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Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean

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Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean.

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Abstract

Although both international and EU law impose a number of obligations on the EU Member States with regard to persons in distress at sea, their effective implementation is limited by the manner in which they are being interpreted. The fact that the persons concerned are migrants who may seek asylum upon rescue has given raise to frequent disputes and to episodes of non-compliance. Frontex missions and the Italian 2009 push-back campaign illustrate the issue. With the objective of clarifying the scope of common obligations and to establish minimum operational arrangements for joint maritime operations, the EU has embarked in a legislative procedure to draft common guidelines for the surveillance of the external maritime borders. On this account, this paper intends to contribute to the clarification of the main obligations in international and European law binding upon the EU Member States when they operate at sea.

1. Introduction:

Although both international and European law impose a number of obligations on the EU Member States regarding persons in distress at sea, their effective implementation is limited by the manner in which they are being construed. Recent events in the Mediterranean demonstrate the uneasiness with which EU Member States deal with boat migration. Urgency to reduce irregular movement has given rise to episodes of non-rescue, frequent disputes over responsibility, and diversion of ships to ports in third countries. The possibility that rescuees may seek asylum appears to constitute the main disincentive to compliance. The Italian push-backs to Libya since May 2009,[1] a country with a doubtful human rights record and a non-Party to the 1951 Geneva Convention,[2] are an example. The joint operations carried out under the aegis of Frontex[3] further illustrate the point. The problem is arguably compounded by the fact that the law of the sea neither establishes where exactly rescuees are to be disembarked, nor does it clearly allocate responsibility in their regard.[4] According to the Maritime Conventions, as expounded below, it is for the shipmaster and the States partaking in the rescue operation to determine the appropriate 'place of safety', taking the relevant circumstances into account.

In the EU, the absence of a system that determines a default port of disembarkation, be it the geographically closest to the emergency, the next port of call, or that of intended destination, is perceived as an important lacuna.[5] An informal group, gathering experts from the EU Member States, Frontex, UNHCR, and IOM, was commissioned to draft minimum guidelines for joint maritime operations in 2007. 'The participants failed to agree on issues such as the implications of human rights and refugee

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[1] UNHCR Press Releases, *UNHCR deeply concerned over returns from Italy to Libya*, 07 May 2009, available at: http://www.unhcr.org/4a02d4546.html; *Follow-up from UNHCR on Italy's push-backs*, 12 May 2009, retrievable from: http://www.unhcr.org/4a0966936.html; *UNHCR interviews asylum seekers pushed back to Libya*, 14 Jul. 2009, retrievable from: http://www.unhcr.org/4a5c638b6.html; BBC News, *Libya given migrant patrol boats*, 15 May 2009, retrievable from: http://news.bbc.co.uk/2/hi/europe/8051557.stm; Human Rights Watch, *Pushed Back, Pushed Around – Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, Sept. 2009, retrievable from: http://www.hrw.org/en/node/85585; Jesuit Refugee Service Malta, *Do They Know? Asylum Seekers Testify to Life in Libya*, Dec. 2009, available at: http://www.jrs.net/news/index.php?lang=en&sid=5137.

[2] Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (*Geneva Convention* or *GC* hereinafter).

[3] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L 349/1 (*Frontex Regulation* hereinafter). Although Frontex is not a search and rescue agency most of the maritime operations it coordinates turn into search and rescue operations.

[4] J. Pugash, 'The Dilemma of the Sea Refugee: Rescue Without Refuge' (1977) 18 *Harvard International Law Journal* 577-604, at 578.

[5] Study on the international law instruments in relation to illegal immigration by sea, SEC(2007) 691 final, 15 May 2007.

rights, the role of Frontex, and the prior identification of the places of disembarkation for the migrants'.[6] Some Member States fear that clarifying obligations and solving the question of concrete attribution of responsibility produces a pull factor, encouraging migrants to come to the EU by sea.[7] Nevertheless, based on those discussions, the European Commission has issued a proposal for a Council Decision supplementing the Schengen Borders Code[8] as regards the surveillance of the external maritime borders in the context of the operational cooperation coordinated by Frontex.[9] The purpose is 'to ensure that the international rules relevant to the maritime border surveillance operations … coordinated by the Frontex Agency … are uniformly applied by all the Member States taking part in these operations'.[10] At the time of writing, the proposal is being negotiated at the Council of the European Union.[11]

Meanwhile, search and rescue obligations are interpreted inconsistently. Some EU Member States as well as Frontex unduly amalgamate interdiction with search and rescue operations, as if both measures were interchangeable and produce equivalent effects. As a result, vessels that are not in distress have been 'rescued', whereas vessels genuinely in distress ignored or diverted according to available reports.[12] Yet, Gil Arias-Fernández, the vice-director of Frontex, has commented favourably on the effect of maritime interventions, stating that '[o]n the humanitarian level, fewer lives have been put at risk, due to fewer departures'.[13] However, equating the humanitarian benefits of interdiction to rescue is a flawed position with no legal basis in international law. Search and rescue obligations are, in turn, understood as operating independently from other international obligations arising from refugee law and human rights, the observance of which is rendered uncertain. Often, minimal intervention is undertaken to prevent loss of life. Food, water and fuel are provided, but without engaging in actual rescue so that responsibility for the migrants concerned is avoided.[14] When interception/rescue is performed in the territorial waters of third countries with which the EU Member States and Frontex collaborate, it seems, moreover, to be assumed that the responsibility for the persons recovered belongs by default to those other countries. International co-operation is wrongly construed as releasing EU Member States from their obligations in relation to those intercepted in the territorial sea of the third countries in question.[15]

Against this background and on account of the drafting process of common guidelines for joint maritime operations, this paper intends to contribute to the clarification of the content of the main obligations binding upon the EU Member States when they operate at sea, in isolation or under the

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[6] Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM(2009) 658 final, 27 Nov. 2009, para. 1.1 (*Frontex Guidelines Proposal* hereinafter).

[7] European Union Committee of the House of Lords, 'FRONTEX: the EU external borders agency,' 9th Report of Session 2007-2008. Oral evidence by Mr Liam Byrne MP, Minister for Immigration, UK Home Office, para. 115: 'The way in which we interpret burden sharing is that we do not think we should be moving people around. We think that would create an enormous pull factor that would compound the problem rather than resolve it'. Major Andrew Mallia, from the armed forces of Malta, concurred, expressing similar concerns.

[8] Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L 105/1 (*Schengen Borders Code* or *SBC* hereinafter).

[9] Frontex Guidelines Proposal, above n. 6.

[10] Ibid., para. 2.

[11] Draft Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, Council doc. 17511/09, 15 Dec. 2009 and Council doc. 5323/1/10, 21 Jan. 2010.

[12] P. Popham, 'Doomed to drown: the desperate last calls of the migrants no one wanted to rescue', *The Independent*, 25 May 2007, available at: http://www.independent.co.uk/news/world/europe/doomed-to-drown-the-desperate-last-calls-of-the-migrants-no-one-wanted-to-rescue-450300.html. See also by the same author 'Europe's Shame', *The Independent*, 28 May 2008, retrievable from: http://www.independent.co.uk/news/world/europe/europes-shame-450754.htm.

[13] 'Immigration: Illegal Arrivals from Sea Halved in Italy', *ANSAmed*, 09 Jul. 2009, retrievable from: http://www.ansamed.info/en/news/ME03.@AM50679.html.

[14] 'Maroni claims Malta sent 40,000 migrants to Italy', *Times of Malta*, 21 Apr. 2009, retrievable from: http://www.timesofmalta.com/articles/view/20090421/local/moroni-claims-malta-sent-40-000-migrants-to-italy.

[15] See below the description of maritime operations.

auspices of Frontex. The first part introduces the agency and the main maritime operations it has coordinated thus far. The second part examines the rights of seaborne migrants and refugees. Search and rescue obligations, interdiction powers and the issue of disembarkation are discussed at some length. The principle of *non-refoulement* and concomitant entitlements to procedures and judicial protection, as they ensue from international and European law, are analyzed as well. Conclusions are drawn at the end.

2. Frontex and joint operations at sea:

Since the abolition of internal border controls, the EU has committed to build up a system of 'integrated border management' for checks at the external borders of the EU Member States. The concept was first introduced by the European Commission[16] and further echoed in subsequent discussions. A 2002 Council plan identified several elements the integrated border management strategy should integrate.[17] A 'common corpus of legislation' was deemed necessary alongside common operational co-ordination and co-operation mechanisms, integrated risk analysis, inter-operational equipment, and burden-sharing. At the beginning, the implementation of the plan was entrusted to the heads of border guards of the Schengen Member States gathering within the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA +). A number of activities had been carried out by June 2003. In light of the 'Report on the implementation of programmes, *ad hoc* centres, pilot projects and joint operations'[18] the need was felt for a more structured framework for inter-state cooperation. The idea of establishing a specialized agency progressed rapidly in the political agenda[19] and, preceding the adoption of the Schengen Borders Code, Frontex was established in 2004.[20]

A full definition of the concept of integrated border management was only articulated in 2006, when the Council established that it consisted of 'multiple dimensions', encompassing border control, crime prevention, inter-agency cooperation, and coordination of the activities carried out in this realm by the Member States and the EU.[21] Three specific components were identified through which the different dimensions of the strategy would be realized: a 'common corpus of legislation', embodied in the Schengen Borders Code; operational cooperation between the Member States, including cooperation undertaken under Frontex; and solidarity, through the creation of an External Borders Fund.[22] Reflecting the goals of the strategy, Frontex has been assigned the mission of improving 'the integrated management of the external borders of the Member States of the Union' in order to ensure both 'a uniform and high level of control and surveillance' and the 'efficient implementation of common rules'[23] in accordance with the fundamental principles of EU law.[24] Regulation 863/2007 has amended the Frontex instrument,[25] establishing the RABIT mechanism for mass influx situations at the external

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[16] Communication from the Commission to the Council and the European Parliament: Towards integrated management of the external borders of the member states of the European Union, COM(2002) 233 final, 07 May 2002.

[17] Plan for the Management of the External Borders of the Member States of the European Union, Council doc. 10019/02, 14 Jun. 2002.

[18] Report on the implementation of programmes, ad hoc centres, pilot projects and joint operations, Council doc. 10058/03, 03 Jun. 2003.

[19] J. Monar, 'The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders', in J. W. de Zwaan and F. A. N. J. Goodappel (eds.), *Freedom, Security and Justice in the EU – Implementation of The Hague Programme* (The Hague: T. M. C. Asser Press, 2006), 73-88; S. Peers and N. Rogers, 'Border Controls', in S. Peers and N. Rogers (eds.), *EU Immigration and Asylum Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006),169-84; P. Hobbing, *Integrated Border Management at the EU Level*, Justice and Home Affairs CEPS Working Documents, 01 Aug. 2005, available at: http://www.ceps.be/book/integrated-border-management-eu-level.

[20] Frontex Regulation, above n. 3.

[21] EU Finnish Presidency, Council Conclusions of 4-5 Dec. 2006, Press Release 15801/06, at 27.

[22] Ibid., at 26.

[23] Art. 1 and Recitals 1, 2, 4 and 21 of the Frontex Regulation.

[24] Recital 22 of the Frontex Regulation, referring to the European Union Charter of Fundamental Rights.

[25] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for

borders and regulating the powers of guest officers[26] participating in joint operations coordinated by the agency. The amendment insists on compliance with fundamental rights, mentioning that the Regulation should be carried out 'in accordance with Member States' obligations as regards international protection and *non-refoulement*' and laying special emphasis in respect of the 'obligations arising under the international law of the sea, in particular as regards search and rescue'.[27]

The overall strategic control of the agency is vested in the Management Board, composed of one representative of each Member State and two representatives of the Commission. The Management Board adopts the work programme and approves the general report of activities every year. Its decisions have to be implemented under the supervision of the Executive Director, appointed by the Management Board itself at the proposal of the European Commission.[28]

Despite the fact that Member States retain the legal 'responsibility for the control and surveillance of external borders'[29] and the power to 'continue cooperation at the operational level with other Member States and/or third countries', they ought to 'refrain from any activity which could jeopardize the functioning of the Agency or the attainment of its objectives'.[30] For the best realization of its functions, Frontex has been endowed with legal personality[31] and may cooperate autonomously with Europol and the international organizations competent in the field of its responsibilities.[32] The agency is also supposed to facilitate collaboration between Schengen Member States and third countries[33] and may conclude operational working arrangements for that purpose.[34] This autonomy has led commentators to detect some imprecision 'in the demarcation of responsibilities between Member States and the Agency',[35] which may decisively influence the allocation of responsibilities for eventual violations of international obligations occurring in the course or as a result of joint operations.

The agency has been entrusted with a variety of tasks.[36] It has to coordinate operational cooperation between the Member States in relation to the joint management of the EU external borders, assist in the training of national border guards, carry out risk analyses, follow up on the development of research relevant for the control and surveillance of the external borders, assist the Member States in circumstances requiring increased technical and operational assistance, provide them with the necessary support in organizing joint return operations, and deploy Rapid Border Intervention Teams in accordance with the RABIT Regulation.[37] Notably, Frontex has the capacity to launch joint operations and pilot projects at the request of the Members States or at its own initiative.[38] Concrete deployment follows a risk analysis developed by the Risk Analysis Unit, according to a common integrated risk

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the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L 199/30 (*RABIT Regulation* hereinafter).

[26] According to art. 12(2) of the RABIT Regulation 'guest officer' means: 'the officers of border guard services of Member States other than the host Member State participating in the joint operations and pilot projects'.

[27] Recitals 16-18 of the RABIT Regulation.

[28] Arts. 15-28 of the Frontex Regulation.

[29] Art. 1(2) of the Frontex Regulation.

[30] Art. 2(2) of the Frontex Regulation.

[31] Art. 15 and Recital 14 of the Frontex Regulation.

[32] Art. 13 and Recital 12 of the Frontex Regulation.

[33] Art. 14 and Recital 12 of the Frontex Regulation.

[34] Arts. 13 and 14 of the Frontex Regulation and Decision of the Management Board of Frontex of 01 Sept. 2006 laying down the procedures for negotiating and concluding working arrangements with third countries and international organizations (on file with the author). So far, working arrangements have been concluded with Europol, the UNHCR, IOM, Ukraine, Russia, Croatia, Moldova and Georgia (on file with the author).

[35] A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', in V. Mitsilegas and B. Ryan (eds.), *Extraterritorial Immigration Control* (The Hague: Martinus Nijhoff Publishers, forthcoming), 229-256, at 233.

[36] For a detailed analysis of the agency see H. 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?*, CHALLENGE Research Paper No. 6, March 2007, retrievable from: http://shop.ceps.eu/BookDetail.php?item_id=1483.

[37] Art. 2 of the Frontex Regulation as amended by art. 12 of the RABIT Regulation.

[38] Art. 3 of the Frontex Regulation.

analysis model.[39] In the case Member States require support in the form of increased technical and operational assistance, the agency can provide coordination between Member States or deploy its own experts.[40] Guest officers can exercise the powers related to border checks in accordance with the Schengen Borders Code.[41] Their executive authority is subject to EU law and to the national law of the Member State hosting the operation. In particular, they may perform their tasks under the instructions and, as a rule, in the presence of border guards from the host Member State, who remain the only competent to refuse entry pursuant to article 13 of the Schengen Borders Code.[42] To date, Frontex has carried out a number of joint missions at the external borders of the EU Member States. For our purposes, the *Hera* and *Nautilus* maritime operations constitute cases in point.

2.1 Joint operation *Hera*:

Hera has been the longest and most expensive single operation carried out so far employing 20 per cent of the total operational budget of the agency.[43] It was first launched at the request of Spain on 17 July 2006 to assist the authorities in the management of irregular arrivals to the Canary Islands from African countries.[44] The operation has been deployed in several phases, involving different EU Member States each time.[45] The objective is to prevent illegal immigration by sea and to identify traffickers and smugglers, while increasing operational cooperation between participating Member States and third countries.

Hera I, carried out between July and October 2006, was concerned with the identification of irregular migrants. It thus involved the secondment of experts from participating Member States to support the Spanish authorities in establishing the identity of detected arrivals.[46] A total of 18,987 migrants landed in the archipelago in the course of the operation. 6,076 were returned.[47] *Hera II* overlapped with the first operation, prolonging it until December. Its goal was to reinforce maritime surveillance of the area separating the Canaries from the Atlantic shore of Africa by dissuading *pateras* and *cayucos* from sailing off the coasts of Senegal, Mauritania and Cape Verde. When the boats were found already at sea, the objective was to intercept them while in the territorial waters of the third country of embarkation. The Spanish Commander in chief declared in an interview that 'boats containing a total of 1,243 people ha[d] been intercepted and returned to shore', adding that when they were located 'within 24 miles off the coast they [were] immediately returned'.[48] The boats were escorted to the Canary Islands only if they were found outside that zone. Apparently, the authorities of the third country concerned formally assumed the responsibility for the returns, but available reports are inconclusive on this point.[49]

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[39] Arts. 3 and 4 of the Frontex Regulation.

[40] Art. 8 of the Frontex Regulation.

[41] Art. 2(10) SBC: '"border checks" means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it'.

[42] Art. 10 of the RABIT Regulation, amending art. 10 of the Frontex Regulation.

[43] COWI, External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Final Report (Draft), Jan. 2009 (*COWI Report* hereinafter), at 38.

[44] S. Carrera, *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Document No. 261, March 2007, retrievable from: http://www.libertysecurity.org/article1406.html.

[45] For the Member States participating in *Hera 2006* and *2007* refer to the Commission staff working document accompanying the report on the evaluation and future development of the Frontex Agency SEC(2008) 150 final, 13 Feb. 2008. Regarding *Hera 2008* refer to Frontex General Report 2008, at 40, retrievable from: http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex_general_report_2008.pdf. Concerning *Hera 2009* refer to the Frontex website: http://www.frontex.europa.eu/examples_of_accomplished_operati/art45.html.

[46] Frontex Press Release, *Longest FRONTEX coordinated operation – HERA, the Canary Islands*, 19 Dec. 2006.

[47] Frontex Press Release, *HERA II Operation to be Prolonged*, 13 Oct. 2006.

[48] BBC News, *Stemming the immigration wave*, 10 Sept. 2006, available at: http://news.bbc.co.uk/2/hi/europe/5331896.stm.

[49] European Commission News, *EU immigration: Frontex Operation*, 12 Sept. 2006, Ref. 48181: '*Normally* Senegalese boats escort the migrants inshore, start the legal procedure and try to arrest the people that were paid for organizing the journey'

From April until November 2007, *Hera III* brought together the two dimensions of *Hera I* and *Hera II*. The explicit 'aim of these patrols, carried out with Senegalese authorities, [was] to stop migrants from leaving the shores on the long sea journey and thus reducing the danger of losses of human lives'.[50] In the course of the operation 'more than 1,000 migrants were diverted back to their points of departure at ports at the West African coast'.[51]

Hera has become a permanent operation, carried out throughout the year according to the needs identified by Frontex. *Hera 2008* was operated from February till December 2008, diverting 5,969 migrants back to African countries.[52] *Hera 2009* ran from March to December 2009, but figures on the mission are not available yet.[53]

The legal base adduced for these operations are the bilateral agreements concluded between Spain and the African States concerned, which content has not been made public. Frontex has disclosed in this regard that the 'agreements with Mauritania and Senegal … allow diverting … would-be immigrants' boats back to their points of departure from a certain distance of the African coast line' and that '[a] Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States' assets and is always responsible for the diversion'.[54] In spite of intensified patrolling, some have managed to arrive to the shores of the Canary Islands. Frontex experts have interviewed a fraction of these people, in order to establish their nationalities. However, as the agency itself has declared, 'for intelligence purposes only'. Frontex claims to ignore whether any asylum applications were submitted during the operations and it does not collect any data in this respect.[55]

2.2 Joint operation *Nautilus*:

The objective of *Nautilus* is 'to strengthen the control of the Central Mediterranean maritime border … and also to support Maltese authorities in interviews with the immigrants'.[56] As *Hera*, *Nautilus* has also been carried out in phases with the participation of different EU Member States[57] and has subsequently evolved into a permanent mission. The first stage took place in June-July 2007. 401 migrants were detected in the operational area, 63 outside it and a total of 166 were rescued. Frontex experts interviewed 26 per cent of the arrivals to Malta. The main nationalities established, 'as declared by the individuals themselves',[58] were Eritrea, Somalia, Ethiopia and Nigeria, which are among the main nationalities of the asylum applicants Malta registered in 2008, half of which received refugee or subsidiary protection status.[59]

Nautilus 2008 was launched after an agreement between the participating Member States was reached. 'The mission was on hold due to the difference of opinion concerning the responsibility of migrants saved at sea'.[60] After prolonged discussions it was decided that migrants intercepted in the Libyan Search and Rescue Area would be returned to Libya or taken to the closest safe port, if that would not be possible. Absent the acquiescence of the Libyan authorities, no diversions were

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(emphasis added).

[50] Frontex Press Release, *A sequel of operation HERA just starting*, 15 Feb. 2007.

[51] Frontex Press Release, *HERA III Operation*, 13 Apr. 2007; Public Bulletin May 2007, Ref. No. 7248/21.05.2007, at 3.

[52] Frontex Press Release, *HERA 2008 and NAUTILUS 2008 Statistics*, 17 Feb. 2009.

[53] Frontex Examples of Accomplished Operations, *Hera 2009*, available at: http://www.frontex.europa.eu/examples_of_accomplished_operati/art45.html.

[54] Frontex Press Release, *HERA 2008 and NAUTILUS 2008 Statistics*, 17 Feb. 2009.

[55] Letter to the Immigration Law Practitioners' Association, Ref. 12425/19.12.2008, 21 Jan. 2009 (on file with the author).

[56] Frontex Press Release, *Joint Operation Nautilus 2007 – the end of the first phase*, 06 Aug. 2007.

[57] For *Nautilus 2006* and *Nautilus 2007* refer to the European Commission, SEC (2008) 150 final, above n. 45. Regarding the participants in *Nautilus 2008* consult Frontex's General Report 2008. For *Nautilus 2009* refer to Frontex's website: http://www.frontex.europa.eu/examples_of_accomplished_operati/art46.html.

[58] Letter to the Immigration Law Practitioners' Association, above n. 55.

[59] Eurostat newsrelease, *Asylum in the EU in 2008*, STAT/09/66, 8 May 2009, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-08052009-AP/EN/3-08052009-AP-EN.PDF.

[60] Frontex Press Release, *Go ahead for Nautilus 2008*, 07 May 2008.

performed. 16,098 migrants managed to arrive to Italy, whereas 2,321 reached the shores of Malta.[61] Persisting differences between Italy and Malta with regard to the country responsible for disembarkation delayed the start of *Nautilus 2009*. Ultimately, the 'closest safe port' rule was maintained.

Italy and Libya concluded in August 2008 the Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya, making provision for mutual co-operation in the fight against irregular migration.[62] The first tangible result of the Italian-Libyan partnership was the transfer to Libya of three of the six patrol boats that were to be jointly operated by the authorities of both countries by 14 May 2009. In this connection, the commander of the *Guardia di Finanza*, Cosimo D'Arrigo, stated that the boats would be 'used in joint patrols in Libyan territorial water and international waters in conjunction with Italian naval operations'. He also explained that members of the Libyan coast guard would be stationed at the Italian command base on the island of Lampedusa and that the *Guardia di Finanza* would send a team to the Libyan coast guard station in Zuwarah, which would be used as a base of command on the Libyan side.[63] On this basis Italy has been interdicting vessels on the high seas and forcibly returning migrants to Libya 'without proper assessment of their possible protection needs'.[64] Among those intercepted, according to UNHCR, 'it is clear that a significant number from this group are in need of international protection'.[65]

Although the relationship between *Nautilus 2009* and the Italian push-backs remains ambiguous, what is certain is that *Nautilus 2009*, running from April to October 2009, coincided with the period in which Italy began this policy. At the launch of *Nautilus 2009* the hope was expressed, in addition, that the mission would be 'beefed up through the launch of joint patrols between Italy and Libya … monitoring the North African country's territorial waters'.[66] The decrease in the number of arrivals to the shores of Sicily and Sardinia in that period has openly been attributed to the agreements between Italy and Libya. As reported by Gil Arias-Fernandez himself, '[b]ased on our statistics … we are able to say that the agreements have had a positive impact'.[67] On the other hand, Frontex has been accused of having assisted Italy by taking action that has resulted in the diversion of migrants to Libya. According to Human Rights Watch, on 18 June 2009 '[a] German Puma helicopter operating as part of the Operation Nautilus IV coordinated [the] Italian Coast Guard interception of a boat carrying about 75 migrants 29 miles south of Lampedusa. The Italian Coast Guard reportedly handed the migrants over to a Libyan patrol boat, which took them to Tripoli where they were reported to have been handed over to a Libyan military unit'.[68] A day after Human Rights Watch's report was published, Frontex issued a press release 'to state categorically that the agency has not been involved in diversion activities to Libya', clarifying that 'these are based on a bilateral agreement which Italy signed with Libya in May [2009]'. The press release addresses the incident described in the report, specifying that 'Operation Nautilus 2009 was underway on June 18th 2009, but in a different operational area'.[69] The operational plan of *Nautilus 2009* remaining secret, this is difficult to corroborate. In any case, even if the exact degree of the agency's participation in the diversions to Libya cannot be established, the complementarity between *Nautilus 2009* and the Italian-Libyan patrols is quite clear.

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[61] Frontex Press Release, *HERA 2008 and NAUTILUS 2008 Statistics*, 17 Feb. 2009.

[62] 'Firma per risarcimento Italia-Libia, "Saremo uniti sull'immigrazione",' *La Repubblica*, 30 Aug. 2008, available at: http://www.repubblica.it/2008/05/sezioni/esteri/libia-italia/berlusconi-gheddafi/berlusconi-gheddafi.html.

[63] 'Libya can process asylum seekers', *La Gazzetta del Mezzogiorno*, 14 May 2009, available at: http://www.lagazzettadelmezzogiorno.it/GdM_economia_NOTIZIA_02.php?IDNotizia=234671&IDCategoria=2687.

[64] UNHCR Press Release, *UNHCR deeply concerned over returns from Italy to Libya*, 07 May 2009, above n. 1.

[65] UNHCR Press Release, *UNHCR interviews asylum seekers pushed back to Libya*, 14 Jul. 2009, above n. 1.

[66] I Camilleri, 'Rescued immigrants to disembark at the "closest safe port"', *Times of Malta*, 26 Apr. 2009.

[67] 'Immigration: Illegal Arrivals from Sea Halved in Italy', *ANSAmed*, 09 July 2009, above n. 13.

[68] Human Rights Watch, *Pushed Back, Pushed Around*, above n. 1, at 37 (references omitted).

[69] Frontex Press Release, *Frontex not involved in diversion activities to Libya*, 21 Sept. 2009.

2.3 The outcome of evaluations:

Joint operations have been evaluated by different actors. Frontex itself has to assess the results achieved as joint operations and pilot projects are concluded.[70] However, neither the evaluations nor the risk analysis upon which the missions are launched are made public.[71]

The European Commission has conducted its own assessment of the agency's performance.[72] The document is divided into two sections. The first deals with the 'achievements 2005-2007', whilst the second presents the 'long-term vision' and proposals for the further development of the agency.[73] Although the European Council had requested a comprehensive evaluation,[74] the Commission has focused on the quantitative outcome of Frontex's activities. The fact that 'more than 53,000 persons, for 2006 and 2007 together, have been apprehended or denied entry at the border during these operations'[75] is uncritically presented as an 'impressive' result. At the same time, the Commission admits that 'experiences gained from joint operations show that border guards are frequently confronted with situations involving persons seeking international protection or crisis situations at sea',[76] but it fails to undertake any further analysis on the point.

A private contractor has carried out the external evaluation required by article 33 of the Frontex Regulation.[77] Although the European Parliament had explicitly urged 'to fully evaluate Frontex's activities with regard to their impact on fundamental freedoms and rights, including the "responsibility to protect",'[78] the report does not engage in this endeavour. With reference to the objectives set out in the agency's own work programmes and general reports, COWI considers that Frontex has generally achieved satisfactory results. It underscores, however, that the actual contribution of joint patrolling to migration control is unclear, suggesting that Frontex operations may cause mere displacement of migratory routes. This is difficult to ascertain, since the actual number of successful irregular crossings is unknown.[79] The report also remarks that the missions' success is inextricably dependant on the consent by third countries of origin and transit to readmit the migrants intercepted. Without considering their human rights implications, the conclusion of working arrangements with the countries concerned is portrayed as a high priority.[80] On the other hand, among the recommendations COWI formulates at the end of the report, it is suggested that Frontex engages in the promotion of 'a uniform approach to asylum, migration and other human rights procedures … , giving full consideration to international protection standards'.[81]

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[70] Art. 3(3) of the Frontex Regulation.

[71] Art. 20(2)(b) of the Frontex Regulation calls on the Management Board to adopt the general report of the agency's activities by 31 March each year. To date, the General Reports of 2005, 2006, 2007 and 2008 have been released.

[72] Report on the evaluation and future development of the FRONTEX Agency, COM(2008) 67 final, 13 Feb. 2008.

[73] On the development of Frontex see also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Examining the creation of a European Border Surveillance System (EUROSUR), COM(2008) 68 final and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Preparing the next steps in border management in the European Union, COM(2008) 69 final, both of 13 Feb. 2008. For a commentary see: J. Jeandesboz, *Reinforcing the Surveillance of the EU Borders – The Future Development of FRONTEX and EUROSUR*, CHALLENGE Research Paper No. 11, August 2008, retrievable from: http://www.libertysecurity.org/article2204.html.

[74] The Hague Programme, Council doc. 16054/04, 13 Dec. 2004, at 15.

[75] Report on the evaluation and future development of the FRONTEX Agency, above n. 72, at 3 and accompanying Commission staff working document SEC(2008) 150 final, providing for the breakdown of statistical data per mission.

[76] Report on the evaluation and future development of the FRONTEX Agency, above n. 72, at 5.

[77] COWI Report, above n. 43.

[78] European Parliament resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)), P6_TA(2008)0633, para. 23.

[79] COWI Report, paras. 1.21.4, 1.21.5 and 1.23.1The unspecified number of irregular crossings is dubbed 'the dark number'.

[80] COWI Report, paras. 1.28.1 and 1.35.8.

[81] COWI Report, para. 1.34.

3. The rights of seaborne migrants and refugees:

The fate of asylum seekers caught up in maritime missions remains unknown. The fact that Frontex does not register any data with regard to international protection is particularly unhelpful and casts doubt on the robustness of its commitment to fundamental rights. From the little information accessible, it appears that they are probably diverted back to African countries before being given the opportunity to lodge an asylum application or to contest the entry refusal of which they were the object. This may entail very serious breaches of the relevant standards as elaborated hereunder.

3.1 Search, rescue and disembarkation:

Search and rescue of persons in distress at sea constitutes 'one of the most ancient and fundamental features of the law of the sea'[82] and is recognized as a norm of customary law. Conventional instruments have been concluded to specify several elements of this obligation. To the 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea[83] have followed the 1974 Safety of Life at Sea Convention,[84] the 1979 Search and Rescue Convention[85] and the 1989 International Convention on Salvage.[86] The 1982 UN Convention on the Law of the Sea[87] has also codified a duty on every State to render assistance.

Concerning the flag State, Article 98(1) UNCLOS establishes that 'every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers … to render assistance to any person found at sea in danger of being lost' and 'to proceed to the rescue of persons in distress …'. The SOLAS Convention similarly provides that '[t]he master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance …'.[88] The obligations imposed on coastal States further comprise a duty to ensure that the necessary arrangements are made for coast watching and for the rescue of persons in distress at sea around their coasts. 'These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary …'.[89] According to article 98(2) UNCLOS, the obligation also applies in the high seas. The SAR Convention provides in addition for inter-state co-ordination of SAR services and for the delimitation of SAR regions in cooperation among Contracting Parties.[90]

The personal scope of application of the search and rescue obligation is universal. It benefits 'any person' found in distress at sea regardless of her nationality or legal status.[91] Discrimination on account of other circumstances is also prohibited.[92] In regard to its territorial ambit, the obligation is due 'throughout the ocean'.[93] The use of the generic 'at sea' in article 98 UNCLOS does not seem to allow for any geographical restriction. Otherwise, the effectiveness of the obligation would be compromised.[94]

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[82] E. de Vattel, *The Law of Nations* (London: J Chitty, 1834), at 170.
[83] Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea [1913] U.K.T.S. 4.
[84] International Convention for the Safety of Life at Sea, 1184 U.N.T.S. 278 (*SOLAS* hereinafter).
[85] International Convention on Maritime Search and Rescue, 405 U.N.T.S. 97 (*SAR* hereinafter).
[86] International Convention on Salvage, [1996] U.K.T.S. 93.
[87] United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 3 (*UNCLOS* hereinafter).
[88] Regulation 33(1), Chap. V SOLAS.
[89] Regulation 7(1), Chap. V SOLAS.
[90] Chap. 2 and 3, SAR Annex.
[91] Para. 2.1.10., SAR Annex.
[92] Article 11 of the 1910 Convention for the Unification of Certain Rules relating to Assistance and Salvage at Sea stipulates that the duty to assist applies to 'everybody, even though an enemy, found at sea in danger of being lost'.
[93] S. N. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. III (The Hague: Martinus Nijhoff Publishers, 1995), at 177.
[94] M. Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002)14 *IJRL*, 329-64, at 337.

As far as the material object of the obligation is concerned, it is crucial to clarify the notions of 'distress' and 'rescue'. The term of *distress* has been defined in the SAR Convention as 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.[95] Further specifications have been provided in relevant jurisprudence and commentary. In the case of *The Eleanor* it was held that distress must entail urgency, but that 'there need not be immediate physical necessity'.[96] Subsequently, the decision on the *Kate A Hoff* established that it is not required for the vessel to be 'dashed against the rocks' before a claim of distress can be invoked.[97] The International Law Commission has confirmed that a situation of distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned'.[98] In this light, unseaworthiness may *per se* entail distress. According to the European Commission, 80 per cent of the illegal traffic in the Mediterranean towards the EU is undertaken in small unseaworthy vessels, such as *cayucos* and *pateras*, which put the lives of its passengers 'objectively in danger'. It may then be inferred that persons onboard such crafts are per definition in distress and *a priori* in need of assistance.[99]

The notion of *rescue* in the SAR Convention includes an 'operation to retrieve persons in distress, provide for their initial medical or other needs and to deliver them to a place of safety'.[100] Subsequent to non-rescue incidents and frequent disagreement over disembarkation, the SAR and SOLAS Conventions have been amended and the content of the obligation further clarified.[101] Since 2006, the State responsible for the SAR region in which assistance is rendered shall exercise 'primary responsibility' to ensure the cooperation necessary for the survivors to be 'delivered to a place of safety'.[102] Although the duty on the coastal State is limited to ensuring collaboration, the amendments establish nonetheless an obligation of result. The SAR operation will not be considered accomplished unless rescuees are effectively disembarked. Neither the *place of safety* nor the concept of *safety* itself have been defined, though. Yet, the amendments do clearly indicate that in determining the place of safety both 'the particular circumstances of the case and [the] guidelines developed by the [International Maritime] Organization' have to be taken into account.[103]

According to the International Maritime Organization's (IMO) guidelines on the treatment of persons rescued at sea, a place of safety is, in principle, 'a location where the rescue operation is considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors'.[104] It is commonplace to interpret the delivery to a place of safety as disembarkation in the next port of call, but this practice has not yet evolved into a rule of customary law.[105] Some authors and the UNHCR believe that the obligation on the coastal State to allow disembarkation is implicit in the maritime Conventions.[106] They assert any other interpretation would discourage rescue at sea, running counter the very purpose of the

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[95] Para. 1.3.13, SAR Annex.

[96] England High Court of Admiralty, *The Eleanor* [1809] Edw., 135.

[97] General Claims Commission United States and Mexico, Opinion rendered 2 April 1929, *Kate A. Hoff v The United Mexican States*, 4 UNRIAA 444, reprinted in (1929) 23 *AJIL* 860-865.

[98] Yearbook of the International Law Commission, Vol. II (1973), at 134, para. 4.

[99] Study on the international law instruments in relation to illegal immigration by sea, above n. 5, at 9 and 28.

[100] Para. 1.3.2, SAR Annex.

[101] Resolutions MSC.155(78) and MSC.153(78), 20 May 2004.

[102] Para. 3.1.9, SAR Annex and Regulation 33 (1-1), Chap. V SOLAS (in identical terms).

[103] Ibid.

[104] Resolution MSC.167(78), *Guidelines on the treatment of persons rescued at sea*, 20 May 2004, para. 6.12.

[105] R. Barnes, 'Refugee Law at Sea' (2004) 53 *ICLQ*, 47-77, at 63 referring to the discussions held at the 29th Session of the IMO Facilitation Committee on 7-11 January 2002 on the disembarkation of stowaways.

[106] UNHCR, 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea', UN Doc EC/SCP/18, 26 Aug.1981, paras. 19-21. See also EXCOM Conclusion No. 23 (XXXII), at 3: 'In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum-seekers rescued at sea'.

SAR and SOLAS Conventions. A draft circular of the IMO Facilitation Committee adopted in January 2009 seems to back this proposition, recommending that '[i]f 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 …'.[107]

The absence in the law of the sea of a rule designating a specific port of disembarkation, leaving it to the States involved in the SAR operation to provide for *ad hoc* arrangements every time, has been characterised by the European Commission as an important lacuna.[108] In the draft guidelines for Frontex operations at sea it is proposed that the operational plan of each mission 'spell[s] out the modalities for the disembarkation of the persons intercepted or rescued, in accordance with international law and any applicable bilateral agreements'.[109] In so doing, it is indicated that 'priority should be given to disembarkation in the third country from where the persons departed or through the territorial waters or search and rescue region of which the persons transited'.[110] If this would not be possible, disembarkation should take place in the Member State hosting the maritime operation 'unless it is necessary to act otherwise to ensure the safety of these persons'.[111]

However, the benefits of a system pre-determining the place of safety are not straightforward. The notion of 'safety' has no univocal meaning and the arrangements made in regard of some of those rescued may not be valid for others. The fact that the 'place of safety' is not pre-defined in the maritime Conventions is precisely what allows for 'taking into account the particular circumstances of the case'[112] alongside 'other rules of international law' in conformity with which the law of the sea is to be interpreted.[113] As established by the IMO guidelines, '[t]hese circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units. Each case is unique, and selection of a place of safety may need to account for a variety of important factors'.[114] Only a case-by-case approach leaves enough room for the particularities of each situation and for any entitlements of the rescuees to be taken into account. Safety bears different meanings when applied to different categories of rescuees. Whereas it may simply relate to the passengers' immediate well-being, considering shipwrecked persons in general, when the notion concerns refugees and asylum seekers in particular their special position has to be taken into account.

'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'.[115] Therefore, 'States cannot circumvent refugee law and human rights requirements by declaring border control measures – that is, the interception, turning back, redirecting etc. of refugee boats – to be rescue measures'.[116] In relation to asylum seekers an adequate interpretation requires search and rescue obligations to be read jointly with the requirements of refugee law and human rights.[117] Launching maritime operations with the objective 'to stop migrants from

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[107] Circular FAL.3/Circ.194, *Principles relating to administrative procedures for disembarking persons rescued at sea*, 14 Jan. 2009. Note that Malta has objected not only the circular but also the 2004 amendments to the SAR and SOLAS Conventions and it is, therefore, not bound by them. The country has also shown fierce opposition to the proposed Frontex Guidelines and has warned that it will not partake in future Frontex operations if they are adopted. See M Carabott, 'Malta and Frontex missions: "No chance if the rules are changed",' *The Malta Independent*, 04 Feb. 2010, available at: http://www.independent.com.mt/news.asp?newsitemid=101119.

[108] Study on the international law instruments in relation to illegal immigration by sea, above n. 5, at 4 and 6.

[109] Frontex Guidelines Proposal, above n. 6, para. 4.1.

[110] Ibid.

[111] Council doc. 5323/1/10, above n. 11, para. 4.1.

[112] Para. 3.1.9, SAR Annex and Regulation 33 (1-1), Chap. V SOLAS.

[113] Arts. 2(3) and 87(1) UNCLOS.

[114] IMO Guidelines on the treatment of persons rescued at sea, above n. 104, para. 6.15.

[115] Ibid., para. 6.17. Note that the UN General Assembly has subsequently endorsed these guidelines in: UN Doc A/RES/61/222, 16 March 2007.

[116] A. Fischer-Lescano, T. Lohr and T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *IJRL*, 256-96, at 291.

[117] For concurrent opinions see: R. Weinzierl and U. Lisson, *Border Management and Human Rights – A Study of EU Law*

leaving the shores on the long sea journey and thus reducing the danger of losses of human lives'[118] constitutes a misconception of search and rescue obligations. Equating interception to search and rescue measures and separating them from their human rights implications is invalid under international law. In the same way, disembarkation in a pre-determined place –in Senegal, Mauritania or Cape Verde, as in the *Hera* operations, or in Libya, as is the case in the Italian push-back scheme– disregarding the particular requirements determining the safety of the asylum seekers onboard, may not only amount to a breach of the protection obligations of the EU Member States, but also to a violation of maritime law itself.

3.2 Shipping interdiction, free navigation, innocent passage and access to port:

State authority at sea is not absolute. UNCLOS circumscribes States' powers so that they are exercised with due respect to the Convention itself and to 'other rules of international law'.[119] In the high seas freedom of navigation reigns and, as a rule, ships are subject to the exclusive jurisdiction of their flag State.[120] Other States may exercise jurisdiction in very limited instances only.[121]

For our purposes, it is worth noting the case of ships of uncertain nationality and stateless ships in regard of which States enjoy a 'right of visit'.[122] In principle, such a right of visit, '[e]xcept where acts of interference derive from powers conferred by treaty', appears simply to entail a right to approach and board the ship as to effect a *vérification du pavillon*. With regard to the question of seizure, the doctrine is divided and limited jurisprudence is available on the point. Some authors consider that the use of force would not be justified in the case of flagless ships without 'some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against [them].'[123] Other authors conversely opine that 'extraordinary deprivational measures are permitted with respect to stateless ships'.[124] The first view appears more consonant with the UNCLOS.[125] According to the exact wording of article 110, when a ship is without nationality, the warship of the State concerned may proceed to verify its identity. 'If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration'.

If a ship is engaged in the transport of slaves, in human trafficking or in the smuggling of migrants, '[t]he approach taken under various international instruments to maritime jurisdiction over such crimes is inconsistent'.[126] Slave trade, pursuant to articles 99 and 110 UNCLOS, attracts only a right of visit. The slavery Conventions do not provide for interdiction powers either.[127]

With regard to human trafficking, the UN Trafficking Protocol, provides for cooperation between State Parties in order to prevent and combat trafficking and to protect and assist the victims thereof.[128]

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and the Law of the Sea, German Institute for Human Rights, December 2007; S. Trevisanut, 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection', (2008) 12 *Max Planck Yearbook of United Nations Law*, 205-46; K. Wouters and M. Den Heijer, 'The *Marine I* Case: A Comment', (2009) *IJRL*, Advance Access published online on 27 Dec. 2009, 1-19.

[118] Frontex Press Release, *A sequel of operation HERA just starting*, 15 Feb. 2007.

[119] Arts. 2(3) and 87(1) UNCLOS concerning, respectively, the territorial sea and the high seas.

[120] Arts. 92(1) and 87 UNCLOS. See also art. 6 of the 1958 Convention on the High Seas 450 UNTS 82.

[121] Arts. 99, 100, 109, 110 and 111 covering the only instances in which non-flag States may exercise jurisdiction: slave trading, piracy, unauthorized broadcasting, flaglessness, hot pursuit and constructive presence.

[122] Arts. 92(2) and 110 UNCLOS.

[123] R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester: Manchester University Press, 1983), at 214.

[124] M.S. McDougal and W.T. Burke, *The Public Order of the Oceans* (New Haven/London: YUP, 1962), at 1084.

[125] D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: CUP, 2009), at 17.

[126] Ibid., at 181.

[127] 1926 Slavery Convention, [1927] U.K.T.S. 16 and 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3.

[128] Art. 2, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, supplementing the United Nations Convention

Without specifically providing for any interdiction authority, article 11 requires States Parties to 'strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons'. Nonetheless, 'the rights, obligations and responsibilities of States … under international law, including international humanitarian law and international human rights law … the 1951 Convention … relating to the Status of Refugees and the principle of *non-refoulement*' remain unaffected.[129]

As far as smuggling is concerned, the relevant UN Protocol establishes that where a State Party has reasonable grounds to suspect that a vessel flying the flag of another State is engaged in migrant smuggling it may so notify the flag State, request confirmation of registry and, if confirmed, request its authorization to board and search the vessel. If evidence is found thereafter that the vessel is engaged in migrant smuggling, the State concerned can then take 'appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State'.[130] In cases of boats without nationality suspected of being engaged in migrant smuggling, the State concerned may directly 'board and search the vessel'.[131] In the event 'evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law'.[132] In neither case shall these measures 'affect the other 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 … relating to the Status of Refugees and the principle of *non-refoulement* …'.[133]

Therefore, contrary to what the European legislator assumes in the draft guidelines for Frontex operations, such actions as 'seizing the ship and apprehending persons on board; ordering the ship to modify its course … towards a destination other than the territorial waters or contiguous zone, escorting the vessel or steaming nearby until the ship is heading on such course; conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country…',[134] do not clearly transpire from the literal wording of these texts. The fact that the *cayucos* and *pateras* used for the transport of migrants do not fly the flag of any State does not seem to allow for unlimited enforcement jurisdiction in their regard.

In this framework, detention constitutes a separate issue. The European legislator, supposedly 'in accordance with the Protocol against the Smuggling of Migrants', establishes that when ships without nationality are presumably engaged in the smuggling of migrants, among the various measures that may be adopted, the persons on board can be apprehended.[135] However, the Smuggling Protocol does not regulate anywhere the conditions under which smuggled migrants can be detained. As stated above, the Protocol provides merely for the State Party concerned to take 'appropriate measures' if evidence is found confirming the suspicion that the vessel is engaged in the smuggling of migrants by sea. In the case of *Medvedyev*, the European Court of Human Rights has established the inadequacy of a similar 'appropriate measures' provision contained in article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs[136] to serve as a legal basis for the arrest of persons on board a ship in the high seas suspected of being engaged in drug trafficking. The Court considered that the provision did 'not afford sufficient protection against arbitrary violations of the right to liberty'. In the same way as article 8(7) of the Smuggling Protocol, article 17 of the Convention against Drug Trafficking merely allows the

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against Transnational Crime [2001] 40 ILM 353 (*Trafficking Protocol* hereinafter).

[129] Art. 14(1) Trafficking Protocol.

[130] Art. 8(2) and (5) Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, supplementing the United Nations Convention against Transnational Crime [2001] 40 ILM 384 (*Smuggling Protocol* hereinafter).

[131] Art. 8(7), Smuggling Protocol.

[132] Ibid.

[133] Art. 19 Smuggling Protocol.

[134] Frontex Guidelines Proposal, above n. 6, paras. 2.4 (d), (e) and (f) and Council doc. 5323/1/10, above n. 11.

[135] Ibid., paras. 2.5.2.5. and 2.4.(d) and Council doc. 5323/1/10, above n. 11.

[136] UN Convention against Illicit Traffic in Narcotic Drugs and Phsychotropic Substances, [1989] 28 ILM 497.

intervening State to 'take appropriate measures' concerning the vessel in question and, 'if evidence of involvement in illicit traffic is found', to take 'appropriate action with respect to the vessel, persons and cargo on board'. The Court considered that '[n]one of those provisions refers specifically to depriving the crew of the intercepted ship of their liberty,' concluding that 'they do not regulate the conditions of deprivation of liberty on board ship, and in particular the possibility for the persons concerned to contact a lawyer … Nor do they place the detention under the supervision of a judicial authority'.[137] In this light, an appropriate legal basis should be established, respecting the legality criterion enshrined in article 5 ECHR[138] and subjecting detention measures to proper procedural guarantees and judicial oversight, before the draft guidelines for Frontex operations are adopted.

With regard to detention, an additional observation is in order. Not only does the Smuggling Protocol fail to regulate the conditions under which those suspected of involvement in migrant smuggling by sea can be detained, but it also warrants that a general distinction be drawn between the victims and the smugglers themselves. Whereas the Protocol provides for 'the prevention, investigation and prosecution' of the crimes related to migrant smuggling,[139] it also requires that the victims thereof be the object of 'protection and assistance'. To that end each Contracting Party shall adopt 'appropriate measures' to preserve and protect their rights 'consistent with its obligations under international law'.[140] Consequently, if the draft guidelines for Frontex operations are to carry out the Smuggling Protocol in good faith,[141] 'appropriate measures' should be introduced to distinguish victims from smugglers in accordance with international standards.

Still in the high seas, the contiguous zone extends out the baseline up to 24 nautical miles. In this area Coastal States enjoy 'a limited right of police'.[142] Although the rule continues to be that of freedom of navigation, article 33(1) UNCLOS allows 'the coastal State [to] exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea'. Only such control as it is *necessary* to prevent immigration rules being breached is permitted, which requires a proportionality exercise being carried out in each particular case. *A priori*, it is not obvious that powers of detention, escort to port and forcible return are encompassed in this provision. The observations made with regard to the high seas on this point are pertinent here too. According to O'Connell, it is 'arguable that the necessary power to control does not include the right to arrest, because at this stage (i.e. that of a ship coming into the contiguous zone) the ship cannot have committed an offence. Enforced direction into port may not be arrest, in a technical sense, but it is tantamount to it and therefore is in principle excluded'.[143] It is appropriate to recall that in any event an exercise of jurisdiction in this zone remains constrained to the observance of 'other rules of international law',[144] including refugee law and human rights.

Not even in the 12 miles of territorial sea can coastal States exert unlimited powers. The right of innocent passage allows vessels to navigate it without entering internal waters. In principle the right does not involve a concomitant entitlement to enter port, unless authorized by the coastal State. Passage must be continuous and expeditious, except for stopping or anchoring incidental to ordinary navigation or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance.[145] Article 19 UNCLOS specifies that passage is not innocent when it is prejudicial to the

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[137] ECtHR, *Medvedyev a.o. v France*, Appl. No. 3394/03, 10 Jul. 2008, paras. 57-63, at 61.

[138] European Convention for the Protection of Human Rights and Fundamental Freedoms C.E.T.S. 5 (*ECHR* hereinafter).

[139] Art. 4 Smuggling Protocol.

[140] Art. 16 Smuggling Protocol.

[141] Art. 26 of the 1969 Vienna Convention on the Law of Treaties 1155 U.N.T.S. 331 codifies the *pacta sunt servanda* principle, stipulating that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. According to art. 31, '[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'.

[142] D. P. O'Connell, *The International Law of the Sea*, Vol. II (Oxford: OUP, 1984), at 1058.

[143] Ibid.

[144] Arts. 87(1) UNCLOS.

[145] Art. 18 UNCLOS.

peace, good order or security of the coastal State. In particular, passage is rendered non-innocent if the vessel engages in the loading or unloading of persons 'contrary to the immigration rules of the coastal State'. Asylum legislation is commonly integrated in the immigration rules of those States regulating the issue. It is thus difficult to accept that passage for the purpose of requesting asylum would be 'contrary to the immigration rules of the coastal State'. However, State practice has offered examples of the passage of boats carrying asylum seekers being considered non-innocent.[146] Goodwin-Gill and McAdam claim that '[t]he fact that a vessel may be carrying refugees or asylum seekers who intend to request the protection of the coastal State arguably removes that vessel from the category of innocent passage',[147] but the doctrine is not uniform on this point. Pallis has questioned this approach, noting that seeking asylum actually 'accords with international law' for which reason the passage of asylum seekers' boats should not be deemed contrary to article 19(1) UNCLOS.[148] Moreover 'passage' does not strictly correspond to 'unloading', which arguably removes refugee boats transiting the territorial sea from the scope of application of article 19(1) UNCLOS.

Where passage is considered non-innocent recourse may be made to article 25 UNCLOS, allowing coastal States to adopt 'the necessary steps … to prevent passage'. Any such steps should always conform to other applicable 'rules of international law'.[149] The regime of distress constitutes an exception to this norm, extending a right of *non-innocent* passage, to dock and to seek refuge to vessels in distress. Although the UNCLOS does not directly codify it, the existence of this right in customary law is supported by commentary and consistent jurisprudence.[150] The necessity of entering port 'must be urgent and proceed from such a state of things as may be supposed to produce, on the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo or of the lives of the crew'.[151] The Irish High Court of Admiralty has recently confirmed 'the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent coastal state'.[152] Refusing entry under these circumstances, returning marginally seaworthy vessels to the high seas, seems indeed opposed to elementary principles of humanity. Alternative solutions to allowing entry may fail to comply with the rationale of securing the safety of life at sea inscribed in the maritime Conventions. Thus, if assistance can initially be provided aboard the assisting ship maintaining rescuees at sea,[153] according to the IMO Guidelines a vessel cannot be considered a final place of safety within the meaning of the SAR Convention. 'A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety *until the survivors are disembarked* …'.[154] In the case of asylum seekers, the European Court of Human Rights has ruled that retention in purportedly extra-jurisdictional zones must not deprive them of gaining effective access to determination procedures.[155] A breach of article 5 ECHR should be anticipated if this option is pursued without a procedure 'in accordance with the law' or for a time exceeding the legal period of detention without judicial review.[156] Another possibility the coastal State concerned may contemplate is the return to a third country. Yet, summary expulsions, without account being taken of the particular circumstances of asylum seekers, may amount to *refoulement*.[157] Therefore, no other reasonably practicable alternatives

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[146] For example Australia in the *MV Tampa* incident in 2001. For a full account of the facts of the case refer to the Full Federal Court of Australia, *Ruddock a. o. v. Vadarlis a. o.* [2001] FCA 1329.

[147] G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: OUP, 3rd Ed., 2007) at 274.

[148] M. Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes', above n. 94, at 357. For the whole discussion on innocent passage refer to 355-59.

[149] Art. 2(3) UNCLOS.

[150] *The Creole* [1853] Moore, International Arbitration 824.

[151] General Claims Commission United States and Mexico, Opinion rendered 2 April 1929, *Kate A. Hoff v The United Mexican States*, 4 RIAA 444, reprinted in (1929) 23 *AJIL* 860-865.

[152] *The MV Toledo* [1995] 2 ILRM 30, 48-49.

[153] This would reproduce the initial strategy taken by Australia in the *MV Tampa* incident in 2001, above n. 143.

[154] IMO Guidelines on the treatment of persons rescued at sea, above n. 104, para. 6.14 (emphasis added).

[155] ECtHR, *Amuur v France*, Appl. No.19776/92, 25 Jun. 1996, para. 43.

[156] Ibid.; *Shamsa v Poland*, Appl. No. 45355/99 and 45357/99, 27 Feb. 2004; *Saadi v UK*, Appl. No. 13229/03, 29 Jan. 2008.

[157] ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, 26 Apr. 2007; *Abdolkhani and Karimnia v. Turkey*, Appl. No.

but to allow entry to port may finally remain.

Beyond factual considerations, *de jure*, stemming from a positive obligation to protect the life of those under their jurisdiction, coastal states may be obliged to authorize entry to port and disembarkation. The European Court of Human Rights implicitly accepted in *Xhavara* that migration controls bring the persons concerned under the jurisdiction of the intercepting State and so within the ambit of the ECHR. The incident concerned the death of 58 Albanians aboard the *Kater I Rades*, which sunk in the open seas 35 miles off the Italian coast after collision with the Italian warship *Sibilla*. Although the claim was finally dismissed for non-exhaustion of domestic remedies, the Court, relaying on the *Osman* doctrine on positive obligations,[158] recalled that the first sentence of article 2(1) ECHR enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.[159] Assertive action to protect human life is required in these circumstances. As observed by Spijkerboer, '[t]he obligation … is not conditioned on a causal relationship between the State's actions and someone's death. Rather, the obligation is triggered by the State's knowledge that a particular life is at risk and that same State's ability to [protect if from being lost]'.[160]

3.3 Co-operation with third countries, extraterritoriality and *non-refoulement*:

States cannot exercise sovereign powers in the territorial sea of a third country without the latter's consent. The *Hera* operations have taken the bilateral arrangements entered by Spain with Senegal and Mauritania as their legal basis, whereas the push-backs campaign orchestrated by Italy is underpinned by a treaty concluded with Libya. Beyond the issue of whether unpublished bilateral agreements concluded by a single Member State and a third country provide a sufficient legal base in either international or European law to allow other Member States and Frontex to partake in such operations, other substantive concerns arise from the current situation.

Member States and Frontex appear to understand that the responsibility for possible breaches of human rights and refugee law occurring in the course of or as a result of joint patrols belongs exclusively to the third country in whose territorial waters the operation was carried out. The consent by Senegal, Mauritania or Libya to allow the joint patrolling of their territorial waters[161] and the diversion of 'would-be immigrants' boats back to their points of departure from a certain distance of the African coast line'[162] does not relieve EU Member States of their responsibilities under international law. The fact that '[a] Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States' assets'[163] or that 'members of the Libyan coast guard … take part in patrols on [Italian] ships'[164] does not readily amount to making them 'always responsible for the diversion'[165] as it seems to be understood.

Under international law,[166] 'no State can avoid responsibility by outsourcing or contracting out

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30471/08, 22 Sept. 2009; see also *Hussun a. o. v Italy*, Appl. No. 10171/05, 11 May 2006, but note that the case has been struck out of the list of cases in a decision rendered on 19 Jan. 2010.

158 ECtHR, *Osman v UK*, Appl. No. 23452/94, 28 Oct. 1998.

159 ECtHR, *Xhavara and 15 others v Italy and Albania*, Appl. No. 39473/98, 11 Jan. 2001, at 1. The original is in French: The Court 'rappelle cependant que la première phrase de l'article 2(1) astreint les Etats non seulement à s'abstenir de provoquer la mort de manière volontaire et irrégulière mais aussi à prendre les mesures nécessaires à la protection de la vie des personnes relevant de leur juridiction'.

160 T. Spijkerboer, 'The Human Costs of Border Control' (2007) 9 *EJML* 137-39, at 138.

161 'Libya can process asylum seekers', *La Gazzetta del Mezzogiorno*, above n. 63.

162 Frontex Press Release, *HERA 2008 and NAUTILUS 2008 Statistics*, 17 Feb. 2009.

163 Ibid.

164 'Libya can process asylum seekers', *La Gazzetta del Mezzogiorno*, above n. 63.

165 Frontex Press Release, *HERA 2008 and NAUTILUS 2008 Statistics*, 17 Feb. 2009.

166 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, (2001) UNGA A/56/10 corrected by A/56/49(Vol.I)/Corr.4.

its obligations, either to another State, or to an international organisation'.[167] International co-operation to block passage to crafts and hand them over to the national authorities of the third country concerned does not release EU Member States from their international engagements. Nor does the transfer of competences to international bodies. The Strasbourg Court has established in this connection that '[a]bsolving Contracting States completely from their … responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the [ECHR]: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards'.[168] Accordingly, EU Member States partaking in joint patrols cannot eschew responsibility under the European Convention on Human Rights by transferring powers to Frontex.

Concerning international collaboration, the Strasbourg Court has ascertained that '[w]here States establish … international agreements to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such [agreements]'.[169] The Court also considers that '[i]n so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State …'.[170] The fact that Senegal, Mauritania and Libya, with which the EU Member States collaborate, are not Parties to the ECHR prevents their liability under this instrument. Although Senegal, Mauritania and Libya may well be responsible for the same internationally wrongful act under other instruments to which they are Parties, when a plurality of States is responsible for the same wrongful act the general rule is that 'in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act'.[171] Thus, with regard to the human rights violations that may result from joint maritime operations, the independent responsibility of each participating EU Member State may be invoked.

This is how the Court proceeded in *Xhavara*, attributing exclusive responsibility to Italy for the acts it perpetrated in international waters as a result of the convention concluded with Albania authorising it to patrol both international and Albanian waters for the purpose of migration control. The Court explicitly established that, because the shipwreck had been directly provoked by the Italian navy, any complaint in this regard had to be considered to be addressed exclusively against Italy. In this way, legal accountability was matched with responsibility for actual facts. The Court made clear that the mere fact that Albania was a Party to a bilateral convention with Italy could not engage its responsibility with regard to the ECHR for every measure that the Italian authorities would adopt for the implementation of the agreement in question.[172] An analogous reasoning was applied in *Medvedyev*. The fact that the flag State had consented through a diplomatic note 'to intercept, inspect and take legal action' against the *Winner*, suspected of being engaged in illicit drug trafficking while navigating through the waters off Cape Verde, did not prevent the European Court of Human Rights to find France responsible for a violation of article 5 ECHR on account of the illegal arrest of the crew.

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[167] G. S. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection : The Legal Responsibilities of States and International Organisations', (2007) 9 *U.T.S. Law Review*, 26-40, at 34.

[168] ECtHR, *Bosphorus v Ireland*, Appl. No. 45036/98, 30 Jun. 2005, para. 154.

[169] ECtHR, *T.I. v UK*, Appl. No. 43844/98, 07 Mar. 2000, at 15 and *K.R.S. v UK*, Appl. No. 32733/08, 02 Dec.2008, at 15.

[170] ECtHR, *Saadi v UK*, 37201/06, 28 Feb. 2008, para. 126.

[171] Special Rapporteur J. Crawford, Commentary to the Draft Articles on State Responsibility, International Law Commission, Annual Report (2001), Chap. IV, at 314, available at: http://www.lcil.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf. Art. 47 of the Draft Articles on State Responsibility, above n. 166, stipulates that '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act'.

[172] ECtHR, *Xhavara v Italy*, Appl. No. 39473/98, 11 Jan. 2001, at 5: 'La Cour note d'emblée que le naufrage … a été directement provoqué par le navire de guerre italien *Sibilla*. Par conséquent, toute doléance sur ce point doit être considérée comme étant dirigée exclusivement contre l'Italie. Le fait que l'Albanie est partie à la Convention italo-albanaise ne saurait, à lui seul, engager la responsabilité de cet Etat au regard de la Convention pour toute mesure adoptée par les autorités italiennes en exécution de l'accord international en question'.

Although jurisdiction in international law is generally territorially framed,[173] extraterritoriality does not prevent human rights obligations from being engaged in particular circumstances. The underlying rationale is to prevent a double standard from arising. In the words of the Human Rights Committee, it would be 'unconscionable' to interpret responsibility under human rights instruments as to 'permit a State Party to perpetrate violations … on the territory of another State, which violations it could not perpetrate on its own territory'.[174] In these situations human rights bodies consider the exercise of 'effective control' over the territory[175] or the persons concerned[176] to be the crucial element giving rise to State responsibility.[177] In *Medvedyev*, the Court noted precisely that from the date on which the *Winner* was arrested and until it arrived to port in Brest 'the *Winner* and its crew were under the control of French military forces, so that even though they were outside French territory, they were within the jurisdiction of France for the purposes of article 1 of the Convention'.[178]

What may remain unclear is whether situations other than those amounting to detention or arrest constitute an exercise of control over persons on board vessels sufficient to trigger human rights responsibility. In this regard, the Committee against Torture provides valuable guidance. Its decision in the *Marine I* case offers an example of human rights responsibility being engaged by a single State in a search and rescue operation carried out extraterritorially in co-operation with other countries. The incident involved the recovery of 369 migrants of Asian and African origin by the Spanish authorities off the Mauritanian coast. In spite of the agreement concluded between the governments of both countries and the further collaboration undertaken with third States in the process, the Committee considered that it was Spain who 'maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou'. By virtue of that 'constant *de facto* control', the Committee, relying on its prior jurisprudence,[179] considered that the alleged victims were subject to Spanish jurisdiction for the purposes of the CAT.[180] Jurisdiction was considered to be exercised not only on account of the arrangements subsequent to disembarkation, but from the very moment the vessel was rescued. As ascertained by Wouters and Den Heijer, what follows from this case law is that 'the assertion of physical control over vessels and/or their passengers is sufficient to engage the "controlling" State's human rights obligations'.[181]

Nothing appears to impede the extension of this reasoning to *non-refoulement* obligations.[182]

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[173] There are some exceptional 'recognised instances' of the extraterritorial exercise of jurisdiction by a State, which include cases involving the activities of State agents abroad at its embassies or 'on board craft and vessels registered in, or flying the flag of, that State'. See ECtHR, *Bankovic a. o. v Belgium a. o.,* Appl. No. 52207/99, 12 Dec. 2001, para. 73.

[174] HRC, *Delia Saldias de Lopez Burgos v Uruguay*, Communication No. 52/1979, 29 Jul. 1981, paras. 12.1-12.3; *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29 Jul. 1981, para. 10.3. The ECtHR has borrowed from the HRC, concluding that: 'Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory' in *Issa and Others v Turkey*, Appl. No. 31821/96, 16 Nov. 2004, para. 71; *Isaak v Turkey*, Appl. No. 44587/98, 28 Sept. 2006, at 19; *Solomou v Turkey*, Appl. No. 36832/97, 24 Jun. 2008, para. 45; *Andreou v Turkey*, Appl. No. 45653/99, 03 Jun. 2008, at 10; and *Al-Saadoon and Mufdhi v United Kingdom*, Appl. No. 61490/08, 30 Jun. 2009, para. 85.

[175] ECtHR, *Loizidou v Turkey*, Appl. No. 15318/89, 23 Mar. 1995; *Cyprus v Turkey*, Appl. No. 25781/94, 10 May 2001; *Bankovic a. o. v Belgium a. o.,* Appl. No. 52207/99, 12 Dec. 2001, para. 70.

[176] ECtHR, *Issa and Others v Turkey*, Appl. No. 31821/96, 16 Nov. 2004; *Ocalan v Turkey*, Appl. No. 46221/99, 12 May 2005; HRC, *Delia Saldias de Lopez Burgos v Uruguay*, Communication No. 52/1979, 29 Jul. 1981; *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29 Jul. 1981; General Comment No. 31, CCPR/C/21/Rev.1/Add. 13 26 May 2004, para. 10; Inter-Am.C.H.R., *Coard a.o. v United States*, Case 10.951, Report No. 109/99, paras. 37-43. The ICJ has confirmed that the International Covenant on Civil and Political Rights 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory' in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Gen. List No. 131, para. 111.

[177] E. Guild, *Security and European Human Rights: Protecting Individual Rights in Times of Exception and Military Action* (Nijmegen: Wolf Legal Publishers, 2007).

[178] ECtHR, *Medvedyev a.o. v France*, Appl. No. 3394/03, 10 Jul. 2008, para. 50.

[179] CAT Committee, General Comment No. 2, CAT/C/GC/2, 24 Jan. 2008, para. 16.

[180] CAT Committee, *J.H.A. v Spain*, Communication No. 323/2007, 10 Nov. 2008, para. 8.2.

[181] K. Wouters and M. Den Heijer, , 'The *Marine I* Case: A Comment', above n. 117, at 10.

[182] For a detailed analysis see V. Moreno-Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) *Non-Refoulement* in EU

Article 33(1) GC should hence be deemed to apply wherever a Signatory Party exercises 'effective control'.[183] At face value 'the decision generally to constrain the application of rights on a territorial or other basis [in the Geneva Convention] creates a presumption that no such limitation was intended to govern the applicability of the rights not subject to such textual limitations'.[184] The Supreme Court of the United States considered, nonetheless, that the Convention did not apply with regard to the Haitian interdiction program carried out in the high seas.[185] Based on an ambiguous reading of the text of the Convention and its *travaux préparatoires*, the *Sale* decision has been severely criticized.[186] The doctrine is practically unanimous in its disapproval[187] and subsequent jurisprudence has also rejected its approach. In response to *Sale*, the Inter-American Commission on Human Rights asserted 'that article 33 had no geographical limitations',[188] establishing that the US was in breach of its international obligation of *non-refoulement* when intercepting Haitians and returning them back without a proper assessment of their particular circumstances. In the same vein, the English Court of Appeal declared that *Sale* was 'wrongly decided', concluding that 'it is impermissible to return refugees from the high seas to their country of origin'.[189] The majority of their Lordships in the judgment on the *Prague Airport* case have also retained this reading.[190] In fact, what matters is *to* where the refugee cannot be sent, *from* where the action is initiated is superfluous.[191]

During the *Hera* operations, 'more than 1,000 migrants were diverted back to their points of departure at ports at the West African coast'[192] presumably before any asylum claims had been considered. At the same time, the Commission's evaluation reveals that the 'experiences gained from joint operations show that border guards are frequently confronted with situations involving persons seeking international protection …'.[193] With regard to the Italian push-backs no official statistics are accessible, but according to UNHCR between May and July 2009 'at least 900 people'[194] were sent back to Libya 'without proper assessment of their possible protection needs'.[195] Apparently, a significant number from this group was in clear need of international protection.[196] Although diversion is not always synonymous with *refoulement*, where it causes the return –directly or indirectly- to the territories where life or freedom is threatened on account of race, religion, nationality, membership of a particular social group or political opinion it violates article 33(1) of the Geneva Convention.

Law', in M.-C. Foblets, D. Vanheule and P. De Bruycker (eds.), *The External Dimension(s) of EU Asylum and Immigration Policy* (Brussels: Bruylant, forthcoming).

[183] E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: CUP, 2003), 87-177.

[184] J. C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: CUP, 2005), at 161.

[185] *Chris Sale, Acting Commissioner, Immigration and Naturalization Service et al. v Haitian Centers Council Inc. et al.* [1993] 509 US 155.

[186] UNHCR, Amicus Curiae Brief in *Sale*, 21 Dec. 1992; 'UN High Commissioner for Refugees responds to U.S. Supreme Court Decision in Sale v Haitian Centers Council' (1993) 32 ILM 1215; '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 Jan. 2007, para. 24.

[187] G. S. Goodwin-Gill, 'The Haitian Refoulement Case: A Comment' (1994) 6 *IJRL* 103-110; B. Frelick, '"Abundantly Clear": Refoulement' (2004) 19 *Georgetown Immigration Law Journal* 245-76; S. H. Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 *IJRL* 679-83; J.-Y. Carlier, *Droit d'asile et des réfugiés: de la protection aux droits* (Collected Courses of The Hague Academy of International Law, Vol. 332, 2007), at 107 and references therein.

[188] Inter-Am. C.H.R., *The Haitian Centre for Human Rights et al. v United States*, Case 10.675, Report No. 51/96, para. 157.

[189] *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport*, [2003] EWCA Civ 666, para. 34-5.

[190] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55. The exclamation by Lord Hope of Craighead 'that the *Sale* case was [not] wrongly decided' emerges as an isolated position in para. 68.

[191] G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, above n. 147, at 250.

[192] Frontex Press Release, *HERA III Operation*, 13.04.2007.

[193] Report on the evaluation and future development of the FRONTEX Agency, above n. 72, at 5.

[194] UNHCR Press Release, *UNHCR interviews asylum seekers pushed back to Libya*, above n. 1.

[195] UNHCR Press Release, *UNHCR deeply concerned over returns from Italy to Libya*, above n. 1.

[196] UNHCR Press Release, *UNHCR interviews asylum seekers pushed back to Libya*, above n. 1.

However, the extraterritorial applicability of article 33 GC is subordinated to the person concerned meeting the qualification criteria in article 1 GC, which includes being outside the country of own nationality. Therefore, if interdiction occurs within the country of origin, the Geneva Convention is rendered inapplicable.[197] Regarding those still inside the country of origin, human rights' instruments afford equivalent protection. Article 3 ECHR, for instance, as construed by the Strasbourg organs, grants protection against *refoulement* to everyone, regardless of his geographical emplacement. The extraterritorial applicability of the '*Soering* principle'[198] was already established in 1992.[199] At the time, the European Commission of Human Rights was confronted with a case involving 18 citizens from the DDR wishing to emigrate to the West. As permission was refused, WM and his companions entered the Danish Embassy to request mediation with the German authorities. The ambassador asked them to leave and, as they did not obey, he requested the assistance of the DDR police to remove them. At their hands WM allegedly suffered arbitrary detention. Even if 'the applicant was not deprived of his liberty … by an act of the Danish diplomatic authorities but by an act of the DDR authorities', the Commission declared itself 'satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of article 1 of the Convention'. Borrowing from *Soering*, it pointed out that 'an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention'. Because what happened to the applicant at the hands of the DDR authorities could not be considered to be 'so exceptional' as to engage the responsibility of Denmark, the claim was ultimately dismissed.[200] Arguably, no 'substantial grounds' had been shown for believing that WM, when *refouled*, faced 'a real risk' of being subjected to torture or to inhuman or degrading treatment or punishment in the DDR.[201]

A comparable case on the extraterritorial applicability of the *Soering* principle to the acts of the British army in Iraq is pending before the Strasbourg Court.[202] The case concerns two Iraqi nationals affiliated to the Ba'ath Party, allegedly involved in the murder of two British servicemen. The applicants were held in detention in a military prison run by the UK forces in Basra from 2003 up to their submission to the Iraqi authorities in December 2008 for a trial at which they risked the death penalty. The Court has declared the claim admissible. On the issue of jurisdiction, given the 'total and exclusive' control the British authorities exercised over the premises in question, the Court has established that 'the individuals detained there … were within the United Kingdom's jurisdiction'.[203] 'The questions whether the United Kingdom was under a legal obligation to transfer the applicants to Iraqi custody and whether, if there was such an obligation, it modified or displaced any obligation owed to the applicants under the Convention'[204] have been deferred to the decision on the merits. For our purposes, in the absence of a decision qualifying *Soering* or overturning *WM*, the principle that a 'real risk' of exposure to extraterritorial *refoulement* entails an obligation to prevent it from occurring continues to be valid.

The Human Rights Committee has reasoned in similar terms in a case involving the passage of an Iraqi-American dual national through the Romanian Embassy in Bagdad with the consequence of the person being subsequently detained and allegedly subject to abuse and mistreatment in a detention

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[197] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para. 18.

[198] ECtHR, *Soering v United Kingdom*, Appl. No. 14038/88, 07 Jul.1989, para. 91: 'the decision by a Contracting State to extradite a fugitive may give rise to an issue under article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.

[199] ECommHR, *WM v Denmark*, Appl. No. 17392/90, 14 Oct.1992.

[200] Ibid, at 'THE LAW', para. 1.

[201] *Mutatis mutandis* ECtHR, *Soering v United Kingdom*, Appl. No. 14038/88, 07.07.1989, para. 91, above n. 198.

[202] ECtHR, *Al-Saadon and Mufdhi v UK*, Appl. No. 61498/08, 30 Jun. 2009.

[203] Ibid., para. 88.

[204] Ibid., para. 89.

camp run by the US military forces. Although the Committee concludes that the claim is not sufficiently substantiated, it accepts that '[t]he main issue … is whether, by allowing the author to leave the premises of the Romanian Embassy in Bagdad, [Romania] exercised jurisdiction over him in a way that exposed him to a real risk of becoming a victim of violations of his rights under [the Covenant] which it could reasonably have anticipated'.[205]

EU law also includes a reference to *non-refoulement*. The Schengen Borders Code alludes in its preamble to the rights and principles 'recognized in particular by the Charter of Fundamental Rights of the European Union' and submits its implementation to the observation of 'the Member States' obligations as regards international protection and *non-refoulement*'. In the operative part, article 3 holds that the Code is to be applied 'without prejudice to the rights of refugees …, in particular as regards *non-refoulement*'. Article 5(4)(c), in turn, allows for derogations to normal entry requirements on account of humanitarian considerations and international obligations. Finally, article 13(1) establishes that entry refusals 'shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection'. The Frontex Regulation supposedly 'respects the fundamental rights and observes the principles recognised by article 6 … of the Treaty on European Union[206] and reflected in the Charter of Fundamental Rights of the European Union'. [207] The RABIT amendment reiterates the need to conform to fundamental rights and *non-refoulement*.[208]

The content of *non-refoulement* in this framework has yet to be determined by the EU Court of Justice. Meanwhile, article 6 EU and the EU Charter of Fundamental Rights,[209] to which those instruments refer, offer assistance in establishing it.[210] Two provisions are particularly relevant for our purposes. On the one hand, article 18 EUCFR stipulates that the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention and in accordance with the EU Treaties. The explanations of the Presidium, in conformity with which the Charter is to be interpreted,[211] clarify that this wording is based on article 78 TFEU, 'which requires the Union to respect the Geneva Convention on refugees'.[212] As a result the 'right to asylum' in EU law includes, at a minimum, a right to protection against *refoulement* as established in article 33 GC.[213] Article 19(2) EUCFR, on the other hand, establishing that '[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment,' incorporates the Strasbourg case law on article 3 ECHR.[214]

Having established the substance of *non-refoulement* within the EU legal framework, it still remains to be determined whether the border *acquis* applies extraterritorially. In principle, border control 'means the activity carried out *at* a border' and article 2(2) of the Schengen Borders Code describes external borders in geographical terms. A border guard, in turn, is defined as a public official who carries

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[205] HRC, *Mohammad Munaf v Romania*, Communication No. 1539/2006, 30 Jul. 2009, para. 14.2.

[206] The Lisbon Treaty entered into force on 1 Dec. 2009. Thereafter, the EU and EC treaties have respectively been replaced by the Consolidated Version of the Treaty on European Union, [2008] OJ C 115/13 (*EU* hereinafter) and the Consolidated Version of the Treaty on the Functioning of the European Union, [2008] OJ C 115/47 (*TFEU* hereinafter).

[207] Recital 22 of the Frontex Regulation.

[208] Recital17 and 18 and arts. 2 and 12(6) of the RABIT Regulation.

[209] Charter of Fundamental Rights of the European Union, [2007] OJ C 303/1 (*EUCFR* hereinafter).

[210] According to Recital 5 in the Preamble, the Charter 'reaffirms … the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights'.

[211] Article 52(7) EUCFR: 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'

[212] Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, at 24 (*Explanations to the EUCFR* hereinafter).

[213] The content of the 'right to asylum' in article 18 EUCFR has elicited a rich debate. Some authors read in it a right *to seek* asylum, see: C Harvey, 'The Right to Seek Asylum in the European Union' (2004) 1 *EHRLR* 17-36. Other authors ascertain a right *to be granted* asylum, see: M-T Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 *RSQ* 33-52.

[214] Explanations to the EUCFR, above n. 212, at 24.

out border control tasks 'along the border or the immediate vicinity of that border'. By contrast, when defining specific methods of surveillance the Code adopts a functional criterion. As regards rail traffic it establishes that checks can be performed 'in stations in a third country where persons board the train'.[215] Concerning air borders the Code determines that checks can be effected 'on the aircraft or at the gate', even in 'airports which do not hold the status of international airport'.[216] At sea 'checks may also be carried out … in the territory of a third country'.[217] These extraterritorial activities being covered by the Schengen Borders Code, insisting on its inapplicability to maritime operations carried out beyond the territorial sea of the EU Member States is misconceived. It is the legal instrument itself which defines its own *territorial* scope of application as exceeding the territories of the EU Member States.[218]

This is not the only example in EU law providing for the applicability abroad of the principle of *non-refoulement*. Article 12(2) of the Council Joint Action governing the *Atalanta* operation against piracy in Somalia stipulates that no one 'may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment'.[219]

If the Schengen Borders Code applies extraterritorially, so does its article 3. The Commission, elaborating on its material scope of application, has arrived at the same conclusion. In response to a request from the LIBE Committee, it has delivered an opinion concerning the applicability of the Code to the Italian-Libyan push-backs.[220] The Commission considers that border surveillance activities aiming at preventing unauthorised border crossings fall within the purview of the Schengen Borders Code. The reasoning is grounded in the object of article 12 SBC. Because Italian-Libyan controls amount to border surveillance activities, they are deemed to fall within its scope of application. As a result, both the Code and the principle of *non-refoulement* enshrined therein ought to be respected, regardless of whether controls are undertaken in the territorial waters of the Member States or in the high seas.

The proposed guidelines for Frontex operations maintain the same position, establishing that nobody 'should be disembarked in or otherwise handed over to the authorities of a country with regard to which there are substantial grounds for believing that he or she would be subjected to persecution or to torture or to other forms of inhuman or degrading treatment or punishment, or from which there is a risk of expulsion or return towards such a country'.[221] It may, accordingly, be inferred that interception undertaken by EU Member States anywhere at sea with the purpose of border control shall be considered as coming within the remit of the Schengen Borders Code and subject to its provision on *non-refoulement*.

3.4 Procedures, judicial review and effective remedies:

Where *non-refoulement* applies, there is a series of related procedural guarantees that become applicable as well. As Article 33(1) GC prohibits the *refoulement* of refugees, it has been accepted that the only adequate manner in which to determine whether the person concerned may be safely expelled is to determine whether his life or freedom would be at risk in the country of destination on account of

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[215] Para. 1.2.2. SBC Annex VI.

[216] Paras. 2.1.3. and 2.2.1. SBC Annex VI.

[217] Para. 3.1.1. SBC Annex VI.

[218] Note in this regard that the ECJ has expressed the view that, a sufficient connection to EU law provided, '[t]he geographical application of the Treaty [as] defined in Article [52 EU] … does not, however, preclude Community rules from having effects outside the territory of the Community' in *Ingrid Boukhalfa v Federal Republic of Germany*, C-214/94, [1996] ECR I-2253, paras. 14-5.

[219] Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, [2008] OJ L 301/33.

[220] Letter from ex Commissioner Barrot to the President of the LIBE Committee of 15 Jul. 2009 (on file with the author).

[221] Frontex Guidelines Proposal, above n. 6, para. 4.2. The Council has slightly modified the wording of this provision in doc. 5323/1/10, above n. 11, para. 1.2.

his race, religion, nationality, membership of a particular social group or political opinion before the removal takes place.[222] It is therefore understood that the Geneva Convention 'may implicitly require States to perform status determination procedures'.[223] This is what the UNHCR establishes in its *Handbook on Procedures*. In order to enable States Parties to the Convention to implement their provisions, refugees have to be identified.[224]

Such identification, although mentioned in the Convention itself, is not specifically regulated.[225] Article 9 GC, for instance, foresees that '[n]othing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, *pending a determination by the Contracting State that that person is in fact a refugee* and that the continuance of such measures is necessary in his case in the interests of national security'. Preparing this article the drafters considered that, given the fact that 'none of the provisions of the Convention would apply unless the refugees were genuine',[226] 'it was essential first to determine whether a refugee was *bona fide*'.[227] Status determination was perceived as indispensable as 'it was difficult to be certain whether a person was really a refugee …'.[228] Contracting Parties considered they would hence 'need time to screen them'[229] before according them the whole array of the secondary rights attached to refugee status.

No explicit provision can be traced, though, with regard to the *quality* of the procedures to be established.[230] The Convention does not indicate what kind of procedures are to be adopted. It is left to each Signatory State to establish the one it considers most appropriate, taking into account its particular constitutional and administrative structure.[231] The general principle of effectiveness in international law requires in any case that the treaty deploys its 'appropriate effects'[232] in light of its 'object and purpose'.[233] It has therefore been submitted that, at a minimum, an individual assessment of each particular case is necessary.[234]

As far as judicial review is concerned, article 16(1) GC allows every refugee to 'have free access to the courts of law on the territory of all Contracting Parties'. During the drafting process the absolute character of this provision elicited no debate.[235] To be able to enforce the rights they derived from the Convention, refugees were to be granted unimpeded access to judicial protection without exception.[236] Although the possibility to review the outcome of the refugee status determination procedure is not expressly contemplated therein, the doctrine has accepted the applicability of article 16(1) GC in this context too.[237] Some jurisprudence endorses this approach. The English High Court has indeed considered that '[t]he use of the word "refugee" is apt to include the aspirant, for were that not so, if in fact it had to be established that he did fall within the definition of "refugee" in article 1, he might find that he could have no right of audience before the court because the means of establishing

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[222] J. C. Hathaway, above n. 184, at 279 and G. S. Goodwin-Gill and J. McAdam, above n. 147, at 215.
[223] H. Battjes, *European Asylum Law and International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), at 467 and references therein.
[224] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/1P/4/Eng/REV.2 [1992] (*UNHCR Handbook* hereinafter), para. 189.
[225] Article 9 and 31(2) of the Geneva Convention.
[226] Comment by the English representative, in P. Weis, *The Refugee Convention 1951 – The Travaux Preparatoires analysed with a Commentary by Dr. Paul Weis* (Cambridge: CUP,1995), at 63.
[227] Comment by the US representative, in P. Weis, above n. 226, at 64.
[228] Comment by the representative of Denmark, in P. Weis, above n. 226, at 65.
[229] Comment by the President, in P. Weis, above n. 226, at 68.
[230] On the fairness of determination procedures see EXCOM Recommendation No. XXX, Oct. 1977.
[231] Para. 189 UNHCR Handbook.
[232] Yearbook of the International Law Commission, Vol. II (1966), at 219.
[233] Article 31(2) of the Vienna Convention on the Law of Treaties.
[234] K. Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia, 2009), 164 ff.
[235] J. C. Hathaway, above n. 184, at 237.
[236] Note that article 42 GC forbids any reservations to article 16(1) GC.
[237] J.-Y. Carlier, above n. 187, 320 ff and references therein.

his status would not be available to him'.[238]

As regards the suspensive effect of appeals, several case law observes that, the prospect of removal being refugees' principal concern, '[i]f their fears are well-founded, the fact that they can appeal after they have been returned to the country where they fear persecution is scant consolation'.[239] It has thus been maintained that '[i]f a claim for asylum is made by a person … that person cannot be removed from or required to leave … pending a decision on his claim, and, even if his asylum claim is refused, so long as an appeal is being pursued'.[240]

In the framework of the ECHR, due to the worth attached to article 3, enshrining 'one of the fundamental values of democratic societies',[241] the Strasbourg Court requires States to organize the procedures to determine whether eventual return would cause the person concerned to face a 'real risk' of exposure to ill-treatment in a manner that enables independent and rigorous scrutiny.[242] Deportation orders have to be served in writing after an individual examination of the case, following a legal procedure previously established by law. The reasons underlying the removal have to be notified to the person concerned alongside the means and conditions to appeal the decision before the removal occurs.[243] To preserve the effectiveness of rights,[244] no impediments of a legal or material character can be imposed on the access to such procedures.[245] The failure of the person concerned to fulfill immigration requirements or the fact that he may be sent to a purportedly safe third country does not exonerate State authorities from establishing not only prospective breaches but also an 'arguable claim'[246] that the rights protected under the ECHR would be violated if return takes place. In fact, indirect *refoulement* is forbidden too. The removal to an intermediary country, be it also a Contracting Party to the ECHR, does not affect the responsibility of the expelling State 'to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to article 3 of the Convention'.[247] Presumptions of safety remain subject to rebuttal. Therefore, Contracting Parties cannot rely on international arrangements, like the ones underpinning the *Hera* operations or the Italian push-back scheme, to transfer persons from one jurisdiction to another automatically before conformity with article 3 ECHR has been established.

Where an independent and rigorous assessment has led the State to conclude that no substantial grounds have been shown for believing that the applicant would face a real risk of being

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[238] *R v Secretary of State for the Home Department, ex parte Jahangeer et al.,* [1993] Imm. AR 564 (Eng. QBD), 11 Jun. 1993, at 566.

[239] *R (L) v Secretary of State for the Home Department*, [2003] EWCA Civ 25, 24 Jan. 2003, para. 54.

[240] *R (Senkoy) v Secretary of State for the Home Department*, [2001] EWCA Civ 328, 02 Mar. 2001, para. 15. In the same line: *R v Secretary of State for the Home Department, ex parte Onibiyo*, [1996] QB 768, 05 Mar. 1996.

[241] ECtHR, *Ireland v Uk*, Appl. No. 5310/71, 08 Jan. 1978, para. 163; *Chahal v UK*, Appl. No. 22414/92, 15 Nov.1996, para. 79; *Saadi v Italy*, Appl. No. 37201/06, 28 Feb. 2008, para. 127.

[242] ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, 11 Jul. 2000, para. 39: 'a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by art. 3'.

[243] ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, 22 Sept. 2009, paras. 107-117.

[244] ECtHR, *Artico v Italy*, Appl. No. 6694/74, 13 May 1980. The Convention aspires to guarantee rights that are 'practical and effective', not 'theoretical or illusory'.

[245] ECtHR, *Jabari v Turkey*, para. 40: 'It would appear that the applicant's failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran'; in *Gebremedhin v France*, Appl. No. 25389/05, 26 Apr. 2007, at 54 ff, the Court declared France to be in breach of its obligations by providing for an asylum procedure the access to which was subordinated to a prior decision on leave to enter that was enforceable before the asylum claim had been assessed.

[246] The term 'arguable' is not synonymous with 'manifestly ill-founded'. At times the Court has accepted the arguability of a claim determining its foundedness only after a thorough examination. In *T.I. v UK*, Appl. No. 43844/98, 07 Mar. 2000, the Court considered the claim arguable because it raised concerns about the risks faced after expulsion, although it was declared inadmissible in the end. On the issue of arguability see: K. Wouters, above n. 234, at 333 ff; T. Spijkerboer, 'Subsidiarity and "Arguability": the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases', (2009) *IJRL*, Advance Access published online on 15 Jan. 2009, 1-27; N. Mole, *Asylum and the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2007), at 67 ff and F. J. Hampson, 'The Concept of an 'arguable claim' under Article 13 of the European Convention on Human Rights' (1990) 39 *ICLQ* 891-99.

[247] ECtHR, *T.I. v UK*, Appl. No. 43844/98, 07 Mar. 2000, at 15 and *K.R.S. v UK*, Appl. No. 32733/08, 02 Dec.2008, at 16.

subject to ill-treatment upon return, the individual concerned must still be provided with an effective remedy. The Court held in *Jabari* 'that article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief'.[248] To be considered effective, remedies have to be legally and materially accessible.[249] The authority referred to in article 13 ECHR does not 'necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective'.[250]

With regard to the suspensive effect of appeals there has been an evolution in the Court case law. The Court initially considered that the notion of an effective remedy required 'the possibility of suspending the implementation of the measure impugned'.[251] In *Conka*, it established that article 13 'requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible'. The Court considered it 'inconsistent with article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention'.[252] In *Gebremedhin*, the Court eventually concluded that article 13 requires access to appeals 'with automatic suspensive effect'. [253]

Within the EU legal framework, the EU borders *acquis* does not provide for a specific procedure to be followed in *refoulement* cases. In principle, entry should be refused to any third-country national not fulfilling the entry requirements established by the Schengen Borders Code, which include being in possession of adequate travel documents and valid visas.[254] Entry refusals should be issued by a competent national authority in writing, in a standard form stating the reasons behind the refusal, and 'take effect immediately'.[255] Persons refused entry have the right to lodge an appeal without suspensive effect in accordance with national law.[256] These rules are, however, 'without prejudice to the application of special provisions concerning the right of asylum and to international protection'.[257] The asylum *acquis*, on the other hand, has regulated the procedure applicable to asylum applications made in the territory or at the borders of the EU,[258] leaving it for the Member States to decide on the arrangements applicable to requests submitted abroad.[259] This does not mean, though, that a legal procedure to determine the compatibility of pre-entry refusals with *non-refoulement* is not required under EU law. In the absence of harmonized rules on the issue, it is for the domestic legal system of each Member State to lay down the applicable procedure.[260] Domestic rules should not render 'practically impossible or excessively difficult the exercise of rights conferred by Community law'.[261] In particular, the associated 'right to effective judicial protection' should remain intact.[262]

The individual entitlement to judicial protection is one major consequence of the EU being

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[248] ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, 11 Jul. 2000, para. 48.
[249] ECtHR, *Salah Sheekh v The Netherlands*, Appl. No. 1948/04, 11 Jan. 2007, para. 121; *NA. v UK*, 25904/07, 17 Jul. 2008, para. 89.
[250] ECtHR, *Conka v Belgium*, Appl. No. 51564/99, 05 Feb. 2002, para. 75.
[251] ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, 11 Jul. 2000, para. 50.
[252] ECtHR, *Conka v Belgium*, Appl. No. 51564/99, 05 Feb. 2002, para. 79.
[253] ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, 26 Apr. 2007, para. 66; confirmed in *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, 22 Sept. 2009, para. 58.
[254] Arts. 13 and 5(1) SBC.
[255] Art. 13(2) SBC.
[256] Art. 13(3) SBC.
[257] Art. 13(1) SBC.
[258] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13 (*Procedures Directive* hereinafter).
[259] Art. 3 Procedures Directive.
[260] ECJ, *Courage and Crehan*, C-453/99 [2001] ECR I-6297, para. 29; *Safalero*, C-13/01 [2003] ECR I-8679, para. 49.
[261] ECJ, *Rewe*, 158/80, [1981] ECR 1805, para. 5; *Peterbroeck*, C-312/93, [1995] ECR I-4599, para. 12.
[262] ECJ, *Verholen and Others*, C-87/90 and C-89/90, [1991] ECR I-3757, para. 24.

organized as a 'community based on the rule of law'.[263] The right is considered to be a general principle of European law, stemming from the common constitutional traditions of the Member States, as enshrined in articles 6 and 13 of the ECHR.[264] Article 47 of the EU Charter of fundamental rights has subsequently codified a subjective 'right to an effective remedy and to a fair trial', intended to apply to the institutions of the Union and to the Member States when they are implementing EU law.[265] As a result 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'.[266] The right comprises, in particular, an entitlement to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law' and 'the possibility of being advised, defended and represented'.[267] In order to ensure effective access to justice, '[l]egal aid shall be made available to those who lack sufficient resources'.[268] According to the Presidium's explanations, article 47 is based both on article 13 and 6 ECHR. Judicial protection in EU law is, however, 'more extensive' as it guarantees the right to an effective remedy 'before a Court'.[269] Therefore, the 'national authority' to which article 13 ECHR refers has to be understood within the EU legal framework as a reference to a Court of law. Likewise the substance of article 6 ECHR has been given a wider scope. In EU law the right to a fair hearing is not confined to civil and penal law suits.[270] The procedural guarantees enshrined in article 6 ECHR, which applicability in the context of the ECHR has been excluded in cases concerning immigration proceedings by the Strasbourg Court,[271] are generally applicable in the EU legal order.

The suspensive effect of appeals is not expressly provided for in article 47 EUCFR, but article 52(3) EUCFR indicates that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, although the Union may provide more extensive protection, the meaning and scope of those rights shall, in principle, be 'the same' as those laid down by the Convention. According to the Presidium's explanations article 52(3) EUCFR 'is intended to ensure the necessary consistency between the Charter and the ECHR…'.[272] This means in particular that the legislator, in laying down limitations to the rights recognized in the Charter, must comply with the same standards as the ECHR, established not only in the text of the instrument, but also by the case law of the Strasbourg Court. The Presidium stresses in this connection that, in any event, 'the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.[273]In this light, it seems reasonable to assume that in pre-border proceedings regarding *non-refoulement* the Strasbourg prescriptions on the automatic suspensive effect of appeals apply in the EU legal framework as a matter of article 47 EUCFR.

Concerning the specific relationship between general principles and secondary legislation in EU law, the *Siples* jurisprudence established that the general principle of judicial protection overrules any provision contained in secondary legislation that affords less individual protection. In the instant case, article 243 of the Community Customs Code did not provide for national Courts to grant interim relief. The European Court of Justice considered that the provision should be given an interpretation consistent with the general principle, as it could not 'limit the right to effective judicial protection'.[274] Transposing the argument to the matter of our concern, the regime of pre-border controls at sea has to

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[263] ECJ, *Les Verts* C-294/83, ECR 1986 I-1339, para. 23; *Unión de Pequeños Agricultores*, C-50/00, [2002] ECR I-6677, para. 38.

[264] ECJ, *Johnston*, 222/84, [1986] ECR 1651; *Heylens*, 222/86, [1987] ECR 4097; *Borelli*, C-97/91, [1992] ECR I-6313; *Unión de Pequeños Agricultores*, C-50/00, [2002] ECR I-6677, para. 39; *Unibet Ltd*, C-432/05, [2007] ECR I-02271, para. 37.

[265] Art. 51(1) EUCFR and Explanations to the EUCFR, above n. 212, at 29.

[266] Art. 47(1) EUCFR.

[267] Art. 47(2) EUCFR.

[268] Art. 47(3) EUCFR.

[269] Explanations to the EUCFR, above n. 212, at 29.

[270] Ibid., at. 30.

[271] ECtHR, *Maaouia v France*, Appl. No. 39652/98, 05 Oct. 2000, para. 40.

[272] Explanations to the EUCFR, above n. 212, at 33.

[273] Ibid.

[274] ECJ, *Siples Srl*., [2001] ECR I-0277, para. 17. For an analysis see E. Brouwer, *Digital Borders and Real Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), 303 ff.

be aligned with the requirements of article 47 EUCFR. Removals cannot take place 'immediately'.[275] When an 'arguable claim' of *refoulement* is formulated, an exercise of consistent interpretation becomes necessary.[276] Therefore, either the wording of article 13(3) SBC is given an interpretation in conformity with article 47 EUCFR, or, as contemplated in article 13(1) SBC, an entirely new procedure is enacted introducing 'special provisions concerning the right of asylum and to international protection'.

The Commission has put forward an intermediate solution in its proposed guidelines for Frontex maritime missions, submitting that the persons intercepted or rescued in the course of a joint operation 'must be informed in an appropriate way so that they can express any reasons for believing that they would be subject to [persecution or ill treatment] in the proposed place of disembarkation'.[277] Then the SAR coordination centre concerned should be informed of the presence of such persons and convey the information to the competent authorities of the Member State hosting the maritime operation.[278] The Council draft on the guidelines has added that on the basis of that information the operational plan of the mission 'should determine which follow-up measures may be taken'.[279]

However, these provisions do not amount to a legal procedure previously established by law that would enable an independent and rigorous scrutiny in each individual case. Whereas the principle of informing the persons intercepted of the prospective place of disembarkation is considered a legally binding rule, inscribed in Part I of the Annex to the draft Council Decision containing the guidelines, the follow-up measures to be adopted, inscribed in Part II of the Annex, produce no legal effect.[280] No procedural guarantees, access to legal counsel or representation have been contemplated either. A provision on judicial protection is also lacking, as are the conditions under which remedies before the Courts competent to grant appropriate relief could be exercised. The fact that appeals should be endowed with automatic suspensive effect is not reflected anywhere in the text. As a result, the general impression is that the EU legislator is trying to defer the essential conclusion that meaningful procedures and judicial protection can only be guaranteed on dry land. While an initial onboard profiling is necessary, it is not sufficient for the correct identification and subsequent processing of asylum seekers.[281] Should the competent Courts be able to sit elsewhere in a way that would not compromise the effectiveness of *non-refoulement*, access to the territory of the EU Member States may be open to debate. Otherwise, inherent in a plea of *non-refoulement* is an entitlement to provisional admission on dry land for the purpose of such procedures as may be necessary to guarantee that removal to a third country is safe.

4. Conclusions:

Without minimizing the challenges posed by irregular maritime migration, EU Member States must secure to everyone within their jurisdiction the rights and freedoms they derive from human rights instruments and EU law. Reasons of political convenience or economic cost do not excuse from this obligation. The consequences that compliance may precipitate in terms, for instance, of the number of asylum applications to be processed, do not exclude a duty on the EU Member States to organise their

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[275] Art. 13(2) SBC.

[276] ECJ, *Ordre des barreaux francophones*, C-305/05, [2007] ECR I-05305, para. 28: 'On that point, the Court has consistently held that, if the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty rather than to the interpretation which leads to its being incompatible with the Treaty ... Member States must not only interpret their national law in a manner consistent with Community law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law'.

[277] Frontex Guidelines Proposal, above n. 6, para. 4.2.

[278] Ibid., para. 4.3.

[279] Council doc. 5323/1/10, above n. 11, para. 4.2.

[280] Art. 1 of the Draft Council Decision in Council doc. 5323/1/10, above n. 11.

[281] UNHCR, 'Background note on the protection of asylum seekers and refugees rescued at sea', 18 Mar. 2002, para. 23.

border control systems in such a way that they can meet their responsibilities.[282] Operational guidelines for maritime missions and a regime to apportion responsibility among participating Member States may be welcome, but they cannot condition compliance with clear international obligations to be fulfilled in good faith. Responsibility accrues in these situations from the mere fact of exercising effective control through rescue or interception, without requiring a specific system to allocate it in a more suitable way.

Where interception occurs, fundamental rights remain applicable. Member States and Frontex cannot intercept migrants as a means to reduce loss of life without considering the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution or a real risk of ill treatment may be put in jeopardy.[283] Interception does not equate with rescue in international law.

Interdiction powers should also be exercised with due regard to the UNCLOS and 'other rules of international law',[284] respecting the regime of innocent passage as well as the right of vessels in distress to seek refuge in an adjacent coastal State. Ultimately, a positive obligation to preserve human life may require that permission to enter port be accorded. The fact that *cayucos* and *pateras* do not fly the flag of any State does not allow for unlimited enforcement jurisdiction in their regard. The UN Human Trafficking Protocol does not create any interdiction powers whatsoever, whereas the UN Smuggling Protocol requires a distinction to be drawn between the smugglers and their victims. If the former can make the object of legal prosecution and punishment, the latter have to be assisted and protected through measures appropriate to preserve their human rights.

Neither International co-operation nor extraterritoriality release EU Member States from their international engagements. An independent responsibility remains for each Member State exercising effective control over the persons concerned. *Non-refoulement* is applicable in this context. Therefore, border surveillance activities carried out anywhere at sea entail the obligation to respect article 3 of the Schengen Borders Code and the EU Charter of Fundamental Rights, which content is established by reference to the ECHR and the Geneva Convention.

A series of procedural guarantees ensue from an entitlement to protection against *refoulement*. Where an arguable claim is invoked that removal would expose the person concerned to persecution or mistreatment, an independent and rigorous scrutiny is to be undertaken by a competent national authority in every individual case. Member States cannot rely automatically on bilateral arrangements with third countries to transfer the person in question. Compatibility of the removal with the requirements of *non-refoulement* must be determined first. Removal orders have to be served in writing according to a legal procedure previously established by law, containing the reasons motivating the removal and indicating the appropriate means and conditions to appeal. A judicial remedy should be available in domestic law allowing the competent Court to deal with the substance of the claim and to grant appropriate relief. The appeal should be endowed with automatic suspensive effect, which should cause the execution of the removal to be suspended until it has been examined whether it is compatible with *non-refoulement*.

Where the initial procedure is conducted *physically* is not without repercussions. The exercise of the rights conferred to individuals by EU law cannot be rendered practically impossible or exceedingly difficult and decisions at first instance should not prejudice the right to effective judicial protection. Therefore, it is submitted that compliance with EU law requires the EU Member States to allow preliminary access to the territory of the Member States for the purpose of ensuring, through adequate procedures, that removing the persons concerned to a third country is actually safe.

On this account, the EU legislator should align border control legislation with the rights migrants

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[282] One of the arguments Belgium submitted to justify the elimination of the automatic suspensive effect of appeals in expulsion cases was the overloading of the Conseil d'Etat and the risk of abuse of procedure, which the Strasbourg Court rejected considering that: 'Article 13 imposes on the Contracting States the duty to organize their judicial systems in such a way that their courts can meet its requirements,' ECtHR, *Conka v Belgium*, Appl. No. 51564/99, 05 Feb. 2002, para. 84.

[283] IMO Guidelines on the treatment of persons rescued at sea, above n. 104, para. 6.17.

[284] Arts. 2(3) and 87(1) UNCLOS.

and refugees derive from EU law. The drafting process of the guidelines governing Frontex maritime operations offers the EU institutions a good opportunity to anchor the Union in 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights …'.[285]

[285] Art. 2 EU.