

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
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Migrants in the Mediterranean: Protecting human rights

DROI



STUDY

Migrants in the Mediterranean: Protecting human rights

ABSTRACT

In reaction to recurrent tragedies in the Mediterranean Sea, the European Union (EU) has adopted a series of measures seeking to improve the protection of migrants trying to reach the borders of the EU by sea and to share responsibility among countries involved by increasing cooperation with transit countries. This study focuses on the existing and planned EU policies and actions to protect the human rights of migrants before entering the EU by sea or after they have left the territory of the EU. The picture that emerges from the evaluation of EU policies and actions is a mixed one. On the one hand, it cannot be denied that instruments of sea borders surveillance and instruments of cooperation with third countries have now generally included human rights safeguards. On the other hand, implementation, monitoring and control remain problematic. Furthermore, the primary aim of existing EU policies and actions still seems to be the protection of the external borders against so-called 'illegal' immigration and the return of illegally staying migrants, rather than the development of effective strategies to protect human rights of migrants and the saving of lives on the Mediterranean. The study therefore offers specific recommendations to ensure a coherent human rights-based EU approach to improve the protection of the rights of migrants aiming to reach the EU.

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List of acronyms

AFET	Committee on Foreign Affairs
AFSJ	Area of Freedom, Security and Justice
AMIF	Asylum, Migration and Integration Fund
CAMM	Common Agenda on Migration and Mobility
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEPS	Centre for European Policy Studies
CFR	European Union Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CSDP	Common Security and Defence Policy
DROI	Subcommittee on Human Rights
EASO	European Asylum Support Office
EEAS	European External Action Service
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ENI	European Neighbourhood Instrument
ESDP	European Security and Defence Policy
EU	European Union
EUNAVFOR MED	European Union military operation in the Southern Central Mediterranean
EURA	European Union Readmission Agreement
EUROSUR	European Border Surveillance System

FRA	European Union Agency for Fundamental Rights
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GAMM	Global Approach to Migration and Mobility
HRW	Human Rights Watch
JO	Joint Operation
JRO	Joint Return Operation
JRC	Joint Readmission Committee
IAMSAR Manual	International Aeronautical and Maritime Search and Rescue Manual
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	Immigration Liaison Officers
IMO	International Maritime Organization
IOM	International Organization for Migration
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MOAS	Migrant Offshore Aid Station
MONITOR	Pilot Initiative to Monitor Readmission in Ukraine and Pakistan
MP	Mobility Partnerships
MSF	Médecins sans Frontières
NGO	Non-governmental organisation
PACE	Parliamentary Assembly of the Council of Europe
Palermo Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime
PSC	Political and Security Committee
RDPP	Regional Development Protection Programme
Refugee Convention	Geneva Convention relating to the Protection of Refugees

RPP Regional Protection Programme

SAR Convention International Convention on Maritime Search and Rescue

SBC Schengen Borders Code

SOLAS Convention for the Safety of Life at Sea

TCN Third Country National

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

UDHR Universal Declaration of Human Rights

UNCLOS United Nations Convention on the Law of the Sea

UNHCR United Nations High Commissioner for Refugees

Executive summary

This study focuses on the existing and planned policies and actions of the European Union (EU) to protect the human rights of migrants before entering the EU or after they have left the territory of the EU. It is divided into six parts. **Part 1** includes data on migrant arrivals and fatalities (1.1), presents the profile of migrants crossing the Mediterranean (1.2), lists the main push and pull factors for the migration flows (1.3), sets out the routes taken and the main States affected (1.4), and lastly, gives a short overview of the actors involved in trying to deal with migration flows on the Mediterranean (1.5).

Part 2 defines the key terms of ‘migrants’ and ‘refugees’ (2.1), and gives an overview of existing international laws and standards seeking to ensure respect of the rights of all migrants irrespective of their legal status (2.2), with due regard to their extraterritorial application (2.3). One of the most important human rights principles in the context of boat migrants is the right to *non-refoulement*, which was originally enshrined in international refugee law. Migrants, like all human beings, also enjoy the human rights enshrined in various international and regional human rights treaties, which now include either implicitly or explicitly the prohibition of *refoulement*. Additionally, international legal instruments have imposed obligations to protect and assist persons in distress at sea, and prohibitions of smuggling or human trafficking while still respecting the human rights of migrants.

Part 3 focuses on violations of migrant rights. It investigates possible human rights violations in three particular phases of the migratory route to the EU: the pre-departure phase, whereby migrants travel from their country of origin to the country of departure and often spend a considerable amount of time in the latter, waiting for a boat to depart (3.1); the crossing of the Mediterranean by boat (3.2), and their interception by coast guards and possible expulsion to their country of origin or transit (3.3).

Part 4 briefly outlines the competence of the EU and the power of the European Parliament in the field of migration (4.1). It then analyses and evaluates the existing and planned EU policies and actions in sea borders operations to protect the human rights of the migrants before entering, or after they have left the territory of the EU (returns), such as the Joint Operations (JOs) Triton and Poseidon of the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) and military operations (EUNAVFOR MED/Sophia) (4.2), and cooperation with third countries (4.3). The role of the European Parliament is identified throughout this process.

Part 5 offers specific recommendations with regard to migration policy in general, sea borders surveillance and cooperation arrangements with third countries in particular, so as to ensure a coherent human rights-based EU approach to improve the protection of the rights of migrants aiming to reach the EU. The focus is again on the possible role of the European Parliament.

It is concluded in **Part 6** that the picture that emerges from the evaluation of existing and planned EU policies and actions is a mixed one. While it cannot be denied that policies of sea border surveillance and instruments of cooperation with third countries have gradually included human rights safeguards, the primary aim of EU policies remains to protect external borders, rather than develop effective strategies to protect the human rights of migrants and save lives in the Mediterranean Sea. Implementation in particular is key, and effective monitoring mechanisms should therefore be established to deal with breaches of fundamental rights throughout sea borders surveillance and cooperation arrangements with third countries.

Introduction

Context

Tragic losses of lives drowning or succumbing to hunger, thirst, or cold, are reported daily off the coasts of Greece, Italy, Malta and Spain. In reaction to recurrent tragedies, the EU adopted a series of measures seeking to improve the protection of the migrants trying to reach the borders of the EU and to share responsibility among countries involved by increasing cooperation with transit countries. In a Resolution of 29 April 2015, the European Parliament urged the EU and the Member States 'to do everything possible to prevent further loss of life at sea'¹. On 15 September 2015, a joint hearing of the Committee on Foreign Affairs (AFET), Committee on Civil Liberties, Justice and Home Affairs (LIBE), and Subcommittee on Human Rights (DROI) on 'Respecting Human Rights in the Context of Migration Flows in the Mediterranean' took place. A strategic initiative report on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)) will be presented on 10 December 2015 and adopted later in 2016 in the LIBE Committee. The DROI Subcommittee has requested a study that would feed into the debate and help the Parliament form opinions and make decisions in this respect.

Objectives

The study pursues two major objectives. First, it seeks to map the context of the current migration flows in the Mediterranean and identify the human rights and international legal framework applicable to migrants irrespective of their legal status, particularly during their transit and before entering the territory of the EU. Consequently, Parts 1, 2 and 3 of the study describe and analyse the current migration flows in the Mediterranean, the applicable legal framework and human rights violations faced by migrants during their transit. Second, the study analyses and evaluates in Part 4 the existing and planned EU policies and actions to protect the human rights of migrants, particularly before their entry into, and after their departure from, the EU. On that basis, the study will formulate in Part 5 specific recommendations to ensure a coherent EU approach to improve the protection of the rights of migrants, with a particular attention to the role of the European Parliament.

Methodology

In terms of methodology, the study was first drafted on the basis of desk research consisting of the survey of international and EU legal instruments, including both international and regional human rights conventions, as well as international organisations' reports, Non-Governmental Organisations' (NGOs) reports and relevant academic legal literature focusing on human rights of migrants. Part 1 primarily uses the official data on migrant arrivals and fatalities in the Mediterranean Sea which both the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration's (IOM) Global Migration Data Analysis Centre compiled in up-to-date reports. The study also refers throughout all Parts to the two regional studies on the management of the external borders of the EU and the specific country reports which the UN Special Rapporteur on the human rights of migrants, François Crépeau, conducted in 2013² and 2015³. In addition, the study draws on the key publications of

¹ European Parliament, 'Resolution on the latest tragedies in the Mediterranean and EU migration and asylum policies', 29 April 2015, 2015/2660(RSP), para. 1.

² Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46.

³ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', 8 May 2015, UN Doc. A/HRC/29/36.

the EU Agency for Fundamental Rights (FRA) on the human rights protection of migrants⁴, as well as the reports and briefing notes published by NGOs dealing actively with the refugee crisis, such as Human Rights Watch (HRW)⁵ or Amnesty International⁶. Research for this study finally benefited from the results of the FRAME project (funded by the European Commission under the 7th Framework Programme), which notably address EU policies in relation to migrant rights, and of which the Leuven Centre for Global Governance Studies is the Coordinator⁷. In support of, and as a way to elaborate on findings yielded by the examination of these sources, two targeted informant interviews were conducted with Dr. Sergio CARRERA, Senior Research Fellow and Head of the Justice and Home Affairs Programme, Centre for European Policy Studies (CEPS), and Dr. Aspasia PAPADOPOULOU, Senior Policy Officer, European Council Refugees and Exile (ECRE). Moreover, on 15 September 2015, the first co-author of this study attended the AFET/LIBE/DROI joint hearing on 'Respecting Human Rights in the Context of Migration Flows in the Mediterranean'.

⁴ See, e.g., FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013,

http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf

⁵ See, e.g., HRW, 'The Mediterranean Migration Crisis: Why People Flee, What the EU Should Do', 2015, http://reliefweb.int/sites/reliefweb.int/files/resources/eu0615_web.pdf, p. 5

⁶ See, e.g., Amnesty International, 'Human Cost of Fortress Europe – Human rights Violations Against Migrants and Refugees at Europe's Borders', July 2014,

http://www.sos-europe-amnesty.eu/content/assets/docs/The_Human_Cost_of_Fortress_Europe_July_2014.pdf, p. 17

⁷ See, e.g., V. Engström & M. Heikkilä, 'Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice', Work Package No 11, Deliverable No 1, 29 September 2014,

<http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf>

1 Background

The first Part sets out the background of the current migration flows in the Mediterranean. This analysis includes data available up until 16 October 2015 on migrant arrivals and fatalities (1.1), presents the profile of migrants crossing the Mediterranean (1.2), lists the main push and pull factors for the migration flows (1.3), sets out the routes taken and the main States affected (1.4), and gives a short overview of the actors dealing with the crisis in the Mediterranean (1.5).

1.1 Migrant arrivals and fatalities in the Mediterranean

Figure 1 below shows a strong increase in the number of migrants arriving in Europe by crossing the Mediterranean Sea between 2010 and 2015. Already in 2014, 219 000 people reached Europe, in comparison to 60 000 in 2013. In 2015, after only 6 months, 137 000 migrants had passed the Mediterranean, which already represented a 83 % increase compared to the same period in 2014.

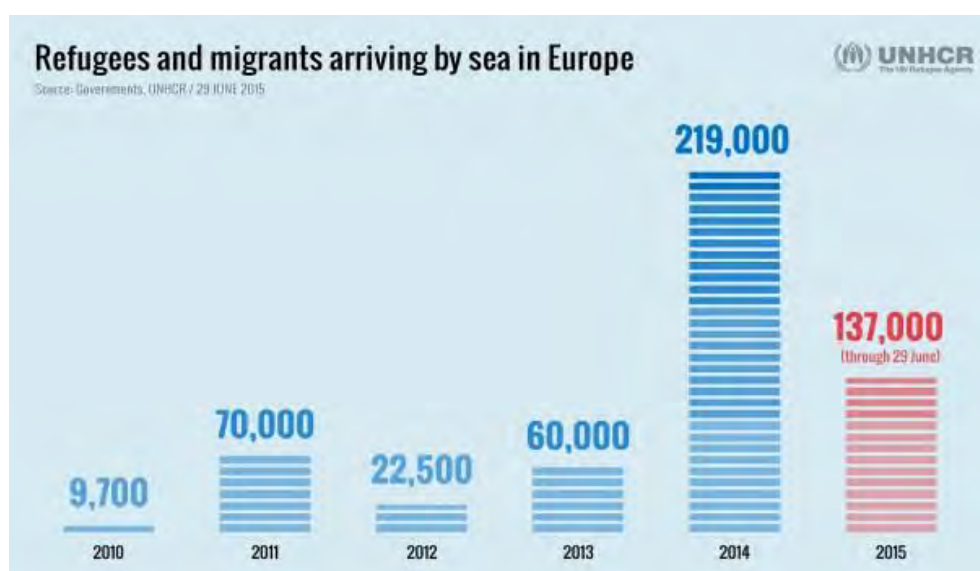


Figure 1 / Source: UNHCR, 'The sea route to Europe: The Mediterranean passage in the age of refugees', 1 July 2015, <http://www.unhcr.org/5592bd059.html>, p. 5

Figure 2 presents more detailed data on migrant arrivals and fatalities in the Mediterranean up until 16 October 2015. Due to a significant increase of crossings during summer, the estimate of maritime arrivals of migrants rose up to 613 179. 3 117 migrants died up until 16 October this year while trying to pass the Mediterranean Sea by boat, compared to 3 229 fatalities in total for 2014. The number of deaths at sea rose at a peak in April 2015 with 1 246 reported dead in one month. Yet, a significant decline was observed in the months of May (95) and June (10), due to an intensification of rescue operations by the EU and other actors (see *infra*).

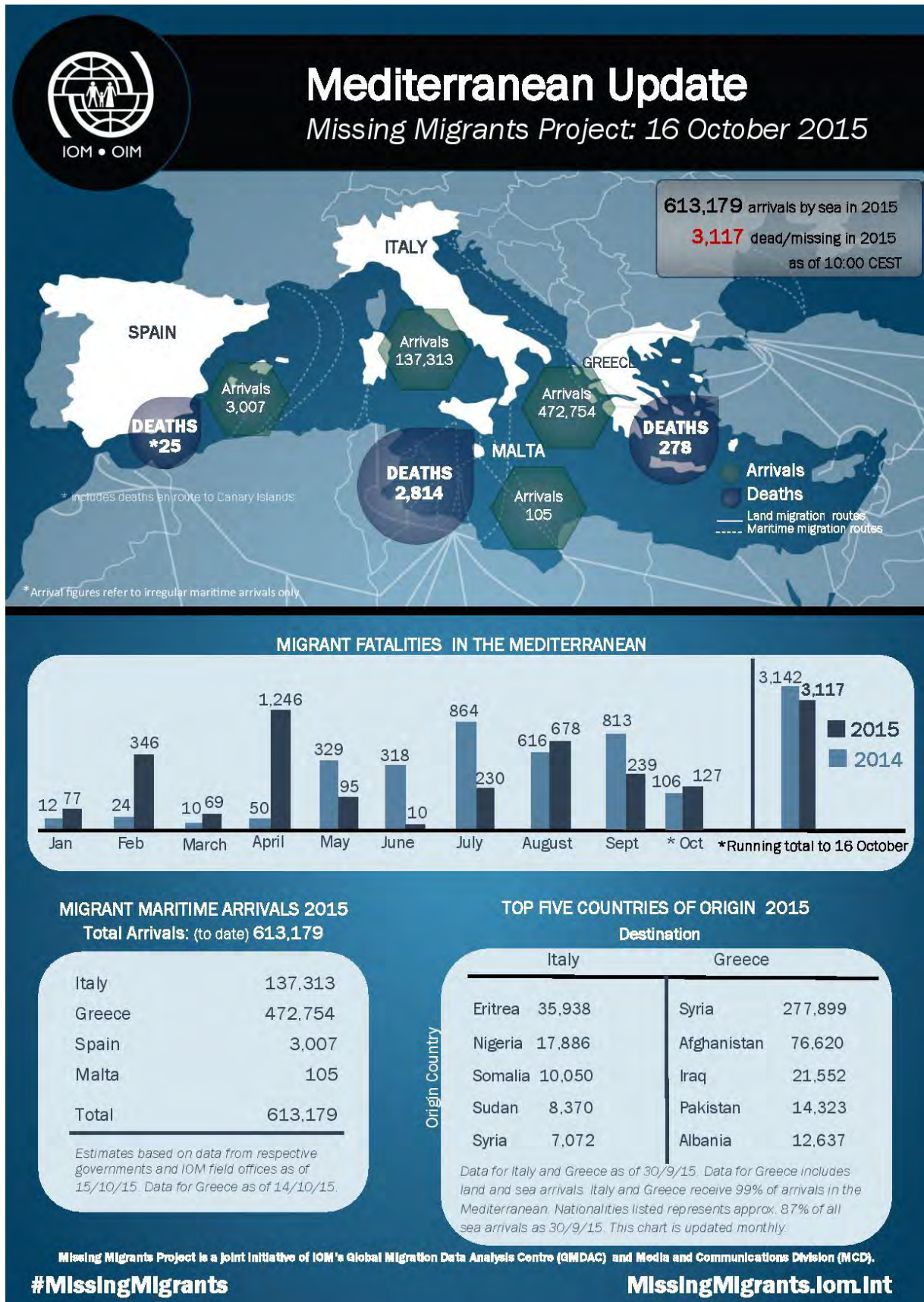


Figure 2 / Source: IOM, 'Mediterranean Update', 16 October 2015,
<http://missingmigrants.iom.int/en/mediterranean-update-2-october-2015>

1.2 Profile of migrants

According to UNHCR and as Figure 4 below relays, 94 % of the migrants arriving to Europe by sea come from **only ten different countries**: Syria (59 %), and to a lesser extent from Afghanistan (14 %), Eritrea (6 %), Iraq (4 %), Nigeria (3 %), Pakistan (3 %), Somalia (2 %), Sudan (1 %), Gambia (1 %) and Bangladesh (1 %)⁸.

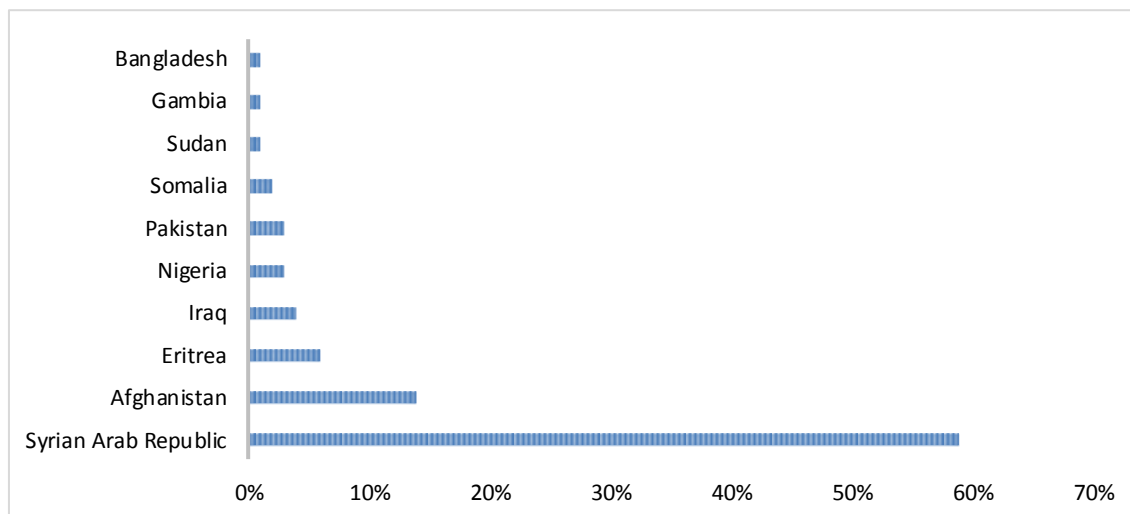


Figure 3 / Source: UNHCR, 'Refugees/Migrants Emergency Response - Mediterranean', <http://data.unhcr.org/mediterranean/regional.php>

UNHCR also reported that so far, 69 % of the migrants that arrived in Europe by sea were men, while the proportion of **children** and **women** was respectively of 18 % and 13 %⁹. The most vulnerable children are those who arrive without family or guardians. This was the case for half of the minors who arrived in Italy in 2014. Between 1 January and 31 August 2015, for Italy alone, 8 255 unaccompanied children have arrived, with about a quarter coming from Eritrea. This year, unaccompanied children nevertheless account for less than 10 % of all children who have arrived in Italy¹⁰. Their situation poses particular problems for authorities in terms of making reception arrangements and providing education, care and counselling.

1.3 Push and pull factors

Push factors designate the reasons for migrants to leave their country of origin, while pull factors are the reasons encouraging them to come, in this case, to Europe¹¹. According to the UN Special Rapporteur on the human rights of migrants, migration to Europe by boats is 'largely driven by conflict, persecution and poverty (push factors) as well as unmet needs with the labour market (pull factors)'¹².

⁸ UNHCR, 'Refugees/Migrants Emergency Response – Mediterranean', <http://data.unhcr.org/mediterranean/regional.php>

⁹ *Id.*

¹⁰ The authors are indebted to the IOM's Global Migration Data Analysis Centre and the NGO Save the Children for providing them with the latest data available on unaccompanied migrant children arriving to Italy. Unfortunately, accurate data on unaccompanied migrant children arriving in other Southern countries is still lacking.

¹¹ The founding paper on push and pull factors is by E. Lee, 'A Theory of Migration', *Demography* Vol 3, No 1, 1966, pp. 47-57.

¹² Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', 8 May 2015, UN Doc. A/HRC/29/36, para. 26.

Since the vast majority of the migrants arriving – or trying to arrive – by boat in the EU come from countries faced with great instability due to ongoing war, conflict or repression, persecution in the country of origin for reasons of race, religion, nationality, membership of a particular social group or political opinion is often cited as one of the main **push factors** for the current migration flows¹³. In addition to those who flee persecution, it should also be acknowledged that others may decide to migrate ‘in response to famine, denial of economic and social rights, corrupt and ‘bad’ governance, conflict and other forms of human insecurity’¹⁴. The need to support families at home by sending them money from Europe may represent another push factor¹⁵. A report of the IOM entitled *Children on the Move* shows that unaccompanied children may move for an extremely wide variety of reasons: economic push factors, educational needs, cultural pressures such as the feeling of responsibility to improve the family’s standard of living, traumatic experiences such as the need to escape sexual violence, or conflicts and natural disasters¹⁶.

The abovementioned push-factors are not new. In recent years, however, the resurgence of violence and repression in the aforementioned countries (see *supra*, 1.2) has caused an increase of the worldwide migration flux. Syrians, for example, who account for 59% of the current arrivals by boat, flee indiscriminate attacks on civilian areas by both government forces and armed groups, forced disappearances, torture in detention, and, in addition, systematic and widespread violations committed by extremist Islamic groups – Islamic State and Jabhat al-Nushra (an al-Qaeda affiliate). Since the start of the civil war in Syria in 2011, UNHCR has registered almost 4 million Syrian refugees in the neighbouring countries¹⁷. In Afghanistan, a new period of insecurity started in 2014, involving political instability and a growing pressure by various insurgent groups, including the Taliban. Among the reasons why Afghan refugees flee their country are frequent attacks against civilians, kidnappings, restrictions of movement (especially against women) and torture in custody of Afghan forces. In Eritrea, more than 357 000 nationals (representing over 5 % of the population) have fled their country by the end of 2014 due to a worsening of the repression. Reasons for leaving include an open-ended military conscription as of the age of 18, torture, arbitrary arrests, restrictions on freedoms of expression, conscience and movement and the repression of the freedom of religion¹⁸. As said above (see *supra*, 1.2), approximately 1/4 of the unaccompanied children who arrived in Italy so far in 2015 were Eritrean nationals. The number of Iraqis seeking refuge in the EU has also risen considerably due to the escalation of armed conflict and the advance of the Islamic State in central Iraq. In Nigeria, the conflict between governmental forces and insurgent armed groups like Boko Haram in the north-eastern part has caused over 192 000 persons to flee the country as of 31 December 2014¹⁹. Pakistanis escape insurgencies in north-west Pakistan where the security is increasingly fragile²⁰. A two-decade civil war in Somalia has restricted humanitarian access and caused humanitarian crises. In addition, the Islamist group al-Shabaab carries out regular attacks against civilians, students, teachers and schools. Children are forced to join armed groups²¹. The drought

¹³ UNHCR, ‘The sea route to Europe: The Mediterranean passage in the age of refugees’, 1 July 2015, <http://www.unhcr.org/5592bd059.html>, p. 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ IOM, *Children on the Move*, 2013, http://publications.iom.int/bookstore/free/Children_on_the_Move_19Apr.pdf, pp. 30-32.

¹⁷ HRW, ‘The Mediterranean Migration Crisis: Why People Flee, What the EU Should Do’, 2015, http://reliefweb.int/sites/reliefweb.int/files/resources/eu0615_web.pdf, p. 5.

¹⁸ HRW, ‘World Report 2015: Eritrea’, <https://www.hrw.org/world-report/2015/country-chapters/eritrea>

¹⁹ UNHCR, ‘Nigeria Situation. Emergency Response’, 8 May 2015, <http://www.unhcr.org/554cbed29.html>, p. 6.

²⁰ UNHCR, ‘2015 UNHCR country operations profile - Pakistan’, <http://www.unhcr.org/pages/49e487016.html>

²¹ UNHCR, ‘2015 UNHCR country operations profile - Somalia’, <http://www.unhcr.org/pages/49e483ad6.html>

and famine crisis partly caused by climate change presents another push factor in Somalia. In all cases, the most important push factor for migrants seems to be the necessity to flee from instability²².

Besides, it is true that family connections, the availability of better social security systems, the hope for more affordable education, employment opportunities resulting from demographic deficits in certain EU Member States, and more specifically the demand for seasonal and low-skilled workers, may exert **pull forces**²³. The illusion created by smugglers that Europe is easily reachable can also play a role in migratory movements towards the EU²⁴. However, the fact that many migrants first tried to settle in third countries before undertaking the dangerous journey to Europe by crossing the Mediterranean suggests that push factors are more decisive than pull factors²⁵. As a recent joint IOM-Altai report asserted, 'the current migratory flows across the Mediterranean, from sub-Saharan Africa and the Middle-East to Europe, seem to be driven much more significantly by push factors that cause migrants to depart their homes, than by the pull factors that draw migrants to Europe'²⁶.

1.4 Main routes and countries affected

Figure 4 below shows that, on a global scale, the EU hosts a relatively small number of refugees. The three most **refugee-hosting countries** with a refugee population of over 1 million (indicated in pink) were at the end of 2014: Turkey (1,59 million), Pakistan (1,51 million), Lebanon (1,15 million). Other non-EU countries like Iran (982 000), Ethiopia (659 500) or Jordan (654 100) (indicated in blue) hosted under 1 million refugees²⁷. The rising pressure over the last years in these countries, and the outbreak of new hostilities in transit countries like Libya, makes it more and more difficult for refugees to find shelter

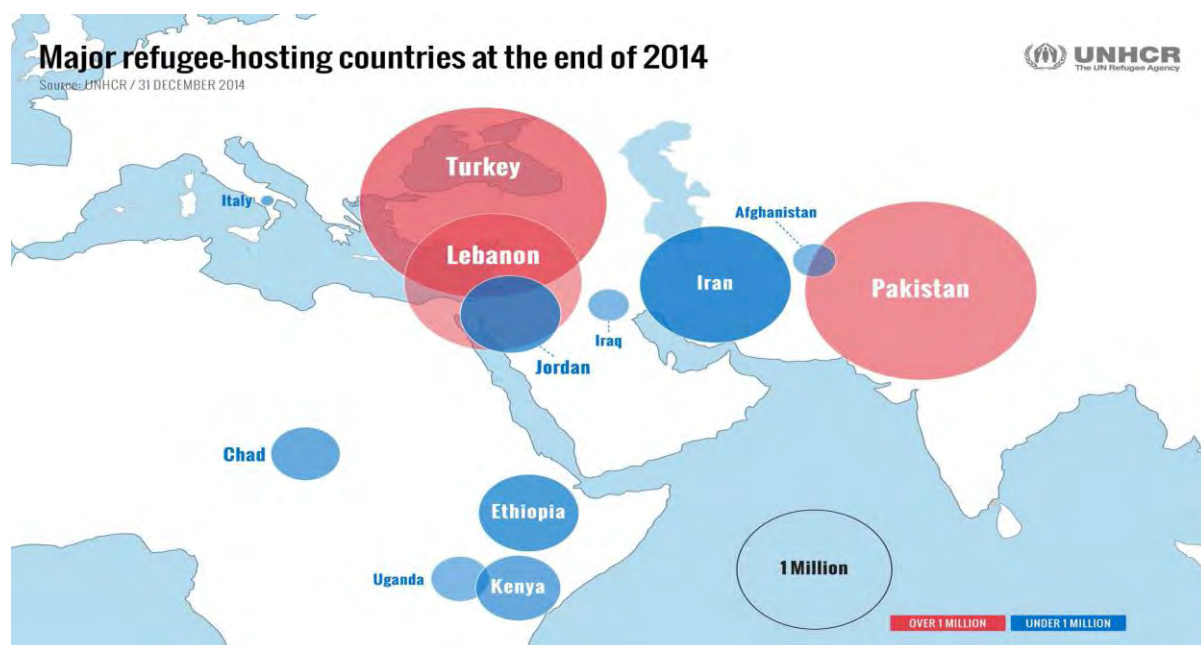


Figure 4/ Source: UNHCR, 'The sea route to Europe: The Mediterranean passage in the age of refugees', 1 July 2015, <http://www.unhcr.org/5592bd059.html>

²² IOM & Altai Consulting, 'Migration Trends Across the Mediterranean: Connecting the Dots', June 2015, http://www.altaiconsulting.com/docs/migration/Altai_Migration_trends_across_the_Mediterranean.pdf, p. 26.

²³ Commissioner for Human Rights, 'The Human Rights of Irregular Migrants in Europe', CommDH/IssuePaper(2007)1, Strasbourg, 17 December 2007, p. 6.

²⁴ IOM & Altai Consulting, 'Migration Trends Across the Mediterranean: Connecting the Dots', June 2015, http://www.altaiconsulting.com/docs/migration/Altai_Migration_trends_across_the_Mediterranean.pdf, p. 82.

²⁵ *Id.*, p. 27.

²⁶ *Id.*, p. 81.

²⁷ UNHCR, 'Global Trends: Forced Displacement in 2014', <http://www.unhcr.org/556725e69.html>, p. 2.

there. As a result, many migrants move on to search a safe place to live in the EU.

Departure countries are Turkey when using the **Aegean Sea route**, Egypt or Libya when using the **Central and Eastern Mediterranean channels**, and Morocco or Tunisia when using the **routes over the Western Mediterranean**²⁸. Figure 5 below shows the complexity of migratory and transit routes to reach the EU, with a focus on the Western, Central and Eastern Mediterranean routes.

Figure 2 above showed that migrants trying to reach the EU by crossing the Mediterranean first arrived in **Greece** (472 754 arrivals), **Italy** (137 313 arrivals), **Spain** (3 007 arrivals) and **Malta** (105 arrivals). However, it should be acknowledged that most migrants do not stay in the first EU country of arrival. In 2014, Germany and Sweden received almost half of the total amount of 625 000 asylum applications in the EU as they are often thought to provide the best protection for asylum-seekers²⁹. Hence, it should not be overlooked that, once migrants reach the EU, they still face a long and perilous journey toward their final destination in northern and western parts of Europe. For instance, migrants who originally entered the EU through the Bulgarian-Turkish or Greek-Turkish land/sea borders, now use the 'Western Balkan route' to reach Hungary³⁰. The route has now become one of the main transit areas for migrants from Syria (+363 % in 2014, compared to 2013) and Afghanistan (+168 % in 2014, compared to 2013) trying to reach the Schengen Zone³¹.

²⁸ For a detailed analysis of the Western and Central Mediterranean routes, see IOM & Altai Consulting, 'Migration Trends Across the Mediterranean: Connecting the Dots', June 2015, http://www.altaiconsulting.com/docs/migration/Altai_Migration_trends_across_the_Mediterranean.pdf, p. 26.

²⁹ FRA, 'Fundamental rights: challenges and achievements in 2014', Annual Report 2014, http://fra.europa.eu/sites/default/files/fra-annual-report-2014_en.pdf, p. 85.

³⁰ Frontex, 'Western Balkan Route', <http://frontex.europa.eu/trends-and-routes/western-balkan-route/>

³¹ Frontex, 'Western Balkans: Annual Risk Analysis 2015', http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2015.pdf, p. 5.

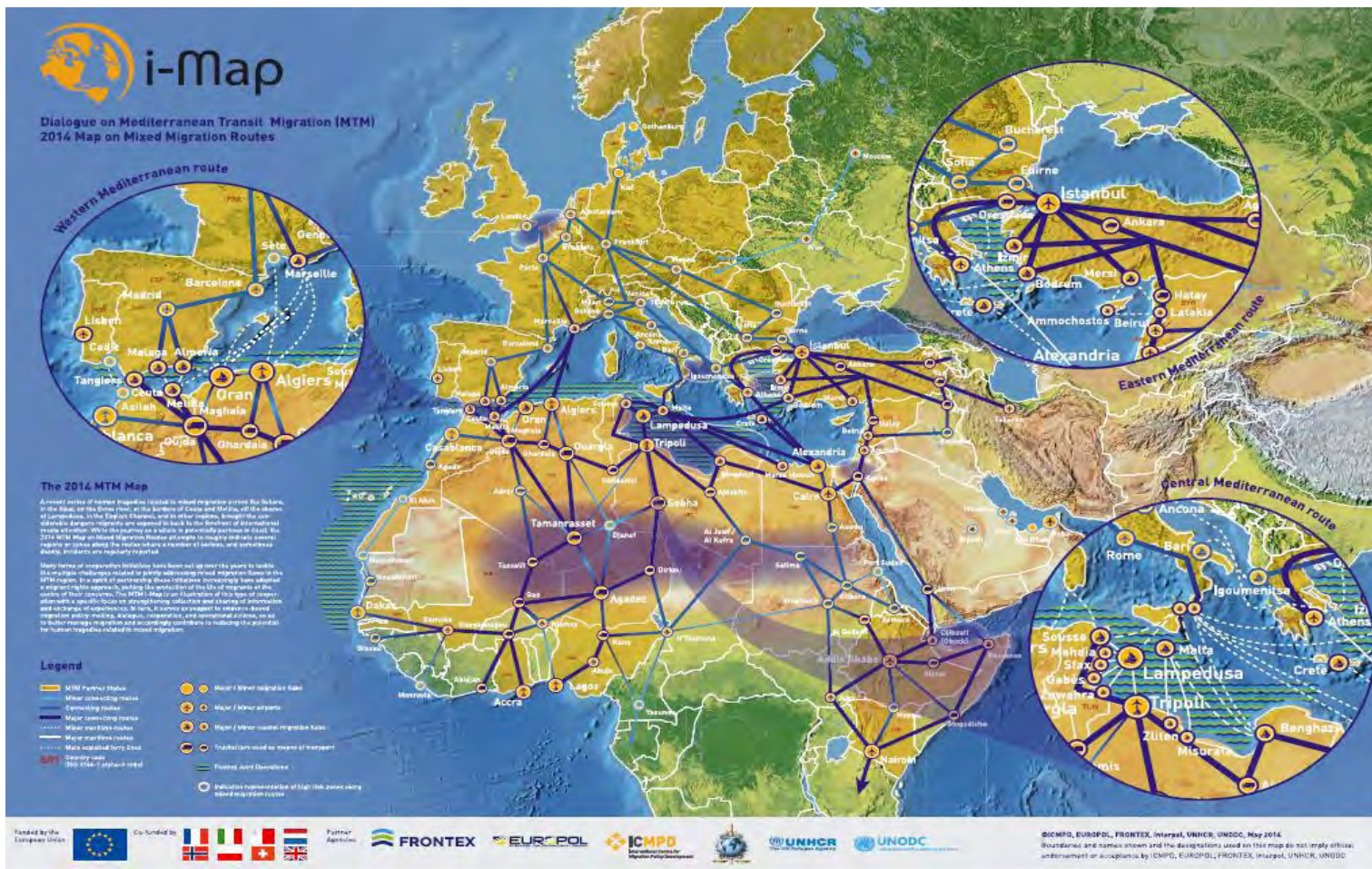


Figure 5 / Source: I-Map, 'MTM Map on Mixed Migration Routes in the MTM Region', 2014,
http://www.imap-migration.org/fileadmin/Editor/Visualisations/MTM/i-Map_poster_14.05_ENGLISH_Screen_reduced.pdf

1.5 Actors involved

At the international level, **UNHCR** was entrusted by the UN General Assembly in 1950 with the task of ensuring international protection to refugees and, together with governments of UN Member States, seeking solutions to refugee problems in providing shelter in temporary camps, organising voluntary return or resettling refugees in third countries³². UNHCR is also charged with the supervision of international conventions for the protection of refugees and ensures that the human rights of refugees or stateless people are respected in their countries of asylum (see *infra*)³³.

In addition, since 1951, **IOM** has helped States 'to ensure the orderly flow of migration'³⁴, primarily by advising and assisting them in implementing migration control policies, through policy consultations, resettlement or repatriation operations, and training of border guards. IOM has notably developed one of the most important data collections on migrant arrivals and fatalities in the form of the Missing Migrants Project (see *supra*, figure 2)³⁵. Neither UNHCR nor IOM carry out search-and-rescue operations on the Mediterranean Sea.

At the European level, migration-related issues are a shared competence between the EU and its Member States (see Part 4, *infra*). A few decentralised agencies of the EU play a key role in the field of migration policy. The European Asylum Support Office (**EASO**) was set up by Regulation (EU) 439/2010 'in order to help to improve the implementation of the Common European Asylum System (the CEAS), to strengthen practical cooperation among Member States on asylum and provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems'³⁶. In practice, EASO has developed into an independent centre of expertise on asylum matters. It provides practical, technical and operational support to member States subject to migratory pressure, through *inter alia* training, capacity building, research, coordination of resettlement plans. The European Commission has recently entrusted EASO with the mission of helping Member States to identify people in need of international protection and process asylum applications in so-called 'hot spots' in Italy and Greece³⁷. The **FRA**, which provides expert advice since 2007 in the field of human rights to the EU and its Member States, has published a number of key publications on the human rights protection of migrants aiming to reach the EU, which are therefore also referred to in this study³⁸.

The EU Border Agency, **Frontex**, was set up by Council Regulation (EC) No 2007/2004³⁹. It aims at strengthening border security and ensures coordination between actions by Member States, when they implement the EU measures relating to external border management. On 1 November 2014, Frontex launched JO Triton, after the Italian-run Operation *Mare Nostrum* was ended (see *infra*). 17 Member States are supporting this Operation. Its main objective is border surveillance, but it has also contributed to the detection and rescue of migrants in distress. Faced with the dramatic increase of dead migrants at sea in

³² UN General Assembly, 'Statute of the Office of the United Nations High Commissioner for Refugees', 14 December 1950, A/RES/428(V).

³³ *Id.*, para. 8(a).

³⁴ Constitution of the Intergovernmental Committee for European Migration, 19 October 1953, 207 UNTS 189, Preamble.

³⁵ See <http://missingmigrants.iom.int/en>

³⁶ Article 1 of Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11, 29.5.2010.

³⁷ See European Commission, Annex to the Communication from the Commission to the European Parliament, the European Council, and the Council, 'Managing the refugee crisis: immediate operation, budgetary and legal measures under the European Agenda on Migration', COM(2015) 490 final, 23.9.2015.

³⁸ See, e.g., FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013,

http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf

³⁹ Council Regulation (EC) no. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), OJ L 349/1, 25.11.2004.

April 2015 (see *supra*), the EU tripled the resources of JO Triton with an annual budget of € 38 million⁴⁰. JO Poseidon Sea exercises a similar mandate as Operation Triton in Greece. 18 Member States contribute to it directly. Its budget was also increased in order to prepare for the ‘peak summer season’⁴¹ – it now stands at € 18 million. Next year, the Commission will provide Frontex with additional € 45 million for both operations⁴². While the rescue operations had a visible and direct impact on the number of death at sea (see *supra*), they have not remained without criticism. The UN Special Rapporteur on the human rights of migrants has criticised Operation Triton because of its ‘limited mandate for effective search and rescue operations [...], incoherence in search and rescue zone management, tensions between unilateral and regional interventions, disincentives for private and military vessels to provide assistance to migrants, limited resource commitments from Member States and difficulties in establishing disembarkation protocols’⁴³. The Commission also recently acknowledged that ‘the assets made available still fall short of what is needed’⁴⁴.

Besides Frontex JOs, the Council established on 18 May 2015 an **EU military operation** against human smugglers and traffickers in the Mediterranean called European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)⁴⁵, now renamed Operation Sophia⁴⁶, with the mission to identify, capture and dispose of vessels and enabling assets used or suspected of being used by smugglers (see *infra*, 4.2.4).

National authorities of EU Member States and neighbouring countries undertake action as well. As reported by the FRA, the main authorities involved in search and rescue coordination are the **Hellenic Coast Guard** for Greece, the **Salvamento Marítimo** for Spain, the **Comande Generale delle Capitanerie di Porto** for Italy, and the **Armed forces of Malta** for Malta⁴⁷. In 2013, Italy launched Operation *Mare Nostrum* in reaction to the tragic death of 365 migrants near the Italian island of Lampedusa. Because of its high financial burden, carried solely by Italy, the operation was terminated towards the end of 2014. Despite the efforts undertaken by the Italian authorities, there have been reports of push-backs carried out by State officials involved in the operation (see *infra*, 3.3). Turkey has also carried out rescue operations.

In addition to actions taken by the EU and Member States, NGOs also launched operations to provide humanitarian assistance to migrants in the Mediterranean. As of 12 October 2015, **Médecins Sans**

⁴⁰ I. Traynor, ‘Migrant deaths: EU leaders to triple funding of rescue operation’, The Guardian, 23 April 2015, www.theguardian.com/world/2015/apr/23/migrant-deaths-eu-funding-rescue-ships-mediterranean. A total of 26 European countries are taking part in Triton by deploying experts and technical equipment. These are: Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, and United Kingdom.

⁴¹ Frontex, ‘Frontex expands its Joint Operation Triton’, 26 May 2015, <http://frontex.europa.eu/news/frontex-expands-its-joint-operation-triton-udpbHP>

⁴² *Id.*

⁴³ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, ‘Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants’, 8 May 2015, UN Doc. A/HRC/29/36, para. 33.

⁴⁴ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, ‘Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration’, COM(2015) 510 final, 14.10.2015, p. 8.

⁴⁵ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31, 19.5.2015.

⁴⁶ Council of the European Union, ‘EUNAVFOR Med: EU agrees to start the active phase of the operation against human smugglers and to rename it “Operation Sophia”’, Press Release, 28 September 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor/>

⁴⁷ FRA, ‘Fundamental Rights at Europe’s southern sea borders’, July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 42.

Frontières (MSF) had two search-and-rescue boats operational on the Mediterranean⁴⁸. Many other NGOs and National Red Cross Societies are providing assistance to the migrants once they arrive on land. Besides the NGOs, some **private companies or individuals** have also used their resources to help migrants. Under international law, captains of vessels are indeed obliged to provide assistance to persons in distress at sea (see *infra*), and under the penal codes of the Member States bordering the Mediterranean, refusal to provide such assistance is a criminal offence⁴⁹. The FRA notes that '[a]s there are many more fishing vessels at sea than patrol vessels, they are often first in sighting migrants crossing the central Mediterranean⁵⁰. According to Frontex' latest Annual Risk Analysis, merchant vessels accounted for 40% of all rescues in 2014 in the Mediterranean⁵¹. The latter trend has however been labelled as 'detrimental to commercial shipping operations, with a knock-on effect on trade' by the Secretary-General of the International Maritime Organization (IMO)⁵². According to the UN Special Rapporteur on the human rights of migrants, 'known difficulties in disembarking migrants, the high costs [e.g. port taxes] associated with such intervention, and the lack of cooperation by States with private entities seeking to provide such humanitarian assistance, as well as the potential repercussions for private individuals, has resulted in the reluctance of private vessels to take responsibility for boats in distress, thus compounding the risk of death at sea⁵³.

2 Legal framework protecting the rights of migrants

The human rights of migrants trying to reach Europe by boat on the Mediterranean may be threatened or violated at various stages of their journey to Europe. After defining some key terms (2.1), the existing international laws and standards seeking to ensure respect of the right of all migrants irrespective of their legal status shall be discussed, with due regard to their extraterritorial application (2.2).

2.1 Definitions

This study uses the generic term of '**migrant**' in a very broad fashion to refer to all people trying to reach a safe haven in the EU by traveling through the Mediterranean Sea. Yet, a distinction is often made between '**regular**' and '**irregular**' migrants. According to the IOM, while the former 'entered a country lawfully and remains in the country in accordance with his or her admission criteria', the latter lack legal status in the country in question 'owing to unauthorized entry, breach of a condition of entry, or the expiry of his or her visa⁵⁴. The term '**illegal**' migrant is also often used, including in EU legislation⁵⁵, but it

⁴⁸ MSF, 'Mediterranean Migration', 25 September 2015, <http://www.msf.org/topics/mediterranean-migration>. It had three boats until 23 September 2015, when MSF had a team providing care on board a search and rescue vessel run by Migrant Offshore Aid Station (MOAS) funded by MSF for 50 %.

⁴⁹ For Greece, see Article 227 of the 1974 Greek Code for Sea Law; for Italy, see Article 1158 of Royal Decree 1942 (as amended in 2002); for Malta, see Arts. 305(1) and 206(1) of the Merchant Shipping Act, Cap 234; for Spain, see Article 195 Penal Code. Provisions were listed by FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 35.

⁵⁰ FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 35.

⁵¹ Frontex, 'Annual Risk Analysis 2015', April 2015, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf, p. 19.

⁵² IMO, 'Address of the Secretary-General at the opening of the ninety-fourth session of the Maritime Safety Committee', 17 November 2014, <http://www.imo.org/en/MediaCentre/SecretaryGeneral/Secretary-GeneralsSpeechesToMeetings/Pages/MSC-94-opening.aspx>

⁵³ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46, para. 46.

⁵⁴ Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150.

⁵⁵ See, e.g., Recital 1 of the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24,

carries a false criminal and discriminatory connotation and should therefore be avoided at all costs. As alluded above (see *supra*, 1.3), migrants fleeing persecution or serious harm are most often entitled to international protection. While such a person awaits determination of his/her legal status in a country other than his/her own, he/she will be named '**asylum seeker**'. Finally, by virtue of Article 1(A) (2) of the 1951 Geneva Convention relating to the Protection of Refugees (Refugee Convention), a **refugee** is someone who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country'⁵⁶. Unless indicated otherwise, this study however discusses the human rights of *all* migrants trying to reach Europe by crossing the Mediterranean, irrespective of their legal status. Indeed, as a group of 674 international legal scholars recently stated, the EU should 'treat all refugees, asylum-seekers and migrants with dignity and respect, respecting and protecting their human rights, irrespective of status'⁵⁷.

2.2 Applicable law

One of the most important human rights principles in the context of boat migrants is the principle of *non-refoulement*, which was first enshrined in international refugee law (2.2.1). Migrants, like all human beings, also enjoy the human rights enshrined in various international and regional human rights treaties (2.2.2). Additionally, international legal instruments have imposed obligations to protect and assist persons in distress at sea on the one hand (2.2.3), and prohibitions of smuggling or human trafficking (2.2.4). The rights and legal principles which are most relevant to migrants aiming to reach the EU are listed below.

2.2.1 International refugee law

All EU Member States have signed and ratified the 1951 **Refugee Convention**, which codifies the rights of refugees at the international level. The principle of *non-refoulement* is enshrined in Article 33:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The UNHCR has recurrently recalled the central importance, non-derogable nature and customary status of the principle of *non-refoulement* set out in Article 33. As it noted in 2001,

[t]he obligation of States not to expel, return or refole refugees to territories where their life or freedom would be threatened is a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the [UDHR]. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established non refoulement as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to refole is also recognized as applying to refugees

30.6.2009: 'cooperation among Member States should be strengthened in the fight against *illegal immigration*' (emphasis added).

⁵⁶ IOM, 'Key Migration Terms', <https://www.iom.int/key-migration-terms#Migrant>

⁵⁷ 'Open Letter to the peoples of Europe, the European Union, EU Member States and their representatives on the Justice and Home Affairs Council', 22 September 2015, <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2015/09/open-letter1.pdf>

irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect refoulement, whether of an individual seeking asylum or in situations of mass influx⁵⁸.

The 1967 Protocol, to which all EU Member States are also Parties, removed all geographic and temporal limitations of the 1951 Convention⁵⁹.

Yet, as the definitions above make it clear, the scope of the 1951 Refugee Convention is limited to those migrants who qualify as 'refugees'. Other migrants, often qualified as 'irregular' migrants, were only granted explicit protection in 1990 in the **International Convention on Protection of the Rights of All Migrant Workers and Members of their Families**⁶⁰. Although the 1990 Convention merely articulates already existing rights in the specific context of migrant workers, it should be noted that none of the EU Member States has yet ratified it.

2.2.2 International and regional human rights law

Migrants, regardless of their nationality or legal status, are also protected by a substantial amount of international and regional human rights instruments as all other human beings. First, at the international level, the **Universal Declaration of Human Rights (UDHR)** recognises the right to life (Article 3), the prohibition of torture or cruel, inhuman or degrading treatment (Article 5), the right of everyone to leave any country, including his own, and to return to his country (Article 13(2)), as well as the right to seek and to enjoy in other countries asylum from persecution (Article 14(1))⁶¹.

The **International Covenant on Civil and Political Rights (ICCPR)**, which has been signed and ratified by all EU Member States, also includes the right to life (Article 6), a prohibition on torture or cruel, inhuman or degrading treatment (Article 7), as well as the right to leave one's country (Article 12)⁶². The UN Human Rights Committee, which is the monitoring body of the ICCPR, has held that 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'⁶³. The Committee also stated that 'the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'⁶⁴.

The **Convention on the Rights of the Child (CRC)** similarly recognises that every child has an inherent right to life (Article 6) and prohibits torture or other cruel, inhuman or degrading treatment or punishment (Article 37(a))⁶⁵. The Committee on the Rights of the Child has also interpreted both Articles

⁵⁸ UNHCR, 'Note on international protection', 13 September 2001, UN Doc A/AC.96/951, para. 16.

⁵⁹ Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

⁶⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, 2220 UNTS 3.

⁶¹ UN General Assembly, 'Universal Declaration of Human Rights', 10 December 1948, A/RES/3/217. Note that although the UDHR is not legally binding as such, those provisions can be said to have been incorporated in international customary law.

⁶² International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

⁶³ Human Rights Committee, General Comment No 20, 'Article 7', 10 March 1992, UN Doc HRI/GEN/1/Rev.1, para. 9.

⁶⁴ Human Rights Committee, General Comment No 31, 'Nature of the General Legal Obligation on States Parties to the Covenant', 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13, para. 9.

⁶⁵ Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

as prohibiting the return of a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child⁶⁶.

An explicit *non-refoulement* provision is finally enshrined in Article 3(1) of the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** which provides that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'⁶⁷. The CAT has been signed and ratified by all EU Member States. It should be noted that many complaints before the UN Human Rights Committee and Committee Against Torture actually concern alleged breaches of the principle of *non-refoulement*.

Second, at the regional level, the **European Convention on Human Rights (ECHR)**⁶⁸ and, for EU Member States and institutions specifically when they implement EU law, the **EU Charter of Fundamental Rights (CFR)**⁶⁹ protect the rights of boat migrants in the Mediterranean. While all EU Member States are party to the ECHR, the EU, until today, is not. This will change in the future, as Article 6(2) Treaty on European Union (TEU) states that the EU 'shall' accede to the ECHR⁷⁰.

Although the list below is far from exhaustive, the following provisions enshrined in the CFR and ECHR represent human rights principles which apply to boat migrants in the Mediterranean and acts performed by the EU or its Member States extraterritorially:

- The **right to life** (Article 2(1) CFR and Article 2 ECHR). The right to life means that unreasonable use of force should not be used to prevent the entry of 'irregular' migrants. In the context of the Mediterranean Sea, the right to life translates into the duty to render assistance to persons in distress at sea (see *infra*).
- The **prohibition of torture, inhuman and degrading treatment** (Article 4 CFR and Article 3 ECHR). The prohibition is absolute in both instruments. As will be seen below, the responsibility of the EU and its Member States may be engaged in actions performed outside of their own territories. When the EU or its Member States cooperate with third countries to perform border controls or return illegally staying third-country nationals, Article 4 CFR and Article 3 ECHR entail an obligation to apply coercive measures in removal proceedings in accordance with the right to dignity and to protect individuals risking persecution in the country of origin or transit.
- The **right to seek asylum** in compliance with the abovementioned 1951 Geneva Convention and 1967 Protocol (Article 18 CFR). The ECHR does not provide for a right to asylum, as it was thought at the time of drafting that the 1951 Geneva Convention would fully cover the rights of refugees.
- The **prohibition of collective expulsion of aliens** (Article 19(1) CFR and Article 4 Protocol 4 to the ECHR). In *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights (ECtHR) held that even acts carried out outside of the national territory, such as the interception and

⁶⁶ Committee on the Rights of the Child, General Comment No 6, 'Treatment of unaccompanied and separated children outside their country of origin', 1 September 2005, UN Doc CRC/GC/2005/6, para. 27.

⁶⁷ International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

⁶⁸ Convention for the Protection of Human Rights and Fundamental Rights Freedoms, 4 November 1950, 213 UNTS 222.

⁶⁹ Charter of Fundamental Rights of the European Union, OJ C 326/931, 26.10.2012.

⁷⁰ In its Opinion 2/13 of 18 December 2014, the Court of Justice of the European Union (CJEU) found that the draft accession agreement was incompatible with EU law. See Opinion 2/13 of 18 December 2014 [2012] C:2014:2454.

disembarkation of boat migrants in a third country without any examination of each individual situation, can amount to collective expulsion⁷¹.

- The **principle of non-refoulement** (Article 19(2) CFR) according to which '[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'. Although the right to *non-refoulement* is not contained explicitly in the ECHR, the ECtHR ruled in the landmark case of *Soering* that the expulsion of an individual '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 [expulsed], faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the [country of destination]⁷².

The applicability of human rights instruments is triggered whenever a situation falls within the jurisdiction of the States (or organisations) party to the instrument. Article 1 ECHR provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I [of the ECHR]'. However, the notion of jurisdiction is not defined by the ECHR. Jurisdiction is primarily territorial⁷³, meaning that it is presumed to be exercised normally throughout the State's territory. Territoriality is, however, not the only possible venue to conclude that a State has jurisdiction for the purposes of ECHR applicability. Indeed, according to ECtHR's case-law, jurisdiction can also be established when a State exercises control over an area or territory, or when its State agents exercise effective control over an individual⁷⁴. Linked to the situation of migrants trying to reach Europe by crossing the Mediterranean by boat, a few interesting observations regarding jurisdiction can be made, based on a couple of scenarios.

Scenario 1: Migrants on a boat trying to cross the Mediterranean have entered the territorial waters of a State party to the ECHR. As territorial waters form part of the territory of a State (Article 2 UNCLOS), the migrants are in the jurisdiction of the State in question and can thus enjoy all rights of the ECHR. The issue of jurisdiction is not questioned here.

Scenario 2: The boat of the migrants is located on the High Seas. A national authority vessel from a ECHR State takes the migrants on board. The vessel then brings the migrants towards authorities of the country of departure, and hands them over to those authorities. As the vessel falls within the jurisdiction of the flag State (Article 92 UNCLOS), and because they were under the effective control of State officials, the migrants in question also fall within the jurisdiction of the ECHR. The ECtHR confirmed this scenario in the *Hirsi Jamaa* case, where it stated that 'in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities. [...] Accordingly, the events [...] fall within Italy's "jurisdiction" within the meaning of Article 1 [ECHR]⁷⁵.

Scenario 3: The boat of the migrants is located on the High Seas or within the territorial waters of the departure State. National authority vessels from a ECHR State puncture the rubber boats, causing the boat to sink and the migrants to drown. In this scenario, even though the persons were not on board of a

⁷¹ ECtHR, *Case of Hirsi Jamaa and others v. Italy*, Judgment of 23 February 2012, Appl. No. 27765/09, paras 159-186.

⁷² ECtHR, *Soering v. the UK*, Judgment of 7 July 1989, Appl. No. 14038/88, para. 91. See also ECtHR, *Jabari v. Turkey*, Judgment of 11 July 2000, Appl. No. 40035/98, para. 38.

⁷³ ECtHR, *Banković and others v. Belgium and others*, Decision on the Admissibility of 12 December 2001, Appl. No. 52207/99, paras 59-61.

⁷⁴ ECtHR, *Al Skeini v. United Kingdom*, Judgment of 7 July 2011, Appl. No. 55721/07, paras 133-137 (Stage agent authority and control), paras 138-140 (effective control over an area).

⁷⁵ ECtHR, *Hirsi Jamaa and others v. Italy*, Judgment of 23 February 2012, Appl. No. 27765/09, paras 81-82.

ECHR State vessel, it is accepted that the incident occurred within the jurisdiction of the ECHR State. In the *Xhavara* case, concerning an Albanese migrant boat that sunk after being struck by an Italian marine vessel outside Italian territorial waters, the ECtHR did not object that the victims had been within the jurisdiction of Italy⁷⁶. In this scenario, the violated human rights provision would be Article 2 ECHR, protecting the right to life.

Scenario 4: The boat of the migrants is located on the High Seas. National authority vessels from a ECHR State encircle the boat and escort it back to the national waters of the State of departure. In this scenario, there is no jurisdiction on the basis of effective control over persons, as the migrants remain in their own boat and do not board onto another vessel. It therefore remains open to debate whether this situation would trigger jurisdiction of a ECHR State. According to Borelli and Stanford, '[b]oth common sense and an interpretation of the ECHR in light of the principle of effectiveness would suggest that in such a situation the Court would find that individuals on board are within the jurisdiction of the intercepting Contracting State'⁷⁷.

Scenario 5: Migrants on a boat trying to cross to Europe drown before entering in territorial waters. No vessels of European Member States were present when this incident occurred. As in this case the establishment of jurisdiction cannot be based upon the territoriality or effective control over persons or over an area, the establishment of jurisdiction is even more debatable than in scenario 4. A purely conventional approach would clearly not accept jurisdiction in this scenario. However, in line with the functional approach to jurisdiction of the ECHR, Spijkerboer argues that the deaths could have occurred within the jurisdiction of European Member States because they are the result of strict border policies which make a safe and legal entry within the EU impossible⁷⁸. The ECtHR has indeed in some instances held that 'in exceptional cases [...] acts of the Contracting States performed, or producing effects, outside their territories can constitute and exercise of jurisdiction by them [...]'⁷⁹. Nevertheless, if one accepts that boat migrants dying on the Mediterranean fall within the jurisdiction of EU States because of EU border policies, a next step is to determine which human rights of the migrants have been violated. Logically this would be the right to life as enshrined in Article 2 ECHR. Under a conventional approach, one would argue that the link between EU policies and the death of migrants on the Mediterranean is too remote to conclude that a violation of Article 2 ECHR has occurred. However, if one adopts a functional approach, as Spijkerboer does, one could argue that at least the positive obligations linked to Article 2 ECHR are relevant here: a duty to carry out an investigation into the number of deaths at sea, an obligation to reassess the EU policies in light of such data, and lastly, the obligation to identify the victims and inform their relatives of their death, and deal with the dead bodies in accordance with the relatives' wishes⁸⁰.

⁷⁶ ECtHR, *Xhavara and others v. Italy and Albania*, Decision on the Admissibility of 11 January 2001, Appl. No. 39473/98.

⁷⁷ S. Borelli and B. Stanford, 'Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights', *Uluslararası Hukuk ve Politika – Review of International Law and Politics*, Vol 10, 2014, p. 44.

⁷⁸ T. Spijkerboer, "Moving Migrants, States, and Rights". Human Rights and Border Deaths', *Law and Ethics of Human Rights*, Vol 213, No 2, 2013, p. 226.

⁷⁹ ECtHR, *Hirsi Jamaa and others v. Italy*, Judgment of 23 February 2012, Appl. No. 27765/09, para. 71.

⁸⁰ T. Spijkerboer, "Moving Migrants, States, and Rights". Human Rights and Border Deaths', *Law and Ethics of Human Rights*, Vol 213, No 2, 2013, p. 235.

2.2.3 International law of the sea

The 1982 **United Nations Convention on the Law of the Sea (UNCLOS)** determines that a ship falls under the jurisdiction of its flag State on the high seas (Article 92(1)) and requires ship masters to render assistance and rescue persons in distress (Article 98)⁸¹:

1. 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:
 - a. to render assistance to any person found at sea in danger of being lost;
 - b. to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - c. after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

The duty to render assistance at sea is also included in three other treaties:

- the 1979 **International Convention on Maritime Search and Rescue (SAR Convention)**⁸², in its Annex, at paragraph 2.1.10:

Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

and paragraph 3.1.9:

Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.

- the 1974 **Convention for the Safety of Life at Sea (SOLAS)**⁸³, in its Annex, Chapter V, Regulation 10:

The master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress.

- the 1989 **International Convention on Salvage**⁸⁴, in Article 10:

⁸¹ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

⁸² International Convention on maritime search and rescue, 27 April 1979, 1405 UNTS 97.

⁸³ Convention for the Safety of Life at Sea, 1 November 1974, 1184 UNTS 278.

1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.
3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.

2.2.4 International law prohibiting the smuggling of migrants

The 2000 **Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol)**⁸⁵ requires the 141 Contracting Parties (including the EU and all its Member States) that have ratified it to prosecute trafficking and smuggling as international criminal offences. The Palermo Protocol clearly reiterates that any action undertaken against smuggling should take into account the human rights of the migrants, regardless of their legal status or nationality, by providing the following in the saving clause of Article 14(1):

Nothing in this Protocol shall 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 and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

It should be noted that Article 16 provides for a positive duty to preserve and protect the rights of victims of smuggling, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, with a particular attention to the ‘special needs of women and children’.

3 Human rights violations

Having discussed the applicable legal framework, the analysis shall now focus on the possible human rights violations migrants trying to cross the Mediterranean are faced with *when they have not yet reached the EU*. This Part investigates possible violations in three particular phases of the migratory route to the EU: the pre-departure phase, whereby migrants travel from their country of origin to the country of departure and often spend a considerable amount of time in the latter, waiting for a boat to depart (3.1); the actual crossing of the Mediterranean by boat (3.2), and their interception by coast guards and possible expulsion to their country of origin or transit in what has been termed ‘push-back operations’ (3.3). This part should make clear that migrants face violations of their most basic human rights at all stages of the migratory process⁸⁶.

3.1 Pre-departure phase

With regard to the pre-departure phase, the situation is different for those **migrants who depart from countries bordering the Mediterranean** (for example Moroccans or Tunisians wishing to reach Europe)

⁸⁴ International Convention on Salvage, 28 April 1989, 1953 UNTS 165.

⁸⁵ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2241 UNTS 507.

⁸⁶ As indicated *supra*, most migrants who arrive in Southern Europe do not stay there but travel to Northern destinations such as Germany or Sweden. Southern European countries therefore often also form part of the transit route a migrant undertakes from departure until destination country. As this report focuses, however, on the human rights of migrants when they have *not yet reached* the EU, the situation of migrants in EU Member States bordering the Mediterranean shall not be dealt with here. This does not, however, mean that no human rights issues exist in those contexts.

and those **migrants originating from Sub-Saharan countries** (Somalia, Eritrea, Nigeria) or the Middle East (Syria, Afghanistan). The first category can possibly rely on a network of family and friends before their departure by boat. However, when this is not the case, migrants risk detention in overcrowded facilities during several months⁸⁷. Such situations constitute violations of the right to liberty and the right to be protected from arbitrary arrest and detention.

As indicated in Part 1 of this study, the majority of the migrants belongs to the second category. These migrants have already travelled a very long distance to their intended country of departure, and thus faced additional risks and human rights violations e.g. when crossing the Sahara desert, 'where rough natural conditions, corrupt officials and bandits put the life and safety of migrants at risk'⁸⁸. In addition, women migrants crossing the Sahara are often victims of rape, violence or other mistreatment⁸⁹. Once the country of departure has been reached, migrants often stay in 'makeshift camps' – i.e. camps organised and managed by migrant communities, regularly dismantled by local police. In other cases, migrants are locked up by the smugglers while waiting for a boat to Europe. In many of these countries, migrants lack access to education, health care and other basic services, in violation of the economic, social and cultural rights enshrined in the ICESCR. In Turkey, for example, the Special Rapporteur on the human rights of migrants observed that '[t]he requirement to have a foreigner identification number in order to access any form of public service means that irregular migrants, including children, are not able to receive education or to get treatment for health problems', which constitutes a violation of the CRC⁹⁰.

Migrants who are apprehended by the authorities of transit countries may be taken to immigration **detention** facilities on the ground that they are considered to be 'illegal', regardless of the valid refugee claims they may have under international law. As the Special Rapporteur on the human rights of migrants indicated, '[w]omen migrants who are detained are vulnerable to sexual violence, which may be committed by male detainees or guards'⁹¹. The Special Rapporteur also expressed his concerns as to psychological and physical damages to other 'vulnerable categories of migrants, including victims of torture, unaccompanied older persons, persons with a mental or physical disability, and persons living with HIV/AIDS'⁹². In a report of 2013, he 'witnessed the detention of children and families, and the lack of a proper system of guardianship for children' in Tunisia, Turkey and Greece⁹³. In Turkey, he observed that 'when apprehended with their mothers, boys over the age of 12 are automatically separated from their mothers and placed in orphanages'⁹⁴. In Turkey, he also deplored the lack of healthcare to detainees and he noted plans for the funding of new detention facilities funded by the EU⁹⁵. In Tunisia, he deplored the detention of unaccompanied minors⁹⁶. In Libya, 15 detention centres are run by the 'Department for Combatting Illegal Migration'. In April 2015, the UNHCR noted that it was aware of at least 2 663 migrants

⁸⁷ FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 24.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Addendum, 'Mission to Turkey (25-29 June 2012)', 17 April 2013, UN Doc. A/HRC/23/46/Add.2, para. 69.

⁹¹ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 2 April 2012, UN Doc. A/HRC/20/24, para. 36.

⁹² *Id.*, para. 43.

⁹³ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46, para. 40.

⁹⁴ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Addendum, 'Mission to Turkey (25-29 June 2012)', 17 April 2013, UN Doc. A/HRC/23/46/Add.2, para. 57.

⁹⁵ *Id.*, para. 52.

⁹⁶ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Addendum, 'Mission to Tunisia', 3 May 2013, UN Doc. A/HRC/23/46/Add.1, para. 65.

or asylum-seekers spread in these centres out of some 36 000 refugees and asylum-seekers who were registered with UNHCR in Libya⁹⁷. The UNHCR further observed that the conditions in these centers were poor and that they urgently needed 'medical help, improved ventilation and sanitation as well as relief items'⁹⁸. In the case of Libya, a recent briefing published by Amnesty International confirmed and further developed these allegations as follows:

foreign nationals travelling irregularly to and from Libya face abuses, including abductions for ransom, torture and other ill-treatment, and in some cases rape and other forms of sexual violence at all stages of the smuggling routes running from west and east Africa towards the Libyan coast. Most often they are handed over to criminal groups upon entry to Libya at the country's southern borders or in major transit cities along the migration routes such as Ajdabya and Sabha. At times, the smugglers themselves hold the migrants and refugees in remote areas in the desert forcing them to call their families to pay a ransom. [...] Torture and other ill-treatment in immigration detention centres have remained widespread. In many cases, migrants and refugees attempting to cross the Mediterranean Sea have been subjected to prolonged beatings in such facilities following their interception and arrest by the Libyan coastguard or militias acting on their own initiative in the absence of strong state institutions. Women held in these facilities, which lack female guards, are vulnerable to sexual violence and harassment⁹⁹.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) opined in 2010 that the practice of detaining migrants in such detention facilities put them at risk of severe ill-treatment¹⁰⁰. These cases indeed demonstrate that numerous human rights of these migrants are threatened and/or violated at the pre-departure phase. These rights include **civil and political rights** as the right to life, the protection from torture and inhuman or degrading treatment or punishment, the protection from slavery and forced labour, the respect for private and family life, and the right to be protected from arbitrary detention; and **economic and social rights** as the right to adequate housing, right to primary and secondary school education for children, rights to employment and access to emergency health care. The detention of migrant children in these circumstances also violates the **rights of the child** which, *inter alia*, prohibit the unlawful or arbitrary deprivation of their liberty (Article 37(b) CRC). In light thereof, the Committee on the Rights of the Child stated that 'unaccompanied or separated children should not, as a general rule, be detained' and that '[d]etention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof'¹⁰¹. Article 24 of the CFR provides that '[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.

3.2 Crossing of the Mediterranean and travel to the EU

The actual crossing of the Mediterranean by boat also entails serious risks and human rights violations. Most fundamentally, in the absence of regular and safer migration opportunities to seek asylum in the EU, the increasing use by migrants of precarious routes such as through the Central Mediterranean Sea

⁹⁷ UNHCR, 'UNHCR works to ease dire conditions in Libya's immigration detention centres', Briefing Note, 28 April 2015, <http://www.unhcr.org/553f65519.html>

⁹⁸ *Id.*

⁹⁹ Amnesty International Briefing, 'Libya is full of cruelty': Stories of abduction, sexual violence and abuse from migrants and refugees, MDE 19/1578/2015, 10 May 2015, p. 5.

¹⁰⁰ CPT, 'Report to the Italian Government on the visit to Italy carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009', 28 April 2010, para. 47.

¹⁰¹ Committee on the Rights of the Child, General Comment No 6, 'Treatment of unaccompanied and separated children outside their country of origin', 1 September 2005, UN Doc CRC/GC/2005/6, para. 61.

(see *supra*) results 'in large-scale violations of the **right to life**'¹⁰². The Commissioner for Human Rights of the Council of Europe observed that migrants were at risk during their journey of losing their life or facing serious injury 'as a result of (a) the actions of private individuals in the course of trafficking and smuggling by land or at sea; and (b) excessive use of force by law enforcement officials charged with border control'¹⁰³.

The violations of the right to life as a result of public authorities' actions will be further discussed *infra*, in Section 3.3, presenting push-back operations. As far as **private individuals** are concerned, it is undeniable that '[s]mugglers have displayed a remarkable disregard for the dignity, life and rights of migrants and have systematically exploited those desperate to reach safer soil'¹⁰⁴. The right to life of migrants is indeed exposed to numerous threats, starting with the use of unseaworthy boats to cross the Mediterranean. The type of boat that is used depends on a number of factors: the distance to be covered, the border controls to be avoided, the means available and whether or not the boat will be re-used or rather abandoned after the journey¹⁰⁵. In 2013, the FRA reported that inflatable speed boats, wooden or fiberglass boats, old fishing boats or larger vessels, and sometimes even yachts or sailboats were being used to cross the Mediterranean¹⁰⁶, often overcrowded. Frontex however reported that since September 2014 a new *modus operandi* was observed: the use of cargo ships to transport migrants from the Turkish coast to Italy¹⁰⁷.

In addition to the type of boat used, the safety of the crossing also depends on various other factors, such as **the route, the weather and sea conditions, the number of people on board and the navigations skills of the captain or migrants**¹⁰⁸. While the type of boat, its condition (some have powerful engines, others not) and the weather conditions may pose serious risks, another risk factor arises when migrants are asked to operate the boat themselves. In this manner, smugglers avoid being arrested upon arrival. In most cases the migrants instructed to pilot the boat are selected at random and may only have limited sea experience. Proper navigation equipment is not always present. Because of all these factors, it is not uncommon that migrants get lost at sea, that they run out of fuel, that they encounter heavy seas or have engine problems, and in the worst case scenario, that the boat fills with water. Life jackets are not always present, first aid kits have been rarely reported. In addition to the difficulties linked to the type of boat and navigation problems, **shortage of food and water** during the boat trip also poses serious risks to the migrants. Interviews with migrants carried out by FRA show that migrants are sometimes discouraged or even prohibited from bringing food with them on the boat¹⁰⁹. These situations represent violations of the right to food and the right to water.

Furthermore, once migrants reach a Member State of the EU like Greece, they often have to go through the **Western Balkans route** to reach their final destination in western and northern Europe. The upsurge

¹⁰² Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', 8 May 2015, UN Doc. A/HRC/29/36, para. 26.

¹⁰³ Commissioner for Human Rights, 'The Human Rights of Irregular Migrants in Europe', CommDH/IssuePaper(2007)1, Strasbourg, 17 December 2007, p. 3.

¹⁰⁴ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', 8 May 2015, UN Doc. A/HRC/29/36, para. 26.

¹⁰⁵ *Id.*, para. 25.

¹⁰⁶ FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 25.

¹⁰⁷ Frontex, 'Annual Risk Analysis 2015', April 2015, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf, p. 5.

¹⁰⁸ FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 25.

¹⁰⁹ *Id.*, p. 27

of migrants in this region has put severe pressure on the hosting capacities of countries like Serbia and Macedonia, where many among them have been victims of trafficking by smugglers and ill-treatments by the police. Due to the lack of shelters, thousands of migrants sleep there in the open, without any access to medical care, toilets or washing facilities¹¹⁰.

The situation is even worse for vulnerable groups of migrants, such as (pregnant) women and children¹¹¹. Frontex' Risk Analysis of 2015 acknowledged the need for European border-control authorities to be prepared 'to manage flow of vulnerable people, including numerous children' and to identify in due time '[a]pplicants in need of special procedural guarantees, e.g. due to their age, disability, illness, sexual orientation or traumatic experiences'¹¹². A first problematic issue is the sexual violence and slavery against **women**¹¹³. IOM reported that during the trip from Libya to Italy, Nigerian women 'were repeatedly raped or forced to prostitute themselves in near slavery condition'¹¹⁴. Another IOM report indicated that the number of Nigerian women victims of sexual trafficking who arrived in Italy 'increased by 300 % in 2014'¹¹⁵. The rights of these women to be protected against inhumane, cruel or degrading treatment or punishment are undeniably violated in such cases. **Migrant children**, particularly unaccompanied ones (see *supra*, 1.2), 'are highly vulnerable to becoming victims of violence and abuse during their migratory journeys'¹¹⁶. They also need specific psychological support. In the Western Balkans, ECRE reported 'the lack of protection sensitive system for screening and referral of different vulnerable groups of people, including unaccompanied children'¹¹⁷. The rights afforded to every child by the aforementioned CRC, like the right to life, survival and development in Article 6, are often violated in these circumstances.

3.3 Push-back operations

Violations of the right to *non-refoulement* may actually be caused by national coast guards trying to avoid that migrant boats reach certain territorial waters by returning them to their points of departure in so-called '**push-back operations**'. Scenarios 2 and 4 depicted above in the analysis of extraterritorial jurisdiction (see *supra*, 2.2.2) concerned such push-back operations. There have been reports of push-backs by individual States, such as Italy, Greece or Spain. In addition, similar operations have been carried out under the auspices of Frontex¹¹⁸.

¹¹⁰ UNHCR, 'Europe's Refugee Emergency – Update #1 on the Situation in Greece, the Former Yugoslav Republic of Macedonia and Serbia', 1 September 2015, <http://reliefweb.int/sites/reliefweb.int/files/resources/Operational%20Update%20%231%20-%20Greece%20FYRM%20and%20Serbia%20-%203%20Jun%20-%201%20Sep%202015.pdf>

¹¹¹ Other vulnerable groups include stateless persons, elderly people, victims of trafficking, migrants with illnesses and migrants with disabilities, but accurate and up-to-date information about their situation across all Mediterranean migratory routes is scarce.

¹¹² Frontex, 'Annual Risk Analysis 2015', April 2015, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf, p. 48.

¹¹³ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', 8 May 2015, UN Doc. A/HRC/29/36, para. 31.

¹¹⁴ IOM, 'More Women Making Dangerous Mediterranean Crossing - Many Victims of Abuse', 11 July 2014, <https://www.iom.int/news/more-women-making-dangerous-mediterranean-crossing-many-victims-abuse>

¹¹⁵ IOM & Altai Consulting, 'Migration Trends Across the Mediterranean: Connecting the Dots', June 2015, http://www.altaiconsulting.com/docs/migration/Altai_Migration_trends_across_the_Mediterranean.pdf, p. 8.

¹¹⁶ IOM, *Children on the Move*, 2013, http://publications.iom.int/bookstore/free/Children_on_the_Move_19Apr.pdf, p. 2.

¹¹⁷ ECRE, 'Refugees' fundamental rights seriously violated on the Western Balkans route', 18 September 2015, <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1192-refugees-fundamental-rights-seriously-violated-on-the-western-balkans-route.html>

¹¹⁸ S. Borelli & B. Stanford, 'Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights', *Uluslararası Hukuk ve Politika – Review of International Law and Politics*, Vol 10, 2014, pp. 34-35.

As to push-back operations carried out by **Greece**, the German NGO Pro Asyl reported in 2007 that

[the Greek] coast guard attempts to block small boats carrying refugees and push them out of the national territorial waters. In order to do so, they circle the boats with their own boats causing waves. These risky maneuvers can result in the death of refugees. Refugees who are already in Greek territorial waters or even at the Greek coast are being driven back into Turkish waters. Their dinghies are deliberately damaged, so that they can, at best, return to the Turkish coast¹¹⁹.

According to the FRA, the situation had improved between 2010 and 2012, a period in which no push-backs by Greek authorities were reported¹²⁰. However, in 2014 and 2015, Greek authorities have again been criticised for allegedly carrying out push-back operations¹²¹.

Similarly, when **Italy** signed a Treaty on Friendship, Partnership and Cooperation with Libya in 2008, the two countries agreed to jointly fight clandestine migration and from May 2009, Italy started push-back operations in order to return migrants into Libyan waters. When in 2011 armed violence erupted in Libya, Italy stopped push-back operations towards that country. Nevertheless, returns to Tunisia seem to have taken place¹²².

Spain has adopted a policy of push-backs of migrant boats on the Atlantic trying to land on its Southern coast¹²³. The FRA reported that at least two interviewed migrants had been intercepted at sea by Spanish vessels and delivered to Moroccan authorities¹²⁴. Furthermore, reports show that push-backs on land, from Spanish enclaves into Morocco, occur regularly¹²⁵. **Malta** seems thus far not to have adopted any policy of push-back operations, even if the Maltese Armed Forces allegedly sent back a group of Somalis intercepted at sea to Libya in July 2010¹²⁶.

Frontex has coordinated a number of operations of interception and diversion at sea. The first one, Operation Hera I, did not concern the Mediterranean but was carried out in 2006 in the Atlantic ocean, and officially had as aim to enhance 'the control of the area between the West African coast and the Canary Islands, thus diverting the vessels using this migration route and contributing to the reduction of human lives lost at sea during the dangerous long journey'¹²⁷. As noted by Borelli and Stanford, while saving lives might well have been a driving factor, 'it seems clear that a major, if not the principal,

¹¹⁹ Pro Asyl, 'The truth may be bitter, but it must be told. The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard', October 2007,

http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Broschueren_pdf/GriechenlandDoku_dt_klein.pdf, p. 6.

¹²⁰ FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 47.

¹²¹ See UNHCR, 'Statement on boat incident off Greece coast', Press Release, 21 January 2014, <http://www.unhcr.org/52df83d49.htm>; ECRE, '12 refugees die during alleged push-back operation off Greek island', 22 January 2014, http://www.ecre.org/index.php?option=com_downloads&id=843

¹²² FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 48.

¹²³ UNHCR, 'Refugee protection and international migration: a review of UNHCR's role in the Canary Islands, Spain', Evaluation Report, April 2009, <http://www.unhcr.org/4a1d2d7d6.html>

¹²⁴ FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 47.

¹²⁵ See, e.g., HRW, 'Spain: excessive force in Melilla. Ensure accountability; halt summary returns', 21 October 2014, <https://www.hrw.org/news/2014/10/21/spain-excessive-force-melilla>; Amnesty International, ECRE, HRW, Rights International Spain, 'Joint Letter on Spain to the Commissioner for Migration and Home Affairs of the European Union', 6 November 2014, <https://www.hrw.org/news/2014/11/06/joint-letter-spain-commissioner-migration-and-home-affairs-european-union>

¹²⁶ FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 48.

¹²⁷ S. Borelli and B. Stanford, 'Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights', *Uluslararası Hukuk ve Politika – Review of International Law and Politics*, Vol 10, 2014, p. 34.

motivating factor, was preventing migrants from reaching the shores of the Canary Islands¹²⁸. Similar operations were carried out in the Mediterranean: Operation Nautilus (2007), Operation Indalo (2011), Operation Hermes (2011), and Operation Aeneas (2012). Frontex' operations have attracted much criticism as allegations often arise in NGO and press reports that it participates in push-back operations. This position was also shared by the legal literature, which 'ascertained that diversion operations, as carried out by [Member States] and Frontex during JO Hera and in occasion or alongside JO Nautilus violate several legal frameworks: interceptions and push-back constitute refoulement and therefore are in breach of the international refugee law, as they have the effect of sending persons back to the place of departure'¹²⁹.

According to the authorities carrying out push-back operations, these operations have been 'particularly effective in tackling irregular migration by sea', leading to 'a sharp decline in the number of undocumented individuals reaching European shores'¹³⁰. However, it is now widely recognised that the practice of push-backs leads to serious **human rights violations**, especially of the principle of *non-refoulement*. Indeed, once migrants are pushed-back to the country of departure, they face detention (in Morocco, Algeria, Tunisia, Libya and Egypt) and possible ill-treatment because they left a State's territory in an irregular manner¹³¹. The CPT thus unambiguously denounced the method of push-backs in a critical report of 2010¹³². In 2012, the ECtHR famously ruled in *Hirsi Jamaa and Others v. Italy* that Italy was supposed to know that the Somali and Eritrean migrants – including those with a right to asylum and international protection – who they intercepted in the Mediterranean Sea and forced to return to Libya under a readmission agreement risked to be subject to serious human rights violations¹³³. Italy was found to violate Articles 3 (prohibition of ill-treatment), 4 (prohibition of slavery and forced labour) and 14 (prohibition of discrimination) of the ECHR¹³⁴.

Most fundamentally, **lives of migrants** may be put at risk by such operations, as reported by Amnesty International in a 2013 report¹³⁵. This is particularly true when damages are caused to the boats themselves by coastguards. For instance, Greek coastguards have recently been accused of sinking a boat with migrants¹³⁶. Other similar cases were reported by Amnesty International in which migrants were pushed back to Turkey and their inflatable boats were 'rammed or knifed, or nearly capsized while they were being towed or circled by a Greek coastguard boat, their engines disabled, their oars removed, and their occupants left in the middle of the sea on unseaworthy vessels'¹³⁷. Moreover, testimonies of certain migrants pointed at ill-treatments during these push-back operations. For instance, some migrants claimed that they had been beaten with batons, others to have been stripped naked¹³⁸. These examples

¹²⁸ *Id.*, pp. 34-35.

¹²⁹ L. Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border', *Journal of Contemporary European Research*, Vol 7, No 4, 2011, p. 482.

¹³⁰ *Id.*, p. 33.

¹³¹ For a detailed overview of the possible duration of the imprisonment and the amount of the fine listed per country, see FRA, 'Fundamental Rights at Europe's southern sea borders', July 2013, http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf, p. 43.

¹³² CPT, 'Report to the Italian Government on the visit to Italy carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009', 28 April 2010, 29 pp.

¹³³ ECtHR, *Case of Hirsi Jamaa and others v. Italy*, Judgment of 23 February 2012, Appl. No. 27765/09, paras 125-126.

¹³⁴ *Id.*, paras 113-138.

¹³⁵ Amnesty International, 'Frontier Europe: Human Rights Abuses on Greece's Borders with Turkey', 2013, p. 11.

¹³⁶ 'Turkish fisherman claims Greek officials intentionally sank migrant boat', Euronews, 14 August 2015, <http://www.euronews.com/2015/08/14/turkish-fisherman-claims-greek-officials-intentionally-sank-migrant-boat/>

¹³⁷ Amnesty International, 'Frontier Europe: Human Rights Abuses on Greece's Borders with Turkey', 2013, <https://www.amnesty.org/en/documents/EUR25/008/2013/en/>, p. 12.

¹³⁸ *Id.*, pp. 13-14.

undeniably constitute violations of the right to be protected against inhumane, cruel or degrading treatment or punishment. Other human rights that are frequently violated during these operations are the right to property and the right to privacy. Amnesty International noted that '[a]lmost all interviewed described being searched and their mobile phones, money, jewellery, baggage containing clothes and family photographs confiscated or thrown into the sea'¹³⁹.

4 Human rights impact assessment of EU migration policy

After briefly outlining the competence of the EU and the power of the European Parliament in the field of migration (4.1), this fourth part analyses and evaluates the existing and planned EU policies and actions to better protect the human rights of migrants in sea borders surveillance, such as Frontex JOs (Triton and Poseidon) and military operations (EUNAVFOR MED/Sophia) (4.2), as well as its cooperation with third countries (4.3). The role of the European Parliament is identified throughout this analysis. It should be stressed, however, that the EU migration policy has gradually been built and implemented through a complex patchwork of both political and legal instruments, cooperation arrangements, as well as a wide range of operational and capacity-building programmes¹⁴⁰. The construction of the EU external migration policy is still in the making and will considerably evolve as the EU searches to respond more adequately to the current refugee crisis in the Mediterranean. Furthermore, this study only explores the aspects of EU migration policy which affect the rights of migrants *before* entering, or *after* they have left the territory of the EU (returns). This means that key EU legal instruments such as the Employers Sanctions Directive¹⁴¹ which regulates the situation of 'illegally staying third-country nationals' *within* the EU, or the Return Directive¹⁴² which allows detention of 'illegally staying third-country nationals' also *within* the EU for the purpose of removal are not discussed at length in this study.

4.1 EU legal and policy framework in the field of migration

The Amsterdam Treaty of 1999 made the EU (then European Community) competent for migration and asylum policies. Today, since the entry into force of the Lisbon Treaty in December 2009, the EU and its Member States share competence in the **Area of Freedom, Security and Justice (AFSJ)** (Article 4(2)(j) Treaty on the Functioning of the European Union (TFEU)), which means that Member States may only exercise their competence to the extent that the EU has not exercised its competence (Article 2(2) TFEU). Article 67(1) TFEU provides that the EU 'shall constitute an [AFSJ] *with respect for fundamental rights*' (emphasis added). Another welcome post-Lisbon development is that, although the Court of Justice of the European Union (CJEU) had previously no power to review Council decisions adopted in this area, it has now jurisdiction to review legislation that would not meet the human rights standards detailed above.

Articles 78 and 79 TFEU lay down the legal basis for EU action to prevent irregular immigration and protect the rights of migrants in the Mediterranean. Article 78(1) provides that '[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and *ensuring compliance with the principle of non-refoulement*' and that '[t]his policy must be *in accordance with the*

¹³⁹ *Id.*, p. 13.

¹⁴⁰ For a historical overview, see S. Velluti, 'Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective', in A. Abass & F. Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective*, Ashgate, 2014, p. 146.

¹⁴¹ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24, 30.6.2009.

¹⁴² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008.

Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’ (emphasis added). Article 78(2) TFEU introduced the ordinary legislative procedure in the field of immigration policies, which puts the European Parliament on an equal footing with the Council in the decision-making in this area. However, Article 78(3) TFEU provides that the Council may act alone, after consulting the Parliament, in case one or more Member States are confronted ‘by an emergency situation characterised by a sudden inflow of nationals of third countries’.

Article 79(1) states that ‘[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings’. Here too, the European Parliament and the Council act according to the ordinary legislative procedures to adopt measures against illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation, as well as against trafficking in persons, in particular women and children (Article 79(2)(c)-(d)). Article 79(3) finally makes the external competence of the EU in the field of migration explicit by authorising it to conclude agreements with third countries for the readmission of illegally staying third-country nationals (see *infra*).

According to Article 68 TFEU, ‘[t]he European Council shall define the strategic guidelines for legislative and operational planning within the [AFSJ]’. In June 2014, the European Council adopted its latest multi-annual programme in the AFSJ: the **Strategic Agenda for the Union in times of change** (2015-2020). Therein, the European Council set four major objectives over the five coming years until 2020: (i) strengthen and expand regional protection programmes (RPPs), (ii) forcefully address smuggling and trafficking of human beings, (iii) establish an effective common return policy, and (iv) fully implement the actions identified by the Task Force Mediterranean, which was established after the tragic deaths off the coast of Lampedusa in October 2013¹⁴³.

Besides the measures taken under the AFSJ, migration has also become a specific component of the EU’s **Common Security and Defence Policy (CSDP)**. Decisions relating to CSDP operations such as the recent EUNAVFOR MED¹⁴⁴ are adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini, or an initiative from a Member State (Article 42(4) TEU). The role of the European Parliament in the CSDP is much more limited than in the AFSJ. Yet, the European Parliament ‘may address questions or make recommendations to the Council or the High Representative’, and ‘[t]wice a year it shall hold a debate on progress in implementing the [CSDP]’ (Article 36(2) TEU).

With the unprecedented migration and refugee crisis in the Mediterranean, migration quickly became a central priority of EU institutions and the need for a more holistic approach became more pressing. Following calls for urgent action from the European Council¹⁴⁵, the Joint Foreign and Home Affairs Council¹⁴⁶, and the European Parliament¹⁴⁷, the European Commission launched on 13 May 2015 the **European Agenda on Migration**, which ‘brings together the different steps the [EU] should take now,

¹⁴³ The three preceding multi-annual programmes which gradually built up the AFSJ are: (i) the Tampere Programme (1999-2004), (ii) the Hague programme (2005-2009), (iii) the Stockholm Programme (2010-2014).

¹⁴⁴ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31, 19.5.2015.

¹⁴⁵ European Council, ‘Special meeting of the European Council’, Statement, 23 April 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/>.

¹⁴⁶ European Commission, ‘Joint Foreign and Home Affairs Council: Ten point action plan on migration’, Press release, 20 April 2015, http://europa.eu/rapid/press-release_IP-15-4813_en.htm.

¹⁴⁷ European Parliament, ‘Resolution on the latest tragedies in the Mediterranean and EU Migration and asylum policies’, 2015/2660(RSP), 29 April 2015, para. 5.

and in the coming years, to build up a coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration¹⁴⁸. It includes immediate measures to cope with the crisis in the Mediterranean such as the tripling of the budget of the Triton and Poseidon JOs. In the longer term, it focuses on four areas of action: (i) reducing the incentives for irregular migration; (ii) border management to save lives and secure external borders; (iii) a strong common asylum policy as part of Europe's duty to protect; (iv) a new policy on legal migration.

Following the European Agenda on Migration, the Commission presented two implementation packages on 27 May 2015 and on 9 September 2015.

The first package of 27 May 2015 included six measures:

- (i) the relocation from Italy and Greece 40 000 persons in clear need of international protection¹⁴⁹,
- (ii) the resettlement from third countries of 20 000 persons in clear need of international protection¹⁵⁰,
- (iii) the EU Action Plan against migrant smuggling¹⁵¹,
- (iv) guidance to Member States to facilitate fingerprinting of asylum applicants¹⁵²,
- (v) public consultations on the EU's labour policies and 'the elaboration of a new European policy on legal migration'¹⁵³,
- (vi) a new operational plan for JO Triton.

The second package of 9 September 2015 put forward eight measures:

- (i) the relocation from Italy, Greece and Hungary of 120 000 persons in clear need of international protection¹⁵⁴,
- (ii) the proposal for a permanent crisis relocation mechanism under the Dublin system (which establishes the criteria for determining which Member State is responsible for examining an application for international protection)¹⁵⁵,

¹⁴⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European Agenda on Migration', COM(2015- 240 final, 13.5.2015, p. 2.

¹⁴⁹ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015.

¹⁵⁰ Council of the European Union, 'Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection', 22 July 2015, 11130/15.

¹⁵¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'EU Action Plan against migrant smuggling (2015 – 2020)', COM(2015) 285 final, 27.5.2015.

¹⁵² European Commission, Commission Staff Working Document, on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints', SWD(2015) 150 final, 27.5.2015.

¹⁵³ European Commission, 'Public consultation on the EU Blue Card and the EU's labour migration policies', http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting_0029_en.htm

¹⁵⁴ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80, 24.9.2015.

¹⁵⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council, 'establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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', COM(2015) 450 final, 9.9.2015.

- (iii) the proposal for a regulation establishing a European list of safe countries in order to support the swift processing of asylum applications from persons originating from these countries¹⁵⁶,
- (iv) an Action Plan on return¹⁵⁷,
- (v) a return handbook to be used by Member States when returning illegally staying third-country nationals¹⁵⁸,
- (vi) public procurement rules for Refugee Support Measures¹⁵⁹,
- (vii) a Communication on the external dimension of the refugee crisis¹⁶⁰,
- (viii) the proposal to create an Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa¹⁶¹.

On 23 September 2015, in order to further implement the Agenda, the Commission identified priority actions in terms of (i) operational measures, (ii) budgetary support and (iii) implementation of EU law, all to be taken within six months¹⁶². The Commission's plan was endorsed by the informal meeting of EU heads of state or government on migration on the same day¹⁶³. On 14 October 2015, before the meeting of the European Council on 15-16 October 2015, the Commission commented on the state of play of the implementation of these priority actions¹⁶⁴. First, regarding operation measures, the Commission deployed 'hotspots' to help Greece and Italy. Yet, although hotspots heavily rely on the participation of EU agencies such as Frontex and EASO, the Commission deplored that only six Member States so far had responded to Frontex and EASO's request for more human resources and technical equipment. Since May 2015, the Commission proposed and the Council adopted two emergency schemes to relocate 160 000 people in clear need of international protection from Italy, Greece and Hungary to other Member States. However, only six Member States have so far improved their reception capacity to make relocation possible. The Commission thus called on all Member States to provide it 'with clear commitments as to the number of people they will relocate from now until the end of the year'¹⁶⁵. The Commission finally asked Member States to make other commitments as to people they would resettle from third countries,

¹⁵⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council, 'establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU', COM(2015) 452 final, 9.9.2015.

¹⁵⁷ European Commission, Communication from the Commission to the European Parliament and to the Council, 'EU Action Plan on return', COM(2015) 453 final, 9.9.2015.

¹⁵⁸ European Commission, Draft – Adoption to Follow, Commission Recommendation of XXX, 'establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks', C(2015) 6250 - Draft, 9.9.2015.

¹⁵⁹ European Commission, Communication from the Commission to the European Parliament and the Council, 'on Public Procurement rules in connection with the current asylum crisis', COM(2015) 454 final, 9.9.2015.

¹⁶⁰ European Commission, Joint Communication to the European Parliament and the Council, 'Addressing the Refugee Crisis in Europe: The Role of EU External Action', JOIN(2015) 40 final, 9.9.2015.

¹⁶¹ European Commission, Draft Commission Decision of 9.9.2015, 'on the establishment of European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa', C(2015) 6251 draft, 9.9.2015.

¹⁶² See European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, 'Managing the refugee crisis: immediate operation, budgetary and legal measures under the European Agenda on Migration', COM(2015) 490 final, 23.9.2015.

¹⁶³ European Council, 'Informal meeting of EU heads of state or government on migration, 23 September 2015 – statement', 24 September 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/>

¹⁶⁴ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, 'Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration', COM(2015) 510 final, 14.10.2015.

¹⁶⁵ *Id.*, p. 6.

and to implement return decisions more quickly. Second, in terms of financial resources, the Commission proposed to amend budgets by an additional € 801.3 million for 2015 and € 900 million for 2016 in humanitarian help, reinforcement of agencies and redeployment of EU funds, which means that the total funding devoted to tackle the refugee crisis will amount to € 9,2 billion in 2015 and 2016. Both the Council¹⁶⁶ and the European Parliament¹⁶⁷ swiftly approved the injection of new funds in the remaining months of 2015, but still need to adopt the changes for 2016. Furthermore, above the contribution of the EU, Member States committed during the informal European Council of 23 September 2015 to mobilise € 1 billion¹⁶⁸. Third, regarding the implementation of EU law, the Commission promised to pursue infringement procedures to ensure full compliance with the Asylum Procedures Directive, the Reception Conditions Directive and the Qualification Directive. Fourth, the Commission declared that a 'diplomatic offensive' was now under way to 'put migration at the centre of bilateral, regional and multilateral dialogue'¹⁶⁹. It is this fourth aspect, namely the external dimension of the EU's migration policy, which will be examined at length below.

4.2 EU sea borders surveillance

The internal border-free Schengen Area, which currently comprises 26 Member States, first requires a strong focus on EU operational cooperation for external borders control and surveillance. In 2002, the Commission submitted a communication 'Towards Integrated Management of the External Borders of the Members States of the Union' in which it called for a common policy on management of the external borders of the EU and the creation of an 'external borders practitioners common unit'¹⁷⁰. The Commission's recommendations led to the establishment of three new instruments of border management in the EU: Frontex (4.2.1), the Schengen Borders Code (SBC) (4.2.2), and the External Border Fund (EBF) which was succeeded in 2014 by the Internal Security Fund (ISF) (4.2.3). Furthermore, the Council approved this year the launch of a CSDP operation to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean (4.2.4). Each of these instruments of EU sea borders surveillance may have an impact on the human rights of migrants aiming to reach the EU, and is therefore discussed below.

4.2.1 Frontex

Council Regulation No 2007/2004 of 26 October 2004 established Frontex (the Frontex Regulation). Frontex became operational on 3 October 2005 and came to complement national border security systems by coordinating border management operations such as the aforesaid JOs Triton and Poseidon, as well as return operations. With an annual budget of € 142 million, it is today one of the most highly funded agencies of the EU. Recently, the EU approved the establishment of 60 more posts for Frontex to increase its capacity on the ground.

While the Preamble of the Council Regulation stated that it 'respects the fundamental rights and observes the principles recognised by Article 6(2) of the [TEU] and reflected in the Charter of

¹⁶⁶ Council of the EU, 'Council approves more money to tackle refugee crisis', Press Release, 8 October 2015, http://www.consilium.europa.eu/press-releases-pdf/2015/10/40802203340_en_635799320400000000.pdf

¹⁶⁷ European Parliament, 'Resolution of 14 October 2015 on the Council position on Draft amending budget No 7/2015 of the European Union for the financial year 2015, Managing the refugee crisis: immediate budgetary measure under the European Agenda on Migration', 12511/2015 – C8-0297/2015 – 2015/2252.

¹⁶⁸ European Council, 'Informal meeting of EU heads of state or government on migration, 23 September 2015 – statement', 24 September 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/>

¹⁶⁹ *Id.*, p. 13.

¹⁷⁰ 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/2002.0233 final, 7.5.2002.

Fundamental Rights of the European Union¹⁷¹, there was originally no human rights monitoring mechanism, nor any mention whatsoever of the principle of *non-refoulement* in the Frontex Regulation. In 2011, the Parliamentary Assembly of the Council of Europe (PACE) considered that ‘although [Frontex] plays an ever increasing role in interception at sea, there are inadequate guarantees of respect for human rights and obligations arising under international and [EU] law, in the context of the [JOs] it coordinates’¹⁷².

As a result of widespread condemnation of Frontex’ operations, the mandate of Frontex was significantly revised and expanded in **Regulation No 1168/2011 of the European Parliament and of the Council of 25 October 2011** (the new Frontex Regulation) to ensure that all measures taken ‘fully respect fundamental rights and the rights of refugees and asylum seekers, including in particular the prohibition of *refoulement*’¹⁷³. The European Parliament notably played an active role to foster human rights safeguards in the new Frontex Regulation. As one commentator said, ‘[t]he European Parliament has arguably been the most prominent democratic voice in the scrutiny of Frontex’¹⁷⁴.

Under the driving force of the European Parliament, the new Frontex Regulation indeed required the Agency (i) to train all border guards in fundamental rights and access to international protection (new Article 5(1)), (ii) to draw up and further develop and implement its Fundamental Rights Strategy (new Article 26a(1), first sentence), (iii) to put in place an effective mechanism to monitor the respect for fundamental rights in all its activities (new Article 26a(1), second sentence), (iv) to establish a Consultative Forum, which consists of representatives from the FRA, the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE), UNHCR, the European Asylum Support Office, the IOM, and nine civil society organisations, to assist the Executive Director and the Management Board in fundamental rights matters (new Article 26a(2)), and, finally, (v) to designate an independent Fundamental Rights Officer charged with monitoring fundamental rights within the Agency (new Article 26a(3)). The work of the Fundamental Rights Officer has been presented as ‘an example of good practice’ by the Special Rapporteur for the human rights of migrants¹⁷⁵, notably for the publication of the Vega handbook on children which contains recommendations for border guard officers to ensure respect of the rights of children at airports¹⁷⁶. In addition, Article 3 of the new Regulation required the home Member State to ‘provide for appropriate disciplinary or other measures [...] in case of violations of fundamental rights or international protection obligations in the course of a joint operation or pilot project’. Article 3 also obliged Frontex’ Executive Director to ‘suspend or terminate, in whole or in part, joint operations and pilot projects if he/she considers that such violations are of a serious nature or are likely to persist’. Finally, even when operations take place on the territory of third countries, the new Regulation stated that Frontex and the Member States ‘shall comply with norms and standards at least equivalent to those set by Union legislation’ (new Article 14(1)).

¹⁷¹ Council Regulation (EC) no. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), OJ L 349/1, 25.11.2004.

¹⁷² PACE, ‘The interception and rescue at sea of asylum seekers, refugees and irregular migrants’, Resolution 1821, 21 June 2011, para. 5.4.

¹⁷³ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 303/1, 22.11.2011, Preamble, Recital 9.

¹⁷⁴ See A. Spengeman, ‘Upholding the Legitimacy of Frontex: European Parliamentary Oversight’, *European Security Review*, March 2013, p. 6.

¹⁷⁵ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, ‘Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants’, 8 May 2015, UN Doc. A/HRC/29/36, para. 26.

¹⁷⁶ Frontex, ‘Vega Handbook: Children at airports’, August 2015, http://frontex.europa.eu/assets/Publications/Operations/VEGA_Children_Handbook.pdf

Although '[t]he recast of the Frontex Regulation is certainly more than a step in the right direction'¹⁷⁷, Frontex continues to raise **human rights concerns**. First, the new procedural safeguards 'have made little difference' in practice, according to NGOs which still report allegations of push-back operations carried out by partners of Frontex¹⁷⁸. For example, while Amnesty International called on Frontex' Executive Director to suspend parts of its JO Poseidon along the Greek border with Turkey 'because of the widespread and persistent human rights violations that take place there', no response was actually brought to this critical situation¹⁷⁹. As one commentator observed, 'efforts to date to achieve adequate transparency, accountability and human rights standards within the Agency have been unsatisfactory for civil society'¹⁸⁰.

Second, the lack of internal complaints mechanism for individuals who consider that their rights have violated by Frontex has been criticised by the PACE in a resolution adopted in April 2013¹⁸¹. The European Ombudsman opened two own-initiative inquiries into the implementation by Frontex of its fundamental rights obligations (see Article 228 TFEU)¹⁸². The Ombudsman followed the call of the PACE and submitted in 2013 a special report to the European Parliament, recommending that 'Frontex should establish a mechanism for dealing with complaints about infringements of fundamental rights in all Frontex-labelled joint operations'¹⁸³. For Amnesty International, 'the lack of a clear mechanism for investigating reports of human rights abuses from [JOs] or operational areas where Frontex is present and the inability to handle individual complaints means that this human rights framework is, in practice, of limited discernible impact'¹⁸⁴. In 2015, the Ombudsman asked Frontex to enhance the transparency of its action as a coordinator of Joint Return Operations (JROs) and amend its Code of Conduct in areas such as medical examinations and the use of force¹⁸⁵.

Third, Frontex' non-binding 'working arrangements' with third countries¹⁸⁶, which currently escape approval by the European Parliament and judicial scrutiny by the CJEU, may be concluded with third countries where human rights are not respected. Cooperation with such third countries may lead to borders surveillance, return and interception operations with no regard for migrant rights. Legal scholars have also concluded that 'working arrangements concluded between Frontex and [...] third countries, in their current form, show considerable deficiencies from the perspectives of [...] human rights

¹⁷⁷ L. Marin, 'Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border', *Journal of Contemporary European Research*, Vol 7, No 4, 2011, p. 485.

¹⁷⁸ F. Webber, 'The cradle or the grave? EU migration policy and human rights', *Statewatch Journal*, Vol 23, No 3/4, 2014, p. 4.

¹⁷⁹ Amnesty International, 'Human Cost of Fortress Europe – Human rights Violations Against Migrants and Refugees at Europe's Borders', July 2014,

http://www.sos-europe-amnesty.eu/content/assets/docs/The_Human_Cost_of_Fortress_Europe_July_2014.pdf, p. 17.

¹⁸⁰ See A. Spengeman, 'Upholding the Legitimacy of Frontex: European Parliamentary Oversight', *European Security Review*, March 2013, p. 6.

¹⁸¹ PACE, 'Frontex: human rights responsibilities', Resolution 1932, 25 April 2013, para. 9.5.

¹⁸² European Ombudsman, Case OI/5/2012/BEH-MHZ, Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013; European Ombudsman, Case OI/9/2014/MHZ, Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 4 May 2015.

¹⁸³ European Ombudsman, Case OI/5/2012/BEH-MHZ, Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 12 November 2013.

¹⁸⁴ Amnesty International, 'Human Cost of Fortress Europe – Human rights Violations Against Migrants and Refugees at Europe's Borders', July 2014,

http://www.sos-europe-amnesty.eu/content/assets/docs/The_Human_Cost_of_Fortress_Europe_July_2014.pdf, p. 16.

¹⁸⁵ European Ombudsman, Case OI/9/2014/MHZ, Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 4 May 2015.

¹⁸⁶ See Frontex, 'Third countries', <http://frontex.europa.eu/partners/third-countries/>

protection¹⁸⁷. The PACE recommended in its 2013 resolution that ‘the European Parliament [...] be consulted prior to the conclusion of any agreements between Frontex and third countries’¹⁸⁸.

In 2013, the **European Border Surveillance System (EUROSUR)** Regulation came to supplement the activities of Frontex with a technology-driven project to develop so-called ‘smart borders’. EUROSUR basically requires Member States and encourages non-EU countries to enhance control over cross-border movement in the Mediterranean with drones, offshore sensors and satellite tracking systems. Article 2(4) of the EUROSUR Regulation¹⁸⁹ devotes some attention to fundamental rights:

Member States and the Agency shall comply with fundamental rights, in particular the principles of non-refoulement and respect for human dignity and data protection requirements, when applying this Regulation. They shall give priority to the special needs of children, unaccompanied minors, victims of human trafficking, persons in need of urgent medical assistance, persons in need of international protection, persons in distress, persons in need of international protection, persons in distress at sea and other persons in a particularly vulnerable situation.

However, EUROSUR’s large-scale data storage and exchange project is still focused on sea borders surveillance, rather than rescue operations. The UN Special Rapporteur regretted that the Regulation does not ‘lay down any procedures, guidelines, or systems for ensuring that rescue at sea is implemented effectively as a paramount objective’¹⁹⁰. Furthermore, Amnesty International deplored that the Regulation does not give any ‘indication as to how [human rights safeguards] will be monitored or enforced’¹⁹¹.

4.2.2 The Schengen Borders Code (SBC)

In 2006, one year after Frontex became operational, the Union established the **SBC** to set out common rules for internal and external border checks and surveillance¹⁹². The SBC thus regulates Frontex operations. The SBC makes explicit reference to the human rights standards enshrined in the CFR (Recital 20). It applies to ‘any person crossing the internal or external borders of Member States, without prejudice to [...] the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*’ (Article 3). Article 6 requires border guards to fully respect human dignity and the principle of non-discrimination in the performance of their duties. Article 16 adds that ‘Member States shall provide for training on the rules for border control and on fundamental rights’.

In 2010, the Council supplemented the said SBC with controversial **guidelines regarding the surveillance of the sea external borders and the disembarkation of persons intercepted or rescued at sea in operations coordinated by Frontex**, such as current JOs Triton and Poseidon¹⁹³. The Annex of

¹⁸⁷ M. Fink, ‘Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding “Technical Relationships”’, *Utrecht Journal of International and European Law*, Vol 28, No 75, 2014, p. 20.

¹⁸⁸ PACE, ‘Frontex: human rights responsibilities’, Resolution 1932, 25 April 2013, para. 9.2.2.

¹⁸⁹ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir), OJ L 295/11, 6.11.2013.

¹⁹⁰ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, ‘Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants’, 24 April 2013, UN Doc. A/HRC/23/46, para. 44.

¹⁹¹ Amnesty International, ‘Human Cost of Fortress Europe – Human rights Violations Against Migrants and Refugees at Europe’s Borders’, July 2014, http://www.sos-europe-amnesty.eu/content/assets/docs/The_Human_Cost_of_Fortress_Europe_July_2014.pdf, p. 18.

¹⁹² 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), OJ L 105, 13.4.2006.

¹⁹³ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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, OJ L 111/20, 4.5.2010.

the Council Decision included respect for fundamental rights in the general principles governing the sea border operations coordinated by Frontex. However, in 2012, the CJEU annulled the 2010 Council Decision in its entirety on the ground, *inter alia*, that it 'does not ensure the right of persons intercepted on the high seas to claim asylum and associated rights' and 'the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required'¹⁹⁴.

In 2014, the Council, this time together with the European Parliament, adopted **Regulation 656/2014 laying down rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex** to replace the Council Decision¹⁹⁵. The new Regulation does not only apply on EU territory (Article 6), but also extraterritorially on the high seas (Article 7)¹⁹⁶. In contrast to the 2010 Decision, the new Regulation seeks to put an end to the aforementioned push-back operations conducted by certain Member States, and codifies, at least in part, the aforementioned judgment of the ECtHR in *Hirsi v. Italy*. First, Article 4(1) introduces a clear and legally binding definition of the principle of *non-refoulement*:

No person shall, in contravention of the principle of *non-refoulement*, be disembarked in, forced to enter, conduced to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*.

Next, Article 4 details the procedure the host Member State, in coordination with participating Member States and Frontex, should follow when considering the possibility of disembarking migrants in a third country. By virtue of Article 4(2), the participating units 'shall take into account the general situation in that third country'. According to Article 4(3), they 'shall [...] use all means to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*'. Attention should be given to 'the special needs of children, including unaccompanied minors, victims of trafficking in human beings, persons in need of urgent medical assistance, disabled persons, persons in need of international protection and other persons in a particularly vulnerable situation' (Article 4(4)). 'Participating units shall, in the performance of their duties, fully respect human dignity' (Article 4(6)). Note that this procedure applies to all measures taken in accordance with this Regulation (Article 4(7)).

Finally, following amendments made by the European Parliament, Article 13 requires Frontex to submit an annual report on the practical application of the Regulation, 'including detailed information on compliance with fundamental rights and the impact on those rights, and any incidents which may have taken place'.

¹⁹⁴ Judgment of 5 September 2012 in Case C-355/10: *European Parliament v Council of the European Union* [2012] ECR I-516 at paras 49 and 77.

¹⁹⁵ Regulation No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189/93, 27.6.2014.

¹⁹⁶ Note that Article 7 only applies 'where there are reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea' and 'subject to the authorisation of the flag State, in accordance with the Protocol against the Smuggling of Migrants'.

However, Regulation 656/2014 does not fully implement the **principles laid down in the *Hirsi* case**. First, although UNHCR stressed that the identification of the individual situation of the intercepted or rescued persons under Article 4(3) may not 'result in a *de facto* admissibility procedure or substitute the asylum procedure'¹⁹⁷, participating units are effectively charged with processing applications for international protection on board. The Regulation does not provide migrants with an effective remedy against the decision of the participating units which would, as the ECtHR required in accordance with Article 13 ECHR (see also Article 47 CFR), enable them to lodge complaints of violations of their right to *non-refoulement* 'to obtain a thorough and rigorous assessment of their requests before the removal measure [is] enforced'¹⁹⁸. The Meijers Committee¹⁹⁹ also recommended the European Parliament to include 'a remedy before an independent authority with suspensive effect'²⁰⁰.

Second, although the ECtHR ruled that a Member State 'cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements'²⁰¹, the procedure detailed in Article 4 is formally not applicable to Frontex operations carried out in the territorial seas of third countries, which remain subject to bilateral agreements. Yet, the Preamble of Regulation 656/2014 provides that '[w]hen cooperation with third countries takes place on the territory or the territorial sea of those countries, the Member States and the Agency should comply with norms and standards at least equivalent to those set by Union law' (Recital 5) and '[t]he possible existence of an arrangement between a Member State and a third country does not absolve Member States from their obligations under Union and international law, in particular as regards compliance with the principle of *non-refoulement*' (Recital 13). Thus, even though the Regulation does not apply in the territorial seas of third countries, it is submitted that Member States and Frontex remain subject to the human rights standards set forth above (see also Article 14(1) of the new Frontex Regulation).

4.2.3 The European Borders Fund (EBF) and Internal Security Fund (ISF)

The **EBF** was established by the European Parliament and the Council for the period 2007 to 2012 to support the costs incurred by certain Member States to control their external borders²⁰². In total, it provided € 1,82 billion in financial assistance to Member States to protect their external borders. The EBF was absorbed by the **ISF** for the period 2014-2020, with a total of € 3.8 billion²⁰³. The ISF has two core objectives: (i) the establishment of a common visa policy and (ii) a uniform and high level of control of the external borders. In sharp contrast to the former instrument, respect for human rights and the rule of law is now one of the 'key principles guiding the implementation of the International Security Strategy'

¹⁹⁷ UNHCR, 'UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operation cooperation coordinated by the European Agency for the Management of Operation Cooperation at the External Borders of the Member States of the European Union (Frontex) COM 2013(197) final', April 2014, available at <http://www.unhcr.org/534fd9e99.pdf>

¹⁹⁸ ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, Judgment, 23 February 2012, para. 205.

¹⁹⁹ The Meijers Committee is an independent group of experts in the field of European criminal, migration, refugee, privacy, non-discrimination and constitutional law. See: <http://www.commissie-meijers.nl/en>

²⁰⁰ Meijers Committee, 'Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (COM(2013) 197 final)', CM1308, 23 May 2013, pp. 2-3.

²⁰¹ *Id.*, para. 129.

²⁰² Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', OJ L 144/22, 6.6.2007.

²⁰³ Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC, OJ L 150, 20.5.2014. See for a more detailed table of funds allocated to Member States in 2014-2020, European Commission, Annex to the Communication from the Commission to the European Parliament, the European Council and the Council, 'Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration', COM(2015) 510 final, Annex 8, 14.10.2015.

(Recital 6). The ISF should complement and reinforce the activities undertaken by Frontex, which ‘means, inter alia, that, when drawing up their national programmes, Member States should take into account [Frontex’s] components with regard to fundamental rights and access to international protection’ (Recital 20). Article 3(4) stipulates that

[a]ctions funded the Instrument shall be implemented in full compliance with fundamental rights and respect for human dignity. In particular, actions shall comply with the provisions of the [CFR], Union data protection law, the [ECHR], the principle of fair treatment of third-country nationals, the right to asylum and international protection, the principle of *non-refoulement* and the international obligations of the Union and Member States arising from international instruments to which they are signatory such as the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967.

In particular, whenever possible, special attention shall be given by Member States when implementing actions to the identification, immediate assistance and referral to protection services of vulnerable persons, in particular children and unaccompanied minors.

Article 3(5) reiterates that

[w]hen implementing actions funded under the Instrument which are related to maritime border surveillance, Member States shall pay special attention to their obligations under international maritime law to render assistance to persons in distress. In that regard, equipment and systems supported under the Instrument may be used to address search and rescue situations which may arise during a border surveillance operation at sea, thereby contributing to ensuring the protection and saving the lives of migrants.

Among other eligible actions, the ISF should provide finance assistance to actions in or by Member States, such as training of border guards, including where appropriate in third countries, with respect to the performance of their tasks in compliance with international human rights law (Article 4(1)(e)).

4.2.4 Military operation

After the tragic death of hundreds of migrants on the Mediterranean in the course of April 2015 (see *supra*, Part 1), the EU decided to take military action against migrant smugglers operating on the Mediterranean Sea. On 20 April 2015 a 10-point action plan was presented and included the call for – in analogy with the Atalanta operation against pirates – ‘[a] systematic effort to capture and destroy vessels used by the smugglers’²⁰⁴. On 18 May, the EU Foreign Affairs Council approved the creation of a CSDP operation against the smugglers²⁰⁵. The **EU military operation in the Southern Central Mediterranean (EUNAVFOR MED)** was launched on 22 June 2015²⁰⁶.

The **mission** of EUNAVFOR MED is to ‘conduct a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean [...], achieved by undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers, in accordance with applicable

²⁰⁴ European Commission, ‘Joint Foreign and Home Affairs Council: Ten point action plan on migration’, Luxembourg, Press Release, 20 April 2015, http://europa.eu/rapid/press-release_IP-15-4813_en.htm

²⁰⁵ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31, 19.5.2015.

²⁰⁶ Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED), OJ L 157/51, 23.6.2015.

international law, including UNCLOS and any UN Security Council Resolution²⁰⁷. Its **mandate** consists of three phases²⁰⁸:

- a) in a first phase, support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law,
- b) in a second phase,
 - (i) conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, under the conditions provided for by applicable international law, including UNCLOS and the Protocol against the Smuggling of Migrants;
 - (ii) in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, conduct boarding, search, seizure and diversion, on the high seas or in the territorial and internal waters of that State, of vessels suspected of being used for human smuggling or trafficking, under the conditions set out in that Resolution or consent;
- c) in a third phase, in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.

The evolution from one phase into the next is to be decided by the Council, which shall 'assess whether the conditions for transition beyond the first phase have been met, taking into account any applicable UN Security Council Resolution and consent by the coastal States concerned'²⁰⁹. In September 2015, the Political and Security Committee (PSC) of the Council of the EU decided that the operation would move to phase 2 as of 7 October 2015²¹⁰. At the same time the PSC also decided to change the name of the operation from EUNAVFOR MED into '**Operation Sophia**'²¹¹. On 9 October 2015, the UN Security Council adopted resolution 2240 under Chapter VII of the UN Charter which authorises for the period of one year the EU and its Member States to inspect, seize and dispose of vessels that are being used for migrant smuggling or human trafficking from Libya²¹². For the European Commission, the resolution represents 'an important political endorsement' of EUNAVFOR MED Operation Sophia²¹³. Yet, the resolution is limited to operations on the high seas; it does not apply to Libya's territorial waters, nor to vessels entitled to sovereign immunity under international law²¹⁴. As of today there is no Libyan consent for

²⁰⁷ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31, 19.5.2015, Article 1(1).

²⁰⁸ *Id.*, Article 2(2).

²⁰⁹ *Id.*

²¹⁰ Council of the European Union, 'EUNAVFOR Med: EU agrees to start the active phase of the operation against human smugglers and to rename it "Operation Sophia"', Press Release, 28 September 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor>

²¹¹ Sophia is the name of the baby that was born on a EUNAVFOR MED ship near the coast of Libya, after her mother was rescued.

²¹² UN Security Council, Resolution 2240 (2015) Adopted by the Security Council at its 7531st meeting on 9 October 2015, S/RES/2240 (2015), paras 7-8.

²¹³ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, 'Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration', COM(2015) 510 final, 14.10.2015, p. 13.

²¹⁴ *Id.*, paras 10-11.

operations in its territorial waters. Hence, it remains to be seen whether and how phase three of EUNAVFOR MED Operation Sophia will be further operationalised²¹⁵.

While the mission of EUNAVFOR MED Operation Sophia is clearly aimed at stopping smugglers from operating in the Mediterranean, the operation can pose serious **risks of violations of migrants rights**. Especially the third phase, in which EUNAVFOR MED Operation Sophia would 'take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable', may negatively affect the migrants present on the boats concerned, and more specifically their right to life. The second phase, however, during which 'boarding, search, seizure and diversion' of vessels suspected of smuggling can be conducted, is also not without human rights concerns. Indeed, the diversion of boats could affect the passengers' protection under the principle of *non-refoulement* as it is enshrined in Article 33 of the 1951 Geneva Convention and Article 3 of the ECHR. The actions undertaken in phase 2 could also undermine the migrants' rights to leave any country, as it is provided by Article 12(2) ICCPR. Similarly, depending on whether and how the personnel of EUNAVFOR MED Operation Sophia uses force when for example obliging them to board on a vessel, the prohibition of torture, inhuman and degrading treatment (*inter alia* in Article 3 ECHR) may become relevant. Apart from possible human rights violations committed by EUNAVFOR MED Operation Sophia, human rights NGOs like HRW²¹⁶ and ECRE²¹⁷ voiced their concern that the destruction of smugglers boats can lead desperate migrants to take even more dangerous routes to reach the EU, which would in turn put them at risk of further violations of their right to life. For them, the most efficient long-term solution to disrupt the business model of smugglers is to provide safe and legal channels to seek asylum in the EU.

CSDP operations, as all EU actions, have to comply with the obligations provided for in the CFR and customary international humanitarian law²¹⁸. EU Member State are moreover also bound by specific human rights treaties (see *supra*, 2.2.2), including the ECHR. While the EU is not yet party to the ECHR, efforts have been undertaken to ensure human rights compliance during CSDP missions. For example, guidelines to respect human rights are included in the 2005 Generic Standards of Behaviour for (back then still called) European Security and Defense Policy (ESDP) operations²¹⁹ or in the 2008 Council Handbook on Mainstreaming Human Rights and Gender into European Security and Defense Policy²²⁰. Regarding EUNAVFOR MED Operation Sophia more specifically, the Council Decision mentions that

The Union CSDP operation will be conducted in accordance with international law, in particular with the relevant provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 2000 Protocols against the Smuggling of Migrants by Land, Sea and Air (the Protocol against the Smuggling of Migrants) and to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1979 International Convention on Maritime Search and Rescue (SAR), the 1976 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), *the 1951*

²¹⁵ As this report focuses on human rights, it will not address the – nevertheless important – issue of seeking UN Security Council or Libyan authorization for EUNAVFOR MED actions in Libyan waters.

²¹⁶ HRW, 'EU: Don't Endanger Lives at Sea or Deny Protection: Anti-smuggling Operation Bound by Human Rights Law', 21 May 2015, <https://www.hrw.org/news/2015/05/21/eu-dont-endanger-lives-sea-or-deny-protection>

²¹⁷ ECRE, 'EU starts the "active phase" of a critical operation against human smugglers', 1 October 2015, <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1207-eu-starts-the-active-phase-of-a-critical-operation-against-human-smugglers-.html>

²¹⁸ For a comprehensive overview, see European Parliamentary Research Service, 'Human Rights applied to CSDP operations and missions', Briefing of 21 January 2014.

²¹⁹ Council of the European Union, 'Generic Standards of Behaviour for ESDP Operations', 18 May 2005, 8373/3/05 Rev 3.

²²⁰ EU, General Secretariat of the Council, *Mainstreaming Human Rights and Gender into European Security and Defense Policy, Compilation of Relevant Documents*, 2008, 75 p.

*Geneva Convention relating to the Status of Refugees and the principle of non-refoulement and international human rights law*²²¹.

The UN Security Council also underscored that its resolution of 9 October 2015 'is not intended to undermine the human rights of individuals or prevent them from seeking protection under international human rights law and international refugee law'²²².

The European Parliament proposed in its resolution of 21 November 2013²²³ to include human rights advisors in all CSDP missions. Captain Annunziata Cosenza is currently the Human Rights and Gender Issues Expert to the Commander at the European Union Headquarters, in Rome, for the EUNAVFOR MED Operation Sophia²²⁴. However, in contrast to what the PACE and the European Ombudsman recommended for Frontex (see *supra* 4.2.1), EUNAVFOR MED Operation Sophia does not have an internal complaints mechanism for individuals who consider that their rights have been violated in course of its missions. Also in contrast with Frontex (see *supra* 4.2.2), EUNAVFOR MED Operation Sophia does not report directly to the Council or the European Parliament on human rights issues encountered in missions.

Under Article 340(2) TFEU the EU must compensate for damages caused by EU institutions or servants in the performance of their duties. For CSDP missions specifically, however, victims' access to compensation is hampered by the fact that the CJEU does – apart from some minor exceptions – not have jurisdiction over CSDP matters. For some commentators this 'accountability gap' is an additional argument for the EU to accede to the ECHR, which would give the ECtHR in Strasbourg competence over cases involving human rights violations committed during CSDP missions. Opponents argue however that the ECHR should not be able to decide on matters over which the CJEU does not have competence. In its Opinion 2/13 of 18 December 2014 (see *supra*, 2.2.2), the CJEU has followed the latter view²²⁵. Therefore, victims of possible human rights violations committed by EUNAVFOR MED Operation Sophia would only be able to seek for compensation from the EU before the courts of the Member States, who obtain jurisdiction on the basis of Article 274 TFEU²²⁶. Alternatively, they could seek for compensation directly from the Member States themselves, but this raises the intricate question whether responsibility for CSDP operation is a EU and/or Member State responsibility.

4.3 EU cooperation with third countries²²⁷

4.3.1 The Global Approach to Migration and Mobility (GAMM)

The other important aspect of the EU asylum and migration policy which has an impact on migrant rights in the Mediterranean is the EU external cooperation with third countries, mainly countries of transit and origin. In 2011, the Commission adopted the **Global Approach to Migration and Mobility (GAMM)**, which succeeds the 'Global Approach to Migration' of 2005 and now constitutes the overarching

²²¹ Recital 6 of the Preamble to Council Decision (CFSP) 2015/778 (emphasis added).

²²² UN Security Council, Resolution 2240 (2015) Adopted by the Security Council at its 7531st meeting on 9 October 2015, S/RES/2240 (2015), para. 12.

²²³ European Parliament, 'Resolution of 21 November 2013 on the implementation of the Common Security and Defence Policy (based on the Annual Report from the Council to the European Parliament on the Common Foreign and Security Policy)', 14605/1/2012 – 2013/2105(INI), para. 21.

²²⁴ The authors are indebted to the Spokesperson's Service of EUNAVFOR MED Operation Sophia and Captain Annunziata COSENZA for providing them with this information.

²²⁵ Opinion 2/13 of 18 December 2014 [2012] C:2014:2454, paras. 249 to 257.

²²⁶ Article 274 TFEU reads as follows: 'Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.'

²²⁷ Note that a study on EU cooperation with third countries in the field of migration is currently underway.

framework of the EU external migration and asylum policy²²⁸. The GAMM was endorsed by the Council as the framework for dialogue and cooperation with third countries in its Conclusions of 29 May 2012²²⁹. It defines four broad strategic priorities for which the EU should engage in its external action and policy dialogue and cooperation with third countries: (i) organising and facilitating legal migration and mobility, (ii) preventing and reducing irregular migration and trafficking in human beings, (iii) promoting international protection and enhancing the external dimension of asylum policy, and (iv) maximising the development impact of migration and mobility. The policy framework elevates respect of human rights of migrants as a cross-cutting dimension of all four pillars 'in source, transit and destination countries alike'²³⁰:

Special attention should be paid to protecting and empowering vulnerable migrants, such as unaccompanied minors, asylum-seekers, stateless persons and victims of trafficking. This is also often a priority for migrant source countries. Respect for the Charter of Fundamental Rights of the EU is a key component of EU policies on migration. The impact on fundamental rights of initiatives taken in the context of the GAMM must be thoroughly assessed. More will also need to be done to explain the EU legal framework, including the new Single Permit Directive, to the EU's partners and to migrants.

[...]

The dialogue and cooperation with partners should strive to protect the human rights of all migrants throughout their migration process. Unscrupulous employers should be targeted and action taken to prevent and prosecute criminal acts and human rights violations committed against migrants. Measures should be taken to ensure decent living conditions for migrants in reception centres and to avoid arbitrary or indefinite detention. Special attention should be given to unaccompanied minors in the context of implementation of the Action Plan adopted in 2010.

[...]

This approach includes protecting the human rights of all migrants in transit by focusing on: protecting vulnerable migrants (unaccompanied minors, asylum-seekers, victims of trafficking, stranded migrants, etc.) and on the specific needs of women; supporting capacity-building for law enforcement forces and referral systems; supporting prevention, protection and prosecution of criminal acts and human rights violations committed against migrants, including those travelling irregularly; and guaranteeing decent living conditions for migrants in reception centres in non-EU countries.

This 'more rights-focused agenda', with a special attention to vulnerable migrants, including unaccompanied children, was welcomed by the UN Special Rapporteur²³¹. However, the trend to **externalisation** of migration control outside of the borders of the EU – or the 'outsourcing of migration control'²³² – has been heavily criticised by various instances. As the UN Special Rapporteur observed,

the responsibility for migration control is shifted to countries outside the [EU] and [...], consequently, the recourse of those migrants to human rights mechanisms within the [EU] becomes legally restricted or practically impossible. Moreover, the externalization process seems to aim at placing the migrants within the firm control of non-[EU] countries, without the [EU] providing commensurate financial and technical support for human rights mechanisms in such countries, thereby allowing the

²²⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The Global Approach to Migration and Mobility', COM/2011.0743 final.

²²⁹ Council Conclusions on the Global Approach to Migration and Mobility, Council Document No 9417/12, 3 May 2012.

²³⁰ *Id.*

²³¹ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46, para. 28.

²³² Parliamentary Assembly of the Council of Europe, 'Readmission agreements: a mechanism for returning irregular migrants', Resolution 1741, 22 June 2010, para. 1.

[EU] to wash its hands of its responsibility to guarantee the human rights of those persons attempting to reach its territory²³³.

Without any monitoring or enforcement mechanism of external practices that would infringe human rights, it remains difficult indeed to guarantee that human rights of migrants be respected and protected by third countries. The Report on the implementation of the GAMM in 2012-2013 adopted by the Commission in 2014 also noted that 'more work can still be done to address human rights issues in a systematic manner in policy and political dialogues with third countries'²³⁴.

4.3.2 Bilateral and regional frameworks for dialogue and cooperation

The GAMM is implemented across a broad range of cooperation arrangements. The GAMM first includes **bilateral and regional policy dialogues** with countries of origin and transit. In 2011, for example, the EU launched a regional policy dialogue for migration, mobility and security with the southern Mediterranean countries²³⁵. The dialogue in question aimed 'at enhancing and facilitating the regular channels for migration and mobility of the citizens between these countries and the EU'²³⁶. According to the Commission, the High Representative will also follow up in dialogues with Ethiopia, Somalia, the African Union and the Sahel countries²³⁷. On 8 October 2015, a High Level Conference on the Eastern Mediterranean-Western Balkan route took place in Luxembourg with the aim to ensure 'an orderly management of refugee and migration flows along this route'²³⁸. It led to a Declaration which put forward a series of practical measures to support affected countries along this route in the form of humanitarian assistance and more effective borders surveillance 'in full respect of human rights' as key actions to better manage the migration flows in the region²³⁹.

Another example is the recent **EU-Turkey Joint Action Plan** agreed to by both European Commission President Juncker and President of the Republic of Turkey Erdoğan on 5 October 2015²⁴⁰. The Action Plan sets out a series of short, medium, and longer term actions aimed at preventing migratory flows from Turkey, which is the main departure point for migrants who arrive in Greece. It should achieve this core objective by (i) 'supporting the refugees and their host communities in Turkey' and (ii) 'strengthening cooperation to prevent irregular migration flows to the EU'²⁴¹. The draft plan was endorsed by the European Council at its summit on 15 October 2015²⁴², but it still needs to be adopted by Turkey. If it is

²³³ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46, para. 58.

²³⁴ Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', 'Report on the implementation of the Global Approach to Migration and Mobility 2012-2013', 21 February 2014, COM(2014) 96 final, p. 18.

²³⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A dialogue for migration, mobility and security with the southern Mediterranean countries', COM(2011) 292 final, 24.5.2011.

²³⁶ *Id.*, p. 3.

²³⁷ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, 'Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration', COM(2015) 510 final, 14.10.2015, p. 7.

²³⁸ EEAS, 'High Level Conference on the Eastern Mediterranean-Western Balkans route takes place on 8 October in Luxembourg', http://eeas.europa.eu/statements-eeas/2015/151002_03_en.htm

²³⁹ Council of the European Union, 'Declaration of the High-level Conference on the Eastern Mediterranean - Western Balkans Route', <http://www.consilium.europa.eu/en/press/press-releases/2015/10/08-western-balkans-route-conference-declaration/>

²⁴⁰ European Commission, 'Draft Action Plan: Stepping up EU-Turkey cooperation on support of refugees and migration management in view of the situation in Syria and Iraq', 6 October 2015, http://europa.eu/rapid/press-release_MEMO-15-5777_en.htm?locale=en

²⁴¹ *Id.*

²⁴² European Council, 'European Council meeting (15 October 2015) – Conclusions', EUCO 26/15, 16 October 2015, para. 2.

adopted, the EU will provide further humanitarian assistance to the more than 2.2 million refugees in Turkey, and additional EU funds to open new refugee reception centres and to help refugees find a job and get access to basic services in Turkey. The main stumbling blocks remain the financial aid that the EU is willing to give (on offer is a possible € 3 billion per year²⁴³), visa liberalisation for Turkish nationals, the opening of five accession negotiation chapters, and the classification of Turkey as a 'safe country of origin'.

The goal of such dialogues is often to conclude **Mobility Partnerships (MPs)** – including visa facilitation and readmission agreements with third countries – and **Common Agendas for Migration and Mobility (CAMMs)** – mainly used vis-à-vis neighbourhood countries. Both programmes today constitute the most advanced bilateral cooperation instruments under the GAMM. In particular, MPs offer to third countries legal migration programmes, visa facilitation, development aid or trade opportunities in return for tighter border controls, readmission agreements and cooperation with Frontex. So far, MPs have been signed with eight countries (Armenia, Cape Verde, Georgia, Jordan, Moldova, Morocco, Azerbaijan, Tunisia), but negotiations are underway with other countries. The first CAMM was signed with Nigeria on 12 March 2015.

However, the situation of migrants and refugees raises serious **human rights concerns** in some of the EU's partner countries. Amnesty International has shown that 'the demands being placed on third countries to prevent irregular departures to Europe put refugees, asylum-seekers and migrants in those countries at risk of prolonged and arbitrary detention, *refoulement*, and ill-treatment'²⁴⁴. According to the UN Special Rapporteur, 'the detention of migrants appears increasingly to be practised [...] in neighbouring States at the external border, often at the behest of, or with encouragement by, the [EU]'²⁴⁵. As seen above (see *supra*, 3.1), the Special Rapporteur reported that detention centres were being built with EU funds in Turkey, Libya, Albania, which lacked 'basic human rights protection for detainees'²⁴⁶. Hence, human rights NGOs have often urged the EU not to enter into agreements with countries which do not respect the rights of migrants. For instance, the International Federation for Human Rights (FIDH) called on the EU '[t]o suspend negotiations on migration with Tunisia until the country [...] respects and protects the rights of migrants, refugees and asylum seekers' and '[t]o exclude readmission clauses from all partnerships and agreements signed with Tunisia, in view of the frequent violations of the rights of migrants and refugees in the implementation of readmission procedures, of the criminalisation of "illegal" entry and exit in Tunisia and of the risk of *refoulement* and deportation faced by third country nationals [(TCN)]'²⁴⁷. In the same vein, the aforementioned EU-Turkey Draft Action Plan raised critics from Human Rights Watch as it shifts responsibility to host refugees to a country which lacks a well-functioning asylum system capable of granting refugee status to non-Europeans like Syrians, Afghans, or Iraqis²⁴⁸. Indeed, although Turkey has ratified the 1951 Refugee Convention, it made a reservation under the 1967 Protocol to only accept refugees from Europe. According to Amnesty International, the plan

²⁴³ P. Taylor, 'Merkel says 3 billion euro EU aid for Turkey in discussion', Reuters, 15 October 2015, <http://www.reuters.com/article/2015/10/16/us-europe-migrants-turkey-merkel-idUSKCN0S92YL20151016>

²⁴⁴ Amnesty International, 'Human Cost of Fortress Europe – Human rights Violations Against Migrants and Refugees at Europe's Borders', July 2014, http://www.sos-europe-amnesty.eu/content/assets/docs/The_Human_Cost_of_Fortress_Europe_July_2014.pdf, p. 13.

²⁴⁵ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46, para. 50.

²⁴⁶ *Id.*, para. 51.

²⁴⁷ FIDH, 'EU-Tunisia Mobility Partnership: Externalisation policy in disguise', 3 December 2013, <https://www.fidh.org/International-Federation-for-Human-Rights/north-africa-middle-east/tunisia/14335-eu-tunisia-mobility-partnership-externalisation-policy-in-disguise>

²⁴⁸ HRW, 'EU: Shifting Responsibility on Refugees, Asylum Seekers', 7 October 2015, <https://www.hrw.org/news/2015/10/07/eu-shifting-responsibility-refugees-asylum-seekers>

risks 'putting the rights of refugees a distant second behind border control measures designed to prevent refugees from reaching the EU'²⁴⁹.

Furthermore, the non-binding nature of the aforementioned flexible political instruments makes it particularly difficult to incorporate human rights obligations or monitoring mechanisms and accountability measures: 'there is no guarantee that the participating member State, or the third country, will engage or comply with the initiatives or the commitments made, as no enforcement exists and there is no independent evaluation'²⁵⁰. The Commission also acknowledged in its Report on the implementation of the GAMM in 2012-2013 that 'more work needs to be done to make sure that the MPs are being implemented in a balanced manner, i.e. better reflecting all four thematic priorities of the GAMM, including more actions with regard to legal migration, human rights and refugee protection'²⁵¹. The recently adopted New Action Plan on Human Rights and Democracy (2015-2019) specifically put forward as an objective of the EU diplomacy to 'enhance human rights safeguards in all migration and mobility dialogues and co-operation framework with third countries, including [MPs] and [CAMMs], as well as in migration-related agreements, processes and programmes, including through the analysis of human rights impacts'²⁵². The Action Plan also called to 'promote improved conditions of detention for detained migrants and alternatives to the use of detention for irregular migrants in third countries' and 'pay particular attention in this regard to vulnerable migrants including unaccompanied minors'²⁵³.

4.3.3 EU Readmission Agreements (EURAs)

MPs and other cooperation arrangements often lead to the conclusion of so-called **EU Readmission Agreements (EURAs)** with third countries to facilitate the return process of nationals to their country of origin, or third-country nationals to their country of transit, who do not longer fulfil the conditions to legally stay on the territory of an EU Member State²⁵⁴. EURAs are negotiated in exchange for visa facilitation, financial assistance or other trade incentives to the benefit of third countries of origin or transit. EURAs are concluded on the basis of Article 79(3) TFEU and take precedence over bilateral readmission agreements concluded between individual Member States and third countries. The Return Directive, adopted in 2008, which seeks to establish clear, transparent and fair standards for an effective EU return policy of illegally staying third-country nationals, emphasises the need to conclude EURAs with third countries to facilitate the return process (Recital 7 and Article 3(3))²⁵⁵. To date, 17 EURAs have already entered into force²⁵⁶. On 8 October 2015, the Justice and Home Affairs Council invited the Commission 'to ensure that ongoing negotiations on readmission agreements are accelerated and

²⁴⁹ Amnesty International, 'Turkey: Merkel must ensure rights of refugees not cut out of EU-Turkey deal', 17 October 2015, <https://www.amnesty.org/en/latest/news/2015/10/turkey-merkel-must-ensure-rights-of-refugees-not-cut-out-of-eu-turkey-deal/>

²⁵⁰ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46, para. 68.

²⁵¹ Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', 'Report on the implementation of the Global Approach to Migration and Mobility 2012-2013', 21 February 2014, COM(2014) 96 final, p. 9.

²⁵² Council of the European Union, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 - 2019', 20 July 2015, 10897/15, p. 21.

²⁵³ *Id.*, p. 22.

²⁵⁴ See M. Lilienkamp & S. Saliba, 'EU Readmission Agreements: Facilitating the return of irregular migrants', Briefing, European Parliamentary Research Service, April 2015, http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282015%29554212

²⁵⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008.

²⁵⁶ All agreements are available online at <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/search-results/?dl=EN&title=readmission&from=0&to=0>

concluded as soon as possible' to make sure that 'increased return rates would act as a deterrent to irregular migration'²⁵⁷. For the Commission, '[t]he immediate priority is to ensure that existing readmission agreements are effectively applied in practice'²⁵⁸.

EURAs are negotiated with the third country by the Commission, but must receive, before the Council can conclude them, the European Parliament's consent (Article 218(6)(v) TFEU). The European Parliament should also 'be immediately and fully informed at all stages of the procedure' (Article 218(10) TFEU). In the past, the European Parliament has criticised the lack of references to human rights or refugee law, such as the principle of *non-refoulement*, in EURAs signed with Hong Kong, Macao, Sri Lanka, Ukraine and Pakistan. As a result, EURAs now include a 'non-affected clause', which provides that the agreement shall be without prejudice to the obligation to respect the rights of migrants. For instance, Article 18(1) of the recent EURA concluded with Turkey reads as follows:

This agreement shall be without prejudice to the rights, obligations and responsibilities of the Union, its Member States and Turkey arising from international law including from international conventions to which they are party, in particular:

- the Convention of 28 July 1951 on the Status of Refugees as amended by the Protocol of 31 January 1967 on the Status of Refugees,
- the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms,
- the international conventions determining the State responsible for examining applications for asylum lodged,
- the Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,
- where applicable, the European Convention of 13 December 1955 on Establishment,
- international conventions on extradition and transit,
- multilateral international conventions and agreements on the readmission of foreign nationals.

However, EURAs still raise **human rights concerns**. There is indeed an inherent risk with EURAs that the readmitting country fails to comply with the rights of the returnees. The situation of TCN is even more worrying as the contracting party may be required as a country of transit to transfer them to a non-contracting country of origin, which is not bound by any kind of human rights obligations under the EURA. According to the UN Special Rapporteur, '[EURAs] have been developed with third countries despite the lack of a well-functioning asylum system or the lack of resources or infrastructure to manage large inflows of migrants in a manner that would effectively ensure proper protection of human rights'²⁵⁹. In a 2010 resolution, the PACE thus called to 'conclude readmission agreements only with countries that comply with relevant human rights standards and with the 1951 Geneva Convention, that have functioning asylum systems in place and that protect their citizens' right to free movement'²⁶⁰. The PACE specifically invited the EU to 'properly consider the human rights situation and the availability of a well-functioning asylum system in a country prior to entering into negotiations on readmission agreements

²⁵⁷ Council of the European Union, 'Council conclusions on the future of the return policy', 8 October 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/10/08-jha-return-policy/>, paras 11 and 5.

²⁵⁸ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, 'Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration', COM(2015) 510 final, 14.10.2015, p. 7.

²⁵⁹ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46, para. 63.

²⁶⁰ PACE, 'Readmission agreements: a mechanism for returning irregular migrants', Resolution 1741, 22 June 2010, para. 6.1.

with that country', 'include in its readmission agreements as a condition for their application, that third-country nationals are not sent to transit countries where they might risk facing a situation threatening their human dignity in terms of social rights', and 'instruct an appropriate body to monitor the implementation'²⁶¹.

The European Commission acknowledged in a 2011 **evaluation of EURAs** that 'certain flanking measures, control mechanisms and/or guarantees [should be included] in future EURAs, to ensure that the human rights of returnees are fully respected at all times'²⁶². The Commission thus recommended that (i) NGOs and international organisations participate in the Joint Readmission Committees (JRCs) established under EURAs to monitor their implementation, (ii) suspension clauses be included and that Member States suspend the application of EURAs when it would lead to a violation of fundamental rights, (iii) TCN clauses be included whereby the readmitting countries commits to respect human rights of TCN, and (iv) international organisations be charged with monitoring the situation of persons readmitted under the EURA²⁶³. Amnesty International deplored that none of these recommendations had been observed in the EURA which was signed with Turkey in December 2013²⁶⁴. However, the European Commission launched in 2014 a 'Pilot Initiative to Monitor Readmission in Ukraine and Pakistan' (MONITOR) with the IOM, UNHCR and local partners. In its 2015 update report, the Special Rapporteur urged the EU 'to ensure its effective implementation and to analyse and publish the results of this implementation'²⁶⁵.

4.3.4 Regional Protection Programmes (RPPs) and Regional Development and Protection Programmes (RDPPs)

A decade ago, following the adoption of the Hague Programme which promoted the use of external relations tools to better manage migration, the EU decided to initiate **RPPs** designed to enhance the refugee protection and asylum capacity in third countries of origin and transit through durable solutions such as voluntary repatriation, local integration or resettlement in a third country²⁶⁶. RPPs have become a key policy tool in the GAMM and the recently adopted European Agenda on Migration. The Asylum, Migration and Integration Fund (AMIF), which replaces the previous Integration, Refugee and Return Funds for the period 2014-2020, provides financial assistance for RPPs. So far, the EU has developed RPPs in Africa, Moldova, Belarus, Ukraine, and the Middle East. In 2009, the Commission charged an independent consulting group with the evaluation of the RPPs. The report concluded that despite some achievements in enhancing protection capacities in transit areas, only a small number of refugees had been resettled and RPPs generally lacked coordination and visibility²⁶⁷. A discussion paper of the Dialogue on Migration and Asylum in Development noted that regarding the implementation of the RPPs

²⁶¹ *Id.*, paras 7.1, 7.4 and 7.5.

²⁶² European Commission, Communication from the Commission to the European Parliament and the Council, 'Evaluation of EU Readmission Agreements', COM(2011) 76 final, 23.2.2011, p. 11.

²⁶³ *Id.*, pp. 11-14.

²⁶⁴ Amnesty International, 'Human Cost of Fortress Europe – Human rights Violations Against Migrants and Refugees at Europe's Borders', July 2014,

http://www.sos-europe-amnesty.eu/content/assets/docs/The_Human_Cost_of_Fortress_Europe_July_2014.pdf, p. 15.

²⁶⁵ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', 8 May 2015, UN Doc. A/HRC/29/36, para. 40.

²⁶⁶ European Commission, Communication from the Commission to the Council and the European Parliament, 'On Regional Protection Programmes', COM(2005) 388 final, 1.9.2005.

²⁶⁷ GHK, Evaluation of pilot Regional Protection Programmes, DG Justice, Freedom and Security, Request 22 – Framework Service Contract No JLS/2006/A1/004, 25 June 2009, <http://ec.europa.eu/smart-regulation/evaluation/search/download.do?sessionId=1O2GTTWJ1m0pM7kSWO90h1v1CBzjvJpV2CLp0BgQxQv8zyGqQ3j!1601440011?documentId=3725>

in general 'it is true that through the provision of classic UNHCR services and capacity building activities the RPP projects have contributed to the overall improvement of conditions, and the capacities of authorities at the national level'²⁶⁸. Nevertheless, the same paper criticized the RPPs for a 'lack of clarity' regarding the scope of their activities, for 'insufficient coordination with development and humanitarian aid policies in the same countries' and an underdevelopment of the 'regional approach'²⁶⁹. In general, the paper warned that '[t]he existence of RPPs should not become an excuse for Member States to shift to their protection responsibilities to those regions, or to return persons in need of protection back to the regions'²⁷⁰. The Commission recently announced that € 30 million would be made available in 2015-2016 'to step up its support to the countries bearing the brunt of displaced refugees'²⁷¹.

Towards 2012, *inter alia* in reaction to the 2009 report, there was 'a growing awareness of the need to revisit the RPP more strategically and to strengthen their scope'²⁷². The Commission therefore launched the **Regional Development and Protection Programmes (RDPPs)** in 2013. The implementation of the first RDPP started on 1 July 2014 and is managed by Denmark. This RDPP was created in response to the Syrian crisis and aims 'to strengthen the protection of refugees in the region through promoting improved access to basic rights and appropriate legal assistance'²⁷³. It focuses on supporting Lebanon, Jordan and Iraq with their response to the impact of Syrian displacement in their countries. RDPPs strive to combine 'humanitarian and development funds to support refugee hosting countries on a long-term perspective, thus aiming to ensure greater coherence, and the promotion of durable solutions, in parallel with socioeconomic development, for both host communities and refugees'²⁷⁴. In contrast with the traditional RPPs, RDPPs are managed and implemented by Member States and promote more local ownership. The RDPP 'offers a new model, bringing in form the outset development donors to a conflict and displacement situation, in order to plan policies that can benefit both the displaced and the host countries' services and communities'²⁷⁵. Meanwhile, a RDPP is currently in place in North Africa (launched on 15 April 2015 and covering Morocco, Tunisia, Egypt, Algeria, and whenever possible Libya, with certain actions possible in Niger or Mauritania) and a RDPP for the Horn of Africa has been launched²⁷⁶. A new RDPP for North Africa will be funded jointly under the AMIF and the European Neighbourhood Instrument (ENI)²⁷⁷. The European Agenda on Migration announced that € 30 million from the EU and additional contributions from Member States would be made available in 2015/2016 to deepen RDPPs²⁷⁸.

RPPs and RDPPs should be seen as part of the EU's broader **efforts to promote stability in countries of origin and transit**. Indeed, if Frontex JOs, the military operation and EURAs might help the EU to manage

²⁶⁸ Dialogue on Migration and Asylum in Development, 'Regional Protection Programmes: an effective policy tool?', Discussion Paper, January 2015, 15.

²⁶⁹ *Id.*, 15-16.

²⁷⁰ *Id.*, 16.

²⁷¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European Agenda on Migration', COM(2015 - 240 final, 13.5.2015, p. 5.

²⁷² Dialogue on Migration and Asylum in Development, 'Regional Protection Programmes: an effective policy tool?', Discussion Paper, January 2015, 15.

²⁷³ European Commission, Press release, 'New EU regional development and protection programme for refugees and host communities in Lebanon, Jordan and Iraq', 16 December 2013, http://europa.eu/rapid/press-release_IP-13-1253_en.htm

²⁷⁴ Dialogue on Migration and Asylum in Development, 'Regional Protection Programmes: an effective policy tool?', Discussion Paper, January 2015, 14.

²⁷⁵ *Id.*

²⁷⁶ European Commission, Presentation by Mr. Romanovic, 'Regional Development and Protection Programmes (RDPPs)', <http://processusderabat.net/web/uploads/Rabat2015/EN/EC---Mr.-Romanovic.pdf>

²⁷⁷ European Commission Fact Sheet, 'Funding of migration-related activities in the Southern Neighbourhood region', Brussels, 6 October 2015, http://europa.eu/rapid/press-release_MEMO-15-5621_en.htm

²⁷⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European Agenda on Migration', COM(2015 - 240 final, 13.5.2015, p. 5.

temporarily the current migration flows in the Mediterranean, there is a consensus to say that the EU should also tackle the root causes and real drivers of migration in countries of origin and transit – violence and instability. In its 2015 Resolution on the latest tragedies in the Mediterranean, the European Parliament called ‘for EU cooperation with partner countries in the Middle East and Africa to be strengthened in order to promote democracy, fundamental freedoms and rights, security and prosperity’²⁷⁹. In light thereof, the European Agenda on Migration stressed the importance of the action of the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission, Federica Mogherini, to restore peace and stability in Libya and seek a lasting political solution in Syria²⁸⁰. On 15 October 2015, the European Council recalled its willingness to find a political solution to the conflict in Syria on the basis of the Action Group for Syria’s Communiqué of 30 June 2012²⁸¹. As of Libya, the European Council reiterated the EU’s offer ‘of substantial political and financial support to the Government of National Accord as soon as it takes office’²⁸².

4.3.5 Exchange of information with third countries

Last but not least, initiatives which aim at enhancing the exchange of information with non-EU countries in the field of migration policy may potentially impact the rights of migrants. For instance, Council Regulation (EC) 377/2004²⁸³, amended by Regulation (EU) 493/2011²⁸⁴, set up a network of **Immigration Liaison Officers (ILO)** in non-EU Member States in order to improve exchanges of information regarding flows of ‘illegal’ immigrants. On 8 October 2015, the Justice and Home Affairs Council announced that ILOs would be deployed ‘by the end of 2015 to Egypt, Morocco, Lebanon, Niger, Nigeria, Senegal, Pakistan, Serbia, Ethiopia, Tunisia, Sudan, Turkey and Jordan’²⁸⁵. Although there was no mention whatsoever of human rights in the original Council Regulation, the new Regulation now provides that the biannual report to the European Parliament, the Council and the Commission on the activities of ILO must take into consideration, *inter alia*, ‘human rights’ (Article 6(1) and (3)). Furthermore, the aforementioned **EUROSUR Regulation**, which establishes a common framework for the exchange of information between Frontex, Member States and third countries²⁸⁶, reiterates that it is ‘essential that any exchange of information and any cooperation between Member States and neighbouring third countries be carried out in full compliance with fundamental rights and in particular with the principle of non-refoulement’ (Recital 15).

5 Recommendations

Based on the human rights impact assessment of EU policies and actions provided above, this fifth part puts forward a series of specific recommendations to ensure a coherent human rights-based EU approach to improve the protection of the rights of migrants aiming to reach the EU, or after they have left the EU. The focus is maintained on the possible role of the European Parliament.

²⁷⁹ European Parliament, ‘Resolution on the latest tragedies in the Mediterranean and EU Migration and asylum policies’, 2015/2660(RSP), 29 April 2015, para. 13.

²⁸⁰ *Id.*

²⁸¹ European Council, ‘European Council meeting (15 October 2015) – Conclusions’, EUCO 26/15, 16 October 2015, para. 4.

²⁸² *Id.*, para. 5.

²⁸³ Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers’ network, OJ L 64, 2.3.2004.

²⁸⁴ Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers’ network, OJ L 141/13, 27.5.2011.

²⁸⁵ Council of the European Union, ‘Council conclusions on the future of the return policy’, 8 October 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/10/08-jha-return-policy/>, para. 13.

²⁸⁶ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir), OJ L 295/11, 6.11.2013.

5.1 General recommendations

Address the root causes of migration

- Address the root causes and drivers of migration by increasing the development cooperation (e.g. through RDPPs), improving the capacity-building, supporting conflict resolution and promoting respect for human rights in countries of origin and transit.

Create more legal entry channels to the EU

- In line with the recommendations of the Task Force Mediterranean²⁸⁷, support the creation of additional safe and regular channels for vulnerable people in need of international protection to seek asylum (e.g. through external processing of applications for international protection, resettlement offers, suspension of the carriers sanctions, delivery of humanitarian visas, and activation of the temporary protection Directive²⁸⁸) in order to avoid the use of precarious migration routes on the Mediterranean Sea and to disrupt the business model of smuggling and trafficking networks.
- Ensure access to fair and effective asylum procedures to migrants under the control of EU Member State or Frontex, such as those intercepted and rescued at sea, including the right to raise fear of treatment contrary to Article 3 ECHR.

5.2 Recommendations regarding EU sea borders surveillance

Reinforce parliamentary oversight and scrutiny

- Reinforce and exercise parliamentary oversight and scrutiny of Frontex' activities through the European Parliament's approval of Frontex' budget, the examination of Frontex' annual reports, and the hearing of Frontex' Executive Director.
- Address questions and make recommendations to the Council and the High Representative regarding the human rights impact of CSDP operations (Article 36(2) TEU).
- Require that the European Parliament be consulted prior to the conclusion of 'working arrangements' with third countries to ensure that human rights are duly taken into account²⁸⁹.

Frontex

- Request that Frontex refrains from expelling refugees and asylum seekers, either directly or in the framework of JOs by its partners, to countries of origin or transit where they would be subjected to persecution, inhuman or degrading treatment, in violation of the principle of non-refoulement and Article 3 ECHR.
- Follow up on the recommendations of the European Ombudsman in the context of both its inquiries in case OI/5/2012/BEH-MHZ and OI/9/2014/MHZ.
- Ensure that the Executive Director of Frontex effectively suspends or terminate, in whole or in part, joint operations and pilot projects if he/she considers that such violations are of a serious nature or are likely to persist (Article 3 (1a) of the new Frontex Regulation) and request

²⁸⁷ European Commission, 'Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean', COM(2013) 869 final, 4.12.2013, para. 2.5.

²⁸⁸ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures protecting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001.

²⁸⁹ *Id.*, para. 9.2.2.

explanation when the Executive Director disregards calls from NGOs or international organisations to suspend or terminate an operation.

- Request the Executive Director of Frontex to provide adequate administrative support and independence to Frontex' Fundamental Rights Officer.
- Ensure that human rights safeguards in the EUROSUR Regulation be accompanied by clear monitoring and enforcement mechanisms.
- Establish an internal complaints mechanism by which Frontex could deal with individual incidents of breaches of fundamental rights occurred in the course of its work, in line with the recommendations of the PACE²⁹⁰ and of the European Ombudsman²⁹¹, as well as in compliance with Article 26a(1) of the new Frontex Regulation.

Schengen Borders Code (SBC)

- Implement all principles laid down in the Hirsi case in the rules for external border checks and surveillance.
- Provide migrants with an effective remedy against the decision of border patrols in accordance with Article 13 ECHR and Article 47 CFR to enable them to lodge a complaint of violations of their right to non-refoulement.
- Ensure that when cooperation with third countries takes place on the territory or the territorial sea of those countries, the Member States and Frontex should comply with norms and standards at least equivalent to fundamental rights as protected in the EU.

EU military operation

- In line with recommendations from human rights NGOs²⁹², assess the human rights implications of EU NAVFOR Operation Sophia and consider that the disruption of the smugglers' business model might force desperate migrants to take even more precarious routes to leave situations of violence or persecution.
- Recommend to the Council and the High Representative to keep as a high priority the rescue of people and the protection of migrant rights over coercive measures against smugglers in the Mediterranean.
- Recommend to the Council and the High Representative that CSDP operations do not transfer boat migrants to countries where they could face violations of their human rights, such as the right to life, the prohibition of torture and the principle of *non-refoulement*.

From border control to rescue operations

- Recast the focus of Frontex, the SBC and the ISF from sea borders surveillance to the effective delivery of fundamental rights, such as saving lives at sea in full compliance with the right to life and international maritime law.
- Support the increase of the mandate for search and rescue operations of both Triton and Poseidon JOs so that saving lives on the Mediterranean becomes an absolute priority.

²⁹⁰ PACE, 'Frontex: human rights responsibilities', Resolution 1932, 25 April 2013, para. 9.5.

²⁹¹ European Ombudsman, Case 01/5/2012/BEH-MHZ, Special Report of the European Ombudsman in own-initiative inquiry 01/5/2012/BEH-MHZ concerning Frontex, 12 November 2013.

²⁹² See, e.g., HRW, 'EU: Don't Endanger Lives at Sea or Deny Protection: Anti-smuggling Operation Bound by Human Rights Law', 21 May 2015, <https://www.hrw.org/news/2015/05/21/eu-dont-endanger-lives-sea-or-deny-protection>

- Avoid border control practices which put the migrants' right to life at risk.
- Ensure that migrants intercepted and rescued at sea be taken to safe ports in the EU.
- Put the rights and wellbeing of migrant children, women and other vulnerable persons at the heart of rescue operations with due regard for human rights instruments such as the CRC.
- Continue to call for the creation of a permanent humanitarian European rescue operation.

5.3 Recommendations regarding EU cooperation with third countries

Parliamentary oversight

- Improve the democratic control of the development of external migration arrangements such as MPs and EURAs concluded under the GAMM.

Policy dialogues, Mobility Partnerships (MPs), Common Agenda for Migration and Mobility (CAMM), Regional Protection Programmes (RPPs) and Regional Development and Protection Programmes (RDPPs)

- Make the respect and protection of human rights a prerequisite for any cooperation with third countries in the field of migration.
- Request to suspend negotiations and to terminate the cooperation with third countries which are unable to demonstrate that they fully respect and protect the human rights of migrants.
- Consult international organisations such as UNHCR and NGOs in the negotiation process of migration before approval of cooperation agreements with third countries.
- Ensure that human rights clauses with explicit references to the rights of migrants, including the prohibition of arbitrary detention, refoulement, and ill-treatment, be contained in any agreement concluded with third countries.
- Ensure that, in the framework of RPPs/RDPPs, third countries of transit and origin receive the necessary resources and competences to treat asylum-seekers and returnees in full compliance with international law and human rights, for instance through the creation of a fair asylum system.
- Ensure that human rights become a core component of the training of foreign agents responsible for border control in third countries.
- Prioritise capacity-building projects that will improve the human rights of migrants over borders surveillance.
- Ensure that border control carried out by third countries respects and protects human rights guarantees and, in particular, that no push-backs are carried out by partner countries.
- Request that MPs and other cooperation arrangements be subjected to independent evaluation.

EU Readmission Agreements (EURAs)

- Refrain from entering into EURAs with third countries which do not have functioning asylum systems in place and which are unable to demonstrate their ability to ensure the proper protection of human rights of migrants.
- Continue to ensure that non-affectation clauses be contained in any EURA concluded with a third country.

- Include in EURAs TCN clauses as a condition for their application so that third-country nationals are not sent to transit countries where they would face persecution, inhuman or degrading treatment, in violation of the principle of non-refoulement and Article 3 ECHR.
- Establish under any EURA an effective post-return control mechanisms to monitor the human rights of returnees at all times. Enhance the role of JRCs in the oversight of EURAs and include, as the Commission recommended, international organisations such as UNHCR and NGOs to monitor their implementation.
- As the European Commission recommended²⁹³, include a suspension clause in every EURA providing for suspension in the event of human rights violations in the readmitting country.
- Pursue initiatives such as MONITOR in other countries than Pakistan and Ukraine.

6 Conclusion

The latest data on migrant arrivals and fatalities in the Mediterranean show a dramatic increase in the number of crossings – 613 179 arrivals by sea up until 16 October 2015 compared to a 2014 total of 219 000²⁹⁴. With 3 117 deaths in the Mediterranean out of a total of 4 416 migrant deaths worldwide, the Mediterranean Sea today constitutes by far the world's most dangerous migratory region²⁹⁵. Most migrants came to Greece, Italy, Spain and Malta. Since the vast majority originates from Syria (59 %) and Afghanistan (14 %), which are countries faced with great instability due to ongoing conflict, most of them qualify as refugees under Article 1 of the 1951 Geneva Convention.

Boat migrants in the Mediterranean are indeed protected by a host of international conventions. First and foremost, the principle of *non-refoulement* enshrined in Article 33 of the 1951 Geneva Convention states that '[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. Yet, legal protection is not limited to refugees. Migrants, regardless of their nationality or legal status, are also protected by a substantial amount of international and regional human rights instruments like all other human beings. In the EU, the ECHR and the CFR protect the right to life, the prohibition of torture, the prohibition of collective expulsion of aliens, and the principle of *non-refoulement*. According to the ECtHR's case-law, jurisdiction can be established when a State exercises control over an area or territory, or when its State agents exercise effective control over an individual²⁹⁶. This is for example the case when a national authority vessel of a Contracting State to the ECHR takes migrants on board. Third, international law of the sea requires in any case that ship masters render assistance and rescue persons in distress at sea.

This study however showed that boat migrants faced human rights violations in various phases of their migratory process toward the EU – notably, in the pre-departure phase while waiting for a boat to departure, during the actual crossing of the Mediterranean, and in push-back operations allegedly carried out by EU Member States and Frontex. Some groups of migrants are particularly vulnerable, such as unaccompanied children or women who are often victims of rape, violence or other mistreatment by smugglers. In the absence of regular and safe channels to seek asylum, an increasing number of migrants

²⁹³ European Commission, Communication from the Commission to the European Parliament and the Council, 'Evaluation of EU Readmission Agreements', COM(2011) 76 final, 23.2.2011, p. 12.

²⁹⁴ IOM, 'Mediterranean Update', 16 October 2015, http://missingmigrants.iom.int/sites/default/files/Mediterranean_Update_16_October.pdf

²⁹⁵ *Id.*

²⁹⁶ ECtHR, *Al Skeini v. United Kingdom*, Judgment of 7 July 2011, Appl. No. 55721/07, paras 133-137 (Stage agent authority and control), paras 138-140 (effective control over an area).

use precarious routes such as the central Mediterranean route, which results in what has been termed by the UN Special Rapporteur on the human rights of migrants, 'large-scale violations of the right to life'²⁹⁷.

Against this background, the EU has taken initiatives to better protect the human rights of migrants before entering, or after they have left the territory of the EU (returns), in sea borders surveillance, such as Frontex JOs (Triton and Poseidon) and military operations (EUNAVFOR MED/Sophia), as well as in its cooperation with third countries. Yet, the picture that emerges from the evaluation of existing and planned EU policies and actions is a mixed one. On the one hand, it cannot be denied that policies of sea borders surveillance and instruments of cooperation with third countries have now generally included human rights safeguards. The European Parliament has shown much political will to better protect the human rights of migrants. In that sense, the fundamental rights training of Frontex' border guards, the creation of a function of Fundamental Rights Officer and the inclusion of a suspension clause in case of human rights violations under the new Frontex Regulation should be welcomed. The same goes for the prioritisation of migrant rights across all four pillars of the GAMM, as well as the systematic inclusion of so-called non-affectation clauses under EURAs.

On the other hand, while explicit references to human rights now appear to exist in almost all instruments of sea borders surveillance and cooperation with third states, implementation, monitoring and control remain the main concerns of the European Ombudsman, PACE, UN Special Rapporteur, NGOs, and legal scholars alike. For instance, despite significant progress in *ex ante* human rights safeguards in the new Frontex Regulation, the lack of a genuine complaints mechanism within Frontex, which would be open to all persons affected by violations of human rights and refugee law committed in its activities, seems no longer tenable. Indeed, without effective monitoring mechanisms and accountability measures, there is no guarantee that the human rights principles referred to in EU political and legal instruments will be duly complied with at all times of the migratory process. Furthermore, the primary aim of existing EU policies and actions still seems to be the protection of the borders against 'illegal' immigration and the return of illegally staying migrants, rather than the development of effective strategies to protect human rights of migrants and the saving of lives on the Mediterranean. Yet, it appears that the securisation of borders is often at odds with the protection of migrant and refugee rights. For instance, MPs and EURAs have been concluded with third countries which have a poor human rights record and do not have well-functioning asylum systems in place. Recently, a group of 674 international legal scholars expressed their 'horror at the human rights violations being perpetrated against those seeking refuge, in particular the acts of violence, unjustified coercion and arbitrary detention'²⁹⁸. The recurring tragedies off the coasts of Greece, Italy and Spain should indeed now prove the limits of repressive measures against migration and should send a strong signal to the EU to further adjust its policy priorities toward the rescue of migrants and the protection of their most basic human rights.

²⁹⁷ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', 8 May 2015, UN Doc. A/HRC/29/36, para. 26.

²⁹⁸ 'Open Letter to the peoples of Europe, the European Union, EU Member States and their representatives on the Justice and Home Affairs Council', 22 September 2015, <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2015/09/open-letter1.pdf>

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