants whom they rescue. Furthermore, it is argued that immigration preoccupations combined with the inadequacy of the SAR regime to deal with massive inflows of irregular migrants on unseaworthy boats and due to overlapping search and rescue zones, between Italy, Malta and Libya have proved fatal to migrant lives.<sup>128</sup> This Chapter argues that in the absence of specific provisions by the SAR Convention to address a failure to act scenario by reluctant SAR States or provide for agreed criteria on the ‘safest place’ for disembarkation, a legal gap of accountability is created as long as States do not agree on how the SAR Convention’s definition of distress should be interpreted and applied.<sup>129</sup> Despite International Maritime Organisation (IMO) providing further clarification in 2004 of what ‘place of safety’ means,<sup>130</sup> the

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<sup>127</sup> Barnes, ‘The International Law of the Sea’ (n 65) 127.

<sup>128</sup> On 11 October 2013, a boat carrying over 400 people sank 111 km from Lampedusa and 218 km from Malta, within Malta’s SAR zone in an attempt to evade responsibility for disembarking rescued persons in their territories; Tugba Basaran, ‘Saving Lives at Sea: Security, Law and Adverse Effects’ (2014) EJML 16(3) 365- 387, 366; Amnesty International, ‘Lives Adrift Refugees and Migrants in Peril in the Central Mediterranean’ 30 September 2014, 4; also refer to the 2011 incident when 63 migrants died as a result of distress calls being ignored by the Italian and Maltese RCC.

<sup>129</sup> Richard Barnes, ‘Refugee law at sea’ (2004) 53 ICLQ, 58-59; Michael Pugh, ‘Drowning, not waving: boat people and humanitarianism at sea’ (2004) 17 JRS, 58-59.

<sup>130</sup> See IMO *Guidelines on the Treatment of Persons Rescued at Sea* 20 May 2004 Resolution MSC.167(78) point 6.12 ‘a location where rescue operations are considered to terminate. It is

EU's attempt to create to create uniform rules on interception, search and rescue and disembarkation during Frontex joint operations through the Sea Borders Regulation, and the United Nations High Commissioner for Refugees (UNHCR) and IMO proposals to establish a cooperation model framework on concerted procedures and protection response teams following the disembarkation of rescued persons,<sup>131</sup> disparities in interpretation have continued. States have an obligation not only to ensure a safe place of disembarkation for rescued irregular migrants but also to ensure that the receiving country provides the necessary legal guarantees against indirect *refoulement*,<sup>132</sup> very much dependent on the disembarking country's functional asylum system.<sup>133</sup> Chapters Three, Four and Five of this thesis will argue that the main third countries of departure or transit (Libya and Turkey), and the two frontline Member States (Italy and Greece) no longer fulfil the 'safe country' criteria governing disembarkation.<sup>134</sup> Thus, disembarking irregular migrants to these States effectively violates international obligations.

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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. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination' <<http://www.refworld.org/docid/432acb464.html>> accessed 26 October 2017; also see Annex 3 on the adoption of amendments to the SAR Convention, Resolution MSC. 70(69), (adopted on 18 May 1998) paragraph 1.3.2 "Rescue" - An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety <[http://www.imo.org/blast/blastDataHelper.asp?data\\_id=15436&filename=70\(69\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15436&filename=70(69).pdf)> accessed 26 October 2017.

<sup>131</sup> UNHCR, *Refugees and Asylum-Seekers in Distress at Sea – how best to respond? Expert meeting in Djibouti, 8-10 November 2011*, Summary Conclusions <<http://www.refworld.org/pdfid/4ede0d392.pdf>> accessed 25 October 2017.

<sup>132</sup> Wouters and den Heijer (n 57) 7; Parliamentary Assembly, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, Resolution 1821 (2011) Rapporteur Mr Arcadio Diaz Tejera, 1 June 2011, Doc 12628, point 5.2; Matteo Tondini, 'The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations, with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the *Hirsi Case*' (2012) 18 JIML 59-74, 59; see Chapter 4 for further detail on indirect *refoulement*.

<sup>133</sup> C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] paragraph 94; *MSS* (n 115) paragraph 358; Susan Kneebone, *The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The "Safe Third Country" Concept* in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing Oxford and Portland OR 2008) 129 and 54; Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press New York 2009) 46.

<sup>134</sup> See Chapters 3-5.

In Chapter Three the thesis moves on to consider the reaction of Italy, Greece and the EU to the irregular migration situation in terms of security in the form of individual and collective preventative extraterritorial State control, a measure purportedly against smugglers. From a legal perspective, these extraterritorial measures taken by the EU, Italy and Greece in response to the irregular migration crisis are scrutinised under a pre-emptive three stage strategy, acting as *ad hoc* fences. The first stage involves the EU's determination for third countries such as Libya and Turkey to comply with their obligations under the Palermo protocols, scrutinising their adopted provisions to 'criminalise the smuggling of migrants'.<sup>135</sup> Although international criminal law allows States to impose administrative measures on smuggled migrants this Chapter argues that they pose a great threat on the smuggled migrants' rights due to the limited involvement of the courts. They also violate Article 5 of the Migrant Smuggling Protocol as they have similar characteristics to a criminal sanction involving a forced deprivation of liberty and personal autonomy which both entail coercive treatment.<sup>136</sup>

The second stage scrutinises the Italian and EU assistance to Libya to pull-back irregular migrants and returns from Greece in accordance the EU-Turkey statement. It is argued that the Italian and EU assistance to Libya for the prevention of irregular migrants' boats from leaving territorial waters is a form of pull-back which constitutes an interference with the right to leave one's own country and restricts the 'right to seek asylum' in a safe country,<sup>137</sup> hence it is incompatible with the *non-refoulement* principle and refugee law obligations. In addition, in assisting third countries to pull-back would-be asylum seekers in effect constitutes an indirect push-back practice in which Italy and the EU act

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<sup>135</sup> UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime, United Nations, (Resolution 55/25 of 15 November 2000) United Nations, Treaty Series, Volume 2241, 507 (Migrant Smuggling Protocol) article 6.

<sup>136</sup> Mathew Groves, 'Immigration Detention vs Imprisonment' (2004) 29 ALJ, 228-230.

<sup>137</sup> Refugee Convention, article 1; EU Charter, article 18; UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (UDHR) article 14; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 71) 370.

contrary to the *bona fide* principle to provide international protection against persecution or other forms of ill treatment in the State of departure.<sup>138</sup> In relation to the Greek returns to Turkey, it is argued that despite the presumption created by the EU-Turkey statement that Turkey is considered a ‘safe third country’, Greece has an obligation under international human rights and refugee law to nonetheless assess the efficiency of the Turkish asylum and immigration system and the particular treatment the individual will be subjected before return.<sup>139</sup>

The third stage examines the EU surveillance system, EUROSUR, and its unsubstantiated contribution to the European refugee crisis as a humanitarian tool for distress situations at the Mediterranean Sea. Instead, its hidden objective is argued to construct a ‘controlled space’<sup>140</sup> in the Mediterranean Sea to deploy the military as a tool to assist Turkish and Libyan authorities in pull-back operations, intercept and push-back migrants purportedly viewed as a threat to national security. With such sophisticated intelligence surveillance in place, State authorities would easily detect irregular migrant boats over third country territorial waters making it impossible for them to reach international waters. The ‘pre-frontier’ mechanism in partner third countries is not there to assist with the issue of distress as argued in Chapter Two, but is a disguised form of push-back, negatively interfering with the ‘right to leave ones’ own country’ and the ‘right to asylum’.<sup>141</sup> Chapter Four then argues that the illicit push-back operations and the adoption of EUROSUR have endangered irregular migrants’ lives contrary to the right of life.<sup>142</sup>

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<sup>138</sup> UNHCR’s amicus curiae brief (n 70) 427.

<sup>139</sup> *MSS* (n 115) paragraphs 293 and 321.

<sup>140</sup> Rocco Bellanova and Denis Duez, ‘The Making (Sense) of EUROSUR: How to Control the Sea Borders?’ in Raphael Bossong and Helena Carrapko (eds), *EU Borders and Shifting Internal Security* (Springer 2016) 26.

<sup>141</sup> Ben Hayes and Mathias Vermeulen, *Borderline, EU Border Surveillance Initiatives, An assessment of the Costs and Its Impact on Fundamental Rights* (Heinrich Boll Stiftung, May 2012) 11.

<sup>142</sup> See Chapter 4, section 4.3 on push-backs endangering migrants’ lives.

Chapter Four provides a detailed analysis of Greek indiscriminate push-back practices during interception operations from 2013 to June 2016. Whereas, in relation to Italy the Chapter does not address the Italian push-back practice conducted from May 2008 to February 2012. Since 2014, following the ECtHR's decision in *Hirsi* condemning push-back practices to Libya, no incidents have been reported.<sup>143</sup> It is argued in this Chapter that immigration preoccupations have created high risks for migrant's rights generally resulting in non-rescue episodes causing loss of life, route diversion, push-back practices, and disputes over refugee responsibility upon disembarkation.<sup>144</sup> This Chapter scrutinises the incidents occurring in Greek territorial waters on 20 January 2014, 25 October 2014 and 14 August 2015. On 25 October 2014, Greek coastguards boarded a vessel, removed the engine's fuel tank, punctured the vessel and subsequently pushed the boat to Cesme, Turkey.<sup>145</sup> On 5 August 2015, Watch the Med Alarm Phone reported four separate incidents of push-back practices (involving violence) from 26 July to 1 August 2015. Furthermore, on 14 August 2015, Turkish fishermen claimed that a boat carrying fifty people was intentionally sunk by Greek authorities.<sup>146</sup> These incidents question the legal safeguards afforded by international human rights frameworks, on the 'right to life', 'duty to rescue', the prohibition of 'torture or inhuman or degrading treatment or punishment', and the principle of *non-refoulement*.<sup>147</sup> It is argued that these illicit practices have caused

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<sup>143</sup> *Hirsi* (n 57) paragraph 137; Fulvio Vassallo Paleologo, "The Eclipse of Europe: Italy, Libya, and the Surveillance of Borders" (E-International Relations, 30 March 2014) <<http://www.e-ir.info/2014/03/30/the-eclipse-of-europe-italy-libya-and-the-surveillance-of-borders/>> accessed 26 October 2017; Mattia Toaldo, *Migrations Through and From Libya: A Mediterranean Challenge* (IAI Working Papers 15, 14 May 2015) 7.

<sup>144</sup> Moreno-Lax, 'Seeking Asylum in the Mediterranean' (n 43) 174.

<sup>145</sup> Watch the Med, "They Want to See Us Drown" (Alarm Phone Investigation 25/26 October 2014) <<http://watchthemed.net/reports/view/84>> accessed 26 October 2017.

<sup>146</sup> Euronews, "Turkish Fisherman Claims Greek Officials Intentionally Sank Migrant Boat" (14 August 2015) <<http://www.euronews.com/2015/08/14/turkish-fisherman-claims-greek-officials-intentionally-sank-migrant-boat>> accessed 26 October 2017.

<sup>147</sup> UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR Convention, Chapter 2.1.10; CAT, article 3 and article 16; ECHR, article 3; CoE, Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No.11, ETS no 46, 16.IX.1963 (Protocol No 4 to the ECHR) article 4; EU Charter, article 19.



‘a real and immediate risk to the life of an individual’,<sup>148</sup> in which Greece has a positive obligation to safeguard within its jurisdiction.<sup>149</sup> These push-back practices will be argued to constitute internationally wrongful acts and trigger Greece’s international responsibility for breaches of international obligations.<sup>150</sup>

Furthermore, it is argued that the returns under the EU-Turkey statement violate the *non-refoulement* principle prohibited under the EU Charter and the ECHR.<sup>151</sup> From mid-January 2016 to 1 April 2016, recent reports from NGOs indicate that Turkey expelled groups of 100 individuals to Syria on a daily basis.<sup>152</sup> These returns to Syria, at a time when that country continues to be in serious turmoil, impute Greek authorities with knowledge that Turkey does not respect the principle of *non-refoulement* in practice.<sup>153</sup> On this basis, Greece has the duty to investigate the human rights protection mechanism offered by Turkey on the ground and offer an effective remedy in return; otherwise these individuals would be subjected to an increased risk of arbitrary *refoulement*.

Chapter Five scrutinizes the Sea Borders Regulation<sup>154</sup> as a means of harmonising Member State interception, search and rescue as well as disembarkation practices during Frontex joint operations at sea. The Chapter questions the legality of the

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<sup>148</sup> SAR Convention, Annex, Chapter 1, point 11.

<sup>149</sup> UNCLOS, article 98; Convention on the High Seas, article 12; International Convention on Salvage 1989, article 7; SOLAS, article 33; *Osman* (n 33) paragraph 115.

<sup>150</sup> ASR, article 1 and 2; ECHR, article 2(2) read in conjunction with article 1; *Kelly* (n 35) paragraph 94.

<sup>151</sup> EU Charter, article 19.

<sup>152</sup> Amnesty International, ‘Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal’ 1 April 2016 <<https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>> accessed 25 October 2017.

<sup>153</sup> International Federation for Human Rights (FIDH), ‘Libya the Hounding of Migrants Must Stop’ 11 December 2012, 48 <<https://www.fidh.org/IMG/pdf/libyemignantsuk-ld.pdf>> accessed 25 October 2017; HRW, ‘Turkey: Syrians Pushed Back at the Border Closures Force Dangerous Crossings with Smugglers’ 23 November 2015 <<https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>> accessed 25 October 2017; Amnesty International, ‘Europe’s Gatekeeper Unlawful Detention and Deportation of Refugees from Turkey’ 16 December 2015, 1-2 <<https://www.amnesty.org/en/documents/eur44/3022/2015/en/>> accessed 25 October 2017.

<sup>154</sup> Sea Borders Regulation (n 7) recital 1 and 2.

permissive measures conducted in the territorial sea of the host Member State (Article 6(2)(b)) or on the high seas (Article 7(2)(b)) and concludes that they are likely to constitute a push-back practice and a collective expulsion measure in violation of the Refugee Convention, the EU Charter, the recast Asylum Procedures Directive and the principle of *non-refoulement*, as well as of the Sea Borders Regulation itself.<sup>155</sup> Furthermore, the Sea Borders Regulation as also argued in Chapters Three and Four of this thesis to have increased the risk of irregular migrant's loss of life on the high seas by permitting the alteration of the irregular migrants' boat course on the high seas leaving them stranded at sea, in violation of the 'right to life'<sup>156</sup> and the 'duty to rescue' at sea.<sup>157</sup>

The purpose of the Sea Borders Regulation is not to improve legal safeguards for irregular migrants, but to create a new immigration regime differentiating irregular migrants travelling by sea from the protection usually offered under EU and international asylum laws. The Regulation does not expressly address the possibility for irregular migrants intercepted in Member State territorial waters to claim asylum, a situation incompatible with the recast Asylum Procedures Directive and the Schengen Borders Code.<sup>158</sup> Hence, asylum and immigration legal frameworks seem to be disconnected and to be non-applicable to irregular migrants arriving by sea, raising a presumption that such individuals are to be treated differently from other irregular migrants travelling by land. It is argued that this new immigration regime is likely to contravene the ECtHR's reasoning

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<sup>155</sup> Refugee Convention, article 33(1); Protocol No 4 to the ECHR, article 4; Sea Borders Regulation (n 7) article 4; *Hirsi* (n 57) paragraphs 134.

<sup>156</sup> ICCPR, article 6; ECHR, article 2; EU Charter, article 2; UDHR, article 3; Aas and Gundhus (n 79) 14.

<sup>157</sup> UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR, Chapter 2.1.10 ; also contrary to the Sea Borders Regulation's objective 'to ensure the efficient monitoring of the crossing of external borders including through border surveillance, while contributing to ensuring the protection and saving of lives' see (n 7) recital 1 and article 3.

<sup>158</sup> Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) OJ [2013] L180/60 (Asylum Procedures Directive) article 3; Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders OJ L105/1, Chapter II as amended by Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders - Schengen Borders Code (SBC) [2016] OJ L77/1.

on the guarantees protected by the ECHR, as articulated in the case of *Medvedyev*<sup>159</sup> and more recently in *Hirsi* holding that the irregular migration crisis falls under the ambit of the ECHR.<sup>160</sup>

In addition, by not taking into consideration the local reception conditions or the effectiveness of the asylum and immigration laws of Italy or Greece, the Sea Borders Regulation violates EU and international search and rescue legal frameworks on the grounds of prohibition of the *non-refoulement* principle and collective expulsions. Furthermore, it is argued that by disembarking irregular migrants to Italy and Greece, Frontex violates its international obligations. In addition, this Chapter argues that the practice of using coercive measures as proposed by the EU against irregular migrants who refuse to provide their fingerprints constitute acts of inhuman treatment contrary to Article 16 CAT, Article 3 ECHR and Article 4 of the EU Charter. In Chapter Six it is argued that not only is Italy responsible for committing acts of inhuman treatment which constitute international wrongful acts, but the EU also acquires international responsibility through compelling Italian authorities to commit these wrongful acts.

Chapter Six argues that the actual purpose behind Frontex deployment in the Mediterranean Sea is not only to assist Member States in managing their external borders but to constitute a crucial strategic tool to circumvent the international responsibility of Member States and the EU. It is argued that Frontex deployment has the following dual purpose 1) that the EU may use the EU legal framework on shared competence as a shield against international responsibility for violations of international obligations exercised by Member States when conducted under Frontex coordination, and 2) to bind and dictate its participating Member States through the regulatory character of Frontex in accordance with EU policies which

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<sup>159</sup> *Medvedyev and Others v France* Application no 3394/03 ECHR 2010, paragraph 81.

<sup>160</sup> *Hirsi* (n 57) paragraphs 177 and 178 – where the ECtHR recognised that article 4 of Protocol No 4 may have extraterritorial application.

gives the EU an opportunity to circumvent the challenges brought by the Lisbon Treaty to the transparency, accountability and quality of the EU decision making process.<sup>161</sup> Member States and the EU have created assumptions that international responsibility can be diluted if confusion is created as to whether Frontex is the only responsible entity in joint operations. Therefore, the Chapter provides a detailed analysis of ARIO determinations of attributed exclusive responsibility. A rebuttal to the EU and Member State assumption is provided arguing that international responsibility between the Member States and Frontex cannot be diluted. The Chapter assesses the EU's (through Frontex) international responsibility for the wrongful conduct exercised within the Frontex operational area in light of Articles 4 and 7 ARIO. In addition, it is argued that the Sea Borders Regulation, the EU-Turkey statement and the EU-Turkey readmission agreement constitute circumvention tools from international responsibility under the auspices of the EU legal order to the transparency, accountability and quality of the EU decision making process. It is argued however that upon an assessment of Article 17 ARIO, international responsibility cannot be shifted nor circumvented by the EU and its Member States only because they have chosen to cooperate with EU agencies or partner third countries to strengthen security at its external borders.

Chapter Seven concludes by summarising the main arguments of the thesis, as well as, identifies legal issues for future research. Although it is acknowledged that human smuggling and organised crime raise national and supranational security concerns, responding to such a threat however, should not entail the criminalisation of irregular migrants so as to undermine their human rights. That is why this thesis points out the need to focus future research on the implications of opening legal migration channels as to the most adequate solution to prevent irregular migration. If irregular migration is tackled through an economic and

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<sup>161</sup> Frontex Regulation, article 3a – as repealed by EBCG Regulation (n 1) article 15(3) emphasis on ‘shall be binding on the Agency, the host Member State and the participating Member States’.

fundamental rights approach, Europe could actually benefit from the long term benefits of migration to address its eminent problems of the ageing population and labour shortages. Thus, changes of mind-set by political leadership to focus on migration governance would most certainly secure legal pathways for migrants and avoid the tragic deaths at sea.

## Chapter 2: The International Legal Framework of Interception and Search and Rescue

### 2.1 Introduction

For more than a decade Europe has received a high number of irregular migrant flows. Since 2011, due to the Syrian civil war, Libya's institutional breakdown and Eritrea's political unrest, record high numbers<sup>162</sup> of irregular migrants have been arriving at the EU's south-eastern external borders, publicly as 'Europe's refugee crisis'.<sup>163</sup> The most pressurised borders have been those of Greece and Italy.<sup>164</sup> The control and management of external borders has become a top

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<sup>162</sup> 141,051 in 2011, 72,437 in 2012, 107,365 in 2013, 283,532 in 2014, 1,015,078 in 2015 and 363,348 in 2016: FRAN Annual Risk Analysis 2014, 14, <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2014.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf)> accessed 26 October 2016; IOM Monitors Latest Migrant Arrivals, Deaths in Mediterranean, <<https://www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom>> accessed 26 October 2016; IOM, 'Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079' 1 June 2017 <<https://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079>> accessed 26 October 2017.

<sup>163</sup> Bruno Nascimbene and Alessia Di Pascale, 'The "Arab Spring" and the Extraordinary Influx of People who Arrived in Italy from North Africa' (2011) EJML 13(4) 341-360, 342; Florian Trauner, 'Asylum Policy: the EU's "crises" and the looming policy regime failure' (2016) JEI 38(3) 311-325, 311.

<sup>164</sup> From 2010 to 2016, the Arab Spring led to a rise in irregular migrants by: 35% in 2011, with 64,000 detections in the Central Mediterranean area and 55,000 in the Eastern Mediterranean; 48% in 2013, with approximately 107,000 detections of which 40,304 were detected in the Central Mediterranean area and 24,800 in the Eastern Mediterranean; 162% in 2014, with 280,000 detections by sea, including 170,000 in the Central Mediterranean and 50,800 in the Eastern Mediterranean. In 2015, unprecedented numbers of detections were reported by Member States with 1,822,177 along external borders, six times the number of reported detections in 2014, with 885,386 detections in the Eastern Mediterranean route, mostly in the Aegean Sea, and 154,000 detections reported in the Central Mediterranean route. There was a 72% decrease in 2016, with 511,371 detections, of which 182,277 arrived by the Eastern Mediterranean route and 181,459 by the Central Mediterranean route.; From 104,000 in 2010 to 141,000 in 2011; Frontex, Annual Risk Analysis 2012, 4 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2012.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2012.pdf)> accessed 26 October 2017; A total of 107,000 irregular entries; Frontex Annual Risk Analysis 2014, 7-8 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2014.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf)> accessed 26 October 2017; Frontex Annual Risk Analysis 2015, 5 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2015.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf)> accessed 26 October 2017; Frontex Risk Analysis 2016, 6 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2016.pdf)> accessed 26 October 2017; Frontex Risk Analysis 2017, 18 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017)> accessed 26 October 2017; Frontex, "Frontex and NATO to Cooperate in the Aegean Sea" (3 June 2016) <<http://frontex.europa.eu/news/frontex-and-nato-to-cooperate-in-the-aegean-sea-nzmsyr>> accessed 26 October 2017; NATO, "Assistance for the Refugee and Migrant Crisis

priority for the EU and its Member States, translated into concrete measures linking irregular migration with issues on security and criminalisation.<sup>165</sup>

Italy and Greece have taken drastic measures to reduce and prevent arrivals in their territories through increased policing at external borders and by strengthening their surveillance capacities. They aimed to facilitate returns via interception operations at sea and land borders, conducting formal expulsions through readmission agreements and informal expulsions in the form of push-backs; otherwise known as ‘externalisation’ measures of border control. Despite EU and Member State policies on preventing and sanctioning irregular migration,<sup>166</sup> the number of irregular migrants reaching EU shores is increasing, over-burdening Member State asylum and immigration capacities.<sup>167</sup> In consequence, the lack of legal channels and stringent entry controls has contributed to creating a multibillion business of organised migrant smuggling and trafficking networks.<sup>168</sup>

Irregular migrants cross the Mediterranean Sea with the help of centralised and sophisticated criminal cartels.<sup>169</sup> These integrated criminal cartels operate in the region with some knowledge of European and international law on asylum and

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in the Aegean Sea” (27 June 2016) <[http://www.nato.int/cps/en/natohq/topics\\_128746.htm](http://www.nato.int/cps/en/natohq/topics_128746.htm)> accessed 26 October 2017; UNHCR, “Refugees/Migrants Emergency Response-Mediterranean, Deaths 3,151” <<http://data.unhcr.org/mediterranean/regional.php>> accessed 26 October 2017.

<sup>165</sup> Georgios Karyotis and Dimitris Skleparis, ‘Qui Bono?’ (2013) GLR 22(3) 683-706, 683; Van Liempt and Sersli (n 11) 1029; Salt (n 11) 32; European Commission, on the Delivery of the European Agenda on Migration (n 6) 2.

<sup>166</sup> For a summary on EU and Member State extraterritorial policies see Triandafyllidou and Dimitriadi (n 2) 600-602.

<sup>167</sup> See (n 164).

<sup>168</sup> Salt (n 11) 32.

<sup>169</sup> Anna Triandafyllidou and Thanos Maroukis, *Human Smuggling from/via North Africa and Turkey to Greece* (Palgrave Macmillan, London, 2012) 89-115; Paolo Cuttitta, ‘Humanitarianism and Migration in the Mediterranean Borderscape: The Italian-North African Border between Sea Patrols and Integration Measures’ in Brambilla et al (eds) *Borderscaping: Imaginations and Practices of Border Making* (Ashgate 2015) 133; Joanne Van Der Leun and Anet van Schijndel, ‘Emerging from the Shadows or Pushed into the Dark? The Relation between the Bomat against Trafficking in Human Beings and Migration Control’ (2016) 4 IJLCJ, 26-42.

search and rescue.<sup>170</sup> In accordance with ECtHR case law, government vessels patrolling the Mediterranean Sea are obliged following interception or search and rescue operations not to return irregular migrants back to their country of departure without conducting an independent assessment of their individual circumstances.<sup>171</sup> Furthermore, Member State authorities have a further investigative duty not to return an individual if they know or ought to know that the country of departure's asylum and immigration system is deficient or systematically violates human rights obligations.<sup>172</sup> As a result, criminal cartels have developed an 'organised refugee' strategy moving away from unplanned irregular movements, to well-planned organised routes.<sup>173</sup> Knowing that the boats will not turn back, the recent practice of human smugglers has been to place as many irregular migrants as possible on cheap, unsophisticated vessels often with defective engines controlled by the migrants themselves.<sup>174</sup> The migrants are instructed to: 1) broadcast a distress call or a call for assistance as soon as they have left the State of departure's territorial waters; and 2) concoct the 'best story' they can to tell the Member State authorities (supported with forged documents).<sup>175</sup> Such a practice known as 'a border game' is creating difficulties in distinguishing genuine asylum seekers from other types of migrants.<sup>176</sup> The migrant smugglers, facets of transnational organised crime, are the protagonists in the declared legal and policy battle with European governments.

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<sup>170</sup> Ferruccio Pastore, Paola Monzini, and Giuseppe Sciortino, 'Schengen's Soft Underbelly? Irregular Migration and Human Smuggling across Land and Sea Borders to Italy' IM (2006) 44(4), 95 <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2435.2006.00381.x/epdf>> accessed 27 October 2017.

<sup>171</sup> *Hirsi* (n 57) paragraphs 131, 133.

<sup>172</sup> *NS and ME* (n 133) paragraph 94; *MSS* (n 115) paragraph 358.

<sup>173</sup> AFP, 'Wave of Refugees to Europe an "Organized Invasion" says Czech PM', *The Telegraph* (27 December 2015) <<http://www.telegraph.co.uk/news/worldnews/europe/czechrepublic/12070377/Wave-of-refugees-to-Europe-an-organised-invasion-says-Czech-PM.html>> accessed 27 October 2017.

<sup>174</sup> House of Lords, European Union Committee, *Operation Sophia: a Failed Mission* 2<sup>nd</sup> Report of Session 2017-19, HL Paper 5, paragraph 45; Carling (n 28) 327; Lori Nessel, 'Externalized Borders and the Invisible Refugee' (2009) CHRLR 40, 625.

<sup>175</sup> Van Liempt and Sersli (n 11) 1038.

<sup>176</sup> Bigo (n 17) 212; Andréas (n 18).



The human smuggler's 'organised refugee' strategy has identified various legal issues resulting from the application of parallel legal frameworks both at regional and at international level. The Member States' policy-making response to human smuggling has created loopholes through conflicting interpretations of the international legal framework on search and rescue and the inconsistent application of human rights law. These policies, in the form of extraterritorial measures, are supposed to be a solution; however, in this thesis it will be argued that they have become the *problem*. Although human smuggling must be sanctioned, it is argued that this battle is happening at the expense of persons in need of international protection and thus in violation of international refugee and human rights law. This thesis argues that the EU and its Member States have the obligation to *protect* the victims of crime and especially those entitled to special protection such as refugees and other vulnerable groups in accordance with international obligations.<sup>177</sup> The positive extraterritorial measures effectively activate the EU and its Member State collective responsibility.

The issue of the irregular migration phenomenon involves enforcement measures consisting of pre-border, border and post-border controls. This chapter explores from a legal (doctrinal) perspective, border enforcement and human rights issues in response to the smuggling of migrants. It examines the international legal framework of the Law of the Sea, addressing the complex legal issues arising in interception and SAR. It covers the applicable legal regimes: the Law of the Sea, transnational criminal law, international human rights and international refugee law. It will first address the rules on law enforcement at sea, with particular

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<sup>177</sup> Obligation to protect expressly appears in: Migrant Smuggling Protocol (n 135) article 9 'safeguard clause'; UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, United Nations, (Resolution 55/25 of 15 November 2000) United Nations, Treaty Series, Volume 2237, 319 (Trafficking Protocol) article 14 'Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein'.

emphasis on interception. As migrants often travel in unseaworthy boats, this chapter also examines the obligation upon the masters of ships to render assistance to a person in distress at sea regardless of immigration status. Due to overlapping search and rescue zones, there are legal issues as to which State is responsible for disembarking persons rescued or interdicted at sea, arising from the international obligation not to return any person to a country where there is a real risk that they would face ill-treatment. The chapter will also provide an analysis of the United Nations High Commissioner for Refugees (UNHCR) and International Maritime Organisation (IMO) proposals to establish a cooperation model framework on concerted procedures and protection response teams following the disembarkation of rescued persons.<sup>178</sup> Furthermore, an analysis of the EU External Borders Sea Regulation on interception, search and rescue and disembarkation is provided.

## **2.2 The International Law of the Sea and Interception**

Any counter response to migrant smuggling by sea is challenged by the complex legal landscape of cumulative rules and international obligations under refugee and human rights laws, the Law of the Sea and transnational criminal law. Confronted with this challenge, Member States are reacting to the high number of irregular migrants coming to their territory by externalising border controls.<sup>179</sup> Interception operations are justified on the basis that the State has a ‘legitimate interest in controlling irregular migration as well as ensuring the safety and security of air and maritime transportation, and a right to do so through various measures’.<sup>180</sup> They also act as a multipurpose endeavour to rescue persons on unseaworthy vessels and to prevent human trafficking and people smuggling.<sup>181</sup>

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<sup>178</sup> UNHCR, *Refugees and Asylum-Seekers in Distress at Sea* (n 131).

<sup>179</sup> Luiza Bialasiewicz, ‘Off-shoring and Out-sourcing the Borders of Europe: Libya and EU Border Work in the Mediterranean’ (2012) *Geopolitics* 17(4), 843–866; Maribel Casas-Cortes, Sebastian Cobarrubias and John Pickles, “‘Good neighbours make good fences’”: Seahorse Operations, Border Externalization and Extra-territoriality’ (2014) *EURS* 1–21, 2.

<sup>180</sup> UNHCR, *Conclusion on Protection Safeguards in Interception Measures* (n 126).

<sup>181</sup> Klein (n 126) 788.

At the international level, these interception measures are exercised on the basis of the Protocols to the UN Convention against Transnational Organized Crime 2000, henceforth the ‘Palermo Protocols’:<sup>182</sup> 1) *The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children 2000*,<sup>183</sup> which defines ‘trafficking in persons’ and protects the victims of trafficking; 2) *The Protocol against the Smuggling of Migrants by Land, Sea and Air 2000*,<sup>184</sup> which deals with the smuggling of migrants by organised criminal groups, defines ‘smuggling of migrants’, and protects the rights of smuggled migrants;<sup>185</sup> and 3) *The Protocol against the illicit Manufacturing and Trafficking in Firearms, their parts and Components and Ammunition 2001*,<sup>186</sup> the purpose of which is to facilitate cooperation between the States Parties in order to ‘prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition’ (Article 2). These Protocols aim to establish an ‘international co-operative framework’ in the field of cross-border crime, the smuggling of migrants by land, sea and air, and the protection of victims of human trafficking.<sup>187</sup> They act as a mechanism for States to respond to criminal networks via bilateral agreements allowing a State other than the flag State to intercept vessels involved in criminal operations.

In anticipation of difficulties in interpretation of parallel legal frameworks applicable at sea, the EU, through the Schengen Borders Code (SBC) handbook, has laid down certain principles and procedures to be followed by border officials upon intercepting irregular migrants. The SBC handbook provides that border

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<sup>182</sup> UNTS 12, Vol. 2225 (adopted by resolution A/RES/55/25 of 15 November 2000, New York, 15 November 2000) 209.

<sup>183</sup> Trafficking Protocol (n 177).

<sup>184</sup> Migrant Smuggling Protocol (n 135).

<sup>185</sup> Van Liempt and Sersli (n 11) 1035.

<sup>186</sup> UN General Assembly, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organised Crime, (Resolution 55/255 of 31 May 2001, entered into force on 3 July 2005).

<sup>187</sup> Migrant Smuggling Protocol (n 135) article 7: ‘States Parties shall cooperate... in accordance with the international law of the sea’.

officials must: a) allow any person in need of international protection access to legal safeguards, b) identify those persons that express fear of ill-treatment or harm upon being returned to country of origin or transit, c) consult with relevant national authorities as to whether a person's declaration should be construed as a wish to apply for asylum or any other form of international protection, and d) inform potential applicants of procedural legal guarantees such as access to interpreters when appropriate, and give adequate information to intercepted persons about what will happen to them.<sup>188</sup> Most importantly, border guards cannot take any decision to return a person 'without prior consultation with the competent national authority or authorities'.<sup>189</sup> Despite the existence of clear guidance, however, this chapter argues that illicit extra-territorial border control practices are being conducted by the Italian and Greek authorities in violation of human rights law and other international obligations.<sup>190</sup>

In the circumstances where a migrant smuggling vessel attempts to enter State territory without authorisation, the State has the right to enforce its coercive or punitive measures in the form of interception subject to its national laws on immigration and crime and subject to its international obligations.<sup>191</sup> International law has not established a uniform definition of what 'interception' means.<sup>192</sup> According to academic literature and the UNHCR, it means to: 'i) prevent embarkation of persons on an international journey without the required documentation; (ii) prevent further onward international travel by persons who have commenced their journey either by land, air or sea; or (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting

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<sup>188</sup> Commission Recommendation establishing a common 'Practical Handbook for Border Guards to be used by Member States' competent authorities when carrying out the border control of persons, C(2006) 5186 final (SBC handbook) Asylum-seekers/applicants for international protection, section 10.1- 10.2.

<sup>189</sup> *ibid*, section 10.3.

<sup>190</sup> See Chapter 4 on Greek push-backs and Chapter 3 on Italian indirect push-backs.

<sup>191</sup> Klein (n 126) 795; Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 408.

<sup>192</sup> Gallagher (n 191) 407.

persons contrary to international or national maritime law'.<sup>193</sup> The primary objective of interception is to detect boats carrying irregular migrants and stop them reaching Member State territory, and to persuade them to return to their country of departure. Although it is recognised that every State has the right to use various measures in border management, they must do so in conformity with international law.<sup>194</sup> This chapter will focus on interception at sea where legal safeguards are most challenged on grounds of jurisdiction. Operations at sea are governed by the UN Convention on the Law of the Sea 1982 ('UNCLOS').<sup>195</sup> The international Law of the Sea is addressed later in this chapter.

## 2.3 State Jurisdiction in Interception Operations at Sea

### 2.3.1 Territorial Jurisdiction

Human smugglers no longer need to find new migratory routes to cross borders irregularly. Their innovative 'organised refugee' strategy seeks to benefit from the international and EU legal framework, as well as from case law developments on international human rights law and the search and rescue regime. With knowledge of international law,<sup>196</sup> human smugglers seem to be aware that State sovereignty<sup>197</sup> is limited in its right to regulate immigration on matters concerning asylum and refugee law,<sup>198</sup> as well as by the principle of international law prohibiting the return of individuals to a country where s/he might face a real risk

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<sup>193</sup> UNHCR, *Conclusion on Protection Safeguards in Interception Measures* (n 126); Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CStICL, 2012) 9; Tondini (n 132) 60.

<sup>194</sup> Gallagher (n 191) 408.

<sup>195</sup> Italy, Greece and Malta, as well as the EU ratified the Convention, <[http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)> accessed 25 October 2017.

<sup>196</sup> Tuesday Reitano and Peter Tinti, *Survive and Advance: the Economics of Smuggling Refugees and Migrants into Europe* (2015) ISS Paper 289, 5.

<sup>197</sup> *Jabari v Turkey* Application no 40035/98 ECHR 2000-VIII, paragraph 38.

<sup>198</sup> Refugee Convention, articles 1 and 33; Linda Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' IMR 25(4) Special Issue: *U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (Winter, 1991) 737-770, 742-746.

of being subjected to ill treatment.<sup>199</sup> At the international and regional level, States must further ensure that human rights<sup>200</sup> guarantees and safeguards are afforded to every person within their jurisdiction.<sup>201</sup> As distinct jurisdictional rules apply to specific maritime zones as recognised by the Law of the Sea, directly affecting a State's right to intercept a foreign vessel,<sup>202</sup> the border game consists of irregular migrant boats coming as close as possible to the outer limit of Member State territorial sea jurisdiction, up to 12 nautical miles from the baseline.<sup>203</sup> Within their territorial sea, States are sovereign and have the power to stop, board, and arrest individuals who violate their immigration laws and regulations.<sup>204</sup> It is precisely at this zone that human smugglers count upon the coastal State to intercept and stop the vessel. Once the vessel reaches the coastal State's territorial waters, the latter becomes responsible for the reception of these individuals in accordance with the Dublin Regulation,<sup>205</sup> and international refugee law,<sup>206</sup> and cannot return the vessel to its country of departure or any third State without first assessing each passenger's individual circumstances.

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<sup>199</sup> EU Charter, article 19(2); ECHR, article 3; UNCLOS, article 2(3); *Soering* (n 59) paragraph 91; *Ahmed v Austria* Application no 25964/94 ECHR Reports 1996-VI, paragraph 47.

<sup>200</sup> Section 2.3.2; also see Chapter 4 and 5 of this thesis.

<sup>201</sup> ECHR, article 1 'The High Contracting Parties shall secure *to everyone within their jurisdiction the rights and freedom*'; *Bankovic* (n 76) paragraph 66; cf. ICCPR, article 2 'Each State Party to the present Covenant undertakes to respect and to ensure *to all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*', emphasis added to highlight the differences between the wording of the two articles; *Wall Case: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion ICJ Reports 2004, 136, paragraph 108.

<sup>202</sup> Migrant Smuggling Protocol (n 135) articles 7, 9(3).

<sup>203</sup> UNCLOS, articles 2 and 3.

<sup>204</sup> UNCLOS, article 33(1)(b); Vaughan Lowe, 'The Development of the Concept of the Contiguous Zone' (1981) 52 BYIL, 159-169; Malcolm Shaw, *International Law* (7th edn, Cambridge, 2014) 556; Henrik Ringbom, *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff, 2015) 284.

<sup>205</sup> Dublin Regulation (n 42) article 7; see Chapter 4.

<sup>206</sup> Refugee Convention, article 33; see Chapter 4.

Human smugglers seem to be aware that beyond the 12-mile limit and extending up to 24 nautical miles from the baseline is the ‘contiguous zone’<sup>207</sup> where, as regards incoming vessels, the coastal State is limited in its exercise of ‘control’ to ‘inspections and warnings’; i.e. it can only ‘stop, board and search the vessel’ with a view to preventing it from entering the territorial sea and there infringing the coastal State’s laws and regulations.<sup>208</sup> The coastal State’s exercise of control depends upon the existence of a ‘relevant connection with territorial areas’,<sup>209</sup> i.e. the migrant smuggling vessel intends to disembark its passengers in the territory of the intercepting State.<sup>210</sup> But how would the coastal State *know* whether the migrant smuggling vessel intended to disembark its passengers in its territory? To confirm its suspicions, the coastal State may send a small boat alongside the vessel so that its officers can board the latter and inspect its documents, thus exercising control short of arrest.<sup>211</sup> However, once the vessel’s documents are inspected and if unauthorised entry into the territorial sea is confirmed, the coastal State is permitted to punish in the contiguous zone infringement of its laws and regulations committed within its territorial sea.<sup>212</sup> This course of action would require that upon inspection the coastal State arrests the vessel and assumes responsibility under domestic and international law. To avoid international responsibility, Italy and Greece have exercised push-back practices in the form of coercion to prevent the vessel entering their territorial waters.<sup>213</sup> Such coercion involves directing the vessel out of the contiguous zone, onto the high seas, in the

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<sup>207</sup> UNCLOS, article 33.

<sup>208</sup> UNCLOS, article 33(1)(a) to ‘exercise the control necessary to prevent infringement of its...*immigration*...laws and regulations within its territory or territorial sea’; and article 33(1)(b) with regard to incoming vessels; emphasis added; Gerald Fitzmaurice, ‘Some Results of the Geneva Conference on the Law of the Sea’ (1959) 8 ICLQ 73, 113; Ivan Shearer, ‘Problems of Jurisdiction and Law Enforcement against Delinquent Vessels’ (1986) ICLQ 35(2) 320-343, 330.

<sup>209</sup> Gallagher (n 191) 417; see *M/V Saiga* (No 2) (*St Vincent and the Grenadines v Guinea*) International Tribunal for the Law of the Sea Case No 2, [1999] ITLOS Rep 10, paragraph 15.

<sup>210</sup> Shearer (n 208) 330.

<sup>211</sup> UNCLOS article 33(1)(b): arrest would not be permitted unless the vessel had actually infringed the relevant laws or regulations of the coastal State in the latter’s territorial sea; Shearer (n 208) 330; Douglas Guilfoyle, ‘Maritime Interdiction of Weapons of Mass Destruction’ (2007) 12 JCSL 1, 7.

<sup>212</sup> Guilfoyle (n 211) 7.

<sup>213</sup> Barnes, ‘The International Law of the Sea’ (n 65) 127; see Chapters 3 and 4.

belief that no responsibility rests on States on the high seas.<sup>214</sup> This thesis argues that such a practice is illegal and constitutes a breach of international obligations including human rights law.<sup>215</sup>

With regard to the two States that form the focus of this analysis, it should be noted that in accordance with UNCLOS, Italy has made the following maritime claims: their territorial waters extend to 12 nautical miles<sup>216</sup> and have declared a contiguous zone of 24 nautical miles.<sup>217</sup> Due to its geographical location,<sup>218</sup> Greece has encountered obstacles in claiming the maximum territorial sea breadth of 12 nautical miles in accordance with UNCLOS. This situation has led to a breakdown of relations between Greece and Turkey since the 1970s, extending beyond maritime zone issues to airspace, over-flight and the militarisation of islands in the Aegean Sea.<sup>219</sup> Following negotiations, however, Greece and Turkey have agreed to have a territorial sea of 6 nautical miles<sup>220</sup> and to refrain from unilaterally claiming an extension of this limit.<sup>221</sup> This arrangement allows

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<sup>214</sup> See section 2.3.2.

<sup>215</sup> See Chapters 3-5 on push-backs.

<sup>216</sup> Italian Law, *Navigation Code*, Official Gazette No 327, 30 March 1942 updated to Legislative Decree No 19 January 2017, article 2 <<http://www.fog.it/legislaz/cn-indice.htm>> accessed 25 October 2017.

<sup>217</sup> *ibid.*

<sup>218</sup> Republic of Turkey, Ministry of Foreign Affairs <<http://www.mfa.gov.tr/the-breadth-of-territorial-waters.en.mfa>> accessed 28 October 2017; The Greek island specialist <<http://www.greeka.com/greece-geography/>> accessed 28 October 2017.

<sup>219</sup> Deniz Bölükbaşı, *Turkey and Greece, the Aegean Disputes, A Unique Case in International Law* (Cavendish Publishing, 2004), 66; *Aegean Sea Continental Shelf (Greece v Turkey)* ICJ Judgment of 19 December 1978.

<sup>220</sup> Greek Law No 230/1936 *concerning the extension of the territorial waters of the Kingdom of Greece* Official Gazette A-450, 13 October 1936 as amended by Legislative Decree 187/1973, Code of Public Maritime Law, Official Gazette A-261, 3 October 1973, article 1; Greek Law 2321, *on the ratification of the United Nations Convention on the Law of the Sea and the Agreement on the Implementation of Part IX of the Convention*, A-136, 23 June 1995; The New Territorial sea Act of Turkey No 2674, 20 May 1982, article 1.

<sup>221</sup> In accordance with the Madrid Declaration of 8 July 1997 on Euro-Atlantic Security and Cooperation, M-1(97)81 <<http://www.nato.int/docu/pr/1997/p97-081e.htm>> accessed 28 October 2017; Turkish Ministry of Foreign Affairs, “Agreement Reached by Turkey and Greece Regarding the Confidence-building Measures in the Aegean June 5 1998” <[http://www.mfa.gov.tr/agreement-reached-by-turkey-and-greece-regarding-the-confidence-building-measures-in-the-aegean\\_br\\_june-5\\_-1998.en.mfa](http://www.mfa.gov.tr/agreement-reached-by-turkey-and-greece-regarding-the-confidence-building-measures-in-the-aegean_br_june-5_-1998.en.mfa)> accessed 28 October 2017; Turkish Ministry of Foreign Affairs, “The Breadth of Territorial Waters” <<http://www.mfa.gov.tr/the-breadth-of-territorial-waters.en.mfa>> accessed 28 October 2017.



the rest of the Aegean to be used by Turkey, Greece or any third country as high seas. Even under these circumstances, there is already geographical overlap to some extent.<sup>222</sup>

### 2.3.2 Extraterritorial Jurisdiction

Human smugglers instruct irregular migrants to use unmanned rubber Zodiac boats, to avoid detection upon leaving the Libyan or Turkish coasts, and upon reaching the territorial sea of the Member State to request assistance in the form of a distress call.<sup>223</sup> In response, coastal States use extraterritorial measures in the form of interception beyond the territorial sea with the aim of returning the migrants' boats to the country of departure. However, although this practice is beneficial to Member States in preventing high numbers of irregular migrant flows to their territories, it violates their international obligations.

To try and legitimise such a practice, Member States regard acts on vessels and on the high seas as not constituting an exercise of jurisdiction by them.<sup>224</sup> However, the International Court of Justice (ICJ),<sup>225</sup> the European Court of Human Rights (ECtHR)<sup>226</sup> and supervisory bodies have indicated that such an interpretation is wrong, holding acts done on them can be within a State's jurisdiction as a result of the principle of exclusive flag State jurisdiction over vessels on the high seas. At first, the concept of jurisdiction in human rights treaties was interpreted similarly to the concept under customary international law, being primarily territorial.<sup>227</sup> However, due to a series of human rights violations taking place

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<sup>222</sup> Deniz Bölükbaşı, *Turkey and Greece: The Aegean Disputes* (Cavendish Publishing, 2012) 422.

<sup>223</sup> Reitano and Tinti (n 196) 12.

<sup>224</sup> *Medvedyev* (n 159) paragraphs 49-50; *Kumin* (n 2) 49.

<sup>225</sup> *Wall* (n 201) paragraph 109.

<sup>226</sup> *Drozdz and Janousek v France and Spain* Application no 12747/87 Series A no 240, paragraph 91; *Cyprus v Turkey* Application no 25781/94 ECHR 2001-IV; *Medvedyev* (n 159) paragraph 67.

<sup>227</sup> *Bankovic* (n 76) paragraph 61 and 67; *Al-Adsani v United Kingdom* Application no 35763/97 ECHR 2001-XI, paragraph 39; Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) EJIL 14(3) 529-568, 530.

outside a State's territory,<sup>228</sup> it was considered unconscionable to allow a State to perpetrate human rights violations on another State's territory, which would be condemned if perpetrated within its own territory.<sup>229</sup> Thus, international courts have recognised that the exercise of jurisdiction beyond State territory can take place in exceptional circumstances with special justification.<sup>230</sup>

An authoritative interpretation of the scope of extraterritorial jurisdiction over ships beyond the 12-mile limit was established in the recent case of *Hirsi*.<sup>231</sup> On 6 May 2009, around two hundred individuals departing from Libya were intercepted by Italian Coastguards on the high seas within the Maltese Search and Rescue Region. Upon interception, Italian coastguards transferred these individuals into the Italian warship and took them back to Tripoli without examining the passengers' individual circumstances or informing them of the place of disembarkation. The ECtHR accepted that 'ships of the Italian armed forces' composed of Italian military personnel fell under Italian jurisdiction for the purposes of the Convention, even though the acts were performed on the high seas.<sup>232</sup> Applying the principle of exclusive flag State jurisdiction, the applicants were under the 'exclusive *de jure* and *de facto* control of the Italian authorities' during the period 'between boarding the ships and being handed over to the Libyan authorities'.<sup>233</sup> With this ruling, the Court challenged the traditional stance that jurisdiction is mainly territorial.<sup>234</sup>

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<sup>228</sup> *Al-Skeini and Others v the United Kingdom* Application no 55721/07 (7 July 2011) paragraph 150; *Drozd* (n 226) paragraph 91; *Wall* (n 201) paragraph 109.

<sup>229</sup> *Celiberti de Casariego v Uruguay* 29 July 1981 (U.N. Doc. CCPR/C/13/D/56/1979) paragraph 10.3; Michael Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) *AJIL* 99(1) 119-141, 124-125.

<sup>230</sup> *Bankovic* (n 76) paragraphs 59-61; *Wall* (n 201) paragraph 109; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, Oxford, 2011) 7-9.

<sup>231</sup> See (n 57).

<sup>232</sup> *Hirsi* (n 57) paragraph 81.

<sup>233</sup> *Hirsi* (n 57) paragraphs 77, 81

<sup>234</sup> Giuffré, 'Watered-Down Rights on the High Seas' (n 65) 730.

The Italian government had argued that the Italian vessels were on a rescue mission rather than an interception operation at the time, hence the Law of the Sea on search and rescue prevailed.<sup>235</sup> The ECtHR rejected that argument, holding that Convention rights are not diminished on the ground that multiple international law regimes apply to a given situation.<sup>236</sup> In relation to the ‘jurisdiction’ issue, the Court concluded that it did not matter why the migrants were on board the Italian vessels. What mattered was whether they were under the ‘control’ of the Italian authorities.<sup>237</sup> However, no guidance was given as to the intensity of control required to engage jurisdiction. It is also not clear whether a State vessel’s failure to come to the rescue of a ship in distress would engage that State’s jurisdiction under the Convention and so provide the basis for a possible violation of the ECHR.

In relation to migration at sea, *Hirsi* confirmed that irregular entry did not preclude asylum seekers from the application of the *non-refoulement* principle at the frontier as guaranteed by the 1951 Refugee Convention<sup>238</sup> and re-iterated by the UNHCR Executive Committee.<sup>239</sup> *Hirsi* implied a positive obligation on the intervening State *not to return* the vessel to its country of origin or to *re-direct* it to an unsafe third country without first assessing the individual circumstances of the people on board.<sup>240</sup> It held that a State’s obligation under Article 3 ECHR is not exempted if the applicants do not ask for asylum.<sup>241</sup> Rather, whether or not a request for asylum is made, there is a positive duty to analyse how the authorities of the receiving State are fulfilling their international obligations in relation to the

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<sup>235</sup> *Hirsi* (n 57) paragraphs 79-80.

<sup>236</sup> *Hirsi* (n 57) paragraphs 79-80.

<sup>237</sup> *Hirsi* (n 57) paragraphs 79-81.

<sup>238</sup> Article 31(1).

<sup>239</sup> UNHCR, *Conclusions adopted by the Executive Committee on the International Protection of Refugees No 15 (XXX) 1979, A/34/12/Add.1*, paragraph (c): States have an obligation to admit asylum seekers on a temporary basis if not on a durable basis due to large-scale influx situations.

<sup>240</sup> Trevisanut, ‘The Principle of *Non-Refoulement*’ (n 65) 674; emphasis added.

<sup>241</sup> ECHR, article 3 prohibits torture and inhuman or degrading treatment or punishment.

protection of refugees.<sup>242</sup> The effect of the *Hirsi* case was to avoid binding the *non-refoulement* principle to the traditional concept of territory, avoiding duplicity of regimes. If the Court had decided the case differently, it would have made international protection conditional upon an individual's capacity to subvert border control migration policies by crossing borders undetected.<sup>243</sup>

Thus, intercepting States cannot be insulated from accountability only because they exercise extraterritorial border control measures. On the contrary, de-territorialisation comes with the guarantee of the *non-refoulement* principle. In effect, the *Hirsi* judgment established a beacon for migrants' rights at sea when confronted with State interception measures.<sup>244</sup> On the other hand, by focusing its reasoning in applying Article 3 ECHR mainly on asylum seekers and refugees, the Court avoided making a general statement that the *non-refoulement* principle applies to all intercepted migrants, thus undermining the 'absolute character of the rights secured by Article 3'.<sup>245</sup>

## 2.4 The International Legal Framework on Search and Rescue

The smugglers' next innovative strategy in response to the ECtHR's extraterritorial application of human rights and the *Mare Nostrum* Operation<sup>246</sup> performed by Italian authorities is to first cross the territorial sea of Libya and then leave irregular migrants' boats stranded at sea waiting to be rescued by Member States patrol boats.<sup>247</sup> Upon crossing over onto the high seas, irregular migrants are instructed to sabotage their own vessels (self-induced distress) to oblige State authorities to rescue them.<sup>248</sup> This brings a very high risk of death

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<sup>242</sup> *Hirsi* (n 57) paragraph 157; Giuffr , 'Watered-Down Rights on the High Seas' (n 65) 747.

<sup>243</sup> Giuffr , 'Watered-Down Rights on the High Seas' (n 65) 749.

<sup>244</sup> Wouters and den Heijer (n 57) 1.

<sup>245</sup> *Hirsi* (n 57) paragraph 122; Trevisanut 'The Principle of *Non-Refoulement*' (n 65) 669.

<sup>246</sup> Italian response to immigration to Europe from 18 October 2013 to 31 October 2014 operating close to Libyan coast; superseded by Frontex *Triton* Operation; see Chapter 5 and 6.

<sup>247</sup> Reitano and Tinti (n 196) 12.

<sup>248</sup> Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers, 2009) 98.

through starvation, dehydration, suffocation and violence from human smugglers.<sup>249</sup> This strategy has resulted in overburdening the search and rescue services of coastal States, making them ineffective to save lives. From 1988 to June 2016, over 27,000 people were documented as having drowned in an attempt to cross the Mediterranean Sea,<sup>250</sup> identified as one of the most deadly seas in Europe.<sup>251</sup> Situations of distress at sea often resulting in fatalities have become a regular feature of the Mediterranean Sea. Human rights challenges are raised in the context of search and rescue, disembarkation, and post-disembarkation processing for States, the shipping industry and international organisations.<sup>252</sup> The main challenges include the safety of lives at sea, the identification of a safe place of disembarkation in a timely manner and access to asylum procedures. In identifying solutions to these challenges, States must consider the different regimes of the Law of the Sea, international refugee law, international human rights law, international humanitarian law and criminal law.

The duty to assist persons in distress at sea, part of the *jus gentium*,<sup>253</sup> has its origins in customary international law.<sup>254</sup> This duty has been codified in various international conventions, namely: the International Convention for the Safety of

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<sup>249</sup> Amnesty International, “Libya is Full of Cruelty, Stories of Abduction, Sexual Violence and Abuse From Migrants and Refugees” 10 May 2015, 6, 11 <<https://www.amnesty.org/en/documents/mde19/1578/2015/en/>> accessed 28 October 2017.

<sup>250</sup> Amnesty International, ‘Search and Rescue Operations in the Central Mediterranean: Facts and Figures’ <<https://www.amnesty.org/en/latest/news/2014/09/search-and-rescue-operations-central-mediterranean-facts-and-figures/>> accessed 28 October 2017; adding up to date figures, see UNHCR Mediterranean Situation (n 122).

<sup>251</sup> Rapporteur Ms Tineke Strik, *Lives Lost in the Mediterranean Sea: Who is Responsible?* Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons 29 March 2012, 5.

<sup>252</sup> UNHCR, *Rescue at Sea, Stowaways and Maritime Interception* (2<sup>nd</sup> edition, 2011) 4.

<sup>253</sup> Grant Gilmore and Charles Black, *Salvage* (1957) *The Law of Admiralty* (8-1 law of nations).

<sup>254</sup> Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea (212 CTS 187) 23 September 1910, article 11; Geneva Convention on the High Seas 1958, article 12, also note that the preamble regarded the Convention as ‘generally declaratory of established principles of international law’; UNCLOS, article 98; ILC, *Commentary on draft article 12 of the United Nations Convention on the High Seas* (1956) UN Doc. A/3179; David Joseph Attard, Malgosia Fitzmaurice, Norman Martinez Gutierrez (eds), *The IMLI Manual on International Maritime Law: Volume I: the Law of the Sea* (Oxford University Press, 2014) 43.

Life at Sea 1974 (SOLAS Convention),<sup>255</sup> the International Convention on Maritime Search and Rescue 1979 (SAR Convention);<sup>256</sup> the United Nations Convention on the Law of the Sea 1982 (UNCLOS),<sup>257</sup> and the International Convention on Salvage 1989.<sup>258</sup> This duty applies to any master of a navigating vessel, be it a governmental or private fishing vessel.<sup>259</sup> States are responsible for establishing consecutive search and rescue zones without any overlap in the Mediterranean Sea,<sup>260</sup> through the conclusion of SAR agreements with neighbouring States.<sup>261</sup> The SAR Convention 1979 provides for the adoption of a ‘coordination system of search and rescue operations’<sup>262</sup> at the international level.<sup>263</sup> Italy, Malta and Libya have unilaterally declared<sup>264</sup> their SAR regions which partially overlap, creating problems of coordination in SAR operations. Malta’s SAR region covers an area of 250,000 km<sup>2</sup>, 750 times bigger than Malta itself.<sup>265</sup> It extends to Tunisian territorial waters, the Greek island of Crete and the territorial waters of Lampedusa, Lampione and Linosa.<sup>266</sup> Since the 1970s, Greece

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<sup>255</sup> SOLAS, article 98; 162 contracting parties as of 6/07/2016; all Mediterranean coastal States are parties, except for Bosnia Herzegovina.

<sup>256</sup> SAR Convention, Annex, Chapter 2; 107 contracting States as of 06/07/2016; Malta has not ratified the 2004 amendments on disembarkation of persons found in distress at sea; all Mediterranean coastal States have ratified the SAR Convention apart from Egypt and Israel.

<sup>257</sup> UNCLOS article 98; 168 contracting parties as of 30.06.2016.

<sup>258</sup> International Convention on Salvage 1989, article 10; 69 contracting parties as of 31.04.2016; note: Malta and Cyprus not ratified the Convention. Egypt, Syria and Tunisia are parties. Turkey is not a party.

<sup>259</sup> UNCLOS, article 98(1); SOLAS Chapter V, Regulation 33(1); SAR Convention, Chapter 1.3.2.

<sup>260</sup> SAR Convention, Annex, Chapter 2, paragraphs 2.1.3-2.1.5.

<sup>261</sup> SAR Convention, Annex, Chapter 2.1.4.

<sup>262</sup> Responsible SAR authorities: Italy (Ministry of Transport (Ministero dei Trasporti) and the Coastal Guard (Guardia Costiera) see SAR.8/Circ.1/Corr.6, Annex 2, 9; Malta (Armed Forces of Malta (AFM), Greece (JRCC Piraeus) see <sarcontacts.info/contacts/jrcc-piraeus-cospas-sarsat-spoc-5837/> 28 October 2017; IMO, *Global SAR Plan Containing Information on The Current Availability of SAR Services on Turkey* (Turkish Coast Guard Command) SAR.8/Circ.1/Corr.4, Annex 2, 65.

<sup>263</sup> UNCLOS, article 98(2); SOLAS, Chapter 5, Regulation 7; SAR Convention, Chapter 3.

<sup>264</sup> For Malta: IMO *Global SAR Plan Containing Information on the Current Availability of SAR Services* 20 October 2005, Circular SAR.8/Circ.1/Corr.3, Annex 2, 25; For Italy, IMO *Global SAR Plan Containing Information on The Current Availability of SAR Services* 23 April 2007, Circular SAR.8/Circ.1/Corr.5, Annex 2, 11.

<sup>265</sup> Malta Search and Rescue Training Centre <www.sarmalta.gov.mt/sar\_in\_Malta.htm> 28 October 2017.

<sup>266</sup> IMO Circular SAR.8/Circ.1/Corr.3, Annex 2; also see Amnesty International, ‘Lives Adrift Refugees’ (n 128) 32.

and Turkey have been in conflict over their sovereign rights in the Aegean Sea.<sup>267</sup> In the 1950s, Greece unilaterally designated its maritime search and rescue area,<sup>268</sup> followed by a unilateral declaration by Turkey in 1988, overlapping with the Greek region.<sup>269</sup> These unilateral demarcations are in contravention of the Hamburg Convention, which requires the demarcation of SAR areas to be based on bilateral agreements.<sup>270</sup> Equally, claiming overlapping SAR areas violates international standards as set out by IMO,<sup>271</sup> ICAO<sup>272</sup> Recommendations and the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual).<sup>273</sup>

The long-running Aegean dispute and the overlapping SAR areas between Italy, Malta and Libya have caused long delays in responding to rescue calls and have sometimes been used as an excuse for in-action, proving fatal to migrant lives. On

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<sup>267</sup> *Aegean Sea Continental Shelf Case* (n 219) 3; Petros Siousiouras and George Chrysochou, 'The Aegean Dispute in the Context of Contemporary Judicial Decisions on Maritime Delimitation' (Laws 2014) 3 12-49, 13; Tryfon Korontzis, 'Search and Rescue in the Aegean Sea' (2014) AJHSS 2(1) 13.

<sup>268</sup> In accordance with the International Civil Aviation Organization, *Convention on Civil Aviation ("Chicago Convention")*, 7 December 1944, (1994) 15 U.N.T.S. 295, 'Athens FIR was delimited within the framework of the European Regional Aviation Conferences in 1950, 1952 and 1958', see Hellenic Republic, Ministry of Foreign Affairs <<http://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/athens-fir.html>> accessed 24 October 2017; See Greek Law 1844/1989, on *Ratification of the Convention on Maritime Search and Rescue*, Government Gazette 100/A/25-4-1989, article 2 <<https://www.e-nomothesia.gr/diethneis-sunthekes/nomos-18441989-fek-100a-25-4-1989.html>> accessed 24 October 2017; Greece delimited its responsibility for airspace control (Athens FIR) – the sea boundaries are designated in accordance with the Athens FIR, see <[http://www.greekembassy.hu/english/thematiki\\_enotita\\_1/FIR.htm](http://www.greekembassy.hu/english/thematiki_enotita_1/FIR.htm)> accessed 24 October 2017; Turkey does not accept this designation and objects to any delimitation absent of a bilateral agreement.

<sup>269</sup> Turkish *Search and Rescue Regulation* 1988/13559 amended by Regulation 2001/3275, Official Gazette 24611, 12 December 2001.

<sup>270</sup> SAR Convention, Annex 2.1.5.

<sup>271</sup> International Maritime Organization, details on international standards <<http://www.unhcr.org/487b47f12.pdf>> accessed 28 October 2017.

<sup>272</sup> International Civil Aviation Organization, <<http://www.icao.int/safety/safetymanagement/pages/sarps.aspx>> accessed 28 October 2017.

<sup>273</sup> International Civil Aviation Organization (ICAO), *Convention on Civil Aviation ("Chicago Convention")*, 7 December 1944, (1994) 15 U.N.T.S. 295, Annex 12, <[http://www.icao.int/safety/airnavigation/NationalityMarks/annexes\\_booklet\\_en.pdf](http://www.icao.int/safety/airnavigation/NationalityMarks/annexes_booklet_en.pdf)> accessed 28 October 2017; on further discussion see Isavella Vasilogeorgi, 'Delimitation of IMO - ICAO Search and Rescue Regions: A Case of Jurisdictional Compilation and Complication' (2011) 36 AASL 251.

11 October 2013, a boat carrying over 400 people sank 111 km from Lampedusa and 218 km from Malta, within Malta's SAR zone.<sup>274</sup> The island of Lampedusa forms part of Maltese and Italian SRR. More than 200 people died as a consequence of the Maltese and Italian Regional Coordination Centre (RCC) passing rescue calls to one another in an attempt to evade responsibility for disembarking rescued persons in their territories.<sup>275</sup> Italy and Malta were guilty of similar failures in 2011, when 63 migrants died as a result of distress calls being ignored by the Italian and Maltese RCC.<sup>276</sup> These incidents are not a result of a lack of capacity, but of fear from consequences of rescue. Coastal States fear the heavy burden upon their immigration and security systems and private vessels fear investigation and possible detention.<sup>277</sup>

## 2.5 Conditions of Distress

Rescue interventions are duty based, not conditional on the nationality of the vessel in distress or of the individuals found on board.<sup>278</sup> It is for the State, the master of the ship or the commander of an aircraft to assess a specific case as a distress situation and whether it requires assistance. It does not matter whether the persons in need of assistance are irregular migrants, as long as they are found to be in distress.<sup>279</sup> The rescue of irregular migrant boats in distress has given rise to various legal issues with serious consequences. 'Distress' means 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'.<sup>280</sup> But states cannot agree on how the SAR Convention's definition of distress should be interpreted and applied. For some States, the vessel must be on the

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<sup>274</sup> Amnesty International, 'Lives Adrift Refugees' (n 128) 12.

<sup>275</sup> Basaran, 'Saving Lives at Sea' (n 128) 366.

<sup>276</sup> Amnesty International, 'Lives Adrift Refugees' (n 128) 1.

<sup>277</sup> Basaran, 'Saving Lives at Sea' (n 128) 367.

<sup>278</sup> Marcelo Di Filippo, *Irregular Migration and Safeguard of Life at Sea in International Law of the Sea: Current Trends and Controversial Issues* (Del Vecchio 2014) 12-13.

<sup>279</sup> SAR Convention, Chapter 2.1.10.

<sup>280</sup> SAR Convention, Annex 3, Chapter I, 1.3.13.



point of sinking, while for others it is sufficient for the vessel to be unseaworthy.<sup>281</sup>

But more worrying is the Member States' reluctance to initiate rescue operations. Malta for example knowing that irregular migrants wish to be rescued by Italian armed forces, will initiate a rescue operation if the boat is in distress, ie is sinking and in imminent danger of loss of lives.<sup>282</sup> If the boat people actively resist rescue attempts, the interception is not considered to fall under the SAR legal regime.<sup>283</sup> However, this interpretation is contrary to the SAR Convention's definition of 'distress phase' as: 'a situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance'.<sup>284</sup> The Convention places an obligation on the shipmaster responding to a distress call to decide whether the vessel needs immediate assistance. Logically, coastal States cannot know that a vessel is in distress if they do not receive a distress call from the vessel itself. However, once the distress call is received, the coastal State cannot ignore it or refuse to provide assistance if the individuals on board prefer to be rescued by an Italian vessel instead of by a Maltese or Greek vessel. The SAR Convention does not offer a solution to failed rescue scenarios by inactive SAR states. It is argued that the created legal vacuum requires specific provisions to address a failure to act scenario by reluctant SAR States and possible penalization measures for those who fail to exercise their responsibility to act.

It is argued that the confusion of responsibility in overlapping SAR zones or non-responsibility for a SAR zone does not relieve another State from responsibility under the SAR Convention if it is the recipient of a distress call. Trevisanut

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<sup>281</sup> Moreno-Lax, 'Seeking Asylum in the Mediterranean' (n 43) 195; Barnes, 'Refugee Law at Sea' (n 129) 58-59; Pugh (n 129) 58-59.

<sup>282</sup> Silja Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (2011) IJRL 0(0) 16; Tondini (n 132) 62.

<sup>283</sup> Klepp (n 282)15.

<sup>284</sup> SAR Convention, Annex, Chapter I, 1.11.

argues that an ‘exclusive long distance *de facto* control’ nexus exists between the State and those individuals in distress at the moment that a distress call is made, creating ‘a relationship’ sufficient to make the ECHR applicable.<sup>285</sup> A *de facto* control nexus exists when distress calls are made from the high seas, deriving from the argument that people in distress place their lives in the hands of the State receiving the call.<sup>286</sup> This control becomes *de jure* at the moment that the distress call comes from within the SAR zone, the State in question having the additional obligation to ‘promote the establishment, operation and maintenance of an adequate and effective search and rescue service...’<sup>287</sup> It is argued that the coastal State does not have an obligation merely to perform the SAR service, but to provide with ‘due diligence’ a certain level of service when assuming responsibility for its SAR zone.<sup>288</sup> Thus, coastal States have a positive obligation to take preventative measures to counter immediate risks to persons in distress under their responsibility – leading to recognition of a ‘right to be rescued’. Furthermore, the inconsistent interpretation of ‘distress’ is fatal to the most fundamental principle, the ‘right to life’.<sup>289</sup> With any rescue intervention, the decision as to the vessel’s seaworthiness rests with an individual shipmaster.<sup>290</sup> If the wrong decision is made and people drown as a result, the above inconsistency would not exonerate the shipmaster from liability.

## 2.6 The ‘Disembarkation’ Complication

Once a private or governmental vessel rescues irregular migrants, it becomes responsible to provide ‘initial medical or other needs and deliver them to a place of safety’ in accordance with the international legal framework on search and

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<sup>285</sup> Seline Trevisanut, “Is There a Right to be Rescued at Sea?” (n 48).

<sup>286</sup> Seline Trevisanut, “Is There a Right to be Rescued at Sea?” (n 48).

<sup>287</sup> UNCLOS, article 98(2).

<sup>288</sup> Moen (n 48) 386, 389: ‘Article 98(2) represents the imposition of a positive duty, with no clear understanding of its minimum threshold or its outer limit, and no clear indication of the relationship that gives rise to such an obligation. (...) Search and rescue under Article 98(2) then cannot be the mere promotion of a service, but the promotion of a certain level of service’.

<sup>289</sup> ECHR, article 2; EU Charter, article 2; ICCPR, article 6; see Chapter 5 for more detail.

<sup>290</sup> Basaran, ‘The Saved and the Drowned’ (n 43) 210.

rescue.<sup>291</sup> Complex legal issues arise in relation to governmental vessels rescuing irregular migrant vessels in distress, especially with regard to where to disembark the rescued individuals. Disembarkation rules have become problematic because of the Member States' reluctance to accept the responsibility to host irregular migrants whom they rescue. At EU level, the State in which the irregular migrants first disembark is legally responsible for their reception and screening, for processing asylum claims and for facilitating their return in accordance with CEAS<sup>292</sup> and the Dublin Regulation.<sup>293</sup> SAR Convention makes the State responsible for the search and rescue region decision maker on the 'place of safety'.<sup>294</sup> In this situation, the main preoccupation of Member States is not how to provide assistance, but what will happen to their immigration system. As there is no EU burden-sharing mechanism in respect of irregular migratory flows, the Member State which rescues these persons bears this burden alone.<sup>295</sup> Consequently, Member States such as Italy and Greece are discouraged from participating in rescue operations. This practice is contrary to international law governing search and rescue which requires assistance to be rendered to any person regardless of their immigration status.<sup>296</sup> It also violates the legal obligation to protect human life<sup>297</sup> and the principle of *non-refoulement*.<sup>298</sup> In short, immigration preoccupations are undermining the SAR regime.

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<sup>291</sup> SAR Convention, Annex 3, Chapter I, 1.3.2.

<sup>292</sup> Based on article 78(1) TFEU.

<sup>293</sup> Dublin Regulation (n 42) based on article 78(2)(e) TFEU, see articles 3, 5, and 18; Return Directive (n 42) article 1, articles 6-14; legal basis article 63(3)(b) TEC.

<sup>294</sup> Annex 5 to the amended SAR Convention, Chapter 3, paragraph 3.1.9 (MSC 78/26/Add.1, 3); SOLAS, Chapter V, Regulation 33.

<sup>295</sup> TFEU, article 80: Any Union policies on border checks, asylum and immigration shall 'be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'. In the field of irregular migration (apart from inadequate financial assistance), the European Council and the Commission omit to provide further assistance upholding the principle that this matter is a Member State obligation.

<sup>296</sup> UNCLOS, article 98; SOLAS as amended, Regulation 33, 1-1; SAR Convention, as amended, Chapter 3.1.9; MSC Guidelines (n 130) Annex 34; IMO *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* 22 January 2009 Circular FAL.3/Circ. 194, point 2(3).

<sup>297</sup> UDHR 1948, article 3; ICCPR, article 6(1); ECHR, article 2; EU Charter, article 2.

<sup>298</sup> Refugee Convention, article 33; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) 10 December

Hence, they do not apply a uniform interpretation of ‘place of safety’ and when a State is deemed to have discharged its responsibilities under international law,<sup>299</sup> benefiting from one of the weaknesses of the SAR regime - lack of agreed criteria on the ‘safest place’ for disembarkation. The original SAR Convention 1979 did not define ‘place of safety’. Equally problematic is the ‘place of safety’ interpreted as satisfied through a temporary accommodation of the rescued persons on board a warship, not necessarily on land.<sup>300</sup> Disparities in interpretation have continued despite IMO providing further clarification in 2004 of what ‘place of safety’ means, namely: ‘a location where rescue operations are 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. Further, it is a place from which transportation arrangements can be made for the survivors’ next or final destination’.<sup>301</sup>

The main reason for the disparity of interpretations is that Malta has not ratified the subsequent amendments.<sup>302</sup> It insists that rescued migrants must be disembarked at the nearest safe port; distinguishing the concept of safe place in terms of search and rescue.<sup>303</sup> Malta interprets this as meaning disembarkation in a country that satisfies the rescued person’s basic needs, without taking into consideration the need for international protection.<sup>304</sup> In Malta’s case, the nearest

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1984, United Nations, Treaty Series, Volume 1465, 85 (entry into force 26 June 1987), article 3; EU Charter, article 19.

<sup>299</sup> Parliamentary Assembly, *Europe’s Boat People: Mixed Migration Flows by Sea into Southern Europe* Resolution 1637 (2008) paragraph 6.

<sup>300</sup> MSC Guidelines (n 130) article 6.13.

<sup>301</sup> MSC Guidelines (n 130) point 6.12; Resolution MSC.70(69) (n 130) Annex 3, paragraph 1.3.2 "Rescue" - An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.

<sup>302</sup> IMO, Report of the Facilitation Committee on its Thirty-Fifth Session, *Formalities Connected with the Arrival, Stay and Departure of Persons* (19 March 2009) FAL 35/17, point 6.57.

<sup>303</sup> Jasmine Coppens, ‘The Lampedusa Disaster: How to Prevent Further Loss of Life at Sea?’ (2013) *IJMNST* 7(4) 591.

<sup>304</sup> Klepp (n 282) 549.

safe port is in Italy.<sup>305</sup> Italy, on the other hand, is a party to the 2004 Amendments and interprets the latter as requiring the State responsible for the SAR zone in which the rescue takes place to accept disembarkation in its own territory, which usually means the Maltese port of Valletta due to Malta's extended SAR area.<sup>306</sup> These inconsistent interpretations create problems and tensions between the two countries, resulting in disembarkation delays.

These interpretations go against the jurisprudence of ECtHR turning the concept of 'place of safety' coupled with the *non-refoulement* rule into the 'safe third country' concept for disembarkation purposes.<sup>307</sup> States have an obligation not only to ensure a safe place of disembarkation for individuals but also to ensure that the third country provides the necessary legal guarantees against indirect *refoulement*.<sup>308</sup> Such a decision is dependent on the third country's functional asylum system. This thesis will argue that the main third countries of departure or transit (Libya and Turkey), and the two frontline Member States (Italy and Greece) no longer fulfil the 'safe country' criteria governing disembarkation.<sup>309</sup>

## 2.7 In Search of Adequate Disembarkation Criteria

Due to the lack of clear disembarkation criteria, the UNHCR has developed guidelines on disembarkation based on the concept of 'next port of call'.<sup>310</sup> These do not provide a clear definition of 'next port of call'; rather, they assist by recognising various possibilities depending on the circumstances. In those

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<sup>305</sup> *M/V Pinar E* incident, <[http://www.doiarchived.gov.mt/EN/press\\_releases/2009/04/pr0640E.asp](http://www.doiarchived.gov.mt/EN/press_releases/2009/04/pr0640E.asp)> accessed 28 October 2017.

<sup>306</sup> Patricia Mallia, 'The MV Salamis and the State of Disembarkation at International Law: the Undefinable Goal' (2014) ASIL 18(11) May 15; Annex 5 to the amended SAR Convention (n 294) Chapter 3, paragraph 3.1.9.

<sup>307</sup> *NS and ME* (n 133) paragraph 94; *MSS* (n 115) paragraph 358; Hurwitz (n 133) 46; Kneebone (n 133) 129 and 54.

<sup>308</sup> *Wouters and den Heijer* (n 57) 7; Resolution 1821 (2011) (n 132) point 5.2; Tondini (n 132) 59; see Chapter 4 for further detail on indirect *refoulement*.

<sup>309</sup> See Chapters 3-5.

<sup>310</sup> UNHCR's Executive Committee, *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, EXCOM Conclusion No 23 (1981) No 12A (A/36/12/Add.1) paragraph 3.

circumstances where large numbers of irregular migrants are rescued, the next port of call would be the nearest port of geographic proximity. Paramount consideration shall be given to the safety and humanitarian needs of the rescued persons. Depending on the circumstances, other interpretations include: the next scheduled port of call if the situation allows so that the rescued vessel does not deviate from its route; the next port which is best equipped to receive the rescued person and provide access to asylum guarantees; disembarkation can take place at the nearest port of the State which conducts interception measures; or if the situation allows, in the State from which the boat left, considering its primary responsibility not to allow unseaworthy vessels to leave its territory.<sup>311</sup> Although guidance has been provided by the responsible international agencies assigned with the task of overseeing and guiding States regarding the development of international maritime law and safety at sea,<sup>312</sup> States have not taken these guidelines into consideration or acted upon them when conducting disembarkation practices.

In 2011, the UNHCR further proposed a ‘Model Framework for Cooperation following Rescue at Sea Operations involving Refugees and Asylum Seekers’ addressing disembarkation situations by the State other than the flag State.<sup>313</sup> This model framework was intended to be adopted as ‘one element in a broader comprehensive regional approach to address irregular mixed movements’.<sup>314</sup> To address the situation where States do not have the capacity to meet the needs of rescued persons, the UNHCR recommended the establishment of mobile

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<sup>311</sup> UNHCR and Global Consultations International Protection, *Background note on the protection of asylum-seekers and refugees rescued at sea*, 18 March 2002, paragraph 30 <<http://www.unhcr.org/3e5f35e94.html>> accessed 26 October 2017.

<sup>312</sup> IMO, UNHCR, International Chamber of Shipping, ‘UNHCR, Rescue at Sea, A Guide to Principles and Practice as Applied to Migrants and Refugees’ January 2015, <[http://www.imo.org/en/MediaCentre/HotTopics/seamigration/Documents/UNHCR-Rescue\\_at\\_Sea-Guide-ENG-screen.pdf](http://www.imo.org/en/MediaCentre/HotTopics/seamigration/Documents/UNHCR-Rescue_at_Sea-Guide-ENG-screen.pdf)> accessed 27 October 2017.

<sup>313</sup> UNHCR, *The Model Framework, Expert Meeting in Djibouti*, 8-10 November 2011; UNHCR, ‘Refugee Protection and Mixed Migration: The 10-Point Plan in Action’ February 2011; UNHCR, *Global Initiative on Protection at Sea, Division of International Protection*, 2014 <<http://www.unhcr.org/4ec1436c9.pdf>> accessed 17 October 2017.

<sup>314</sup> Klug (n 39) 58.

protection response teams. These experts, coming from governments, international organisations, UNHCR and NGOs, would be on a standby basis and called on by States upon request.<sup>315</sup> These teams would greatly assist States to comply with their international obligations and avoid the reception and detention of rescued people in inadequate conditions.

In response to the 11 October 2013 Mediterranean shipwrecks, UNCHR adopted the Central Mediterranean Sea Initiative (CMSI).<sup>316</sup> It introduced 12 steps designed to contribute to saving lives at sea, with steps taken at 1) EU level, 2) in collaboration with first countries of asylum and transit, and 3) in collaboration with countries of origin.<sup>317</sup> The UNHCR considers that introducing SAR patrols on certain Mediterranean routes followed with the reinforcement of Frontex is the key to saving lives at sea. Other recommendations included the establishment of a compensation scheme for those masters of commercial ships assisting vessels in distress, and a joint EU response for establishing a predictable mechanism for identifying clearly and without delay the safest places of disembarkation.<sup>318</sup>

The UNHCR's proposals and recommendations focused mainly on enhancing international cooperation through the facilitation of existing tools, agreements and instruments. It did not adopt new binding legal obligations on international cooperation to address the issue of inconsistent interpretations of the relevant provisions. It also failed to address the collective responsibility of burden sharing which many scholars regard as the key to the phenomenon of mixed migration.<sup>319</sup> The proposed mobile teams would not be a suitable solution for those States that experience a consistent flow of large-scale maritime arrivals, which is becoming

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<sup>315</sup> UNHCR, *The Model Framework* (n 313) Annex B, 11; Klug (n 39) 59.

<sup>316</sup> UNHCR Central Mediterranean Sea Initiative (CMSI), *EU solidarity for Rescue-at-sea and Protection of Refugees and Migrants: CMSI Action Plan* (UNHCR Bureau for Europe, updated March 2015).

<sup>317</sup> *ibid*, 2-3.

<sup>318</sup> *ibid*, see steps 2 and 3.

<sup>319</sup> Hurwitz (n 133) 163; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 71) 505. The authors argue that 'collective responsibility for refugee protection' is emerging as a legal principle.

the norm in Italy and Greece.<sup>320</sup> In fact, the UNHCR proposals mirror the EU action plan for irregular migration on re-enforcing existing instruments as the answer to this problem.<sup>321</sup>

One wonders whether the re-enforcement of existing instruments, which have not proven effective so far, will be the right solution to this continuing problem. Klug argues that although the proposed adoption of a model framework on cooperation for State action after rescue at sea is to be welcomed and contributes to ensuring adequate SAR services, these proposals are cost-intensive and strain public resources.<sup>322</sup> Requesting States to cooperate to the fullest extent possible when there is no such duty under customary international law is difficult.<sup>323</sup> The IMO has attempted to close loopholes impairing cooperation through the adoption of treaties creating a duty to cooperate. However, these loopholes exist not because of a lack of treaty obligations, but because of an unsatisfactory degree of non-compliance with existing rules.

The IMO has also established a set of principles on disembarkation as guidelines for Member States on where to disembark undocumented irregular migrants if the third country does not willingly collaborate.<sup>324</sup> The draft circular re-iterates that ‘if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued into a place of safety under its control in which the persons rescued can have timely access to post rescue support’.<sup>325</sup> It is not clear whether

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<sup>320</sup> Klug (n 39) 60.

<sup>321</sup> European Commission, *The Global Approach to Migration and Mobility*, COM(2011) 743 final, 2.

<sup>322</sup> Klug (n 39) 57.

<sup>323</sup> Delbrück Jost, ‘The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? – A Critical Look at a Much Debated Paradigm of Modern International Law’ in Holger Hestermeyer et al. (Eds), *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum* (Leiden: Martinus Nijhoff Publishers, 2012) 13-14.

<sup>324</sup> IMO *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* (n 296) point 2(3).

<sup>325</sup> *ibid*, point 2(3).



this imposes on the State responsible for the SAR zone a duty to accept the disembarkation of rescued persons in its own territory. There was considerable opposition by delegations to the change in the wording from ‘shall’ to ‘should’; leaving the situation uncertain due to the latter’s non-obligatory nature.<sup>326</sup> Member States feared that making disembarkation rules clear would act as a pull factor, increasing the number of irregular migration by sea.<sup>327</sup> Equally IMO’s attempts to adopt a Memorandum of Understanding (MoU)<sup>328</sup> between the countries in the central Mediterranean to reach an agreement on concerted procedures for the disembarkation of rescued persons failed.<sup>329</sup> In April 2014, it again failed to achieve any significant progress in reaching agreement between States Parties.<sup>330</sup>

So far, IMO and the UNHCR have managed to prepare joint guidelines, principles and practices fully respecting the rights of migrants and refugees at sea.<sup>331</sup> Although these guidelines are a first step to assisting States to avoid inconsistent interpretations, they represent soft law thus are not binding on States. Furthermore, they do not provide a precise procedure. On the contrary, they contain general principles without addressing the root cause of the inconsistencies. It is precisely the lack of detailed guidance as to good practice in given situations that are causing these conflicting interpretations. Furthermore, these guidelines fail to address the situation where the nearest Member States responsible for these individuals (Italy and Greece) do not fulfil the ‘safest place’

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<sup>326</sup> Facilitation Committee, *Report of the Facilitation Committee on Its Thirty-Fifth Session*, Doc. FAL 35/17, 19 March 2009, paragraph 6.59.

<sup>327</sup> Moreno-Lax (n 43) 176; comments by UK and Malta.

<sup>328</sup> MoU considered an informal but legal agreement; see Maritime Delimitation and Territorial Questions between *Qatar v Bahrain* (1 July 1994) ICJ Reports 1994, 112, paragraph 27; Hollis Duncan, *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012) 46.

<sup>329</sup> IMO, *Address of the Secretary-General at the Opening of the Thirty Seventh Session of the Facilitation Committee* 5-9 September 2011, Doc. FAL 37/INF, 3-4.

<sup>330</sup> Amnesty International, ‘Lives Adrift Refugees’ (n 128) 39; Coppens (n 303) 594.

<sup>331</sup> IMO, UNHCR, and the International Chamber of Shipping, ‘Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees’ January 2015, <[http://www.imo.org/en/MediaCentre/HotTopics/seamigration/Documents/UNHCR-Rescue\\_at\\_Sea-Guide-ENG-screen.pdf](http://www.imo.org/en/MediaCentre/HotTopics/seamigration/Documents/UNHCR-Rescue_at_Sea-Guide-ENG-screen.pdf)> accessed 25 October 2017.

criteria due to the overburdening of their reception capacities.<sup>332</sup> In need of concrete solidarity, the Greek and Italian governments have shown great interest in turning the CMSI into a concrete formalised model of cooperation on rescue for the Mediterranean Region.<sup>333</sup> However, the process is moving slowly with discussions and proposals but so far without any concrete action at regional level.<sup>334</sup>

In 2016, all 193 UN Member States agreed through the New York Declaration for Refugees and Migrants to protect those who are forced to flee.<sup>335</sup> The UNHCR was given the task of building upon the Comprehensive Refugee Response Framework and developing a ‘Global Compact on Refugees’, consisting of a programme of action setting out measures for States and other stakeholders to better cooperate and share responsibility for large-scale movements of refugees.<sup>336</sup> The four key objectives of the Global Compact are to ‘ease the pressures on host countries; enhance refugee self-reliance; expand access to third-country solutions; and support conditions in countries of origin for return in safety and dignity’.<sup>337</sup> The New York Declaration also paved the way for the opening of negotiations on a Global Compact for safe, regular and orderly migration.

Although UN action towards refugees in vulnerable situations is to be welcomed, the Global Compact has been criticised by legal scholars because it is not legally

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<sup>332</sup> see Chapter 5 for more detail.

<sup>333</sup> UNHCR, *CMSI: Action Plan* (n 316); Klug (n 39) 63.

<sup>334</sup> High Commissioner’s Dialogue on Protection Challenges, 2014  
<<http://www.unhcr.org/pages/5357caed6.html>> accessed 22 October 2017.

<sup>335</sup> UN General Assembly, New York Declaration for Refugees and Migrants, Resolution adopted on 19 September 2016, A/RES/71/1 (New York Declaration)  
<[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1)> accessed 20 May 2018.

<sup>336</sup> UNHCR, ‘The Global Compact on Refugees’, ZERO DRAFT, as at 31 January 2018  
<<http://www.unhcr.org/Zero-Draft.pdf>> accessed 20 May 2018; OHCHR, ‘Global Migration Group, Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations within Large and/or Mixed Movements’,  
<<http://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>> accessed 20 May 2018.

<sup>337</sup> UNHCR, Global Compact, <<http://www.unhcr.org/towards-a-global-compact-on-refugees.html>> accessed 20 May 2018.

binding Portraying the migrants as victims presenting States with a ‘moral and humanitarian’ challenge not only shows that protection will largely depend on States’ generosity, but also underlines the unwillingness of States to bind themselves legally to respect, promote and protect migrant rights in terms of international human rights law.<sup>338</sup> Hence, all that States committed themselves to in the New York Declaration was to ‘consider developing non-binding guiding principles and voluntary guidelines’.<sup>339</sup> Although the Global Compact is a positive step in a more human rights centred direction, it is not a long term solution to migrants’ vulnerability. Any response to large scale movements of migrants will not be resolved by adopting new laws and binding protocols as recommended by the zero draft but by finding solutions to ensure that States comply with their human rights obligations.<sup>340</sup> What is necessary in times of large scale movements of migrants is to create an international mechanism of accountability and independent oversight of human rights violations.

## **2.8 Regulating Interception and Search and Rescue at EU level**

Equally, the EU failed to adopt a uniform interpretation on principles such as rescue, disembarkation and distress. In 2014, to avoid Member States divergent practices for sea operations, the Commission proposed the adoption of a ‘Sea Borders Regulation’,<sup>341</sup> combining border control and search and rescue within one Regulation, operational under Frontex<sup>342</sup> coordination. The Sea Borders Regulation promotes the protection of fundamental rights and the principle of *non-refoulement*;<sup>343</sup> prohibiting the disembarkation of intercepted or rescued

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<sup>338</sup> Idil Atak and others, ‘Migrants in Vulnerable Situations’ and the Global Compact for Safe Orderly and Regular Migration, SSRN Paper No. 273/2018, 6; New York Declaration (n 335) paragraph 10.

<sup>339</sup> New York Declaration (n 335) paragraph 52.

<sup>340</sup> Zero draft (n 336) objective 7.

<sup>341</sup> Based on article 77(2)(d) TFEU; a legal act which is of general application, binding in its entirety and directly applicable in all Member States, TFEU, article 288.

<sup>342</sup> For further details on Frontex see Chapter 5.

<sup>343</sup> Refugee Convention, article 33(1).

persons to a third country by participating Member States if they are aware or ought to be aware that the third country is engaged in human rights violations.<sup>344</sup>

Despite human rights safeguards expressly set out within the Sea Borders Regulation, it is argued however that in practice the rules do not effectively assist in a uniform interpretation. Unfortunately, disembarkation continues to depend largely on where the ship was intercepted and/or rescued. If the interception occurred within the territorial sea or the contiguous zone of a host or participating Member State, the disembarkation must be conducted within that coastal Member State.<sup>345</sup> If the interception takes place on the high seas, the persons on the ship must be disembarked at the third country of the ship's departure in accordance with the principle of *non-refoulement* and respect for fundamental rights; and if this is not possible, the disembarkation must take place in the host Member State.<sup>346</sup> There is no geographic restriction on the 'place of safety' for disembarkation. This allows irregular migrants to be disembarked in non-EU countries. Furthermore, the Sea Borders Regulation permits an intercepted ship to alter its course, meaning a possible diversion to international waters or a third country of origin, a possible risk of *refoulement*.<sup>347</sup> This practice could constitute a form of push-back which is prohibited.<sup>348</sup>

Such an outcome was a result of contestation on Article 9 on 'Search and Rescue' and Article 10 on 'disembarkation' of the 2013 draft Regulation by the six Member States (Italy, Malta, Greece, Cyprus, Spain and France)<sup>349</sup> bordering the Mediterranean Sea. They were of the opinion that there is no need to over-regulate the area of 'search and rescue and disembarkation' as it is already

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<sup>344</sup> Sea Borders Regulation (n 7) article 4 (1) and (2); The words 'forced to enter' and 'conducted to' were included by the EP in order to cover situations of push-backs.

<sup>345</sup> Sea Borders Regulation (n 7) article 10(1)(a).

<sup>346</sup> Sea Borders Regulation (n 7) article 10(1)(b).

<sup>347</sup> Aas and Gundhus (n 79) 14.

<sup>348</sup> *Hirsi* (n 57) paragraphs 134, 138; see Chapter 4 on push-backs.

<sup>349</sup> Greek, Spanish, French, Italian, Cyprus and Maltese delegations, Inter-institutional file: 2013/0103(COD) Council Doc. 14612/13 (Brussels 10 October 2013).

regulated by international law through UNCLOS, SAR, the SOLAS Convention, and the IMO guidelines in the IAMSAR Manual as they were in complete agreement as to their requirements. However, in August 2013, only a few months before their contestation, Italy and Malta were in complete disagreement as to the place of disembarkation for the 102 migrants rescued by the oil tanker ‘MV Salamis’ in Syracuse, Italy.<sup>350</sup> The irregular migrants were saved 45 nautical miles from the Libyan port. On behalf of the Libyan authorities, the Rome RCC<sup>351</sup> ordered the oil tanker, flying the flag of Libya, to disembark the migrants at the nearest port in Libya, Khoms which MV Salamis refused.<sup>352</sup> Malta then refused the tanker permission to enter its territorial waters with the belief that disembarkation takes place in safest port, ie Lampedusa despite Malta’s SAR responsibility. After being stranded at sea for two days, the Italian government agreed that the irregular migrants could be disembarked in Italy.<sup>353</sup>

Equally, these States succeeded in the current Sea Borders Regulation to fail to address a specific definition on distress. The 2013 draft Regulation specified that participating units were to take into account the following elements when assessing whether a ship was in distress: ‘(a) the existence of a request for assistance; (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination; (c) the number of passengers in relation to the type and condition of the ship; (d) the availability of necessary supplies such as fuel, water, food to reach a shore; (e) the presence of qualified crew and command of the ship; (f) the availability and capability of safety, navigation and communication equipment; (g) the presence of passengers in urgent need of

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<sup>350</sup> Niels Frenzen, ‘Details (and Document) Regarding EU Mediterranean States Opposition to Proposed Frontex Sea Borders Regulation’ (Migrants At Sea, 16 October 2013) <[migrantsatsea.wordpress.com/2013/10/16/details-and-document-regarding-eu-mediterranean-states-opposition-to-proposed-frontex-sea-borders-regulation/](http://migrantsatsea.wordpress.com/2013/10/16/details-and-document-regarding-eu-mediterranean-states-opposition-to-proposed-frontex-sea-borders-regulation/)> accessed 27 October 2017.

<sup>351</sup> Rescue Coordination Centre.

<sup>352</sup> CoE Parliamentary Assembly, *The “Left-to-die boat”: Actions and Reactions* Report Committee on Migration, Refugees and Displaced Persons, Rapporteur: Ms Tineke Strik (Doc. 13532, 9 June 2014) 11.

<sup>353</sup> BBC News Europe, ‘Tanker Migrants Rejected by Malta Arrive in Italy’ (7 August 2013) <<http://www.bbc.com/news/world-europe-23599696>> accessed 27 October 2017.

medical assistance; (h) the presence of deceased passengers; (i) the presence of pregnant women or children; (j) the weather and sea conditions, including weather and marine forecasts'.<sup>354</sup> As irregular migrants travel in overcrowded and unseaworthy ships, intercepting Member States would end up rescuing a ship full of refugees fulfilling points (a-j).

For this reason, the six Mediterranean States amended the 2013 draft regulation from a duty to classifying the above factors as 'shall be considered to be in a situation of distress'<sup>355</sup> to an obligation to transmit relevant information and observations to the responsible RCC to consider whether the vessel is in a 'phase of uncertainty, alert or distress'.<sup>356</sup> This amendment took away Member State obligation of an immediate action to render assistance or launch an operation. This amendment has stripped the Regulation of its aim, that of saving lives at sea and avoiding inconsistent interpretations by Member States. It also creates a dangerous environment whereby it is left to the discretion of government vessels to transmit 'relevant' information. The actual problem in the Mediterranean has arisen because of Member State understanding of the word 'relevant' in the context of border control undermining the concepts of international regime on search and rescue and human rights. As a result, a dangerous discretion is afforded to search and rescue units in determining a distress situation on a case by case basis having regard to the above list of factors. Furthermore, this Regulation does not address cases where a situation of 'uncertainty' eventually becomes a situation of 'distress'. There is a blurred line between these situations which leaves irregular migrants vulnerable to the perils of the sea and the discretion of State authorities judging a particular situation, especially in light of border control objectives. Similarly, it does not address the issue of post-disembarkation

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<sup>354</sup> Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union COM(2013) 197 final, article 9(6).

<sup>355</sup> *ibid*, articles 9(5) and 9(6).

<sup>356</sup> Sea Borders Regulation (n 7) article 9(2)(a) and (f).

capacities and efficiency of asylum and immigration system of receiving coastal State.

## **2.9 Conclusion**

The ongoing battle between Member States and organised criminal networks (described as the dark side of globalisation) challenges fundamental principles of international law. On the one hand, human smugglers pin their hopes upon Member States' compliance with their refugee, human rights and search and rescue obligations towards overcrowded boats of irregular migrants in distress. On the other hand, Member States determined to combat human smugglers are intentionally misinterpreting their international obligations to avoid responsibility for the individuals who are unwittingly assisting the growing industry of organised crime. Member States' reluctance to receive irregular migrants rescued at sea has directly contributed to the inconsistent application of certain terms in the relevant Conventions, giving rise to different national approaches to the irregular migration phenomenon. This is particularly true of the term 'place of safety'. Clearly, the obligations arising out of search and rescue operations conflict with Member States' interests in managing migration and ensuring their security. Despite these extraterritorial measures, the situation has not improved and irregular migration flows remain high.

In light of above legal issues, it is highly recommended that concerned member states may a) refer a question for uniform interpretation of 'distress' to the International Tribunal for the Law of the Sea (ITLOS Hamburg), or b) request the EU Parliament to initiate an opinion of the CJEU, or c) to the ECtHR. In addition, the EU Commission must take positive action against those States that refuse disembarkation of boats containing asylum seekers, especially, prohibit any disembarkation instructions to countries known as human rights violators. In addition, the definition of 'safe port' must be redefined to take into consideration not just their immediate physical needs but also the risk of *refoulement*. In

addition, a systematic evaluation of Frontex operations and State diversion practices must be conducted against the principle of *non-refoulement* and in protection of ‘right to life’.

Chapter Three will assess the Member States’ double challenge: on the one hand they must comply with their border management obligations under the SBC; and on the other, they must comply with their obligation to provide international protection to those entitled to it. The tendency of EU and Member State policy makers is to deal with the issue of irregular migration by managing external borders through ‘externalisation’ measures, notably the externalisation of responsibility through returns or transfer mechanisms to third countries. The main challenge for the SAR Regime and for EU and Member State immigration laws is to prohibit the practice of illicit return to unsafe third countries and identify the place of safety for disembarkation, especially due to the mixed nature of these irregular migratory flows involving refugees and asylum seekers. As a result, the Italian and Greek extraterritorial measures on irregular migration with EU assistance aimed mainly at combating human smuggling are undermining human rights.



## Chapter 3: Europe's South-Eastern External Border Crisis

### 3.1 Introduction

Migrants, arriving on overcrowded unseaworthy vessels fleeing persecution, civil war, poverty and devastation generated contradictory reaction from the EU and its Member States. Bound by its international obligations under the Refugee Convention and the ECHR, unable to dissociate asylum seekers from irregular migrants in mixed migration related matters, the EU had to present these massive arrivals as a humanitarian crisis.<sup>357</sup> However, this approach came in direct conflict with its policies and practices considerations on border control preventing unauthorised entry. This 'Border Spectacle'<sup>358</sup> has politically been addressed from the perspective of human smuggling and neglected significantly the refugee and asylum seeker perspective.<sup>359</sup> This approach stereotypes the people as unidentified 'alien bodies', promoting a state of exception reflecting 'institutional racism and biopolitics'<sup>360</sup> with the intended effect of suspending migrants' rights, contrary to the Refugee Convention and the ECHR.<sup>361</sup> The chapter examines the reaction of the EU, Italy and Greece to the situation in terms of security in the form of collective preventative extraterritorial State control against smugglers. This chapter questions the implications of EU border control from a legal perspective.

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<sup>357</sup> Commission, 'Humanitarian Aid and Civil Protection' <[http://ec.europa.eu/echo/refugee-crisis\\_en](http://ec.europa.eu/echo/refugee-crisis_en)> accessed 28 October 2017.

<sup>358</sup> Nicholas De Genova, *Working the Boundaries: Race, Space, and 'Illegality' in Mexican Chicago* (Durham, NC: Duke University Press, 2005); Bigo (n 17) 213.

<sup>359</sup> Migrant Smuggling Protocol (n 135) article 2; article 3(a) "Smuggling of migrants" 'shall mean 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'; Federica Mazzara, 'Spaces of Visibility for the Migrants of Lampedusa: The Counter Narrative of the Aesthetic Discourse' (2015) IS 70(4) 449-464, 449.

<sup>360</sup> Iain Chambers, 'The Museum of Migrating Modernities' in Beatrice Ferrara (ed), *Cultural Memories, Migrating Modernities and Museum Practices* (Milan: Politecnico di Milano, 2012) 3-32, 17.

<sup>361</sup> Mazzara (n 359) 450; Giorgio Agamben, *State of Exception* (The University of Chicago Press 2005) 87.

To block flows of refugees from arriving in EU territory, Italy and Greece with EU assistance have transformed the Mediterranean and Aegean seas into a migration containment belt. This invisible belt would be secured through a series of extraterritorial measures acting as movable walls to an invisible fortress Europe. These extraterritorial measures taken by the EU, Italy and Greece in response to the European refugee crisis are scrutinised under a pre-emptive three stage strategy. Under the first stage, this chapter questions the steps taken by Libya and Turkey to ‘criminalise the smuggling of migrants’ and their adopted provisions prohibiting any person to leave the country or cross its borders in an irregular manner, in light of the object and purpose of the Protocol against the Smuggling of Migrants by Land, Sea and Air.<sup>362</sup> The second stage scrutinises the interception measures in the Mediterranean and Aegean seas and the EU-Turkey statement. The third stage consists of an assessment of EUROSUR, a surveillance system in the Mediterranean Sea. The chapter concludes by arguing that these measures referred to as the EU ‘humanitarian border’<sup>363</sup> policy violate international obligations such as *non-refoulement*, and the right to leave one’s own country combined with the right to asylum.

### **3.2 The European Refugee Crisis and the Evolving Supranational External Border Regime**

In the name of ‘humanitarianism’ and deaths in the Mediterranean Sea,<sup>364</sup> the legal and political justification delivered by the EU and its Member States to manage the ‘European refugee crisis’ is pre-emptive interception.<sup>365</sup> The EU’s pre-emptive interception strategy can be summarised in the words of a European coast guard quoted in research conducted by Ruben Andersson: to avoid deaths at sea the strategy is ‘to prevent [migrants] from leaving’, that is, prevent them

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<sup>362</sup> Article 6.

<sup>363</sup> William Walters, ‘Foucault and Frontiers: Notes on the Birth of the Humanitarian Border’, in Ulrich Bröckling, Susanne Krassman and Thomas Lemke (eds), *Governmentality: Current Issues and Future Challenges* (London and New York, NY: Routledge, 2010) 138–164.

<sup>364</sup> The Global Approach to Migration and Mobility (n 321) 6.

<sup>365</sup> The Global Approach to Migration and Mobility (n 321) 15-16.

getting on a boat which leads to danger.<sup>366</sup> The Australian Prime Minister Tony Abott described this approach as a compassionate policy, to ‘stop the boats’ in a determination to save lives.<sup>367</sup> Although the EU led into believing that its migration policy acted in solidarity with the refugees, this chapter argues that in fact it is consistent with a ‘border management game’, in which the EU sets and changes its terms: the smuggler is the ‘cause’, irregular migrants are ‘the victims’, the EU is the ‘saviour’ and military intervention is the ‘solution’.<sup>368</sup> All these fall ‘under the rubric of compassionate border work’<sup>369</sup> in which the EU purports to have developed measures such as interception and surveillance as lifesaving tools. However, in this chapter it is argued that these measures are adopted as deterrent tools to irregular migration having as their main objective the circumvention of international responsibility contrary to international obligations and human rights laws.

This form of border control process is referred to as ‘border externalisation or the external dimension of border management’.<sup>370</sup> The concept of ‘extra-territorialisation’ is described by legal scholars as the ‘means by which the EU attempts to push-back the EU’s external borders’ beyond Member State territories.<sup>371</sup> Others describe extra-territorialisation as the process of ‘policing EU borders at a distance’,<sup>372</sup> under ‘remote control’<sup>373</sup> deciding who enters and who is

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<sup>366</sup> Ruben Andersson, ‘Europe’s Failed “Fight” against Irregular Migration: Ethnographic Notes on a Counterproductive Industry’ (2016) JEMS Volume 42 Issue 7, 1060 <<http://www.tandfonline.com/doi/full/10.1080/1369183X.2016.1139446>> accessed 16 October 2017.

<sup>367</sup> Richard Ackland, ‘If Europe Listens to Tony Abbott, the Future for Refugees Will be Cruel’ (The Guardian, 21 April 2015) <<https://www.theguardian.com/commentisfree/2015/apr/21/if-europe-listens-to-tony-abbott-the-future-for-refugees-will-be-cruel>> accessed 28 October 2017.

<sup>368</sup> Pallister-Wilkins (n 81) 63.

<sup>369</sup> Adrian Little and Nick Vaughan-Williams, ‘Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia’ (2016) EJIR 3, <<http://journals.sagepub.com/doi/abs/10.1177/1354066116661227>> accessed 28 October 2017.

<sup>370</sup> Casas-Cortes and Cobarrubias (n 3) 80.

<sup>371</sup> Triandafyllidou and Dimitriadi (n 2) 601; Marin, ‘Policing EU’s External Borders’ (n 3) 486.

<sup>372</sup> Guild and Bigo (n 17) 258.

<sup>373</sup> Guiraudon (n 3) 191.

prevented from entering.<sup>374</sup> The combination of extra-territorial and externalisation measures, has created a new concept of border management. Borders are no longer considered only fixed territories of a State, but extend beyond State territories through pre-emptive security checks and surveillance activities.<sup>375</sup> Although extra-territorialisation measures are conveyed as necessary to save lives at sea, this chapter shows that their actual objective is to prevent third country nationals (TCNs) from entering the EU; and if they attempt to do so, they do not come close to reaching Member State territory.<sup>376</sup> To achieve this objective, the main actors in border management had to be the third countries from which the irregular migrants are departing, in collaboration with the EU, its Member States and the relevant EU agencies.<sup>377</sup> These various actors in the field would act under the auspices of the renewed Global Approach to Migration and Mobility (GAMM) policy,<sup>378</sup> an EU strategy to externalise the complete agenda on migration towards third countries' territories through the EU's external relations policy.<sup>379</sup>

This chapter divides the extraterritorial measures undertaken by Italy and Greece in collaboration with the EU under a pre-emptive three-stage strategy, acting as *ad hoc* fences. The first stage involves the EU's determination for third countries such as Libya and Turkey to comply with their obligations under the Palermo

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<sup>374</sup> Torresi (n 3) 656; Casas-Cortes, Cobarrubias and Pickles, 'Riding Routes and Itinerant Borders' (n 3) 895.

<sup>375</sup> Topak (n 120) 2; Kirstine Mose and Vera Wriedt, 'Mapping the Construction of EU Borderspaces as Necropolitical Zones of Exception' (2015) BLR 3(2) 278-304, 281.

<sup>376</sup> Rogier van Reekum, 'The Mediterranean: Migration Corridor, Border Spectacle, Ethical Landscape' (2016) MP, 21(2) 336-341, 338.

<sup>377</sup> Commission Communication, *A European Agenda on Migration* 13 May 2015, COM(2015) 240 final, 11-12; GAMM extended the concept of borders to neighbouring countries of the EU to the 'neighbours of neighbours', i.e. to third countries of origin, transit and destination; The *Global Approach to Migration and Mobility* (n 321) 2.

<sup>378</sup> TFEU, article 77(2)(d); Council of the European Union, *Presidency Conclusions* (2005) Doc 7619/1/05; Council of the European Union, *Global approach to migration: priority actions focusing on Africa and the Mediterranean*, Doc 15744/05; *Global Approach to Migration and Mobility* (n 321) 2; Casas-Cortes, Cobarrubias and Pickles, 'Good Neighbours Make Good Fences' (n 179) 2; Anna Triandafyllidou, 'Multi-levelling and Externalizing Migration and Asylum: Lessons From the Southern European Islands' (2014) ISJ 9(1) 7-22, 9.

<sup>379</sup> The *Global Approach to Migration and Mobility* (n 321) 2.

protocols. The second stage scrutinises the readmission agreements and interception measures taken by Italy and Greece on the high seas. The third stage examines the EU surveillance system, EUROSUR and its purported contribution to the European refugee crisis.

### **3.3 First Pre-emptive Security Check: Criminalisation of Migrants**

To ensure irregular migrants will not cross the high seas and arrive on EU territory, they had to be prevented from leaving the third country territory. The EU adopted pre-emptive interception measures referred to in this thesis as the ‘border game’.<sup>380</sup> The ‘border game’ consists of the third country of departure playing an active role in the surveillance and apprehension of would-be asylum seekers in their own territory. If the TCN manages to reach Member State territorial sea, only then will the respective Member State respect and comply with its obligations under the Refugee Convention. It can be questioned how this individual can possibly receive full protection by the very State that tried to sabotage his/her arrival as an undesired immigrant. Although beyond their infrastructural capacities, the EU requires Libya and Turkey<sup>381</sup> to manage the increasing number of migrants or refugees who transit their territory, and simultaneously provide the necessary legal guarantees within their immigration systems.<sup>382</sup> To comply with these requirements, Libya and Turkey, both parties<sup>383</sup> to the UN Convention against Transnational Organised Crime 2000 and its Protocols (Palermo Protocols),<sup>384</sup> have taken steps to ‘criminalise the smuggling

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<sup>380</sup> See Chapter 2 , section 2.1

<sup>381</sup> No association agreement between EU and Libya; part of European Neighbourhood Instrument (ENI) regional programmes on migration and human rights <[http://eeas.europa.eu/libya/index\\_en.htm](http://eeas.europa.eu/libya/index_en.htm)> accessed 25 October 2017; Regulation (EU) No 232/2014 Establishing a European Neighbourhood Instrument (OJ L77/27 15.3.2014); EU-Turkey re-admission Agreement (n 99).

<sup>382</sup> HRW, “Europe’s Refugee Crisis, An Agenda for Action” 16 November 2015 <<https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>> accessed 25 October 2017.

<sup>383</sup> Parties: 187, Signatories: 147; <[https://treaties.un.org/PAGES/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/PAGES/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en)> accessed 26 October 2017.

<sup>384</sup> See (n 72).

of migrants’ and have adopted provisions prohibiting any person to leave the country or cross its borders in an irregular manner.<sup>385</sup> In accordance with Libyan legislation, any non-national apprehended crossing Libyan borders irregularly may be imprisoned and/or subject to a minimum fine of 2,000 Libyan dinars (equivalent to EUR 1,326).<sup>386</sup> Turkey imposes an administrative fine of 1,000 to 3,000 Turkish Lira (equivalent to EUR 260 to 780) on its nationals or non-nationals who are apprehended crossing or attempting to cross Turkish borders irregularly.<sup>387</sup>

Although Turkey and Libya justify these measures on the basis of meeting the overall object and purpose of the Protocol against the Smuggling of Migrants by Land, Sea and Air, they are risking to violate Article 5, which prohibits the ‘criminalisation’ of migrants, specifying that smuggled migrants should not be subject to criminal prosecution if they are the object of conduct related to migrant smuggling as set forth in Article 6 of that Protocol.<sup>388</sup> The legislative guide for the implementation of the Protocol expressly provides that sanctions should not apply to migrants ‘even in cases where it involves entry or residence that is illegal under the laws of the State concerned’.<sup>389</sup> It has been acknowledged since 1949, that people fleeing from persecution and other forms of hardship do not usually have the required travel documents, as they often have no choice but to cross international borders irregularly.<sup>390</sup> In consequence, States cannot legitimately

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<sup>385</sup> Article 6.

<sup>386</sup> Libyan Law No 6 of 20 June 1987, *Concerning the Regulation of Aliens Entry, Residence and Exit in Libya*, Issued on 24/Shawwal/1396 FDP, Corresponding to 20/06/1987, as amended by Law No 2 in 2004, article 19 <[http://security-legislation.ly/sites/default/files/files/lois/1214-Law%20No.%20\(6\)%20of%201987\\_EN.pdf](http://security-legislation.ly/sites/default/files/files/lois/1214-Law%20No.%20(6)%20of%201987_EN.pdf)> accessed 25 October 2017; Exchange rate as of 06.01.2017 <<http://lyd.fxexchangerate.com/eur/2000-currency-rates.html>> accessed 6 January 2017.

<sup>387</sup> Turkey: Law No 5682 of 1950, *Passport Law*, 24 July 1950 (as amended in April 2011 by articles 7–9 of Law No 6217) article 33; Exchange rate as of 06.01.2017 <<http://www.currencyconverterx.com/1000-TRY-to-EUR>> accessed 6 January 2017.

<sup>388</sup> An obligation similar to article 31 of the Refugee Convention.

<sup>389</sup> UNODC, ‘Legislative Guides for the Implementation of the UN Convention against Transnational Organized Crime and the Protocols Thereto’ (UN 2004) 340.

<sup>390</sup> UN Economic and Social Council, ‘Study on Statelessness’ (UN doc E/1112/Add.1, 1949) 24.

prosecute migrants who use fraudulent documents to leave their country.<sup>391</sup> These measures disregard the mixed migration pattern in the Central and Eastern Mediterranean routes which consist of refugees and economic migrants.<sup>392</sup>

The Protocol not only protects refugees but also covers the contemporary reality of the broad category of migrant smuggling. As Andreas Schloenhardt and Hadley Hickson have argued, the immunity granted by Article 5 of the said Protocol must extend to any administrative measure punishing smuggled migrants. Holding otherwise would result in States being allowed to impose ‘punitive measures under the guise of administrative immigration processes’ even though they are precluded from imposing criminal sanctions.<sup>393</sup> This view is supported by the *travaux préparatoires* which confirm that Article 6(1)(b) applies even when an individual knowingly possesses fraudulent documents for the purpose of migrant smuggling within the meaning of Article 6(1)(a).<sup>394</sup>

Administrative measures such as detention and fines pose a greater threat to smuggled migrants’ rights due to the limited involvement of the courts. In effect, detention measures are similar to a criminal sanction prohibited under Article 5. They have similar characteristics such as forced deprivation of liberty and personal autonomy, and both entail coercive treatment.<sup>395</sup> Detainees are often held in criminal prisons or prison-like settings.<sup>396</sup> Detention measures have proved to

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<sup>391</sup> Colin Harvey and Robert Barnidge, ‘Human Rights, Free Movement, and the Right to Leave in International Law’ (2007) *IJRL* 19(1), 1-21, 16.

<sup>392</sup> Anna Triandafyllidou, *Disentangling the Migration and Asylum Knot, Dealing with Crisis Situations and Avoiding Detention* (RSCAS PP 2013/19 Policy Papers, 2013) 1.

<sup>393</sup> Andréas Schloenhardt and Hadley Hickson, ‘Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air’ (2013) *IJRL* 25 (1), 39-64, 47.

<sup>394</sup> UN GAOR, Report of the Ad Hoc Committee, *Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions*, 55th Session, Addendum, ‘Interpretative Notes for the Official Records’ (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (Travaux Préparatoires) (UN Doc. A/55/383/ Add.1, 14, paragraph 93.

<sup>395</sup> Groves (n 136) 228-230.

<sup>396</sup> International Detention Coalition, ‘A New Agenda for Home Affairs: Ending Unnecessary Immigration Detention in the EU’ (2014) point 16, 5.

be ineffective as deterrence tools to irregular migration.<sup>397</sup> There are other less intrusive instruments which the EU and its partners can use to achieve the desired outcome in preventing irregular migration.<sup>398</sup> States may include in their legal and policy frameworks alternatives to detention, such as: community placement, shelters, fundraising opportunities and reporting conditions.<sup>399</sup> These punitive domestic measures conflict with the principle of ‘good faith performance’.<sup>400</sup> States parties to a treaty must ensure that the treaty is ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms ‘...in their context and in the light of its object and purpose’<sup>401</sup> and must not act arbitrarily or capriciously.<sup>402</sup> Although States have a sovereign right to impose administrative measures on smuggled migrants, in effect they are sanctioning them contrary to Article 5 and the good faith principle,<sup>403</sup> rendering this obligation ineffective.<sup>404</sup>

The restrictive measures are taken in response to requests by the strongest and economically independent States to weaker States such as Libya, Turkey and Egypt to curtail the ‘right to leave’, including place of citizenship or current

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<sup>397</sup> Detention Watch Network, ‘Ending the Use of Immigration Detention to Deter Migration’ April 2015, <<https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Detention%20as%20a%20Deterrence%20Policy%20Brief.pdf>> accessed 25 October 2017; Frontex Annual Risk Analysis 2015, Massive influxes of irregular migrants have reached European soil in 2014 (280,000) 5 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2015.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf)> accessed 25 October 2017; For 2015 (557,899 as of October 6 2015) see <<https://www.iom.int/news/iom-monitors-latest-migrant-arrivals-deaths-mediterranean>> accessed 25 October 2017.

<sup>398</sup> Harvey and Barnidge (n 391) 14.

<sup>399</sup> OHCHR and UNHCR, ‘Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-seekers and Refugees’ (2014-2019) 19 <<http://www.unhcr.org/53aa929f6.pdf>> accessed 25 October 2017.

<sup>400</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, Volume 1155, 331 (VCLT) article 26: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

<sup>401</sup> VCLT, article 31(1); article 31 reflects customary international law; see Kasikilil /Sedudu Island (*Botswana v Namibia*) Judgment, ICJ Reports 1999, 1045, paragraph 18.

<sup>402</sup> Gabcíkovo-Nagymaros Project (*Hungary v Slovakia*) [1997] ICJ Reports 142; Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Sources of Law* (Volume 1, Grotius Publishers, 1986) 12–13.

<sup>403</sup> *Free Zones (Switzerland v France)(Merits)* [1930] PCIJ (ser A/B) No 46.

<sup>404</sup> Schloenhardt and Hickson (n 393) 49-50.



presence.<sup>405</sup> It also restricts the ‘right to seek asylum’ in a safe country.<sup>406</sup> A tension is created between the right to emigrate from one’s own country and the right to enter another country, which the latter is considered a matter of national sovereignty.<sup>407</sup> There exists a right to leave as long as the destination State permits entry.<sup>408</sup> Departing States have a dual duty: 1) not to impede departure; and 2) to issue relevant documents for departure.<sup>409</sup> In the courts, this positive duty is usually linked with passport issuance.<sup>410</sup> Today, however, in the context of border control, the negative duty of States involves their undertaking of ‘respect’, that is, not to impede any person from leaving. The right to leave a country does not differentiate between a national and a foreigner.<sup>411</sup>

Although the right to leave one’s own country is a non-derogable right,<sup>412</sup> universally accepted as a norm of customary international law,<sup>413</sup> it has not been

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<sup>405</sup> UDHR, article 13(2); ICCPR, article 12(2); Satvinder Juss, ‘Free Movement and the World Order’ (2004) 16 IJRL 289, 291; Dimitry Kochenov, ‘The Right to Leave any Country’ in Sir Richard Plender (ed), *International Migration Law* (The Hague, Martinus Nijhoff, 2012) 17; Seline Trevisanut, ‘Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management’, in Loic Azoulay and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford Scholarship Online, 2014) 137–138.

<sup>406</sup> Refugee Convention, article 1; EU Charter, article 18; UDHR, article 14; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 71) 370.

<sup>407</sup> *Üner v the Netherlands* Application no 46410/99 ECHR 2006-XII, paragraph 54; *Saadi v Italy* Application no 37201/06 (2008) ECHR 179, paragraph 124; Koffi Anan, *International Migration and Development: report of the Secretary General* 18 May 2006, A/60/871, paragraph 76; Richard Ball, *The Legitimacy of the European Union Through Legal Rationality: Free Movement of Third Country Nationals* (Routledge Research in EU Law) 219.

<sup>408</sup> *Peltonen v Finland*, Communication No 492/1992 (UN Doc CCPR/C/51/D/492/1992 (1994) paragraph 31; Juss (n 394) 294.

<sup>409</sup> Kochenov (n 405) 22; in line with ICCPR, article 12(2) ‘to respect’ and ‘to ensure’.

<sup>410</sup> *Peltonen* (n 408); *Baumann v France* Application no 33592/96 ECHR 2001-V, paragraphs 61–63; also see Vincent Chetail and Celine Bauloz, *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014) 12.

<sup>411</sup> Human Rights Committee, *General Comment No 27: Article 12 on Freedom of Movement* CCPR/C/21/Rev.1/Add.9, 2 November 1999, paragraph 10; Siegfried Wiessner, ‘Blessed by the Ties That Bind: The Nexus between Nationality and Territory’ (1986) 56 MLJ, 512.

<sup>412</sup> ICCPR, article 4(2); ECHR, article 15(2) applicable under Protocol No 4 to the ECHR, article 6.

<sup>413</sup> Vincent Chetail, *The Transnational Movement of Persons Under General International Law - Mapping the Customary Law Foundations of International Migration Law* (Research Handbook on International Law and Migration Edward Elgar Publishing, 2014) 10; Colin Harvey, ‘Time for Reform? Refugees, Asylum Seekers, and Protection under International Human Rights Law’ (2015) RSQ 34 (1) 43-60, 48.

respected by those States unwilling to grant it. According to Goodwin-Gill, although States have agreed two declarations about this norm,<sup>414</sup> in practice it remains weak<sup>415</sup> despite attempts by experts<sup>416</sup> and the Human Rights Committee<sup>417</sup> to enforce respect for this right on the ground. To render any restriction of irregular migrants' rights legitimate, irregular migration has been linked with issues of security and criminalisation.<sup>418</sup> Italy, Greece, and the EU collectively, take advantage of the limitations accompanying the right to leave: it 'shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant'.<sup>419</sup> Turkey and Libya claim that restrictions on the enjoyment of this right are in accordance with their national law and consistent with the Palermo Protocols. Irregular migrant boats depart from non-official ports and to protect public order, these States must prevent human trafficking and smuggling and undocumented immigration. However, a State cannot invoke provisions of its national law to justify its failure to carry out the terms of a treaty.<sup>420</sup> Nor do the Palermo Protocols permit border controls to interfere with the free movement of people whilst discovering trafficking and smuggling.<sup>421</sup> Articles 14 of the Trafficking Protocol and Article 19 of the

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<sup>414</sup> Uppsala Colloquium, Sweden, June 21 1972, *The Right to Leave and the Right to Return* (reprinted in 7 *International Migration Review*, 1973) 62; the Strasbourg Declaration on the Right to Leave and Return (26 November 1986); Rush Hofmann, 'The Right to Leave and Return to One's Own Country: The Strasbourg Declaration on the Right to Leave and to Return, Results of the Meeting of Experts Held in Strasbourg in November 1986' (1987) HRLJ 8, 478.

<sup>415</sup> Goodwin-Gill, 'The Right to Leave' (n 71) 96.

<sup>416</sup> Jose Ingles, *Study on Discrimination in Respect of the Right of Everyone to Leave any Country and to Return to His Country* (1963) E/CN.4/Sub.2/220/Rev.1, 9.

<sup>417</sup> Human Rights Committee, *General Comment No 27* (n 411) paragraph 18.

<sup>418</sup> Mark Provera, *The Criminalisation of Irregular Migration in the European Union* (CEPS Liberty and Security in Europe No80/2015) 2; Migrant Smuggling Protocol (n 135) article 2 and 3(a).

<sup>419</sup> ICCPR, article 12(3); Protocol No 4 to the ECHR, article 2(3).

<sup>420</sup> VCLT, article 27.

<sup>421</sup> UN Office on Drugs and Crime, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (2011), 43 '[w]ithout prejudice to international commitments in relation to the free movement of people'; Migrant Smuggling Protocol, article 5; Harvey and

Smuggling Protocol expressly state that the measures taken under these protocols must not affect human rights and refugee law obligations.<sup>422</sup> Nor have the CJEU and ECtHR accepted the justification that the right to leave can be curtailed to protect the immigration laws of another State.<sup>423</sup> The right to leave one's own country must not be undermined through the use of blanket prohibitions.<sup>424</sup> Instead, it must be construed in light of the ordinary meaning of the provision and without undermining the treaty's purpose and object.<sup>425</sup>

In its guidance, the UN Human Rights Committee has stated that any restrictions on the right to leave should be narrowly interpreted so as not to impair the essence of the right, to avoid an unfettered discretion on those executing such restrictions.<sup>426</sup> For a restriction to be proportionate,<sup>427</sup> a set of precise criteria should be used in compliance with the principles of equality and non-discrimination.<sup>428</sup> To justify the restriction on grounds of security and public order there must be a genuine link between the individual's conduct and his/her threat to national security which must be genuine and present.<sup>429</sup> In its recent report published by the Special Rapporteur on counter-terrorism and human rights, Ben Emmerson QC, there was no evidence that irregular migration lead to increased terrorist activity.<sup>430</sup> Furthermore, the report criticized the overly-restrictive migration policies not to be justified on grounds of State security.<sup>431</sup> On the contrary, the more restrictive migration policies that criminalise irregular

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Barnidge (n 391) 14: States can control departure of migrants within the limits of the ICCPR, article 12(3).

<sup>422</sup> See Chapter 2, section 2.2 on Palermo Protocols.

<sup>423</sup> Case 33/07 *Jipa v Romania* [2008] ECR I-5157, paragraphs 26–27; *Stamose* (n 16) paragraph 32.

<sup>424</sup> Harvey and Barnidge (n 391) 18.

<sup>425</sup> VCLT, article 31(1).

<sup>426</sup> Human Rights Committee, *General Comment No 27* (n 411) paragraph 13.

<sup>427</sup> *ibid*, paragraph 15.

<sup>428</sup> ICCPR, article 12(1) and (2); UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, Volume 660, 195 (entry into force 4 January 1969) article 5; Human Rights Committee, *General Comment No 27* (n 411) paragraph 18.

<sup>429</sup> *Stamose* (n 16) paragraph 35; Markard (n 16) 609.

<sup>430</sup> UN, 'Promotion and Protection of Human Rights (n 21) paragraph 11.

<sup>431</sup> *ibid*, 5, paragraph 11.

migration and which engage in push-back operations increase the covert movements of people by smugglers which as a consequence may increase terrorist activities.<sup>432</sup> It is therefore argued that the measures undertaken under the Protocol on migrant smuggling are not proportionate to the aim of tackling human smuggling and do not meet the tests of legality and necessity.<sup>433</sup>

### **3.4 Second Pre-emptive Security Check: Interception at Sea**

For those irregular migrants who manage to depart without being detected by third country officers, detection and interception at sea act as a second wall barrier. As the Central and Eastern Mediterranean route is the busiest and most dangerous bringing about thousands of deaths,<sup>434</sup> the burden of detecting, intercepting, disembarking and receiving irregular migrants falls to Italy and Greece.<sup>435</sup> To keep irregular migrants away from EU territorial waters, these Member States in collaboration with the EU have devised bilateral strategies in the form of readmission agreements with third countries.<sup>436</sup> A readmission agreement is a bilateral agreement for the acceptance of ‘persons who do not, or who no longer, fulfil the conditions in force for entry or residence on the territory of the requesting Contracting Party provided that it is proved or may be validly assumed that they possess the nationality of the requested Contracting Party’.<sup>437</sup>

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<sup>432</sup> *ibid*, 5, paragraph 11.

<sup>433</sup> ICCPR, article 12(3).

<sup>434</sup> From 1988 to June 2016, over 27,000 people were documented as having drowned in an attempt to cross the Mediterranean Sea identified as one of the most deadly seas in Europe, see Amnesty International, <<https://www.amnesty.org/en/latest/news/2014/09/search-and-rescue-operations-central-mediterranean-facts-and-figures/>> accessed 28 October 2017; also see <<http://data.unhcr.org/mediterranean/regional.php>> accessed 28 October 2017; Rapporteur Ms Tineke Strik, *Lives Lost in the Mediterranean Sea* (n 251) 5.

<sup>435</sup> Dublin Regulation (n 42) article 7: allocates responsibility for asylum claims upon the first EU State of entry; Due to the Maltese/Italian disembarkation conflict, Italy is taking responsibility for disembarking irregular migrants in its territory. Malta is receiving a limited number of irregular migrants.

<sup>436</sup> Council Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal migration, Justice and Home Affairs Council in its 2998<sup>th</sup> meeting (Brussels, 25 and 26 February 2010) measure 4, 2 <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/113065.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/113065.pdf)> accessed 18 October 2017.

<sup>437</sup> Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third Country (OJ C 274, 19/09/1996) article 1.

By entering into a readmission agreement, the particular State undertakes to re-admit any person who is a national of that country, or resides in it, or has crossed its borders illegally as a means of transit. These agreements allow Member States to return without any formalities unauthorised individuals intercepted at sea or apprehended in their territory to third countries of origin or transit. This chapter will now focus on readmission for those individuals intercepted before entering Member State territorial waters.

### 3.4.1 Italian Interception and Push-back Policy

In May 2008, in response to the high number of irregular migrant crossings, Italy commenced an indiscriminate push-back policy to the country of departure. From May 2008 to February 2012, the Italian strategy was to return unauthorised individuals apprehended on the high seas to North African countries such as Libya, Tunisia and Algeria.<sup>438</sup> These individuals were transferred onto Italian boats and were compelled to disembark in third country ports without a prior examination of their individual circumstances.<sup>439</sup> Italy argued that its push-back operations were consistent with the Italy-Libya bilateral agreements.<sup>440</sup> However, these interception operations were conducted without transparency and in the absence of monitoring mechanisms by international organisations, NGOs and the

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<sup>438</sup> Marianna Pavan, *Can/Will Italy be Held Accountable for its 'Push-back' Policy in Relation to International Refugee, Human Rights and European Union Law?* (Migration Studies Unit, Working Papers no 2011/12, 2011) 12; Moreno-Lax, 'Seeking Asylum in the Mediterranean' (n 43) 175; In 2011, the Treaty of Friendship was suspended because of the political turmoil in Libya and revived again under the new Libyan government; Colonialism Reparation, Italy-Libya <<http://www.colonialismreparation.org/en/compensations/italy-libya.html>> accessed 16 October 2017; Tripoli Declaration, signed in Tripoli on 21 January 2012, <<http://www.governo.it/backoffice/allegati/662567318.pdf>> accessed 16 October 2017; Italy continued its push-back policy with the National Transitional Council under the 'Memorandum of Understanding'.

<sup>439</sup> Borelli and Stanford (n 64) 37.

<sup>440</sup> Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya, made in Benghazi August 30, 2008 <[http://www.camera.it/\\_dati/leg16/lavori/schedela/apriTelecomando\\_wai.asp?codice=16PDL0017390#PD](http://www.camera.it/_dati/leg16/lavori/schedela/apriTelecomando_wai.asp?codice=16PDL0017390#PD)> accessed 25 October 2017; Italian Law no 7/2009, Ratification and Implementation of the Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Libyan People's Liberation Movement in Libya, made in Benghazi on August 30, 2008, Official Gazette No 40, 18 February 2009, article 2 <<http://www.parlamento.it/parlam/leggi/090071.htm>> accessed 25 October 2017.

media.<sup>441</sup> The Italian push-back policy, was strongly contested by the UNHCR,<sup>442</sup> academics,<sup>443</sup> NGOs such as HRW<sup>444</sup> and Amnesty International,<sup>445</sup> as well as by the Council of Europe (CoE),<sup>446</sup> the EU<sup>447</sup> and ultimately by the ECtHR.<sup>448</sup>

According to the ECtHR, in all cases of removal where an individual shows substantial grounds of facing ‘a real risk of being subjected to treatment contrary to Article 3’,<sup>449</sup> prior to taking a decision to return migrants, a State must first examine whether 1) the receiving country complies with its human rights obligations and respects them in practice and 2) the individual will be subjected to any form of ill-treatment.<sup>450</sup> Although Member States may refuse entry to TCNs who do not fulfil their entry requirements,<sup>451</sup> they must always act in accordance with the EU Charter and general principles of Union Law, the Refugee Convention and the principle of *non-refoulement*.<sup>452</sup> As a result of their immediate return, these individuals are denied the right to have their case heard by an independent administrative body, and the opportunity to challenge their expulsion.<sup>453</sup> Furthermore, upon return these individuals have been fined for breaching immigration rules and/or detained in detention centres, sometimes for

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<sup>441</sup> Barbara Miltner, ‘Human Security and Protection from *Refoulement* in the Maritime Context’ in Edward and Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP 2010) 195, 215.

<sup>442</sup> UNHCR, ‘UNHCR Deeply Concerned over Returns from Italy to Libya’ (Press release, 7 May 2009); UNHCR, ‘UNHCR Interviews Asylum Seekers Pushed Back to Libya’ (Briefing note, 14 July 2009).

<sup>443</sup> Giuffrè, ‘State Responsibility beyond Borders’ (n 61).

<sup>444</sup> HRW, ‘Pushed Back, Pushed Around’ (n 115).

<sup>445</sup> Amnesty International, ‘“Libya of Tomorrow”: What Hope for Human Rights?’ (London, June 2010).

<sup>446</sup> Council of Europe, Parliamentary Assembly, *The Arrival of Mixed Migratory Flows to Italian Coastal Areas* 2 October 2013, Doc 12557, 6; Letter of 2 July 2010, from Thomas Hammarberg, Commissioner for Human Rights, to Franco Frattini, Minister of Foreign Affairs of Italy, (CommDH(2010)23).

<sup>447</sup> Letter of 15 July 2009, from Jacques Barrot, Vice-President of the European Commission, to Lopez Aguilar, President of the European Parliament Committee on Civil Liberties, Justice and Home Affairs, Brussels.

<sup>448</sup> *Hirsi* (n 57) paragraphs 137, 158, 186.

<sup>449</sup> ECHR, article 3; *Hirsi* (n 57) paragraph 114.

<sup>450</sup> *Hirsi* (n 57) paragraphs 146-147; *MSS* (n 115) paragraphs 365-366.

<sup>451</sup> SBC (n 158) article 14.

<sup>452</sup> SBC (n 158) article 4.

<sup>453</sup> *Shamayev and Others v Georgia and Russia* Application no 36378/02 ECHR 2005-III, paragraph 460.

prolonged periods.<sup>454</sup> The indiscriminate return of migrants through the practice of interception without any form of screening is incompatible with the minimal procedural guarantees and international human rights law. The ECtHR has held that any push-back practices performed without adequate assessment of individual circumstances is in contravention of Article 3 ECHR, Article 4 of Protocol No 4 to the ECHR (prohibition of collective expulsions) and the principle of *non-refoulement*.<sup>455</sup> These push-back practices are not only in violation of the Refugee Convention,<sup>456</sup> the ECHR but also of EU law such as the EU Charter and CEAS.<sup>457</sup>

Following the ECtHR's decision in *Hirsi*, Italy formally stopped its push-back practices to Libya.<sup>458</sup> No other formal agreements have been concluded by Libya to date either with the EU collectively, or with Italy. This is due to Libya's continuing political instability and the fact that it is not a party to the Refugee Convention. However, as Libya is a party to the UN Convention against Transnational Organized Crime and the UN Trafficking Protocol,<sup>459</sup> the two countries have co-operated in the field of migration and defence. Since 2012, Italian and Libyan cooperation has been reinforced through EU funding on matters involving human rights<sup>460</sup> and migration,<sup>461</sup> to improve Libyan border

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<sup>454</sup> Tiffany Butler et al, *Human Rights in the Middle East and North Africa, Task Force 2015* (University of Washington, Jackson School of International Studies 2016) 46-55, 56-65, 66-77, 110-118, 119-135.

<sup>455</sup> *Hirsi* (n 57) paragraphs 137, 158, paragraphs 184-186; for article 3 ECHR, see paragraphs 137-138; see Chapter 4 for more detail on push-backs.

<sup>456</sup> See Chapter 4 for more detailed analysis.

<sup>457</sup> Refugee Convention, article 1 and 33; ECHR, article 3; Return Directive (n 42); Asylum Procedure Directive (n 158).

<sup>458</sup> *Hirsi* (n 57) paragraph 137; Paleologo (n 143); Toaldo (n 143) 7.

<sup>459</sup> UNTS 12, Vol. 2225, 209 (adopted by resolution A/RES/55/25 of 15 November 2000, New York, 15 November 2000); Parties: 187, Status as at 8.01.2017, <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en)>.

<sup>460</sup> €80.5 million humanitarian assistance during the 2011 revolution, <[http://europa.eu/rapid/press-release\\_MEMO-14-228\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-228_en.htm)> accessed 28 October 2017.

<sup>461</sup> Libya receives funding under the European Neighbourhood Instrument (ENI), The EU's total funding programme for Libya is €108 million, <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572797/EPRS\\_BRI\(2015\)572797\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572797/EPRS_BRI(2015)572797_EN.pdf)> accessed 28 October 2017.

control.<sup>462</sup> Italy has reinforced the implementation of an integrated border management system in order to undertake surveillance of Libya's vast desert to prevent irregular migrants from leaving Libyan territory.<sup>463</sup>

### **3.4.1.1 EUBAM – An Italian and EU Indirect Push-back Practice**

It is argued that the EU and Italy continue to act in contravention of their international obligations by indirectly contributing to the financing of Libyan border security for the purposes of returning irregular migrants. On 22 May 2013, the Council of the EU supported Libya's re-construction process by improving its border security.<sup>464</sup> The mission, known as EUBAM Libya (EU Border Assistance Mission),<sup>465</sup> had an initial mandate of two years, extended for a year and six months until 21 August 2017.<sup>466</sup> Italy and the EU have undertaken to build and upgrade detention camps for migrants and to provide training programmes for Libyan police to control maritime and terrestrial borders and for identification processes.<sup>467</sup> This collaboration places a strong focus on Libyan authorities to exercise interception practices in their territories and territorial waters to prevent irregular migrants and would-be asylum seekers from reaching Europe, constituting a pull-back practice.<sup>468</sup> By assisting Libyan authorities to improve its border security to perform pull-back practices, Italy in collaboration with the EU

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<sup>462</sup> From May 2013, EU Border Assistance Mission in Libya (EUBAM Libya), contributing in enhancing Libyan security at land, sea and air borders <[http://eeas.europa.eu/csdp/missions-and-operations/eubam-libya/index\\_en.htm](http://eeas.europa.eu/csdp/missions-and-operations/eubam-libya/index_en.htm)> accessed 27 October 2017.

<sup>463</sup> FIDH (n 153) 36; For original process verbal see <<http://www.statewatch.org/news/2012/sep/ita-lib-processo-verbale.pdf>> accessed 7 October 2017.

<sup>464</sup> EUBAM Libya (n 9) article 3(1)(a).

<sup>465</sup> EUBAM Libya (n 9) article 1.

<sup>466</sup> EU External Action, 'EUBAM Libya' <[https://eeas.europa.eu/csdp-missions-operations/eubam-libya/10551/eubam-libya-mission-extended-budget-approved\\_en](https://eeas.europa.eu/csdp-missions-operations/eubam-libya/10551/eubam-libya-mission-extended-budget-approved_en)> accessed 18 October 2017; Annual budget of €17 million from 22 August 2016 to 21 August 2017; Council of the EU, 'Libya: Border Management Assistance Mission Amended and Extended' 15 February 2016 <<http://www.consilium.europa.eu/en/press/press-releases/2016/02/15-fac-libya-border-management/>> accessed 15 October 2017; Annual budget for 2014 was €26 million <[http://eeas.europa.eu/archives/docs/csdp/missions-and-operations/eubam-libya/pdf/factsheet\\_eubam\\_libya\\_en.pdf](http://eeas.europa.eu/archives/docs/csdp/missions-and-operations/eubam-libya/pdf/factsheet_eubam_libya_en.pdf)> accessed 15 October 2017.

<sup>467</sup> EUBAM Libya (n 9) article 3; also see FIDH (n 153) 36.

<sup>468</sup> FIDH (n 153) 36.



in effect conduct indirect forms of push-back in violation of the right to seek asylum and the *non-refoulement* principle.<sup>469</sup>

Through EUBAM, Italy with the assistance of the EU is forcing would-be asylum seekers to stay on Libyan territory where their life and freedom are under threat. Italy has a positive obligation to provide international protection against persecution or other forms of ill treatment in the State of departure.<sup>470</sup> Any form of assistance to Libyan authorities by Italy and the EU constitutes an exploitation of refugee law and a violation of Article 31(1) VCLT stating that ‘a treaty shall be interpreted in good faith 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’. In accordance with Article 1A(2) of the Refugee Convention, to be recognised as a refugee the person must be outside the territory of his/her country of nationality or habitual residence.<sup>471</sup> One observes that through EUBAM, Italy with EU assistance seem to interpret Article 1A(2) of the Refugee Convention that as long as the would-be asylum seeker does not leave the country of origin or transit the Refugee Convention is non-applicable. However, Italy does not only have the obligation to provide international protection once the person leaves his/her territory but to also ensure that it does not sabotage their departure from the State where s/he flees from political or other forms of persecution. Italy has an obligation in accordance with Article 31(1) VCLT to interpret Article 1A(2) of the Refugee Convention in the light of its object and purpose, i.e. ‘the emphasis of this definition is on the protection of persons from political or other forms of persecution’.<sup>472</sup> Libya has been reported to systematically violate international human rights and refugee law. Thus, any assistance to Libyan authorities to pull-

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<sup>469</sup> Markard (n 16) 616; For an analysis on Greek push-backs see Chapter 4.

<sup>470</sup> UNHCR’s amicus curiae brief (n 70) 427.

<sup>471</sup> *European Roma Rights Centre and Others* (n 74) paragraph 31; Also see UNHCR Handbook (n 74) paragraph 88.

<sup>472</sup> UNHCR, Convention and Protocol relating to the Status of Refugees, 3, <<http://www.unhcr.org/3b66c2aa10.pdf>> accessed 28 October 2017.

back irregular migrants is in effect an illicit indirect push-back to Libya, as condemned by the ECtHR in *Hirsi*.<sup>473</sup>

EUBAM however, reveals another legal gap created by the provisions of Article 33 of the Refugee Convention, Article 3 ECHR and Article 19(2) EU Charter which provide safeguards against the expulsions of refugees.<sup>474</sup> Article 33 of the Refugee Convention and Article 3 ECHR do not contain any geographical limitation to its protection. Article 33 of the Refugee Convention provides that ‘no Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.<sup>475</sup> It is argued here that the terms ‘expel’, ‘return’ and ‘*refouler*’ when combined with the text ‘in any manner whatsoever’ connote both a territorial and extraterritorial application of Article 33 of the Refugee Convention.<sup>476</sup> Any other interpretation would deny refugees protection from *refoulement* as long as they have not entered the Contracting party’s territory. The extraterritorial application of Article 33 of the Refugee Convention is established when the State exercises its jurisdiction similar to the protection offered by Article 1 ECHR.<sup>477</sup>

The ECtHR has already confirmed that *refoulement* may occur within the territory of a State, at its borders, or outside its territory.<sup>478</sup> Thus to trigger the application of the *non-refoulement* principle, the would-be asylum seeker must cross the

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<sup>473</sup> *Hirsi* (n 57) paragraph 137.

<sup>474</sup> EU Charter, article 52(3) ‘this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention’.

<sup>475</sup> Refugee Convention, article 33.

<sup>476</sup> Kate Elliott (ed), *International legal standards for the Protection from Refoulement* (Instituut voor Immigratierecht 2009) 51; UNHCR, *Conclusions adopted by the Executive Committee on the International Protection of Refugees No 85 (XLIX) 1998, A/53/12/Add.1, paragraph (q)* – Article 33 applies to non-admission at a border.

<sup>477</sup> See Chapter 2, section 2.3.2; also see ICCPR, article 2(1) – ‘within its territory and subject to its jurisdiction’; CAT, article 2(1) ‘in any territory under its jurisdiction’.

<sup>478</sup> *Amuur v France* Application no 19776/92 EHRR 1996-III, paragraph 52.

territorial sea of the third country of departure and either reach the territory of the country of asylum or fall under its jurisdiction.<sup>479</sup> To establish the exercise of a State's jurisdiction beyond the State's border it is necessary to prove the element of a 'factual effective control' in which the State has over territory or persons.<sup>480</sup> Thus jurisdiction is understood as 'control over territory by military occupation or the exercise of public powers by virtue of the consent of the government of the territory',<sup>481</sup> or 'when a State's acts take place on-board vessels registered in or flying the flag of the State' and 'when there is the consent of the government of the foreign territory'.<sup>482</sup> Thus, not all State conduct falls within the scope of Article 33 of the Refugee Convention and Article 3 ECHR.

To hold Italy accountable for its assistance provided to Libya through EUBAM, the key element to establish is whether the refugee is forced to go or stay to the 'frontiers of territories' facing ill-treatment as a consequence of Italy's conduct.<sup>483</sup> A causal link must exist between the conduct of Italy and that of the refugee being forced to go or stay 'to the frontiers of territories' where his life or freedom are under threat, irrespective whether the conduct occurs in or outside the State's territory.<sup>484</sup> However, the element of an 'effective control' over Libyan territory, an exercise of public powers by virtue of the consent of the government of the territory or actual control over persons cannot be established. The financial assistance and training program do not satisfy the requirement of 'effective control' over the Libyan territory or over persons.<sup>485</sup> On this basis, it is argued that EUBAM, an EU policy on third country financial support, constitutes in effect a strategy to avoid international responsibility under EU and international

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<sup>479</sup> Refugee Convention, article 1A(2) combined with article 33; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 71) 206-208; Mungianu (n 84) 141; Lauterpacht and Bethlehem (n 55) paragraphs 76-86; On jurisdiction at sea see Chapter 2, section 2.3.1-2.3.2.

<sup>480</sup> *Bankovic* (n 76) paragraph 71; also see Mungianu (n 84) 156.

<sup>481</sup> *Ilascu and Others v Moldova and Russia* Application no 48787/99 ECHR 2004-VII, paragraph 387; *Öcalan v Turkey* Application no 46221/99 ECHR 2005-IV, paragraph 91-92.

<sup>482</sup> *Bankovic* (n 76) paragraph 73.

<sup>483</sup> Elliott (n 476) 53.

<sup>484</sup> Elliott (n 476) 53; EXCOM Conclusions No 22 (n 75) paragraph II(A)(2).

<sup>485</sup> EUBAM Libya (n 9) article 6 and 13.

law, despite the fact that Libya uses this financial assistance to commit human rights breaches.<sup>486</sup>

It is argued however that assisting Libyan authorities to prevent boats of irregular migrants from leaving territorial waters and build and upgrade detention camps with Italian and EU finances is a form of pull-back which constitutes an interference with the right to leave one's own country and is incompatible with the *non-refoulement* principle and refugee law obligations. The right to leave one's own country complements the *non-refoulement* principle creating the basis of refugee protection.<sup>487</sup> As it was considered unconscionable by the international courts to allow a State to perpetrate human rights violations on another State's territory, which would be condemned if perpetrated within its own territory,<sup>488</sup> equally unconscionable would be to allow a State to avoid its international responsibilities by engaging and assisting third countries to breach their international obligations in the context of cooperation in migration control.

#### **3.4.1.2 Italy and the EU Become Derivatively Responsible for Aid or Assistance Given to Libya**

The EU collectively and Italy in particular, assist Libyan authorities in intensifying border controls to detect and detain unauthorised migrants attempting to cross its borders and provide financial assistance to up-grade detention camps despite prior knowledge that Libya has been regularly reported by NGOs and Council of the EU's conclusions to have a poor human rights record.<sup>489</sup> In

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<sup>486</sup> Little and Vaughan-Williams (n 369) 8; Melanie Fink, 'A "Blind Spot" in the Framework of International Responsibility?' in Thomas Gammeltoft-Hansen, Jens Vedsted-Hansen (eds) *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement* (The Danish Institute for Human Rights, Research Project 2015) 13.

<sup>487</sup> Guy Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' (2011) IJRL 23, 444; Seline Trevisanut, 'The Principle of *Non-Refoulement*' (n 65) 667.

<sup>488</sup> *Celiberti de Casariego* (n 229) paragraph 10.3; Dennis (n 229) 124-125; see Chapter 2, section 2.3.1.

<sup>489</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with*

accordance with Article 16 ASR and Article 14 ARIO Italy and the EU become derivatively responsible for aid or assistance given to Libya for the commission of an internationally wrongful act if it does so with ‘knowledge of the circumstances of the internationally wrongful act’ and ‘the act would be internationally wrongful if committed by that State’. Italy and the EU must 1) be aware<sup>490</sup> of the circumstances that its aid and assistance facilitates Libya to conduct international wrongful acts, 2) the aid and assistance must actually facilitate the commission of the act and 3) the act would have been wrongful if committed by Italy and the EU itself.

Italy and the EU cannot argue that they had no knowledge of the situation in Libya as UNHCR and NGOs have reported Libya to be a gross human rights violator.<sup>491</sup> Once returned to Libya, irregular migrants face torture and other ill-treatment, and abuses such as sexual violence, abductions for ransom, and foreign nationals face detention for migration related offences.<sup>492</sup> Furthermore, in the absence of stable State institutions, upon interception and arrest irregular migrants claim to have been subjected to prolonged beatings by Libyan coastguards.<sup>493</sup> Amnesty International reports that lawlessness and chaos prevail in Libya creating

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*commentaries 2001* (ASR Commentary) UN Doc. A/56/83, 3 August 2001, article 16 paragraph 10; FIDH (n 153) 36; Council of the EU, *Conclusions on Libya* (Foreign Affairs Council Meeting, Luxembourg, 20 October 2014) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/145200.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145200.pdf)> accessed 28 October 2017.

<sup>490</sup> See Chapter 6, section 6.3 on a detailed analysis of ‘knowledge’ as the key element.

<sup>491</sup> UN, ‘General Assembly Suspends Libya from Human Rights Council’, GA/11050, 11 March 2011, Secretary General Voices “Grave Concern” at Ongoing Violence against Civilians <<http://www.un.org/press/en/2011/ga11050.doc.htm>> accessed 26 October 2017; OHCHR and United Nations Support Mission in Libya ‘Report on the Human Rights Situation in Libya’ 16 November 2015, 1 <[http://www.ohchr.org/Documents/Countries/LY/UNSMIL\\_OHCHRJointly\\_report\\_Libya\\_16.11.15.pdf](http://www.ohchr.org/Documents/Countries/LY/UNSMIL_OHCHRJointly_report_Libya_16.11.15.pdf)> accessed 26 October 2017; Amnesty International, *The State of the World’s Human Rights, Libya 2015/2016*, 236 <<https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya/>> accessed 26 October 2017; HRW, ‘World Report 2014: Libya’ <<https://www.hrw.org/world-report/2014/country-chapters/libya>> accessed 26 October 2017.

<sup>492</sup> Amnesty International, “Libya is full of cruelty” (n 249) 5; MHUB, ‘Detained Youth, The Fate of Young Migrants, Asylum-seekers and refugees in Libya Today’ 2015, 55 <[http://www.mixedmigrationhub.org/wp-content/uploads/2015/07/MHUB\\_2015\\_Detained-Youth.pdf](http://www.mixedmigrationhub.org/wp-content/uploads/2015/07/MHUB_2015_Detained-Youth.pdf)> accessed 26 October 2017.

<sup>493</sup> Amnesty International, “Libya is full of cruelty” (n 249) 5.

xenophobic feelings especially against Christian foreign nationals, resulting in their exploitation in unpaid work, physical assault, abductions, torture, unlawful killings, and other forms of ill-treatment.<sup>494</sup> Libyan legal framework allows for the indefinite detention of irregular entry, stay or exit.<sup>495</sup> For many years, NGOs have criticised the Libyan detention policy as a disproportionate measure and condemns it for not distinguishing general migrants from refugees, or those in need of international protection.<sup>496</sup> Moreover, migrant women detainees are vulnerable to sexual violence due to the lack of female guards in Libyan detention centres. Libyan detention centres lack adequate ventilation, have no hygienic facilities, are overcrowded and have a shortage of basic necessities including medicine and food.<sup>497</sup> HRW,<sup>498</sup> Amnesty International,<sup>499</sup> the Jesuit Refugee Service<sup>500</sup> and Médecins sans Frontières<sup>501</sup> have all documented that once irregular migrants are intercepted and returned to Libya, the Libyan authorities detain these individuals in overcrowded detention facilities, with poor sanitation and nutrition, and without access to an interpreter, a lawyer or to judicial review in order to challenge their detention. Libya is directly violating its international obligations and human rights law by violating international conventions such as Convention against Torture 1989 (CAT), Convention on the Elimination of All

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<sup>494</sup> Amnesty International, “Libya is full of cruelty” (n 249) 6.

<sup>495</sup> Law No 6 of 20 June 1987 Concerning the Regulation of Aliens Entry, Residence and Exit in Libya (amended by Law No 2 in 2004), article 19.

<sup>496</sup> MHUB, ‘Detained Youth’ (n 492) 48.

<sup>497</sup> Amnesty International, “Libya is full of cruelty” (n 249) 20.

<sup>498</sup> HRW, ‘Libya: Whipped, Beaten, and Hung from Trees, Detained Migrants, Asylum Seekers Describe Torture, other abuse in Detention’ 22 June 2014 <<https://www.hrw.org/news/2014/06/22/libya-whipped-beaten-and-hung-trees>> accessed 26 October 2017.

<sup>499</sup> Amnesty International, ‘Scapegoats of Fear, Rights of Refugees, Asylum-seekers and Migrants abused in Libya’ 6 May 2013, 19.

<sup>500</sup> Jesuit Refugee Service, ‘Malta, Beyond Imagination, Asylum Seekers Testify to Life in Libya’ January 2014, 12.

<sup>501</sup> Médecins sans Frontières, ‘Libya: Arbitrary Detention of Refugees, Asylum-seekers and Migrants must Stop’ 1 September 2017 <<http://www.msf.org/en/article/libya-arbitrary-detention-refugees-asylum-seekers-and-migrants-must-stop>> accessed 26 October 2017.

Forms of Discrimination against Women 1989 (CEDAW) and the Protocol on Migrant Smuggling and Trafficking.<sup>502</sup>

In addition, Libya fails to offer adequate asylum safeguards. Although it is not a signatory to the Refugee Convention, it is bound to the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) sharing similar principles.<sup>503</sup> Libya does not adopt domestic asylum legislation in line with its international obligations nor does it provide the necessary legal safeguards such as national asylum institutions and processes.<sup>504</sup> The only organisation dealing with asylum related issues in Libya is UNHCR and its partners. Due to no cooperation agreement existing between UNHCR and the Libyan government, decisions on asylum applications by UNHCR are given un-systematically, on an *ad hoc* basis. For the above reasons, Libya is not considered a safe country as is evidenced by the EUBAM offices operating in Tunisia instead of in Libya since August 2014.<sup>505</sup> Despite various calls by NGOs and civil society groups to stop the collaboration with Libya, the EU and its Member States are more concerned to externalise border controls. The economic and security

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<sup>502</sup> International Convention on the Elimination of All Forms of Racial Discrimination 1969, article 1; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, Volume 993, 3, article 2; International Covenant on Civil and Political Rights 1976, article 2; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, Volume 1249, 13, article 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1989, articles 1-3; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, volume 1577, 3, article 2; UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, article 1; UN Convention against Transnational Organized Crime 2000, New York, 15 November 2000, UNTS 12, Vol. 2225, 209, and its two Protocols – Trafficking Protocol (n 177) Article 6; Migrant Smuggling Protocol (n 135) article 5 (not to criminalize individuals for being the object of migration).

<sup>503</sup> African Commission on Human and Peoples' Rights, 'Ratification Table' <<http://www.achpr.org/instruments/refugee-convention/ratification/>> accessed 17 October 2017.

<sup>504</sup> MHUB 'Detained Youth' (n 492) 45-46.

<sup>505</sup> EUBAM Libya (n 9) article 4(2): 'EUBAM Libya shall have its Headquarters in Tripoli.' Common Security and Defence Policy, *EU Integrated Border Assistance Mission in Libya* (January 2015) <[http://eeas.europa.eu/csdp/missions-and-operations/eubam-libya/pdf/factsheet\\_eubam\\_libya\\_en.pdf](http://eeas.europa.eu/csdp/missions-and-operations/eubam-libya/pdf/factsheet_eubam_libya_en.pdf)> accessed 7 October 2017.

concerns of the EU as a whole seem to take precedence over concerns over migrants' rights protection.<sup>506</sup>

However, to incur international responsibility for aiding or assisting Libya, a link must exist between the assistance provided and the wrongful act.<sup>507</sup> In accordance with the ILC commentaries the assistance 'must be given with a view to facilitating the commission of an internationally wrongful act', and proof is required of an implicit 'intention' by the EU and Italy that its manpower assistance and financial aid facilitates the commission of the wrongful act.<sup>508</sup> At first, the ILC commentaries suggest the 'intent' criterion to consist of a 'subjective element' as a decisive factor for international responsibility.<sup>509</sup> It is argued however that such an approach makes the standard of proof inherently difficult in practice for two obvious reasons: 1) the EU and Italy are not expected to openly express their illegal purpose and 2) they will not officially declare the actual purpose of their assistance. Thus, the requirement of intent makes international responsibility obscure and very difficult to prove in practice. Hence, to aid or assist with a view to facilitate must be 'deliberate in character' not towards the 'ultimate purpose of the act' that it is 'assisting'.<sup>510</sup> The ILC has explained that it is not necessary for the aid or assistance to make an 'essential contribution' to the performance of the wrongful act but that it simply 'contributes significantly'.<sup>511</sup> For the attribution of responsibility to arise all the EU and Italy need to know are the circumstances of the wrongdoings.

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<sup>506</sup> Emanuela Paoletti, *Migration Agreements between Italy and North Africa: Domestic Imperatives versus International Norms* (Middle East Institute, 2012) 4.

<sup>507</sup> James Crawford, *Second Report on State Responsibility* (Addendum, A/CN.4/498/Add.1) paragraph 180; Pieter Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out', in Malcolm Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart Publishing, 2013) 35.

<sup>508</sup> ARIO Commentary (n 98) article 14, paragraph 4; ASR Commentary (n 489) article 16, paragraph 5.

<sup>509</sup> *ibid.*

<sup>510</sup> Vladislav Lanovoy, *Complicity in an Internationally Wrongful Act* SHARES Paper 38(2014) 152.

<sup>511</sup> See ASR Commentary (n 489) article 16, paragraph 5; James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002) 50.



Hence, to become effective, the decisive element proving international responsibility must be based objectively on evaluating Italy's and EU's knowledge that human rights violations are conducted with its assistance.<sup>512</sup> Special Rapporteurs Crawford and Ago support this argument, asserting the element of intent to 'demonstrate proof of rendering aid or assistance with knowledge of the circumstances'.<sup>513</sup> The element of intent considered from a knowledge-based focus imputes responsibility in consideration for rendering assistance to the wrongful act, providing a distinction between standard forms of cooperation and assistance rendered for the commission of a wrongful act.<sup>514</sup> Thus, the impact of the assistance rendered coupled with the knowledge of the international wrongful act is the decisive element triggering EU's and Italy's international responsibility. That explains why international law imposes on a State or international organisation the obligation to withdraw assistance upon gaining knowledge of human rights violations.<sup>515</sup> Once it is established that the aid or assistance has been rendered by the EU and Italy for the commission of an international wrongful act then the 'aid or assistance' in itself constitutes an international wrongful act.<sup>516</sup> Hence, the EU and Italy bear international responsibility independently for their own conduct, i.e. the aid or assistance which has become internationally wrongful.

This chapter argues that through the conduct of Frontex, the EU derives international responsibility for aiding and assisting the Libyan authorities to improve Libya's border security, providing training programmes for Libyan police to control maritime and terrestrial borders to best conduct pull-back practices in their territories and territorial waters, and providing financial aid to build and upgrade detention camps for migrants unlawfully and arbitrarily

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<sup>512</sup> ARIO Commentary (n 98) article 14 paragraph 3; Fink, 'A "Blind spot"' (n 486) 13.

<sup>513</sup> Crawford, *Second Report on State Responsibility* (n 507) paragraph 186; Roberto Ago, *Seventh Report on State Responsibility* (1978) YILC, I(1) 58, paragraph 72.

<sup>514</sup> Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 239.

<sup>515</sup> ARIO, article 14 and 30; Wall (n 201) paragraph 146.

<sup>516</sup> ARIO, articles 14; Ago *Seventh Report on State Responsibility*, paragraph 99.

depriving them of their liberty.<sup>517</sup> Without EU and Italian financial assistance, Libyan authorities would not have had the capacity or the infrastructure to pull-back irregular migrant boats and hold them in substandard detention facilities offering degrading treatment.<sup>518</sup> The EU and Italy have continued to provide financial assistance to Libya despite the NGOs and Council of the EU's conclusions that 'on-going violence, human rights abuses, and violations of international humanitarian law' take place across the country.<sup>519</sup> For many years now Libya has been reported by the UNHCR and NGOs to be a gross human rights violator.<sup>520</sup> Hence, the EU and Italy acquire international responsibility for aiding and assisting Libya with knowledge that it conducts internationally wrongful acts.<sup>521</sup>

In relation to the third element, through the Italian/EU aid and assistance, Libyan authorities apprehend and detain in inhuman and degrading conditions would-be asylum seekers in violation of the right to leave one's own country,<sup>522</sup> the right to seek asylum,<sup>523</sup> and contrary to the prohibition of inhuman and degrading

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<sup>517</sup> EUBAM Libya, article 3; See Chapter 3, section 3.4.1.1; FIDH (n 153) 36.

<sup>518</sup> ARIO commentary (n 98) article 14 paragraph 4; see by analogy ASR Commentary (n 489) article 16, paragraph 5; Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 CJTL 280–281.

<sup>519</sup> See Chapter 3, section 3.4.1.1; Council of the EU, *Conclusions on Libya* (n 489).

<sup>520</sup> UN, 'General Assembly Suspends Libya from Human Rights Council' (n 491); UNHCR, 'Report on the Human Rights Situation in Libya' (16 November 2015) 1 <[http://www.ohchr.org/Documents/Countries/LY/UNSMIL\\_OHCHRJointly\\_report\\_Libya\\_16.11.15.pdf](http://www.ohchr.org/Documents/Countries/LY/UNSMIL_OHCHRJointly_report_Libya_16.11.15.pdf)> accessed 13 October 2017; Amnesty International, *Libya 2015/2016* (n 491) 236; HRW, 'World Report 2014' (n 491).

<sup>521</sup> ASR, article 16; Fink, 'A "Blind Spot"' (n 486) 13; Annie Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 EJIL 883; Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 5; Maarten den Heijer, *Issues of Shared Responsibility before the European Court of Human Rights* ACIL Research Paper No 2012-04 SHARES Series, 26; See by analogy ASR, article 16 'responsibility for aid or assistance under Article 16 of the ASR is a rule of customary international law', Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, ICJ Reports 2007, 43, paragraph 420.

<sup>522</sup> Universally accepted as a norm of customary international law, UDHR, article 13(2); ICCPR, article 12(2).

<sup>523</sup> UDHR, article 14(1); For Italy see Refugee Convention, article 1A(2); CAT, article 3; Asylum Procedures Directive (n 153) article 3; Libya is a party to the Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45 (1969), article 1(1).

treatment;<sup>524</sup> international obligations which Italy and the EU are bound.<sup>525</sup> The EU and Italy have an obligation not to continue to support Libya financially or provide logistics, services, manpower which is used to conduct human right violations and to cease any form of cooperation i.e. EUBAM in Libya.<sup>526</sup> International responsibility may be imputed to the EU and Italy even in those circumstances where they have not issued specific instructions to execute an action resulting in violation, but could have prevented the wrongful conduct from occurring.<sup>527</sup> Italy and the EU respectively acquire international responsibility as complicit to the wrongful act if they fail to withdraw assistance rendered when used to commit human rights violations.<sup>528</sup> This is based on the assumption that Italy and the EU have a positive obligation to act with ‘due diligence’ to stop furnishing aid and assistance to Libya.<sup>529</sup>

### 3.4.2 Greek Returns to Turkey under the EU/Turkey Statement

Greece responded to the sharp increase in irregular migrants by building a 10.5km fence costing millions of Euros and deploying 1800 border guards along the Greek/Turkish border.<sup>530</sup> This fence, although built without EU support,

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<sup>524</sup> CAT, article 16; for Italian and Libyan ratification see <<http://indicators.ohchr.org/>> accessed 17 October 2017; ECHR, article 3- ratified by Italy <<http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3>> accessed 17 October 2017.

<sup>525</sup> TFEU article 78(1) obliges the EU to act in accordance with the Refugee Convention and other treaties such as CAT, the ICCPR and the ECHR; TEU, article 6(3); EU Charter, article 19(2); see ratifications to the Refugee Convention as of 27 October 2017 <<http://www.unhcr.org/uk/3b73b0d63>pdf> accessed 27 October 2017.

<sup>526</sup> See Chapter 3, section 3.4.1.1; Council of Europe, Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII, A/37/745, 50.

<sup>527</sup> ARIQ, article 4; *Nuhanovic v the Netherlands* (5 July 2011) LJM: BR5388, paragraph 5(9); Tom Dannenbaum, ‘Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct’ (2012) ICLQ 61(3) 713–728, 716; *Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Reports 4; Goodwin-Gill, ‘The Right to Seek Asylum’ (n 487) 452- 453.

<sup>528</sup> *Bosnia and Herzegovina v Serbia and Montenegro* (n 521) paragraph 432; See by analogy *Rantsev v Cyprus and Russia* Application no 25965/04 (2010) 51 EHRR 1, paragraph 218-219 and paragraph 232.

<sup>529</sup> Olivier Corten and Pierre Klein, ‘The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case’, in Karine Bannelier et al. (eds.), *The ICJ and the Evolution of International Law* (London: Routledge, 2011) 331.

<sup>530</sup> Peter Shields, ‘The Human Cost of the European Union's External Border Regime’ (2015) JSJPR, 27(1) 83-84.

effectively reduced the number of irregular migrants crossing the border from Turkey to Greece,<sup>531</sup> but in the same time produced the side effect of displacing migrants' routes to more dangerous sea routes.<sup>532</sup> To stop sea arrivals, Greece subsequently exercised forced returns in the form of push-backs to Turkey.<sup>533</sup> NGOs have reported Greek coastguards intercepting irregular migrants in their dinghies, taking them on board a Greek vessel where some have been 'slapped, beaten and manhandled', towing them back to Turkish waters, damaging their boats and subsequently abandoning them in Turkish waters for the Turkish coastguard to rescue them.<sup>534</sup> These allegations are addressed in more detail in Chapter 4 of this thesis.

To support Greece, and in response to the migration crisis and allegations of push-backs, the EU intensified its cooperation with Turkey to improve the management of migration flows from Turkey to Greece and subsequently Bulgaria. On 1 June 2016, the EU-Turkey readmission agreement succeeded the Greek/Turkish readmission agreement.<sup>535</sup> In return for EU incentives on visa liberalisation and possible EU membership, Turkey agreed to admit its own nationals, transiting

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<sup>531</sup> Frontex, Eastern Mediterranean Route <<http://frontex.europa.eu/trends-and-routes/eastern-mediterranean-route/>> accessed 15 October 2017; Western Spring, EU Refused to Fund Greek Anti-Invasion Fence along Border with Turkey (30 December 2012) <<http://www.westernspring.co.uk/eu-refused-to-fund-greek-anti-invasion-fence-along-border-with-turkey/>> accessed 15 October 2017.

<sup>532</sup> Frontex, Eastern Mediterranean Route (n 531).

<sup>533</sup> Everton Gayle, *Greece's Illegal Push Backs of Asylum Boats Puts Lives at Risk, says Amnesty International* (Euronews, 25 August 2015) <<http://www.euronews.com/2015/08/25/greece-routinely-pushes-back-immigrant-boats-out-to-sea-says-amnesty/>> accessed 18 October 2017; A critical analysis of such practices are laid out in Chapter 4.

<sup>534</sup> *ibid*; also see Amnesty International, 'SOS Europe' 2013; see Chapter 4.

<sup>535</sup> EU-Turkey re-admission Agreement (n 99); Agreement between the Hellenic Republic and the Republic of Turkey on cooperation of the Ministry of Public Order and the Ministry of Interior of Turkey on combating crime, especially terrorism, organized crime, illicit drug trafficking and illegal immigration 2001 (effective from April 2002) published at Southeast European and Black Sea Studies, Volume 1, Issue 2, 171-174; Greek Migration Law, 33-86-2005; Turkey: Law on ratification of Decision No. 2/2016 of *The Joint Readmission Committee Set Up - The Agreement Between the Republic of Turkey and the EU on the Readmission of Persons Residing Without Authorisation – on implementing arrangements for the application of Articles 4 and 6 of the Agreement as of 1 June 2016*, 1 April 2016.

TCNs, and stateless persons coming to the EU.<sup>536</sup> On 18 March 2016, members of the European Council and their Turkish counterpart decided to step up their commitments to the implementation of their joint action plan as agreed on 29 November 2015, as well as, end irregular migration from Turkey to the EU by breaking the business model of the smugglers.<sup>537</sup> Through this statement, it was decided as of 20 March 2016, TCNs who did not apply for asylum or whose application was determined as ‘inadmissible’ or unfounded would be returned to Turkey.<sup>538</sup> According to the Recast Asylum Procedures Directive, a Member State may reject an application as ‘inadmissible’ without examining its substance when: 1) the individual should have requested asylum in the first country of arrival guaranteeing effective access of protection (safe third country),<sup>539</sup> or the applicant has been recognised as a refugee in another country (first country of asylum).<sup>540</sup> Both these concepts have been deemed applicable to Turkey.<sup>541</sup>

Turkey however, cannot be considered a ‘safe third country’ as it does not fulfil the safeguards under Article 38 of the Recast Asylum Procedures Directive, nor does it offer protection under the Refugee Convention and respect for the

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<sup>536</sup> EU-Turkey readmission Agreement (n 99) articles 3-4; Council Decision 2008/157/EC on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC (OJ L 51/4, 26.2.2008); European Commission Press release 4 April 2016, <[http://europa.eu/rapid/press-release\\_MEMO-16-1221\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-16-1221_en.htm?locale=en)> accessed 18 October 2017.

<sup>537</sup> EU-Turkey statement (n 99).

<sup>538</sup> *Greek Law No 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC [Greece] Official Gazette A-51, 3 April 2016, article 54; Greek Presidential Decree 113/2013 establishing a uniform recognition procedure for aliens and stateless persons of refugee or subsidiary protection status in compliance with Council Directive 2055/85/EC, Official Gazette A-146, 14 June 2013, article 54; EU Charter, article 18; Asylum Procedure Directive, articles 3 and 6; Refugee Convention, article 1 and 33; see Chapter 4, section 4.5 for further analysis.*

<sup>539</sup> Asylum Procedures Directive (n 158) article 38.

<sup>540</sup> Asylum Procedures Directive (n 158) article 35.

<sup>541</sup> European Commission, ‘An EU ‘Safe Countries of Origin’ List’ <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_eu\\_safe\\_countries\\_of\\_origin\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_safe_countries_of_origin_en.pdf)> accessed 18 October 2017.

principle of *non-refoulement*.<sup>542</sup> Turkey a party to the Refugee Convention,<sup>543</sup> only recently reformed its asylum and immigration system, passing its first law on international protection. In retaining the geographic limitation, Turkey offers legal guarantees only to those individuals who come from a country that is a member of CoE.<sup>544</sup> Its asylum system does not ensure that the returned irregular migrants of Syrian, Egyptian, Libyan, and Afghan nationality have access to international protection as ensured by the Refugee Convention. Any individual coming from a non-CoE country receives national protection status on a temporary basis until the individual is resettled.<sup>545</sup> Turkish law does not grant the right to apply for international protection nor does it set a maximum time period for the temporary protection, contrary to the UNHCR Guidelines on Temporary Protection.<sup>546</sup> It only provides subsidiary protection status for those individuals who have fled from generalised violence and other forms of human rights violations.<sup>547</sup> Consequently, these individuals cannot integrate with the population in Turkey. They do not have permission to work or access the social services, resulting in them having fewer social rights than Turkish nationals contrary to the Refugee Convention.<sup>548</sup> This particular excluded group of people are the ones most in need of international protection as most come from war-torn countries such as Syria,

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<sup>542</sup> Roman, Baird, and Radcliffe (n 104); UNHCR, “Legal Considerations” (n 104) 6; Reinhard Marx, ‘Legal Opinion on the Admissibility under Union Law of the European Council’s Plan to Treat Turkey like a “safe third state”’ (Pro Asyl, 14 March 2016) 10, <[http://www.asylumineurope.org/sites/default/files/resources/160315\\_legal\\_opinion\\_by\\_dr\\_marx\\_turkey\\_is\\_no\\_safe\\_third\\_state.pdf](http://www.asylumineurope.org/sites/default/files/resources/160315_legal_opinion_by_dr_marx_turkey_is_no_safe_third_state.pdf)> accessed 17 October 2017; See Chapter 4 analysis on *non-refoulement*.

<sup>543</sup> Turkey a party to Geneva Convention  
<<http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>> accessed 17 October 2017.

<sup>544</sup> Turkey: Law No 6458 of 2013 *on Foreigners and International Protection*, 4 April 2013 (entered into force in April 2014) article 61 <<http://www.refworld.org/docid/5167fbb20.html>> accessed 25 October 2017.

<sup>545</sup> UN General Assembly, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Addendum – Turkey*, 17 April 2013 A/HRC/23/46/Add.2, paragraph 63.

<sup>546</sup> Turkish Law on Foreigners and International Protection (n 544) article 62 and 92; Guidelines on Temporary or Stay Arrangements, <<http://www.unhcr.org/5304b71c9.pdf>> accessed 10 October 2017.

<sup>547</sup> Turkish Law on Foreigners and International Protection (n 544) article 63.

<sup>548</sup> *François Crépeau: Addendum – Turkey* (n 545) paragraphs 65 and 69; European Commission, Staff Working Document, *Turkey 2013 Progress Report* 16 October 2013, SWD(2013) 417 final, 16.

Afghanistan, Iran, Iraq and Somalia.<sup>549</sup> On 17 May 2016, the Greek Appeal Committees undermined the legal and practical basis of the EU-Turkey statement by overturning deportation orders holding that the temporary protection offered by Turkey to a Syrian citizen do not offer rights equivalent to those required by the Refugee Convention.<sup>550</sup> By 22 December 2016, the number of refugees registered in Turkey was 2.8 million, constituting a significant number of people likely not to receive adequate legal safeguards.<sup>551</sup>

In *Hirsi*, the ECtHR held that a State cannot justify practices incompatible with its obligations under the Convention because of its problems with migratory flows management.<sup>552</sup> Nor can it justify practices contrary to the Convention based on the existence of a statement or readmission agreement concluded with Turkey which purports to guarantee respect for fundamental rights. In itself the agreement is not sufficient to guarantee adequate protection in accordance with international human rights and refugee law.<sup>553</sup> By analogy with the Dublin case law, it can be argued that despite the presumption provided under the EU-Turkey readmission agreement and the EU-Turkey statement holding Turkey to constitute a ‘safe third country’, nonetheless Greece has the obligation to assess the efficiency of the Turkish asylum and immigration system and must provide access to its asylum

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<sup>549</sup> UNHCR, *UNHCR Asylum Trends 2013: Levels and Trends in Industrialized Countries*, 21 March 2014, 17; Refugee Convention, articles 22-24.

<sup>550</sup> European Database of Asylum Law, “Greece-Appeals Committee PD 114/2010, Decision 05/133782, 17 May 2016” <[http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Backlog%20Committees%20decision\\_inadmissibility.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Backlog%20Committees%20decision_inadmissibility.pdf)> accessed 19 October 2017; Apostolis Fotiadis, Helena Smith and Patrick Kingsley, ‘Syrian Refugee Wins Appeal Against Forced Return to Turkey’ (The Guardian, 20 May 2016) <<https://www.theguardian.com/world/2016/may/20/syrian-refugee-wins-appeal-against-forced-return-to-turkey>> accessed 19 October 2017; Pro Asyl, ‘Appeals Committee on Lesbos Stops Deportations to Turkey’ 1 June 2016 <<https://goo.gl/mbvXVI>> accessed 26 October 2017; See also European Commission, *Second Report on the Progress Made in the Implementation of the EU-Turkey Statement* 15 June 2016, COM(2016) 349, 6.

<sup>551</sup> UNHCR, ‘Syria Regional Refugee Response 2– Turkey’ <<https://data.unhcr.org/syrianrefugees/country.php?id=224>> accessed 18 October 2017.

<sup>552</sup> *Hirsi* (n 57) paragraph 179.

<sup>553</sup> *Hirsi* (n 57) paragraph 128; *MSS* (n 115) paragraph 353; UN, ‘Promotion and Protection of Human Rights (n 21) paragraph 37.

process or other immigration remedies before returning individuals to Turkey.<sup>554</sup> Greece cannot liberate itself from its obligations stemming from the ECHR only because the EU and the members of the Council of Europe have entered into a commitment with Turkey.<sup>555</sup> Thus, Greece must first examine whether it is lawfully discharging its own obligations under the ECHR on a case by case basis irrespective of whether Turkey is also a party to the Convention.<sup>556</sup> Returns under the EU-Turkey statement and the international responsibility of Greece are addressed in more detail in Chapter 4 of this thesis.

### 3.5 Third Pre-emptive Security Check: Intensifying Surveillance

To carry out further surveillance for the southern maritime EU external borders, the European Surveillance System (EUROSUR)<sup>557</sup> was adopted to work as information data exchange system and at the same time contribute towards search and rescue in the Mediterranean Sea.<sup>558</sup> This chapter argues that EUROSUR's objective is not to act as a strategic lifesaving tool as purported by the Commission but to construct a 'controlled space'<sup>559</sup> in the Mediterranean Sea functioning as an early detection system in which Member States with Frontex coordination and partner third countries may detect and intercept irregular migrants' boats on departure or before they reach the high seas. EUROSUR's aim is to exchange information containing data on: unauthorised border crossings of migrants and whether their lives seem to be at risk; cross-border crime; and data on any vehicles or vessels which seem suspicious to the authorities at or in the

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<sup>554</sup> *Sharifi* (n 115) paragraph 139-140; *NS and ME* (n 133) paragraphs 78 – 80.

<sup>555</sup> *Al-Saadoon and Mufdhi v United Kingdom* Application no 61498/08 (4 October 2010), paragraph 128.

<sup>556</sup> Dublin Regulation (n 42) article 3; *Refah Partisi v Turkey* Application no 41340/98 ECHR 2003, paragraph 119; *MSS* (n 115) paragraph 359; Turkey party to the ECHR status as of 18 October 2017 <<http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3>>.

<sup>557</sup> EUROSUR Regulation (n 19) legal basis: TFEU, article 77(2)(d) 'any measure necessary for the gradual establishment of an integrated management system for external borders'.

<sup>558</sup> European Commission, 'EUROSUR Kicks off: New Tools to Save Migrants' Lives and Prevent Crime at EU Borders' (Press release IP-13-1182, 29 November 2013) <[http://europa.eu/rapid/press-release\\_IP-13-1182\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1182_en.htm)> accessed 19 October 2017.

<sup>559</sup> *Bellanova and Duez* (n 140) 26.



vicinity of the Member State's external borders.<sup>560</sup> These data are subsequently used to adopt a situational picture at national and European levels,<sup>561</sup> and a simultaneous pre-frontier situation in partner third countries.<sup>562</sup> Through the pre-frontier intelligence picture, Frontex is authorised to conduct surveillance in the territorial waters of third States as well as on the high seas. National coordination centres may request Frontex to monitor third country ports identified as 'being embarkation or transit points for vessels or other craft used for illegal immigration or cross-border crime'; the tracking of vessels suspected of carrying irregular migrants on the high seas; designated pre-frontier areas; and other areas in order to detect or track vessels suspected of carrying irregular migrants.<sup>563</sup> The 'pre-frontier situation in partner third countries' is justified by the Commission as the means to better assist boats in distress found in third country territorial waters.<sup>564</sup> However, in reality the 'pre-frontier' mechanism is a disguised form of push-back, negatively interfering with the 'right to leave one's own country' and the 'right to asylum'.<sup>565</sup> With such sophisticated intelligence surveillance in place, would-be asylum seekers will be prevented from departing the third country, making it impossible for them to reach international waters let alone the territorial waters of Member States. The pre-frontier mechanism in partner third countries is the EU's externalisation tool providing its assistance to third countries such as Turkey and Libya to conduct pull-back operations.<sup>566</sup>

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<sup>560</sup> EUROSUR Regulation (n 19) article 1 and article 9(3): '*Member States and the Agency shall comply with fundamental rights, in particular the principles of non-refoulement and respect for human dignity and data protection requirements, when applying this Regulation. They shall give priority to the special needs of children, unaccompanied minors, victims of human trafficking, persons in need of urgent medical assistance, persons in need of international protection, persons in distress at sea and other persons in a particularly vulnerable situation.*'; also see recital 11 and article 2(4).

<sup>561</sup> EUROSUR Regulation (n 19) article 10.

<sup>562</sup> EUROSUR Regulation (n 19) article 11: pre-frontier means the geographical area beyond the external borders – see article 3 (g).

<sup>563</sup> EUROSUR Regulation (n 19) article 12(2).

<sup>564</sup> European Commission, 'EUROSUR Kicks off' (n 558).

<sup>565</sup> Hayes and Vermeulen (n 141) 11.

<sup>566</sup> Joseph Pugliese, 'Technologies of Extraterritorialisation, Statist Visuality and Irregular Migrants and Refugees' (2013) GLR 22(3) 571-597, 578; see the analysis of pull-backs in section 3.4.1.1

The EU is making every effort to commit the main third countries producing the highest number of irregular migrant departures to participate in regional surveillance systems.<sup>567</sup> Turkey is already a participant to EUROSUR through its membership in the Baltic Sea Region Border Control Cooperation.<sup>568</sup> To get Libya, Algeria, Tunisia and Egypt on board, the Commission's plans to connect EUROSUR to the Seahorse Mediterranean network.<sup>569</sup> However, due to Libya's unstable political environment it has not been possible to install a National Contact Point in Libya.<sup>570</sup> Similarly, despite Spanish efforts to commit Algeria, Tunisia and Egypt to the Seahorse Mediterranean project, these States have not yet confirmed their participation due to lack of political will.<sup>571</sup> A lack of commitment continues despite EU funding of EUR 200 million to Libya, Tunisia, Egypt and Algeria to strengthen their border surveillance systems.<sup>572</sup>

Moreover, once these third countries connect to EUROSUR they will be able to exchange information.<sup>573</sup> As a purported legal safeguard, the EUROSUR

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<sup>567</sup> EUROSUR is linked to Seahorse Atlantic network (Participating third countries: Mauritania, Morocco, Senegal, the Gambia, Guinea Bissau and Cap Verde) and the Black Sea Littoral States Forum (BSCF); on BSCF see European MSN Platform, 'Black Sea' <<http://msp-platform.eu/sea-basins/black-sea-0>> accessed 18 October 2017; Bulgaria and Spanish NCC linked to BSCF and Seahorse Atlantic network.

<sup>568</sup> Including Turkey, Ukraine, Russia and Morocco.

<sup>569</sup> Commission, *Communication on the Work of the Task Force Mediterranean* COM(2013) 869 final, 9; EP, 'Parliamentary questions' (Ms Malmstrom, 7 March 2014) <[www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-000331&language=EN](http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-000331&language=EN)> accessed 18 October 2017; Linked to Italian NCC from 2015; Libya may join the network, linked to the Italian National Contact Point (NCPs), see EP, 'Parliamentary Questions' (Mr. Avramopoulos, 23 October 2015) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-010826&language=EN>> accessed 18 October 2017.

<sup>570</sup> *ibid.*

<sup>571</sup> *ibid.*

<sup>572</sup> Southern Mediterranean Border Surveillance Network, 'Annex 2 to the AAP 2012 part 3 of the Thematic Programme for Cooperation with Third Countries in the Areas of Migration and Asylum' <[http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/comitologie/ros/2012/D023377-01/COM-AC\\_DR\(2012\)D023377-01\(ANN2\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/comitologie/ros/2012/D023377-01/COM-AC_DR(2012)D023377-01(ANN2)_EN.pdf)> accessed 18 October 2017; European Commission, 'Central Mediterranean Route: Commission Proposes Action Plan to Support Italy, Reduce Pressure and Increase Solidarity' (Press Release IP-17-1882, 4 July 2017) <[http://europa.eu/rapid/press-release\\_IP-17-1882\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1882_en.htm)> accessed 18 October 2017.

<sup>573</sup> EUROSUR Regulation (n 19) articles 20(1).

Regulation prohibits the exchange of information to a third country if it would be used to ‘identify persons or groups of persons whose request for access to international protection is under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights’.<sup>574</sup> However, EUROSUR’s role is engaged from the moment these irregular migrants are detected and intercepted at sea, where no individual examination of international protection has taken place. There is not enough information at this stage to determine whether these individuals are at serious risk of being subjected to any form of ill-treatment. Once the competent national authorities intercept these vessels, EUROSUR no longer plays a role in ‘operational, procedural and legal measures taken after interception’.<sup>575</sup>

Thus, Libya, Tunisia, Algeria and Egypt (expected to join), third countries known for their poor human rights records, must be denied access to the system. Without a safety procedural facet to the system, how can it be expected that the EU, contributing millions of Euros to convince Libya, Tunisia, Egypt and Algeria to strengthen their border surveillance to proclaim these countries not to be trustworthy for a mutual sharing of information through EUROSUR? Although the EUROSUR Regulation contains legal safeguards against human rights violations, it has not provided monitoring mechanisms for oversight by independent and objective institutions. Access to all information concerning fundamental rights in Frontex’s activities conducted within EUROSUR is given to the Fundamental Rights Officer (FRO) reporting to the Consultative Forum (CF), the Frontex Management Board and the Executive Director of Frontex.<sup>576</sup> The FRO and CF evaluations are limited to recommendations; they do not have the authority to oblige the legislator or Frontex itself to take a particular course of

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<sup>574</sup> EUROSUR Regulation (n 19) article 20(5).

<sup>575</sup> EUROSUR Regulation (n 19) article 2(3).

<sup>576</sup> EUROSUR Regulation (n 19) article 26a and see recital 12 of preamble.

action.<sup>577</sup> Deficiencies in the monitoring system still exist mainly contributed by the high degree of opacity in Frontex operations.<sup>578</sup>

It is apparent that the Commission's declarations on search and rescue are pretexts, and that the real purpose of Europe is not to develop genuine life-saving tools which act as 'pull factors' encouraging further departures from the Mediterranean Sea,<sup>579</sup> but to intercept migrant boats before or on departure, a pull-back practice. The Commission's expectation for EUROSUR to contribute towards search and rescue in the Mediterranean Sea and work as a surveillance system monitoring vessels in distress is seriously questioned especially when considering the fact that search and rescue is excluded from EUROSUR's scope.<sup>580</sup> Once it locates vessels in distress, it does not have the authority to oblige Member States or Frontex to initiate SAR operations.<sup>581</sup> To EUROSUR, the irregular migrants, comprising refugees and asylum seekers, are seen as 'mere radar blips, infrared blobs and anonymous numbers'.<sup>582</sup> The casualty figures in the Mediterranean Sea speak for themselves. Since EUROSUR became operational there were 3,279 registered deaths in 2014,<sup>583</sup> over 3,772 in 2015,<sup>584</sup>

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<sup>577</sup> Yves Pascouau and Pascal Schumacher, *Frontex and the Respect of Fundamental Rights: from Better Protection to Full Responsibility* (European Policy Centre, Policy Brief 3 June 2014) 2.

<sup>578</sup> Luisa Marin, 'Protecting the EU's Borders from...Fundamental Rights? Squaring the Circle Between Frontex's Border Surveillance and Human Rights' in Ronald Holzhaecker and Paul Luif (eds), *Freedom, Security and Justice in the European Union* (Springer, 2014) 85; Aas and Gundhus (n 79); Frontexit, 'The Mandate of Frontex is Incompatible with Human Rights' May 2014, 18 <<http://www.frontexit.org/fr/docs/42-bilan-frontexit-2014en/file>> accessed 27 October 2017.

<sup>579</sup> UN General Assembly, 'Report of the Special Rapporteur on the Human Rights of Migrants' François Crépeau, *Regional Study: Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants* 8 May 2015, A/HRC/23/46, 12; Özgün (n 18) 830; European Commission, 'EUROSUR Kicks off' (n 558).

<sup>580</sup> EUROSUR Regulation (n 19) article 2(1) and (2); European Commission, 'EUROSUR Kicks off' (n 558).

<sup>581</sup> Charles Heller and Chris Jones, 'EurosUR: Saving Lives or Reinforcing Deadly Borders?' SJ 23(¾) 10.

<sup>582</sup> Pugliese (n 566) 577.

<sup>583</sup> IOM, "Missing Migrants Project" (n 122).

<sup>584</sup> IOM, 'IOM Monitors Latest Migrant Arrivals, and Deaths in Mediterranean' 10 June 2015 <<https://www.iom.int/news/iom-monitors-latest-migrant-arrivals-deaths-mediterranean>> accessed 26 October 2017.

and 5,079 in 2016.<sup>585</sup> Before the implementation of extraterritorial measures, according to statistics the probability of dying in the Mediterranean Sea from 2005-2014 was 20.5% and in the first four months of 2015 it has increased by at least 45%.<sup>586</sup> In 2016, the chances for irregular migrants dying on the Libya to Italy route was ten times higher than the crossing in the Eastern Mediterranean route from Turkey to Greece.<sup>587</sup> That explains why the number of detections decreased by 72% in 2016 to a total of 511,371 detections compared to 1.8 million detections in 2015.<sup>588</sup> These extraterritorial measures have become a form of ‘structural violence’, used as a deterrent tool in the most inhuman way.<sup>589</sup> The more Member States try to close their doors, the more people die attempting to enter. The Mediterranean Sea, identified as the most deadly sea in Europe, has turned into a graveyard despite the EU’s sophisticated surveillance, and the deployment of military vessels.<sup>590</sup> EUROSUR, an EU externalisation tool, is argued to constitute a disguised form of push-back and a contributor to endangering irregular migrants’ lives contrary to the right of life.<sup>591</sup>

### 3.6 Conclusion

Since 2011, the high numbers of irregular migrants arriving to Europe have proved that the entire immigration containment belt has produced continuous

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<sup>585</sup> IOM, “Missing Migrants Project, Migrant Fatalities Worldwide” <<https://missingmigrants.iom.int/latest-global-figures>> accessed 18 October 2017.

<sup>586</sup> Fargues and Di Bartolomeo (n 36) 3.

<sup>587</sup> Refugees and Migrants, ‘UN Refugee Agency: 2016 is Deadliest Year’ (n 37).

<sup>588</sup> Frontex Risk Analysis 2017, 18, <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf)> accessed 26 September 2017.

<sup>589</sup> Weber and Pickering (n 32) 93-118.

<sup>590</sup> Rapporteur Ms Tineke Strik, *Lives Lost in the Mediterranean Sea* (n 251) 5; From 1988 to 11 May 2015, over 25,000 people have been documented as having drowned in an attempt to cross the Mediterranean Sea; see latest figures added to previous listed deaths by Amnesty International and United against Racism and Fortress Europe - <<http://www.amnesty.org/en/news/death-toll-mediterranean-rises-while-europe-looks-other-way-2014-09-30>> accessed 18 October 2017; United against Racism and Fortress Europe, List of 19204 documented refugee deaths through Fortress Europe <<http://www.unitedagainstracism.org/campaigns/refugee-campaign/fortress-europe/>> accessed 18 October 2017.

<sup>591</sup> See Chapter 4, section 4.3 on push-backs endangering migrants’ lives.

displacement of migration routes turning them to being even more dangerous. These individuals are fleeing from repressive regimes, terrorism and extreme poverty. Their best opportunity is to reach Europe. Europe, on the other hand, through the implementation of extraterritorial measures and surveillance technology attempts to discourage irregular border crossing to avoid acquiring international responsibility for individuals in need of international protection contrary to its international obligations under international human rights and refugee law.

To justify these extraterritorial preventative measures, the EU presents smugglers as the cause of the crisis and irregular migrants as victims. To fight smugglers, the EU in collaboration with third countries perceives an obligation to target victims in order to stop growing levels of criminal activity. However, the fight against smugglers cannot justify a State's violation of its obligations under international law. Knowingly that Libya and Turkey lack a well-functioning asylum system or the infrastructure to effectively manage the mass influxes of migrants, the EU and its Member States did not hesitate to assist these third countries to perform their obligations on border control. In preventing would-be asylum seekers from leaving their own territory, the third country and its partners (Italy and the EU in its collective role) become jointly liable for breaches of international law. Nor can Greece justify the return of irregular migrants to Turkey only because the existence of an EU-Turkey statement. Nonetheless, to lawfully discharge its obligations under the ECHR, Greece must examine on a case by case basis whether Turkey is indeed considered a safe third country for the person concerned before return.

Chapter Four provides a detailed analysis of Greek indiscriminate push-back practices during interception operations. It argues that these indiscriminate push-back practices are illegal since they violate international human rights law and other obligations. Through the illicit practice of push-back and its commitment

under the EU-Turkey statement, Greece is argued to acquire international responsibility for breaches of international obligations, such as the 'right to life', prohibition of ill-treatment and the *non-refoulement* principle.

## Chapter 4: Illicit Return Practices on the Eastern Mediterranean Route

### 4.1 Introduction

Irregular migration throughout Europe exposes the regulatory shortcomings of the Refugee Convention and CAT to protect against *refoulement*.<sup>592</sup> Although these two Conventions determine the criteria for international protection, they do not provide specifically for rules in case of mass migration; concurrently, non-applicability of these Conventions in such cases cannot be assumed as it would leave migrants without protection under international law – which is not in line with the Conventions’ aims. However, this legal uncertainty continues to be exploited by Member States to legitimise returns of irregular migrants on the basis of bilateral readmission agreements, despite the threat of persecution and torture in the respective countries. As there are many of such agreements in place, rulings of the ECtHR are providing relevant guidelines on treatment in individual cases.

This chapter will provide an analysis of the EU’s ‘compassionate border work’ policy,<sup>593</sup> a practice known as push-back. It is argued that these push-back practices violate international obligations, notably the ‘right to life’, the ‘duty to search and rescue’, the prohibition of inhuman or degrading treatment or punishment and the principle of *non-refoulement*. These aspects will be exposed in the context of the EU-Turkey statement the legality of which is questioned in light of EU and international law, focusing mainly on the Asylum Procedures Directive, the EU Charter, the ECHR and the Refugee Convention. In this chapter it is argued that Turkey does not meet the ‘safe third country’ requirements and that the returns under the EU-Turkey statement violate the *non-refoulement* principle.<sup>594</sup> This chapter addresses the illicit push-back practices conducted by Greece with EU support but it will not consider Italy, as since 2014 no incidents

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<sup>592</sup> CAT, article 3; Refugee Convention, article 33.

<sup>593</sup> Little and Vaughan-Williams (n 369); see Chapter 3, section 3.2.

<sup>594</sup> Refugee Convention, article 33; ECHR, article 3; EU Charter, article 19(2).



of illicit push-back practices to Libya have been reported.<sup>595</sup> Italy formally stopped its push-back practice to Libya following the ECtHR's decision in *Hirsi*.<sup>596</sup>

#### **4.2 The EU's 'Compassionate Border-Work' Policy**

Since 2011, irregular migrants have been victimised not only by the circumstances occurring in their countries of origin, but also by the EU's 'compassionate border work' policy, adopted to manage the influx. In their fight against smugglers, organised crime and terrorism, the EU and its Member States seek to persuade the rest of the world that their extraterritorial measures are not directed against irregular migrants whom they purportedly see as 'victims', but against smugglers whom they consider to be the 'cause' of the migration outreach.<sup>597</sup> Irregular migrants are indeed the victims of the declared war between the Member States and smugglers, but in their effort to fight smugglers, the EU and its Member States have turned these 'victims' into 'targets'. It is argued that the fight against smugglers by no means justifies a policy resulting in violation of human rights law and other international obligations.<sup>598</sup>

Smugglers perceive the refugee crisis as a business opportunity; to them, the extraterritorial measures are part of a 'border game'.<sup>599</sup> All smugglers have to do is to ensure that the irregular migrants cross the territorial sea onto the high seas and then call the Greek Rescue Coordination Centre for assistance, taking advantage of the search and rescue legal framework. In response to this 'border game', Greece has adopted its own strategy, that of informal forced returns known

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<sup>595</sup> Paleologo (n 143); Toaldo (n 143) 7; Amnesty International, 'Italy: Beatings and Unlawful Expulsions Amid EU Push to Get Tough on Refugees and Migrants' 3 November 2016 <<https://www.amnesty.org/en/latest/news/2016/11/italy-beatings-and-unlawful-expulsions-amid-eu-push-to-get-tough-on-refugees-and-migrants/>>accessed 25 October 2017.

<sup>596</sup> *Hirsi* (n 57) paragraph 137; Paleologo (n 143); Toaldo (n 143) 7.

<sup>597</sup> Pallister-Wilkins (n 81) 63.

<sup>598</sup> *Hirsi* (n 57) paragraph 179.

<sup>599</sup> House of Lords, *Operation Sophia: a Failed Mission* (n 174) paragraphs 45-46; Bigo (n 17) 212.

as push-backs: Upon interception, the boat in ‘distress’ is not offered immediate assistance in accordance with international obligations under the search and rescue legal framework,<sup>600</sup> instead, coastguards take steps to ensure the immediate return of these individuals to their country of departure without examining their individual circumstances.<sup>601</sup> The Greek extraterritorial measures on irregular migration have thereby exposed refugees to vulnerabilities along their way.<sup>602</sup> The race between smugglers and border authorities have forced smugglers to be inventive, for each unauthorised point of entry that is closed by border authorities, two more unauthorised points of entry are found by smugglers.<sup>603</sup> This has created high risks for migrants generally resulting in non-rescue episodes, route diversion, push-back practices, and disputes over refugee responsibility upon disembarkation.<sup>604</sup>

Through identifying the extraterritorial practices as necessary measures in the fight against smugglers, Greece risks adverse effects in the form of violations of international obligations and human rights law as unfortunate collateral damage.<sup>605</sup> As explained in Chapter Three, in accordance with its ‘compassionate border-work’ policy, Greece interacts in relation to Turkey out of ‘compassion’, that is, in order to prevent irregular migrants from departing on unseaworthy boats. However, even if these individuals manage to depart, Greek coastguards

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<sup>600</sup> See Chapter 2, section 2.3.

<sup>601</sup> Allegations of push-backs from November 2013 to 11 June 2016; see Pro Asyl, “Pushed-back” (n 110) 14-20; Amnesty International, “Greece: Frontier of Hope and Fear” (n 112) 15; Watch the Med, “Alarm Phone Press Release” (n 114); Infomobile, ‘Information with, about and for Refugees in Greece’ (27 July 2015) <<http://infomobile.w2eu.net/2015/07/27/minors-separated-from-their-family-in-moria-greek-coast-guard-punctures-refugee-boat-under-the-eyes-of-frontex/>> accessed 13 October 2017; Watch the Med Alarm Phone, “Illegal Push-Back Operation with Frontex Present” (15 June 2016) <<https://alarmphone.org/en/2016/06/15/watchthemed-alarm-phone-denounces-illegal-push-back-operation-with-frontex-present/>> accessed 13 October 2017.

<sup>602</sup> Maija Mustaniemi-Laakso et al, *The Protection of Vulnerable Individuals in the Context of EU Policies on Border Checks, Asylum and Immigration* (FRAME, 31 May 2016) 33.

<sup>603</sup> Gammeltoft-Hansen and Hathaway (n 518) 237.

<sup>604</sup> Moreno-Lax, ‘Seeking Asylum in the Mediterranean’ (n 43) 174.

<sup>605</sup> Xavier Ferrer-Gallardo, ‘The Deadly EU Border Control’ (2014) ACME: IECG 13(2) 295-304, 299.

ensure their push-back.<sup>606</sup> During push-backs, irregular migrants claim that their lives have been endangered intentionally by Greek coastguards who have seized the boat engine, or have pierced holes in boats and subsequently abandoned them in Turkish territorial waters; these practices have contributed to irregular migrants' boats capsizing and resulting in loss of life.<sup>607</sup> In addition, irregular migrants claim that violence has been used against them during push-backs.<sup>608</sup> The Greek push-back practices appear to be similar to the strategy of smugglers in Libya, that of 'self-induced distress'.<sup>609</sup> Smugglers in Libya left irregular migrant boats stranded at sea without a boat engine and in unseaworthy conditions.<sup>610</sup> It cannot be precluded that the Greek authorities are exercising similar practices against irregular migrants' boats intercepted on the high seas or in Greek territorial waters to avoid acquiring international responsibility in accordance with international human rights and refugee law.

When conducting field operations, Greece claims to have fully respected applicable EU and international legal frameworks.<sup>611</sup> Nevertheless, the illegal practices conducted by Greek and Turkish coastguards have been confirmed by the testimonies of irregular migrants during various studies conducted by Pro Asyl,<sup>612</sup> HRW,<sup>613</sup> Amnesty International,<sup>614</sup> Migreurop<sup>615</sup> and Watch the Med.<sup>616</sup> The ECtHR relied on similar reports produced by HRW and Amnesty

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<sup>606</sup> See (n 581).

<sup>607</sup> HRW, 'Greece: Attacks on Boats Risk Migrant Lives, Masked Assailants Attack, Disable Boats, Abuse Passengers' 22 October 2015 <<https://www.hrw.org/news/2015/10/22/greece-attacks-boats-risk-migrant-lives>> accessed 13 October 2017; BBC, 'Migrant Crisis: Boat Sinking off Didim, Turkey Claims 25 lives' (6 March 2016) <<http://www.bbc.com/news/world-europe-35739555>> accessed 13 October 2017.

<sup>608</sup> Amnesty International, "The Human Cost of Fortress Europe" (n 112) 20; HRW, 'Greece: Attacks on Boats Risk Migrant Lives' (n 607).

<sup>609</sup> See Chapter 2 on search and rescue.

<sup>610</sup> Van Liempt and Sersli (n 11) 1029.

<sup>611</sup> EMHRN, *Violations of the Rights of Migrants and Refugees at Sea, Prioritising Border Control over Human Lives* June 2014, Copenhagen, Policy Brief, 18.

<sup>612</sup> Pro Asyl, "Pushed-back" (n 110) 27.

<sup>613</sup> HRW, "Greece: Investigate Push-backs" (n 111).

<sup>614</sup> Amnesty International, 'The Human Cost of Fortress Europe' (n 112) 20; Amnesty International, 'Greece: Frontier of Hope and Fear' (n 112) 15.

<sup>615</sup> FIDH, Migreurop, EMHRN (n 113).

<sup>616</sup> Watch the Med, "Alarm Phone Press Release" (n 114).

International when it held that Greece were in violation of Article 3 ECHR.<sup>617</sup> The same form of documentation is now relied upon to prove that systematic push-backs are occurring on the Eastern Mediterranean route (Greece to Turkey). For many years, NGOs have reported that Greece systematically pushes intercepted irregular migrants back from its territorial waters and/or on the high seas to Turkey.<sup>618</sup> The pushed-back migrants were of Syrian, Somali, Afghan, or Eritrean nationality, identified by the UNHCR as persons in need of international protection.<sup>619</sup> These individuals were given no opportunity to request international protection or challenge their forced return.<sup>620</sup>

NGOs and even Frontex have confirmed practices of informal forced returns taking place from Greek territorial waters and/or on the high seas to Turkey.<sup>621</sup> In 2013, Frontex confirmed that it had received eighteen reports alleging informal forced returns in the form of push-backs in groups.<sup>622</sup> The Greek authorities categorically denied such allegations, arguing they were isolated incidents.<sup>623</sup> It was the CoE's Commissioner for Human Rights who reacted to the calls of NGOs in requesting an effective investigation addressing recorded incidents of unlawful

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<sup>617</sup> *Hirsi* (n 57) paragraphs 35-36, 37-39, 40-41, 125; *Sharifi* (n 115) paragraph 102; see Report of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading treatment or Punishment (CPT) visit on Italy from 27 to 31 July 2009; HRW, 'Pushed Back, Pushed Around' (n 115).

<sup>618</sup> Duncan Breen, 'Abuses at Europe's Borders' (2016) FMR 51, 21; HRW, 'Greece: Attacks on Boats Risk Migrant Lives' (n 607); Pro Asyl, "Pushed-back" (n 110) 14-20; Amnesty International, 'Frontier Europe' (n 117) 9.

<sup>619</sup> UNHCR, 'UNHCR Urges Continued International Protection for Asylum-seekers from Somalia' (Dan Maclsaac, 28 January 2014) <<http://www.unhcr.org/news/latest/2014/1/52e7adda9/unhcr-urges-continued-international-protection-asylum-seekers-somalia.html>> accessed 24 October 2017; UNHCR, 'Syrians in Greece: Protection Considerations and UNHCR Recommendations' (17 April 2013) <[https://www.unhcr.gr/fileadmin/Greece/News/2012/Syria/pc/Greece\\_Syria\\_Note\\_for\\_Pressconference\\_English.pdf](https://www.unhcr.gr/fileadmin/Greece/News/2012/Syria/pc/Greece_Syria_Note_for_Pressconference_English.pdf)> accessed 24 October 2017.

<sup>620</sup> *Andric v Sweden* Application no 45917/99 (23 February 1999) paragraph 1; *Henning Becker v Denmark* Application no 7011/75 (3 October 1975); *Hirsi* (n 57) paragraphs 184-185; also see SBC handbook in Chapter 2, section 2.

<sup>621</sup> See (n 581).

<sup>622</sup> Amnesty International, 'The Human Cost of Fortress Europe' (n 112) 9.

<sup>623</sup> Amnesty International, 'The Human Cost of Fortress Europe' (n 112) 5.

practices in the form of push-backs.<sup>624</sup> In response to this investigation, the Greek government denied that there was a Greek policy of push-back in the Aegean Sea and confirmed their commitment to respect human rights. They stated that any allegations would be investigated, but that no such allegations had been received.<sup>625</sup> However, between November 2014 and August 2015, NGOs reported eleven incidents of push-back practices at Greek-Turkish land and sea borders,<sup>626</sup> in which irregular migrants claimed violence was used against them.<sup>627</sup> In addition, these practices have contributed to irregular migrants' loss of life. It was only in October 2015 that the Prosecutor of the Thessaloniki Appeals Court ordered the Internal Affairs Directorate of the Police to commence a criminal investigation based on the reports of NGOs that push-backs were taking place in the Evros region.<sup>628</sup> However, no push-backs were found to have taken place.<sup>629</sup>

### **4.3 Push-backs Endangering Migrants' Lives**

During push-back practices, the most contentious incidents in violation of the 'right to life' were those occurring in Greek territorial waters on 20 January 2014, 25 October 2014 and 14 August 2015. On 20 January 2014, a boat carrying 28 people sank 100m from the Greek island of Farmakonisi during a search and rescue operation conducted by the Greek authorities.<sup>630</sup> A total of eleven people drowned.<sup>631</sup> Survivors told the UNHCR that immediately upon interception Greek

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<sup>624</sup> Council of Europe Commissioner for Human Rights letter to Greek Ministry of Public Order and Citizen Protection and Minister of Shipping and the Aegean (Strasbourg, 5 December 2013).

<sup>625</sup> Ministry of Public Order and Citizen Protection, Minister Nikos Dendias responding letter to Council of Europe Commissioner for Human Rights, Athens, 10 January 2014, Ref: 4236.

<sup>626</sup> Amnesty International Annual Report 2015/2016, 'The State of the World's Human Rights' 168 <<https://www.amnesty.org/en/latest/research/2016/02/annual-report-201516/>> accessed 14 October 2017.

<sup>627</sup> (n 581).

<sup>628</sup> Amnesty International Report 2015/2016 (n 625) 168.

<sup>629</sup> Amnesty International Report 2015/2016 (n 625) 168.

<sup>630</sup> Amnesty International, 'Greece: Farmakonisi Migrant Tragedy – One Year on and Still no Justice for Victims' 20 January 2015 <<https://www.amnesty.org/en/latest/news/2015/01/greece-farmakonisi-migrant-tragedy-one-year-and-still-no-justice-victims/>> accessed 26 October 2017, 25 were from Afghanistan and three from Syria.

<sup>631</sup> *ibid.*

coastguards towed the boat to Turkey. The coastguard vessel sped across the sea, flooding the irregular migrants' boat and causing it to capsize.<sup>632</sup> Survivors also claimed that once in the water, they tried to climb on board the Greek coastguard vessel but were beaten badly by the coastguards.<sup>633</sup> The migrants who managed to get on board were held at gunpoint.<sup>634</sup> The Greek coastguards categorically denied these allegations. They claimed that the boat capsized when being towed towards Greek territory and that weather conditions had not allowed the irregular migrants to board the Greek vessel.<sup>635</sup>

Immediate reactions came from the EU and the CoE. The EU Commissioner for Home Affairs requested independent investigations.<sup>636</sup> The CoE's Commissioner for Human Rights commented that the incident appeared to be 'a case of failed collective expulsion'.<sup>637</sup> The Greek Minister of Shipping, Maritime Affairs and the Aegean<sup>638</sup> was obliged to commence an investigation.<sup>639</sup> In August 2015, with the approval of the Athens' Court of Review, the Prosecutor of Piraeus' Marine Court dropped the investigation holding the survivors' testimonies unfounded.<sup>640</sup>

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<sup>632</sup> UNHCR, 'Statement on Boat Incident off Greece Coast' (Press Release, 21 January 2014) <<http://www.unhcr.org/52df83d49.html>> accessed 26 October 2017.

<sup>633</sup> ECRE, '12 Refugees Die during Alleged Push-back Operation off Greek Island' (24 January 2014) <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/574-12-refugees-die-during-alleged-push-back-operation-off-greek-island.html>> accessed 17 October 2017.

<sup>634</sup> *ibid.*

<sup>635</sup> *ibid.*

<sup>636</sup> The Guardian, 'Greek Minister: Migrant Survivors of Boat Accident Have Changed Stories' (24 January 2014) <<http://www.theguardian.com/world/2014/jan/24/migrant-survivors-boat-sinking-changed-stories-marine-minister>> accessed 17 October 2017.

<sup>637</sup> EnetEnglish, "European Rights Watchdog 'Shocked and Distressed' at Migrant Drowning's: Nils Muižnieks says Government Must Stick to Promises to Stop Push-backs" (22 January 2014) <<http://www.enetenglish.gr/?i=news.en.article&id=1722>> accessed 17 October 2017.

<sup>638</sup> Ministry of Shipping and the Aegean changed to Ministry of Shipping and Island Policy from 23 September 2015 <<https://www.yen.gr/>> accessed 17 October 2017.

<sup>639</sup> Greek Ministry of Marine and Aegean, Letter from the Minister of Marine and Aegean Miltiades Varvitsioti to Commissioner for Human Rights of the Council of Europe (Niels Mouiznieks, 29 January 2014) <<http://www.hcg.gr/node/6814>> accessed 17 October 2017; ECHR, article 2 imposes duty to investigate; see also *McCann* (n 35) paragraph 161.

<sup>640</sup> The Greek Council for Refugees, "One Year Following the Tragic Shipwreck of January 20, 2014, off the Coast of Farmakonisi Island, with 8 Children and 3 Women as Victims" <<http://gcr.gr/index.php/en/news/press-releases-announcements/item/432-enas-xronos-meta-to-tragiko-navagio-tis-20is-ianouariou-2014-ekso-apo-to-farmakonisi-me-thymata-8-paidia-kai-3>>

The investigation was argued by NGOs to have been conducted inadequately, not taking into consideration serious discrepancies in the evidence provided by the coastguard.<sup>641</sup> The termination of any investigation against Greek coastguards comes as no surprise when one considers the insistence of the Greek Foreign Minister that there had been no ‘illegal repelling to Turkey’.<sup>642</sup>

On 25 October 2014, Greek coastguards boarded a vessel, removed the engine’s fuel tank, punctured the vessel and subsequently pushed the boat to Cesme, Turkey.<sup>643</sup> The boat was carrying migrants of Syrian nationality, including children and pregnant women.<sup>644</sup> On 5 August 2015, Watch the Med Alarm Phone reported four separate incidents of push-back practices (involving violence) from 26 July to 1 August 2015. It reported that ‘masked special units of coastguard’ had attacked boats of refugees between the Greek-Turkish islands.<sup>645</sup> According to the Alarm Phone, the boats were in distress as a result of Greek coastguards’ attacks, and were left drifting at sea until they were rescued by Turkish coastguards. These allegations were confirmed by the Alarm Phone which was in direct contact with the irregular migrants straight after the attacks occurred. Furthermore, on 14 August 2015, Turkish fishermen claimed that a boat carrying fifty people was intentionally sunk by Greek authorities.<sup>646</sup> These fishermen supported their claim with a video.<sup>647</sup> On 15 June 2016, a further allegation of a push-back practice occurred between Chios, Greece and Cesme, Turkey.<sup>648</sup> On 22

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gynaikes> accessed 17 October 2017; Amnesty International, ‘Greece: Farmakonisi Migrant Tragedy’ (n 630).

<sup>641</sup> ECRE, “With Their Case Shelved in Greece, Survivors of the Farmakonisi Tragedy Seek Justice at the ECtHR” (22 January 2015) <<http://www.ecre.org/with-their-case-shelved-in-greece-survivors-of-the-farmakonisi-tragedy-seek-justice-at-the-ecthr/>> accessed 16 October 2017.

<sup>642</sup> Katerina Penna, ‘Farmakonisi Migrant Tragedy Sparks EU policy Debate’ (Equal Times, 19 March 2014) <<http://www.equaltimes.org/farmakonisi-migrant-tragedy-sparks-eu-policy-debate?lang=en#.VdXCtfmqpHw>> accessed 16 October 2017.

<sup>643</sup> Watch the Med, “They Want to See Us Drown” (n 145).

<sup>644</sup> Watch the Med, “They Want to See Us Drown” (n 145).

<sup>645</sup> Watch the Med, “They Want to See Us Drown” (n 145).

<sup>646</sup> Euronews, “Turkish Fisherman Claims” (n 146).

<sup>647</sup> Euronews, “Turkish Fisherman Claims” (n 146).

<sup>648</sup> Watch the Med, “Illegal Push-Back” (n 601).

August 2016, TheIntercept.com reports on the allegations of a female passenger to have been shot by the Greek patrol within the Frontex operational area.<sup>649</sup> Frontex documents the use of firearms against irregular migrant's boats targeting two shots to the outboard engine on the same date the allegation was made (24 November 2015).<sup>650</sup> To date, no investigation has been undertaken by Greece to confirm or disprove these allegations.

These incidents question the legal safeguards afforded by international human rights frameworks on the 'right to life' and 'duty to rescue'. It is universally accepted that 'no one shall be arbitrarily deprived of his life'.<sup>651</sup> The 'right to life' is codified in maritime law through the duty to render assistance to persons in distress at sea and through the search and rescue obligations.<sup>652</sup> Article 2 ECHR ranks the 'right to life' as the most fundamental<sup>653</sup> right within the ECHR and the Convention expressly provides that no derogation from it is permitted.<sup>654</sup> Any deprivation of life has to be justified. Article 2(2) ECHR describes the circumstances 'where it is permitted to use force which may result as an unintended outcome in the deprivation of life'.<sup>655</sup> Such use of force must not be 'more than absolutely necessary'<sup>656</sup> in achieving its intended purpose in accordance with sub-paragraphs (a)-(c) of Article 2(2) ECHR. Furthermore, the ECtHR and the Human Rights Committee have emphasised the positive obligation of States to take measures<sup>657</sup> within their 'legal and administrative

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<sup>649</sup> Watch the Med, "Illegal Push-Back" (n 601).

<sup>650</sup> The Intercept, "Shoot First: Coast Guard Fired at Migrant Boats, European Border Agency Documents Show" (22 August 2016) <<https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show/>> accessed 16 October 2017).

<sup>651</sup> UDHR, article 3, ICCPR, article 6; ECHR, article 2; EU Charter, article 2.

<sup>652</sup> International Convention on Salvage 1989, article 10; UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR Convention, Chapter 2.1.10.

<sup>653</sup> *Nachova and Others v Bulgaria* Application nos 43577/98 and 43579/98 [2004] ECHR 89, paragraph 93; also see Explanatory report to Protocol No 13 to the ECHR 'concerning the abolition of the death penalty in all circumstances' ETS No 187, point 1 <<http://conventions.coe.int/Treaty/EN/reports/html/187.htm>> accessed 17 October 2017.

<sup>654</sup> ECHR, article 15: except for 'deaths resulting from lawful acts of war'.

<sup>655</sup> *Solomou and Others v Turkey* Application no 36832/97 (24 September 2008) paragraph 64.

<sup>656</sup> *McCann* (n 35) paragraph 148.

<sup>657</sup> UN Human Rights Committee, *General Comment No 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 26 May



framework<sup>658</sup> to ensure that the lives of those persons within their jurisdiction<sup>659</sup> are not lost. The Greek authorities have a positive obligation to refrain from intentionally taking life. States also have a positive obligation under the Palermo Protocols to take ‘all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of smuggling as accorded under applicable international law, in particular the “right to life”’.<sup>660</sup>

As Greece is part of Operation *Poseidon* at sea in collaboration with Frontex, it is bound to follow the Frontex sea borders rules.<sup>661</sup> Irregular migrants are arriving on Greek shores in overcrowded, unseaworthy vessels controlled by unprofessional seamen. The deaths in the Mediterranean Sea and the arrivals on Greek shores in overcrowded, unseaworthy wooden boats have evidenced ‘a real and immediate risk to the life of an individual’.<sup>662</sup> For these reasons, upon interception, Greek authorities must consider the irregular migrants’ boats to be in a ‘distress phase’.<sup>663</sup> Based on its positive obligations under the Sea Borders Regulation and the ECHR, Greece is obliged to take preventative measures to

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2004, CCPR/C/21/Rev.1/Add.13, paragraph 6  
<<http://www.refworld.org/docid/478b26ae2.html>> accessed 10 October 2017; *L.C.B. v the United Kingdom* Application no 23413/94 [1998] ECHR 108, paragraph 36.

<sup>658</sup> Human Rights Committee, *General Comment No 31* (n 657) paragraph 7; *Kılıç v Turkey* Application no 22492/93 [2000] ECHR 127, paragraph 62; *Andréou v Turkey* Application no 45653/99 [2009] ECHR 1663, paragraph 49.

<sup>659</sup> ECHR, article 1; *Soering* (n 59) paragraph 86.

<sup>660</sup> Migrant Smuggling Protocol (n 135) article 16(1); emphasis added.

<sup>661</sup> See the Sea Borders Regulation, article 9(2)(f) Participating units must take into account the following information when considering whether a vessel is in ‘a phase of uncertainty, alert, or distress’: ‘(i) the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation; (ii) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination; (iii) the number of persons on board in relation to the type and condition of the vessel; (iv) the availability of necessary supplies such as fuel, water and food to reach a shore; (v) the presence of qualified crew and command of the vessel; (vi) the availability and capability of safety, navigation and communication equipment; (vii) the presence of persons on board in urgent need of medical assistance; (viii) the presence of deceased persons on board; (ix) the presence of pregnant women or of children on board; (x) the weather and sea conditions, including weather and marine forecasts’.

<sup>662</sup> SAR Convention, Annex, Chapter 1, point 11.

<sup>663</sup> SAR Convention, Annex, Chapter 1, point 11: ‘Distress phase: A situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance’.

assist these boats and avoid any illicit practices leading to the capsizing of boats resulting in deaths.<sup>664</sup> It is the duty of the Greek coastguard's captain to rescue these persons in distress, not to be the cause of their drowning.<sup>665</sup>

Greece has a positive obligation to safeguard the lives of individuals within its jurisdiction<sup>666</sup> and prevent loss of life.<sup>667</sup> A 'causal relationship' is established at the moment Greek authorities take persons on board and/or tows the boat to a particular destination. It is precisely at this moment that they exercise direct control over the boat, thus placing the passengers under Greek jurisdiction.<sup>668</sup> As long as border guards exercise their control during interception there is no need to prove 'effective control over its geographical surroundings'.<sup>669</sup> Apart from establishing *de jure* and *de facto* control,<sup>670</sup> to hold Greece accountable for the incidents of 20 January 2014, 25 October 2014 and 14 August 2015 it must also be proved that Greece 'knew, or ought to have known, of any unlawful act perpetrated therein, or to have known the authors'.<sup>671</sup> The Greek State has full command of its coastguards.<sup>672</sup> In addition, the reports produced by NGOs alleging push-back practices impute Greece with knowledge of unlawful acts perpetrated by its officials.<sup>673</sup> On the high seas, individuals have died as a direct

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<sup>664</sup> Sea Borders Regulation, article 10; *Öneryildiz* (n 34) paragraphs 62-65; *Osman* (n 33) paragraph 93.

<sup>665</sup> Basaran 'The Saved and the Drowned' (n 43) 210.

<sup>666</sup> *Osman* (n 33) paragraph 115; *Dijk and others* (n 33) 355.

<sup>667</sup> UNCLOS, article 98; Convention on the High Seas, article 12; International Convention on Salvage 1989, article 7; SOLAS, article 33.

<sup>668</sup> ECHR, article 1; EU Charter, article 1; ICCPR, article 2; Committee against Torture, *Conclusions and Recommendations Concerning the Second Report of the United States of America* (U.N. Doc. CAT/C/USA/CO/2, 25 July 2006) paragraph 15; also see Chapter 2, section 2.3.1.

<sup>669</sup> *Jaloud v the Netherlands* Application no 47708/08 (20 November 2014) paragraphs 149-150; Aurel Sari, 'Untagling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v Netherlands*: Old Problem, New Solutions?' (2014) 53 MLLWR 287-318, 288.

<sup>670</sup> *Loizidou v Turkey* Application no 15318/89 Series A no 310, paragraph 62; Christiane Ahlborn, *To Share or Not to Share? The Allocation of Responsibility between International Organizations and Their Member States* (SHARES Research Paper 28 2013) ACIL 2013-26, 6.

<sup>671</sup> *Corfu Channel Case* (n 527) 18; *Massey* (1927), RIAA iv. 155, paragraph 159.

<sup>672</sup> ASR, article 4; Mungianu (n 84) 61.

<sup>673</sup> HRW, "Greece: Investigate Push-backs" (n 111); Amnesty International, 'The Human Cost of Fortress Europe' (n 112) 20; Amnesty International, 'Greece: Frontier of Hope and Fear' (n

result of Greek coastguards' exercise of authority over irregular migrants' boats.<sup>674</sup> In causing intentional damage to migrant boats and leaving them stranded at sea it is argued that Greek officials are committing internationally wrongful acts.<sup>675</sup> These wrongful acts, in the form of push-back practices trigger international responsibility for Greece.<sup>676</sup>

In the Aegean Sea, the risk of death has materialised but no action has been taken by Greece to adequately respond to such risk in accordance with its obligations under Article 2 ECHR.<sup>677</sup> Furthermore, in failing to conduct an effective investigation in respect of the 14 August 2015 and 15 June 2016 incidents, Greece is in breach of its procedural obligations under Articles 2 and 3 ECHR.<sup>678</sup> Greece has a positive duty imposed by the ECHR to commence investigations to identify those dying at sea and punish those responsible for causing these deaths.<sup>679</sup> Failure to commence investigations into alleged human rights violations constitutes an internationally wrongful act imputing Greece with international responsibility.<sup>680</sup>

#### **4.4 Irregular Migrants Subjected to Ill-Treatment**

Not only do Greek authorities have a positive duty to protect life at sea in the form of rescue but they also need to respect individuals and treat them humanely. During push-backs, irregular migrants have alleged receiving ill-treatment of a severity which may amount to inhuman or degrading treatment or punishment.

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112) 15; FIDH (n 153); Watch the Med, "Alarm Phone Press Release" (n 114); EMHRN (n 611) 18; Pro Asyl, "Pushed-back" (n 110) 27.

<sup>674</sup> *Hirsi* (n 57) paragraph 75: having *de jure* jurisdiction over these persons; see Chapter 2, section 3.2.1.

<sup>675</sup> ASR, article 2: To determine the wrongful act of the State, first the conduct must be attributable to the State; and secondly, for responsibility to be attached, the conduct must constitute a breach of an international legal obligation.

<sup>676</sup> ASR, article 1: A breach of international law by a State entails its international responsibility.

<sup>677</sup> *Öneryildiz* (n 34) paragraph 101.

<sup>678</sup> *Jaloud* (n 669).

<sup>679</sup> ECHR, article 2(2) read in conjunction with article 1; *McCann* (n 35) paragraph 161; *Kelly* (n 35) paragraph 94.

<sup>680</sup> See section 4.8 for a critical analysis of international responsibility.

Irregular migrants interviewed by Pro Asyl alleged that they had been ‘slapped, beaten with batons, punched and kicked on their body, on their head and on their face’ by Greek officers during their apprehension and push-back.<sup>681</sup> Others alleged that Greek coastguards had forced them to come on board the Greek Coastguard vessel, where they were threatened with guns and made to ‘kneel down and keep their hands behind their neck’ whilst bodily searched; others said they were forced to take their clothes off.<sup>682</sup> There were allegations of theft of personal belongings, as well as the removal of identification documents.<sup>683</sup> NGOs have also reported that Greek border guards assaulted a pregnant woman.<sup>684</sup>

If these allegations are true, it is argued that Greek authorities are committing acts of inhuman or degrading treatment or punishment.<sup>685</sup> The prohibition of ill-treatment is non-derogable under the ECHR and CAT.<sup>686</sup> Thus, all States Parties are obliged to ‘eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment’ and must take effective measures to ensure such conduct does not re-occur.<sup>687</sup> To distinguish torture from the other forms of ill-treatment, both the jurisprudence of the Committee against Torture and the ECtHR have moved towards the establishment of a special stigma for ‘deliberate inhuman treatment causing very serious and cruel suffering’<sup>688</sup> and the ‘difference

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<sup>681</sup> Pro Asyl, “Pushed-back” (n 110) 32.

<sup>682</sup> FIDH (n 153) 29.

<sup>683</sup> *ibid.*

<sup>684</sup> *ibid.*

<sup>685</sup> ECHR, article 3; CAT, article 16; EU Charter, article 4; Note the difference in terminology between the CAT and the ECHR/EU Charter: unlike article 3 ECHR and article 4 EU Charter, article 16 CAT refers ‘to torture *or cruel, inhuman or degrading treatment or punishment*’; ICCPR, article 7; UDHR, article 5.

<sup>686</sup> ECHR, article 15; also see CAT, article 2: The Committee Against Torture has expressly commented that the ‘obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter “ill-treatment”) under article 16, paragraph 1 are interdependent, indivisible and interrelated’, see Committee Against Torture, *General Comment 2, Implementation of Article 2 by States Parties* (U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007)) paragraph 3.

<sup>687</sup> *ibid.*, also see Committee Against Torture, *General Comment 2*, paragraph 4.

<sup>688</sup> *Dikme v Turkey* Application no 20869/92 (11 July 2000) paragraph 93; *Aksoy v Turkey* Application nos. 28635/95, 30171/96, 34535/97 ECHR 1996-VI, paragraph 64.

in the intensity of the suffering inflicted'.<sup>689</sup> The minimum level of severity depends on the circumstances of the case such as treatment duration, physical and mental effects, sex, age and state of health of the victim.<sup>690</sup> Any ill-treatment of not a sufficient intensity or purpose to that required for torture is classified as inhuman or degrading.<sup>691</sup>

It is argued that the acts conducted by Greek authorities such as slapping, beating with batons, and punching and kicking an irregular migrant's body, head and face amount to inhuman treatment.<sup>692</sup> These particular acts caused a deliberate actual bodily injury on the migrants concerned.<sup>693</sup> Similarly, the infliction of severe pain to a pregnant woman, and a series of intense blows to the entire body, is considered a heinous and violent intentional act, punishable by law.<sup>694</sup> The severity of the pain to the woman taken in conjunction with the consequences of such pain to the unborn child arguably amounts to torture. As the ECtHR has consistently held and as Article 2(2) of the CAT makes clear, the prohibition of torture is absolute.<sup>695</sup> No exceptional circumstances whatsoever can be invoked

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<sup>689</sup> CAT, *H.K. v Switzerland* (2013) Communication no 432/2010, paragraph 7.4; CAT, *Fatou Sonko v Spain* (2012) Communication no 368/2008, paragraph 10.4; *The Greek case* (1969) ECHR no 12, 186; *Ireland v United Kingdom* (1978) ECHR Series A no 25, paragraph 167 'level of severity'; *Keenan v the United Kingdom* Application no 27229/95 [2001] ECHR 239, paragraph 20; *Jalloh v Germany* Application no 54810/00 ECHR 2006-IX, paragraph 68; Fernando Menéndez, 'Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees' (2015) RSQ 34 (1) 61-78 <<https://academic-oup-com.chain.kent.ac.uk/rsq/article-lookup/doi/10.1093/rsq/hdu019>> accessed 17 October 2017.

<sup>690</sup> *Tekin v Turkey* Application no 22496/93 ECHR 1998-IV, paragraph 52; *Selmouni v France* Application no 25803/94 ECHR 1999-V, paragraph 96; *Keenan* (n 689) paragraph 20; *Valašinas v Lithuania* Application no 44558/98 (24 July 2001) paragraph 120; and specifically to torture see *Labita v Italy* Application no 26772/95 ECHR 2000-IV, paragraph 120; The Committee Against Torture has already established that the physical and mental suffering, aggravated by the vulnerability of the individual as a migrant, exceed the threshold of cruel, inhuman or degrading treatment or punishment - see CAT, *Fatou Sonko* (n 689) paragraph 10.7.

<sup>691</sup> *Tekin* (n 690) paragraph 52.

<sup>692</sup> ECHR, article 3.

<sup>693</sup> *Jalloh* (n 689) paragraph 68; *Labita* (n 690) paragraph 120.

<sup>694</sup> *Selmouni* (n 690) paragraph 103.

<sup>695</sup> *Chahal* (n 59) paragraph 79; *Saadi v Italy* (n 407) paragraph 127.

by way of justification.<sup>696</sup> There can be no derogation from the prohibition, even in the event of a public emergency threatening the life of the nation.<sup>697</sup>

As to the acts of bodily search and forced removal of clothes on-board the vessel in front of coastguards and others they interfere with the irregular migrants' dignity, acting as a form of 'gross humiliation' and thus constituting degrading treatment.<sup>698</sup> Although the bodily search and forced removal was exercised for security reasons, the ECtHR has reiterated that the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment even in circumstances such as organised crime, security and terrorism.<sup>699</sup> The effect of these acts on irregular migrants crossing the sea on overcrowded unseaworthy vessels fleeing persecution and civil war was such as to arouse their 'feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'.<sup>700</sup>

For many years, NGOs and civil society groups have reported the Greek coastguards' practice of inflicting physical and mental violence causing severe pain and suffering to irregular migrants, however, the solidity of these allegations must be proved in court beyond reasonable doubt.<sup>701</sup> For Greece, the law on the burden and standard of proof in Article 3 ECHR cases is opportune. These irregular migrants are immediately returned to the country of departure, mainly Turkey. Upon return they face difficulties in obtaining supporting evidence of ill-

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<sup>696</sup> *The Greek case* (n 689) 186.

<sup>697</sup> *M/V Saiga* (No 2) (n 209) paragraphs 155-156.

<sup>698</sup> *Tyrer v UK* [1978] 2 EHRR 1, paragraphs 32 and 35.

<sup>699</sup> *Tomasi v France* Application no 12850/87 Series A no 241-A, paragraph 115; on CAT see article 2(2): 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'.

<sup>700</sup> *Hurtado v Switzerland* Application no 17549/90, Series A no 280, paragraph 67 - the absence of a specific purpose having as its object to humiliate and debase the person concerned, does not conclusively rule out a finding of a violation of article 3 ECHR; see *Peers v Greece* Application no 28524/95, ECHR 2001-III, paragraph 68 and 74.

<sup>701</sup> *Pruneanu v Moldova* Application no 6888/03 ECHR 2004-IV, paragraph 45; *Ireland* (n 689) paragraph 161: 'to assess the evidence, proof may follow from the coexistent of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact'.

treatment considering that Turkey faces massive inflows of irregular migrants;<sup>702</sup> they do not receive adequate legal services such as interpreters and legal aid.<sup>703</sup> Without legal advice, the victims of ill-treatment are not aware on the evidence they need to obtain in order to support a case of ill-treatment in court.

Mindful of such difficulties, to avoid a situation where State authorities act with virtual impunity, the ECtHR has imposed upon States an obligation, similar to that in respect of the ‘right to life’, to carry out an effective investigation into allegations of ill-treatment on the basis of *prima facie* evidence provided by the victims.<sup>704</sup> In those situations when a person alleges injury under the control of State authorities, such as the police or coastguards, a strong presumption arises that the person concerned was subjected to ill-treatment.<sup>705</sup> Upon allegations of ill-treatment conducted under its jurisdiction,<sup>706</sup> Greece has the burden of explaining the circumstances under a thorough investigation to determine the nature and circumstances of the event in which these irregular migrants were intercepted, treated and returned to country of departure.<sup>707</sup>

NGOs and UNHCR have brought to the attention of the Greek government the fact that practices of torture and ill-treatment have taken place during push-backs,

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<sup>702</sup> *Labita* (n 690) paragraph 125, difficulties obtaining medical report.

<sup>703</sup> Women’s Refugee Commission, ‘EU-Turkey Agreement Failing Refugee Women and Girls’ (August 2016) 20, <<https://www.womensrefugeecommission.org/images/zdocs/EU-Turkey-Refugee-Agreement-Failing.pdf>> accessed 16 October 2017.

<sup>704</sup> *Assenov v Bulgaria* Application no 24760/94, EHRR 1998-VIII, paragraph 102; *Kaya v Turkey* Application no 22535/93, 28 EHRR 1, paragraph 86; *McCann* (n 35) paragraph 161.

<sup>705</sup> *Pruneanu* (n 701) paragraph 44; *Bursuc v Romania* Application no 42066/98 (12 October 2004) paragraph 80.

<sup>706</sup> ECHR, article 1: ‘secure to everyone within their jurisdiction the rights and freedoms defined in ... the Convention’; also see Chapter 2, section 2.1; A State party’s jurisdiction includes any territory where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.

<sup>707</sup> *Tomasi* (n 699) paragraphs 108-111; *Ribitsch v Austria* Application no 18896/91 Series A no 336, paragraph 34; *Aksoy* (n 688) paragraph 61; *Pruneanu* (n 701) paragraph 47; CAT, *Fatou Sonko* (n 689) paragraph 10.4; Juliet Chevalier-Watts, ‘Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?’ EJIL (2010) 21 (3) 701-721, 705.

i.e. within its jurisdiction.<sup>708</sup> In its recently decided case *Sakir v Greece*, the ECtHR held that the Greek authorities were at fault for failing to consider the reports of various NGOs and other Greek institutions as relevant to the investigation.<sup>709</sup> Referring to alleged push-backs, the Greek Government has not commenced any investigations to secure evidence concerning the incidents.<sup>710</sup> Greece has an obligation to identify and punish the wrongdoers.<sup>711</sup> Such failure is likely to send a message of tolerance to the perpetrators of Article 3 ECHR and Article 16 CAT violations which is undesirable from EU perspective as it furthers incompliance with EU laws, values, and human rights. From Greek perspective, confronted with massive influxes of irregular migrants, the possibility of a case taken to the ECtHR is seen as permissible collateral damage when compared to the positive results produced by the illicit push-back practices acting as strategic deterrence tools.<sup>712</sup> Nonetheless, Greece obtains responsibility for the wrongful actions committed by its coastguards during push-back practices and must commence adequate investigations to determine their nature and take appropriate measures against its perpetrators.<sup>713</sup> The Greek authorities' failure to commence investigations against cogent allegations of ill-treatments violates Article 3 ECHR procedural aspect to conduct an effective official investigation.

#### **4.5 The EU-Turkey Statement as a violation of the *Non-refoulement* Principle**

To avoid international responsibility for individuals in need of protection, it is argued that Greece is intentionally ignoring its obligations under the *non-refoulement* principle. An example of such infringement is the EU-Turkey statement. Since 20 March 2016, Greece has returned irregular migrants, including asylum seekers, to Turkey on the basis of the EU-Turkey statement

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<sup>708</sup> See (n 581).

<sup>709</sup> *Sakir* (n 116) paragraphs 70-72.

<sup>710</sup> *Pruneanu* (n 701) paragraph 47, such as eyewitness testimony and forensic evidence; *Tanrikulu v Turkey* Application no 23763/94 ECHR 1999-IV, paragraph 104.

<sup>711</sup> CAT, article 12; CAT, *Fatou Sonko* (n 689) paragraph 10.7; *Tomasi* (n 699) paragraphs 108-111; *Ribitsch* (n 707) paragraph 34; *Aksoy* (n 688) paragraph 61.

<sup>712</sup> See section 4.6.

<sup>713</sup> See section 4.8 for an analysis of Greek's international responsibility.



considering Turkey to be a ‘safe third country’.<sup>714</sup> Despite the existence of a statement determining Turkey as safe, to be relieved of its obligations under the ECHR and the Refugee Convention, Greek authorities may return a potential asylum seeker to Turkey if it can ensure that Turkey will admit and consider the individuals’ request by providing him/her with effective protection.<sup>715</sup> The assessment must take into consideration whether Turkey realistically offers the following legal guarantees: ‘that the person will be admitted to that country; will enjoy effective protection against *refoulement*; will have the possibility to seek and (if necessary) enjoy asylum; and will be treated in accordance with accepted international standards’.<sup>716</sup>

If there are substantial grounds for believing that the individual would be subjected to a real risk of ill-treatment, Greece has a positive duty to observe all legal safeguards not to return (*‘refouler’*) the individual to a State where there exists ‘a consistent pattern of gross, flagrant or mass violations of human rights’.<sup>717</sup> The rights provided by Article 3 ECHR are of an ‘absolute character’ and may not be derogated from even in times of public emergency.<sup>718</sup> The *non-refoulement* principle applies equally to those individuals who are displaced, victims of trafficking, and economic migrants.<sup>719</sup> In addition, the EU has adopted the ‘subsidiary protection’ framework to offer protection to displaced persons and

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<sup>714</sup> EU-Turkey statement (n 99); see Chapter 3, section 3.4.2.

<sup>715</sup> Valeria Ilareva, *Undocumented Immigrants and Their Access to Fundamental Human Rights* (Saarbrücken, Germany: Scholar’s Press, 2013) 92; *Salah Sheekh v the Netherlands* Application no 1948/04 ECHR 2007-I, paragraph 141; *Abdolkhani and Karimnia v Turkey* Application no 30471/08 (22 September 2009) paragraph 88.

<sup>716</sup> UNHCR, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Lisbon Expert Roundtable, 9-10 December 2002) February 2003, paragraph 15 <<http://www.unhcr.org/refworld/docid/3fe9981e4.html>> accessed 17 October 2017.

<sup>717</sup> CAT, article 3(2); ECHR, article 3; *Soering* (n 59) paragraph 90-91; *Salah Sheekh* (n 715) paragraph 135; *Jabari* (n 197) paragraph 38; *Hirsi* (n 57) paragraph 114.

<sup>718</sup> ECHR, article 15; *Ahmed* (n 199) paragraph 40; Michael Addo and Nicholas Grief, ‘Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights’ (1998) 9 EJIL 510-524, 513.

<sup>719</sup> ICCPR, article 7; CAT, article 3; Convention on the Rights of the child, article 11; ECHR, article 3; EU Charter, article 19(2).

not return them to a place where they will face harm.<sup>720</sup> These provisions are an extension of the *non-refoulement* principle in the Refugee Convention to those persons who do not qualify for refugee status but nonetheless need protection. Thus, the *non-refoulement* principle is an absolute, non-derogable<sup>721</sup> peremptory norm<sup>722</sup> of international law (*jus cogens*) and the cornerstone of international refugee protection law.<sup>723</sup> Therefore, the principle of *non-refoulement* must be observed even by those States that are not parties to the 1951 Refugee Convention.<sup>724</sup>

It is argued that these legal safeguards are not fulfilled by Turkey which is an unsafe third country in the light of the *non-refoulement* principle. Although the

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<sup>720</sup> Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast Qualification Directive) [2011] OJ L337/9, article 21; Joined cases C-57/09 and C-101/09 *B and D* [2010] ECR I-10979, paragraphs 76-78, CJEU affirmed that the Qualification Directive must be interpreted ‘in a manner consistent with’ the 1951 Refugee Convention and the other relevant treaties referred to in Article 78(1) TFEU.

<sup>721</sup> Refugee Convention, article 42(1) and article VII(1) of the 1967 Protocol – ‘no reservations are permitted’; UN General Assembly, Office of the United Nations High Commissioner for Refugees 12 February 1997, A/RES/51/75, paragraph 3.

<sup>722</sup> Jean Allain, ‘The *jus cogens* Nature of *non-refoulement*’ (2001) *IJRL* 13 (4) 533-558, 534; Cathryn Costello and Michelle Foster, ‘*Non-refoulement* as custom and *jus cogens*? Putting the Prohibition to the Test’ in Maarten den Heijer and Harmen van der Wilt, *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis* (Volume 46, Springer Link, 2016) 273-327; UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09; The Declaration was welcomed by the UN General Assembly, *Office of the United Nations High Commissioner for Refugees: Resolution adopted by the General Assembly*, 6 February 2003, A/RES/57/187, paragraph 4 (adopted on 18 December 2001); UNHCR, *UNHCR Note on the Principle of Non-Refoulement* (November 1997) <<http://www.refworld.org/docid/438c6d972.html>> accessed 26 October 2017; UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) <<http://www.refworld.org/docid/45f17a1a4.html>> accessed 15 October 2017; *Hirsi* (n 57) see Concurring Opinion of Judge Pinto de Albuquerque, paragraphs 67–8, 79; Paolo Picone, ‘The Distinction between *Jus Cogens* and Obligations *Erga Omnes*’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford Scholarship Online, 2011) 414; Elliott (n 476) 30.

<sup>723</sup> *North Sea Continental Shelf Cases* ICJ Reports 1969, paragraphs 71, 73 and 77.

<sup>724</sup> Philip Chan, ‘The Protection of Refugees and Internally Placed Persons: *Non Refoulement* under Customary International Law?’ (2006) 10 *IJHR* 231-232.

principle of *non-refoulement* has been incorporated in Turkish legislation,<sup>725</sup> NGOs are sceptical as to its implementation.<sup>726</sup> From mid-January 2016 to 1 April 2016, recent reports from NGOs indicate that Turkey expelled groups of 100 individuals to Syria on a daily basis.<sup>727</sup> These returns to Syria, at a time when that country continues to be in serious turmoil, impute Greek authorities with knowledge that Turkey does not respect the principle of *non-refoulement* in practice.<sup>728</sup> Greece should take into account the reports of NGOs and the UNHCR on Turkey,<sup>729</sup> especially when considering Turkey's record of violations to the ECtHR receiving the highest judgments against it when compared to received judgments' from all other State parties to the ECHR.<sup>730</sup>

The return of irregular migrants from Greece to Turkey on the basis of the EU-Turkey statement becomes more worrying in the light of the four readmission agreements signed by Turkey with Kyrgyzstan, Romania, Ukraine, Belarus, and Turkey's proposed readmission agreements with 22<sup>731</sup> third countries.<sup>732</sup> Equally worrying is the fact that Turkey has commenced negotiations with these unsafe third countries based on its obligations under the EU-Turkish visa free regime

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<sup>725</sup> Law on Foreigners and International Protection, 4 April 2013 (entered into force on April 2014) article 4 and article 55.

<sup>726</sup> FIDH, 'Turkey: The Supreme Court Due to Render its Judgment on April 30 Must Put an End to 16 Years of Judicial Harassment against Pinar Selek' (Press Release 25 April 2014); FIDH (n 153) 49.

<sup>727</sup> Amnesty International, "Turkey: Illegal Mass Returns" (n 152).

<sup>728</sup> FIDH (n 153) 48; HRW, "Turkey: Syrians" (n 148); Amnesty International, "Europe's Gatekeeper Unlawful Detention" (n 153).

<sup>729</sup> UNHCR, "Legal Considerations" (n 104); AIDA, 'Country Report: Turkey' (December 2015) 109 <[http://www.ecre.org/wp-content/uploads/2016/01/www.asylumineurope.org\\_sites\\_default\\_files\\_report-download\\_aida\\_tr\\_update.i.pdf](http://www.ecre.org/wp-content/uploads/2016/01/www.asylumineurope.org_sites_default_files_report-download_aida_tr_update.i.pdf)> accessed 18 October 2017.

<sup>730</sup> Lisa Reppell, 'Turkey's Track Record with the European Court of Human Rights' (2015) TR 5(2) 6.

<sup>731</sup> Algeria, Bulgaria, Bangladesh, China, Egypt, Ethiopia, Georgia, India, Iraq, Iran, Israel, Jordan, Lebanon, Mongolia, Morocco, Nigeria, Pakistan, Russian Federation, Sri Lanka, Sudan, Tunisia, Uzbekistan.

<sup>732</sup> Emine Kart, 'Turkey Seeks Readmission Deals with Iraq and Iran' (Daily News, 12 April 2016) <<http://www.hurriyetdailynews.com/turkey-seeks-readmission-deals-with-iraq-iran.aspx?pageID=238&nID=97699&NewsCatID=510>> accessed 17 October 2017.

incentives, as expressly requested by the EU.<sup>733</sup> There is no transparency during the negotiations with these third countries, nor are these readmission agreements disclosed for public scrutiny. These readmission agreements will have the effect of subjecting irregular migrants to arbitrary detention or any other form of ill-treatment and an increased risk of *refoulement* to third countries which do not offer adequate legal safeguards in accordance with International Refugee law. Greece has the obligation not to ‘hand over those concerned to the control of a state where they would be at risk of persecution (direct *refoulement*),<sup>734</sup> or from which they would be returned to another country where such a risk exists (indirect *refoulement*)’.<sup>735</sup> On this basis, Greece has the duty to investigate the human rights protection mechanism offered by Turkey on the ground and offer an effective remedy in return; otherwise these individuals would be subjected to an increased risk of arbitrary *refoulement*.<sup>736</sup> Hence, the ‘foreseeable consequences’ of any removal must be taken into consideration in the light of the person’s individual circumstances.<sup>737</sup> In consequence, the return of irregular migrants to Turkey under the EU-Turkey statement without prior examination of individual circumstances may result in arbitrary repatriation in violation of the principle of *non-refoulement*.

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<sup>733</sup> European Commission, *Roadmap towards a visa-free regime with Turkey* COM (2014) 646 final, 4-5.

<sup>734</sup> Refugee Convention, article 33(1); ECHR, article 3; EU Charter, article 19(2); TFEU, article 78; Asylum Procedures Directive (n 158) article 9; Return Directive (n 42) articles 1 and 5.

<sup>735</sup> *Abdolkhani and Karimnia* (n 703) paragraphs 88-89; UNHCR, ‘UNHCR Intervention before the European Court of Human Rights in the Case of *Hirsi and Others v Italy*’ (March 2010) paragraph 4.3.4 <<http://www.refworld.org/docid/4b97778d2.html>> accessed 16 October 2017.

<sup>736</sup> *Hirsi* (n 57) paragraphs 146-147; *MSS* (n 115) paragraph 342; ECRE, “ECRE Fears Human Rights Being Left Behind in the Rush to an EU Turkey Deal” (1 December 2015) <<http://www.ecre.org/ecre-fears-human-rights-being-left-behind-in-the-rush-to-an-eu-turkey/>> accessed 17 October 2017; ECRE, “Dutch Plan to Return Asylum Seekers from Greece to Turkey Violates International Law” (29 January 2016) <<http://www.ecre.org/dutch-plan-to-return-asylum-seekers-from-greece-to-turkey-violates-international-law-statement/>> accessed 17 October 2017; UNHCR ‘Legal Considerations’ (n 104) 7.

<sup>737</sup> *MSS* (n 115) paragraph 359.

Equally worrying is the Commission's proposal to replicate the EU-Turkey statement to more than 16 countries in Africa and Middle East.<sup>738</sup> Amongst these countries are Somalia, Sudan, Afghanistan and Eritrea listed as top ten countries generating refugees.<sup>739</sup> The EU's high representative for foreign affairs and security policy, Federica Mogherini, together with Matteo Renzi, the Italian Prime Minister, also wish to replicate the EU-Turkey statement model with Libya.<sup>740</sup> Libyan coast guard capacity would be enhanced through the EUNAVFOR MED 'Operation *Sophia*', accessing Libyan territorial waters. Preparations to replicate this model are already being put to place. EUBAM has started training Libyan coast guards in Tripoli.<sup>741</sup> Furthermore, on 11 February 2016, NATO Defence Ministers announced the deployment of NATO's Standing Maritime Group 2,<sup>742</sup> to the Aegean, to carry out surveillance on irregular crossings. NATO Secretary-General Stoltenberg stated that any rescued persons intercepted at sea would be immediately returned to Turkey.<sup>743</sup> It is argued that in effect the EU-Turkey statement has achieved a legitimisation of push-backs.<sup>744</sup>

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<sup>738</sup> Commission, *Communication on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration* COM(2016) 385 final, 8.

<sup>739</sup> UNHCR, "Refugees/Migrants Response-Mediterranean" <<http://data.unhcr.org/mediterranean/regional.php>> accessed 25 October 2017.

<sup>740</sup> Italian Migration Compact, "Contribution to an EU Strategy for External Action on Migration" <[http://www.governo.it/sites/governo.it/files/immigrazione\\_0.pdf](http://www.governo.it/sites/governo.it/files/immigrazione_0.pdf)> accessed 16 October 2017; Glenda Garelli and Martina Tazzioli, 'Warfare on the Logistics of Migrant Movements: EU and NATO Military Operations in the Mediterranean' (Open Democracy, 16 June 2016) <<https://www.opendemocracy.net/mediterranean-journeys-in-hope/glenda-garelli-martina-tazzioli/warfare-on-logistics-of-migrant-movem>> accessed 16 October 2017.

<sup>741</sup> Glenda and Tazzioli, 'Warfare on the Logistics of Migrant Movements' (n 740).

<sup>742</sup> Germany, Italy, Canada, Netherlands, Turkey and Greece; Florian Eder, '72 Hours to Launch NATO's Migrant Mission' (Politico, 15 February 2016) <<http://www.politico.eu/article/72-hours-to-launch-natos-migrant-mission-refugees-asylum-greece-turkey/>> accessed 16 October 2017.

<sup>743</sup> Andr w Rettman, 'NATO to Take Migrants Back to Turkey, if Rescued' (EU Observer, 23 February 2016) <<https://euobserver.com/foreign/132418>> accessed 16 October 2017; NATO, 'NATO Defence Ministers Agree on NATO Support to Assist with the Refugee and Migrant Crisis' <<http://statewatch.org/news/2016/feb/refugees-NATO-mil-force-med-prel.pdf>> accessed 16 October 2017.

<sup>744</sup> ECRE, 'ECRE Strongly Opposes Legitimizing Push-backs by Declaring Turkey a "Safe Third Country"' (Brussels, 29 January 2016) <<http://www.ecre.org/ecre-strongly-opposes-legitimising-push-backs-by-declaring-turkey-a-safe-third-country/>> accessed 16 October 2017; see Chapter 4 on further analysis.

#### 4.6 State Practice of Push-backs and the *Non-refoulement* Principle

Hathaway contests the customary character of the *non-refoulement* principle.<sup>745</sup> He notes that throughout the world, there has been a long standing practice of *refoulement* and refusal to allow access to State territory for refugees through push-back policies.<sup>746</sup> In 2009, the World Refugee Survey reported that fifty-two countries had committed acts of *refoulement* showing consistent State practice. According to Hathaway, these results undermine the claim of a universally accepted norm of customary international law.<sup>747</sup> He further argues that this principle does not apply to a beneficiary class, or to a ‘particular class of persons or type of risk’.<sup>748</sup> In his view this duty resembles an *injunctio* giving relief to individuals in certain circumstances, instead of being customary international law on *non-refoulement*.<sup>749</sup> However, other scholars such as Lauterpacht and Bethlehem argue that the consistent declaration by States, together with the UNHCR declarations of respect for *non-refoulement*, constitute a norm.<sup>750</sup> The requirement to justify acts of *refoulement* as exceptions to the norm supports the argument that *non-refoulement* is a peremptory norm of customary international law.<sup>751</sup> Thus, the principle of *non-refoulement* has become an integral facet of the absolute prohibition of torture and inhuman or degrading treatment or punishment.<sup>752</sup>

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<sup>745</sup> James Hathaway, ‘Leveraging Asylum’ (2010) ILJ 45(3) 503-536, 510.

<sup>746</sup> United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 - Canada* 17 June 2009, 279-286 <<http://www.refworld.org/docid/4a40d2a2c.html>> accessed 17 October 2017.

<sup>747</sup> Hathaway ‘Leveraging Asylum’ (n 745) 510

<sup>748</sup> Hathaway ‘Leveraging Asylum’ (n 745) 510.

<sup>749</sup> Hathaway ‘Leveraging Asylum’ (n 745) 510; emphasis added.

<sup>750</sup> Lauterpacht and Bethlehem (n 55) paragraphs 196-253; see other scholars Goodwin-Gill and McAdam, *The Refugee in International Law* (n 71) 345-347; Nils Coleman, ‘*Non-refoulement* Revisited: Renewed Review of the Status of the Principle of *Non-refoulement* as Customary International Law’ (2003) EJML 5(1) 23-68.

<sup>751</sup> Lauterpacht and Bethlehem (n 55) paragraphs 196-253; *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Case)* (Merits), ICJ reports 27 June 1986, paragraph 186; also see Declaration of States parties to the 1951 Convention (n 722).

<sup>752</sup> ICCPR, article 7; ECHR, article 3; CAT, article 3; Goodwin-Gill, ‘The Right to Seek Asylum’ (n 487) 444.

This chapter supports the view that the *non-refoulement* principle is a peremptory norm of customary international law. However, confronted with the European refugee crisis, States seem have chosen to violate the *non-refoulement* principle because the economic costs for non-compliance are definitely lower than the costs of compliance. In accordance with the Reception Conditions Directive, Member States must ensure that asylum seekers have access to shelter being entitled to food and extra money to buy it, medical attention, schooling and access to lawyer and interpreter.<sup>753</sup> Since 2015, 1.03 million people have entered Greece. Before 18 March 2016, Greece exercised a policy of free movement for asylum seekers who were not subjected to detention. Against this background, the economic cost per beneficiary has been estimated to be \$780/per year.<sup>754</sup> After 18 March 2016, upon the conclusion of the EU-Turkey statement, every person including asylum seekers were held into automatic detention, thus, raising the costs per beneficiary to approximately \$14,000/per year.<sup>755</sup> Since 2015, over EUR 1 billion in EU funding has been allocated to Greece to manage the irregular migration crisis, more than EUR 500 million in emergency assistance, and up to EUR 200 million under the EU Emergency Support Instrument for projects.<sup>756</sup> By way of example, Italy gives EUR 1125/month per asylum seeker to centres to provide meals and shelters.<sup>757</sup> Between 2011 and 2016, Italy received 630,000 irregular migrants.<sup>758</sup>

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<sup>753</sup> Directive 2013/33 laying down standards for the reception of applicants for international protection (recast) OJ L180/96 (Reception Conditions Directive), article 7(3) and articles 13-19.

<sup>754</sup> The Guardian, ‘Where Did the Money Go? How Greece Fumbled the Refugee Crisis’ (9 March 2017) <<https://www.theguardian.com/world/2017/mar/09/how-greece-fumbled-refugee-crisis>> accessed 24 October 2017.

<sup>755</sup> *ibid.*

<sup>756</sup> European Commission, “EU-Turkey Statement: One Year On” 3, <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu\\_turkey\\_statement\\_17032017\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf)> accessed 24 October 2017; European Commission, “Managing the Refugee Crisis: EU Financial Support to Greece” (26 January 2017) <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/20170126\\_factsheet\\_managing\\_refugee\\_crisis\\_eu\\_financial\\_support\\_greece\\_-\\_update\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/20170126_factsheet_managing_refugee_crisis_eu_financial_support_greece_-_update_en.pdf)> accessed 24 October 2017; An additional EUR 35.1 million is given to Greece for the implementation of the Relocation and Resettlement mechanisms.

<sup>757</sup> See costs figures for EU countries, taking as example Germany- per asylum seeker (free meals plus EUR 143/month cash to maximum EUR 216/month and EUR 92/per child depending on age, compared to Italy EUR 35/day which goes to centres for meals and shelter and EUR 2.50

In 2016, a total of 181,436 irregular sea arrivals entered Italy.<sup>759</sup> This means that on a monthly average, Italy has financed the accommodation of at least 15,119 persons constituting a figure of EUR 17 million. To date, Italy has received EUR 560 million from 2014-2020 to facilitate reception, returns and relocation and EUR 19 million in emergency funding.<sup>760</sup> These figures reflect only the costs of free meals and accommodation; it does not cover the costs of legal aid and other services which Italy and Greece are obliged to provide access to.

When one compares the economic cost figures for Italy and Greece on the irregular migration crisis to the costs of pecuniary, non-pecuniary damages, costs and expenses awarded by the ECtHR for breach of human rights law and other international obligations, it is noted that it is in the economic interest of Italy and Greece to push-back and return these individuals before they are disembarked in their territories. Since the beginning of 2011, ECtHR decisions against Greece and Italy based on asylum and immigration matters violating ECHR rights have been very few. As of July 2017, the ECtHR has given judgment against Greece on only three cases involving applicants who had entered Greece through irregular means in light of Articles 3, 5 and 13 ECHR respectively.<sup>761</sup> Since 2016, following the EU-Turkey statement, the ECtHR has communicated two cases concerning the applicant's detention in VIAL and Souda hotspots in Chios under

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pocket money, see Reuters, "Factbox: Benefits offered to Asylum Seekers in European Countries" <<http://www.reuters.com/article/us-europe-migrants-benefits-factbox/factbox-benefits-offered-to-asylum-seekers-in-european-countries-idUSKCN0RG1MJ20150916>> accessed 24 October 2017.

<sup>758</sup> The European Political Strategy Centre, "Irregular Migration via the Central Mediterranean: From Emergency Responses to Systemic Solutions" <[https://ec.europa.eu/epsc/publications/strategic-notes/irregular-migration-central-mediterranean\\_en](https://ec.europa.eu/epsc/publications/strategic-notes/irregular-migration-central-mediterranean_en)> accessed 22 October 2017.

<sup>759</sup> *ibid.*

<sup>760</sup> European Commission, "Managing the Refugee Crisis, Italy: State of Play Report" 2, <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/italy\\_state\\_of\\_play\\_report\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/italy_state_of_play_report_en.pdf)> accessed 24 September 2017.

<sup>761</sup> *MSS concerning Dublin transfers on conditions of detention under article 3 and 13 ECHR; Sharifi* (n 115); *Rahimi v Greece* Application no 8687/08 (5 April 2011) conditions in detention centres under Article 3, 5 and 13 ECHR <[http://www.echr.coe.int/Documents/CP\\_Greece\\_eng.pdf](http://www.echr.coe.int/Documents/CP_Greece_eng.pdf)> accessed 28 October 2017.



Articles 3 and 5 ECHR respectively.<sup>762</sup> Similarly, since 2011, the ECtHR has considered only four cases from applicants entering Italy irregularly under Articles 3, 5 and 13 ECHR, respectively.<sup>763</sup> On average, the highest amount the ECtHR has ordered against Italy has been EUR 17,000 per applicant.<sup>764</sup> The amount of damages against Greece has varied from EUR 4,500 – 5,000, including non-pecuniary damages, costs and expenses. Thus, for Italy and Greece, the economic costs for compliance with the *non-refoulement* principle are definitely higher than the costs for non-compliance, especially when considering the low number of applications before the ECtHR by individuals whose rights have been violated by EU and Member State extraterritorial measures.

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<sup>762</sup> see ECtHR communicated case of *Raoufi and Others v Greece* Application no 22696/16 (Communicated by ECtHR on 26 May 2016) concerning their detention in VIAL hotspots in Chios after entry into force of EU-Turkey statement under article 3 and 5 ECHR; also see communicated case of *Allaa Kaak and others v Greece* Application no 34215/16 (Communicated by ECtHR on 7 September 2017) article 3 (conditions of Vial and Souda in Chios hotspots and article 5 ECHR (detention in the hotspots).

<sup>763</sup> *Hirsi* (n 57) pushed-back at sea, held: violations under Article 3 ECHR, Article 4 of Protocol No 4 (prohibition of collective expulsions) and Article 13 ECHR for being exposed to risk of ill-treatment in Libya and repatriation to Somalia and Eritrea; *Khlaifia* (n 115) concerning the holding in the reception centre on the island of Lampedusa and on ships in Palermo harbor in Sicily, violations of Article 5(1), (2) and (4) ECHR and article 13 ECHR, but no violation of Article 3 ECHR and Article 4 of Protocol No 4 to the ECHR; *Mohammed Hussein v the Netherlands and Italy* Application no 27725/10 ECHR 2013 concerned Dublin transfer to Italy of a Somali asylum seeker, application was found manifestly ill-founded and declared inadmissible; *Sharifi* (n 115), concerned immediate returns to Greece from Italy, Held: Greece violated article 13 ECHR combined with article 3 ECHR, for lack of access to asylum procedure and risk of deportation to Afghanistan. A violation by Italy of article 4 of Protocol No 4 and article 3 ECHR by returning these applicants to Greece exposed them to the shortcomings of the Greek asylum procedure, and a violation of Article 13 ECHR combined with Article 3 ECHR and Article 4 of Protocol No 4 to the ECHR of the lack of access to asylum procedure in the port of Ancona.

<sup>764</sup> *Hirsi* (n 57) paragraphs 215-218, non-pecuniary damage: EUR 15,000 for each applicant (24 applicants), costs and expenses: EUR 1,575.74; *Sharifi* (n 115) paragraphs 251-252 and 256, non-pecuniary damage: with regards to Italy and Greece - applicants did not submit their claim for just satisfaction within time-limit, no amount was granted, costs and expenses: EUR 5,000 (granted jointly to the applicants); *Khlaifia* (n 115) paragraphs 285 and 288, non-pecuniary damage: EUR 2,500 for each applicant (3 applicants), costs and expenses: EUR 15,000 to applicants jointly; *MSS* (n 115) paragraphs 406, 411, 414, and 420: non-pecuniary damage: against Greece - EUR 1,000, against Belgium – EUR 24,900 costs and expenses: EUR 3,450 and EUR 6,075 respectively.

#### 4.7 Legal Redress before the ECtHR

These extraterritorial border controls become even more dangerous when viewed in the context of the complexities of the judiciary system. Victims of illicit border control practices may seek redress in an international court only if they do not receive sufficient redress in domestic courts.<sup>765</sup> The majority of irregular migrants disembark in Italy, Greece or Turkey. However, these countries do not have adequate asylum and immigration systems and lack effective redress mechanisms.<sup>766</sup> Furthermore, in the context of individual applications to the ECtHR, only those individuals or non-governmental organisations that suffer detriment as a result of a particular violation of the Convention may petition the Court for redress.<sup>767</sup> There is no right of petition for those individuals or NGOs to complain about a law through an *actio popularis* because they believe it to contravene the Convention.<sup>768</sup> In addition, the Convention does not enable the scrutiny of laws ‘*in abstracto*’.<sup>769</sup> Applicants must prove that the violation has affected them personally.<sup>770</sup>

The problem encountered in the context of border control is that the ‘right to life’ has been violated, but the victims are no longer alive. Third party standing before the ECtHR is based on the right violated. In exceptional circumstances, the ECtHR admits applications by the victims’ close relatives.<sup>771</sup> In cases concerning deaths or disappearances, the ECtHR has accepted indirect victim status, but in relation to Article 3 ECHR the Court has held that this right is ‘strictly personal’

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<sup>765</sup> *Tanase v Moldova* Application no 7/08 (27 April 2010) paragraph 112.

<sup>766</sup> See Chapter 3 on Turkey and Chapter 5 for Italy and Greece.

<sup>767</sup> ECHR, article 34.

<sup>768</sup> ECHR, article 34; *Klass and Others v Germany* Application no 5029/71 (1979) 2 EHRR 214, [1978] ECHR 4, paragraph 33; *Burden v UK* Application no 13378/05 (2008 ECHR 357) paragraph 33.

<sup>769</sup> *The Christian Federation of Jehova’s Witnesses in France v France* (unreported 6 November 2001) <<http://swarb.co.uk/the-christian-federation-of-jehovahs-witnesses-of-france-v-france-echr-6-nov-2001/>> accessed 128 October 2017.

<sup>770</sup> *Tanase* (n 765) paragraph 108.

<sup>771</sup> ECHR, article 34; *Hristozov and Others v Bulgaria* Application no 33071/96 ECHR 2000-XII, paragraph 71.

and cannot be transferred to a third party.<sup>772</sup> These strict legal standards of admissibility make applications to the ECtHR by irregular migrants' virtually impossible. In cases of expulsions at sea, in the context of Article 3 ECHR, to lodge a complaint before the Court there must be a binding decision against the person who has exhausted all effective domestic remedies.<sup>773</sup> In push-backs at sea no expulsion order is given to irregular migrants, the result being no opportunity to exhaust domestic remedies; a situation leading to the ECtHR rejecting the claim for want of victim status within the meaning of Article 34 ECHR.<sup>774</sup>

To remedy gaps in accountability, it has been argued that the ECtHR should adopt a practice wherein NGOs have legal standing to represent the victims' interests.<sup>775</sup> This would ensure more effective protection of Convention rights.<sup>776</sup> Although NGO involvement within the ECtHR is advantageous to the victims and their families, this practice might open a floodgate,<sup>777</sup> overburdening the ECtHR considering that most of NGOs have the financial means to make claims even though they might fail on admissibility grounds.<sup>778</sup> In drawing a balance between NGO accountability and the protection of a victims' interest, it is suggested that the ECtHR should relax the victim status requirement and allow an *actio popularis* for specific cases which are of interest to a broader group or class,

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<sup>772</sup> *Kaburov v Bulgaria* Application no 9035/06 ECHR 2003-IX, paragraph 52.

<sup>773</sup> ECHR, article 34; *Hirsi* (n 57) paragraph 57.

<sup>774</sup> *Scordino v Italy* (no.1) Application no 36813/97 (29 March 2006), 45 EHRR 7, paragraphs 179-180; *Albayrak v Turkey* Application no 38406/97 (7 July 2008), ECHR 104, paragraph 32.

<sup>775</sup> ASR, article 33; Lloyd Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions* (Scholarly Works, 2011, Paper 54) 911; Emanuele Rebasti and Luisa Vierucci, "A Legal Status for NGOs in Contemporary International Law?" ESIL, November 2002, 12 <<http://www.esil-sedi.eu/sites/default/files/VierucciRebasti.PDF>> accessed 17 October 2017.

<sup>776</sup> By analogy see *Scozzari and Giuntay v Italy* Application No 39221/98 (13 July 2000) paragraph 138; Spijkerboer, *Are European States Accountable* (n 28) 73.

<sup>777</sup> Protocol No 14, which entered into force on 1 June 2010, was designed to address the floodgate issue by introducing a new admissibility criterion and changing the way in which repetitive and clearly inadmissible cases are treated. See CoE, Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13.V.2004, CoE Treaty Series No. 194, article 12.

<sup>778</sup> Rebasti and Vierucci (n 775) 12.

similar to the practice of the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights.<sup>779</sup>

#### **4.8 The International Responsibility of Greece for Breach of International Obligations**

Greece incurs international responsibility for every internationally wrongful act which may 'consist in one or more actions or omissions or a combination of both'.<sup>780</sup> To determine the existence of an internationally wrongful act, there must exist first an international obligation which is said to have been breached and such the act is attributed to Greece as a subject of international law.<sup>781</sup> The notion of a breach of an international obligation was described by the ICJ as an act or omission which acts 'contrary to' or 'inconsistent with' a rule,<sup>782</sup> or 'failure to comply with its treaty obligations'.<sup>783</sup> Article 12 ASR states that 'there is a breach of an international obligation by a State when an act of that State *is not in conformity* with what is required of it by that obligation, regardless of its origin or character'.<sup>784</sup> The phrase 'regardless of its origin' means that the ASR articles apply to all international obligations of States, i.e. those established by a treaty, general principles within the international legal order or by a customary rule of international law.<sup>785</sup>

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<sup>779</sup> Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969 (American Convention on Human Rights) article 44; Inter-American Commission on Human Rights, *Rules of Procedure and Evidence*, Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009 (entry into force 1 August 2013) article 23; 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (27 October 2001, 30<sup>th</sup> Ordinary Session); Peter Kooijmans, 'The Role of Non-State Actors and International Dispute Settlement' in Wybo Heere, *From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System* (TMC Asser Press 2004) 23.

<sup>780</sup> ASR, article 1; ASR commentary, paragraph 1.

<sup>781</sup> ASR, article 2; *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, 3, paragraph 56 and paragraph 90; *Nicaragua case* (n 751) paragraph 226.

<sup>782</sup> *Nicaragua case* (n 751) paragraphs 115 and 186.

<sup>783</sup> *Gabčíkovo-Nagymaros Project* (n 402) paragraph 57.

<sup>784</sup> Emphasis added.

<sup>785</sup> ASR commentary, article 12, paragraph 3; also see *Nicaragua case* (n 751) paragraph 177; *North Sea Continental Shelf* (n 723) paragraph 63.

Greek coastguards as officers in authority represent their government, thus as an organ of Greece, their conduct is considered an act of Greece under international law.<sup>786</sup> Regardless of whether these officers are classified of a ‘superior’ or ‘subordinate’ category what matters is that they are acting in their official capacity, thus their conduct is attributable to Greece for the purposes of Article 4 ASR.<sup>787</sup> It is argued in this chapter that the intentional damage to migrant boats leaving them stranded at sea by Greek officials during push-back practices are not in conformity with Greece’s treaty obligations on the ‘right to life’<sup>788</sup> and ‘duty to rescue’.<sup>789</sup> In addition, Greece has a positive procedural obligation under Articles 2 and 3 ECHR to conduct an effective investigation in respect of allegations of push-back practices, particularly on the 14 August 2015 and 15 June 2016 incidents.<sup>790</sup> Furthermore, it is argued that the acts of inhuman and degrading treatment conducted during these push-back practices constitute internationally wrongful acts contrary to Greece’s international obligations deriving under the ECHR and CAT.<sup>791</sup> Moreover, the continued failure of Greek authorities to commence investigation against cogent allegations on the ‘right to life’, ‘duty to rescue’ and ill-treatment violate the procedural aspects of Articles 2 and 3 ECHR, thus constituting internationally wrongful acts.<sup>792</sup>

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<sup>786</sup> ASR, article 4(1); ASR commentary, article 4, paragraph 3; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, 62, paragraph 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

<sup>787</sup> ASR commentary, article 4, paragraph 7; *Currie case* Decision No 21, Volume XIV 21 (13 March 1954) 24.

<sup>788</sup> Also contrary to ICCPR, article 6; ECHR, article 2; EU Charter, article 2; UDHR, article 3.

<sup>789</sup> UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR Convention, Chapter 2.1.10.

<sup>790</sup> *Jaloud* (n 669).

<sup>791</sup> ECHR, article 3; CAT, article 16; EU Charter, article 4; Note the difference in terminology between the CAT and the ECHR/EU Charter: unlike article 3 ECHR and article 4 EU Charter, article 16 CAT refers ‘to torture *or cruel, inhuman or degrading treatment or punishment*’; ICCPR, article 7; UDHR, article 5.

<sup>792</sup> *Jaloud* (n 669); also see ECHR, article 15; also see CAT, article 2: The Committee Against Torture has expressly commented that the ‘obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment under article 16, paragraph 1 are interdependent, indivisible and interrelated’, see Committee Against Torture, *General Comment 2* (n 686) paragraph 3.

It is also argued that Article 54 of Greek Law 4375/2016 adopted as a result of Greek's commitment under the EU-Turkey statement constitutes an internationally wrongful act.<sup>793</sup> Article 54 states that individuals whose application was determined as 'unfounded' or 'inadmissible' would be returned to Turkey.<sup>794</sup> Despite its bilateral commitments under the EU-Turkey statement, Greece has a positive duty not to return an individual to a third country without first assessing the human rights situation in the receiving country and the treatment the individual would be subjected on return.<sup>795</sup> In accordance with Article 12(1) ASR, for the purposes of attribution of responsibility the Greek parliament is considered an organ of the State.<sup>796</sup> Hence, the internationally wrongful act via the passage of legislation entails the international responsibility of Greece as an enacting State.<sup>797</sup>

Necessarily, a violation by Greece of its international obligations gives rise to its responsibility as well as a consequent duty of reparation.<sup>798</sup> The regime of State responsibility for breach of an international obligation is general in scope and character, thus it can involve minor infringements and serious breaches of obligations, such as peremptory norms of customary international law.<sup>799</sup> Due to

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<sup>793</sup> ASR commentary, article 12, paragraph 2; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 30, paragraph 42; a mere passing of legislation may breach international obligations; also see Chapter 3, section 3.4.2 on an analysis of Article 54 of Greek Law 4375/2016 and the safe third country criteria.

<sup>794</sup> See Chapter 3, section 3.4.2 on 'unfounded' and 'inadmissible' determinations.

<sup>795</sup> *Hirsi* (n 57) paragraphs 133.

<sup>796</sup> ASR, article 4(1); see ASR commentary, article 4, paragraph 1: 'The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State'.

<sup>797</sup> ASR, article 4(1); ASR commentary, article 4, paragraph 1; *Norris v Ireland* Application no 10581/83 [1988] ECHR 22, paragraph 31; *Johnston and Others v Ireland* Application no 9697/82 [1986] ECHR 11, paragraph 42; *Modinos v Cyprus* Application no 7/1992/352/426 [1993] ECHR 259, paragraph 24.

<sup>798</sup> ASR commentary, article 12, paragraph 4; ASR, article 34 on forms of reparation; *Rainbow Warrior (New Zealand v France)* Arbitration Tribunal, 82 I.L.R. 500 (1990) paragraph 75; See also *Barcelona Traction, Light and Power Company, Ltd*, ICJ Reports 5 February 1970, paragraph 86 ("breach of an international obligation arising out of a treaty or a general rule of law").

<sup>799</sup> ASR commentary, article 12, paragraph 6; VCLT, article 53: 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States

its character, peremptory norms affect the interests of the international community as a whole necessarily involving a stricter regime of responsibility.<sup>800</sup> The ‘right to life’ and the prohibition of *refoulement* to a country where the individual will be subjected to ill-treatment are considered peremptory norms of general international law (*jus cogens*).<sup>801</sup> Since 2011, Greece has systematically failed to fulfil its obligations on the ‘right to life’ and the prohibition of *refoulement*.<sup>802</sup> As a general principle of international law, Greece must compensate the individuals for the loss caused.<sup>803</sup> These individuals should be allowed to receive remedy under civil and criminal law. Apart from receiving monetary compensation of interest to irregular migrants would be the demand that Greece ceases the wrongful acts.<sup>804</sup>

The obligations in question are owed by Greece to the international community as a whole.<sup>805</sup> They are obligations *erga omnes*,<sup>806</sup> meaning that all States have a legal interest in their protection and compliance.<sup>807</sup> Therefore, these obligations invoke the responsibility of the EU, its Member States and other States to exercise

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as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.

<sup>800</sup> ASR commentary, article 12, paragraph 7; ASR, article 33.

<sup>801</sup> ASR, article 40; ASR commentary, article 40, paragraph 3: ‘The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values’. See (n 722) on the *jus cogens* character of *non-refoulement*.

<sup>802</sup> See Chapter 4.

<sup>803</sup> ASR, article 36; James Crawford, *Brownlie’s Principles of Public International Law* (8<sup>th</sup> edn, Oxford University Press, 2012) 434.

<sup>804</sup> ASR, article 41(3); ASR commentary, article 41, paragraph 13; *Factory at Chorzów* (Merits, Judgment No13, 1928, P.C.I.J., Series A, No 17) 47.

<sup>805</sup> ASR commentary, article 12, paragraph 6; *Barcelona Traction* (n 798) paragraph 34; Case Concerning East Timor (*Portugal v Australia*) ICJ 30 June 1995; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (*Croatia v Serbia*) ICJ 1 September 2002.

<sup>806</sup> VCLT, article 53; *Barcelona Traction* (n 798) paragraphs 33-34: ‘Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’; *Wall* (n 201) paragraphs 88, 155, 156; *Prosecutor v Anto Furundzija*, ICTY IT-95-17/1-T (Decision of December 1998) paragraph 151.

<sup>807</sup> ASR, article 33 and article 48.

their positive duty to cooperate and assist in the cessation of the serious breaches of peremptory norms by Greece.<sup>808</sup> Given an EU conflict of interest with Greece, it is recommended that States fulfil their positive duty to bring an end to serious breaches of international law through using the United Nations framework.<sup>809</sup> It is suggested to those States that have a common interest to invoke their responsibility to request Greece to conduct a preliminary inquiry into allegations of the ‘right to life’ violations, ‘right to asylum’ and push-backs amounting to prohibition of non-*refoulement*. Furthermore, they may claim that the EU, in its duty of abstention has the obligation not to 1) ‘recognise as lawful situations created by serious breaches’, i.e. returns under the EU-Turkey statement and 2) ‘not to render aid or assistance in maintaining that situation’.<sup>810</sup> Moreover, request that the EU and Turkey suspend their obligations under the EU-Turkey readmission agreement and EU-Turkey statement until the political and legal situation in Turkey improves. In addition, the United Nations monitoring mechanisms such as the OHCHR currently, Filippo Grandi, and the European Committee for the Prevention of Torture and the Commissioner for Human Rights, currently Nils Muižnieks, who may request Greece to desist from committing the wrongful act, and request that the wrongful act does not re-occur.<sup>811</sup>

#### 4.9 Conclusion

Prioritisation of border control has led Greece to exercise systemic push-back of persons in need of international protection in a desperate attempt to avoid its obligations under EU and international law. It is concluded that in exercising push-back practices Greece has violated its obligations under the ECHR, CAT,

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<sup>808</sup> ASR, article 41(1); *Wall* (n 201) paragraphs 88, 155, 156.

<sup>809</sup> ASR commentary, article 14, paragraph 2.

<sup>810</sup> ARIO, article 42(2); ‘aid and assistance’ must be read in conjunction with article 14; see analog articles on ASR, Serious Breaches of Obligations under Peremptory Norms of General International Law, 267.

<sup>811</sup> ASR, Chapter II, articles 34-40; Crawford, *Bronwlie’s Principles of Public International Law* 2012 (n 803) 567; see section 4.4 on ill-treatment.



the Refugee Convention and the EU Charter. Infringement proceedings should be commenced against Greece by the Commission<sup>812</sup> for the systematic push-back of irregular migrants at the Greek-Turkish borders without a prior assessment of their individual circumstances. Greece and the EU have a positive obligation to stop these extraterritorial measures leading to undesired side effects, that is, migrant deaths. At the same time, Greece has an obligation to respond to materialised risks to the ‘right to life’ by instituting an official investigation.

Chapter Five analyses the effects of Frontex disembarkation practices in the Central and Eastern Mediterranean Route in accordance with the Sea Border Regulation.<sup>813</sup> It argues that the measures undertaken under the Sea Borders Regulation purported to be established for the purpose of avoiding divergent practices for joint operations at sea and to adopt a uniform interpretation on principles such as rescue; disembarkation and distress in effect constitute a legitimisation of Member State illicit push-back practices under Frontex coordination. Furthermore, the two host Member States to Frontex joint operations, Italy and Greece are argued to no longer fulfil the safe country criteria for disembarkation purposes. In disembarking intercepted/rescued irregular migrants to Greece or Italy, Frontex violates EU and international human rights law and other international obligations.

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<sup>812</sup> TFEU, article 258.

<sup>813</sup> Sea Borders Regulation (n 7).

## Chapter 5: Frontex and Irregular Migration by Sea

### 5.1 The Sea Borders Regulation – a Legitimation of Push-back Practices?

The Sea Borders Regulation was adopted with the logic that the EU and its Member States consider external border controls to be essential deterrence tools but, concurrently, that they contribute to the protection and saving of lives at sea.<sup>814</sup> Therefore, the Sea Borders Regulation aims to avoid inconsistent practices for joint operations at sea and to promote a uniform interpretation of the principles of rescue, disembarkation and distress.<sup>815</sup> Although uniform rules consolidating inconsistent practices of rescue, disembarkation and distress are to be welcomed, the Sea Borders Regulation has not achieved its objective.<sup>816</sup> Justified by the need to consolidate rules on interception, search and rescue and disembarkation, the impact of the Sea Borders Regulation is perceived as a formal legitimisation of Member State push-back practices under Frontex's coordination.<sup>817</sup> This chapter analyses the most controversial provisions of the Sea Borders Regulation from a human rights perspective, particularly with regard to interception, search, rescue and disembarkation.<sup>818</sup>

This chapter questions the Sea Borders Regulation as a means of harmonising Member State interception, search and rescue as well as disembarkation practices during Frontex joint operations at sea. Although the Sea Borders Regulation attempts to protect irregular migrant rights on interception, search and rescue, it is flawed, predominantly in failing to resolve rather inconsistent search and rescue practices as well as with regard to the sharing of the irregular migrant burden on disembarkation.<sup>819</sup> This chapter argues that the objective of the EU is not to provide a sustainable solution to the inconsistency of interception, search and

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<sup>814</sup> Sea Borders Regulation (n 7) recital 1.

<sup>815</sup> See Chapter 2, section 2.8; also see Sea Borders Regulation (n 7) recital 1.

<sup>816</sup> Marin, 'Policing EU's External Borders' (n 3) 485.

<sup>817</sup> Den Heijer, 'Frontex and the Shifting Approaches' (n 51) 54.

<sup>818</sup> Sea Borders Regulation (n 7) articles 6, 7, 9 and 10.

<sup>819</sup> Den Heijer, 'Frontex and the Shifting Approaches' (n 51) 53.

rescue and disembarkation practices, but to purport to legitimise them under the auspices of the fight against human smugglers and the prevention of irregular migration.<sup>820</sup> Thus, the chapter concludes by arguing that the Sea Borders Regulation was not adopted for the purpose of providing improved legal safeguards for irregular migrants, but to create a new immigration regime differentiating irregular migrants travelling by sea from the protection usually offered under EU and international asylum laws. In addition, by not taking into consideration the local reception conditions or the effectiveness of the asylum and immigration laws of Italy or Greece, the Sea Borders Regulation violates EU and international search and rescue legal frameworks on the grounds of prohibition of the *non-refoulement* principle and collective expulsions.

## 5.2 Interception at Sea

Once a vessel is intercepted in Greek territorial waters, and upon confirmation that its passengers intend to circumvent checks at border crossing points, participating units may take one or more of the following measures:

- a) seizing the vessel and apprehending persons on board; b) ordering the vessel to alter its course outside of or towards a destination other than the territorial sea or the contiguous zone, including escorting the vessel or steaming nearby until it is confirmed that the vessel is keeping to that given course, and/or conducting the vessel or persons on board to the coastal Member State in accordance with the operation plan.<sup>821</sup>

Thus, the Greek coastguard ‘shall instruct the participating unit appropriately through the International Coordination Centre’<sup>822</sup> and the measures taken ‘shall be proportionate and shall not exceed what is necessary to achieve the objectives of

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<sup>820</sup> See Chapter 2, section 2.8.

<sup>821</sup> Sea Borders Regulation (n 7) article 6(2)(a-b).

<sup>822</sup> Sea Borders Regulation (n 7) article 6(4).

this Article'.<sup>823</sup> A similar approach applies in the case of vessels intercepted on the high seas.<sup>824</sup> As irregular migrant vessels are often flagless, travelling in dinghies or rubber boats,<sup>825</sup> units participating in Frontex joint operations may take the following measures: 'a) seizing the vessel and apprehending persons on board; and (b) warning and ordering the vessel not to enter the territorial sea or the contiguous zone, and, where necessary, requesting the vessel to alter its course towards a destination other than the territorial sea or the contiguous zone'.<sup>826</sup> The Sea Borders Regulation permits, then, the participating units to alter the intercepted irregular migrants' vessel course to a destination other than the territorial sea or contiguous zone of the host Member State, leading to a possible diversion to international waters or a third country.

In the territorial sea, Member States participating in Frontex joint interception operations must exercise their sovereignty not only having due regard to domestic and EU laws, but subject to UNCLOS and other rules of international law, such as applicable treaties and customary international law including the law of international responsibility.<sup>827</sup> In the irregular maritime migration context, before exercising their sovereign rights over immigration rules such as altering a vessel's course away from its territorial sea onto the high seas or to a third country or towing the vessel onto the high seas, participating Member States in cooperation with Frontex have the corresponding duty to consider in 'good faith' other rules

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<sup>823</sup> Sea Borders Regulation (n 7) article 6(3).

<sup>824</sup> Sea Borders Regulation (n 7) article 7(2)(a-d).

<sup>825</sup> See Chapter 2, section 2.3.1; Parliamentary Assembly, *The Interception and Rescue at Sea of Asylum Seekers* (n 132) paragraph 2.

<sup>826</sup> Sea Borders Regulation (n 7) article 7 (2)(a-b) and article 7(11).

<sup>827</sup> UNCLOS, article 2(3); Chagos Marine Protected Area Arbitration (*Mauritius v UK*) (The Hague, Case No 2011/03, 18 March 2015) paragraphs 502-503; Tullio Treves, 'Human Rights and the Law of the Sea' (2010) BJIL 28(1) 2; Irina Papanicolopulu, 'International Judges and the Protection of Human Rights at Sea' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law* (Springer, 2013) 536.

of international law,<sup>828</sup> especially the principle of *non-refoulement* and international refugee law.<sup>829</sup>

From 1992 to 2012, before the ECtHR judgment in *Hirsi*, State interception practices on the high seas were based on the reasoning of the Federal Court of Australia in *Ruddock v Vadarlis* (known as the *Tampa* case)<sup>830</sup> and the US Supreme Court in *Sale v Haitian Centers Council*.<sup>831</sup> In the *Tampa* case, Australian authorities refused entry despite calls that the ship was in distress and carrying rescuers who were alleged to be asylum seekers. In refusing entry, the Australian government not only violated the Law of the Sea customary norms but also the Search and Rescue Convention, the Convention for the Safety of Life at Sea and Article 33 of the Refugee Convention preventing *non-refoulement*.<sup>832</sup> The Australian government argued that it was not returning the ship to the State of origin but mainly altered its course to the high seas, which it said it was entitled to do in accordance with its prerogative powers. At no time did the Australian government conduct a prior investigation into the individuals' personal circumstances or whether they would be granted protection norms at the port of disembarkation. Similarly, in the case of *Sale* the US coastguards immediately returned interdicted Haitians to Haiti without a determination of their individual circumstances, based on a bilateral agreement with Haiti<sup>833</sup> and in accordance with US Executive Order no 12,324.

In *Sale*, the US Supreme Court interpreted Article 33 of the Refugee Convention as not placing any limitations on the President's Executive Order to return all

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<sup>828</sup> Nuclear Tests Case (*Australia v France*) (Merits) [1974] ICJ Rep 253; Crawford, *Brownlie's Principles of Public International Law* 2012 (n 803) 134; Miltner, 'The Mediterranean Migration' (n 78) 230.

<sup>829</sup> UNCLOS, article 2(3).

<sup>830</sup> *Ruddock* (n 69).

<sup>831</sup> *Sale* (n 69).

<sup>832</sup> Cecilia Bailliet, 'The Tampa Case and Its Impact on Burden Sharing at Sea', HRQ 25 (2003) 751.

<sup>833</sup> Executive Order no 12,807, 57 Fed Reg 23,133 (1992).

unauthorised migrants intercepted on the high seas.<sup>834</sup> Similarly, in 2001 the Federal Court of Australia found in the *Tampa* case that the government had a prerogative power to prevent non-citizens from entering Australian territory. In both cases, the US and Australian governments were held to have sovereign rights over State territory. As long as vessels did not enter the State's territorial sea, coastguards were authorised to stop them and return any unauthorised migrants who were not refugees to the high seas or back to their country of departure without any obligation to undertake a prior assessment of their individual circumstances. In *Hirsi* in 2012, however, the ECtHR had the opportunity to assess the compatibility of State extraterritorial interception practices with the ECHR and condemned the return of any individuals to their country of departure or the alteration of their course onto the high seas without a prior assessment of their individual circumstances.

On this basis, this Chapter argues that the measures taken in accordance with the Sea Borders Regulation raise two key legal issues: 1) the legality of the permissive measure conducted in the territorial sea of the host Member State (Article 6(2)(b)) or on the high seas (Article 7 (2)(b)); and 2) the effectiveness of the Sea Borders Regulation to ensure the protection of fundamental rights and the principle of *non-refoulement*.

1. In relation to the first legal issue, it is argued in this section that Articles 6(2)(b) and 7(2)(b) are likely to constitute a push-back practice and a collective expulsion measure.<sup>835</sup> At the same time, it is likely that this constitutes a violation of the Refugee Convention, the EU Charter, the recast Asylum Procedures Directive and the principle of *non-refoulement*, as well as the Sea Borders Regulation itself.<sup>836</sup> In 2012, in *Hirsi* the

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<sup>834</sup> *Sale* (n 69) 2559; Thomas Jones, *Sale v Haitian Centers Council, Inc*, AJIL Vol 88, No 1 (January 1994) 114-126, 119.

<sup>835</sup> Protocol No 4 to the ECHR, article 4; *Hirsi* (n 57) paragraphs 134, 138; see Chapter 4 on push-backs.

<sup>836</sup> Refugee Convention, article 33(1); EU Charter, articles 18 and 19, *non-refoulement* enshrined in EU law see TFEU, article 78(1); Sea Borders Regulation (n 7) article 4.

ECtHR prohibited the practice of push-back, holding that returns to the country of origin without an adequate assessment of individual circumstances exposed these individuals to the risk of ill-treatment contrary to the ECHR and the Refugee Convention.<sup>837</sup> Contrary to this ECtHR ruling, Article 6(2)(b) and 7(2)(b) appear to permit the collective return of irregular migrants to their respective country of origin or departure without an assessment of individual circumstances. The push-back of irregular migrants to a third country, in the context of interceptions on the high seas, involves an exercise of jurisdiction under Article 1 ECHR engaging the responsibility of the participating States under Article 4 of Protocol No 4.<sup>838</sup> The prohibition of collective expulsion applies to all individuals, irrespective of whether their residences are lawful within the territory of the State, or in the event of interception on the high seas.<sup>839</sup> As it is unlawful for participating units to request the vessel to return to a third country of departure, without first examining the individual circumstances of those found on-board and enabling them to challenge their expulsion by the relevant authority,<sup>840</sup> such a practice would effectively constitute a push-back amounting to a

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<sup>837</sup> *Hirsi* (n 57) paragraphs 125 and 185.

<sup>838</sup> *Hirsi* (n 57) paragraph 180; participating States in JO EPN *Poseidon Sea – Poseidon Rapid Intervention* (as of 28 December 2015): Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Iceland, Italia, Latvia, Lithuania, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom/Albania, Ukraine see <<http://frontex.europa.eu/operations/archive-of-operations/7UtaOZ>> accessed 7 October 2017; Protocol No 4 to the ECHR does not apply to Greece and United Kingdom which are not parties, see <[http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p\\_auth=JvoXjztQ](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=JvoXjztQ)> accessed 17 October 2017; However, Greece is bound to the EU Charter, article 19(1) and article 52(3) ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’; also see Explanations relating to the Charter of Fundamental Rights, OJ C 303/17, 14.12.2007 on article 19.

<sup>839</sup> *Georgia v Russia* Application no 13255/07 (3 July 2014) paragraph 170; *Hirsi* (n 57) paragraph 180.

<sup>840</sup> *Hirsi* (n 57) paragraph 177; *Sharifi* (n 115) paragraph 210.

collective expulsion.<sup>841</sup> Hence, Article 6(2)(b) and Article 7(2)(b) can be said to contravene the *non-refoulement* principle and the prohibition of collective expulsion.<sup>842</sup>

Since 2006, Frontex has been criticised by NGOs, civil society groups and legal scholars for often altering the course of irregular migrants' boats away from Member State territorial waters and, thus participating in push-back operations in the Aegean and Mediterranean seas.<sup>843</sup> Establishing violations of human rights laws in Frontex joint operations remains challenging, however. There is no official documentation stating that Frontex is or has been involved in push-back practices, nor has it been confirmed that Frontex co-financed vessels have been used by Greek or Italian authorities during push-backs. Hence, any allegations of human rights violations by Frontex are analysed through observations and reports conducted by NGOs and activist networks based on eyewitness accounts, as well as with reference to reported events in the media.

Recently, activist networks have alleged that Greek push-back practices with Frontex involvement have taken place between 5 August 2015 and 11 June

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<sup>841</sup> Protocol No 4 to the ECHR, article 4; *Hirsi (n 57)* paragraph 180 and 185.

<sup>842</sup> Protocol No 4 to the ECHR, article 4: 'Collective expulsion of aliens is prohibited', States cannot remove or return an individual without an examination of personal circumstances, and the opportunity to bring arguments against the measure by the relevant authorities; see *Hirsi (n 57)* paragraph 177; *Čonka v Belgium* Application no 51564/99 ECHR 2002-I, paragraph 59; EU Charter, article 19(1); The explanations of the Charter state that article 19(1) has 'the same meaning and scope as article 4 of Protocol No 4 to the ECHR concerning collective expulsion'; ICCPR, article 13; Human Rights Committee, *General Comment 15/27, The Position of Aliens under the Covenant* UN.DOC.HRI/GEN/1/Rev.1, 22 July 1986, paragraph 10.

<sup>843</sup> Mainly in Spain, Italy, Greece and France; Borelli and Stanford (n 64); HRW 'Pushed Back, Pushed Around' (n 115) 98; Karl Stago-Navarra, "Handover of Migrants to Italy Results in Forced Repatriation" (Malta Today, 21 June 2009) <<http://archive.maltatoday.com.mt/2009/06/21/t8.html>> accessed 19 October 2017; HRW, 'The EU's Dirty Hands: Frontex Involvement in Ill-treatment of Migrant Detainees on Greece' 21 September 2011, 39 <<https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece>> accessed 26 October 2017; Amnesty International, "The Human Cost of Fortress Europe" (n 112) 17; Marin, 'Policing the EU's External Borders' (n 105) 482; Pallister-Wilkins (n 81) 58.



2016.<sup>844</sup> On 5 August 2015, upon interception, irregular migrants alleged that Greek coastguards hit a boat driver with a long metal stick, punctured the boat and subsequently altered its course back to Turkey.<sup>845</sup> The coastguards' boat was reported to be large and white, similar to that of the Norwegian Frontex vessel.<sup>846</sup> That day the Greek coastguard in cooperation with the Norwegian Frontex vessel was reported to have arrested 79 persons near the Greek coast.<sup>847</sup> On 11 June 2016, the Alarm Phone documented a push-back operation between Chios and Cesme:<sup>848</sup> irregular migrants had reached Greek territorial waters when they were intercepted by Greek coastguards in the presence of two Frontex vessels (Portuguese and Romanian).<sup>849</sup> These individuals were immediately returned to Turkey. According to irregular migrants' testimonies, the Greek coastguard took migrants onto their boats and subsequently handed them over to Turkey, forcing those who refused to leave the Greek vessel with guns held above their heads.<sup>850</sup> At the time of these alleged attacks, Frontex was on a mission near the islands of Lesbos, Samos and Chios.<sup>851</sup> If these allegations are true, then Frontex in collaboration with the Greek coastguard violated the *non-refoulement* principle and the prohibition of collective expulsions.

Furthermore, when altering the course of the irregular migrants' boat on the high seas the irregular migrants are left stranded at sea, a practice that places their lives at risk, in infringement of the 'right to life'<sup>852</sup> and the 'duty to rescue' at sea.<sup>853</sup> As

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<sup>844</sup> Infomobile, 'Information with, about and for Refugees in Greece' (n 601); Watch the Med, "Illegal Push-Back" (n 601).

<sup>845</sup> *ibid.*

<sup>846</sup> Norway, "Norwegian Vessel 'Peter Henry von Koss' Rescues Refugees and Migrants in Greece" <[http://www.norway.gr/News\\_and\\_events/Curent-affairs/Rescue-vessel-Peter-Henry-von-Koss-ready-for-service-in-Greece/#.VdRwBfmqpHx](http://www.norway.gr/News_and_events/Curent-affairs/Rescue-vessel-Peter-Henry-von-Koss-ready-for-service-in-Greece/#.VdRwBfmqpHx)> accessed 26 October 2017.

<sup>847</sup> *ibid.*

<sup>848</sup> *ibid.*; also see Watch the Med, "Alarm Phone Press Release" (n 114).

<sup>849</sup> Fulvio Vassallo, 'Illegal Push-back Operation in the Aegean with Frontex Present: EU Trying to Bury Report on Turkey Migrant Returns' (Dirittiefrontiere, 16 June 2016) <<http://dirittiefrontiere.blogspot.de/2016/06/illegal-push-back-operation-in-aegean.html>> accessed 11 October 2017.

<sup>850</sup> *ibid.*

<sup>851</sup> *ibid.*

<sup>852</sup> ICCPR, article 6; ECHR, article 2; EU Charter, article 2; UDHR, article 3; Aas and Gundhus (n 79) 14.

irregular migrants often travel in hazardous weather and sea conditions with women and children on board,<sup>854</sup> while on unseaworthy and overcrowded boats, with a limited supply of fuel, water and food, and in the absence of anyone properly qualified to be in command of the vessel,<sup>855</sup> it is reasonable to suggest that these conditions give rise to factors determining ‘uncertainty, alert or distress’ within the meaning of the Sea Borders Regulation.<sup>856</sup> Upon interception, participating units must not take any course of action against an irregular migrant’s boat, until they receive instructions from the RCC on how to react in the particular circumstances.<sup>857</sup> Until then, participating units must ensure the persons’ safety.<sup>858</sup> To comply with this obligation, due to the vessel’s unseaworthiness, participating units may be obliged to take irregular migrants on board. This action triggers the host Member State’s jurisdiction, imposing on them the burden of examining the individual circumstances of these irregular migrants and ascertaining whether they are in need of international protection.<sup>859</sup> Hence, participating units are left with no choice but to disembark these individuals within the territory of the host Member State.<sup>860</sup> As a result of Articles 7(2) and 13(1) of the Dublin Regulation, the host Member State becomes responsible for these individuals.<sup>861</sup> On the other hand, if they supervise the boat

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<sup>853</sup> UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR, Chapter 2.1.10 ; also contrary to the Sea Borders Regulation’s objective ‘to ensure the efficient monitoring of the crossing of external borders including through border surveillance, while contributing to ensuring the protection and saving of lives’ see recital 1 and article 3.

<sup>854</sup> Sea Borders Regulation (n 7) article 9(2)(f); IMO, “Persons Rescued at Sea – Regulations and Guidance” <<http://www.imo.org/en/OurWork/Facilitation/personsrescued/Pages/Default.aspx>> accessed 11 October 2017.

<sup>855</sup> Amnesty International, ‘Lives Adrift Refugees’ (n 128) 20; FRA, ‘Fundamental Rights at Europe’s Southern Sea Borders’ (2013) 29 <[https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13\\_en.pdf](https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf)> accessed 21 October 2017; see Chapter 2, section 2.5.

<sup>856</sup> Sea Borders Regulation (n 7) article Article 9(2)(c-f) 9(2)(f); See Chapter 4, section 4.3.

<sup>857</sup> Sea Borders Regulation (n 7) article 6(2) and article 9(2)(g).

<sup>858</sup> *ibid.*

<sup>859</sup> See Chapter 2, section 2.3.1.

<sup>860</sup> Sea Borders Regulation (n 7) article 10(1)(c).

<sup>861</sup> Dublin Regulation (n 42) article 1 and 13.

from a distance and take no action until it is at the point of sinking and irregular migrants happen to die, their responsibility for the loss of life may be engaged.<sup>862</sup>

It is therefore reasonably assumed that the fear of having responsibility for irregular migrants under EU and international asylum laws has generated avoidance behaviour towards rescue activities in the Mediterranean Sea amounting to a violation of the international search and rescue obligations.<sup>863</sup> In March 2012, the CoE Committee on Migration, Refugees and Displaced Persons had already condemned failed search and rescue operations when intercepting overcrowded unseaworthy irregular migrant boats.<sup>864</sup> In the well-known ‘left to die boat’ case, despite the existence of a distress call, the Italian and Maltese Maritime RCC, NATO, and military helicopters collectively failed to rescue the lives of 63 people.<sup>865</sup> Although no one disputed their positive duty to rescue people at sea, discrepancies existed between the rhetoric and the practice as to the initiation of rescue.<sup>866</sup> The Sea Borders Regulation was purportedly adopted specifically in order to avoid such discrepancies, by aiming to put a stop to Member State avoidance behaviour on rescue. This chapter, however, argues that, in effect, Article 6(2)(b) and Article 7(2)(b) do not put a stop to Member State avoidance behaviour on rescue, but instead purport to legitimise the participating units’ practice of altering the course of irregular migrants’ boats and leaving the individuals stranded at sea without giving due consideration to the unseaworthiness of the vessels.

2. In relation to the second legal issue, this chapter argues that the Sea Borders Regulation does not effectively ensure protection of fundamental rights and the principle of *non-refoulement* for irregular migrants arriving

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<sup>862</sup> UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR, Chapter 2.1.10.

<sup>863</sup> See Chapter 2, section 2.3.1

<sup>864</sup> Rapporteur Ms Tineke Strik, *Lives Lost in the Mediterranean Sea* (n 251) 1, out of 72 irregular migrants, only 9 survived.

<sup>865</sup> *ibid*, 20.

<sup>866</sup> *ibid*, 13.

by sea. The Regulation does not expressly address the possibility for irregular migrants intercepted in Member State territorial waters to claim asylum, making no reference to the EU asylum and immigration rules or to the ordinary border controls in accordance with the SBC.<sup>867</sup> This situation is incompatible with the recast Recast Asylum Procedures Directive which considers as falling within its scope asylum applications made in the territorial waters of the coastal Member State.<sup>868</sup> Asylum and immigration legal frameworks seem to be disconnected and to be non-applicable to irregular migrants arriving by sea, raising a presumption that such individuals are to be treated differently from other irregular migrants travelling by land. The Sea Borders Regulation seems to, in fact, leave irregular migrants arriving by sea outside the applicable legislative guarantees.<sup>869</sup>

This chapter argues, therefore, that the Sea Borders Regulation purports to establish a new legal framework applicable to irregular migrants arriving by sea. As Maarten den Heijer puts it, a special immigration regime is created to legally separate irregular migrants based on ‘whether their feet are dry or wet’.<sup>870</sup> Those irregular migrants whose ‘feet are wet’ do not benefit from the legal safeguards offered by EU and international legal frameworks on asylum. Instead, they are susceptible to purportedly legitimised coercive measures, in particular expedient and summary returns, when conducted under Frontex joint operations. This new legal framework is arguably discriminatory and to undermine irregular migrants’ rights only because they have attempted to cross borders irregularly by sea instead of over land.<sup>871</sup> In addition, this new legal framework is likely to contravene the ECtHR’s reasoning on the guarantees protected by the ECHR, as articulated in the

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<sup>867</sup> Asylum Procedures Directive (n 158) Chapter II; SBC (n 158) Chapter II.

<sup>868</sup> Asylum Procedures Directive (n 158) article 3.

<sup>869</sup> Den Heijer, ‘Frontex and the Shifting Approaches’ (n 51) 57.

<sup>870</sup> Den Heijer, ‘Frontex and the Shifting Approaches’ (n 51) 67.

<sup>871</sup> Den Heijer, ‘Frontex and the Shifting Approaches’ (n 51) 67.

case of *Medvedyev*,<sup>872</sup> and more recently in *Hirsi*. In *Medvedyev* the ECtHR held that the ‘special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction’.<sup>873</sup> Similarly, in *Hirsi* it refused to accept that ‘a significant component of contemporary migratory patterns’ did not fall under the ambit of the ECHR.<sup>874</sup> Accordingly, Member States may neither justify nor legitimise unlawful unilateral or joint interception practices which are incompatible with their obligations under the ECHR on the basis that massive irregular migration flows are overburdening their asylum and immigration systems.<sup>875</sup>

### 5.3 Disembarkation

Participating units are required to disembark rescued individuals at a place of safety.<sup>876</sup> For disembarkation purposes, ECtHR jurisprudence has turned the concept of ‘place of safety’ coupled with the *non-refoulement* principle into the ‘safe country’ concept.<sup>877</sup> Thus, States have an obligation not only to ensure a safe place of disembarkation to ‘physically’ protect the irregular migrant,<sup>878</sup> but also to ‘respect their fundamental rights’, and must take into consideration the possible need for international protection and the risk of *refoulement*.<sup>879</sup> Such a decision is dependent on the disembarking State’s functional asylum system.<sup>880</sup>

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<sup>872</sup> *Medvedyev* (n 159) paragraph 81.

<sup>873</sup> *ibid.*

<sup>874</sup> *Hirsi* (n 57) paragraphs 177 and 178 – where the ECtHR recognised that article 4 of Protocol No 4 may have extraterritorial application.

<sup>875</sup> *Hirsi* (n 57) paragraph 179.

<sup>876</sup> Sea Borders Regulation (n 7) article 10; See Chapter 2, section 2.4; MSC Guidelines (n 130) point 6.12.

<sup>877</sup> *NS and ME* (n 133) paragraph 94; *MSS* (n 115) paragraph 358; Hurwitz (n 133) 46; Kneebone (n 133) 129 and 54; *Hirsi* (n 57) paragraphs 127-128, 156.

<sup>878</sup> Parliamentary Assembly, Rapporteur Mr Arcadio Diaz Tejera (n 132) point 5.2.

<sup>879</sup> Tondini (n 132) 59; IMO Guidelines on the Treatment of Persons Rescued at Sea (n 130): ‘The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea’; Wouters and den Heijer (n 57) 7; Parliamentary

The Sea Borders Regulation provides clear rules on the place of disembarkation for Frontex joint operations, but does not address the possibility for an alternative course of action if the level of safety in the coastal or host Member State is questionable. It provides that if the interception occurs within the territorial sea or the contiguous zone of a host or participating Member State, the disembarkation must be conducted within that coastal Member State.<sup>881</sup> Where the interception takes place on the high seas, the persons must be disembarked at the third country of the ship's departure, in accordance with the principle of *non-refoulement* and respect for fundamental rights; if this is not feasible, disembarkation must take place in the host Member State.<sup>882</sup> The host Member States in *Poseidon* and *Triton* operations are Greece and Italy, respectively. This chapter argues that these two host Member States do not fulfil the 'safe country' criteria governing disembarkation.<sup>883</sup> Hence, by not offering an alternative course of action in circumstances when the host/coastal Member State does not guarantee an effective functional asylum system, the provisions under the Sea Borders Regulation violate EU and international obligations and human rights laws and the established international search and rescue framework.

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Assembly, Rapporteur Mr Arcadio Diaz Tejera (n 132) point 5.2; see Chapter 4 for further detail on indirect *refoulement*.

<sup>880</sup> See by analogy the CJEU in *NS* and *ME* (n 133) which has held that Member States must not transfer an asylum seeker to the territory of another State if 'there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter', paragraph 86; EU Charter, article 4 uses the same wording and has the same meaning and scope as the ECHR, article 3; see EU Charter, article 52(3).

<sup>881</sup> Sea Borders Regulation (n 7) article 10(1)(a).

<sup>882</sup> Sea Borders Regulation (n 7) article 10(1)(b).

<sup>883</sup> Sea Borders Regulation (n 7) article 4 (1) Under no circumstances shall participating Member States in joint operation *Triton* 'disembark in, forced to enter, conducted to, otherwise handed over' a person to 'the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, *torture*, persecution or *other inhuman or degrading treatment or punishment*, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*'; emphasis added.

#### 5.4 Greece, an ‘Unsafe Country’ of Disembarkation

This section argues that Greece does not guarantee to those rescued at sea basic human needs such as food, shelter and medical provisions. Upon disembarkation, apprehended irregular migrants are accommodated at First Reception Centres where they are to be registered and identified.<sup>884</sup> In response to the irregular migration crisis, refugee hotspots were set up on Greek islands under Frontex coordination, mainly in Lesbos (reception capacity: 1,500), Chios (1,100) Samos (850), Leros (1,000) and Kos (1,000).<sup>885</sup> It should be noted that Greece experienced 885,709 irregular border crossings in 2015, of which 876,777 were people arriving from Turkey and disembarking in Greek islands,<sup>886</sup> and 176,906 arrivals by sea in 2016.<sup>887</sup> The total number of reception facilities in Greece is 34,419, with 17,906 open reception places on the Greek mainland and 9,933 places in the Eastern Aegean islands.<sup>888</sup> With a very limited reception infrastructure, these flows of irregular migrants on such a scale have put immense pressure on Greek reception facilities, resulting in new arrivals being offered inadequate reception conditions.<sup>889</sup>

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<sup>884</sup> *Greek Law No 3907 of 2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions* Official Gazette A-7, 26 January 2011, article 7; also see Greek Law No 4375, article 8.

<sup>885</sup> European Commission, ‘Hotspot State of Play’ (Last updated 27 January 2017) <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf)> accessed 11 October 2017.

<sup>886</sup> European Commission, ‘Managing the Refugee Crisis, Greece: Progress Report’, 1 <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/managing\\_the\\_refugee\\_crisis\\_-\\_greece\\_state\\_of\\_play\\_report\\_20160304\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/managing_the_refugee_crisis_-_greece_state_of_play_report_20160304_en.pdf)> accessed 11 October 2017.

<sup>887</sup> UNHCR, “Refugees/Migrants Emergency Response – Mediterranean, Greece” <<http://data.unhcr.org/mediterranean/country.php?id=83>> accessed 23 October 2017; IOM, ‘Mixed Migration Flows in the Mediterranean and Beyond’ 2016, 1 <[http://migration.iom.int/docs/2016\\_Flows\\_to\\_Europe\\_Overview.pdf](http://migration.iom.int/docs/2016_Flows_to_Europe_Overview.pdf)> accessed 25 October 2017.

<sup>888</sup> *ibid*; The total number of special facilities for asylum seekers and unaccompanied minors are 1,221 places on the mainland and islands and 5,359 places in pre-removal centres.

<sup>889</sup> ECRE and AIDA, ‘Wrong Counts and Closing Doors – The Reception of Asylum Seekers in Europe March 2016, 25-26’ <[http://www.asylumineurope.org/sites/default/files/shadowreports/aida\\_wrong\\_counts\\_and\\_closing\\_doors.pdf](http://www.asylumineurope.org/sites/default/files/shadowreports/aida_wrong_counts_and_closing_doors.pdf)> accessed 25 October 2017; HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe,

In the course of inspections on Samos, Lesbos and Chios from 9 May to 15 May 2016, HRW reported the facilities to be ‘severely overcrowded, with significant shortages of basic shelter along with filthy, unhygienic conditions. Long lines for poor quality food, mismanagement, and lack of information contribute to the chaotic and volatile atmosphere in the three hotspots’.<sup>890</sup> In the emergency Moria refugee camp on 9 May, with a 700-bed capacity was accommodating 4,000 people; Vathi with a 250 bed capacity accommodated 945 people and the VIAL camp accommodated 1,400 people with a 1,150 bed capacity.<sup>891</sup> Disembarked irregular migrants were forced to sleep ‘on the ground in small tents or makeshift shelters constructed of blankets, plastic sheeting, and scraps of fencing, cardboard, and other building materials’.<sup>892</sup> Furthermore, in the Moria camp irregular migrants were left without food for days because of fights occurring in the queues for food.<sup>893</sup> HRW reported the inability of the Greek police to stop the fights and guarantee the safety of the accommodated irregular migrants.<sup>894</sup> Furthermore, the food was reported to be rotten and expired.<sup>895</sup> Those accommodated in VIAL camp after disembarkation were confronted with shortages of soap, hot water and only three toilets (with no bathrooms) for women who have to queue up for hours to use the facilities. In the Vathi, VIAL and Moria camps the men’s toilets were unsanitary, often resulting in sewage from the latrine flowing into the living area.<sup>896</sup>

In addition, rescued individuals were confronted with inadequate healthcare in all hotspots. Those in need of medical attention were given hospital appointments in

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Unsanitary’ (19 May 2016) <<https://www.hrw.org/news/2016/05/19/greece-refugee-hotspots-unsafe-unsanitary>> accessed 25 October 2017.

<sup>890</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889).

<sup>891</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889).

<sup>892</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889).

<sup>893</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889).

<sup>894</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889).

<sup>895</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889).

<sup>896</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889).



approximately two months' time,<sup>897</sup> whereas basic medical needs were/are provided by NGOs or the military.<sup>898</sup> To offer their services these NGOs depended on funding from the Commission or the Greek government. As a protest against the arbitrary detention of asylum seekers, *Médecins sans Frontières*, a persistent campaigner against the deterrence policies of the EU and its Member States, has exposed the refusal of any funds from the EU and/or its Member States.<sup>899</sup> It maintains that these deterrence policies have made the irregular migrants' journey even more dangerous, contributed to further suffering.<sup>900</sup> Other NGOs became part of the protest and refused to offer their services.<sup>901</sup> These protests did not affect the EU leaders' determination to view these arrivals as an immense burden on Member State asylum and immigration systems, rather than as individuals in urgent need of international protection and humanitarian assistance.

Furthermore, upon disembarkation in Farmakonisi, a remote location and one of the busiest disembarkation islands in Greece, with a non-existing first reception facility,<sup>902</sup> activist networks reported that most of the time migrants do not receive food or water for several hours. After disembarkation in Farmakonisi, these individuals are to be transferred to Leros, a process that sometimes does not occur for days. In addition, rescued individuals alleged that they had waited for blankets

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<sup>897</sup> HRW, 'Greece: Refugee 'Hotspots' Unsafe, Unsanitary' (n 889).

<sup>898</sup> HRW, 'Greece: Refugee 'Hotspots' Unsafe, Unsanitary' (n 889).

<sup>899</sup> Médecins sans Frontières, "MSF to no Longer Take Funds from EU Member States and Institutions" 16 June 2016 <<https://www.msf.org.uk/article/msf-no-longer-take-funds-eu-member-states-and-institutions>> accessed 14 October 2017.

<sup>900</sup> *ibid.*

<sup>901</sup> UNHCR, "UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect" (22 March 2016) <<http://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>> accessed 17 October 2017; Sarantis Michalopoulos, 'NGOs Abandon Greece, Oppose EU-Turkey Refugee Plan' (Euroactiv, 23 March 2016) <<http://www.euractiv.com/section/global-europe/news/ngos-abandon-greece-oppose-eu-turkey-refugee-plan/>> accessed 17 October 2017.

<sup>902</sup> Watch the Med, 'Human Rights Violations on the Island of Farmakonisi' (15 December 2015) <<https://alarmphone.org/en/2015/12/15/human-rights-violations-on-the-island-of-farmakonisi-alarm-phone-demands-immediate-transfer-of-all-refugees-stranded-on-the-greek-military-island-farmakonisi-travellers-stuck-on-the-island/>> accessed 17 October 2017.

though at times they were given none, not even for the care of infants.<sup>903</sup> Under these appalling conditions, as if things were not bad enough, the situation only gets worse considering that military units are entrusted with the main responsibility for these new arrivals on the ground.<sup>904</sup> In an attempt to flee from persecution, ill-treatment and human smugglers, the first contact irregular migrants have is with military units entirely untrained for the circumstances and responding to an emergency situation.

On the mainland, in Athens, new arrivals encountered further difficulties of reception, being accommodated in parks and the city squares, and sometimes temporarily in stadiums.<sup>905</sup> On 10 August 2015, more than 2,000 Syrians were contained in a local stadium under the summer heat without adequate supplies of water and food.<sup>906</sup> The agitated crowd protested against these conditions; as a result of in-fighting, the Greek authorities responded with tear gas, fire hydrants and grenades, resorting to violence to subdue the crowd.<sup>907</sup> There were allegations of excessive use of force by the police in attempts to disperse rioters by directing fire extinguishers and tear gas at them.<sup>908</sup> Comparable allegations were made regarding the Moria immigration detention centre.<sup>909</sup> Based on the above, it is concluded that Greece cannot be considered a safe country of disembarkation. As long as Greece does not offer adequate basic humanitarian provisions such as food, shelter and adequate medical care, Frontex violates the international search and rescue framework when disembarking irregular migrants to Greece.<sup>910</sup>

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<sup>903</sup> *ibid.*

<sup>904</sup> *ibid.*

<sup>905</sup> Amnesty International Report 2015/2016 (n 625) 169.

<sup>906</sup> Patrick Kingsley, 'Migrants Locked in Stadium on Kos For Nearly 24 Hours' (The Guardian, 13 August 2015) <<https://www.theguardian.com/world/2015/aug/12/thousand-refugees-locked-in-stadium-overnight-kos>> accessed 14 October 2017.

<sup>907</sup> *ibid.*

<sup>908</sup> Amnesty International Report 2015/2016 (n 625) 169.

<sup>909</sup> Amnesty International Report 2015/2016 (n 625) 169.

<sup>910</sup> SAR, Annex 3, Chapter I, 1.3.2.

### 5.4.1 Asylum Seekers Subjected to Arbitrary Deprivation of Liberty

This section argues that in disembarking an irregular migrant to Greece, Frontex violates Article 4 of the EU Charter and Article 3 ECHR by ‘knowingly exposing him to conditions of detention and living conditions’ subjecting an individual to torture or inhuman or degrading treatment or punishment.<sup>911</sup> Since 20 March 2016, subject to the EU-Turkey statement, TCNs arriving in Greece through the Aegean islands have been deprived of their liberty for a minimum of 3 days and up to 25 days.<sup>912</sup> Greek law 4375/2016 transposing the recast Reception Conditions Directive<sup>913</sup> transformed the hotspots<sup>914</sup> on the Greek islands from reception facilities for registration and screening to centres for accelerated readmission procedures,<sup>915</sup> thus depriving individuals of their liberty.<sup>916</sup> The ECHR and the EU asylum *acquis* authorise the detention of asylum seekers for the purpose of verification as long as it is lawful and non-arbitrary.<sup>917</sup> This chapter does not question the detention of asylum seekers for identification purposes, but it does question their systematic detention for the duration of the entire asylum

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<sup>911</sup> *NS and ME* (n 133) paragraph 88; *MSS* (n 115) paragraphs 358, and 367.

<sup>912</sup> *Greece: Law No. 3907 of 2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions* [Greece], 26 January 2011, article 30(1) amending *Greece: Law No. 3386/2005, Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory* [Greece], June 2005; Greek Law 4375/2016, article 14 based on Recast Reception Conditions Directive (n 753) article 8(3) particularly: (1) determining the applicant’s identity or nationality; and (2) determining elements of the claim, particularly in where there is a risk of absconding.

<sup>913</sup> Reception Conditions Directive (n 753) article 8(3)(1).

<sup>914</sup> Renamed ‘Reception and Identification Centers’; Greek Law 4375/2016, article 46.

<sup>915</sup> Greek Law 4375/2016, article 60; European Commission, *Next Operational Steps in EU-Turkey Cooperation in the Field of Migration* 16 March 2016, COM(2016) 166 final, 4.

<sup>916</sup> AIDA and ECRE, ‘What’s in a name? The Reality of First Reception at Evros, AIDA Fact-Finding Visit in Greece’ (February 2015) <<http://www.asylumineurope.org/sites/default/files/resources/eu-greece-ecre-evros.pdf>> accessed 14 October 2017; UNHCR, ‘UNHCR Urges Immediate Safeguards to be in Place before any Returns Begin under EU-Turkey Deal’ (1 April 2016) <<http://www.unhcr.org/56fe31ca9.html>> accessed 14 October 2017.

<sup>917</sup> ECHR, article 5(1)(f); Recast Reception Conditions Directive (n 753) article 8; Asylum Procedures Directive (n 158) article 26(1); *Saadi* (n 407) paragraph 67; *A and Others v the United Kingdom* Application no 3455/05 ECHR 2009 - 301, paragraph 164; Cathryn Costello and Minos Mouzourakis, ‘EU Law and the Detainability of Asylum Seekers’ (2016) RSQ 35(1) 47-73, 60.

procedure.<sup>918</sup> Asylum seekers cannot be detained simply because they are applying for international protection.<sup>919</sup>

Although the ECtHR recognises the fact that Member States are experiencing an emergency situation of unprecedented flow throwing new challenges in terms of immigration control, that does not mean that they have the unfettered right to deprive individuals intercepted or rescued at sea of their liberty.<sup>920</sup> Detention must be used only as a measure of last resort and no one should be deprived of his/her liberty in an arbitrary fashion.<sup>921</sup> Any detention carried out for the purpose of identification must be performed in good faith and connected closely to the purpose of preventing unauthorised entry. Therefore, they would offer appropriate reception conditions in accordance with EU and international standards and the length of detention must not exceed what is reasonable for the pursued purpose.<sup>922</sup> In addition, Member States must have in mind that these individuals have fled their own country out of fear of their lives; they are not to be treated as criminals. Furthermore, asylum seekers, as well as presumptive refugees, are protected from penalties and arbitrary detention imposed by States because of their illegal entry or presence.<sup>923</sup> Irregular migrants are also protected by the Palermo Protocol on Migrant Smuggling which prohibits the ‘criminalisation’ of migrants.<sup>924</sup> The legislative guide for the implementation of the Protocol expressly provides that sanctions should not apply to migrants ‘even in cases where it involves entry or

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<sup>918</sup> Greek Law 4375/2016, article 14; Helen O’Nions, ‘No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience’ (2008) EJML 10, 149; Evangelia Tsoardi, ‘Asylum Detention in EU Law: Falling between Two Stools?’ (2016) RSQ 35 (1): 7-28.

<sup>919</sup> Recast Reception Conditions Directive (n 753) article 8(1); Asylum Procedures Directive (n 158) article 26(1).

<sup>920</sup> *Hirsi* (n 57) paragraph 176.

<sup>921</sup> *Saadi* (n 407) paragraph 64-66; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* 2012, paragraph 14 <<http://www.unhcr.org/505b10ee9.html>> accessed 25 October 2017.

<sup>922</sup> *Saadi* (n 407) paragraph 74.

<sup>923</sup> Refugee Convention, article 31; Gregor Noll, ‘Article 31 (Refugees Unlawfully in the Country of Refuge)’ in Andréas Zimmermann (ed.), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (Oxford, Oxford University Press, 2011) 1243; see Chapter 3, section 3.3.

<sup>924</sup> Migrant Smuggling Protocol (n 135) article 5.

residence that is illegal under the laws of the State concerned'.<sup>925</sup> As Goodwin-Gill argues, detention should be considered a form of penalty imposed on asylum seekers restricting their freedom of movement contrary to the standards set by international refugee law.<sup>926</sup> At the very least, it should be restricted whenever necessary based on an individual assessment, and used only 'if less coercive alternatives cannot be applied'.<sup>927</sup>

Asylum seekers become vulnerable to detention due to their irregular entry, being considered by immigration authorities as 'unauthorised entrants'. During the identification process it is reasonable for immigration authorities to detain the individual and limit his/her freedom of movement. However, at the moment when an individual submits an asylum claim and is being examined by State authorities, it is argued that the asylum seeker should not be considered an 'unauthorised entrant'.<sup>928</sup> During the period the asylum application is being considered, the asylum seeker is granted the right to residence, a recognition document proving the legality of his/her presence until a negative decision on the application is

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<sup>925</sup> UNODC, *Legislative Guides* (n 389) 340.

<sup>926</sup> Guy Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection" 195–196 <<http://www.refworld.org/pdfid/470a33b10.pdf>> accessed 22 October 2017; Refugee Convention, article 26; James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) 173.

<sup>927</sup> Recast Reception Conditions Directive (n 753) article 8(2); Return Directive (n 42) article 15; *Witold Litwa v Poland* Application no 26629/95 ECHR 2000-III, paragraph 78; *Stanev v Bulgaria* Application no 36760/06 [2012] ECHR 46, paragraph 143; Hathaway, *The Rights of Refugees under International Law* (n 926) 414, 418–419 and 423–439 on necessity; Recast Reception Conditions Directive (n 753) article 8(4) requires Member States to consider measures 'such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place'; Philippe de Bruycker Alice Bloomfield, Evangelia Tsourdi and Joanna Pétin(eds), *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation* (2015) Odysseus Network, 64; also see UN General Assembly, *Protection of migrants: resolution adopted by the General Assembly*, 3 April 2013, A/RES/67/172, paragraph 4.

<sup>928</sup> Violeta Moreno-Lax, *Beyond Saadi v UK: The "Necessity" Requirement for Administrative Detention of Asylum Seekers in the EU, Reflexive Governance in the Public Interest* (Working Paper No. REFGOV-FR-31, 2010) 8; ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation* June 2015, AIDA Legal Briefing No 1, 6; Hathaway, *The Rights of Refugees under International Law* (n 926) 173.

granted.<sup>929</sup> Hence, without a judicial order and an effective judicial remedy, the automatic *de facto* detention of asylum seekers during the entire duration of the asylum process violates the ECHR and the recast Reception Conditions Directive.<sup>930</sup> The ECtHR has accepted the argument that if asylum seekers are authorised to stay in accordance with domestic or EU law, their detention has no legal basis and thus becomes unlawful under Article 5(1)(f) ECHR.<sup>931</sup> Considering that asylum seekers flee their homes and may not find appropriate accommodation in Member State territory, it is suggested that Greece instead of detaining asylum seekers in closed facilities to place them in ‘open facilities with caseworker support’ or ensure ‘regular reporting to the authorities’.<sup>932</sup>

Furthermore, asylum seekers are detained arbitrarily by Greek authorities. Article 3 ECHR requires Greece to ensure adequate conditions of detention for detainees that respect their human dignity and not to subject them to hardship or distress exceeding the level of suffering that is inherent in detention.<sup>933</sup> Poor living conditions in detention or detention-like premises may amount to degrading treatment depending on the period of time the applicant spends in detention in such severe conditions.<sup>934</sup> Even before the EU-Turkey statement, the ECtHR had already established that reception conditions in Greece were inadequate due to

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<sup>929</sup> Recast Reception Conditions Directive (n 753) article 7(1); Asylum Procedures Directive (n 158) article 9(1); See Cathryn Costello, *The Human Rights of Migrants and Refugees under European Law* (Oxford, Oxford University Press, 2016) 290; Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* [2013] EU:C:2013:343, paragraph 49; also see Return Directive (n 42) recital 9.

<sup>930</sup> Recast Reception Conditions Directive (n 753) article 9; ECHR, article 5(1).

<sup>931</sup> *Musa v Malta* Application no 42337/12 (23 July 2013) paragraph 97.

<sup>932</sup> FRA, ‘Alternatives to Detention for Asylum Seekers and People in Return Procedures’ 2015, 2 <file:///C:/Users/User/Downloads/fra-2015-alternatives-to-detention-Compilation-key-materials-1\_en.pdf> accessed 24 October 2017; Suggested types of alternatives to detention: surrender passport, open facilities, release on bail, electronic monitoring, residence restrictions, and regular reporting.

<sup>933</sup> *Rahimi* (n 761) paragraph 60; ‘Freedom from arbitrariness’ in the context of article 5(1)(f) first limb means: ‘that such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; *the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country*; and the length of the detention should not exceed that reasonably required for the purpose pursued’ see *Saadi* (n 407) paragraph 74; emphasis added.

<sup>934</sup> *Rahimi* (n 761) paragraph 86.

overcrowding, inadequate food, sleeping arrangements, sanitation, and heating facilities amounting to degrading treatment.<sup>935</sup> This chapter agrees with legal scholars' criticism that the EU-Turkey statement has exacerbated the reception conditions in Greek islands by further overcrowding the facilities through the influx of new arrivals.<sup>936</sup> The refugee camps on the islands of Lesbos (Moria) and Chios (VIAL) offer 'appalling conditions',<sup>937</sup> with 'poor quality of food, lack of blankets and privacy, and inadequate access to appropriate medical care'.<sup>938</sup> In addition, they offer no access to doctors and medical staff,<sup>939</sup> especially important as individuals coming from Syria (a war torn country) are often in need of medical attention.<sup>940</sup> The HRW report of 13 May 2016 described a situation of chaos and insecurity on the islands of Samos, Lesbos and Chios for 'lack of police protection, overcrowding and unsanitary conditions'.<sup>941</sup> In addition, on the islands of Samos, Lesbos and Chios, HRW reported that single women were not separated from adult men.<sup>942</sup> Frequent sexual harassment has been reported by women in all three hotspots and no action has been taken by police officers to

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<sup>935</sup> *S.D.v Greece* Application no 53541/07 (11 June 2009) paragraphs 49-54; *Affaire A. Y. v Greece* Application no 58399/11 (5 November 2015) paragraph 57-61; *E. A. v Greece* Application no 74308/10 (30 July 2015) paragraph 51; *Mahammad and Others v Greece* Application no 48352/12 (15 January 2015) paragraph 48.

<sup>936</sup> Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal' (2017) 8, <<https://amnesty.org.pl/wp-content/uploads/2017/02/EU-Turkey-Deal.pdf>> accessed 25 October 2017.

<sup>937</sup> Amnesty International, 'Greece: Refugees Detained in Dire Conditions Amid Rush to Implement EU-Turkey Deal', 7 April 2016 <<https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/>> accessed 25 October 2017.

<sup>938</sup> Amnesty International Report 2015/2016 (n 625) 168; ECRE and others 'The Implementation of the Hotspots in Italy and Greece' 5 December 2016, 46 <<http://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>> accessed 20 October 2017; UNHCR, "Greece: Europe's Lack of Political Will Creating Serious Suffering for Thousands of Migrants— UN rights expert" (17 May 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19976&LangID=E#sthash.K b4xrnKb.dpuf>> accessed 14 October 2017; US Department of State, "Greece 2016 Human Rights Report", 18 <<https://www.state.gov/j/drl/rls/hrrpt/2016/eur/265426.htm>> accessed 26 October 2017.

<sup>939</sup> Amnesty International Report 2015/2016 (n 625) 168; ECRE and others 'The Implementation of the Hotspots in Italy and Greece' (n 938) 46

<sup>940</sup> *Khlaifia* (n 115) paragraph 133.

<sup>941</sup> HRW, "Greece: Refugee 'Hotspots' Unsafe, Unsanitary" (n 889).

<sup>942</sup> HRW, "Greece: Refugee 'Hotspots' Unsafe, Unsanitary" (n 889).

separate women from adult men in different parts of the reception facility.<sup>943</sup> Apart from relocating alleged offenders to other sites, legal action against them was infrequent.<sup>944</sup>

The hotspots have been found to be overcrowded. Acting beyond their capacities, Moria holds 3,150 people where it was designed for 1,000; VIAL often holds 50% more than its capacity (designed for 1,200) packing individuals ‘into tight quarters in fenced-off containers of either 30 or 40 square metres’;<sup>945</sup> while at the Vathi hotspot in Samos, a 250 bed facility held 945 people.<sup>946</sup> In situations of overcrowded detention centres, the ECtHR has held that any personal space of less than 4 square meters contravene Article 3 ECHR.<sup>947</sup> But even in cases where the personal space allotted to each migrant is not known, situations of overcrowding are capable of infringing Article 3.<sup>948</sup> Other factors such as whether it is possible to use toilets with respect for privacy, ventilation, access to natural air and light, quality of heating and compliance with basic hygiene requirements are capable of raising an issue under Article 3. Furthermore, situations of blocked pipes, water on the floor, smell from toilets and dirt in living areas fall short of international standards as required by Article 3 ECHR.<sup>949</sup> The length of the period in which the irregular migrant is detained under the impugned conditions is a key factor. The ECtHR has already held that even in situations where an individual is kept in such conditions for a short period, coupled with the fact that he or she has

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<sup>943</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889); Greece 2016 Human Rights Report, 18 <<https://www.state.gov/j/drl/rls/hrrpt/2016/eur/265426.htm>> accessed 24 October 2017.

<sup>944</sup> Police authorities report that legal action is based on upon the agreement of sexual harassment victims to press formal charges against offenders, see Greece 2016 Human Rights Report, 11 <<https://www.state.gov/j/drl/rls/hrrpt/2016/eur/265426.htm>> accessed 24 October 2017.

<sup>945</sup> Jerome Phelps, ‘The EU Must Not Leave Greece to Solve the Migration Crisis’ (Open Democracy, 12 April 2016) <<https://www.opendemocracy.net/can-europe-make-it/jerome-phelps/eu-must-not-leave-greece-to-solve-migration-crisis>> accessed 14 October 2017; Amnesty International, ‘Greece: Refugees Detained in Dire Conditions’ (n 937).

<sup>946</sup> HRW, ‘Greece: Refugee ‘Hotspots’ Unsafe, Unsanitary’ (n 889).

<sup>947</sup> *Kadikis v Latvia* Application no 62393/00 (4 May 2006) paragraph 55; *Sulejmanovic v Italy* Application no 22635/03 (16 July 2009) paragraph 43.

<sup>948</sup> *Khlaifia* (n 115) paragraph 133.

<sup>949</sup> *Rahimi* (n 761) paragraphs 81-85; *Khlaifia* (n 115) paragraph 131 and 133.



undergone a dangerous sea journey in a situation of vulnerability, confinement under substandard conditions impairs human dignity and is capable of giving rise to feelings of anguish and humiliation which break one's moral and physical resistance,<sup>950</sup> effectively constituting degrading treatment in violation of Article 3 ECHR.<sup>951</sup>

The accuracy of NGO findings has been accepted by the ECtHR in *Khlaifia* where the Court attached significant weight to information received from them in establishing that conditions in detention centres amounted to violations of Article 3 ECHR.<sup>952</sup> Therefore, it is argued that the systematic detention of asylum seekers under 'appalling and dire'<sup>953</sup> conditions violates the EU asylum *acquis*, the ECHR and the Refugee Convention.<sup>954</sup> Since 20 March 2016, when disembarking irregular migrants to Greece, Frontex became complicit for their arbitrary detention in violation of the Refugee Convention, the Protocol on Migrant Smuggling and the ECHR.<sup>955</sup>

#### **5.4.2 Infringement of Right to an Effective Remedy**

Frontex has the obligation not to disembark irregular migrants in a country where it 'knew or ought to have known that the individual had no guarantee that his asylum application would be seriously examined by the receiving authorities'.<sup>956</sup> For many years, the Greek asylum system, challenged by the massive influxes of

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<sup>950</sup> *Pretty v UK* Application no 2346/02 [2002] ECHR 423, paragraph 52; David Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press, 3<sup>rd</sup> edition, 2014) 261.

<sup>951</sup> *Khlaifia* (n 115) paragraph 135.

<sup>952</sup> *Khlaifia* (n 115) paragraph 132.

<sup>953</sup> Amnesty International, 'Greece: Refugees Detained in Dire Conditions' (n 937).

<sup>954</sup> TFEU, article 78(1) provides that: 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'; ECHR, article 3; Refugee Convention, article 31.

<sup>955</sup> Refugee Convention, article 31(2); Migrant Smuggling Protocol (n 135) article 5; ECHR, article 5.

<sup>956</sup> *MSS* (n 115) paragraphs 358, 367; ECHR, article 3; *NS* and *ME* (n 133) paragraph 88.

irregular migrants, has been documented as suffering from ‘chronic deficiencies, making it dysfunctional from the stage of arrival to the implementation of the final decision on asylum’.<sup>957</sup> In 2011, the ECtHR<sup>958</sup> and the CJEU<sup>959</sup> both declared Greece to be an ‘unsafe country’ of return for asylum seekers and suspended any Dublin transfers.<sup>960</sup> NGOs have reported that asylum seekers receive limited access to the Greek asylum system due to a significant backlog in the processing of applications which have produced the lowest refugee recognition rate in the EU, with only a 2.87% recognition rate in 2012, rising to 23% in 2015.<sup>961</sup> Despite the Greek government’s legislative attempts to improve its asylum system,<sup>962</sup> the Greek system has become completely saturated under the more recent flows.<sup>963</sup>

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<sup>957</sup> Council of Europe Commissioner for Human Rights Comment Thomas Hammarberg, ‘The Dublin Regulation undermines refugee rights’ (22 September 2010) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1671357&Site=DC&direct=true>> accessed 26 October 2017; *MSS* (n 115) paragraph 320.

<sup>958</sup> *MSS* (n 115) paragraph 320.

<sup>959</sup> *NS* and *ME* (n 133) paragraph 94.

<sup>960</sup> *NS* and *ME* (n 133) paragraph 94; Dublin Regulation (n 42) article 3(2).

<sup>961</sup> HRW, “World Report 2013: European Union (Greece)” <<https://www.hrw.org/world-report/2013/country-chapters/france-germany-greece-hungary-italy-netherlands-poland-romania>> accessed 20 October 2017; Eurostat, ‘Asylum Decisions in the EU’ (Press Release 75/2016, 20 April 2016) <<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5>> accessed 27 October 2017; See by comparison the recognition rate in 2015 of persons granted protection status in Germany (148 200, or +212% compared with 2014), followed by Sweden (34 500, or +4%), Italy (29 600, or +44%), France (26 000, or +26%), the United Kingdom (17 900, or +26%), Austria (17 800, or +77%+) and the Netherlands (17 000, or +29%) Eurostat, “Asylum Decisions in the EU”, 3, <<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5>> accessed 20 October 2017; also see by comparison a good recognition rate in 2015 on first instance decisions: Bulgaria 91%, Denmark 81%, Malta, 79%, Netherlands 78%, Cyprus 77%, Austria 70%, Germany 56% see Eurostat press release 2016, 5 <<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5>> accessed 20 October 2017.

<sup>962</sup> Greek Law 3907 of 26 January 2011; Commission Staff Working Document, *the Assessment of the implementation of the Greek Action Plan on Asylum and Migration management* 6 October 2014, SWD(2014) 316 final, 4.

<sup>963</sup> Council of Europe Parliamentary Assembly, *The Mediterranean Sea: a Front Door to Irregular Migration* Rapporteur Ms Daphne Dumery 17 January 2016, Doc 13942, paragraph 59.

Since 20 March 2016, in accordance with the EU-Turkey statement,<sup>964</sup> new arrivals who do not seek international protection, or whose asylum application has been rejected on its merits, or is found inadmissible, have been returned to Turkey.<sup>965</sup> To seek international protection these individuals must express their will before the police and then be registered by the Asylum Service.<sup>966</sup> The burden of claiming asylum is on the applicant.<sup>967</sup> It is then for Greece to prove that the risk is non-existent upon a ‘proper risk assessment’ based on relevant evidence.<sup>968</sup> It is argued that those individuals who manage to survive the sea voyage are not in the right physical and mental condition to claim asylum or declare a wish to do so at the moment of rescue or interception.<sup>969</sup> Therefore, in cases of interception at sea, the Court has transferred the burden of proof from the applicant to a primary investigative duty on the State, establishing an outright prohibition of removal.<sup>970</sup> Logically, the Court applied its reasoning on the State’s investigative duty to readmission practices.<sup>971</sup>

Therefore, within a reasonable time-span, Greek authorities supported by EU agencies such as Frontex and the European Asylum Support Office (EASO) have the obligation to identify and register those with protection needs for transfer to the mainland as well as offer legal assistance and interpretation on asylum

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<sup>964</sup> EU-Turkey Statement (n 99).

<sup>965</sup> Greek Law 4375/2016, article 54; Greek Presidential Decree 113/2013, article 54 transposing Asylum Procedures Directive; EU Charter, article 18; Asylum Procedure Directive, articles 3 and 6; Refugee Convention, article 1 and 33.

<sup>966</sup> UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, *Global Consultations on International Protection* 31 May 2001, EC/GC/01/12, paragraph 5.

<sup>967</sup> *Moghaddas v Turkey* Application no 46134/08 (15 May 2011) paragraph 34; also see *Talat Tepe v Turkey* Application no 31247/96 (21 December 2004) paragraph 48.

<sup>968</sup> Manfred Nowak, Report of the Special Rapporteur ‘on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment’ (Human Rights Council, 13<sup>th</sup> session, 5 February 2010) paragraph 239  
<[http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf)>  
accessed 16 October 2017.

<sup>969</sup> Maarten den Heijer, ‘Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* case’ (2013) *IJRL* 25 (2) 265-290, 274.

<sup>970</sup> Den Heijer, ‘Reflections on *Refoulement*’ (n 952) 276-277; also see *NS and ME* (n 133) paragraph 94, the protective duty imposed by CJEU on specific claims brought by applicants when Member States ‘cannot be unaware’ of systemic deficiencies, under EU Charter, article 4; *Hirsi* (n 57) paragraph 131.

<sup>971</sup> *Sharifi* (n 115) paragraph 219.

procedures.<sup>972</sup> The systematic massive inflows of irregular migrants combined with the Greek financial crisis have exceeded the capacity of the Greek Asylum Service to identify and register these individuals in a timely manner.<sup>973</sup> Commission vice-president, Valdis Dombrovskis, made a direct accusation on Greece stating that ‘Greece seriously neglected its obligations...There are serious deficiencies in the carrying out of external border control that must be overcome. There is no effective identification and registrations of irregular migrants...Fingerprints are not being entered systematically into the system, travel documents are not being systematically checked for authenticity or against crucial security databases’.<sup>974</sup> This practice impedes individuals access to asylum, leaving them unprotected under an undetermined legal status.<sup>975</sup> The number of individuals left without protection is alarming considering that in 2015, Greece received 84% of arrivals from the world’s top 10 refugee-producing countries, followed by 53% in 2016.<sup>976</sup> The situation becomes worrisome when considering that out of 1,822,177 irregular migrants arriving in 2015 and 511,371 in 2016,

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<sup>972</sup> Asylum Procedures Directive (n 158) article 14 and 34; Gina Clayton, “‘The Right to have Rights’: the European Convention on Human Rights and the Procedural Rights of Asylum Seekers’ in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers, An International Legal Perspective* (Law and Migration, Routledge 2016) 193.

<sup>973</sup> Parliamentary Assembly, *The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016* Resolution 2109(2016) Doc 14028, paragraph 2.1 <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22738&lang=en>> accessed 24 October 2017; Ian Traynor and Helena Smith, ‘Greece Hits Back after EUs Schengen Threat’ (The Guardian, 27 January 2016) <<https://www.theguardian.com/world/2016/jan/27/greece-warned-control-borders-schengen-european-commission>> accessed 14 October 2017; OHCHR, ‘UN Special Rapporteur on the Human Rights of Migrants Concludes His Follow up Country Visit to Greece’ (16 May 2016) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19972&LangID=E>> accessed 14 October 2017; Parliamentary Assembly, *The Mediterranean Sea: a Front Door to Irregular Migration* (n 963) paragraph 60 reports Greece not to register new arrivals.

<sup>974</sup> Traynor and Smith (n 973).

<sup>975</sup> Contrary to TFEU, article 78(1) ‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*’; EU Charter, article 18 and 19; Asylum Procedures Directive (n 158) articles 6,8 and 12(c).

<sup>976</sup> UNHCR, “Refugees/Migrants Response-Mediterranean”, 361,712 arrivals by sea <<http://data.unhcr.org/mediterranean/regional.php>> accessed 24 October 2017; UNHCR, “Over One Million Sea Arrivals reach Europe in 2015” <<http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>> accessed 24 October 2017.

there were only 51,091 applicants for international protection in 2016, out of which there were 28,030 pending applications, 2,467 received refugee status and 244 subsidiary protection; resulting in 26.5% refugee recognition rate.<sup>977</sup> If Greek authorities would have complied with their duty to register every irregular migrant arriving in its territory, Germany would not be sharing the asylum burden by 35% of the EU-28 total in 2015 with 442,000 first time asylum applicants and 722,000 in 2016,<sup>978</sup> sharing 60% of the total EU asylum burden.<sup>979</sup>

Greece's main preoccupation is to shift its responsibility for irregular migrants indirectly to other Member States, even though Greece risks being expelled from Schengen.<sup>980</sup> In February 2016, the Council recommended that Greece should

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<sup>977</sup> AIDA, "Statistics Greece" <<http://www.asylumineurope.org/reports/country/greece/statistics>> accessed 20 October 2017.

<sup>978</sup> Eurostat newsrelease, Asylum in the EU Member States 1.2 million First Time Asylum Seekers Registered in 2016 (46/2017-16 March 2017) <<http://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1>> accessed 24 October 2017; A first time applicant for international protection excludes repeat applicants- reflects the number of newly arrived persons applying for international protection in the reporting Member State.

<sup>979</sup> Eurostat Statistics Explained, "Asylum Statistics" <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> accessed 24 October 2017; 56% recognition rate in 2015, Eurostat press release, Asylum Decisions in the EU, EU Member States Granted Protection to More than 33 000 Asylum Seekers in 2015 (75/2016 - 20 April 2016) 5 <<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5>> accessed 24 October 2017; and 65% recognition rate in 2016, see Eurostat newsrelease, Asylum Decisions in the EU: Member States Granted Protection to More than 700,000 Asylum Seekers in 2016 [2017], 70/2017-26 April 2017, 5 <<http://ec.europa.eu/eurostat/documents/2995521/8001715/3-26042017-AP-EN.pdf/05e315db-1fe3-49d1-94ff-06f7e995580e>> accessed 24 October 2017.

<sup>980</sup> Traynor and Smith (n 973); The border-free Schengen Area allows citizens to cross internal borders without being subjected to border checks. See SBC, article 1. Since 2015, the Commission has identified 'serious' deficiencies 'on the application of the Schengen acquis in the field of management of the external borders by Greece as provided for in Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, *OJ L 295, 6.11.2013*, article 16(3). See Commission Communication, *Eighth Biannual Report on the Functioning of the Schengen Area*, 1 May – 10 December 2015, COM (2015) 675 final, 5. These deficiencies led to the temporary reintroduction of controls at the German, Austrian, Slovenian, Hungarian, Swedish and Norwegian internal borders. On 25 January 2016, EU leaders proposed that the Commission consider plans to allow internal border checks in Europe for up to two years. These proposals aimed to exclude Greece from the Schengen Zone. See Matthew Holehouse, Greece Faces being Sealed off from Europe to Stop Migrant Flow in Move that Creates 'Cemetery of Souls' (The Telegraph, 25 January 2016)

register and ensure the ‘timely collection and transmission of migrants’ fingerprints’ in accordance with Article 14 of the Eurodac Regulation.<sup>981</sup> If irregular migrants are not registered systematically, they may move on to seek asylum to other Member States; hence, the observed increase in first time asylum applicants in Slovenia, Croatia, Germany and Italy.<sup>982</sup> Greece is aware that Member States may not return irregular migrants who have first landed to Greece under Dublin. In accordance with the ECtHR and CJEU rulings, Dublin transfers to Greece are currently suspended.<sup>983</sup> The Commission has made numerous attempts to resume Dublin transfers to Greece however Greece a direct protester against such transfers argued to postpone Dublin transfers as it was under enormous migratory pressure and under an exceptional situation since the *MSS* judgment delivered in 2011.<sup>984</sup> Nonetheless, it is argued here that the unprecedented irregular migration crisis may not justify Greece from failure to fulfil its positive duty to identify, register, protect and provide access to asylum in accordance with the Refugee Convention, the ECHR, the EU Charter and the Eurodac Regulation.<sup>985</sup>

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<<https://www.telegraph.co.uk/news/worldnews/europe/eu/12119799/Greece-threatened-with-expulsion-from-Schengen-free-movement-zone.html>> accessed 16 June 2018.

<sup>981</sup> Council of the EU, Council Implementing Decision setting out a Recommendation on Addressing the Serious Deficiencies Identified in the 2015 Evaluation of the Application of the Schengen acquis in the Field of Management of the External Borders by Greece, Doc 5985/16, 12 February 2016, 6, recommendation 6.

<sup>982</sup> Eurostat Statistics Explained, “Asylum Statistics” (n 979).

<sup>983</sup> *MSS* (n 115) paragraphs 338-340; Commission, ‘Questions and Answers: Recommendation on the Conditions for Resuming Dublin Transfers of Asylum Seekers to Greece’ 8 December 2016 <[http://europa.eu/rapid/press-release\\_MEMO-16-4253\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-4253_en.htm)> accessed 28 October 2017; ECRE, ‘Germany: Suspension of Dublin Procedures to Greece Set to end on 15 March 2017’ 13 January 2017 <<https://www.ecre.org/germany-suspension-of-dublin-procedures-to-greece-set-to-end-on-15-march-2017/>> accessed 28 October 2017.

<sup>984</sup> Recommendation (EU) 2016/2256 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No 604/2013, C(2016) 8525 final, 15 December 2016, OJ L340, 11-12.

<sup>985</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale

In addition, Greece fails to offer an effective remedy for those individuals who manage to make an application for international protection, to which a fast track asylum procedure is applied,<sup>986</sup> lasting no more than 14 days, including a one day deadline for interview preparations and three days to lodge an appeal.<sup>987</sup> The Appeals Authority has the discretion to accept requests for appeal. However, even if the request is accepted, due to budget constraints the interview is conducted at a distance, while the Committee and the interpreter are situated in Athens.<sup>988</sup> It is argued that this fast-track procedure raises grave concerns with regard to the right to an effective remedy.<sup>989</sup> Article 13 ECHR requires the competent body, i.e. a court or tribunal, to examine the substance of the complaint and ensure proper reparation.<sup>990</sup> Confronted with practical obstacles, such as the inability to appear in person, an individual is prevented from establishing an arguable claim of his/her complaint.<sup>991</sup>

The Greek asylum and immigration appeals system is contrary to the overall objective of the EU Charter and the ECHR to offer an effective remedy. To offer a broader protection and an effective implementation of the right to an effective remedy, the EU Charter requires asylum applications to be reviewed by a court or tribunal,<sup>992</sup> whereas the ECHR requires asylum applications to be reviewed by a national authority providing objectivity and independence in the decision-making

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IT systems in the area of freedom, security and justice (Eurodac Regulation) [2013] OJ L180/1, see recital 16 and article 1.

<sup>986</sup> Greek Law 4375/2016, article 60; except for vulnerable individuals undergoing the admissibility assessment see Greek Law 4375/2016, article 14(8) and article 50(2) namely victims of torture or serious physical or sexual violence.

<sup>987</sup> Greek Law 4375/2016, article 60(4)(c)-(e).

<sup>988</sup> ECRE and others, 'The Implementation of the Hotspots in Italy and Greece' (n 938) 39.

<sup>989</sup> ECHR, article 13; EU Charter, article 47; see *MSS* (n 115) paragraph 372.

<sup>990</sup> *MSS* (n 115) paragraph 387.

<sup>991</sup> *MSS* (n 115) paragraph 389.

<sup>992</sup> EU Charter, article 47; C-175/11 *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General* (31 January 2013) paragraphs 11-12, on independence.

process.<sup>993</sup> Greece has the discretion to develop its domestic asylum system in a way that is compatible with EU law and the ECHR and ensure no outside pressure compromises the national authority's impartiality.<sup>994</sup> These legal safeguards have not been met by Greece. Since 2012, as a result of the ECtHR's decision in *MSS*,<sup>995</sup> Greece changed the appeals structure from that of the Council of State (the highest administrative court) to newly established special Appeals Committees.<sup>996</sup> After the entry into force of the EU-Turkey statement, at the time the refugee recognition rate in Greece was increasing, Greece amended its Appeals system once more. This time Greece had to amend its Appeals system not because it was ineffective, but because it was taking decisions contrary to the EU-Turkey statement. In more than 330 cases, the Appeals Committees raised serious doubts as to the safety of Turkey.<sup>997</sup> At first, these decisions were viewed as a victory of international law principles against the pressure brought by the irregular migration crisis to national and EU institutions.<sup>998</sup> However, at the same time, politicians feared that these decisions would re-open the gate in which more irregular migrants would depart from Turkey.<sup>999</sup> Instead of viewing these decisions with serious concerns about the safety of Turkey, the Commission urged Greece to adopt a new structure of Appeals Committees that would purportedly ensure 'full respect of EU and International law'.<sup>1000</sup> Hence, the Council of the EU urged the Greek government to convince its judges that Turkey is safe for Syrians.<sup>1001</sup>

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<sup>993</sup> ECHR, article 13; *H.I.D* (n 992) paragraph 10, not necessarily a tribunal; also see Asylum Procedures Directive (n 158) article 10(3)(a).

<sup>994</sup> *H.I.D* (n 992) paragraph 12(a); *Gautrin and Others v France* Application nos 21257/93, 21258/93 [1998] ECHR 39 see Information Note on the Court's Case Law <file:///C:/Users/User/Downloads/002-7784.pdf> accessed 15 October 2017.

<sup>995</sup> *MSS* (n 115).

<sup>996</sup> Greek Law 4375/2016, article 5(2).

<sup>997</sup> Amnesty International, "A Blueprint for Despair" (n 936) 14.

<sup>998</sup> Amnesty International, "A Blueprint for Despair" (n 936) 14.

<sup>999</sup> Amnesty International, "A Blueprint for Despair" (n 936) 14; Fotiadis, Smith and Kingsley, 'Syrian Refugee Wins Appeal Against Forced Return to Turkey' (n 550).

<sup>1000</sup> Amnesty International, "A Blueprint for Despair" (n 936) 14; Commission, *Second Report on the Progress ...* (n 550) 4; emphasis added.

<sup>1001</sup> Irene Kostaki, 'EU Council: Why Greece Should Consider Turkey Safe for Syrian Refugees' (New Europe, 9 June 2016) <<https://www.neweurope.eu/article/eu-council-greece-consider-turkey-safe-syrian-refugees/>> accessed 14 October 2017.



A change in the composition of the Appeals Committees would guarantee an expedited process facilitating returns from Greece to Turkey. The composition of the Appeals Committee was modified from one representative of the UNHCR, one human rights expert and one representative of the Ministry of the Interior, to two judges of the Administrative Courts and one representative of the UNHCR.<sup>1002</sup> This new composition is very similar to the prior administrative court structure in 2012, which the ECtHR had identified as a key cause of the deficiency in the Greek asylum system,<sup>1003</sup> raising questions of constitutionality with regard to the involvement of judicial officials in administrative bodies.<sup>1004</sup> Amongst its first decided cases, the newly composed Greek appeals committee upheld a deportation decision to return a 20-year-old Syrian man to Turkey.<sup>1005</sup> It is argued here that this new composition does not fulfil the ‘objectivity and independence’ criteria set out by the ECHR and the EU Charter, especially considering the outside pressure on Greece by the Commission and the Council of the EU to bring the Appeals Committee in line with the EU-Turkey statement.<sup>1006</sup> The Head of the Greek Asylum Services has declared that ‘insufferable pressure is being put on us to reduce our standards and minimize the guarantees of the asylum processes’.<sup>1007</sup> This new structure does not guarantee irregular migrants arriving by sea a right to an effective remedy, a violation of EU and international human rights law.<sup>1008</sup>

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<sup>1002</sup> Greek Law 4375/2016, article 5(2); Amnesty International, ‘A Blueprint for Dispair’ (n 936) 15; Commission, *Second Report on the Progress ...* (n 550) 5.

<sup>1003</sup> *MSS* (n 115) paragraph 117.

<sup>1004</sup> ECRE, ‘Greece Amends its Asylum Law After Multiple Appeals Board Decisions Overturn the Presumption of Turkey as a ‘Safe Third Country’ 24 June 2016 <[www.ecre.org/greece-amends-its-asylum-law-after-multiple-appeals-board-decisions-overturn-the-presumption-of-turkey-asa-safe-third-country/](http://www.ecre.org/greece-amends-its-asylum-law-after-multiple-appeals-board-decisions-overturn-the-presumption-of-turkey-asa-safe-third-country/)> accessed 25 October 2017.

<sup>1005</sup> Patrick Kingsley, Reformed Greek Appeals Panel Upholds Syrian Refugee’s Deportation (The Guardian, 12 September 2016) <<https://www.theguardian.com/world/2016/sep/12/reformed-greek-appeals-panel-upholds-syrian-refugee-deportation>> accessed 24 October 2017.

<sup>1006</sup> Kostaki (n 1001).

<sup>1007</sup> Sergio Carrerra and Aikaterini Drakopoulou, ‘Unsafe Turkey, Unsafe Europe’ (Open Democracy, 29 September 2016) <<https://www.opendemocracy.net/sergio-carrera-aikaterini-drakopolou/unsafe-turkey-unsafe-europe>> accessed 24 October 2017; Asylum Procedures Directive (n 158) article 10(3).

<sup>1008</sup> ICCPR, articles 2 and 14; ECHR, article 13; EU Charter, article 47; Human Rights Committee,

## 5.5 Italy – Unlawful and Arbitrary Detention

To tackle migratory pressure the Commission proposed that Italy in collaboration with Frontex, EASO and Europol to ‘swiftly identify, register and fingerprint incoming migrants’ under the newly set up ‘Hotspot’ approach established upon existing reception facilities.<sup>1009</sup> These hotspots would turn into locations where disembarkation takes place and where irregular migrants would be identified for asylum, relocation and return purposes. Hence, irregular arrivals by sea were accommodated in First Aid and Reception Centres (CPSA), First Accommodation Centres (CPA), and Temporary Centres for Emergency Reception (CAS) where they received basic needs such as food and accommodation up to a maximum of 30 days. Once they were identified and registered they would then be transferred on to the System for the Protection of Asylum Seekers and Refugees (SPRAR) or expulsions centres.<sup>1010</sup> No specific change in Italian legislation addressed the procedure and legal safeguards offered during the three fundamental stages of the hotspots such as: fingerprinting, early screening separating asylum seekers from other irregular migrants, and onward transfer.<sup>1011</sup> Irregular migrants in Italy are disembarked and detained in Italian hotspots based on 1) an EU Council Decision,<sup>1012</sup> 2) Italian ‘Roadmap’<sup>1013</sup> on 28 September 2015 indicating the approach for implementation of the hotspots such as ‘medical screening, pre-identification, registration, photographing and fingerprinting of foreigners’ and 3)

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*General Comment No 31* (n 657) paragraph 4 and 15-16.

<sup>1009</sup> Commission, *A European Agenda on Migration* (n 377) 6.

<sup>1010</sup> See established hotspots in Lampedusa, Pozzallo, Trapani and Taranto; *Italy: Legislative Decree No. 142 of 2015 (reception)*, 19 August 2016, available at: <http://www.refworld.org/docid/57b6d6cd4.html> [accessed 27 October 2017] article 11; ECRE and others, ‘The Implementation of the Hotspots in Italy and Greece’ (n 938) 31.

<sup>1011</sup> Amnesty International 2016, 12

<file:///C:/Users/User/Downloads/EUR3050042016ENGLISH%20(5).PDF> accessed 24 October 2017.

<sup>1012</sup> Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece 3 September 2015, Doc 11161/15, paragraph 14; legal basis TFEU, article 78(3).

<sup>1013</sup> Ministry of Interior, Italian Roadmap, 28 September 2016,

<[http://www.immigrazione.biz/upload/Roadmap\\_2015.pdf](http://www.immigrazione.biz/upload/Roadmap_2015.pdf)> accessed 24 October 2017.

Standard Operating Procedures (SOPs)<sup>1014</sup> in March 2016 on the details and tasks to be pursued upon disembarkation.

This chapter argues that irregular migrants disembarked to Italian hotspots are unlawfully and arbitrarily detained.<sup>1015</sup> In the absence of legislation regulating detention in hotspots, any deprivation of liberty must be conducted in accordance with Italian pre-existing legislation adopted for the purpose of identification and expulsion for individuals crossing irregularly EU territory and are issued an expulsion order.<sup>1016</sup> Italian legislation does not provide a legal basis for automatic detention of individuals who are disembarked in Italy as a result of rescue operations. Only if the rescued individual refuses to give his/her identity or provides false documents may Italian authorities detain not more than 24 hours for the purpose of identification.<sup>1017</sup> To remand the unauthorised entrant for a maximum of 48 hours, the detention must be authorised by judicial authorities only under ‘exceptional circumstances of necessity and urgency *strictly defined by law*’.<sup>1018</sup> Italian authorities have detained intercepted and rescued irregular migrants for prolonged periods even before the hotspots were adopted for the purpose of identification.<sup>1019</sup> Furthermore, the detention of those individuals that

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<sup>1014</sup> Ministry of Interior, Standard Operating Procedures (SOPs) applicable to Italian hotspots, March 2016, <[http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots\\_ops\\_-\\_english\\_version.pdf](http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_ops_-_english_version.pdf)> accessed 24 October 2017.

<sup>1015</sup> ECHR, article 5(1)(f); see *Khlaifia* (n 115) paragraphs 105-108, 120-122, 131-135 in which the ECtHR found detention in Italy unlawful contrary to Article 5(1), (2) and (4) – detention had no legal basis in domestic law.

<sup>1016</sup> Italian Constitution Deliberation of the Constituent Assembly of 22 December 1947, promulgation of the Provisional Head of State of 27 December 1947, Official Gazette extraordinary issue no 298 of December 27, 1947 (which entered into force on 1 January 1948) article 13; Italian Legislative Decree no 286 of 1998, *Consolidated text of provisions concerning immigration regulations and rules on the status of aliens*, OJ 18 August 1998, as amended by Laws no 271 of 2004 and no 155 of 2005, and by Legislative Decree no 150 of 2011, article 14; *Del Rio Prada v Spain* Application no 42750/09 (21 October 2013) paragraph 125; *Medvedyev* (n 159) paragraph 79.

<sup>1017</sup> Italian Constitution (n 1016) article 13.

<sup>1018</sup> Italian Constitution (n 1016) article 13; emphasis added.

<sup>1019</sup> Elisa Maimone, ‘The EU “hotspot approach” and the relocation procedures to the (Italian) test: implementation, shortcomings and critical remarks’ 21 September 2016

refused to provide their fingerprints were extended to days or even weeks.<sup>1020</sup> These individuals were deprived of their liberty without a legal basis, or formal detention order and without a judicial review to challenge the lawfulness of such detention contrary to domestic, regional and international human rights law.<sup>1021</sup> To date, no new legislation has been adopted to fill the legal gap of uncertainty as to the legal basis of irregular migrants' detention in hotspots, but nonetheless, this chapter argues that new law may not retroactively justify unlawful detentions occurring before it.

Furthermore, although Italy has an obligation under the Reception Conditions Directive to offer material reception to individuals seeking international protection before disembarking irregular migrants,<sup>1022</sup> Frontex has the primary obligation to assess the reception situation in Italy.<sup>1023</sup> Frontex must ensure that those rescued are accommodated at an adequate standard of living offered effective protection to physical and psychological health, paying particular attention to vulnerable<sup>1024</sup> individuals.<sup>1025</sup> Such protection consists of adequate food, clothing, housing and financial allowance.<sup>1026</sup> Intercepted or rescued irregular migrants are accommodated in CAS centres. However, these have been reported to be unfit for accommodation, being overcrowded with very poor standards of hygiene.<sup>1027</sup> It must be borne in mind that in 2015, Italy received

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<<http://immigrazione.jus.unipi.it/wp-content/uploads/2016/09/Maimone-Hotspots-and-relocationWorking-Paper-3-2016.pdf>> accessed 24 October 2017.

<sup>1020</sup> Amnesty International 2016 (n 1011) 28.

<sup>1021</sup> Italian Constitution (n 1016) article 13; ECHR, article 5(1); See also OHCHR, 'Italy's Migrant Hotspot Centres Raise Legal Questions' 2 August 2016 <<http://www.ohchr.org/EN/NewsEvents/Pages/LegalQuestionsOverHotspots.aspx>> accessed 26 October 2017.

<sup>1022</sup> Reception Conditions Directive (n 753) article 17.

<sup>1023</sup> Sea Borders Regulation (n 7) article 4.

<sup>1024</sup> Minors, unaccompanied minors, elderly, pregnant women, disabled people and individuals subjected to ill-treatment, see Reception Conditions Directive (n 753) article 21; *MSS* (n 115) paragraph 232: 'being an asylumseeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'.

<sup>1025</sup> Reception Conditions Directive (n 753) article 17 and Article 21.

<sup>1026</sup> Reception Conditions Directive (n 753) article 2(g).

<sup>1027</sup> Médecins sans Frontières, 'Neglected Trauma – Asylum seekers in Italy: an Analysis of

153,842 arrivals by sea and in 2016 received 170,973; this is at a time when its first and second stage reception capacities offered only 120,000 places.<sup>1028</sup> Given the high numbers of irregular migrants, Italy does not provide adequate accommodation for vulnerable persons, a practice which is in breach of Reception Conditions Directive obligations.

Far worst, Italy is not complying with its duty to provide accommodation to asylum seekers due to a lack of reception capacity. NGOs have reported that many asylum seekers in Rome are homeless, sleeping on streets, railway stations, parks or abandoned construction sites.<sup>1029</sup> The municipality of Milan has also confirmed that due to limited reception capacity they have turned away people who have presumably ended up homeless on the streets.<sup>1030</sup> Leaving asylum seekers on the streets is not compatible with respect for human dignity.<sup>1031</sup> Furthermore, unable to provide for their basic needs, asylum seekers in Italy risk ill-treatment amounting to a violation of Article 3 ECHR.<sup>1032</sup> Reports from the Commissioner for Human Rights of the Council of Europe reveal that Italy offers inadequate reception conditions to asylum seekers which on a case by case basis raise doubts as to the efficiency of its asylum and immigration system.<sup>1033</sup>

Despite various reports from NGOs, civil society groups and international bodies, the ECtHR has not yet declared the Italian asylum and immigration system dysfunctional or deficient.<sup>1034</sup> However, this chapter argues that Frontex, when considering the place of disembarkation, should follow the legal reasoning of the ECtHR and national courts by analogy with the Dublin transfers. Recent practice

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Mental Health Distress and Access to Healthcare' 15 July 2016, 20.

<sup>1028</sup> Amnesty International, 'Hotspot Italy: How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights' 3 November 2016, 44.

<sup>1029</sup> *ibid.*

<sup>1030</sup> *ibid.*

<sup>1031</sup> EU Charter, article 1.

<sup>1032</sup> *MSS* (n 115) paragraphs 249 and paragraphs 263-264.

<sup>1033</sup> Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, published on 18 September 2012, following his visit to Italy from 3 to 6 July 2012, CommDH(2012)26, 2.

<sup>1034</sup> *Tarakhel v Switzerland* Application no 29217/12 ECHR 2014, paragraph 115; *EM (Eritrea) and others v the Secretary of State for the Home Department* [2012] EWCA Civ 1336, paragraph 63.

shows that Belgian national courts are reluctant to transfer individuals to Italy holding that they could face inhuman and degrading treatment.<sup>1035</sup> Furthermore, in *Tarakhel* the ECtHR held that ‘systemic deficiencies’ were *not* the only grounds for stopping Dublin transfers and that Dublin transfers can be stopped even in those cases where the Member States’ asylum system is not in ‘complete breakdown’.<sup>1036</sup> Thus it may be argued in this chapter that Dublin transfers or disembarkation practices to Italy should be temporarily suspended on the grounds of an overburdened asylum system violating the right to asylum and prohibition of collective expulsions and the *non-refoulement* principle.

### 5.5.1 Irregular Migrants Subjected to Ill-Treatment upon Disembarkation

Irregular migrants who wish to move to other Member States have refused to provide their fingerprints. Since 2014, the Commission put immense pressure on Italian authorities to target a 100% fingerprinting rate and take every effort at legislative level to ‘allow use of force for fingerprinting and to include provisions on longer term retention for those migrants that resist fingerprinting’;<sup>1037</sup> obliging Italy to comply with the ‘Best Practices for upholding the Obligation in the Eurodac Regulation to take fingerprints’.<sup>1038</sup> It was only after the Commission opened infringement proceedings against Italy for breaking the Eurodac Regulation that Italy succeeded in achieving an almost 100% fingerprinting

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<sup>1035</sup> ECRE, ‘Belgian Administrative Court Suspends the Return to Italy of Two Asylum Seekers’ 30 April 2015 <<http://us1.campaignarchive2.com/?u=8e3ebd297b1510becc6d6d690&id=e42964d592&e=1dc2474466#Belgian Court>> accessed 25 October 2017.

<sup>1036</sup> *Tarakhel* (n 1034) paragraph 120; Steve Peers, ‘*Tarakhel v Switerland*: Another Nail in the Coffin of the Dublin System? EU Law Analysis’ (5 November 2014) <<http://eulawanalysis.blogspot.al/2014/11/tarakhel-v-switzerland-another-nail-in.html>> accessed 24 October 2017.

<sup>1037</sup> European Commission, *Progress Report on the Implementation of the hotspots in Italy* 15 December 2015, COM (2015) 679 final, 4.

<sup>1038</sup> European Commission, ‘Best Practices for upholding the Obligation in the Eurodac Regulation to take fingerprints’ 30 October 2014 <<http://statewatch.org/news/2014/dec/eu-com-coercive-fingerprinting-migrants-ds-1491-14.pdf>> accessed 24 October 2017.

rate.<sup>1039</sup> This success was attributed to the use of coercive measures against irregular migrants that refused to provide their fingerprints.<sup>1040</sup>

Irregular migrants have alleged to being subjected to ‘beatings causing severe pain; the infliction of electric shocks by means of electrical batons; and sexual humiliation and infliction of pain to the genitals’.<sup>1041</sup> This chapter argues that the practice of Italian law enforcement authorities to use ‘electrical batons to administer electric shocks’ which are ‘portable electroshock weapons, deliver a painful electric shock aimed at causing compliance by directly touching electrodes onto the skin, disrupting muscle functions and/or causing pain’ amounts to ill treatment.<sup>1042</sup> In assessing whether the applicant runs a real risk of ill treatment contrary to Article 3 ECHR, the Court applies a rigorous test and makes an assessment based on all the information obtained at the material time.<sup>1043</sup> In assessing whether Article 3 ECHR is engaged, the Court has reiterated that ‘ill-treatment must attain a minimum level of severity; that the assessment of this ‘minimum’ is relative;<sup>1044</sup> and that it depends on all the circumstances of the case,<sup>1045</sup> such as the duration of the treatment, its physical or mental effects and, in some instances, the sex, age and state of health<sup>1046</sup> of the victim’.<sup>1047</sup>

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<sup>1039</sup> European Commission, Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings, 10 December 2015 <[http://europa.eu/rapid/press-release\\_IP-15-6276\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6276_en.htm)> accessed 24 October 2017; Eurodac Regulation (n 985) article 9 and 14 ‘each Member State must promptly take the fingerprints of all fingers of every foreigner of at least 14 years of age who seeks asylum in the country or is apprehended while irregularly entering the country’. Regulation does not mention coercive measures taken for fingerprints. It refers to ‘national practice of the Member State concerned and in accordance with human rights safeguards’ see Eurodac Regulation (n 985) article 3(5).

<sup>1040</sup> Amnesty International 2016 (n 1011) 15.

<sup>1041</sup> Amnesty International 2016 (n 1011) 17.

<sup>1042</sup> See Chapter 4, section 4.4 for a detailed analysis of inhuman treatment.

<sup>1043</sup> *Chahal* (n 59) paragraph 60.

<sup>1044</sup> *Hilal v The United Kingdom* Application no 45276/99 ECHR 2001-II, paragraph 60.

<sup>1045</sup> *Vilvarajah and others v The United Kingdom*, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991, paragraph 108.

<sup>1046</sup> *D v United Kingdom* Application no 30240/96 [1997] ECHR 25, paragraph 50.

<sup>1047</sup> *Moghaddas* (n 967) paragraph 34; also see *Labita* (n 690) paragraphs 120 and 121.

Law enforcement officials must not use force unless it is strictly necessary and to the extent required to perform their duties.<sup>1048</sup> If there is no alternative to the use of force then law enforcement officials may adhere to use of force subject to the principles of strict necessity and the use of force should be to a minimum as not to outweigh the law enforcement objective.<sup>1049</sup> Trained police officers cannot be justified to use physical or psychological force during the taking of fingerprints against irregular migrants for the purpose of Eurodac, at a time they could proactively persuade him/her as to the benefits of fingerprinting.<sup>1050</sup> Such persuasion may be ensured through effective information and counselling in a language the individual understands with due account to cultural and gender considerations.<sup>1051</sup> Furthermore, in conducting use of force for the purpose of coercing fingerprinting, Italian authorities violate Italian Constitution which clearly states that ‘any physical or moral violence against people subjected to restrictions of their liberty of whichever nature must be punished’.<sup>1052</sup> Hence, by disembarking irregular migrants to Italy, Frontex subjects them to ill-treatment contrary to Article 4 of the EU Charter and Article 3 ECHR.

### **5.5.2 Right to Seek Asylum - Infringed by Italy**

This chapter further argues that by disembarking irregular migrations to Italy, Frontex becomes complicit in violations of the right to seek asylum contrary to the Refugee Convention, the ECHR and the EU Charter.<sup>1053</sup> The screening procedure adopted in the Italian hotspots arguably violates the right to seek

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<sup>1048</sup> General Assembly Resolution 34/169 of 17 December 1979, *Code of Conduct for Law Enforcement Officials*, articles 2 and 3.

<sup>1049</sup> *ibid.*

<sup>1050</sup> FRA, ‘Fundamental rights implications of the obligation to provide fingerprints for Eurodac’, October 2015, 1 <<http://fra.europa.eu/en/publication/2015/fundamental-rights-implications-obligation-provide-fingerprints-eurodac#main-conclusions>> accessed 24 October 2017.

<sup>1051</sup> FRA, ‘Fundamental rights implications’ (n 1050) 1.

<sup>1052</sup> Italian Constitution (n 1016) article 13; coercive force can be used to take ‘hair or saliva’ from a person subject to criminal investigation following the authorisation of the Public Prosecutor; see Italian Code of Criminal Procedure, DPR 22 September 1988, No 447, article 349(2) <[http://www.normattiva.it/static/codici\\_proc\\_penale.html](http://www.normattiva.it/static/codici_proc_penale.html)> accessed 25 October 2017.

<sup>1053</sup> Refugee Convention, article 1A(2); ECHR, article 3; TFEU, article 78; EU Charter, article 18; Recast Qualification Directive (n 720) article 1.



asylum.<sup>1054</sup> During the identification procedure, Italy requires individuals to specify the reason for entry, dividing individuals as potential asylum seekers or economic migrants.<sup>1055</sup> In Italian hotspots, access to asylum is largely based on whether this intention has been clearly and accurately expressed to the police, or to Frontex officers. Immediately upon disembarkation, after irregular migrants are given water and a snack, they are handed a piece of paper on which to write down their name, age and nationality,<sup>1056</sup> in the absence of adequate information, an interpreter or legal assistance.<sup>1057</sup> Police officers then ask question as to the reason for leaving their country of origin, whilst another officer ticks the relevant box in the questionnaire named ‘foglio-notizie’.<sup>1058</sup> If these individuals do not expressly state ‘asylum’ as their intention for arriving in Italy, they are given a formal standardised removal order and receive no access to the reception system.<sup>1059</sup> In the absence of a monitoring mechanism, the individual’s fate is sealed once the form ‘foglio-notizie’ is completed. It is argued that asking individuals why they left their country of origin violates international refugee law. Through this specific question, the Italian screening procedure is effectively adopting its domestic criterion for refugee determination status instead of applying the international refugee law factor determining the status of a refugee, which is based on the situation he/she *would face* if returned to their country of origin not

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<sup>1054</sup> *ibid.*

<sup>1055</sup> The Swiss Refugee Council, ‘Reception Conditions in Italy, Report on the Current Situation of Asylum Seekers and beneficiaries of protection, in particular Dublin Returnees, in Italy’ August 2016, 17, <<https://www.refugeecouncil.ch/assets/news/2016/161031-final-englisch-sfh-bericht-italien-aufnahmebedingungen.pdf>> accessed 24 October 2017.

<sup>1056</sup> Amnesty International, ‘Hotspot Italy’ (n 1028) 33.

<sup>1057</sup> AIDA, ‘Country Report: Italy’ December 2015, 26 <<http://www.asylumineurope.org/reports/country/italy>> accessed 24 October 2017; ECRE and others, ‘The Implementation of the Hotspots in Italy and Greece’ (n 938) 15; Amnesty International, ‘Hotspot Italy’ (n 1028) 37.

<sup>1058</sup> Italian Constitution (n 1016) article 13; Ministry of Interior, ‘Italian Roadmap’ (28 September 2016) <[http://www.immigrazione.biz/upload/Roadmap\\_2015.pdf](http://www.immigrazione.biz/upload/Roadmap_2015.pdf)> accessed 24 October 2017; Based on Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239, article 8 six hotspots were planned, in Lampedusa, Trapani, Pozzallo, Taranto and Augusta.

<sup>1059</sup> Amnesty International, ‘Hotspot Italy’ (n 1028) 34; also see Médecins sans Frontières, ‘Out of Sight’ March 2016, 6 <[https://www.aerzte-ohne-grenzen.de/sites/germany/files/attachments/aerzte\\_ohne\\_grenzen\\_out\\_of\\_sight\\_report.pdf](https://www.aerzte-ohne-grenzen.de/sites/germany/files/attachments/aerzte_ohne_grenzen_out_of_sight_report.pdf)> accessed 26 October 2017.

on the reason why they left their country.<sup>1060</sup> Both practically and legally, this form constitutes a major obstacle to irregular arrivals by sea having access to asylum.

Furthermore, at the time this form is completed, individuals are given no adequate information on the legal consequences for incorrect completion by police officers.<sup>1061</sup> The situation is aggravated when considering that these police officers are not properly trained to identify those in need of protection and those with vulnerabilities.<sup>1062</sup> Although specialised agencies such as IOM, UNHCR and Save the Children assist at disembarkation hotspots, it is not possible for them to be present in all circumstances.<sup>1063</sup> The deficiencies of this particular identification procedure were addressed in January 2016 by the Italian Prefect Mario Morcone who, through a circular, reminded the police to offer a genuine opportunity for those disembarked to seek asylum through providing adequate information.<sup>1064</sup> After this circular was issued, the number of expulsion orders significantly reduced.<sup>1065</sup> The circular demonstrated that the actual problem is not the absence of ‘know-how’ by the police on how to provide adequate safeguards to potential asylum seekers, but the immense pressure by the Italian government and EU institutions on Italian authorities to return as many irregular migrants as possible.<sup>1066</sup>

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<sup>1060</sup> Refugee Convention, article 33(1); emphasis added.

<sup>1061</sup> Amnesty International, ‘Hotspot Italy’ (n 1028) 35.

<sup>1062</sup> OHCHR, ‘Security at Forefront as Italian Island Receives Migrants’ 18 July 2016, <<http://www.ohchr.org/EN/NewsEvents/Pages/SecurityatforefrontasItalian.aspx>> accessed 24 October 2017.

<sup>1063</sup> Amnesty International, ‘Hotspot Italy’ (n 1028) 33.

<sup>1064</sup> Ministry of Interior, ‘Circular’ (8 January 2016) <[http://www.asgi.it/wp-content/uploads/2016/01/2016\\_Ministero\\_Interno\\_accesso\\_asilo\\_garanzie\\_modalita.pdf](http://www.asgi.it/wp-content/uploads/2016/01/2016_Ministero_Interno_accesso_asilo_garanzie_modalita.pdf)> accessed 24 October 2017.

<sup>1065</sup> Amnesty International, ‘Hotspot Italy’ (n 1028) 39.

<sup>1066</sup> Amnesty International, ‘Hotspot Italy’ (n 1028) 39.

### 5.5.3 Risk of Arbitrary Repatriation?

Furthermore, this flawed identification procedure arguably violates the *non-refoulement* principle. Once the individual is confirmed to be from Egypt, Tunisia, Morocco, Nigeria or Sudan, third countries with which Italy has entered into readmission agreements, expulsion proceedings are commenced to return the individual within 48 hours.<sup>1067</sup> Considering that these third countries are systematic human rights violators, these readmission agreements raise grave concerns about the adequacy of legal safeguards during expulsion proceedings.<sup>1068</sup> This chapter argues that these readmission agreements, particularly the readmission agreement with Sudan, infringe an individual's right to seek asylum and violate the principle of *non-refoulement* and the prohibition of collective expulsions.<sup>1069</sup>

Immediately upon disembarkation, Sudanese nationals are detained in the hotspots to be repatriated under the '48 hours return procedure' in accordance with the MoU signed by Italian and Sudanese police authorities.<sup>1070</sup> On 24 August 2016, under Frontex supervision and financial assistance,<sup>1071</sup> Italian authorities accepted that they had repatriated at least 40 Sudanese nationals in accordance with the MoU.<sup>1072</sup> The Italian-Sudanese MoU provides that the detailed

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<sup>1067</sup> Amnesty International, 'Hotspot Italy' (n 1028) 42-43.

<sup>1068</sup> See HRW on the Middle East/North Africa <<https://www.hrw.org/middle-east/n-africa>> accessed 22 October 2017.

<sup>1069</sup> Refugee Convention, article 33; ECHR, article 3; Protocol No 4 to the ECHR, article 4; EU Charter, article 18 and 19.

<sup>1070</sup> Sudan, Italy sign MoU to stem crime and irregular migration, 4 August 2016 (Signed in Rome 3 August 2016) <<http://www.sudantribune.com/spip.php?article59832>> accessed 24 October 2017 (Firmato memorandum di intesa tra Italia e Sudan su migrazione, 5 August 2016, <<http://www.stranieriinitalia.it/attualita/attualita/attualita-sp-754/firmato-memorandum-di-intesa-tra-italia-e-sudan-su-migrazione.html>> accessed 14 October 2017); Memorandum d'intesa tra il Dipartimento della pubblica sicurezza del Ministero dell'Interno Italiano e la Polizia nazionale del Ministero dell'Interno Sudanese per la lotta alla criminalità, gestione delle frontiere e dei flussi migratori ed in materia di rimpatrio, Rome, 3 August 2016, <[http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan\\_rev.pdf](http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan_rev.pdf)> accessed 24 October 2017; Amnesty International, 'Hotspot Italy' (n 1028) 44.

<sup>1071</sup> Amnesty International, 'Hotspot Italy' (n 1028) 44.

<sup>1072</sup> Angelino Alfano, 'Video Interview with the Minister of Interior' (Il Fatto Quotidiano, 3

investigation for identification purposes should take place once the individual is returned in Khartoum, Sudan; hence, no adequate assessment of individual circumstances is performed by Italian authorities.<sup>1073</sup> In accordance with Italy's EU and international obligations, the Italian authorities must not return an individual who claims to be or is suspected of being a Sudanese national to Sudan with knowledge that Sudan subjects individuals to human rights violations. But how may Italian authorities assess the risk the individual would face upon repatriation to Sudan if they are unable to confirm the identity of the individual prior to return?

Since 2003, Italian authorities have had knowledge of the Sudanese armed conflict causing massive displacement, civilian casualties and human rights abuses.<sup>1074</sup> The Sudanese President, Omar al-Bashir, has been charged by the Prosecutor of the International Criminal Court with war crimes, genocide and crimes against humanity for atrocities committed in Darfur from 2003 to 2008.<sup>1075</sup> Despite knowledge on the on-going situation in Sudan, Italian authorities have entered into the repatriation agreement with Sudan to return individuals without performing any form of identification procedure, let alone carefully examining whether upon return the individual would face ill-treatment. The ECtHR has already made it clear that compliance with bilateral agreements cannot act as justification for non-compliance with international law.<sup>1076</sup> In light of the on-going human rights violations taking place in Sudan, it is argued that Italy in collaboration with Frontex has violated the principle of *non-refoulement* when returning the 40 Sudanese nationals to Sudan.

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September 2016) <<http://tv.ilfattoquotidiano.it/2016/09/03/migranti-alfano-riabilita-i-rimpatri-collettivi-tutto-regolare-anzi-calchero-la-mano/556944>> accessed 24 October 2017; See also a relevant interview with the Head of the Italian Police, Franco Gabrielli, 'Repatriated Migrants in Sudan,' All Regulate" (in L'Avvenire, 28 September 2016) <<http://www.avvenire.it/cronaca/pagine/migranti-rimpatriati-in-sudan-gabrielli.aspx>> accessed 24 October 2017.

<sup>1073</sup> Amnesty International, 'Hotspot Italy' (n 1028) 44.

<sup>1074</sup> Amnesty International, 'Hotspot Italy' (n 1028) 46.

<sup>1075</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 <<https://www.icc-cpi.int/darfur/albashir>> accessed 22 March 2017.

<sup>1076</sup> *Sharifi* (n 115) paragraph 223-224; *Hirsi* (n 57) paragraph 129.

It is thus also arguable that the Italian expulsion orders to Sudan violate the prohibition of collective expulsions.<sup>1077</sup> According to the reports produced by Amnesty International, the expulsion orders given to Sudanese and other nationals included generic sentences such as ‘it was established that the person was not in need of international protection, as foreseen by art.10 c.4, D.L. 286/98’.<sup>1078</sup> The orders do not refer to an individual assessment of personal circumstances but only include general wording of standardised forms to be filled by police officers. Similar decisions do not necessarily mean a collective expulsion has taken place as long as the individual was given the opportunity to challenge his expulsion to competent authorities on an individual basis.<sup>1079</sup> However, Amnesty International reports that the Sudanese nationals were given no opportunity to challenge their expulsion by competent independent and objective authorities.<sup>1080</sup> These individuals were handed over to Sudanese authorities within the timeframe of 48 hours without given access to an interpreter or legal advice to provide them with the necessary information on the right to asylum or to have access to other national procedures.<sup>1081</sup> Neither were these individuals given the opportunity to raise arguments against their expulsion and subsequently examined by State authorities.<sup>1082</sup> The repatriated individuals were expelled as a group only because they belonged to the same nationality. On these grounds it is argued that the expulsion as a group of Sudanese nationals amounts to a collective expulsion.<sup>1083</sup> Italy has been found by the ECtHR on two occasions to have violated the prohibition of collective expulsions and to date it continues to violate the ECHR

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<sup>1077</sup> See section 5.2 on collective expulsions.

<sup>1078</sup> Amnesty International, ‘Hotspot Italy’ (n 1028) 48.

<sup>1079</sup> *Sultani v France* Application no 45223/05 ECHR 2007 IV, paragraph 81; *Andric* (n 620) paragraph 1; on collective expulsions see section 5.2 of this Chapter.

<sup>1080</sup> *Čonka* (n 842) paragraph 58 and 79.

<sup>1081</sup> Protocol No 4 to the ECHR, article 4 in conjunction with ECHR, article 13; *Sharifi* (n 115) paragraphs 242-243.

<sup>1082</sup> *Khlaifia* (n 115) paragraph 132-133; *Sultani v France* (n 1079) paragraph 81.

<sup>1083</sup> Protocol No 4 to the ECHR, article 4; EU Charter, article 19(1); *Georgia* (n 839) paragraphs 171-178; *Sharifi* (n 115) paragraph 223-225.

and international law despite the judgments against it.<sup>1084</sup> Thus, it is argued that by disembarking irregular migrants to Italy, Frontex risks exposing would-be asylum seekers to arbitrary repatriation to Egypt, Tunisia, Morocco, Nigeria or Sudan in violation of the principle of *non-refoulement*.

## 5.6 Conclusion

In the context of border control, the permissive coercive rules to be conducted in the territorial sea of the host Member State under Article 6(2)(b), or on the high seas Article 7 (2)(b) under the Sea Borders Regulation as they now stand violate the right to seek asylum, the principle of *non-refoulement* and the prohibition of collective expulsions. Furthermore, the rules provided by the Sea Borders Regulation on disembarkation to the host State or coastal State (often being Italy and Greece) are vulnerable to future litigation outcomes by the CJEU and the ECtHR. This chapter disputes the safety of Italy and Greece for the disembarkation of intercepted and rescued irregular migrants. As a consequence of the recent migration flows, the overburdened reception systems of Italy and Greece resulted in significant shortcomings in the processing and reception of irregular migrants by sea. As a result, basic needs such as food, water, shelter, sanitation, medical care and access to the immigration and asylum systems were lacking. Italy and Greece were under-prepared to receive new arrivals, to register and accommodate them in reception facilities offering adequate living standards. These two countries cannot guarantee basic reception needs upon disembarkation, and for this reason this chapter has argued that Italy and Greece cannot be considered safe places for disembarkation. The ECtHR and national courts had already found the Greek asylum and immigration system to be dysfunctional. Although the Italian asylum system is not yet suffering a complete breakdown, it has led to violations of the Refugee Convention, the ECHR and the EU Charter. It is argued that the Sea Borders Regulation contravenes CJEU and ECtHR case law prohibiting returns to unsafe countries. In addition, by disembarking irregular

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<sup>1084</sup> *Hirsi* (n 57) paragraph 186; *Sharifi* (n 115) paragraph 225.

migrants to Italy and Greece, Frontex is alleged in this chapter to have participated in a series of internationally wrongful acts such as violation of the ‘right to seek asylum’, the prohibition of collective expulsion, and the principle of *non-refoulement*.

This chapter suggests that the Regulation should be amended to provide alternative places of disembarkation if the host Member State is not considered safe. Frontex may follow the UNHCR guidelines on disembarkation on the concept of ‘next port of call’, meaning the nearest port of geographic proximity.<sup>1085</sup> To Frontex, this would mean disembarkation in the nearest Member State ports such as France or Spain. The UNHCR has already proposed in 2011, a ‘Model Framework for Cooperation following Rescue at Sea Operations involving Refugees and Asylum Seekers’ addressing disembarkation situations by the State other than the flag State.<sup>1086</sup>

Irregular migrants should not be penalised for crossing borders irregularly. State authorities are urged to gather information on apprehended individuals before they are returned to or disembarked at a place of safety for two reasons: 1) assessing individual needs for international protection, and 2) for use as a defence in domestic courts by showing that State operations are not being conducted discriminately. These individuals must be given the right to an effective remedy against any removal order. A case by case assessment of individual circumstances must be conducted by border guards before returning any irregular migrant to their country of departure.

Chapter Six addresses the attribution of international responsibility to the EU for international wrongful acts committed during Frontex joint operations and

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<sup>1085</sup> EXCOM Conclusion No 23 (n 310) paragraph 3.

<sup>1086</sup> UNHCR, *The Model Framework* (n 313); UNHCR, ‘Refugee Protection and Mixed Migration’ (n 313); UNHCR, *Global Initiative on Protection at Sea* (n 313); see Chapter 2, section 2.7.

through its decisions authorising Italy and Greece to commit acts which are internationally wrongful. The actual purpose behind Frontex deployment is argued not merely to assist Member States in managing their external borders but to constitute a crucial strategic tool to circumvent the international responsibility of Member States and the EU for violations of international obligations.



## Chapter 6: The EU's International Responsibility

### 6.1 Introduction

In Chapter Four of this thesis it was argued that the EU-Turkey statement had the effect of subjecting irregular migrants to arbitrary detention, ill-treatment and an increased risk of *refoulement* to Turkey which does not offer adequate legal safeguards in accordance with EU and international refugee law. In Chapter Five it was argued that the interception<sup>1087</sup> and disembarkation<sup>1088</sup> rules under the Sea Borders Regulation violate the prohibition of torture or inhuman or degrading treatment, the *non-refoulement* principle and the prohibition of collective expulsions.<sup>1089</sup> Furthermore, it was argued that by not offering an alternative course of action in circumstances when the host/coastal Member State does not guarantee an effective asylum system, the provisions of the Sea Borders Regulation violate EU and international obligations and the established international search and rescue framework. These violations have been committed under the EU's normative control during Frontex's deployment in joint operations at sea and through its decisions authorising Italy and Greece to commit acts which are internationally wrongful. In accordance with general principles of international law, the EU is responsible for providing reparation for these violations as laid down by ARIO. Against that background and, given its status as an international organization<sup>1090</sup> with international legal personality,<sup>1091</sup> this

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<sup>1087</sup> Sea Borders Regulation (n 7) article 6(2)(b) governing interception on the territorial sea and article 7(2)(b) on the high seas.

<sup>1088</sup> Sea Borders Regulation (n 7) article 10.

<sup>1089</sup> See Chapter 5.

<sup>1090</sup> ARIO, article 2(a) 'international organization' means an 'organization established by a treaty or other instrument governed by international law and possessing its own international legal personality'.

<sup>1091</sup> TEU, article 47 endows the EU with legal personality under international law; C 22-70, *Commission v Council* (European Agreement on Road Transport) (31 March 1971) ECLI:EU:C:1971:32, paragraphs 13-14; in support of international legal personality see TEU, articles 3(5) and 21 for EU to respect international law when acting on the international scene; Marise Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (CUP, 2008) 34 and 38; also see Sari and Wessel (n 93) 4.

chapter seeks to impute the EU with attributed international responsibility<sup>1092</sup> for ‘every internationally wrongful act’.<sup>1093</sup>

In accordance with the general rules on international responsibility, it is possible for the same wrongful conduct to be attributed to more than one actor at the same time. Thus, when States or international organizations act together they may incur shared responsibility. Although both the ASR and ARIO provide determinations of attributed shared responsibility, the limited numbers of cases in which multiple attributions have been recognised in practice have created assumptions amongst the EU and its Member States that their international responsibility can be diluted.<sup>1094</sup> In the context of Frontex joint operations at sea, the EU and its Member States seem to benefit from the Union’s supranational system, especially in relation to the EU-Agency-Member State relationship when applying Union law. It is argued that the EU uses the Frontex regulatory framework not only to assist the Member States to best manage their borders but to also create confusion as to the responsible entity in control of the acts of these border guards which purportedly act under host Member State instructions but are placed at the disposal and the *de facto* control of Frontex. This chapter rebuts such an

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<sup>1092</sup> ASR and ARIO incorporated elements of progressive development and a codification of existing rules of customary international law and thus become legally binding; *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; *Mustafic et al v the Netherlands*, LJN: BR0132, 5 July 2011; *Behrami and Behrami and Saramati v France, Germany and Norway* Application nos 71412/01 and 78166/01 (2007) 45 EHRR (2 May 2007); *Al-Jedda v the United Kingdom* Application no 27021/08 (7 July 2011); also Crawford, *Brownlie’s Principles of Public International Law* 2012 (n 803) 539.

<sup>1093</sup> ARIO, article 3 and 5; article 2(d) Agent of an international organization, an ‘official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts’; ILC, *Report on the Work of Its Sixty-Third Session* (UN General Assembly, A/66/10, 2011) 74, paragraph 2; Cedric Ryngaert, ‘The European Court of Human Rights Approach to the Responsibility of Member States in Connection with Acts of International Organizations’ (2011) ICLQ 4, 997.

<sup>1094</sup> *Behrami and Behrami* (n 1092); *Kasumaj v Greece* Application no 6974/05 (5 July 2007); *Beric and Others v Bosnia and Herzegovina* Application no 36357/04 (16 October 2007); *Al-Jedda* (n 1092); *Mustafic et al* (n 1092); *Nuhanovic* (n 527); Nollkaemper and Jacobs (n 90) 383; Moritz Moelle, *The International Responsibility of International Organizations: Cooperation in Peacekeeping Operations* (Cambridge University Press, 2017) 177; Ömer Direk ‘Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the “Effective Control” Standard’ (2014) 61 NILR 1, 9.

assumption arguing that in light of the law of international responsibility the Member States and the EU cannot use the complexity of the EU legal order to circumvent their international responsibility.

It is concluded that as long as it can be proved that the wrongful conduct is attributed to the EU via Frontex, it becomes possible for the EU to incur international responsibility in light of Article 4 and 7 ARIO.<sup>1095</sup> In addition, it is argued that the Sea Borders Regulation and the EU-Turkey statement constitute decisions authorising Italy and Greece to commit internationally wrongful acts, designed to circumvent the EU's responsibility for violations of international obligations such as the *non-refoulement* principle. It is concluded, however, that despite the EU's attempts to circumvent their international obligations when committed under the EU's normative control, in light of Article 17 ARIO it is possible that they incur international responsibility for internationally wrongful acts. These provisions of ARIO will be considered in more detail in section 6.3 and 6.4 of this thesis.

## 6.2 Frontex – an EU Tool to Dilute International Responsibility?

To engage the EU's or a Member State's international responsibility for the wrongful acts occurring in Joint Operation *Triton*<sup>1096</sup> and *Poseidon Sea* (replaced by *Poseidon Rapid Intervention* from 28 December 2016)<sup>1097</sup> as governed by the Frontex and Sea Border Regulations, the conduct in question must be attributable to a specific organ or agent of the EU or to a Member State.<sup>1098</sup> The Frontex

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<sup>1095</sup> Messineo (n 96) 24.

<sup>1096</sup> Frontex, 'Frontex Launches Joint Operation *Triton*' (n 53).

<sup>1097</sup> Frontex, "Frontex and Greece Agree on Operational Plan For Poseidon Rapid Intervention" (17 December 2015) <<http://frontex.europa.eu/news/frontex-and-greece-agree-on-operational-plan-for-poseidon-rapid-intervention-yiSxga>> accessed 15 October 2017.

<sup>1098</sup> ARIO, article 3; Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Open University Press 2010) 221; Aust (n 514) 97-98; see *Bosnia and Herzegovina v Serbia and Montenegro* (n 521) paragraph 420 confirming the customary nature of the principle within ASR, article 16, see ARIO, article 14; ARIO, Chapter IV 'Responsibility of an international organization in connection with the act of a

European Border and Coast Guard Teams (EBGT) for deployment in joint operations *Triton*<sup>1099</sup> and *Poseidon Rapid Intervention* are composed of border guards from the EU Member States seconded to Frontex. Although international law recognises the possibility of two or more actors sharing responsibility for the same wrongful act,<sup>1100</sup> by way of exception, Article 7 ARIO excludes shared responsibility in those circumstances when an organ of a State is placed at the disposal of another State/international organization.<sup>1101</sup> Hence, any assessment of the EU's international responsibility must be conducted from an exclusive attribution perspective derived from Frontex's conduct.

In Frontex joint interception operations, when multi-actors are involved it is sometimes difficult to establish accountability and pinpoint blame on a specific actor. Member States argue that Frontex has considerable control over the operational planning stage and that of implementation; hence, it is the responsible entity for conduct occurring within the operational area.<sup>1102</sup> It is argued here that Greece and Italy, the two Member States' responsible for requesting Frontex's assistance with regard to the control of their external borders, take advantage of Frontex's separate legal personality to avoid international responsibility for a series of violated international obligations conducted during interception and

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State or another international organization'; Aurel Sari, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in Bard Van Vooren, Steven Blockmans, and Jan Wouters (eds), *The EU's Role in Global Governance: the Legal Dimension* (Oxford Scholarship, 2013) 126.

<sup>1099</sup> Frontex, Joint Operation *Triton* (Italy) <<http://frontex.europa.eu/pressroom/hot-topics/joint-operation-triton-italy--ekKaes>> accessed 27 October 2017.

<sup>1100</sup> ASR, article 47; ARIO, article 48(1); *Al-Jedda* (n 1092) paragraph 80; *Ilascu* (n 481) paragraphs 352, 385, 393; André Nollkaemper and Dov Jacobs, *Shared Responsibility in International Law: A Concept Paper* ASIL Research Paper No 2011-07, SHARES Series, 69-70; the following categorisation is derived from Messineo (n 96) 10-23; see also Giorgio Gaja, *The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations* SHARES Research Paper 25, 2013, 2.

<sup>1101</sup> ARIO, article 7: 'The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization *shall be considered* under international law *an act of the latter organization if the organization exercises effective control over that conduct*'. Emphasis added; Messineo (n 96) 44.

<sup>1102</sup> Fink, "Nobody's Fault?" (n 82).

disembarkation practices within Frontex's operational area.<sup>1103</sup> Frontex shares characteristics of endowed legal personality through its right to initiate and carry out joint operations, conduct risk analysis, deploy EBGT and enter into cooperation agreements.<sup>1104</sup> Within this context, Frontex coordinates joint border control operations in which participating Member States provide financial and technical means and deploy personnel to support the host Member State control its external borders.<sup>1105</sup> On this basis, its legal personality permits accountability and responsibility under international law, capable of bearing rights and obligations separate from those of its members.<sup>1106</sup>

Frontex, on the other hand, contests claims of responsibility on the basis of its coordinating role.<sup>1107</sup> In accordance with Article 4(2)(j) TFEU,<sup>1108</sup> *de jure* Frontex

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<sup>1103</sup> ARIO commentary (n 98) article 61, paragraph 1; see Chapters 4 and 5 on violations of international obligations.

<sup>1104</sup> Frontex Regulation, article 3(1) – as repealed by EBCG Regulation (n 1) article 14; Fink, ‘A “Blind Spot”’ (n 486) 1.

<sup>1105</sup> Frontex Regulation, articles 3(c) – as repealed by EBCG Regulation (n 1) article 14(3); See Joint *Poseidon* Operation/Poseidon Rapid Intervention in the Eastern Mediterranean route; Frontex, ‘Frontex and Greece Agree on Operational Plan for Poseidon Rapid Intervention’ 17 October 2017 <<http://frontex.europa.eu/news/frontex-and-greece-agree-on-operational-plan-for-poseidon-rapid-intervention-yiSxga>> accessed 22 October 2017; and *Triton/EUNAVFOR MED* Operation *Sophia* in the Central Mediterranean route <[https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/36/about-eunavfor-med-operation-sophia\\_en](https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/36/about-eunavfor-med-operation-sophia_en)> accessed 22 October 2017.

<sup>1106</sup> Frontex Regulation, article 21 – as repealed by EBCG Regulation (n 1) article 56 (legal status) and article 62 (management board); and on Frontex Executive Director see articles 26 and 25 respectively – as repealed by EBCG Regulation (n 1) article 68; Izabella Majcher, ‘Human Rights Violations during EU Border Surveillance and Return Operations: Frontex’s Shared Responsibility or Complicity?’ (2015) SJLS, Issue 7, 45-78, 52; Nina Perkowski, *A Normative Assessment of the Aims and Practices of the European Border Management Agency Frontex* (Refugee Studies Centre Working Paper Series No 81, 2012) 18; ARIO, article 2(a); International Law Association, *Accountability of International Organizations* (Final Report, Berlin Conference, 2004) 5; *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion* (ICJ Reports 174, 11 April 1949) 178–179; See by analogy discussion of the NATO legal personality according to the functionalist theory, Nicholas Tsagourias, ‘The Responsibility of International Organizations for Military Missions’ in Marco Odello and Ryszard Piotrowicz (eds), *International Military Missions and International Law* (Volume 31, Martinus Nijhoff, Leiden 2011) 257–260; Marten Zwanenburg, *Accountability of Peace Support Operations* (Volume 9, Martinus Nijhoff, Leiden 2005) 64–68.

<sup>1107</sup> Goodwin-Gill, ‘The Right to Seek Asylum’ (n 487) 453; see Ska Keller et al., ‘Frontex Agency: Which Guarantees for Human Rights?’ (A Study Conducted by Migreurop on the European External Borders Agency in View of the Revision of Its Mandate, March 2011) 22, quoting Ilkka Laitinen, ‘The Interparliamentary Committee Meeting “Democratic

cannot take the leading role in joint operations at EU external borders; such a task belongs to the Member States.<sup>1109</sup> Being a coordinator instead of an initiator allows Frontex to shield itself behind Member State responsibility in an attempt to evade its accountability and the possible attribution of its conduct to the EU for human rights violations committed during the course of its operations.<sup>1110</sup> In reality, the aim of Member States is not to blame Frontex; on the contrary, Frontex is their partner and supporter. However, the chain of causation becomes difficult to prove in practice given the action of several actors involved in the Frontex operational plan.<sup>1111</sup> Sometimes the lack of transparency, accountability and democratic legitimacy allows the various actors involved ‘to act as single cogs in the whole operation’ whilst responsibility is shifted to others.<sup>1112</sup> The thinking behind this strategy is that if no one can be blamed, the act remains lawful although they are acting in violation of human rights law and other international obligations.<sup>1113</sup> Thus, through Frontex’s *de jure* coordinating mandate, the EU purports to create a gap in attribution of international responsibility for human rights violations under the auspices of multi-party involvement.<sup>1114</sup> This chapter argues, however, that despite the assumptions created behind Frontex’s *de jure* coordinating mandate, it is still possible to attribute the EU with international responsibility for the internationally wrongful acts committed under Frontex’s effective control over its operational area.

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Accountability in the area of Freedom, Security and Justice: Evaluating Europol, Eurojust, Frontex and Schengen,” (organised by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, 4–5 October 2010) <<http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>> accessed 22 October 2017; On Frontex coordinative role see its mandate - Frontex Regulation, article 1(2) and preamble recitals 2, 3, 5 - repealed by EBCG Regulation (n 1) article 5(3) and article 8.

<sup>1108</sup> Union shares competence with the Member States in the area of freedom, security and justice; Member States cannot adopt legislation on the same matter as adopted by EU legislation, see TFEU, article 2(2).

<sup>1109</sup> TFEU, article 72 and article 77(4); EBCG Regulation (n 1) article 5(1).

<sup>1110</sup> Ska Keller et al., (n 1107) 8; Carrera, den Hertog, and Parkin (n 78) 341–342.

<sup>1111</sup> Carrera, den Hertog, and Parkin (n 78) 352–353.

<sup>1112</sup> Fink, “Nobody’s Fault” (n 82).

<sup>1113</sup> Sarah Wolff, *Migration and Refugee Governance in the Mediterranean: Europe and International Organizations at a Crossroads* (IAI, 2015) 3.

<sup>1114</sup> See EBCG Regulation (n 1) preamble recitals 2, 3, 5 and article 1(3) and 2; Pascouau and Schumacher (n 577) 4.

### 6.3 Attribution of Wrongful Conduct to the EU through Frontex

The EU's common policy on external border control is adopted under the auspices of Frontex in the form of operational cooperation. As the EU does not have at its disposal military personnel to deploy at the EU's external borders, it must rely on the seconded Member State personnel. This situation raises the legal question as to whether the conduct of a Member State border guard during Frontex joint operations is attributable to the EU and/or to its Member States.<sup>1115</sup> To incur responsibility, the second element of Article 4 ARIO requires that the conduct in question, attributable to the organisation under international law, 'constitutes a breach of an international obligation of that organisation'.<sup>1116</sup> In relation to the first element of Article 4 ARIO, the difficulty arises as to the possibility of Frontex committing wrongful conduct in view of Frontex's formal mandate which provides that its agents do not exercise executive powers;<sup>1117</sup> their role is that of a coordinator.<sup>1118</sup> The EBCG Regulation provides that Frontex's task includes 'monitor[ing] migratory flows and carry[ing] out risk analysis as regards all aspects of integrated border management', 'carry[ing] out a vulnerability assessment including the assessment of the capacity and readiness of Member States to face threats and challenges at the external borders', 'assist[ing] Member States in circumstances requiring increased technical and operational assistance at the external borders', and 'set[ting] up and deploy[ing] European Border and Coast Guard Teams'.<sup>1119</sup> Frontex is entrusted with coordination, a task which it must achieve without standing staff of its own.<sup>1120</sup> In addition, it is entrusted with

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<sup>1115</sup> ARIO, article 7.

<sup>1116</sup> Same provision in ASR, article 2 referring to a 'State' instead of 'international organization'.

<sup>1117</sup> ARIO, article 4 and 7; *Behrami and Behrami* (n 1092) paragraph 133 and 141; *Al-Jedda* (n 1092) paragraph 80.

<sup>1118</sup> Frontex Regulation, article 1(2) as replaced by the EBCG Regulation (n 1) article 5; Jorrit Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and Its Inherent Tensions: The Case of Frontex' in Madalina Busuioc, Martijn Groenleer, and Jarle Trondal, *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making* (Manchester University Press, Manchester 2012) 84–102.

<sup>1119</sup> EBCG Regulation (n 1) article 8(1) (a-u).

<sup>1120</sup> EBCG Regulation (n 1) article 5(3) (coordination), article 8 (tasks) and article 20 (composition

tasks and powers that require it to coordinate external borders of sovereign States without actually taking over national prerogatives.<sup>1121</sup> Furthermore, the EBCG Regulation emphasises that the primary responsibility for the management of external borders is retained by Member States.<sup>1122</sup>

In reality, however, Frontex conducts various activities akin to decision-making powers such as ‘pursuing or stopping anyone trying to cross the border, patrolling the area between border crossing points, screening anyone crossing the border, asking for travel documents, interviewing people about their identity (screening) and itinerary (debriefing), deciding on entry or exit, and accompanying inadmissible persons to detention centres or for removal’.<sup>1123</sup> These activities have often been conducted by seconded Frontex border guards<sup>1124</sup> without host State officers’ supervision.<sup>1125</sup> The legal complexity of Frontex’s standing creates confusion as to who then becomes accountable for violations occurring within its operational area. Notwithstanding whether the EU considers as valid Frontex’s

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and deployment).

<sup>1121</sup> EBCG Regulation (n 1) article 5(3) (coordination) and article 5(2) Member States manage their own borders.

<sup>1122</sup> EBCG Regulation (n 1) article 5(1).

<sup>1123</sup> Majcher (n 1106) 53; UNISYS, *Study on Conferring Executive Powers on Border Officers Operating at the External Borders of the EU* (April 2006) 35–45 <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/borders-and-visas/schengen/docs/study\\_on\\_conferring\\_of\\_executive\\_powers\\_04\\_2006\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/borders-and-visas/schengen/docs/study_on_conferring_of_executive_powers_04_2006_en.pdf)> accessed 24 October 2017; ‘Officers deployed by the agency also assist the Italian authorities in the registration of the arriving migrants. They also collect intelligence about people smuggling networks operating in Libya and other African countries on the smuggling routes. The agency shares this information with the Italian authorities and Europol’ see Frontex, Joint Operation *Triton* (Italy) (n 1099).

<sup>1124</sup> EBCG Regulation (n 1) article 2(3); SBC (n 158) article 2(14).

<sup>1125</sup> Ska Keller et al., (n 1107) 12; Amnesty International (European Institutions Office) and ECRE, ‘Briefing on the Commission Proposal for a Regulation Amending Council Regulation (EC) 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) September 2010, 11–12 <[http://www.ecre.org/wp-content/uploads/2016/07/ECRE-and-Amnesty-Briefing-on-the-Commission-Proposal-amending-the-Frontex-Regulation\\_September-2010.pdf](http://www.ecre.org/wp-content/uploads/2016/07/ECRE-and-Amnesty-Briefing-on-the-Commission-Proposal-amending-the-Frontex-Regulation_September-2010.pdf)> accessed 24 October 2017; UN General Assembly, *Report by the Special Rapporteur on the Human Rights of Migrants, François Crépeau, on His Mission to Italy 29 September–8 October 2012* (A/HRC/23/46/Add.3, 30 April 2013) paragraph 41–42.



conduct on the ground,<sup>1126</sup> this chapter argues that even if Frontex agents' *de facto* conduct exceeds their formal authority or contravenes instructions, Member State and/or EU responsibility under international law cannot be avoided or excluded.<sup>1127</sup>

Thus, the legal issue is whether the conduct of the seconded organ is attributable to the receiving organization or to the seconding State. Article 7 ARIO provides the only exception to multiple attribution of conduct on the transfer of State organs to international organizations: 'The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization has *effective control* over that conduct'.<sup>1128</sup> In the context of joint operations at EU external borders, the border guards of sending States are put at the disposal of Frontex,<sup>1129</sup> an EU agency with distinct legal personality.<sup>1130</sup> What constitutes an organ or agent of the State or international organization is determined in accordance with its internal law.<sup>1131</sup> The seconded border guards of Member States usually exercise law-enforcement authority,<sup>1132</sup> thus acquiring the status of an 'organ'.<sup>1133</sup> The home Member State retains the authority to exercise disciplinary powers over the seconded border

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<sup>1126</sup> ARIO Commentary (n 98) article 8, paragraph 5; Elena Ortega, 'The Attribution of International Responsibility to a State for Conduct of Private Individuals within the Territory of Another State' (2015) *InDret*, 5.

<sup>1127</sup> ARIO, article 8; Majcher (n 1106) 54.

<sup>1128</sup> Emphasis added.

<sup>1129</sup> EBCG Regulation (n 1) article 17 (7-9).

<sup>1130</sup> EBCG Regulation (n 1) article 56(1); Frontex's legal personality permits it to act in full autonomy and independence from the EU; However, Frontex's international legal personality is disputed, it has no treaty-making powers, nor does Frontex have international rights and duties enforceable by law, see Mungianu (n 84) 34; Shaw (n 204) 195, nor has the EU delegated its international legal personality to Frontex, as the EU has the exclusive right to bind the EU in international agreements, TFEU, article 216 and 218; Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding Technical Relationships' (2012) *UJIEL*, 26.

<sup>1131</sup> ARIO Commentary (n 98) article 7, paragraph 2: 'the term "organ", with reference to a State, has to be understood in a wide sense, as comprising those entities and persons whose conduct is attributable to a State according to articles 5 and 8 on the responsibility of States for internationally wrongful acts.'; also see ASR, article 4(2).

<sup>1132</sup> ASR, article 4; Mungianu (n 84) 61.

<sup>1133</sup> ARIO, article 7; ASR, article 4.

guards,<sup>1134</sup> whereas the host Member State exercises civil and criminal jurisdiction.<sup>1135</sup> Nonetheless, Article 7 ARIO covers precisely situations where the seconded organ continues to act to a certain extent as an organ of the seconding State.<sup>1136</sup> Therefore, in cases of multi-party involvement, it is necessary to assess whether Frontex or the seconding Member State has effective control over the conduct of the border guards within the operational area.<sup>1137</sup>

The structure of Frontex joint operations raises similar legal issues to those dealt with by the ECtHR when assessing UN peacekeeping operations in light of the law on international responsibility. The ECtHR addressed ‘effective control’ in *Behrami* concerning the UN Mission in Kosovo under Security Council Resolution 1244 (1999), in which NATO led the Kosovo Force (KFOR) to maintain security and manage the Kosovo civil administration; whereas the *Saramati* case concerned the internment of Mr Saramati by order of KFOR officials of French and Norwegian military forces.<sup>1138</sup> The applicants in these two cases claimed violations of Article 2 ECHR and Articles 5 and 13 ECHR, respectively. The ECtHR observed that the complex nature of security missions required the Security Council to rely on States to provide military personnel and means, as well as delegate command. The key question considered by the ECtHR was whether despite a delegated operational command, the Security Council retained ‘ultimate authority and control’.<sup>1139</sup> In recognition of UN Mission in Kosovo (UNMIK) as a subsidiary organ of the UN, the ECtHR held that the Security Council retained ‘ultimate authority and control’ and only delegated

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<sup>1134</sup> EBCG Regulation (n 1) article 21(5); ARIO Commentary (n 98) article 7, paragraph 7.

<sup>1135</sup> EBCG Regulation (n 1) articles 42 and 43.

<sup>1136</sup> ARIO Commentary (n 98) article 7, paragraph 1; in *Behrami and Behrami* (n 1092) paragraph 139, the ECtHR held that exclusive jurisdiction in disciplinary and criminal matters did not undermine the effective operation control by NATO; see ARIO Commentary (n 98) article 7, paragraph 10.

<sup>1137</sup> Sari ‘International Responsibility for EU Military Operations’ (n 1098) 133; UN, Responsibility of International Organizations, Second Report on Responsibility of International Organizations by Giorgio Gaja, Special Rapporteur, 2 April 2004, UN doc A/CN.4/541, 2.

<sup>1138</sup> *Behrami and Behrami* (n 1092) paragraphs 64-65.

<sup>1139</sup> *Behrami and Behrami* (n 1092) paragraphs 132-133; this test was also applied in *Kasumaj* (n 1094); *Beric* (n 1094).

lawful operational powers to KFOR and UNMIK. Thus, the conduct of KFOR and UNMIK were attributable to the UN.<sup>1140</sup> The test adopted by the ECtHR was whether the UN Security Council retained ultimate authority and control so that only operational command was delegated, and whether it had lawfully delegated its powers to another entity,<sup>1141</sup> not on the basis of *ad hoc* factual analysis on who retains command and control over the actual operation.<sup>1142</sup>

The ECtHR had the opportunity to address the factual element of the ‘operational command’ part of the ‘effective control’ concept in *Al-Jedda*.<sup>1143</sup> In this case, Security Council Resolution 1546 (2004) authorised the presence of a Multinational Force in Iraq.<sup>1144</sup> The ECtHR addressed the legal question of whether the UN or the members of the Multinational Force had ‘effective command and control’ over the operation.<sup>1145</sup> The ECtHR held that the UN Security Council ‘had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant’s detention was not, therefore, attributable to the United Nations.’<sup>1146</sup> In line with the ILC’s Commentary to what is now Article 7 ARIO (then Article 5 ARIO), the ECtHR considered the ‘effective control’ element in terms of ‘the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal’.<sup>1147</sup> As argued in *Behrami*

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<sup>1140</sup> *Behrami and Behrami* (n 1092) paragraphs 133-141.

<sup>1141</sup> *Behrami and Behrami* (n 1092) paragraphs 133-141.

<sup>1142</sup> Kjetil Larsen, ‘Attribution of Conduct in Peace Operations: The Ultimate Authority and Control Test’ (2008) 19 EJIL 509, 516-517; Marko Milanovic and Tatjana Papic, ‘As Bad as It Gets: The European Court of Human Rights’ *Behrami and Behrami* Decision and General International Law’ (2009) 58 ICLQ 267, 281; Christian Tomuschat, ‘Attribution of International Responsibility: Direction and Control’ in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing, 2013) 30.

<sup>1143</sup> *Al-Jedda* (n 1092) paragraph 84.

<sup>1144</sup> *Al-Jedda* (n 1092) paragraph 81.

<sup>1145</sup> *Al-Jedda* (n 1092) paragraph 84; This test was applied in *Mustafic et al* (n 1092); *Nuhanovic* (n 527).

<sup>1146</sup> *Al-Jedda* (n 1092) paragraph 84.

<sup>1147</sup> *Al-Jedda* (n 1092) paragraph 84 and 56 respectively; Court referred to what was then ARIO Commentary (n 98) article 5, paragraphs 1, 6 and 7, what is now ARIO Commentary (n 98) article 7, paragraphs 4, 7 and 8; Messineo (n 96) 41.

and *Saramati* and supported by the ILC Commentary, the effective control element exercised by the receiving international organization is not excluded on the basis that the sending Member State retains exclusive jurisdiction in disciplinary and criminal matters. Article 7 ARIO covers precisely the situation when there is not a full secondment of personnel.<sup>1148</sup> Although it is recognised that the sending State retains elements of governmental authority over disciplinary and criminal matters, for the conduct to be attributed to the receiving State or international organization, the organ must be ‘under its exclusive direction and control, rather than on instructions from the sending State’.<sup>1149</sup> Thus, the ILC emphasises that the entity which gives the order retains effective control over the organ placed at its disposal.

The ‘effective control’ element of Article 7 ARIO seems to require that Frontex is the only entity that gives instructions to the seconded border guards. Such a situation is largely based on the arrangements made by the sending State and receiving international organization over the organ placed under disposal.<sup>1150</sup> The conditions of cooperation between Frontex and the participating Member States are drawn up and dictated by the Frontex Executive Director setting out the operation’s objective, duration, and geographical area, provisions on *command*, team compositions and equipment involved, which Greece agrees to and implements.<sup>1151</sup> The operational plan is implemented through the host Member State giving instructions to the seconded border guards. However, as joint operations are based on risk analysis, the operational plan is kept secret from the

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<sup>1148</sup> *Behrami and Behrami* (n 1092) paragraph 139; ARIO Commentary (n 98) article 7, paragraph 1 and 10.

<sup>1149</sup> ARIO Commentary (n 98) article 7, paragraph 4 and 7.

<sup>1150</sup> ARIO Commentary (n 98) article 7, paragraph 9; emphasis added.

<sup>1151</sup> Frontex Regulation, article 3a(1) - as repealed by EBCG Regulation (n 1) article 15(2-3); also see EBCG Regulation (n 1) article 16; Carrera, *The EU Border Management Strategy* (n 86) 14; emphasis added.

public.<sup>1152</sup> Apart from the specifics of the joint operation, it is not possible to scrutinise the operational plan in the context of the ‘effective control’ element.

Even without a disclosed operational plan, it can still be argued here that Frontex is a *de facto* controller in command of the activities taking place within an operational area. Frontex decides which joint operation proposals to approve and to initiate.<sup>1153</sup> It has the power to decide on the deployment of technical equipment under the established Technical Equipment Pool (TEP).<sup>1154</sup> Although *de jure* the host State gives instructions to the EBGT command in performing its functions;<sup>1155</sup> *de facto* Frontex exercises ‘effective control’<sup>1156</sup> over the EBGT, being responsible for taking the decisions on its deployment and maintaining responsibility for its conduct throughout the operational plan.<sup>1157</sup> During deployment, for the purposes of identification vis-à-vis national authorities and citizens, Frontex officers must wear a blue armband bearing the insignia of the

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<sup>1152</sup> Decision of the Management Board of 21 September 2006 laying down practical arrangement regarding public access to the documents of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), Doc 3402, 22 September 2006, see <<http://www.statewatch.org/ombudsman-cases/frontex/x-frontex-decision-of-the-mb-of-21-september-2006-public-access-to-the-documents-of-frontex.pdf>> accessed 25 October 2017.

<sup>1153</sup> Frontex Regulation, article 3(1) and (1b) for joint operations and article 8(a) for rapid interventions - as repealed by EBCG Regulation (n 1) article 15(2-4).

<sup>1154</sup> Frontex Regulation, articles 2, 3 and 7 for EBGT and TEP being operational resources – as repealed by EBCG Regulation (n 1) article 8(1)(g-i); On the establishment of TEP see Frontex Management Board Decision No 6/2014 of 26 March 2014 reported in Frontex, ‘Annual Information on the Commitments of the Member States to the European Border Guard Teams and the Technical Equipment Pool’ (2015) 5 <[http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/EBGT\\_TEP\\_Report/20150401\\_Frontex\\_Annual\\_Report\\_to\\_the\\_EP\\_on\\_the\\_commitments\\_of\\_the\\_MS\\_to\\_the\\_EBGT\\_and\\_the\\_TEP.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/EBGT_TEP_Report/20150401_Frontex_Annual_Report_to_the_EP_on_the_commitments_of_the_MS_to_the_EBGT_and_the_TEP.pdf)> accessed 24 October 2017; Also see EBCG Regulation (n 1) article 39.

<sup>1155</sup> Frontex Regulation, article 3(c)(1) - as repealed by EBCG Regulation (n 1) article 5; EBCG Regulation (n 1) article 21(1); Chris Deliso, “Safeguarding Europe’s Southern Borders: Interview with Kraus Roesler, Director of Operations Division, Frontex” (Balkananalysis.com, 23 September 2011) <<http://www.balkananalysis.com/greece/2011/09/23/safeguarding-europe%E2%80%99s-southern-borders-interview-with-klaus-roesler-director-of-operationsdivision-frontex/>> accessed 24 October 2017.

<sup>1156</sup> *Behrami and Behrami* (n 1092) paragraph 30-31, 138-140.

<sup>1157</sup> Frontex Regulation, article 3b - as repealed by EBCG Regulation (n 1) article 16(3); ARIO, article 7; Efthymios Papastavridis, “Fortress Europe” and FRONTEX: Within or Without International Law?” (2010) NJIL 79, 78.

EU and Frontex and carry an accreditation document provided by Frontex.<sup>1158</sup> Furthermore, the prominent role of the Frontex Coordinating Officer (FCO) implies shared instructions on operational decisions between the host State and Frontex.<sup>1159</sup> Frontex secures whether the host Member State has issued instructions in accordance with the operational plan through its FCO who has full access to EBGTs at all times. The FCO's views must be taken into consideration by the host State (Greece).<sup>1160</sup> Legal scholars have been divided as to whether these 'views' should be interpreted to constitute opinions (soft law) or instructions implying legally binding decisions.<sup>1161</sup> Roberta Mungianu and Christian Tomuschat consider that these 'views' do not constitute instructions.<sup>1162</sup> However, it is argued here that the mandatory language used by the EBCG Regulation, clearly stating 'must be taken into consideration' and that Greece 'shall agree' to any instructions issued 'in accordance with the operational plan', denote an apparent obligation upon Greece to agree on general and/or special instructions drawn up by Frontex.<sup>1163</sup> Therefore, it is argued that the obligation on Greece to issue instructions to border guards in accordance with the operational plan amounts to the reproduction of a decision taken at EU level.

Furthermore, in accordance with the operational plan, seconded border guards are at the disposal of Frontex which has the competence to dispatch or dismiss

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<sup>1158</sup> EBCG Regulation (n 1) article 40(4) and article 41 respectively; Frontex, Roles and Responsibilities, <<http://frontex.europa.eu/operations/roles-and-responsibilities/>> accessed 22 October 2017.

<sup>1159</sup> Frontex Regulation, article 3b(5) – as repealed by EBCG Regulation (n 1) article 22(3); Carrera, *The EU Border Management Strategy* (n 86) 6.

<sup>1160</sup> Frontex Regulation, article 3c (2-3) and article 8 (g) – as repealed by EBCG Regulation (n 1) article 21(3).

<sup>1161</sup> Mungianu (n 84) 69; Christian Tomuschat, 'The International Responsibility of the European Union' in Enzo Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International, 2002) 186; emphasis added.

<sup>1162</sup> *ibid.*

<sup>1163</sup> Frontex Regulation, article 3c (2) and Regulation No 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] L199/30 (Rabit Regulation), article 5 (1) – as repealed by EBCG Regulation (n 1) article 16(2); emphasis added.

them.<sup>1164</sup> Once the Executive Director of Frontex decides to deploy a rapid reaction pool upon the request of a Member State experiencing immigration pressure at its external borders, border guards must be made available ‘unless they are faced with an exceptional situation substantially affecting the discharge of national tasks’.<sup>1165</sup> The possibility of withdrawing border guards is given only to the home Member States, not the host Member State.<sup>1166</sup> Thus, Greece’s request for Frontex deployment on its external borders implies a transfer of its autonomy over its border guards, giving Frontex full command and effective control during joint operations.<sup>1167</sup> Moreover, the obligation of Frontex’s Executive Director to ‘suspend or terminate operations’ confirms that Frontex retains command and effective control over the joint operations at all times.<sup>1168</sup> Thus, the combination of mandatory language in the implementation of the operational plan coupled with Frontex’s role as a strategic coordinator, data gatherer, designer of operational plans, and deployer of officers and resources, makes it apparent that Frontex, not Greece, is the decision-making body and the *de facto* regulator in command and control of the operational plan.<sup>1169</sup> On this basis, the conduct of border guards placed under Frontex’s disposal<sup>1170</sup> is attributed to the EU and considered to be an act of the EU under international law.<sup>1171</sup>

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<sup>1164</sup> Papastavridis (n 1157) 78.

<sup>1165</sup> Rabit Regulation (n ) article 4(3) – as repealed by EBCG Regulation (n 1) article 17(9) and article 20(5-8).

<sup>1166</sup> Rabit Regulation, article 4(3) – as repealed by EBCG Regulation (n 1) article 20(5-8).

<sup>1167</sup> Anjum Shabbir, ‘The Accountability of Frontex for Human Rights Violations at Europe’s Borders’, 9 <<https://ssrn.com/abstract=2280707>> accessed 22 October 2017; *Al-Jedda* (n 1092) paragraph 67, ‘structural involvement of the United Kingdom in retaining some authority over its troops, as did all troop-contributing nations, was compatible with the effectiveness of the unified command and control’.

<sup>1168</sup> EBCG Regulation (n 1) article 15(2-3).

<sup>1169</sup> *Al-Jedda* (n 1092) paragraph 67; Helene Jorry, *Construction of a European Institutional Model for Managing Operational Cooperation at the EU’s External Borders: Is the FRONTEX Agency a decisive step forward?* CEPS Challenge Research Paper No 6, March 2007, 14.

<sup>1170</sup> Frontex is an ‘organ’ of the EU, see ARIО, article 4; see EU Charter, article 51 its rules are addressed to the ‘institutions, bodies, offices and agencies of the EU’ normally established by EU secondary legislation; see TFEU, article 16; TFEU articles 340(2) and 263; ARIО, article 6 and 2(c) rules of the organization define ‘organ’. Thus, for international law purposes, they are considered as organs of the EU. The CJEU attributed the Union’s liability to its ‘institutions or bodies’ Case C-234/02 *P European Ombudsman v Frank Lamberts* [2004] ECR I-2803, paragraph 59; Frank Hoffmeister, ‘Litigating Against the European Union and

To incur responsibility, the second element of Article 4 ARIO requires that the conduct is an internationally wrongful act<sup>1172</sup> which constitutes a breach of the EU's international obligations. In Chapters Four and Five of this thesis it was argued that the principle of *non-refoulement* and the prohibition of torture or inhuman and degrading treatment have been violated in Frontex's operational area, constituting internationally wrongful acts.<sup>1173</sup> The principle of *non-refoulement*, a peremptory norm of general international law (*jus cogens*),<sup>1174</sup> is embodied in Article 19(2) of the EU Charter of Fundamental Rights. In addition, Article 78(1) TFEU obliges the EU to act in accordance with the Refugee Convention and other treaties such as CAT, the ICCPR and the ECHR.<sup>1175</sup> On this basis it is argued that the EU acquires international responsibility for Frontex's violations of international obligations during its joint operations at sea.<sup>1176</sup>

Frontex's Executive Director (currently Fabrice Leggeri)<sup>1177</sup> has a positive duty to terminate or suspend in full or in part joint operations producing violations of

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its Member States' (2010) EJIL 21(3) 740; Wessel (n 93) 36. On the relationship with the EU Charter, see European Parliament, 'The Implementation of the Charter of Fundamental Rights in the EU institutional Framework', Study for the AFCO Committee, 2016, 49 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL\\_STU\(2016\)571397\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU(2016)571397_EN.pdf)> accessed 19 June 2018.

<sup>1171</sup> ARIO, article 6.

<sup>1172</sup> See (n 1131) at p 217.

<sup>1173</sup> See sections 4.5 and 5.5.2.

<sup>1174</sup> The EU must comply with customary international law, see C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-6019, paragraph 9; C-410/11 *Espada Sanchez and Others* [2013] 1 CMLR 55, paragraph 21; Alessandra Giannelli, 'Customary International Law in the European Union' in Enzo Cannizzaro, Paolo Palchetti and Ramses Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff, 2011) 93; Allain (n 722).

<sup>1175</sup> On Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment see CAT, article 1 and 16; ICCPR, article 7; ECHR, article 3; ARIO, article 10, the EU must respect an international obligation 'regardless of its origin'; ARIO Commentary (n 98) article 10, paragraph 2 the international obligation 'may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order'.

<sup>1176</sup> See Chapter 5 on interception and disembarkation.

<sup>1177</sup> Frontex, Executive Profiles <<http://frontex.europa.eu/about-frontex/organization/executive-profiles/>> accessed 19 October 2017.



human rights.<sup>1178</sup> Since 2014, Amnesty International has been calling upon the Frontex Executive Director to suspend in full or in part Operation *Poseidon* Land and Sea in the Evros region and the Aegean Sea.<sup>1179</sup> To date, Frontex has not suspended or terminated any of its joint operations despite EU and international institutions, NGOs and legal scholars stating that human rights violations are taking place in its operational area.<sup>1180</sup> Hence, the EU is the most appropriate entity with the legal power to prevent wrongdoings in the course of Frontex joint operations.<sup>1181</sup> Thus it has an obligation to stop the joint operation and a duty to act as soon as it becomes ‘aware or should normally have been aware’<sup>1182</sup> of the existence of the serious risk that the violation would be committed.<sup>1183</sup> Upon having reason to believe that during Frontex joint operations international refugee and human rights laws are being violated, the EU through Frontex may not continue to support the operation but must suspend it fully or in part.<sup>1184</sup> The EP and the Council may invite the Frontex Executive Director Fabrice Leggeri to report on joint operations *Triton* and *Poseidon* and hold him accountable for any wrongful acts committed.<sup>1185</sup> Furthermore, the Member States participating in

<sup>1178</sup> Frontex Regulation, article 3(1)(a) - as repealed by EBCG Regulation (n 1) article 27.

<sup>1179</sup> Amnesty International, “The Human Cost of Fortress Europe” (n 112) 17.

<sup>1180</sup> HRW ‘The EU’s Dirty Hands’ (n 843) 38; Frontexit, ‘A Reinforced Frontex Agency EU Turns a Deaf Ear to NGO’s Warnings’ (22 September 2016) <<https://www.frontexit.org/en/news/item/829-a-reinforced-frontex-agency-eu-turns-a-deaf-ear-to-ngo-s-warnings-22-september-2016>> accessed 25 October 2017; Parliamentary Assembly, *Frontex: Human Rights Responsibilities* Resolution 1932(2013), Doc 13161, paragraph 7.4; Anneliese Baldaccini, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial immigration control: Legal challenges* (Martinus Nijhoff Publishers 2010) 233–236; Elspeth Guild et al., *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office* (European Parliament’s LIBE Committee, 2011) 19, 83-87.

<sup>1181</sup> ARIО, article 41 and 42(1); Tom Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’ (2010) HILJ 51(1) 113–192, 158.

<sup>1182</sup> *Bosnia and Herzegovina v Serbia and Montenegro* (n 521) paragraph 432.

<sup>1183</sup> *Bosnia and Herzegovina v Serbia and Montenegro* (n 521) paragraph 431; *El-Masri v the Former Yugoslav Republic of Macedonia* Application no 39630/09 ECHR 2012, paragraph 239 ‘they were aware or ought to have been aware of the risk of that transfer’.

<sup>1184</sup> ARIО Commentary (n 98) article 14, paragraph 6; on cessation see ARIО, article 30(a).

<sup>1185</sup> EBCG Regulation (n 1) article 68(2) and article 7 on Frontex’s accountability to the EP and the Council.

joint operation *Triton* and *Poseidon* ‘may request that the executive director terminate that joint operation or rapid border intervention’.<sup>1186</sup> In addition, the Frontex Executive Director may be forced, upon a recommendation of the FRO, to terminate or suspend all or part of joint operations if ‘violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist’ within its operational area.<sup>1187</sup>

#### **6.4 Circumvention of International Obligations through EU’s Decisions and Authorizations**

This chapter argues that the Sea Borders Regulation and the EU-Turkey statement were designed to circumvent the EU’s international obligations and thus to evade its responsibility.<sup>1188</sup> Being a supranational entity with the power to develop an autonomous normative capacity, it is possible for the EU to use its legal order to influence its Member States ‘to achieve through them a result that the organization could not lawfully achieve directly, and thus circumvent one of its international obligations’.<sup>1189</sup> The question arises as to whether the EU acquires international responsibility in cases of decentralized implementation of EU law by Member States when they result in the commission of internationally wrongful acts. This particular situation is accommodated by special rules of attribution of responsibility under Article 17 ARIO. Article 17(1) ARIO provides: ‘An international organization incurs international responsibility *if it circumvents* one

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<sup>1186</sup> EBCG Regulation (n 1) article 25(2).

<sup>1187</sup> Frontex Regulation, article 3(1)(a) and article 26 (a) - as repealed by EBCG Regulation (n 1) article 25(4); Frontex operations are monitored by the FCO reporting to the Frontex Management Board and Consultative Forum on general fundamental rights issues.

<sup>1188</sup> See TFEU, article 216(2) ‘Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States’. The Council concludes all international agreements, see TFEU, article 218; The EU-Turkey statement (n 99); Sea Borders Regulation (n 7).

<sup>1189</sup> ARIO Commentary (n 98) article 17, paragraph 1; Jose Manuel and Cortes Martin, Does the EU Require Special Treatment in the Articles on the Responsibility of International Organizations? In Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Brill Nijhoff, 2013) 192; Frank Hoffmeister, ‘Litigating against the European Union and its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?’ (2010) *EJIL* 21, 723-47.

of its international obligations by adopting *a decision* binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization'.<sup>1190</sup> The main objective of Article 17(1) is to attribute international responsibility to an international organization which tries to influence its members 'in order to achieve through them a result that the organization could not lawfully achieve directly'.<sup>1191</sup> It is designed to prevent the international organization from escaping its responsibility by 'outsourcing' its actors.<sup>1192</sup> For such circumvention to arise there must be an intention on the part of the international organization to benefit from the distinct legal personality of its members so as to avoid its own international obligations.<sup>1193</sup>

Article 17(1) ARIO does not stipulate as a precondition that the Member States actually implement the required act.<sup>1194</sup> As it is expected that Member States will comply<sup>1195</sup> with binding decisions,<sup>1196</sup> the likelihood that a third party is injured is high.<sup>1197</sup> To imply circumvention, the Member State must be said to have 'so little room for manoeuvre that it would seem unreasonable to make it solely

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<sup>1190</sup> Emphasis added.

<sup>1191</sup> ARIO Commentary (n 98) article 17, paragraph 1.

<sup>1192</sup> ARIO Commentary (n 98) article 17, paragraph 1; UN General Assembly, *Agenda item 144: Report of the International Law Commission on the Work of its Fifty-Sixth Session (continued)* 16 November 2004 A/C.6/59/SR.22, paragraph 24; Niels Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations' (2010) 7 IOLR 35, 39.

<sup>1193</sup> ARIO Commentary (n 98) article 17, paragraph 4.

<sup>1194</sup> ARIO Commentary (n 98) article 17, paragraph 5.

<sup>1195</sup> Article 17(1) ARIO 'assumes that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations'; ARIO Commentary (n 98) article 17, paragraph 7; on the application of article 64, *lex specialis* the ILC has rejected the *sui generis* nature of the EU as an international organization thus arguing that a *lex specialis* is excluded, see ILC, Report of the Fifty-Seventh Session (2005) A/60/10, 95, paragraph 7; According to the ILC, Article 64 was modeled on the basis of ARIO, article 55 'on the responsibility of States for internationally wrongful acts' see ARIO Commentary (n 98) article 64, paragraph 7; Jean d'Aspremont, *A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union* (SHARES Research Paper 22 (2013), ACIL 2013-04, 8.

<sup>1196</sup> TFEU, article 291(1); TFEU, article 288; also see TFEU, article 216(2).

<sup>1197</sup> ARIO Commentary (n 98) article 17, paragraph 5; Nataša Nedeski and André Nollkaemper, 'Responsibility of International Organizations' in Connection with Acts of States' (2012) ACIL 2012-05, 13.

responsible for certain conduct'.<sup>1198</sup> For this reason, Article 17(1) ARIO assumes 'that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations'.<sup>1199</sup>

There is no dispute that the Sea Borders Regulation constitutes a binding act of the EU.<sup>1200</sup> However, the legal status of the EU-Turkey statement was questioned in the recent case of *T-192/16 NF, NG and NM v European Council*.<sup>1201</sup> The EU Court has jurisdiction to review the legality of any measure intended to have legal effects provided that it emanates from an institution, body, office or agency of the EU.<sup>1202</sup> On 28 February 2017, the General Court (GCEU) came close to deciding on the merits of an action for the annulment of the EU-Turkey statement but dismissed it for lack of jurisdiction. The GCEU concluded that the EU-Turkey statement had been agreed by the Heads of State or Government of the Member States of the EU so was not a measure adopted by the European Council.<sup>1203</sup> The court referred to the first and second meetings of the Heads of State or Government on 29 November 2015 and 7 March 2016 which invariably used the term 'EU' and 'European leaders' to designate the representatives of the Member States of the EU in a similar way to the 18 March 2016 meeting.<sup>1204</sup> The press releases of the first two meetings were clearly entitled 'Meeting of the European Union Heads of State or Government with the Republic of Turkey – EU –Turkey Statement, 29 November 2015' and 'Statement of the European Union Heads of State or Government'.<sup>1205</sup> The GCEU considered the meeting of 18 March 2016 as a continuation of the political dialogue with the Republic of Turkey initiated by

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<sup>1198</sup> ARIO Commentary (n 98) article 17, paragraph 7.

<sup>1199</sup> ARIO Commentary (n 98) article 17, paragraph 7.

<sup>1200</sup> TFEU, article 288(2); TFEU, article 291(1); Wessel (n 93) 40; Francesca Martines, "Direct Effect of International Agreements of the European Union" (2014) EJIL 25(1) 129-147 <<https://academic.oup.com/ejil/article/25/1/129/497390/Direct-Effect-of-International-Agreements-of-the>> accessed 17 October 2017.

<sup>1201</sup> *NF, NG and NM* (n 107).

<sup>1202</sup> TFEU, article 263.

<sup>1203</sup> *NF, NG and NM* (n 107) paragraphs 70-71. The case is now on appeal to the CJEU (Case C-208/17).

<sup>1204</sup> The EU-Turkey statement (n 99).

<sup>1205</sup> *NF, NG and NM* (n 107) paragraphs 50-51.

the Commission in October 2015 upon the invitation of the Heads of State or Government of the EU on 23 September 2015.<sup>1206</sup> It noted that the meeting of the European Council on 17 March 2016 and the international summit on 18 March 2016 were organised ‘in parallel in distinct ways from a legal, formal and organizational perspective, confirming the distinct legal nature of those two events’.<sup>1207</sup>

Instead of taking into consideration Article 31 VCLT and interpreting the statement ‘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’, the court paid close attention to the formal and organizational perspectives of the meetings.<sup>1208</sup> It held that the fact that the President of the European Council and the President of the Commission, though not formally invited, had also been present during the meeting ‘cannot allow the conclusion that, because of the presence of all those Members of the European Council, the meeting of 18 March 2016 took place between the European Council and the Turkish Prime Minister’.<sup>1209</sup> By informally engaging the President of the European Council and the President of the European Commission, the European Council negotiated an agreement with Turkey on the basis of the intergovernmental framework.<sup>1210</sup> This way it avoided the cumbersome negotiating procedures involving the Commission and consultation of the EP.<sup>1211</sup> The GCEU’s judgment has been heavily criticised by NGOs and legal scholars arguing that the only reason why the EU would have nothing to do with an agreement that it strongly supports, publicises and provides EU resources for its implementation would be to ‘sidestep accountability’.<sup>1212</sup> The decision

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<sup>1206</sup> *NF, NG and NM* (n 107) paragraph 68.

<sup>1207</sup> *NF, NG and NM* (n 107) paragraph 62.

<sup>1208</sup> The Court took a similar approach in *C-104/16 P Council v Frente Polisario* (21 December 2016) 86.

<sup>1209</sup> *NF, NG and NM* (n 107) paragraph 67.

<sup>1210</sup> Mauro Gatti, “The EU-Turkey Statement: A Treaty that Violates Democracy” (EJIL, 18 April 2016) <<https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>> accessed 17 October 2017.

<sup>1211</sup> TFEU, article 218.

<sup>1212</sup> Amnesty International, ‘EU: Court Decision Exposes Deliberate Attempt to Sidestep

revealed a gap in EU and Member State accountability, demonstrating a ‘safe haven’ for EU institutions and the Heads of State or Government to exploit when conducting negotiations with third countries in the name of the EU, but when it comes to international responsibility it is the Member States and not the EU that retain responsibility. In short, the European Council took advantage of the status of the Heads of States or Government to reach an agreement with Turkey based on Turkey’s existing commitments with the Union in the field of migration. Labelling the agreement as a ‘statement’ and referring to the ‘Members of the European Council’ as the ‘EU’, Turkey would honour this agreement in light of its existing commitments with the EU, and in the same time, if challenged by the EP before the CJEU, this agreement would be disguised as a non-binding instrument.<sup>1213</sup> Thus, the Members of the European Council found a way to commit Turkey to cooperate with Greece in the field of migration, and in the same time, circumvent the procedures imposed by Article 218 TFEU for the negotiation and conclusion of international agreements.

Although at first sight the particular use of the term ‘statement’ seems to suggest a non-binding international instrument,<sup>1214</sup> there is no doubt that the 18 March 2016 statement transformed the general political compromises of the EU-Turkey joint action plan of October 2015 and the 7 March 2016 statement into legally binding commitments taking the form of an ‘international agreement’ binding upon Union

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Accountability’ (1 March 2017) <<http://www.amnesty.eu/en/news/press-releases/all/eu-court-decision-exposes-deliberate-attempt-to-sidestep-accountability-1025/#.WT0mFfmGPcu>> accessed 25 October 2017; Carmelo Danisi, “Taking the ‘Union’ out of ‘EU’: The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law” (20 April 2017) <<https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>> accessed 22 October 2017; Steve Peers, The Final EU/Turkey Refugee Deal: A Legal Assessment (18 March 2016, EU Law Analysis) <<http://eulawanalysis.blogspot.al/2016/03/the-final-euturkey-refugee-deal-legal.html>> accessed 22 October 2017; Sergio Carrera, Leonhard den Hertog and Marco Stefan, ‘It Wasn’t Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal’ CEPS No 2017-15/April 2017, 7.

<sup>1213</sup> TFEU, article 218(6) EP consent required, also see article 218(10): ‘The European Parliament shall be immediately and fully informed at all stages of the procedure’; emphasis added.

<sup>1214</sup> Steve Peers, “The Draft EU/Turkey Deal on Migration and Refugees: Is it Legal? EU Law Analysis” (16 March 2016) <<http://eulawanalysis.blogspot.al/2016/03/the-draft-euturkey-deal-on-migration.html>> accessed 22 October 2017.

institutions.<sup>1215</sup> This argument is supported by the fact that in its fifth report *on the Progress made in the Implementation of the EU-Turkey Statement*, the Commission reported that ‘The European Council of 15 December 2016 reiterated its commitment to the EU-Turkey Statement, underlined the importance of a full and non-discriminatory implementation of all aspects and endorsed the Joint Action Plan on the implementation of the EU-Turkey Statement, elaborated between Greece and the Commission’.<sup>1216</sup> Otherwise, why would the European Commission report regularly on the statement’s implementation? The Heads of State or Government in their capacity as Members of the EU and within the framework of the European Council created binding obligations for the Union outside the established procedures laid down by the Treaties. Under the auspices of the EU-Turkey statement it was necessary for the Member States to act collectively in the framework of the European Council because readmissions and returns cannot be implemented without their decisions. If the Union did not intend to create an international agreement with Turkey via the European Council, then why was there a need for all Member States to meet with their Turkish counterparts? It would have sufficed if interested Member States had set up obligations in the field of migration as necessary. On this basis, the statement is argued to have produced legal effects for the Union, constituting a binding decision of the EU in light of Article 17(1) ARIO.

The key to raising the EU’s responsibility under Article 17(1) ARIO is whether the act is in breach of an international obligation for the EU. The law on the responsibility of international organizations does not permit that the EU adopts a binding decision on its Member States to commit an act that if committed by the EU would constitute an internationally wrongful act. An internationally wrongful

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<sup>1215</sup> *Qatar and Bahrein* (n 328) paragraphs 23-25; *Aegean Sea Continental Shelf* (n 219) paragraphs 96; VCLT, article 2(1)(a) – international agreements may take a number of forms.

<sup>1216</sup> European Commission, *Fifth Report on the Progress made in the Implementation of the EU-Turkey Statement* COM(2017) 204 final, 2; European Council, *Conclusions 15 December 2016* EUCO 34/16 <<http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-euco-conclusions-final/>> accessed 22 October 2017.

act may occur either as a result of the implementation of EU legislation or in connection with the operationalization of its provisions.<sup>1217</sup> This chapter argues that the EU's primary and secondary legislation do not constitute a problem in light of the 'formal recognition of protection principles';<sup>1218</sup> rather, the problem lies in making that protection a reality, i.e. in its operationalization rules.<sup>1219</sup> The Union, its Member States and Frontex are bound to recognise the 'right to asylum' and respect the principle of *non-refoulement* in accordance with Articles 18 and 19 of the EU Charter which have become part of its primary law.<sup>1220</sup> In addition, the Union recognises the fundamental rights as guaranteed by the ECHR as general principles of EU law.<sup>1221</sup> Thus, there is an absolute duty not to expel or return ('*refouler*') an individual to a State if 'substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3'.<sup>1222</sup> Moreover, the prohibition of *refoulement* in border control activities is clearly laid out in the SBC and the EBCG Regulation.<sup>1223</sup>

Through the Sea Borders Regulation, from 15 May 2014, the EP and the Council of the EU compelled Italy and Greece to implement Articles 6(2)(b) and 7(2)(b) authorising participating units to alter the irregular migrant vessel's course outside of or towards a destination other than the territorial sea or the contiguous zone of the host/coastal Member State. It was argued in this thesis that the diversion of irregular migrant vessels on to the high seas or possibly to third countries of departure constitutes a push-back practice and a collective expulsion measure in violation of the Refugee Convention, the EU Charter, the recast Asylum

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<sup>1217</sup> Mungianu (n 84) 55.

<sup>1218</sup> Goodwin-Gill, '*Non-Refoulement*' (n 55) 448-449.

<sup>1219</sup> Goodwin-Gill, '*Non-Refoulement*' (n 55) 448-449.

<sup>1220</sup> TEU, article 6(1).

<sup>1221</sup> TEU, article 6(3)

<sup>1222</sup> ECHR, article 3; *Soering* (n 59) paragraph 90-91; *Salah Sheekh* (n 715) 135; *Jabari* (n 197) paragraph 38; *Hirsi* (n 57) paragraph 114.

<sup>1223</sup> SBC (n 158) article 4; EBCG Regulation (n 1) article 14(2).



Procedures Directive and the principle of *non-refoulement*.<sup>1224</sup> In addition, through their implementation Italy and Greece act contrary to the ECtHR's judgment in *Hirsi* which prohibits the practice of push-back without first conducting an adequate assessment of individual circumstances and to assess whether the individual would be at risk of ill-treatment upon return, contrary to the ECHR and the Refugee Convention.<sup>1225</sup> Although EU law provides formal protection against *refoulement*, it is the border guards of Member States' in the exercise of law-enforcement functions who violate international obligations at the operational level. It was accepted by the CJEU in *European Parliament v Council of the European Union* that the conferring powers on the border guards such as apprehension, seizing vessels and disembarkation, i.e. 'conducting persons apprehended to a specific location' interfere with the fundamental rights of the persons concerned.<sup>1226</sup>

Furthermore, in light of the EU-Turkey statement and upon the Commission's request,<sup>1227</sup> Greece was obliged to amend its immigration and asylum legislation through Law No 4375/2016 to transform the hotspots<sup>1228</sup> on the Greek islands from reception facilities for registration and screening to centres for accelerated readmission procedures.<sup>1229</sup> Such decisions led to the automatic detention of all new irregular entrants from 20 March 2016 for the entire duration of their stay in Greece.<sup>1230</sup> The automatic *de facto* detention of asylum seekers during the entire

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<sup>1224</sup> Refugee Convention, article 33(1); EU Charter, articles 18 and 19, *non-refoulement* enshrined in EU law see TFEU, article 78(1); also see Sea Borders Regulation (n 7) article 4.

<sup>1225</sup> *Hirsi* (n 57) paragraphs 125 and 185.

<sup>1226</sup> C-355/10, *European Parliament v Council of the European Union* (ECLI:EU:C:2012:516) paragraph 77.

<sup>1227</sup> Commission, *Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration* COM (2016) 85 final, 3.

<sup>1228</sup> Renamed 'Reception and Identification Centers'; Greek Law 4375/2016, article 46.

<sup>1229</sup> Greek Law 4375/2016, article 60; European Commission, *Next Operational Steps* (n 915) 4; EU-Turkey readmission agreement (n 99); see TFEU, article 216(2) 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'; Council concludes all international agreements, see TFEU, article 218.

<sup>1230</sup> AIDA and ECRE, 'What's in a name?' (n 916); UNHCR, "UNHCR Urges Immediate Safeguards" (n 916).

duration of the asylum process was argued in Chapter Five to violate Article 5(1)(f) ECHR and the Reception Conditions Directive.<sup>1231</sup>

It was only on the basis of the EU-Turkey statement that Greece was obliged to recognise Turkey as a ‘safe third country’<sup>1232</sup> and determine as ‘inadmissible’<sup>1233</sup> asylum applications from individuals arriving from Turkey.<sup>1234</sup> Without assessing the safety of Turkey in practice, decisions by Greek first-instance courts were based on 1) the text of Turkish law, 2) Commission correspondence with Greek authorities and 3) Commission correspondence with Turkish authorities declaring that the situation in Turkey was safe.<sup>1235</sup> In its letter on 29 July 2016, addressed to Greek authorities, the Commission seems to consider Turkey as a ‘safe third country’ based on the Turkish legal framework and the diplomatic assurances provided by Turkish authorities.<sup>1236</sup> In relation to assurances provided by a third country that the applicant will not be subjected to ill-treatment, the ECtHR has already held that such assurances are unreliable; given the absence of an effective system of ill-treatment prevention it would be difficult to ensure that they would be respected.<sup>1237</sup> Furthermore, in Chapter Three it was argued that the Turkish

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<sup>1231</sup> *Musa* (n 931) paragraph 97; Recast Reception Conditions Directive (n 753) article 9; ECHR, article 5(1).

<sup>1232</sup> European Commission, ‘An EU ‘Safe Countries of Origin’ List’ (n 530); This concept was applied as part of the Fast Track Procedure in accordance with law no 4375/2016, article 60(4).

<sup>1233</sup> Asylum Procedures Directive (n 158) article 35: A Member State may reject an application as ‘inadmissible’ without examining its substance when: 1) the individual should have requested asylum in the first country of arrival Asylum Procedures Directive or see article 38: the applicant has been recognised as a refugee in another country (first country of asylum) guaranteeing effective access of protection (safe third country).

<sup>1234</sup> EU-Turkey statement (n 99) point 1; Greek Law 4375/2016, article 54; Greek Presidential Decree 113/2013, article 54 transposing Asylum Procedures Directive; EU Charter, article 18; Asylum Procedures Directive (n 158) articles 3 and 6; Refugee Convention, article 1 and 33; see Chapter 4, section 4 for further analysis.

<sup>1235</sup> See documents available on <<http://asylo.gov.gr/wp-content/uploads/2016/10/scan-file-mme.pdf>> accessed 17 July 2017; AIDA, “Safe Third Country Greece” <[http://www.asylumineurope.org/reports/country/greece/asylum-procedure/safe-country-concepts/safe-third-country#footnoteref1\\_rcakwfy](http://www.asylumineurope.org/reports/country/greece/asylum-procedure/safe-country-concepts/safe-third-country#footnoteref1_rcakwfy)> accessed 17 October 2017.

<sup>1236</sup> See documents available on <<http://asylo.gov.gr/wp-content/uploads/2016/10/scan-file-mme.pdf>> accessed 17 October 2017.

<sup>1237</sup> *Baysakov and Others v Ukraine* Application no 54131/08 (18 February 2010) paragraph 51; *Klein v Russia* Application no 24268/08 (01 April 2010) paragraph 55; *Othman (Abu Qatada) v the United Kingdom* – Application no 8139/09 (17 January 2012) paragraphs 187-189, Court will consider the general human rights situation in the receiving country and its general

asylum system does not provide access to international protection as ensured by the Refugee Convention to individuals coming from non-CoE countries, which are the source of refugee producing countries.<sup>1238</sup> The Commission should have been mindful to the risk of arbitrary repatriation to countries of origin in light of the concluded Turkish readmission agreements with Kyrgyzstan, Romania, Ukraine, Belarus and 22 other third countries.<sup>1239</sup>

Greece itself does not have a list of safe third countries.<sup>1240</sup> On 10 February 2016, in its Communication of implementation of the priority actions under the European Agenda on Migration, the Commission encouraged Greece to incorporate in its national legislation the notion of safe third countries provided the conditions were met.<sup>1241</sup> To determine Turkey as a ‘safe third country’, the Commission went a step further by providing a controversial interpretation of Article 38 of the recast Asylum Procedures Directive stating that ‘the concept of safe third country as defined in the Asylum Procedures Directive requires that the possibility exists to receive protection in accordance with the Geneva Convention, but does not require that the safe third country has ratified that Convention without geographical reservation’.<sup>1242</sup> Whereas according to the UNHCR, access to refugee status and the rights guaranteed by the Refugee Convention and *its Protocol* must be ensured by law and in practice.<sup>1243</sup>

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reputation for respect of Convention rights, the quality of the assurance and its given weight will depend in each case ‘on the circumstances prevailing at the material time’.

<sup>1238</sup> See Chapter 3, section 4.2.

<sup>1239</sup> Algeria, Bulgaria, Bangladesh, China, Egypt, Ethiopia, Georgia, India, Iraq, Iran, Israel, Jordan, Lebanon, Mongolia, Morocco, Nigeria, Pakistan, Russian Federation, Sri Lanka, Sudan, Tunisia, Uzbekistan; Kart (n ).

<sup>1240</sup> AIDA, Country Report Greece (2016) 77, <[http://www.asylumineurope.org/sites/default/files/report-download/aida\\_gr\\_2016update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_gr_2016update.pdf)> accessed 7 October 2017.

<sup>1241</sup> Commission, *Communication on the State of Play of Implementation* (n ) 18; Asylum Procedures Directive (n 158) article 38.

<sup>1242</sup> Asylum Procedures Directive (n 158) article 38(1)(e); Commission, *Communication on the State of Play of Implementation* (n ) 18.

<sup>1243</sup> UNHCR, “Legal Considerations” (n 104) 1, 6; emphasis added.

If it were not for the EU-Turkey statement the accelerated readmission procedure would not have been adopted, nor would asylum seekers' liberty be taken away or would they be deprived of their 'right to an effective remedy'.<sup>1244</sup> Nor would irregular migrants be subjected to inhuman and degrading treatment in Greek hotspots reported to be 'severely overcrowded, with significant shortages of basic shelter along with filthy, unhygienic conditions. Long lines for poor quality food, mismanagement, and lack of information contribute to the chaotic and volatile atmosphere in the three hotspots'.<sup>1245</sup> The conclusion must be that Greece has taken legislative action to commit acts which are internationally wrongful based on its obligations deriving from the EU-Turkey statement. Thus, when carrying out internationally wrongful acts, Member States are said to be under the normative control of the EU; hence, giving rise to attributed responsibility for the EU.<sup>1246</sup>

Furthermore, in Chapter Five it was argued that Italy has conducted acts of inhuman treatment whilst taking irregular migrants' fingerprints.<sup>1247</sup> It is argued that these acts of inhuman treatment were committed by Italy because of EU authorization contrary to Article 17(2) ARIO.<sup>1248</sup> For EU international responsibility to arise, Article 17(2) ARIO requires that 1) 'the international organization authorizes an act that would be wrongful for that organization and moreover would allow it to circumvent one of its international obligations'; 2) the 'authorized act is actually committed' and 3) the act was committed 'because of that authorization'.<sup>1249</sup> Through the Eurodac Regulation, the EU has imposed upon Italy the obligation to take the fingerprints of everyone arriving irregularly

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<sup>1244</sup> ECHR, article 5(1); Reception Conditions Directive (n 753) article 9; *Musa* (n 931) paragraph 97.

<sup>1245</sup> HRW, "Greece: Refugee 'Hotspots' Unsafe, Unsanitary" (n 889).

<sup>1246</sup> James Fry, 'Attribution of Responsibility' (2014) SHARES Research Paper 37, 25.

<sup>1247</sup> See Chapter 5, section 3.1.

<sup>1248</sup> ARIO, article 17(2) 'An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization'.

<sup>1249</sup> ARIO Commentary (n 98) article 17, paragraph 10 and 11.

at the EU's external borders.<sup>1250</sup> Due to the large scale arrivals, the Italian immigration and asylum system became overwhelmed and unable to take the fingerprints of all new arrivals. However, there were also situations when irregular migrants refused to provide their fingerprints, having the intention to move on to another Member State.<sup>1251</sup> Therefore, to achieve the target of 100% fingerprinting the Commission and Frontex recommended that Italian authorities use force and adopt legislation on longer term retention for those migrants that resist fingerprinting.<sup>1252</sup>

Italy was to adopt the 'Best Practices for Upholding the Obligation in the Eurodac Regulation to Take Fingerprints' established by the Council of the EU and the Commission setting out the 'proportionate use of coercion' purportedly accompanied with legal guarantees.<sup>1253</sup> To oblige Italy to meet the 100% fingerprinting target and implement the Best Practices, the Commission opened infringement proceedings against Italy for violation of the Eurodac Regulation.<sup>1254</sup> It was only under EU pressure that Italy used force against those persons refusing to give their fingerprints. The EU is bound by the prohibition of torture and inhuman or degrading treatment or punishment under Article 4 of the EU Charter.

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<sup>1250</sup> Eurodac Regulation (n 985).

<sup>1251</sup> Steve Scherer, "'No Fingerprints!' Chant Migrants in Italy as EU Cracks Down' (Reuters, 17 December 2015) <<http://www.reuters.com/article/us-europe-migrants-lampedusa-fingerprint/no-fingerprints-chant-migrants-in-italy-as-eu-cracks-down-idUSKBN0U02H720151217>> accessed 28 October 2017.

<sup>1252</sup> Frontex recommends use of force see - Parliamentary Commission of Inquiry on Reception and Identification, (Hearing of Frontex Coordinating Officer, Miguel Angelo Nunes Nicolau, 13 January 2016) <[http://www.camera.it/leg17/1058?idLegislatura=17&tipologia=audiz2&sottotipologia=audizione&anno=2016&mese=01&giorno=13&idCommissione=69&numero=0036&file=indice\\_stenografico](http://www.camera.it/leg17/1058?idLegislatura=17&tipologia=audiz2&sottotipologia=audizione&anno=2016&mese=01&giorno=13&idCommissione=69&numero=0036&file=indice_stenografico)> accessed 22 October 2017.

<sup>1253</sup> Commission, *Non-Paper for SCIFA on Best Practices for Upholding the Obligation in the Eurodac Regulation to take Fingerprints* 13 October 2014, Annex to DS 1491/14, 2; see Council of the EU, *Best Practices for upholding the Obligation in the Eurodac Regulation to take fingerprints* DS 1491/14, 30 October 2014, 2; ARIO Commentary (n 98) article 17, paragraph 9: 'The principle expressed in paragraph 2 also applies to acts of an international organization which may be defined by different terms but present a similar character to an authorization...'

<sup>1254</sup> European Commission, "Implementing the Common European Asylum System" (n 1039); European Commission, *Progress Report on the Implementation of the hotspots in Italy* (n 1037) 4, paragraph 11.

Although the EU has not actually committed the wrongful act itself, it has authorised it. The Italian authorities committed an internationally wrongful act because of the Council of the EU and the Commission's contribution to 'Best Practices' on 'proportionate use of force'.<sup>1255</sup> Therefore, it is argued that the acts of inhuman treatment committed by Italian authorities for the purpose of taking fingerprints were committed under EU authorization through rules of operationalization.<sup>1256</sup> Thus, in those circumstances when an internationally wrongful act results from the implementation of an EU decision by the Member States or its authorisation to engage in certain conduct, the EU incurs primary responsibility.<sup>1257</sup> On this basis, it is argued that the EU incurs international responsibility through circumventing one of its international obligations under Article 17(1) and (2) ARIO.

On this basis, it is argued that the EU has a positive obligation to amend Article 6(2)(b), Article 7(2)(b) and Article 10 of the Sea Borders Regulation to conform with international human rights law and other international obligations. In the meantime, it is suggested that Frontex joint operations at sea, *Poseidon* and *Triton*, must be suspended in full.<sup>1258</sup> In relation to the EU-Turkey statement, in accordance with the law of international responsibility, an international agreement which 'conflicts with a peremptory norm of general international law is void'.<sup>1259</sup> The EU's pretences that the EU-Turkey statement is necessary to manage the European refugee crisis do not and cannot justify or excuse the EU from any derogation from a peremptory norm of general international law.<sup>1260</sup> According to Article 26 ARIO and ASR respectively, 'nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation

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<sup>1255</sup> ARIO Commentary (n 98) article 17, paragraph 10 and 11; Nedeski and Nollkaemper (n 1197) 12.

<sup>1256</sup> ARIO, article 17(2).

<sup>1257</sup> ARIO, article 17.

<sup>1258</sup> ARIO, article 30; *Wall* (n 201) paragraph 145-146.

<sup>1259</sup> ARIO, article 26; ASR, article 26; ASR Commentary, article 26, paragraph 1.

<sup>1260</sup> ASR Commentary (n 489) article 26, paragraph 4; ARIO Commentary (n 98) article 26, paragraph 3; see *Gabčíkovo-Nagymaros Project* (n 402) paragraph 48.

arising under a peremptory norm of general international law'.<sup>1261</sup> Thus, the EU must ensure that Greece suspends returns to Turkey on the basis of the EU-Turkey statement. Any returns to Turkey must be conducted upon an examination of individual circumstances with due regard to the 'right to asylum' and the *non-refoulement* principle. It is suggested that the Commission commences infringement proceedings against Italy and Greece for violations of the *non-refoulement* principle and prohibition of torture and inhuman and degrading treatment occurring in Greek and Italian hotspots contrary to EU and international law.<sup>1262</sup>

## 6.5 Conclusion

The law of international responsibility becomes increasingly important at a time when the EU and the Member States are increasing their activities beyond their borders. To date, practical and legal difficulties are encountered in ascertaining the EU's attribution of responsibility in a multi-actor involvement strategy. The law of attribution requires the establishment of a single actor to have committed the wrongful act before responsibility is attributed. In multi-party involvement this concept of singularity does not adequately address the ever-increasing State cooperation, nor do they respond to the activities of the EU, which acts as a global actor in the field of foreign security.

The articles on the responsibility of international organizations as they stand do not adequately address the EU-Agency-Member State relationship. The regulatory character of Frontex allows its participating Member States and the EU to hide behind Frontex acts in an attempt to circumvent their responsibility. The Frontex operational plan, once drawn, cannot be legally scrutinised. On this basis, as long as Member States use the services of Frontex, they may go ahead and undermine their international obligations without concern that their actions will be subject to

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<sup>1261</sup> ASR Commentary (n 489) article 26, paragraph 4; also see ARIO Commentary (n 98) article 26, paragraph 3.

<sup>1262</sup> TFEU, article 258.

judicial scrutiny. Moreover, the complex supranational framework of the EU has created not only gaps in shared responsibility between the EU and its Member States but also a ‘safe haven’ from accountability.

It is argued here that although the articles on international responsibility have revealed weaknesses when addressing the EU-Agency-Member State relationship, nonetheless, international responsibility cannot be circumvented by the Member States and the EU. Although Frontex’s *de jure* mandate provides for a coordinating role during joint operations, it is argued that its role of a *de facto* regulator makes it responsible for violations of international obligations within its operational area. Thus, the EU through Frontex acquires attributed international responsibility for the same wrongful act committed by Frontex and the participating Member States. Nor can the EU take advantage of its complex supranational framework to circumvent its international obligations. Article 17 ARIO has been designed specifically to attribute international responsibility to an international organization which tries to influence its members ‘in order to achieve through them a result that the organization could not lawfully achieve directly’.<sup>1263</sup> Unfortunately, however, the jurisprudence of the ECtHR involving multi-party actors has placed obstacles for irregular migrants to hold the EU accountable. Thus, the present system of international adjudication for questions on international responsibility for international organizations and/or States is not well designed to deal with the unprecedented level of international co-operation involving several actors (States/international organizations) responsible for human rights violations.<sup>1264</sup>

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<sup>1263</sup> ARIO Commentary (n 98) article 17, paragraph 1.

<sup>1264</sup> André Nollkaemper, ‘Introduction: Procedural Aspects of Shared Responsibility in International Adjudication’ (2013) *JIDS* 4(2) 277-294; Nollkaemper and Jacobs (n 90) 423; Lori Fisler-Damrosch, ‘Multilateral Disputes’ in Lori Fisler-Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational Publishers 1987) 376.



## Chapter 7: Conclusion

### 7.1 Original Contribution to Literature and Key Findings of the Research

Whilst irregular migration is not a new phenomenon, it has gained the most attention on the south-eastern borders of Europe mainly due to the EU's, Italian and Greek extraterritorial deterrence measures against boatloads of irregular migrants. This has revealed practices at odds with key obligations under international human rights and refugee law, and the Law of the Sea. These extraterritorial measures in the form of interception and readmission agreements at EU and Member State level were projected to be a solution to the irregular migration crisis, a response to human smuggling and a contribution to the protection and saving of lives at sea. However, the original part of this thesis stands on the rejection of these assumptions arguing that now they have become the *problem*. This thesis has sought to address the question as to whether the EU, Italian and Greek extraterritorial measures in the form of interception and readmission agreements adopted against irregular migrants crossing the Aegean and Mediterranean seas are in compliance with EU and international human rights law and other international obligations. The thesis has investigated 1) the Greek extraterritorial practices of interception and push-backs to Turkey from January 2014 to June 2016 and Italian indirect push-backs to Libya through EUBAM since 22 May 2013, 2) Frontex's interception operations at sea in accordance with the Sea Borders Regulation to expose serious violations of human rights law and other international obligations and 3) the international responsibility of Greece, Italy and that of the EU in its collective role through Frontex and through its decisions addressed to Member States authorising them to commit acts that are internationally wrongful.

It is argued that these extraterritorial practices, used as a migration containment belt at sea have exposed the regulatory shortcomings of the key conventions designed to afford international protection such as the Refugee Convention and the ECHR. This thesis provides an original contribution to current literature in

respect of finding the Refugee Convention and the ECHR inadequate to offer international protection in light of the unprecedented level of international cooperation, particularly within the framework of transnational organized crime. The territorial limitation under Article 1A(2) of the Refugee Convention which recognises as a refugee a person who is ‘outside the territory of his/her country of nationality or habitual residence’<sup>1265</sup> and the ECtHR interpretation for establishing a State’s extraterritorial jurisdiction in light of Article 3 ECHR have created legal loopholes for exploitation in State cooperation involving several actors responsible for human rights violations. In cases of indirect breaches of the ‘right to asylum’ and the *non-refoulement* principle, these conventions become non-applicable, thus, they are unable to offer their protection to injured parties against all forms of illicit State conduct. In essence however, it is argued that international law does not allow a State to avoid its international responsibilities by assisting third countries to breach their international obligations in the context of cooperation in migration control. This thesis has found that through financial and know-how assistance to Libya within the framework of transnational organised crime, the Libyan pull-back practices become in effect indirect Italian and EU push-back practices, prohibited by the ECtHR in *Hirsi* as a violation of the *non-refoulement* principle.

In terms of push-back practices, this thesis has contributed to raise the legal responsibility of Italy, Greece and the EU (through Frontex) for violations of international obligations in light of ASR and ARIO, respectively. Thus, the international responsibility for Italy and the EU has been established in accordance with Article 16 ASR and Article 14 ARIO respectively, for aid or assistance given to Libya for the commission of internationally wrongful acts. In addition, the international responsibility of Greece has been established in relation to its push-back practices contrary to Article 1 and 12 ASR for the commission of internationally wrongful acts. Against this background, this thesis challenges the

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<sup>1265</sup> *European Roma Rights Centre and Others* (n 74) paragraph 31; Also see UNHCR Handbook (n 74) paragraph 88.

assumptions in existing literature that the EU cannot be attributed with international responsibility for the internationally wrongful acts committed during Frontex joint operations. In light of Articles 4 and 7 ARIO, this thesis imputes upon the EU institutions responsible for producing EU legislative acts with international responsibility for every internationally wrongful act occurring during Frontex joint operations.

Furthermore, this thesis contributes to literature by critically analysing the provisions of Article 6(2)(b), Article 7 (2)(b) and Article 10 of the Sea Borders Regulation purportedly adopted to establish uniform rules on interception and disembarkation, but argued here to amount to direct breaches of international obligations which entail bad faith implementation of key instruments such as the Refugee Convention, UNCLOS, SAR Convention, and the ECHR. Furthermore, this thesis challenges the effectiveness of the Italian and Greek asylum and immigration laws in the context of the Sea Borders Regulation arguing that through disembarkation in these two hosts/coastal Member States, Frontex violates EU and international search and rescue legal frameworks, the Law of the Sea, as well as, the prohibition of *non-refoulement* and collective expulsions. Moreover, through an original contribution, the rules on disembarkation have been found to have created a legal gap in protection in terms of not offering the possibility of alternative places of disembarkation when the host/coastal Member States are deemed unsafe. It is argued that Italy and Greece are not considered safe places for disembarkation purposes in accordance with EU and international legal framework on search and rescue. Furthermore, it has been argued that the Sea Borders Regulation has had the effect of creating a new immigration regime offering less protection to irregular migrants travelling by sea compared to those travelling by land.

Moreover, existing literature have not studied to date the EU-Turkey statement and the Sea Borders Regulation as tools of circumvention for international

obligations in light of Article 17 ARIO. Existing literature has created an assumption that due to the complexity of the EU's legal framework, the EU and its Member States may continue to exploit the gaps in the rule of law and in the legal regime of State and international organisations' legal responsibility and accountability as to evade their international responsibility. However, this thesis rejects the assumption that the complexity of the EU's legal framework has turned into a shield for the EU and its Member States against international responsibility for violations of international obligations when committed under Frontex coordination or the EU's normative control. It is argued that Article 17 ARIO is designed precisely to prevent situations when an international organization attempts to circumvent its responsibility by 'outsourcing' its actors and taking advantage of its separate international legal personality.<sup>1266</sup> Thus, by way of an original contribution the EU is argued to incur international responsibility in light of Article 17 ARIO because through its decisions it has obliged its Member States to commit internationally wrongful acts in an attempt to circumvent its international obligations.

Based on the above framework, the following key arguments have been made in this thesis:

**1. EU, Italian and Greek extraterritorial practices as violations of international obligations.**

The illicit extraterritorial border control practices conducted by Italian and Greek authorities have been based on the assumption that the Refugee Convention, CAT and the ECHR do not apply in situations where massive arrivals of irregular migrants generate a state of emergency. This thesis rejects this assumption arguing that these conventions apply extraterritorially and any conduct contrary to human rights law and other international obligations triggers the international responsibility of that State and that of the international organizations which assist

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<sup>1266</sup> ARIO Commentary (n 98) article 17, paragraph 1.

in the commission of internationally wrongful acts. In addition, the inconsistent interpretations of the international legal framework on search and rescue and the inconsistent application of human rights law for irregular migrants crossing by sea are argued to have created a loophole in Member State and EU responsibility under international law for violations of human rights law and other international obligations.

Chapter Two set out the legal framework on interception and search and rescue to clearly identify the boundary between the State's legitimate interests in protecting its external borders against irregular migration and the limitations of its sovereign right to regulate immigration on matters concerning asylum and refugee law, and the principle of *non-refoulement* prohibiting the return of individuals to a country where s/he might face a real risk of being subjected to ill treatment. As distinct jurisdictional rules apply to specific maritime zones, in light of UNCLOS, Chapter Two provided a detailed analysis of a State's right to intercept a foreign vessel or a stateless vessel within its territorial sea or contiguous zone or on the high seas. As Greek and Italian authorities have treated interception operations as rescue missions, Chapter Two provided a detailed analysis of the international legal framework on search and rescue and the jurisprudence of the ECtHR to substantiate the argument that the application of multiple international law regimes does not diminish Convention rights. The SAR Convention was critically assessed in relation to the legal issues arising out of rescuing irregular migrant boats in distress and the 'place of safety' concept.

The overlapping SAR regions of Italy and Malta have been analysed with regard to their inconsistent interpretations of concepts such as 'distress' and 'safe place' for disembarkation. The inconsistent interpretation of what is meant by a 'distress phase' has given rise to various legal issues on the 'right to life'. It has been argued that the reluctance of the Italian and Maltese authorities to initiate rescue operations upon a distress call has contributed to increased loss of life at sea. It is

argued that this practice has developed as a result of the legal vacuum created by the SAR Convention in not addressing the issue of who acquires responsibility for those rescued or offering a solution to situations of failed rescued scenarios and reluctance to initiate rescue. Chapter Two refers to the jurisprudence of the ECtHR which has clearly asserted that as long as the jurisdiction of the State is triggered, the relevant coastal authorities have a positive obligation to ensure the legal protection and safeguards guaranteed under regional and international legal frameworks on asylum and other international obligations. Furthermore, coastal States have a positive obligation to take preventative measures to counter immediate risks to persons in distress under their responsibility. As part of the solution, Chapter Two advances the argument that at the moment a distress call is made to a coastal State from the high seas, a relationship is created through the establishment of an ‘exclusive long distance *de facto* control’ sufficient to make the ECHR applicable, leading to the recognition of a ‘right to be rescued’.<sup>1267</sup> If the distress call comes from within the SAR Zone this control becomes *de jure* given the additional obligation on the SAR State to ‘promote the establishment, operation and maintenance of an adequate and effective search and rescue service...’<sup>1268</sup> Thus, failure to initiate a rescue operation upon receiving a distress call breaches the coastal State’s international obligation to protect the ‘right to life’.<sup>1269</sup>

The issue of disembarkation has been analysed in light of the SAR Convention and the Sea Borders Regulation. The latter has contributed to the complexities in interpretation instead of adopting a uniform interpretation on principles of rescue, distress and disembarkation. The concept of ‘place of safety’ has been misinterpreted not because of unclear guidance by IMO or due to a lack of specific definition by the SAR Convention, but because of EU rules under the Dublin Regulation and CEAS imposing legal responsibility for the reception and

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<sup>1267</sup> Trevisanut “Is There a Right to be Rescued” (n 48).

<sup>1268</sup> UNCLOS, article 98(2).

<sup>1269</sup> ECHR, article 2; EU Charter, article 2; ICCPR, article 6; see Chapter 5 for more detail.

processing of asylum claims on the State in which the irregular migrant first disembarks.

Chapter Three has investigated the legal background of these extraterritorial measures in the form of interception, readmission agreements and surveillance mechanisms such as EUROSUR under the developed three stage pre-emptive strategy. The purpose of this chapter was to show that these measures, whilst purportedly in the name of saving migrants' lives and combating human smugglers, actually act as movable walls to an invisible fortress Europe, holding irregular migrants in an invisible belt within the Mediterranean and Aegean seas. In fact they are used as forms of deterrence to prevent irregular migrants from reaching EU territory in the most inhuman way. The chapter investigated the Italian and Greek extraterritorial strategy against irregular migration with the assistance of the EU in the light of the UN Convention against Transnational Organised Crime 2000 and its Protocols (the Palermo Protocols) in cooperation with Libya and Turkey.<sup>1270</sup> Chapter Three argued that the detention measures taken by Libya and Turkey penalised irregular migrants contrary to Article 5 of the Migrant Smuggling Protocol and the good faith principle,<sup>1271</sup> rendering the prohibition of 'non-criminalisation' ineffective in practice.<sup>1272</sup> These restrictive measures were also analysed in light of the 'right to leave one's own country' and the 'right to seek asylum'.<sup>1273</sup> The recent report of the Special Rapporteur on counter-terrorism and human rights, Ben Emmerson QC, was used as evidence that there was no genuine or present link between irregular migration and increased terrorist activity.<sup>1274</sup> Therefore, it was argued that the measures undertaken under the Protocols on migrant smuggling were disproportionate to

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<sup>1270</sup> See (n 68).

<sup>1271</sup> *Free Zones (Switzerland v France)* (n 392).

<sup>1272</sup> Migrant Smuggling Protocol (n 135) article 5 - smuggled migrants should not be subject to criminal prosecution if they are the object of conduct related to migrant smuggling as set forth in Article 6 of that Protocol; An obligation similar to article 31 of the Refugee Convention.

<sup>1273</sup> Refugee Convention, article 1; EU Charter, article 18; UDHR, article 14; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 71) 370.

<sup>1274</sup> UN, 'Promotion and Protection of Human Rights' (n 21) paragraph 11.

the aim of tackling human smuggling and do not meet the tests of legality and necessity. Thus, the overly-restrictive migration policies cannot be justified on grounds of State security.<sup>1275</sup>

Thus, the Italian financial assistance to Libya and the Greek returns under the EU-Turkey statement were analysed in light of the ‘right to asylum’ and the *non-refoulement* principle. The Italian extraterritorial measures undertaken post-*Hirsi* were analysed in relation to its financial contribution to Libya in the field of border security for the purposes of returning irregular migrants, under the mission known as EUBAM. Through EUBAM, the EU and Italy are assisting the Libyan authorities to perform pull-back practices, i.e. preventing would-be asylum seekers from reaching Europe. It was argued that such assistance is an indirect form of push-back in violation of international human rights and refugee law,<sup>1276</sup> interfering with the ‘right to leave one’s own country’ and incompatible with the *non-refoulement* principle. Thus, in light of Article 16 ASR and Article 14 ARIO respectively, Italy and the EU become derivatively responsible for the internationally wrongful acts committed by Libya in pulling-back irregular migrants in violation of its international obligations.<sup>1277</sup> Chapter Three also assessed the application of the ‘safe third country’ concept to Turkey and the responsibility of Greece for returns to Turkey in accordance with the EU-Turkey statement. Turkey does not offer effective legal protection under the Refugee Convention or respect the principle of *non-refoulement*.<sup>1278</sup> As recognised by ECtHR and the CJEU case law, Greece has an obligation to assess the efficiency of the Turkish asylum and immigration system before return, despite the fact that Turkey is also a party to the ECHR and a party to the EU-Turkey readmission agreement and the EU-Turkey statement.<sup>1279</sup>

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<sup>1275</sup> UN, ‘Promotion and Protection of Human Rights’ (n 21) paragraph 11.

<sup>1276</sup> See Chapter 4 on push-backs.

<sup>1277</sup> ASR, article 16; ARIO, article 14.

<sup>1278</sup> Roman, Baird, and Radcliffe (n 104); UNHCR, ‘Legal Considerations’ (n 104) 5-6; See Chapter 4 on *non-refoulement*; Reinhard Marx, ‘Legal Opinion on the Admissibility’ (n 542) 10.

<sup>1279</sup> *Sharifi* (n 115) paragraph 139-140; also see *NS* and *ME* (n 133) paragraphs 78 – 80; *Hirsi* (n



The chapter then scrutinised the EU’s intensification of surveillance through EUROSUR, an extraterritorial tool purportedly established to contribute to search and rescue and saving lives at sea. Chapter Three concluded that instead of being a strategic lifesaving tool, EUROSUR’s objective was to construct a ‘controlled space’ in the Mediterranean Sea which has contributed to increased loss of life. The EUROSUR ‘pre-frontier intelligence picture’ and the ‘pre-frontier situation in partner third countries’<sup>1280</sup> were argued to be acting as a disguised form of push-back mechanism. In effect, the pre-frontier mechanism assists Libya and Turkey to conduct pull-back operations, preventing would-be asylum seekers from reaching international waters, thus violating the ‘right to leave one’s own country’ and the ‘right to asylum’. It was argued in Chapter Three that the combination of Greek illicit push-back practices, Frontex joint operations and EUROSUR have contributed to the deaths of irregular migrants, turning the Mediterranean Sea into a graveyard.

Chapter Four scrutinised the illicit Greek push-back practices to Turkey from January 2014 to June 2016. Instead of offering assistance as required under the search and rescue legal framework,<sup>1281</sup> the Greek coastguards have taken positive steps to ensure the immediate return of these individuals to Turkey without first examining their individual circumstances.<sup>1282</sup> Chapter Four addressed the most contentious incidents occurring in Greek territorial waters on 20 January 2014, 25 October 2014 and 14 August 2015. In these incidents it was alleged that the drowning of irregular migrants was caused as a result of Greek coastguards

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57) paragraph 179; see full list of ratifications as of 11 September 2017 <[https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=VqX9Ev7W](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=VqX9Ev7W)> accessed 11 September 2017.

<sup>1280</sup> Emphasis added.

<sup>1281</sup> See Chapter 2, section 4.2-4.3.

<sup>1282</sup> Allegations of push-backs from November 2013 to 11 June 2016; see Pro Asyl, “Pushed-back” (n 110) 14-20; Amnesty International, “Greece: Frontier of Hope and Fear” (n 112) 15; Watch the Med, “Alarm Phone Press Release” (n 114); Infomobile, ‘Information with, about and for Refugees in Greece’ (n 601); Watch the Med, “Illegal Push-Back” (n 601).

towing their boat to Turkey at high speed, causing it to capsize.<sup>1283</sup> Other allegations were that the Greek coastguards boarded and punctured the vessel, and subsequently pushed the boat to Cesme, Turkey after removing the engine's fuel tank.<sup>1284</sup> Allegations of push-back practices have also been reported until 15 June 2016, between Chios, Greece and Cesme, Turkey.<sup>1285</sup> These incidents raised legal issues as to violations of the 'right to life' and 'duty to rescue',<sup>1286</sup> and were also assessed in light of the *non-refoulement* principle and the prohibition of inhuman and degrading treatment.

Chapter Four concluded that these push-back practices have produced 'a real and immediate risk to the life of an individual', violating Article 2(1) ECHR.<sup>1287</sup> In addition, the failure of the Greek authorities to initiate investigations to confirm or disprove these allegations violates the procedural aspect of Articles 2 and 3 ECHR. The intentional damage caused to irregular migrants' boats by Greek coastguards constitutes an internationally wrongful act. The allegations that during push-backs irregular migrants were 'slapped, beaten with batons, punched and kicked on their body, on their head and on their face' were assessed in light of Article 3 ECHR and it was concluded that these acts amounted to inhuman treatment. In addition, the allegations of having to 'kneel down and keep their hands behind their neck' whilst being bodily searched, with some individuals being forced to take their clothes off, were considered to constitute degrading treatment capable of interfering with the irregular migrants' dignity. The international responsibility of Greece for conducting internationally wrongful acts was analysed in light of Article 1 and 12 ASR.

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<sup>1283</sup> UNHCR, 'Statement on Boat Incident' (n 632).

<sup>1284</sup> Watch the Med, "They Want to See Us Drown" (n 145).

<sup>1285</sup> Watch the Med, "Illegal Push-Back" (n 601).

<sup>1286</sup> UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR Convention, Chapter 2.1.10.

<sup>1287</sup> SAR Convention, Annex, Chapter 1, point 11.

Chapter Four also provided a thorough assessment of Greece’s obligation not to ‘hand over those concerned to the control of a state where they would be at risk of persecution (direct *refoulement*),<sup>1288</sup> or from which they would be returned to another country where such a risk exists (indirect *refoulement*)’.<sup>1289</sup> Through returning irregular migrants to Turkey pursuant to the EU-Turkey statement, Greece was found to violate the *non-refoulement* principle, which is an absolute, non-derogable<sup>1290</sup> peremptory norm<sup>1291</sup> of general international law (*jus cogens*).<sup>1292</sup> Upon an assessment of decided cases by the ECtHR against Italy and Greece, this chapter has provided an original contribution by arguing that the reason why Italy and Greece have chosen to violate the *non-refoulement* principle despite its *jus cogens* character is because the economic costs for non-compliance is definitely lower than the costs of compliance.<sup>1293</sup>

In the context of border control, Chapter Four explained that the complexity of the judiciary system has made these extraterritorial border controls even more dangerous for the individuals concerned. Irregular migrants must first exhaust the inadequate asylum and immigration systems of Italy and Greece before accessing

<sup>1288</sup> Refugee Convention, article 33(1); ECHR, article 3; EU Charter, article 19(2); TFEU, article 78; Asylum Procedures Directive (n 158) article 9; Return Directive (n 42) articles 1 and 5.

<sup>1289</sup> UNHCR, ‘UNHCR Intervention before the European Court of Human Rights’ (n 735) paragraph 4.3.4.

<sup>1290</sup> Refugee Convention, article 42(1) and article VII(1) of the 1967 Protocol – ‘no reservations are permitted’; General Assembly (A/RES/51/75) (n 721) paragraph 3.

<sup>1291</sup> Allain (n 722) 534; Picone (n 722) 414.

<sup>1292</sup> *North Sea Continental Shelf Cases* (n 723) paragraphs 71, 73 and 77.

<sup>1293</sup> See Chapter 4, **section 4**; *Hirsi* (n 57) paragraphs 215-218, non-pecuniary damage: EUR 15,000 for each applicant (24 applicants), costs and expenses: EUR 1,575.74; *Sharifi* (n 115) paragraphs 251-252 and 256, non-pecuniary damage: with regards to Italy and Greece - applicants did not submit their claim for just satisfaction within time-limit, no amount was granted, costs and expenses: EUR 5,000 (granted jointly to the applicants); *Khlaifia* (n 115) paragraphs 285 and 288, non-pecuniary damage: EUR 2,500 for each applicant (3 applicants), costs and expenses: EUR 15,000 to applicants jointly; *MSS* (n 115) paragraphs 406, 411, 414, and 420: non-pecuniary damage: against Greece - EUR 1,000, against Belgium – EUR 24,900 costs and expenses: EUR 3,450 and EUR 6,075 respectively. See costs figures for EU countries, taking as example Germany - per asylum seeker (free meals plus EUR 143/month cash to maximum EUR 216/month and EUR 92/per child depending on age, compared to Italy EUR 35/day which goes to centres for meals and shelter and EUR 2.50 pocket money <<http://www.reuters.com/article/us-europe-migrants-benefits-factbox/factbox-benefits-offered-to-asylum-seekers-in-european-countries-idUSKCN0RG1MJ20150916>> accessed 22 October 2017.

the ECtHR. Secondly, assuming that they manage to exhaust the domestic remedies, they must satisfy the stringent eligibility criteria in the context of individual applications to the ECtHR. Chapter Four analysed the difficulties irregular migrants encounter in relation to the strict legal standards of admissibility to the ECtHR in order to prove a violation of Article 2 ECHR on the ‘right to life’ or Article 3 ECHR on prohibition of torture and other ill-treatment. As no expulsion order is given to irregular migrants pushed-back at sea, they have no opportunity to exhaust domestic remedies and as a consequence, their application is rejected by the ECtHR for want of victim status.<sup>1294</sup> Thus, illicit practices in border control coupled with the strict legal standards of admissibility to the ECtHR leave irregular migrants without legal protection. In addition, these create gaps in accountability. To ensure more effective protection of Convention rights, Chapter Four suggested that the ECtHR should adopt a practice wherein NGOs have legal standing to represent the victims’ interests.<sup>1295</sup> Furthermore, the ECtHR should allow an *actio popularis* for specific cases, similar to the practice of the Inter-American and African Commission on Human Rights.<sup>1296</sup>

Through an examination of reported cases and case studies by NGOs and civil society groups of alleged illicit practices in the context of extraterritorial border control, this thesis contributes towards demonstrating that Italy, Greece and the EU are blatantly undermining their obligations under international law, especially the Law of the Sea, the SAR Convention and international human rights and refugee law. Thus, in the framework of Frontex joint operations at sea, this thesis provides an original contribution to literature through finding that the launching of military vessels with the objective of ‘stopping boats’ and ‘altering their course’ to a third country or onto the high seas, referred to in this thesis as a ‘compassionate border work’ policy, is not ‘rescue’. On the contrary, it is a misinterpretation and a violation of SAR duties, an over-stretching of interception

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<sup>1294</sup> ECHR, article 34; Scordino (n 774) paragraph 179.

<sup>1295</sup> ASR, article 33; Mayer (n 775) 911; Rebasti and Vierucci (n 775) 12.

<sup>1296</sup> American Convention on Human Rights, article 44; Rules of Procedure and Evidence of the Inter-American Commission on Human Rights, article 23; Kooijmans (n 779) 23.

powers under UNCLOS, and a violation of the *non-refoulement* principle. Moreover, these extraterritorial measures have had the effect of displacing migrant's routes into more dangerous routes via sea, thereby contributing to increasing the number of deaths in the Mediterranean and Aegean seas. In so doing, they are in violation of the 'right to life'. The representation of interception as a 'compassionate border-work' policy equated to SAR concepts but having human rights consequences most certainly do not find support in international law.

## **2. The Sea Borders Regulation and lack of compliance with the SAR Convention and international human rights and refugee law.**

It has been argued that the consolidation rules on interception, search and rescue and disembarkation constitute a formal legitimisation of Member State push-back practices if committed under Frontex's coordination. The provisions of the Sea Borders Regulation, particularly those in regard to interception, search, rescue and disembarkation, it is argued violate the principle of *non-refoulement* and international refugee law. These rules seem to have created a new immigration regime which offers less protection to those irregular migrants arriving by sea. In addition, it is argued that the rules on disembarkation are flawed. They do not take into consideration the possibility of providing an alternative place of disembarkation if the host/coastal Member State's asylum and immigration system and conditions of disembarkation are not safe. It is argued that by disembarking these irregular migrants to Italy and Greece, Frontex violates international human rights law and other international obligations.

Chapter Five questioned the Council of the EU and the EP's decision to adopt rules on external border controls exclusively for Frontex joint operations, especially when considering that disputes and human rights violations take place through unilateral maritime border controls performed by Member States. Thus, Chapter Five argued that the objective of the Sea Borders Regulation was not to

provide a sustainable solution to the inconsistency in interpretation of interception, search and rescue and disembarkation practices, but was an attempt to use the EU regulatory framework to legitimise push-backs disguised as interception practices under the auspices of the fight against human smugglers and the deterrence of irregular migration. Chapter Five analysed Article 6(2)(b) governing interception on the territorial sea and Article 7(2)(b) on the high seas, two particularly controversial provisions of the Sea Borders Regulation. These provisions permit participating units to alter the intercepted irregular migrants' vessels' course to a destination other than the territorial sea or contiguous zone of the host/coastal Member State. Such a provision leads to a possible diversion of the vessel to international waters or a third country. Therefore, Chapter Five raised two key legal issues questioning '1) the legality of the permissive measure conducted in the territorial sea of the host Member State (Article 6(2)(b)), or on the high seas (Article 7 (2)(b)); and 2) the effectiveness of the Sea Borders Regulation to ensure the protection of fundamental rights and the principle of *non-refoulement*'.<sup>1297</sup> These provisions were assessed in light of the two incidents reported by activist networks between 5 August 2015 and 11 June 2016,<sup>1298</sup> argued to constitute a push-back practice and a collective expulsion measure,<sup>1299</sup> resulting in a violation of the Refugee Convention, the EU Charter, the recast Asylum Procedures Directive and the principle of *non-refoulement*, as well as the Sea Borders Regulation itself.<sup>1300</sup> In addition, these provisions infringe the 'right to life'<sup>1301</sup> and the 'duty to rescue' at sea.<sup>1302</sup> Furthermore, the Sea Borders Regulation has not stopped the rescue avoidance behaviours as analysed in

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<sup>1297</sup> See Chapter 5, section 5.2.

<sup>1298</sup> Infomobile, 'Information with, about and for Refugees in Greece' (n 601); Watch the Med, "Illegal Push-Back" (n 601).

<sup>1299</sup> Protocol No 4 to the ECHR, article 4; *Hirsi* (n 57) paragraphs 134, 138; see Chapter 4 on push-backs.

<sup>1300</sup> Refugee Convention, article 33(1); EU Charter, articles 18 and 19, *non-refoulement* enshrined in EU law see TFEU, article 78(1); Sea Borders Regulation (n 7) article 4.

<sup>1301</sup> ICCPR, article 6; ECHR, article 2; EU Charter, article 2; UDHR, article 3; Aas and Gundhus (n 79) 14.

<sup>1302</sup> UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR, Chapter 2.1.10 ; also contrary to the Sea Borders Regulation's objective 'to ensure the efficient monitoring of the crossing of external borders including through border surveillance, while contributing to ensuring the protection and saving of lives' see recital 1 and article 3.

Chapter Two. On the contrary, it purports to legitimise the participating units' practice of altering the course of irregular migrants' boats and leaving the individuals concerned stranded at sea contrary to the SAR Convention, UNCLOS and the ECHR.

The Sea Borders Regulation was critically analysed in terms of creating a new immigration legal framework offering less protection to those irregular migrants travelling by sea. The Sea Borders Regulation seems to presume that those individuals who arrive by sea should be treated differently from those arriving by land, denying them the applicable legislative guarantees under the asylum and immigration legal frameworks. The creation of a new immigration legal framework is not only discriminatory but also contravenes the ECtHR's reasoning in *Medvedyev* and more recently in *Hirsi* holding that the special nature of the maritime environment will not be allowed to fall outside the law, leaving individuals with 'no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction'.<sup>1303</sup>

In addition, Chapter Five addressed the Sea Borders Regulation's lack of specific rules on the possibility of providing an alternative course of action if the level of safety in the host Member State is questionable. On this basis Chapter Five analysed the local reception conditions and questioned the effectiveness of the asylum and immigration laws of Italy and Greece, the two main disembarking host/coastal Member States in Frontex joint operations at sea. For disembarkation purposes, it was argued that Greece and Italy no longer fulfil the 'safe country' criteria. The Italian and Greek hotspots were shown not to guarantee basic human needs such as food, shelter and medical provisions, contrary to the SAR Convention.<sup>1304</sup> In addition, the irregular migrants' automatic *de facto* detention in

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<sup>1303</sup> *Medvedyev* (n 159) paragraph 81; *Hirsi* (n 57) paragraphs 177 and 178.

<sup>1304</sup> SAR, Annex 3, Chapter I, 1.3.2.

Italy and Greece is unlawful in light of Article 5(1)(f) ECHR.<sup>1305</sup> Furthermore, through disembarking irregular migrants to Italy and Greece, it was argued that Frontex violated Article 4 of the EU Charter and Article 3 ECHR by knowingly subjecting an individual to conditions of detention and living conditions which amount to torture or inhuman or degrading treatment or punishment.<sup>1306</sup> Moreover, the Greek asylum and immigration appeals system does not offer an effective remedy, contrary to the overall objective of the EU Charter and the ECHR, whilst the Italian identification procedures are flawed and violate the *non-refoulement* principle. Chapter Five scrutinised the Italian readmission agreement with Sudan and found that it infringes an individual's right to seek asylum and violates the principle of *non-refoulement* and the prohibition of collective expulsions.<sup>1307</sup> The chapter concluded that by disembarking irregular migrants to Italy and Greece, Frontex through its implementation of the Sea Borders Regulation violates EU and international search and rescue legal frameworks on the grounds of the *non-refoulement* principle and prohibition of collective expulsions.

Thus, the Sea Borders Regulation has failed to resolve the inconsistent search and rescue practices occurring in the Aegean and Mediterranean seas. Even worse, its adoption rather seeks to legitimise these practices when performed under Frontex coordination contrary to a good faith implementation of international human rights and other international obligations. Moreover, the Sea Borders Regulation is perceived in this thesis to be the means to establish a new immigration regime which subjects irregular migrants arriving by sea to less protection. Under this new immigration regime, it is argued that irregular migrants travelling by sea are subjected to push-back practices endangering their lives in violation of the 'right to life' and 'search and rescue duties', as well as forced disembarkation to Italy

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<sup>1305</sup> ECHR, article 5(1); Recast Reception Conditions Directive (n 753) article 9; *Musa* (n 931) paragraph 97.

<sup>1306</sup> *NS* and *ME* (n 133) paragraph 88; *MSS* (n 115) paragraphs 358, and 367.

<sup>1307</sup> Refugee Convention, article 33; ECHR, article 3; Protocol No 4 to the ECHR, article 4; EU Charter, article 18 and 19.



and Greece, two host Member States which no longer satisfy the safe place of disembarkation criteria nor provide adequate asylum and immigration systems.

**3. The Use of the EU legal framework as a shield against EU's international responsibility for violations of international obligations when committed under Frontex coordination.**

This thesis argues that the deployment of Frontex, the adoption of the Sea Borders Regulation and the conclusion of an EU-Turkey statement are strategic tools designed to create confusion as to the responsible actor committing human rights violations and at the same time as a shield against responsibility and accountability for violations of international obligations. Through Frontex and its regulatory framework, the EU seeks to circumvent its international responsibility for any internationally wrongful act committed under the EU's normative control. The Frontex regulatory framework is used not only to help manage the EU's external borders but as a strategic tool to exploit the international judiciary system which is ill-equipped to hold international organisations accountable for the commission of internationally wrongful acts. The thesis contributes to establishing the EU's international responsibility through that of Frontex in light of Articles 4 and 7 ARIO. Frontex has been found to be the *de facto* controller in command of Frontex joint operations, thus, the wrongful conduct of the seconded border guards are attributable to the EU through Frontex. In addition, it is argued that the EU has stepped in to use its competence to act in the area of freedom, security and justice by taking advantage of the limited case law on the responsibility of States and international organisations with the hidden aim of circumventing its international responsibility and that of its Member States for violations of international obligations. However, it is argued that in light of Article 17 ARIO, the EU incurs international responsibility precisely because it takes advantage of its separate international legal personality and that of its Member States to circumvent its international obligations. Thus, the EU is argued

to acquire international responsibility for obliging its Member States through its decisions to commit internationally wrongful acts.

Chapter Six analysed the EU's attributed responsibility in accordance with the general rules on ARIIO. This chapter addressed the EU's international responsibility by arguing that the internationally wrongful acts committed during Frontex joint operations may be attributed to the EU via Frontex. The EU-Agency-Member State relationship was explored in the context of joint operations at sea to address the question as to whether international responsibility can be diluted in cases involving various parties when applying EU law. The legal question raised in this chapter was whether the 'conduct of a Member State border guard during Frontex joint operations is attributable to the EU and/or to its Member States' in light of Articles 4 and 7 ARIIO.<sup>1308</sup> As Frontex joint operations raised similar legal issues as those situations involving UN peacekeeping operations, the jurisprudence of the ECtHR was assessed in light of the law on international responsibility, referring mainly to the cases of *Behrami* and *Saramati* and *Al-Jedda*.<sup>1309</sup> On the basis of who maintains a factual 'effective control' of the 'operational command', it was argued that Frontex was the decision-making body which retained *de facto* command and control of the operational plan.<sup>1310</sup> As Frontex was found to be the only entity responsible for drawing up an operational plan detailing the organisational and procedural aspects of the joint operation, it was argued that Frontex retained control of the seconded border guards as required by Article 7 ARIIO. Frontex's wrongful conduct was argued to be attributed to the EU, thus making the EU internationally responsible. On this basis, as Frontex is accountable to the Council of the EU and the EP it was suggested that these two institutions invite Frontex's Executive Director to report on any allegations of wrongful acts committed in joint operations *Triton* and *Poseidon* and underline the necessity to exercise his positive duty to terminate

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<sup>1308</sup> Chapter 6, section 6.3.

<sup>1309</sup> *Behrami and Behrami* (n 1092); *Al-Jedda* (n 1092).

<sup>1310</sup> *Al-Jedda* (n 1092) paragraph 67.

or suspend in full or in part these joint operations which have adversely effected the human rights of irregular migrants.<sup>1311</sup>

Chapter Six also critically analysed the Sea Borders Regulation and the EU-Turkey statement in light of Article 17 ARIO as extraterritorial measures designed to circumvent the EU's responsibility for violations of international obligations such as the *non-refoulement* principle. These extraterritorial measures were assessed against the objective of Article 17 ARIO which attributes international responsibility to the EU if it influences its members to commit an internationally wrongful act that it cannot itself commit. However, as Article 17 ARIO comes with limitations, the chapter assessed whether in order to avoid its own international obligations, the EU intended to benefit from the distinct legal personality of its members. As Article 17(1) ARIO applies to decisions of the EU, the chapter had to assess the much debated legal status of the EU-Turkey statement as to whether it constitutes an international agreement. The legal status of the EU-Turkey statement was addressed in the cases of *T-192/16 NF, NG* and *NM v European Council*,<sup>1312</sup> in which the GCEU concluded that the statement did not emanate from an institution, body, office or agency of the EU.<sup>1313</sup> This chapter challenged the GCEU decision which is currently on appeal to the CJEU. It was argued that the language used in the EU-Turkey statement press release purports to present this agreement as a non-binding instrument. The actual objective behind this disguise however, is to avoid the cumbersome negotiating procedures imposed by Article 218 TFEU involving the Commission and consultation of the EP.<sup>1314</sup>

Concluding that the Sea Borders Regulation and the EU-Turkey statement constitute binding decisions of the EU, the chapter moved on to analyse the

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<sup>1311</sup> EBCG Regulation (n 1) article 25 (termination/suspension); EBCG Regulation (n 1) article 68(2) (report to Council of the EU and EP).

<sup>1312</sup> (n 107).

<sup>1313</sup> TFEU, article 263.

<sup>1314</sup> TFEU, article 218.

prohibition under Article 17 ARIO against the EU adopting a decision binding its Members to ‘commit an act that if committed by the EU would constitute an internationally wrongful act’.<sup>1315</sup> The above-mentioned binding decisions were argued to raise legal issues not with regard to their formal recognition of protection principles but in relation to their operationalisation rules. At the operational level, it was argued that the border guards of Member States which exercise law enforcement functions in the implementation of the Frontex operational plan have violated human rights law and other international obligations, establishing the causation element necessary for the application of Article 17(1) ARIO. Chapter Six scrutinised the changes made by Greek law no 4375/2016 in compliance with Greek commitments under the EU-Turkey statement, in terms of human rights law and other international obligations.<sup>1316</sup> In addition, the chapter assessed in light of Article 17(2) ARIO the Italian acts on inhuman treatment when taking irregular migrants’ fingerprints arguing these acts to have been committed because of EU authorization.

On this basis, it is argued that the Sea Borders Regulation and the EU-Turkey statement have been designed as extraterritorial tools perceived to constitute formal legitimisation of push-back practices contrary to the *non-refoulement* principle and the prohibition of collective expulsions entailing a bad faith implementation of key instruments such as the Refugee Convention, UNCLOS, SAR, and the ECHR. But most importantly, it is argued that the EU may not use the complexity of its legal framework as a shield against international responsibility when issuing decisions and authorisations contrary to international human rights and other international obligations. However, in light of the law of international responsibility, it is possible to impute the EU with responsibility for every internationally wrongful act or omission attributable through Frontex or its decisions authorising its Member States to commit internationally wrongful acts.

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<sup>1315</sup> See the analysis in Chapter 6, section 6.4.

<sup>1316</sup> Greek Law 4375/2016, article 60; see TFEU, article 216(2) ‘Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States’; Council concludes all international agreements, see TFEU, article 218.

Necessarily, a breach of the EU's international obligations entails its duty to declare the EU-Turkey statement void. Returns to Turkey must be conducted only upon an adequate assessment of individual circumstances. Furthermore, this thesis suggests that Article 6(2)(b), Article 7(2)(b) and Article 10 of the Sea Borders Regulation must be amended as to conform with international human rights law and other international obligations.

## **7.2 Research Limitations and Suggestions for Future Research**

In terms of the scope of the research and the nature of the irregular migration phenomenon, this thesis was limited to conducting a doctrinal analysis based on qualitative research drawing on primary and secondary sources. The nature of the irregular migration phenomenon imposes limitations in terms of conducting quantitative research as a result of irregular migrants departing from different third countries and entering EU territory through irregular means with constantly changing routes managed by migrant smugglers. Thus, quantitative research to determine the number of people who come to Europe in small boats and the treatment they receive during interception and rescue becomes difficult; especially as they are immediately detained in secure facilities with no opportunity of access. Therefore, this thesis has used statistics and data provided by regional and international agencies, civil society groups and NGOs, whose reports have gained authority through being relied upon by the ECtHR. The data provided by the IMO and the UNHCR together with civil society groups have been very useful in creating a nuanced picture of the irregular migrant arrivals crossing the Mediterranean Sea.

One of the main challenges encountered in terms of statistics has been the lack of official and accurate counting and registering of the number of irregular entries by sea and the number of deaths during border crossings. If the Member States had created a unique system for the registration of the number of deaths occurring at their land or sea borders, the international community would have a better picture

of what is truly going on in the Mediterranean Sea, especially in terms of the effects of any extraterritorial measure undertaken in the name of humanitarianism and border security. An official system of registration would not only be beneficial to families who report their family members as missing but would also be important for policy makers and international courts, in terms of quantification of the irregular migration phenomenon in the Mediterranean Sea. Registration is necessary for domestic and international courts to better analyse Member State practices in the light of their EU and international obligations. Although the quantification of irregular migration by sea is necessary, it must be noted that any official system of registration would not of itself reveal the actual number of migrants crossing the Mediterranean Sea considering that irregular migration occurs covertly following irregular paths and departing from unattended ports.

The nature of the irregular migration crisis posed a challenge in terms of difficulties in proving the main argument that the Member States' and Frontex's practices during joint operations at sea do not comply with fundamental rights. The Commission and Frontex are in charge of preparing official reports as to the implementation of Frontex joint operations and the EU-Turkey statement. These reports are prepared on the basis of Member States' self-reporting obligations, Frontex guest officers on the ground, EASO, and liaison officers. The Member States claim that officially the operational plan is fully compliant in practice with the applicable EU and international legal frameworks. The reports on the other hand describe procedural difficulties of implementation but do not refer to any violations occurring during these joint operations. Therefore, limited in terms of proof in support of the thesis's main argument, this research has based its assessment on the reports of FRA and non-legal sources such as NGO reports, activist accounts, and news on the media reporting infringement of international obligations.

The principles of international responsibility for international organizations in terms of Article 4, 7 and 17 ARIO have remained underdeveloped as a result of jurisdictional limitations by international courts and the limited scholarly literature. Thus, this thesis has been limited in terms of interpreting these particular articles to impose international responsibility on the EU through Frontex, or through its decisions and authorizations. The ILC commentaries on Article 4, 7 and 17 ARIO have been helpful in this regard. However, it must be noted that it was out of these limitations in case law and literature that the EU and its Member States adopted the ‘EU’s compassionate border work policy’ in its essence largely undermining the rights of irregular migrants. At the same time, these limitations have contributed into the establishment of Article 17 ARIO which has been designed to impute international organizations with international responsibility if they take advantage of the complexity of their legal frameworks to circumvent their international obligations.

Of particular concern in this thesis have been the conclusion of bilateral readmission agreements in respect to push-backs and *refoulement* to third countries with poor asylum systems and other rule of law deficiencies. Although the ECtHR in *Hirsi* and *Sharifi* challenged the illicit practices of push-backs under the auspices of bilateral agreements, since 2012 Member States with the assistance of the EU have increased their cooperation in terms of concluding bilateral readmission agreements at domestic and/or EU level.<sup>1317</sup> It has been argued in this thesis that readmission agreements involve collective expulsions of migrants and push-backs at sea without a proper assessment of individual circumstances in violation of EU and international human rights law. These agreements are in effect attempts by Member States to shrug off and shift their responsibility for irregular migrants to third countries. A future contribution to the field of bilateral readmission agreements could be the proposal of an expert

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<sup>1317</sup> *Hirsi* (n 57) paragraphs 127-129; *Sharifi* (n 115) paragraph 224.

agency<sup>1318</sup> with the function of scrutinising and controlling negotiations on bilateral readmission agreements both at EU and Member State level. Apart from raising standards and best practice on concluding readmission agreements, it is important that a mechanism is put in place to check that the agreement has been concluded and implemented in accordance with EU and international laws. The challenges brought about by these bilateral readmission agreements have not been due to their rhetoric, which claims consistency with international human rights and other international obligations, but the accelerated return provisions which infringe the legal safeguards established by international human rights and refugee law. Through its early involvement in the negotiation process, such an expert agency would guarantee that the third country satisfies the conditions for the readmission of TCNs.

Another important contribution to future research on the topic of extraterritorial interception measures at sea could be a study on the involvement of Frontex, NATO and Member State military vessels in jointly patrolling the Mediterranean Sea. It was beyond this thesis's scope to analyse the EU's *EUNAVFOR MED* operation *Sophia* and NATO military operations deployed to disrupt the human smugglers' and trafficking networks in the Central Mediterranean Route.<sup>1319</sup> Germany and Greece requested NATO to patrol Turkish and Greek territorial sea, as well as international waters<sup>1320</sup> in support of 'the broader international efforts to stem the flow of illegal trafficking and migration in the Aegean Sea'.<sup>1321</sup> The

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<sup>1318</sup> The agency could mirror the organic structure of FRA which includes legal experts, statisticians, political and social scientists. By way of suggestion the agency should include reputable NGOs as part of the structure to provide insightful information on what actually happens on the ground.

<sup>1319</sup> Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), (2015) OJ L 122/31; NATO, Press Conference by NATO Secretary General Jens Stoltenberg following the meeting of the North Atlantic Council at the level of Defence Ministers, 11 February 2016 <[http://www.nato.int/cps/en/natohq/opinions\\_127972.htm](http://www.nato.int/cps/en/natohq/opinions_127972.htm)> accessed 25 October 2017.

<sup>1320</sup> Germany leads the NATO operation, together with participating members such as Canada, France, Germany, Greece, Turkey and the UK.

<sup>1321</sup> NATO, NATO's Deployment in the Aegean Sea (Fact Sheet, October 2016) <[http://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2016\\_10/20161025\\_1610-factsheet-aegean-sea-eng.pdf](http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_10/20161025_1610-factsheet-aegean-sea-eng.pdf)> accessed 25 October 2017.



31 ships of the NATO's Standing Maritime Group 2 from eight states patrol the Aegean Sea to break the smugglers' business model and at the same time purport to save lives at sea.

This thesis has identified the Frontex military intervention not as a humanitarian tool but as a strategic warfare tool used against irregular migrants. It is suggested that the NATO military interventions have been deployed with similar aims. NATO does not have the mandate to board, search, seize and destroy boats of smugglers, or to interdict and turn away boats of migrants.<sup>1322</sup> NATO has openly stated that it does not intend to act as a transportation company for irregular migrants.<sup>1323</sup> NATO has openly stated in the media that rescued irregular migrants at sea would immediately be returned to Turkey.<sup>1324</sup> The British Defence Secretary, Michael Fallon, has explained that the intention is to save lives in the Aegean and break the criminal networks from Turkey to Europe.<sup>1325</sup> NATO's deployment to the Aegean Sea is questioned in light of search and rescue obligations which NATO ships have under international maritime law to rescue people who are at risk of drowning. Not only does this practice go beyond NATO's competence, but without an adequate assessment of individual circumstances it constitutes a collective expulsion measure and also violates the Law of the Sea. NATO's involvement in the Aegean Sea raises serious legal

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<sup>1322</sup> House of Lords, European Union Committee, *Operation Sophia, The EU's Naval Mission in the Mediterranean: an Impossible Challenge* 14<sup>th</sup> Report of Session 2015-6, HL Paper 144, paragraph 87  
<<https://publications.parliament.uk/pa/ld201516/ldselect/ldEUcom/144/14407.htm>> accessed 26 October 2017.

<sup>1323</sup> Politico, '72 Hours to Launch NATO's Migrant Mission' (Florian Eder 11 February 2016) <<http://www.politico.eu/article/72-hours-to-launch-natos-migrant-mission-refugees-asylum-greece-turkey/>> accessed 22 October 2017.

<sup>1324</sup> The Guardian, 'NATO Launches Naval Patrols to Return Migrants to Turkey' (Ewen MacAskill and Emma Graham-Harrison 11 February 2016) <<https://www.theguardian.com/world/2016/feb/11/nato-launches-naval-patrols-to-return-migrants-to-turkey>> accessed 22 October 2017; Politico, '72 Hours to Launch NATO's Migrant Mission' (n 1323); Niels Frenzen, 'Nato Expands Aegean Sea Migrant Patrols Into Turkish and Greek Territorial Waters-Rescued Migrants to be Automatically Returned to Turkey' 7 March 2016, <<https://migrantsatsea.org/tag/push-back-practice/>> accessed 22 October 2017.

<sup>1325</sup> *ibid.*

issues in terms of violations of international human rights and refugee law and thus constitutes an important area of study for future research.

A further contribution to future research could be the effects of opening legal migration channels of well-organised and coordinated resettlement and integration policies as a solution to prevent irregular migration. Future research should be focused on the means of tackling the refugee crisis from different perspectives including economic factors such as trade and employment as well as concerns for fundamental human rights.<sup>1326</sup> The European Economic forecast demonstrates that since 2011, the refugee crisis has produced positive economic outcomes in the EU, raising the Gross Domestic Product level of the EU to 0.2-0.3% by 2020.<sup>1327</sup> Furthermore, irregular migrants could be seen as a long term benefit to the EU considering its ageing population and the problem of labour shortages.<sup>1328</sup> Thus, future research could be conducted to explore the range of options towards finding the most effective way to open up channels to derive mutual benefit from irregular migration.

The arrival of over a million asylum seekers within the EU does not really represent a crisis of capacity for the Member States but rather one of political leadership.<sup>1329</sup> Politicians should change their collective mind-set and priorities' bearing in mind that migration is a common part of human existence. Migration is not necessarily a problem as such and is definitely not a crime. On this basis, future research should be focused on migration governance to open secure legal pathways for migrants, not to close off borders by wasting billions of Euros to

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<sup>1326</sup> Sergio Carrera, Steven Blockmans, Daniel Gros and Elspeth Guild, 'The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities', 16 December 2015, CEPS Essay No. 20, 21.

<sup>1327</sup> European Commission, *European Economic Forecast*, Autumn 2015, Institutional Paper 011, ISSN 2443-8014, 48-51, <[http://ec.europa.eu/economy\\_finance/publications/eeip/pdf/ip011\\_en.pdf](http://ec.europa.eu/economy_finance/publications/eeip/pdf/ip011_en.pdf)> accessed 22 October 2017.

<sup>1328</sup> *ibid.*

<sup>1329</sup> Francois Crepeau and Anna Purky, *Facilitating Mobility and Fostering Diversity Getting European Migration Governance to Respect the Human Rights of Migrants* (CEPS Paper in Liberty and Security in Europe No.92/May 2016) 1.

fund an EU policy which has failed to prevent irregular migrants and refugees from entering EU territory. The consequence of existing policies has been the tragic death of thousands of people dying in an attempt to find protection or a better life in Europe. The root causes of these tragedies rest with the policies and practices of the Member States and EU agencies. Opening up legal channels is the only way to weaken the criminal organisations responsible for human smuggling and most importantly to save lives at sea.

The battle against human smuggling and the irregular migration phenomenon is happening at the expense of persons in desperate need of international protection and thus in violation of international human rights and refugee law. The EU and its Member States have an obligation not to criminalise migrants who are the victims of conduct related to migrant smuggling but to *protect* these individuals, especially those entitled to special protection such as refugees and other vulnerable groups in accordance with international obligations.<sup>1330</sup> Furthermore, the continuing migration crisis requires that strong mechanisms are established to ensure that search and rescue operations are best coordinated by public authorities and to guarantee and facilitate rapid disembarkation.<sup>1331</sup> The political debate as to the interpretation of terms like ‘place of safety’ and ‘distress’ will cease only when disembarkation is not linked to the processing of asylum applications.<sup>1332</sup> Thus, a more civilised balance must be drawn between the Member States’ right to protect their borders and the ‘right to life’.

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<sup>1330</sup> Migrant Smuggling Protocol (n 135) article 5; Refugee Convention, article 31.

<sup>1331</sup> Åsne Aarstad ‘The Duty to Assist and Its Disincentives: The Shipping Industry and the Mediterranean Migration Crisis’ (2015) MP 20(3) 416.

<sup>1332</sup> Dublin Regulation (n 42) article 7.

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