

# Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation

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## Abstract

Since 2011, due to the Syrian civil war, Libya's institutional breakdown and Eritrea's political unrest, record high numbers of irregular migrants have been arriving at the EU's south-eastern external borders, publicly known as the 'Europe's refugee crisis'. The most pressurised borders have been those of Greece and Italy. The human smuggler's 'organised refugee' strategy has identified various legal issues resulting from the application of parallel legal frameworks both at regional and at international level. The EU Member States' policy-making response to human smuggling has created loopholes through conflicting interpretations of the international legal framework on search and rescue and the inconsistent application of human rights law. Hence, this article will argue that although the International Convention on Maritime Search and Rescue (SAR) and the EU Sea Borders Regulation purportedly adopted to set out clear rules on when to initiate search and rescue, have not addressed the issue of responsibility for and the consequences of failed rescue scenarios by inactive SAR States; thereby creating a gap in the legal framework on State responsibility for negligent or intentional failed rescues.

## Keywords

search and rescue – disembarkation – distress – interception measures

### 1 Introduction<sup>1</sup>

For more than a decade Europe has received a high number of irregular migrant flows. Since 2011, due to the Syrian civil war, Libya's institutional breakdown and Eritrea's political unrest, record high numbers<sup>2</sup> of irregular migrants<sup>3</sup> have been arriving at the EU's south-eastern external borders, publicly known as 'Europe's refugee crisis'.<sup>4</sup> Since 2011 to 2017 the most pressurised borders have been those of Greece and Italy.<sup>5</sup> Although during 2018, the number of irregular

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2 141,051 in 2011, 72,437 in 2012, 107,365 in 2013, 283,532 in 2014, 1,015,078 in 2015 and 363,348 in 2016: FRAN. *Annual Risk Analysis 2014*, 14, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2014.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf), accessed 26 April 2018; IOM, *Monitors Latest Migrant Arrivals, Deaths in Mediterranean*, <https://www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom>, accessed 26 April 2017; IOM, 'Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079', 1 June 2017, <https://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079>, accessed 26 April 2018.

3 IOM defines irregular migration as 'movement that takes place outside the regulatory norms of the sending, transit and receiving countries. However, there is no clear or universally accepted definition of irregular migration'. IOM, *Key Migration Terms*, <https://www.iom.int/key-migration-terms>, accessed 27 April 2018. In the Mediterranean and Aegean seas irregular migration is 'mixed'. It consists of people flows moving for different reasons but which share the same route. The 'boat people' share the same vessel and cross the sea without authorisation with the aim to reach EU territory. Thus, the term 'irregular migrant' includes asylum seekers, refugees, trafficked and smuggled persons, unaccompanied children, stateless persons, economic migrants and displaced persons, see A. Triandafyllidou & A. Dimitriadi, 'Migration Management at the Outposts of the European Union', 22(3) *GLR* 2013, p. 598–618, at p. 600; J. Kumin, 'The Challenge of Mixed Migration by Sea', 45 *FMR* 2014, p. 45, 49; N. Bernardie-Tahir & C. Schmoll, 'Islands and Undesirables: Introduction to the Special Issue on Irregular Migration in Southern European Islands', 12(2) *JIRS* 2014, 87–102, 88–89.

4 B. Nascimbene & A. Di Pascale, 'The "Arab Spring" and the Extraordinary Influx of People who Arrived in Italy from North Africa', 13(4) *EJML* 2011, p. 341–360, at p. 342; F. Trauner, 'Asylum Policy: the EU's "crises" and the looming policy regime failure', 38(3) *JEI* 2016, p. 311–325, at p. 311.

5 From 2010 to 2016, the Arab Spring led to a rise in irregular migrants by: 35% in 2011, with 64,000 detections in the Central Mediterranean area and 55,000 in the Eastern Mediterranean;

migrants has decreased significantly when compared to the years 2016–2017,<sup>6</sup> the arrival of irregular migrants in the Mediterranean Sea remains a controversial political issue. The control and management of external borders remains a top priority for the EU and its EU Member States, translated into concrete measures linking irregular migration with issues on security and criminalisation.<sup>7</sup>

Irregular migrants cross the Mediterranean Sea with the help of centralised and sophisticated criminal cartels.<sup>8</sup> These integrated criminal cartels op-

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- 48% in 2013, with approximately 107,000 detections of which 40,304 were detected in the Central Mediterranean area and 24,800 in the Eastern Mediterranean; 162% in 2014, with 280,000 detections by sea, including 170,000 in the Central Mediterranean and 50,800 in the Eastern Mediterranean. In 2015, unprecedented numbers of detections were reported by Member States with 1,822,177 along external borders, six times the number of reported detections in 2014, with 885,386 detections in the Eastern Mediterranean route, mostly in the Aegean Sea, and 154,000 detections reported in the Central Mediterranean route. There was a 72% decrease in 2016, with 511,371 detections, of which 182,277 arrived by the Eastern Mediterranean route and 181,459 by the Central Mediterranean route.; From 104,000 in 2010 to 141,000 in 2011; Frontex, *Annual Risk Analysis 2012*, 4, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2012.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2012.pdf), accessed 26 April 2018; A total of 107,000 irregular entries; Frontex, *Annual Risk Analysis 2014*, 7–8, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2014.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf), accessed 26 April 2018; Frontex, *Annual Risk Analysis 2015*, 5, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2015.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf), accessed 26 April 2018; Frontex, *Risk Analysis 2016*, 6, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2016.pdf), accessed 26 April 2018; Frontex, *Risk Analysis 2017*, 18, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017), accessed 26 April 2018; Frontex, 'Frontex and NATO to Cooperate in the Aegean Sea' (3 June 2016), <http://frontex.europa.eu/news/frontex-and-nato-to-cooperate-in-the-aegean-sea-nZMSYr>, accessed 26 April 2018; NATO, 'Assistance for the Refugee and Migrant Crisis in the Aegean Sea' (27 June 2016), [http://www.nato.int/cps/en/natohq/topics\\_128746.htm](http://www.nato.int/cps/en/natohq/topics_128746.htm), accessed 26 April 2018; UNHCR, *Refugees/Migrants Emergency Response-Mediterranean, Deaths 3,151*, (Geneva: UNHCR), <http://data.unhcr.org/mediterranean/regional.php>, accessed 26 April 2018.
- 6 As of 9 July 2018, the number of arrivals in the Mediterranean reached 71,779; the number of deaths reached 1,565, see <https://www.iom.int/news/mediterranean-migrant-arrivals-reach-71779-2018-deaths-reach-1565>.
- 7 G. Karyotis & D. Skleparis, 'Qui Bono?', 22(3) *GLR* 2013, p. 683–706, 683; I. van Liempt & S. Sersli, 'State Responses and Migrant Experiences with Human Smuggling: A Reality Check', 45(4) *Antipode* 2013, p. 1029–1046, 1029; J. Salt, 'Trafficking and Human Smuggling: a European Perspective', 38(3) *IM* 2000–3, Special Issue 2000/1, p. 31–56, at p. 32, <http://onlinelibrary.wiley.com/doi/10.1111/1468-2435.00114/pdf>, accessed 21 February 2018; European Commission, *Communication on the Delivery of the European Agenda on Migration*, COM (2017) 55 final, 2.
- 8 A. Triandafyllidou & T. Maroukis, *Human Smuggling from/via North Africa and Turkey to Greece* (Palgrave Macmillan, London, 2012), p. 89–115; P. Cuttitta, 'Humanitarianism and Migration in the Mediterranean Borderscape: The Italian-North African Border between Sea Patrols and Integration Measures', in: C. Brambilla, J. Laine, J.W. Scott & G. Bocchi (eds), *Borderscapes: Imaginations and Practices of Border Making* (Ashgate: Routledge, 2015) 133;

erate in the region with some knowledge of European and international law on asylum and search and rescue.<sup>9</sup> In accordance with the European Court of Human Rights (ECtHR) ruling in *Hirsi*, government vessels patrolling the Mediterranean Sea are obliged following interception or search and rescue operations not to return irregular migrants back to their country of departure without conducting an independent assessment of their individual circumstances.<sup>10</sup> Furthermore, Member State authorities have a further investigative duty not to return an individual if they know or ought to know that the country of departure's asylum and immigration system is deficient or systematically violates human rights obligations.<sup>11</sup> As a result, criminal cartels have developed an 'organised refugee' strategy moving away from unplanned irregular movements, to well-planned organised routes.<sup>12</sup> Knowing that the boats will not turn back, the recent practice of human smugglers has been to place as many irregular migrants as possible on cheap, unsophisticated vessels often with defective engines controlled by the migrants themselves.<sup>13</sup> The migrants are instructed to: 1) broadcast a distress call or a call for assistance as soon as they have left the State of departure's territorial waters; and 2) concoct the 'best story' they can to tell the EU Member State authorities (supported with forged documents).<sup>14</sup> Such a practice known as 'a border game' is creating difficulties in distinguishing genuine asylum seekers from other types of migrants.<sup>15</sup> The

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J. van Der Leun & A. van Schijndel, 'Emerging from the Shadows or Pushed into the Dark? The Relation between the Combat against Trafficking in Human Beings and Migration Control', 4 *IJLCJ*, 2016, p. 26–42.

- 9 F. Pastore, P. Monzini & G. Sciortino, 'Schengen's Soft Underbelly? Irregular Migration and Human Smuggling across Land and Sea Borders to Italy', 44(4) *IM* 2006, p. 95, <http://online.library.wiley.com/doi/10.1111/j.1468-2435.2006.00381.x/epdf>, accessed 27 February 2018.
- 10 *Hirsi Jamaa and Others v Italy*, Application no 27765/09, *ECtHR* 2012, paragraphs 131, 133.
- 11 C-411/10 and C-493/10, *NS v Secretary of State for the Home Department and ME v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] paragraph 94; *MSS v Belgium and Greece*, Application no 30696/09 *ECtHR* 2011, paragraph 358.
- 12 AFP, 'Wave of Refugees to Europe an "Organized Invasion" says Czech PM', *The Telegraph*, 27 December 2015, <http://www.telegraph.co.uk/news/worldnews/europe/czechrepublic/12070377/Wave-of-refugees-to-Europe-an-organised-invasion-says-Czech-PM.html>, accessed 27 April 2018.
- 13 House of Lords, European Union Committee, *Operation Sophia: a Failed Mission*, 2nd Report of Session 2017–19, HL Paper 5, paragraph 45; J. Carling, 'Migration Control and Migrant Fatalities at the Spanish-African Borders', 41(2) *IMR* 2007, p. 327; L. Nessel, 'Externalized Borders and the Invisible Refugee', 40 *CHRLR* 2009, p. 625.
- 14 Van Liempt & Sersli 2013 (n 6), p. 1038.
- 15 D. Bigo, 'The (In)securitization Practices of the Three Universes of EU Border Control: Military/Navy-border Guards/Police—Database Analysts', 45(3) *SAGE* 2014, p. 209–225, at p. 212, <http://sdi.sagepub.com/content/45/3/209.full.pdf+html>, accessed 26 April 2018;

migrant smugglers, facets of transnational organised crime, are the protagonists in the declared legal and policy battle with European governments.

The human smuggler's 'organised refugee' strategy has identified various legal issues resulting from the application of parallel legal frameworks both at regional and at international level. The EU Member States' policy-making response to human smuggling has created loopholes through conflicting interpretations of the international legal framework on search and rescue and the inconsistent application of human rights law. These policies, in the form of extraterritorial measures, are supposed to be a solution; however, in this article it will be argued that they have become the *problem*. Although human smuggling must be sanctioned, it is debated that this battle is happening at the expense of persons in need of international protection. This article argues that the EU and its EU Member States have the obligation to *protect* the victims of crime and especially those entitled to special protection such as refugees and other vulnerable groups in accordance with international obligations.<sup>16</sup>

The EU attempted to offer a solution to these inconsistent national interpretations, through the adoption of the Sea Borders Regulation,<sup>17</sup> where EU Member States agreed on a uniform interpretation of principles such as rescue, disembarkation and distress combining border control and search and rescue within one Regulation, operational under Frontex's coordination. Despite human rights safeguards expressly set out within the Regulation, scholars such as Den Heijer and Basaran argue that in practice the rules do not effectively

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P. Andréas, *Border Games, Policing the US-Mexico Divide* (Ithaca: Cornell University Press, 2000).

- 16 Obligation to protect expressly appears in: UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime, United Nations, (Resolution 55/25 of 15 November 2000) United Nations, Treaty Series, Volume 2241, 507 (Migrant Smuggling Protocol) article 9 'safeguard clause'; UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, United Nations, (Resolution 55/25 of 15 November 2000) United Nations, Treaty Series, Volume 2237, 319 (Trafficking Protocol) article 14 'Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein'.
- 17 Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Sea Borders Regulation) OJ L89/93 [2014] based on TFEU, article 77(2)(d), articles 6–10.

assist in a uniform interpretation on the terms ‘distress’, ‘disembarkation’, and ‘place of safety’.<sup>18</sup> Hence, this article will discuss that although the Sea Borders Regulation purportedly adopted to set out clear rules on when to initiate search and rescue, does not address the issue of responsibility for and the consequences of failed rescue scenarios by inactive States; thereby creating a gap in the legal framework on State responsibility for negligent or intentional failed rescues.

This article explores from a legal (doctrinal) perspective, border enforcement and human rights issues in response to the smuggling of migrants and EU Member State failed rescue scenarios. It examines the international legal framework of the Law of the Sea, addressing the complex legal issues arising in interception and SAR.<sup>19</sup> As migrants often travel in unseaworthy boats, this article also will examine the obligation upon the masters of ships to render assistance to a person in distress at sea regardless of immigration status. Due to overlapping search and rescue zones, there are legal issues as to which State is responsible for disembarking persons rescued or interdicted at sea, arising from the international obligation not to return any person to a country where there is a real risk that they would face ill-treatment.

## 2 The International Law of the Sea and Interception

Any counter response to migrant smuggling by sea is challenged by the complex legal landscape of cumulative rules and international obligations under refugee and human rights laws, the Law of the Sea and transnational criminal law. Confronted with this challenge, EU Member States are reacting to the high number of irregular migrants coming to their territory by externalising border controls.<sup>20</sup> Interception operations are justified on the basis that the State has a ‘legitimate interest in controlling irregular migration as well as ensuring

18 T. Basaran, ‘The Saved and the Drowned: Governing Indifference in the Name of Security’, 46(3) *SD* 2015, p. 205–220, at p. 206; M. den Heijer, ‘Frontex and the Shifting Approaches to Boat Migration in the European Union, A Legal Analysis’, in: R. Zaiotti (ed.), *Externalizing Migration Management: Europe, North America and the Spread of ‘Remote Control’ Practices*, Routledge Research in Place, Space and Politics Series (London/New York: Routledge, 2016), p. 54.

19 <https://treaties.un.org/doc/publication/unts/volume%201405/volume-1405-i-23489-english.pdf>.

20 L. Bialasiewicz, ‘Off-shoring and Out-sourcing the Borders of Europe: Libya and EU Border Work in the Mediterranean’, 17(4) *Geopolitics* 2012, p. 843–866; M. Casas-Cortes, S. Cobarrubias & J. Pickles, “‘Good neighbours make good fences’: Seahorse Operations, Border Externalization and Extra-territoriality’, *EURS* 2014, p. 1–21, at p. 2.

the safety and security of air and maritime transportation, and a right to do so through various measures.<sup>21</sup> They also act as a multipurpose endeavour to rescue persons on unseaworthy vessels and to prevent human trafficking and people smuggling.<sup>22</sup>

At the international level, these interception measures are exercised on the basis of the Protocols to the UN Convention against Transnational Organized Crime 2000, henceforth the 'Palermo Protocols'.<sup>23</sup>

- 1) *The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children 2000*,<sup>24</sup> which defines 'trafficking in persons' and protects the victims of trafficking;
- 2) *The Protocol against the Smuggling of Migrants by Land, Sea and Air 2000*,<sup>25</sup> which deals with the smuggling of migrants by organised criminal groups, defines 'smuggling of migrants', and protects the rights of smuggled migrants;<sup>26</sup> and
- 3) *The Protocol against the illicit Manufacturing and Trafficking in Firearms, their parts and Components and Ammunition 2001*,<sup>27</sup> the purpose of which is to facilitate cooperation between the States Parties in order to 'prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition' (Article 2). These Protocols aim to establish an 'international co-operative framework' in the field of cross-border crime, the smuggling of migrants by land, sea and air, and the protection of victims of human trafficking.<sup>28</sup> They act as a mechanism for States to respond to criminal networks via bilateral agreements allowing a State other than the flag State to intercept vessels involved in criminal operations.

21 UNHCR, *Conclusion on Protection Safeguards in Interception Measures*, No 97 (LIV) 10 October 2003, A/AC.96/987 and No 12A (A/58/12/Add.1).

22 N. Klein, 'A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants', 63(4) *ICLQ* 2014, p. 787–814, at p. 788.

23 *UNTS* 12, Vol. 2225 (adopted by resolution A/RES/55/25 of 15 November 2000, New York, 15 November 2000) 209.

24 UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, United Nations, (Resolution 55/25 of 15 November 2000) United Nations, Treaty Series, Volume 2237, 319 (Trafficking Protocol).

25 Migrant Smuggling Protocol (no 18).

26 Van Liempt & Sersli 2013 (n 6), p. 1035.

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

28 Migrant Smuggling Protocol (no 18) article 7: 'States Parties shall cooperate ... in accordance with the international law of the sea.'



In anticipation of difficulties in interpretation of parallel legal frameworks applicable at sea, the EU, through the Schengen Borders Code (SBC) handbook, has laid down certain principles and procedures to be followed by border officials upon intercepting irregular migrants. The SBC handbook provides that border officials must: a) allow any person in need of international protection access to legal safeguards, b) identify those persons that express fear of ill-treatment or harm upon being returned to country of origin or transit, c) consult with relevant national authorities as to whether a person's declaration should be construed as a wish to apply for asylum or any other form of international protection, and d) inform potential applicants of procedural legal guarantees such as access to interpreters when appropriate, and give adequate information to intercepted persons about what will happen to them.<sup>29</sup> Most importantly, border guards cannot take any decision to return a person 'without prior consultation with the competent national authority or authorities'.<sup>30</sup>

In the circumstances where a migrant smuggling vessel attempts to enter State territory without authorisation, the State has the right to enforce its coercive or punitive measures in the form of interception subject to its national laws on immigration and crime and subject to its international obligations.<sup>31</sup> International law has not established a uniform definition of what 'interception' means.<sup>32</sup> According to the academic literature and the UNHCR, it means to: 'i) prevent embarkation of persons on an international journey without the required documentation; (ii) prevent further onward international travel by persons who have commenced their journey either by land, air or sea; or (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law'.<sup>33</sup> The primary objective of interception is to detect boats carrying irregular migrants and stop them reaching EU Member State territory, and to persuade them to return to their country of departure. Although it is recognised that every State has the right to use various measures in border management, they

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

30 *Ibid.*, section 10.3.

31 Klein 2014 (n 21), p. 795; A. Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010), p. 408.

32 Gallagher 2010 (n 30), p. 407.

33 UNHCR, *Conclusion on Protection Safeguards in Interception Measures* (n 20); D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CStICL, 2012) 9; M. Tondini, 'The Legality of Intercepting Boat People under Search and Rescue and Border Control Operations, with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the *Hirsi Case*', 18 *JIML* 2012, p. 59–74, at p. 60.



must do so in conformity with international law.<sup>34</sup> This section will focus on interception at sea where legal safeguards are most challenged on grounds of jurisdiction by investigating the application of the UN Convention on the Law of the Sea 1982 ('UNCLOS').<sup>35</sup>

## 2.1 *State Jurisdiction in Interception Operations at Sea*

### 2.1.1 Territorial Jurisdiction

Human smugglers no longer need to find new migratory routes to cross borders irregularly. Their innovative 'organised refugee' strategy seeks to benefit from the international and EU legal framework, as well as from case-law developments on international human rights law and the search and rescue regime. With knowledge of international law,<sup>36</sup> human smugglers seem to be aware that State sovereignty<sup>37</sup> is limited in its right to regulate immigration on matters concerning asylum and refugee law,<sup>38</sup> as well as by the principle of international law prohibiting the return of individuals to a country where s/he might face a real risk of being subjected to ill treatment.<sup>39</sup> At the international and regional level, States must further ensure that human rights guarantees and safeguards are afforded to every person within their jurisdiction.<sup>40</sup> As distinct jurisdictional rules apply to specific maritime zones as recognised by the Law of the Sea, directly affecting a State's right to intercept a foreign

34 Gallagher 2010 (n 30), p. 408.

35 Italy, Greece and Malta, as well as the EU ratified the Convention, [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm), accessed 25 April 2018.

36 T. Reitano & P. Tinti, *Survive and Advance: the Economics of Smuggling Refugees and Migrants into Europe*, ISS Paper 289 (Pretoria: Institute for Security Studies, 2015), p. 5.

37 *Jabari v Turkey* Application no 40035/98 ECHR 2000-VIII, paragraph 38.

38 Refugee Convention, articles 1 and 33; L. Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention', 25(4) *IMR* 1991, Special Issue: *U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, p. 737–770, at p. 742–746.

39 EU Charter, article 19(2); ECHR, article 3; UNCLOS, article 2(3); *Soering v UK*, Application no 14038/88, Series A no 161, paragraph 91; *Ahmed v Austria*, Application no 25964/94, ECHR Reports 1996-VI, paragraph 47.

40 ECHR, article 1, 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedom'; *Bankovic and Others v Belgium*, Application no 52207/99, ECHR 2001-XII, paragraph 66; cf. ICCPR, article 2, 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', emphasis added to highlight the differences between the wording of the two articles; *Wall Case: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion ICJ Reports 2004, 136, paragraph 108.

vessel,<sup>41</sup> the ‘border game’ consists of irregular migrant boats coming as close as possible to the outer limit of EU Member State territorial sea jurisdiction, up to 12 nautical miles from the baseline.<sup>42</sup> Within their territorial sea, States are sovereign and have the power to stop, board, and arrest individuals who violate their immigration laws and regulations.<sup>43</sup> It is precisely at this zone that human smugglers count upon the coastal State to intercept and stop the vessel. Once the vessel reaches the coastal State’s territorial waters, the latter becomes responsible for the reception of these individuals in accordance with the Dublin Regulation,<sup>44</sup> and international refugee law,<sup>45</sup> and cannot return the vessel to its country of departure or any third State without first assessing each passenger’s individual circumstances.

Human smugglers seem to be aware that beyond the 12-mile limit and extending up to 24 nautical miles from the baseline is the ‘contiguous zone’<sup>46</sup> where, as regards incoming vessels, the coastal State is limited in its exercise of ‘control’ to ‘inspections and warnings’; i.e. it can only ‘stop, board and search the vessel’ with a view to preventing it from entering the territorial sea and there infringing the coastal State’s laws and regulations.<sup>47</sup> The coastal State’s exercise of control depends upon the existence of a ‘relevant connection with territorial areas’,<sup>48</sup> i.e. the migrant smuggling vessel intends to disembark its passengers in the territory of the intercepting State.<sup>49</sup> But how would the coastal State *know* whether the migrant smuggling vessel intended to disembark

41 Migrant Smuggling Protocol (no 18), articles 7, 9(3).

42 UNCLOS, articles 2 and 3.

43 UNCLOS, article 33(1)(b); V. Lowe, ‘The Development of the Concept of the Contiguous Zone’, 52 *BYIL* 1981, p. 159–169; M. Shaw, *International Law* (7th ed., Cambridge, Cambridge University Press, 2014), p. 556; H. Ringbom, *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden: Brill Nijhoff, 2015), p. 284.

44 Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29.6.2013 (Dublin Regulation) based on TFEU, article 78(2)(e), article 7.

45 Refugee Convention, article 33.

46 UNCLOS, article 33.

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

48 Gallagher 2010 (n 30), p. 417; see *M/V Saiga* (No 2) (*St Vincent and the Grenadines v Guinea*) International Tribunal for the Law of the Sea Case No 2, [1999] ITLOS Rep 10, paragraph 15.

49 Shearer 1986 (n 46), P. 330.

its passengers in its territory? To confirm its suspicions, the coastal State may send a small boat alongside the vessel so that its officers can board the latter and inspect its documents, thus exercising control short of arrest.<sup>50</sup> However, once the vessel's documents are inspected and if unauthorised entry into the territorial sea is confirmed, the coastal State is permitted to punish in the contiguous zone infringement of its laws and regulations committed within its territorial sea.<sup>51</sup> This course of action would require that upon inspection the coastal State arrests the vessel and assumes responsibility under domestic and international law.

With regard to the two States that form the focus of this analysis, it should be noted that in accordance with UNCLOS, Italy has made the following maritime claims: their territorial waters extend to 12 nautical miles<sup>52</sup> and have declared a contiguous zone of 24 nautical miles.<sup>53</sup> Due to its geographical location,<sup>54</sup> Greece has encountered obstacles in claiming the maximum territorial sea breadth of 12 nautical miles in accordance with UNCLOS. This situation has led to a breakdown of relations between Greece and Turkey since the 1970s, extending beyond maritime zone issues to airspace, over-flight and the militarisation of islands in the Aegean Sea.<sup>55</sup> Following negotiations, however, Greece and Turkey have agreed to have a territorial sea of 6 nautical miles<sup>56</sup> and to refrain from unilaterally claiming an extension of this limit.<sup>57</sup> This ar-

50 UNCLOS article 33(1)(b): arrest would not be permitted unless the vessel had actually infringed the relevant laws or regulations of the coastal State in the latter's territorial sea; Shearer (n 49) 330; D. Guilfoyle, 'Maritime Interdiction of Weapons of Mass Destruction', 12 *JCSL* 2007, p. 1, 7.

51 Guilfoyle 2007 (n 49), p. 7.

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

53 *Ibid.*

54 Republic of Turkey, Ministry of Foreign Affairs, <http://www.mfa.gov.tr/the-breadth-of-territorial-waters.en.mfa>, accessed 28 April 2018; The Greek island specialist, <http://www.greeka.com/greece-geography/>, accessed 28 April 2018.

55 D. Bölükbaşı, *Turkey and Greece, the Aegean Disputes, A Unique Case in International Law* (London: Cavendish Publishing, 2004), p. 66; *Aegean Sea Continental Shelf (Greece v Turkey)* 1CJ Judgment of 19 December 1978.

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

57 In accordance with the Madrid Declaration of 8 July 1997 on Euro-Atlantic Security and Cooperation, M-1(97)81, <http://www.nato.int/docu/pr/1997/p97-081e.htm>, accessed

rangement allows the rest of the Aegean to be used by Turkey, Greece or any third country as high seas. Even under these circumstances, there is already geographical overlap to some extent.<sup>58</sup>

### 2.1.2 Extraterritorial Jurisdiction

Human smugglers instruct irregular migrants to use unmanned rubber Zodiac boats, to avoid detection upon leaving the Libyan or Turkish coasts, and upon reaching the territorial sea of the EU Member State to request assistance in the form of a distress call.<sup>59</sup> In response, coastal States use extraterritorial measures in the form of interception beyond the territorial sea with the aim of returning the migrants' boats to the country of departure. This article argues that although this practice is beneficial to Member States in preventing high numbers of irregular migrant flows to their territories, it might result in the violation of their international obligations.

To try and legitimise such a practice, EU Member States regard acts on vessels and on the high seas as not constituting an exercise of jurisdiction by them.<sup>60</sup> However, the International Court of Justice (ICJ),<sup>61</sup> the ECtHR<sup>62</sup> and supervisory bodies have indicated that such an interpretation is wrong; holding acts done on them can be within a State's jurisdiction as a result of the principle of exclusive flag State jurisdiction over vessels on the high seas. At first, the concept of jurisdiction in human rights treaties was interpreted similarly to the concept under customary international law, being primarily territorial.<sup>63</sup> However, due to a series of human rights violations taking place

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28 April 2018; Turkish Ministry of Foreign Affairs, 'Agreement Reached by Turkey and Greece Regarding the Confidence-building Measures in the Aegean June 5 1998', [http://www.mfa.gov.tr/agreement-reached-by-turkey-and-greece-regarding-the-confidence-building-measures-in-the-aegean\\_br\\_june-5\\_-1998.en.mfa](http://www.mfa.gov.tr/agreement-reached-by-turkey-and-greece-regarding-the-confidence-building-measures-in-the-aegean_br_june-5_-1998.en.mfa), accessed 28 April 2018; Turkish Ministry of Foreign Affairs, 'The Breadth of Territorial Waters', <http://www.mfa.gov.tr/the-breadth-of-territorial-waters.en.mfa>, accessed 28 April 2018.

58 Bölükbaşı 2004 (n 54), p. 422.

59 Reitano & Tinti 2015 (n35), p. 12.

60 *Medvedyev and Others v France*, Application no 3394/03, ECHR 2010, paragraphs 49–50; Kumin 2014 (n 2), p. 49.

61 *Wall* (n 41), paragraph 109.

62 *Drozd and Janousek v France and Spain*, Application no 12747/87, Series A no 240, paragraph 91; *Cyprus v Turkey*, Application no 25781/94, ECHR 2001-IV; *Medvedyev* (n 59), paragraph 67.

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

outside a State's territory,<sup>64</sup> it was considered unconscionable to allow a State to perpetrate human rights violations on another State's territory, which would be condemned if perpetrated within its own territory.<sup>65</sup> Thus, international courts have recognised that the exercise of jurisdiction beyond State territory can take place in exceptional circumstances with special justification.<sup>66</sup>

An authoritative interpretation of the scope of extraterritorial jurisdiction over ships beyond the 12-mile limit was established in the recent case of *Hirsi*.<sup>67</sup> On 6 May 2009, around two hundred individuals departing from Libya were intercepted by Italian Coastguards on the high seas within the Maltese Search and Rescue Region. Upon interception, Italian coastguards transferred these individuals into the Italian warship and took them back to Tripoli without examining the passengers' individual circumstances or informing them of the place of disembarkation. The ECtHR accepted that 'ships of the Italian armed forces' composed of Italian military personnel fell under Italian jurisdiction for the purposes of the Convention, even though the acts were performed on the high seas.<sup>68</sup> Applying the principle of exclusive flag State jurisdiction, the applicants were under the 'exclusive *de jure* and *de facto* control of the Italian authorities' during the period 'between boarding the ships and being handed over to the Libyan authorities'.<sup>69</sup> With this ruling, the Court challenged the traditional stance that jurisdiction is mainly territorial.<sup>70</sup>

The Italian government had argued that the Italian vessels were on a rescue mission rather than an interception operation at the time, hence the Law of the Sea on search and rescue prevailed.<sup>71</sup> The ECtHR rejected that argument, holding that Convention rights are not diminished on the ground that multiple international law regimes apply to a given situation.<sup>72</sup> In relation to the 'juris-

64 *Al-Skeini and Others v the United Kingdom*, Application no 55721/07 (7 July 2011), paragraph 150; *Drozd* (n 61), paragraph 91; *Wall* (n 41) paragraph 109.

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

66 *Bankovic* (n 39), paragraphs 59–61; *Wall* (n 39), paragraph 109; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011), p. 7–9.

67 See *Hirsi* (n 9).

68 *Hirsi* (n 9), paragraph 81.

69 *Hirsi* (n 9), paragraphs 77, 81.

70 M. Giuffré, 'Watered-down Rights on the High Seas: *Hirsi Jamaa and Others v Italy* (2012)', 61 *International & Comparative Law Quarterly* 2012, p. 728.

71 *Hirsi* (n 9), paragraphs 79–80.

72 *Hirsi* (n 9), paragraphs 79–80.

diction' issue, the Court concluded that it did not matter why the migrants were on board the Italian vessels. What mattered was whether they were under the 'control' of the Italian authorities.<sup>73</sup> However, no guidance was given as to the intensity of control required to engage jurisdiction. It is also not clear whether a State vessel's failure to come to the rescue of a ship in distress would engage that State's jurisdiction under the Convention and so provide the basis for a possible violation of the European Convention of Human Rights (ECHR).

In relation to migration at sea, *Hirsi* confirmed that irregular entry did not preclude asylum seekers from the application of the *non-refoulement* principle at the frontier as guaranteed by the 1951 Refugee Convention<sup>74</sup> and re-iterated by the UNHCR Executive Committee.<sup>75</sup> *Hirsi* implied a positive obligation on the intervening State *not to return* the vessel to its country of origin or to *re-direct* it to an unsafe third country without first assessing the individual circumstances of the people on board.<sup>76</sup> It held that a State's obligation under Article 3 ECHR is not exempted if the applicants do not ask for asylum.<sup>77</sup> Rather, whether or not a request for asylum is made, there is a positive duty to analyse how the authorities of the receiving State are fulfilling their international obligations in relation to the protection of refugees.<sup>78</sup> The effect of the *Hirsi* case was to avoid binding the *non-refoulement* principle to the traditional concept of territory, avoiding duplicity of regimes. If the Court had decided the case differently, it would have made international protection conditional upon an individual's capacity to subvert border control migration policies by crossing borders undetected.<sup>79</sup>

Thus, intercepting States cannot be insulated from accountability only because they exercise extraterritorial border control measures. On the contrary, de-territorialisation comes with the guarantee of the *non-refoulement* principle. In effect, the *Hirsi* judgment established a beacon for migrants' rights at

73 *Hirsi* (n 9), paragraphs 79–81.

74 Article 31(1).

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

76 S. Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, 12 *Max Planck Yearbook of United Nations Law* 2008, p. 205–246. Available at SSRN: <https://ssrn.com/abstract=1798756>; emphasis added.

77 ECHR, article 3 prohibits torture and inhuman or degrading treatment or punishment.

78 *Hirsi* (n 9), paragraph 157; Giuffré 2012 (n 69), p. 747.

79 Giuffré 2012 (n 69), p. 749.

sea when confronted with State interception measures.<sup>80</sup> On the other hand, by focusing its reasoning in applying Article 3 ECHR mainly on asylum seekers and refugees, the Court avoided making a general statement that the *non-refoulement* principle applies to all intercepted migrants, thus undermining the 'absolute character of the rights secured by Article 3'.<sup>81</sup>

### 3 The International Legal Framework on Search and Rescue

The smugglers' innovative strategy in response to the ECtHR's extraterritorial application of human rights and the Italian and Frontex interception operations at sea is to first cross the territorial sea of Libya and then leave irregular migrants' boats stranded at sea waiting to be rescued by EU Member States patrol boats.<sup>82</sup> Upon crossing over onto the high seas, irregular migrants are instructed to sabotage their own vessels (self-induced distress) to oblige State authorities to rescue them.<sup>83</sup> This brings a very high risk of death through starvation, dehydration, suffocation and violence from human smugglers.<sup>84</sup> This strategy has resulted in overburdening the search and rescue services of coastal States, making them ineffective to save lives. Situations of distress at sea often resulting in fatalities have become a regular feature of the Mediterranean Sea. Human rights challenges are raised in the context of search and rescue, disembarkation, and post-disembarkation processing for States, the shipping industry and international organisations.<sup>85</sup> The main challenges include the safety of lives at sea, the identification of a safe place of disembarkation in a timely manner and access to asylum procedures. In identifying solutions to these challenges, States shall consider the different regimes of the Law of the Sea, international refugee law, international human rights law, international humanitarian law and criminal law.

80 K. Wouters & M. den Heijer, 'The Marine I case: a comment', 22.1 *International Journal of Refugee Law* 2009, p. 1–19.

81 *Hirsi* (n 9) paragraph 122; Trevisanut 2008 (n 75).

82 Reitano & Tinti 2015 (n 35), p. 12.

83 P. Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Leiden: Martinus Nijhoff Publishers, 2009), p. 98.

84 Amnesty International, 'Libya is Full of Cruelty, Stories of Abduction, Sexual Violence and Abuse From Migrants and Refugees', 10 May 2015, 6, 11, <https://www.amnesty.org/en/documents/mde19/1578/2015/en/>, accessed 28 April 2018.

85 UNHCR, *Rescue at Sea, Stowaways and Maritime Interception* (2nd edition, Geneva: UNHCR, 2011), p. 4.



The duty to assist persons in distress at sea, part of the *jus gentium*,<sup>86</sup> has its origins in customary international law.<sup>87</sup> This duty has been codified in various international conventions, namely: the International Convention for the Safety of Life at Sea 1974 (SOLAS Convention),<sup>88</sup> the International Convention on Maritime Search and Rescue 1979 (SAR Convention);<sup>89</sup> the United Nations Convention on the Law of the Sea 1982 (UNCLOS),<sup>90</sup> and the International Convention on Salvage 1989.<sup>91</sup> This duty applies to any master of a navigating vessel, be it a governmental or private fishing vessel.<sup>92</sup> States are responsible for establishing consecutive search and rescue zones without any overlap in the Mediterranean Sea,<sup>93</sup> through the conclusion of SAR agreements with neighbouring States.<sup>94</sup>

The SAR Convention 1979 provides for the adoption of a 'coordination system of search and rescue operations'<sup>95</sup> at the international level.<sup>96</sup> Italy, Malta

86 G. Gilmore & C. Black, *Salvage, The Law of Admiralty* (8-1 law of nations) (Brooklyn: Foundation Press, 1957).

87 Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea (212 CTS 187) 23 September 1910, article 11; Geneva Convention on the High Seas 1958, article 12, also note that the preamble regarded the Convention as 'generally declaratory of established principles of international law'; UN General Assembly, *Convention on the Law of the Sea* (UNCLOS) UNTS 31363 (adopted 10 December 1982, entered into force in 2004) article 98; ILC, *Commentary on draft article 12 of the United Nations Convention on the High Seas* (1956) UN Doc. A/3179; D.J. Attard, M. Fitzmaurice, N. Martinez Gutierrez (eds), *The IMLI Manual on International Maritime Law: Volume I: the Law of the Sea* (Oxford: Oxford University Press, 2014), p. 43.

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

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

90 UNCLOS article 98; 168 contracting parties as of 30.06.2016.

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

92 UNCLOS, article 98(1); SOLAS Chapter V, Regulation 33(1); SAR Convention, Chapter 1.3.2.

93 SAR Convention, Annex, Chapter 2, paragraphs 2.1.3–2.1.5.

94 SAR Convention, Annex, Chapter 2.1.4.

95 Responsible SAR authorities: Italy (Ministry of Transport (Ministero dei Trasporti) and the Coastal Guard (Guardia Costiera), see SAR.8/Circ.1/Corr.6, Annex 2, 9; Malta (Armed Forces of Malta (AFM), Greece (JRCC Piraeas), see [sarcontacts.info/contacts/jrcc-piraeas-cospas-sarsat-spoc-5837/](http://sarcontacts.info/contacts/jrcc-piraeas-cospas-sarsat-spoc-5837/), 28 April 2018; IMO, *Global SAR Plan Containing Information on The Current Availability of SAR Services on Turkey* (Turkish Coast Guard Command) SAR.8/Circ.1/Corr.4, Annex 2, 65.

96 UNCLOS, article 98(2); SOLAS, Chapter 5, Regulation 7; SAR Convention, Chapter 3.

and Libya have unilaterally declared<sup>97</sup> their SAR regions which partially overlap, creating problems of coordination in SAR operations. Malta's SAR region covers an area of 250,000 km<sup>2</sup>, 750 times bigger than Malta itself.<sup>98</sup> It extends to Tunisian territorial waters, the Greek island of Crete and the territorial waters of Lampedusa, Lampione and Linosa.<sup>99</sup> Since the 1970s, Greece and Turkey have been in conflict over their sovereign rights in the Aegean Sea.<sup>100</sup> In the 1950s, Greece unilaterally designated its maritime search and rescue area,<sup>101</sup> followed by a unilateral declaration by Turkey in 1988, overlapping with the Greek region.<sup>102</sup> These unilateral demarcations are in contravention of the Hamburg Convention, which requires the demarcation of SAR areas to be based on bilateral agreements.<sup>103</sup> Although the granting of administrative discretion for States to designate their maritime search and rescue area is at times welcomed, its effects are most certainly undesirable.

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

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

98 Malta Search and Rescue Training Centre, [www.sarmalta.gov.mt/sar\\_in\\_Malta.htm](http://www.sarmalta.gov.mt/sar_in_Malta.htm), 28 April 2018.

99 IMO Circular SAR.8/Circ.1/Corr.3, Annex 2; also see Amnesty International, 'Lives Adrift Refugees and Migrants in Peril in the Central Mediterranean', 30 September 2014, 32.

100 *Aegean Sea Continental Shelf (Greece v Turkey)*, ICJ Judgment of 19 December 1978, 3; P. Siousiouras & G. Chrysochou, 'The Aegean Dispute in the Context of Contemporary Judicial Decisions on Maritime Delimitation', 3 *Laws* 2014, p. 12–49, at p. 13; T. Korontzis, 'Search and Rescue in the Aegean Sea', 2(1) *AJHSS* 2014, p. 13.

101 In accordance with the International Civil Aviation Organization, *Convention on Civil Aviation ("Chicago Convention")*, 7 December 1944, (1994) 15 U.N.T.S. 295, 'Athens FIR was delimited within the framework of the European Regional Aviation Conferences in 2050, 1952 and 1958', see Hellenic Republic, Ministry of Foreign Affairs, <http://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/athens-fir.html>, accessed 24 April 2018; see Greek Law 1844/1989, on *Ratification of the Convention on Maritime Search and Rescue*, Government Gazette 100/A/25-4-1989, article 2, <https://www.e-nomothesia.gr/diethneis-sunthekes/nomos-18441989-fek-100a-25-4-1989.html>, accessed 24 April 2018; Greece delimited its responsibility for airspace control (Athens FIR)—the sea boundaries are designated in accordance with the Athens FIR, see [http://www.greekembassy.hu/english/thematiki\\_enotita\\_1/FIR.htm](http://www.greekembassy.hu/english/thematiki_enotita_1/FIR.htm), accessed 24 April 2018; Turkey does not accept this designation and objects to any delimitation absent of a bilateral agreement.

102 Turkish *Search and Rescue* Regulation 2088/13559, amended by Regulation 2001/3275, Official Gazette 24611, 12 December 2001.

103 SAR Convention, Annex 2.1.5.

lives. On 11 October 2013, a boat carrying over 400 people sank 111 km from Lampedusa and 218 km from Malta, within Malta's SAR zone.<sup>104</sup> The island of Lampedusa forms part of Maltese and Italian SRR. More than 200 people died as a consequence of the Maltese and Italian Regional Coordination Centre (RCC) passing rescue calls to one another in an attempt to evade responsibility for disembarking rescued persons in their territories.<sup>105</sup> Italy and Malta were guilty of similar failures in 2011, when 63 migrants died as a result of distress calls being ignored by the Italian and Maltese RCC.<sup>106</sup> These incidents are not a result of a lack of capacity, but of fear from consequences of rescue. Coastal States fear the heavy burden upon their immigration and security systems and private vessels fear investigation and possible detention.<sup>107</sup>

#### 4 Regulating Interception and Search and Rescue at EU Level

Equally, the EU failed to adopt a uniform interpretation on principles such as rescue, disembarkation and distress. In 2014, to avoid EU Member States divergent practices for sea operations, the Commission proposed the adoption of a 'Sea Borders Regulation',<sup>108</sup> combining border control and search and rescue within one Regulation, operational under Frontex<sup>109</sup> coordination. The Sea Borders Regulation promotes the protection of fundamental rights and the principle of *non-refoulement*,<sup>110</sup> prohibiting the disembarkation of intercepted or rescued persons to a third country by participating EU Member States if they are aware or ought to be aware that the third country is engaged in human rights violations.<sup>111</sup>

104 Amnesty International, 'Lives Adrift Refugees' (n 98), p. 12.

105 T. Basaran, 'Saving Lives at Sea: Security, Law and Adverse Effects', 16(3) *EJML* 2014, p. 365–387, at p. 366.

106 Amnesty International, 'Lives Adrift Refugees' (n 98), p. 1.

107 Basaran 2014 (n 104), p. 367.

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

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

110 UN General Assembly, *Convention Relating to the Status of Refugees* (Refugee Convention) 28 July 1951, United Nations, Treaty Series, Volume 189, 137 (adopted 28 July 1951, entered into force 22 April 1954) article 33(1).

111 Sea Borders Regulation (no 19) article 4 (1) and (2); The words 'forced to enter' and 'conducted to' were included by the EP in order to cover situations of push-backs.

Despite human rights safeguards expressly set out within the Sea Borders Regulation, in this article it is argued however that in practice the rules do not effectively assist in a uniform interpretation. Unfortunately, disembarkation continues to depend largely on where the ship was intercepted and/or rescued. If the interception occurred within the territorial sea or the contiguous zone of a host or participating EU Member State, the disembarkation must be conducted within that coastal EU Member State.<sup>112</sup> If the interception takes place on the high seas, the persons on the ship must be disembarked at the third country of the ship's departure in accordance with the principle of *non-refoulement* and respect for fundamental rights; and if this is not possible, the disembarkation must take place in the host EU Member State.<sup>113</sup> There is no geographic restriction on the 'place of safety' for disembarkation. This allows irregular migrants to be disembarked in non-EU countries. Furthermore, the Sea Borders Regulation permits an intercepted ship to alter its course, meaning a possible diversion to international waters or a third country of origin, a possible risk of *refoulement*.<sup>114</sup> This practice could constitute a form of push-back which is prohibited.<sup>115</sup>

Such an outcome was a result of contestation on Article 9 on 'Search and Rescue' and Article 10 on 'disembarkation' of the 2013 draft Regulation by the six EU Member States (Italy, Malta, Greece, Cyprus, Spain and France)<sup>116</sup> bordering the Mediterranean Sea. They were of the opinion that there is no need to over-regulate the area of 'search and rescue and disembarkation' as it is already regulated by international law through UNCLOS, SAR, the SOLAS Convention, and the IMO guidelines in the IAMSAR Manual as they were in complete agreement as to their requirements. However, in August 2013, only a few months before their contestation, Italy and Malta were in complete disagreement as to the place of disembarkation for the 102 migrants rescued by the oil tanker 'MV Salamis' in Syracuse, Italy.<sup>117</sup> The irregular migrants were saved 45 nautical miles from the Libyan port. On behalf of the Libyan authorities, the Rome RCC<sup>118</sup>

<sup>112</sup> Sea Borders Regulation (no 19) article 10(1)(a).

<sup>113</sup> Sea Borders Regulation (no 19) article 10(1)(b).

<sup>114</sup> K. Franko Aas & H. Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life', 55(1) *BJC* 2015, p. 1–18, at p. 14.

<sup>115</sup> *Hirsi* (n 9), paragraphs 134, 138.

<sup>116</sup> Greek, Spanish, French, Italian, Cyprus and Maltese delegations, Inter-institutional file: 2013/ 0103(COD) Council Doc. 14612/13 (Brussels 10 October 2013).

<sup>117</sup> N. Frenzen, 'Details (and Document) Regarding EU Mediterranean States Opposition to Proposed Frontex Sea Borders Regulation', *Migrants At Sea*, 16 October 2013, migrant-satsea.wordpress.com/2013/10/16/details-and-document-regarding-eu-mediterranean-states-opposition-to-proposed-frontex-sea-borders-regulation/, accessed 27 April 2018.

<sup>118</sup> Rescue Coordination Centre.

ordered the oil tanker, flying the flag of Libya, to disembark the migrants at the nearest port in Libya, Khoms which MV Salamis refused.<sup>119</sup> Malta then refused the tanker permission to enter its territorial waters with the belief that disembarkation takes place in safest port, ie Lampedusa despite Malta's SAR responsibility. After being stranded at sea for two days, the Italian government agreed that the irregular migrants could be disembarked in Italy.<sup>120</sup>

Equally, the current Sea Borders Regulation failed to address a specific definition on distress. The 2013 draft Regulation specified that participating units were to take into account the following elements when assessing whether a ship was in distress: '(a) the existence of a request for assistance; (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination; (c) the number of passengers in relation to the type and condition of the ship; (d) the availability of necessary supplies such as fuel, water, food to reach a shore; (e) the presence of qualified crew and command of the ship; (f) the availability and capability of safety, navigation and communication equipment; (g) the presence of passengers in urgent need of medical assistance; (h) the presence of deceased passengers; (i) the presence of pregnant women or children; (j) the weather and sea conditions, including weather and marine forecasts'.<sup>121</sup> As irregular migrants travel in overcrowded and unseaworthy ships, intercepting EU Member States would end up rescuing a ship full of refugees fulfilling points (a–j).

For this reason, the six Mediterranean States amended the 2013 draft regulation from a duty to classifying the above factors as 'shall be considered to be in a situation of distress'<sup>122</sup> to an obligation to transmit relevant information and observations to the responsible RCC to consider whether the vessel is in a 'phase of uncertainty, alert or distress'.<sup>123</sup> This amendment took away EU Member State obligation of an immediate action to render assistance or launch an operation. It has also stripped the Regulation of its aim, that of saving lives at sea and avoiding inconsistent interpretations by EU Member States. It also creates a dangerous environment whereby it is left to the discretion of

119 CoE Parliamentary Assembly, *The 'Left-to-die boat': Actions and Reactions*, Report Committee on Migration, Refugees and Displaced Persons (Doc. 13532, 9 June 2014), Rapporteur: Ms Tineke Strik (Strasbourg: Council of Europe, 2014), p. 11.

120 BBC News Europe, 'Tanker Migrants Rejected by Malta Arrive in Italy' (7 August 2013), <http://www.bbc.com/news/world-europe-23599696>, accessed 27 April 2018.

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

122 *Ibid.*, articles 9(5) and 9(6).

123 Sea Borders Regulation (no 19) article 9(2)(a) and (f).

government vessels to transmit 'relevant' information. The actual problem in the Mediterranean has arisen because of EU Member State understanding of the word 'relevant' in the context of border control undermining the concepts of international regime on search and rescue and human rights. As a result, a dangerous discretion is afforded to search and rescue units in determining a distress situation on a case by case basis having regard to the above list of factors. Furthermore, this Regulation does not address cases where a situation of 'uncertainty' eventually becomes a situation of 'distress'. There is a blurred line between these situations which leaves irregular migrants vulnerable to the perils of the sea and the discretion of State authorities judging a particular situation, especially in light of border control objectives. Similarly, it does not address the issue of post-disembarkation capacities and efficiency of asylum and immigration system of receiving coastal State.

The disembarkation dilemma continues even nowadays. On 26th June 2018, a search and rescue ship belonging to a German NGO 'Lifeline' was stranded in the Mediterranean for five days after rescuing 233 irregular migrants in international waters.<sup>124</sup> The search and rescue ship 'Lifeline' was prevented from disembarking in Lampedusa (Italy) or Malta even though repeated calls were made to the Italian Ministry of Interior that immediate disembarkation was needed for humanitarian reasons. After the situation was severely deteriorated within the ship, the governments of Italy, Malta, France and Portugal decided for the ship to disembark to Malta and in the spirit of European solidarity they would take in 'tens' of migrants.<sup>125</sup> It was only a few months ago, on June 10, 2018 that Italy and Malta had yet another dispute on where to disembark the 629 people rescued in Libyan territorial waters, close to the area of Tunis and Lampedusa.<sup>126</sup> Italy insisted that Malta accepts disembarkation despite the fact that the operation was conducted by the Rome RCC. Unfortunately, what these inconsistent practices have shown is that despite clear guidelines provided by the Search and Rescue Convention, disembarkation complications are not a result of lack of regulations or guidelines, but highly dependent on the will of politicians.

<sup>124</sup> L. Borghese, S. Vandoorne & J. Vonberg, 'Migrant Rescue Ship Lifeline to Dock in Malta After Being Stranded for Five Days in the Mediterranean' (CNN, 26 June 2018), <https://edition.cnn.com/2018/06/26/europe/migrant-ships-maersk-lifeline-intl/index.html>, accessed 6 July 2018.

<sup>125</sup> *Ibid.*

<sup>126</sup> Independent, *Italy Wants 629 Migrants Rescued near Libya to disembark in Malta, Says its Own Ports 'Closed'*, <http://www.independent.com.mt/articles/2018-06-10/local-news/Italy-wants-629-migrants-rescued-near-Libya-to-disembark-in-Malta-says-its-own-ports-closed-6736191445>, accessed 6 July 2018.



## 5 Conditions of Distress

The rescue of irregular migrant boats in distress has given rise to various legal issues with serious consequences. 'Distress' means a 'situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.<sup>127</sup> Rescue interventions are duty based, not conditional on the nationality of the vessel in distress or of the individuals found on board.<sup>128</sup> It is for the State, the master of the ship or the commander of an aircraft to assess a specific case as a distress situation and whether it requires assistance. It does not matter whether the persons in need of assistance are irregular migrants, as long as they are found to be in distress.<sup>129</sup> To avoid a situation of post rescue decision for disembarkation purposes States cannot agree on how the SAR Convention's definition of distress should be interpreted and applied. For some States, the vessel must be on the point of sinking, while for others it is sufficient for the vessel to be unseaworthy.<sup>130</sup>

More worrying is the EU Member States' reluctance to initiate rescue operations. Malta for example knowing that irregular migrants wish to be rescued by Italian armed forces, will initiate a rescue operation if the boat is in distress, i.e. is sinking and in imminent danger of loss of lives.<sup>131</sup> If the boat people actively resist rescue attempts, the interception is not considered to fall under the SAR legal regime.<sup>132</sup> However, this interpretation is contrary to the SAR Convention's definition of 'distress phase' as: 'a situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance'.<sup>133</sup> The Convention places an obligation on the shipmaster responding to a distress call to decide whether the vessel needs immediate assistance. Coastal States cannot know that a

<sup>127</sup> SAR Convention, Annex 3, Chapter 1, 1.3.13.

<sup>128</sup> M. Di Fillippo, *Irregular Migration and Safeguard of Life at Sea in International Law of the Sea: Current Trends and Controversial Issues* (Pisa: Del Vecchio, 2014), p. 12–13.

<sup>129</sup> SAR Convention, Chapter 2.1.10.

<sup>130</sup> V. Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', 23(2) *IJRL* 2011, p. 174–220, 195, <https://academic-oup-com.chain.kent.ac.uk/ijrl/article-lookup/doi/10.1093/ijrl/eer005>, accessed 24 April 2018; R. Barnes, 'Refugee law at sea', 53 *ICLQ* 2004, p. 58–59; M. Pugh, 'Drowning, not waving: boat people and humanitarianism at sea', 17 *JRS* 2004, p. 58–59.

<sup>131</sup> S. Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea', 0(0) *IJRL* 2011, p. 16; Tondini 2012 (n 32), p. 62.

<sup>132</sup> Klepp 2011(n 130), p. 15.

<sup>133</sup> SAR Convention, Annex, Chapter 1, 1.11.



vessel is in distress if they do not receive a distress call from the vessel itself. However, once the distress call is received, the coastal State cannot ignore it or refuse to provide assistance if the individuals on board prefer to be rescued by an Italian vessel instead of by a Maltese or Greek vessel. The SAR Convention does not offer a solution to failed rescue scenarios by inactive SAR states. It is argued that the created legal vacuum requires specific provisions to address a failure to act scenario by reluctant SAR States and possible penalization measures for those who fail to exercise their responsibility to act.

It is argued that the confusion of responsibility in overlapping SAR zones or non-responsibility for a SAR zone does not relieve another State from responsibility under the SAR Convention if it is the recipient of a distress call. Trevisanut argues that an 'exclusive long distance *de facto* control' nexus exists between the State and those individuals in distress at the moment that a distress call is made, creating 'a relationship' sufficient to make the ECHR applicable.<sup>134</sup> A *de facto* control nexus exists when distress calls are made from the high seas, deriving from the argument that people in distress place their lives in the hands of the State receiving the call.<sup>135</sup> This control becomes *de jure* at the moment that the distress call comes from within the SAR zone, the State in question having the additional obligation to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service ...'<sup>136</sup> It is argued that the coastal State does not have an obligation merely to perform the SAR service, but to provide with 'due diligence' a certain level of service when assuming responsibility for its SAR zone.<sup>137</sup> Thus, coastal States have a positive obligation to take preventative measures to counter immediate risks to persons in distress under their responsibility. With any rescue intervention, the decision as to the vessel's seaworthiness rests with an individual shipmaster.<sup>138</sup> It is the duty of every coastguard's captain to rescue these persons in distress, not to be the cause of their drowning.<sup>139</sup> If the wrong

134 S. Trevisanut, 'Is There a Right to be Rescued at Sea? A Constructive View', 1 *QIL* 2014, <http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-constructive-view/>, accessed 23 April 2018.

135 *Ibid.*

136 UNCLOS, article 98(2).

137 A. Moen, 'For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention', 24 *OYB* 2010, p. 377–410, at p. 386, 389: 'Article 98(2) represents the imposition of a positive duty, with no clear understanding of its minimum threshold or its outer limit, and no clear indication of the relationship that gives rise to such an obligation. (...) Search and rescue under Article 98(2) then cannot be the mere promotion of a service, but the promotion of a certain level of service.'

138 Basaran 2015 (n 17), p. 210.

139 *Ibid.*

decision is made and people drown as a result, the above inconsistency would not exonerate the shipmaster from liability.

These failed rescued practices and the EU Member States' reluctance to initiate rescue operations also question the legal safeguards afforded by international human rights frameworks on the 'right to life' and 'duty to rescue'. It is universally accepted that 'no one shall be arbitrarily deprived of his life'.<sup>140</sup> The 'right to life' is codified in maritime law through the duty to render assistance to persons in distress at sea and through the search and rescue obligations.<sup>141</sup> Article 2 ECHR ranks the 'right to life' as the most fundamental<sup>142</sup> right within the ECHR and the Convention expressly provides that no derogation from it is permitted.<sup>143</sup> Any deprivation of life has to be justified. Furthermore, the ECtHR and the Human Rights Committee have emphasised the positive obligation of States to take measures<sup>144</sup> within their 'legal and administrative framework'<sup>145</sup> to ensure that the lives of those persons within their jurisdiction<sup>146</sup> are not lost. States also have a positive obligation under the Palermo Protocols to take 'all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of smuggling as accorded under applicable international law, in particular the "right to life"'.<sup>147</sup>

Irregular migrants are arriving on Italian and Greek shores in overcrowded, unseaworthy vessels controlled by unprofessional seamen. The deaths in the Mediterranean Sea and the arrivals on Italian and Greek shores in overcrowded, unseaworthy wooden boats have evidenced 'a real and immediate risk to the life of an individual'.<sup>148</sup> For these reasons, upon interception, Italian and Greek authorities must consider the irregular migrants' boats to be in a 'distress

140 UDHR, article 3, ICCPR, article 6; ECHR, article 2; EU Charter, article 2.

141 International Convention on Salvage 1989, article 10; UNCLOS, article 98(1); SOLAS, Chapter V, Regulation 33.1; SAR Convention, Chapter 2.1.10.

142 *Nachova and Others v Bulgaria* Application nos 43577/98 and 43579/98 [2004] ECHR 89, paragraph 93; also see Explanatory report to Protocol No 13 to the ECHR 'concerning the abolition of the death penalty in all circumstances' ETS No 187, point 1 <http://conventions.coe.int/Treaty/EN/reports/html/187.htm>, accessed 27 April 2018.

143 ECHR, article 15; except for 'deaths resulting from lawful acts of war'.

144 UN Human Rights Committee, *General Comment No 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 26 May 2004, CCPR/C/21/Rev.1/Add.13, paragraph 6, <http://www.refworld.org/docid/478b26ae2.html>, accessed 10 October 2017; *L.C.B. v the United Kingdom* Application no 23413/94 [1998] ECHR 108, paragraph 36.

145 Human Rights Committee, *General Comment No 31* (n 84) paragraph 7; *Kılıç v Turkey*, Application no 22492/93 [2000] ECHR 127, paragraph 62; *Andréou v Turkey* Application no 45653/99 [2009] ECHR 1663, paragraph 49.

146 ECHR, article 1; *Soering v UK* Application no 14038/88 Series A no 161, paragraph 86.

147 Migrant Smuggling Protocol (n 18) article 16(1); emphasis added.

148 SAR Convention, Annex, Chapter 1, point 11.

phase'.<sup>149</sup> Based on its positive obligations under the Sea Borders Regulation and the ECHR, Italy and Greece are obliged to take preventative measures to assist these boats and avoid any illicit practices leading to failed rescue practices of boats resulting in deaths.<sup>150</sup>

In addition, Italy and Greece have a positive obligation to safeguard the lives of individuals within its jurisdiction<sup>151</sup> and prevent loss of life.<sup>152</sup> A 'causal relationship' is established at the moment Italian and Greek authorities take persons on board and/or tow the boat to a particular destination. It is precisely at this moment that they exercise direct control over the boat, thus placing the passengers under their jurisdiction.<sup>153</sup> As long as border guards exercise their control during interception there is no need to prove 'effective control over its geographical surroundings'.<sup>154</sup>

In the Mediterranean and Aegean seas, the risk of death has materialised but no action has been taken by Italian and Greek authorities to adequately respond to such risk in accordance with their obligations under Article 2 ECHR.<sup>155</sup>

149 SAR Convention, Annex, Chapter 1, point 11: 'Distress phase: A situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance'; also see the Sea Borders Regulation, article 9(2)(f) Participating units must take into account the following information when considering whether a vessel is in 'a phase of uncertainty, alert, or distress': '(i) the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation; (ii) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination; (iii) the number of persons on board in relation to the type and condition of the vessel; (iv) the availability of necessary supplies such as fuel, water and food to reach a shore; (v) the presence of qualified crew and command of the vessel; (vi) the availability and capability of safety, navigation and communication equipment; (vii) the presence of persons on board in urgent need of medical assistance; (viii) the presence of deceased persons on board; (ix) the presence of pregnant women or of children on board; (x) the weather and sea conditions, including weather and marine forecasts'.

150 Sea Borders Regulation (no 19) article 10; *Öneryildiz v Turkey*, Application no 48939/99 [2004] ECHR 657, paragraphs 62–65; *Osman v United Kingdom*, Application no 23452/94 (1998) ECHR 101, paragraph 93.

151 *Osman* (n 91), paragraph 115; P. van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (4th ed., Antwerp: Intersentia, 2006), p. 355.

152 UNCLOS, article 98; Convention on the High Seas, article 12; International Convention on Salvage 1989, article 7; SOLAS, article 33.

153 ECHR, article 1; EU Charter, article 1; ICCPR, article 2; Committee against Torture, *Conclusions and Recommendations Concerning the Second Report of the United States of America*, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006, paragraph 15.

154 *Jaloud v the Netherlands*, Application no 47708/08 (20 November 2014), paragraphs 149–150; A. Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v Netherlands*: Old Problem, New Solutions?', 53 *MLLWR* 2014, p. 287–318, 288.

155 *Öneryildiz* (n 149), paragraph 101.

Furthermore, in failing to conduct an effective investigation in respect of the failed rescue practices, the respective EU Member States are in breach of their procedural obligations under Articles 2 and 3 ECHR.<sup>156</sup> Coastal EU Member States' have a positive duty imposed by the ECHR to commence investigations to identify those dying at sea and punish those responsible for causing these deaths.<sup>157</sup> Failure to commence investigations into failed rescue practices constitutes a violation of international human rights law on the right to life and the duty to rescue.

## 6 Conclusion

The ongoing battle between EU Member States and organised criminal networks challenges fundamental principles of international law. Human smugglers pin their hopes upon EU Member States' compliance with their refugee, human rights and search and rescue obligations towards overcrowded boats of irregular migrants in distress. However, EU Member States determined to combat human smugglers are intentionally misinterpreting their international obligations to avoid responsibility for the individuals who are unwittingly assisting the growing industry of organised crime. EU Member States' reluctance to receive irregular migrants rescued at sea has directly contributed to the inconsistent application of certain terms in the relevant Conventions, giving rise to different national approaches to the irregular migration phenomenon. This is particularly true of the term 'distress' and 'rescue'. Clearly, the obligations arising out of search and rescue operations conflict with EU Member States' interests in managing migration and ensuring their security.

This article argues that one possible solution to the legal vacuum created by the SAR Convention on lack of responsibility for failed rescue practices would be to impose *de jure* responsibility on the State in which the distress call is made within its SAR zone to actively respond to that call. People in distress place their lives in the hands of the State receiving the call, imposing an obligation on States not only to perform the SAR service but to provide it with 'due diligence' when assuming responsibility for their SAR zone.<sup>158</sup> Therefore, at the moment a distress call is made, an 'exclusive long distance *de facto* control' is

<sup>156</sup> *Jaloud* (n 153).

<sup>157</sup> ECHR, article 2(2) read in conjunction with article 1; *McCann and Others v the United Kingdom* Application no 18984/91 (1995) Series A no 324, paragraph 161; *Kelly and Others v the United Kingdom* Application no 69076/01 (4 May 2001) paragraph 94.

<sup>158</sup> Moen 2010 (n 136); Trevisanut 2008 (n 75); see *Furdík v Slovakia*, Application no 42994/05 (2 December 2008).

created, creating 'a relationship' sufficient to make the ECHR applicable.<sup>159</sup> This *de facto* control is then argued in this article to become *de jure* at the moment that the distress call comes within the SAR zone. Thus, this article argues that coastal States have a positive obligation to take preventative measures to counter immediate risks to persons in distress who come under their responsibility.

In light of above legal issues, it is highly recommended that concerned EU Member States may a) refer a question for uniform interpretation of 'distress' to the International Tribunal for the Law of the Sea (ITLOS Hamburg), or b) request the EU Parliament to initiate an opinion of the Court of Justice of the EU, or c) to the ECtHR. In addition, a systematic evaluation of Frontex operations and State failed rescue practices must be conducted in protection of the 'right to life'.

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<sup>159</sup> Trevisanut 2008 (n 75).